CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 8/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: 1st February, 2017

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Articles 10 of the Power Purchase Agreements dated 17.03.2010 and 21.03.2013 executed between EMCO Energy Limited and the distribution Companies in the States of Maharashtra and Dadra Nagar Haveli respectively for evolving mechanism for grant of an appropriate adjustment/ compensation to offset financial/commercial impact of Force Majeure and Change in Law events during Operation Period and Construction Period.

And
In the matter of

EMCO Energy Limited/GMR Warora Energy Limited
701/704, 71h Floor, Naman Centre, A Wing,
SKC (Sandra Kurla Complex),
Sandra, Mumbai 400051 .....**Petitioner**

Vs

1. Maharashtra State Electricity Distribution Company Limited
   Fifth Floor, Prakashgadh, Plot No. G-9,
   Anant Kanekar Marg, Sandra (East),
   Mumbai- 400 051

2. Electricity Department, Dadra and Nagar Haveli
   Vidhyut Shavan, Opp. Secretariat,
   Dadra and Nagar Haveli, Silvassa, 396230 ......**Respondents**

Parties Present:

1. Shri Amit Kapur, Advocate for the Petitioner

2. Shri V. Mukherjee, Advocate for the Petitioner
3. Shri Rohit Venkat, Advocate for the Petitioner
4. Shri Sai Kumar, Advocate, MSEDCL
5. Shri Nitish Gupta, Advocate, MSEDCL
6. Shri M.G. Ramachandran, Advocate, Prayas
7. Shri Shubham Arya, Advocate, Prayas
8. Ms. Poorva Saigal Advocate, Prayas
9. Ms. Ranjitha Ramchandran, Advocate, Prayas
10. Ms. Ashwini Chitnis, Prayas
11. Shri Anand Ganeshan, Advocate, DNH

ORDER

The Petitioner, EMCO Energy Limited, now known as GMR Warora Energy Limited (Petitioner/GWEL) has set up a 600 MW coal based thermal power plant (hereinafter referred to as the "Power Project") at Warora Taluka, District Chandrapur in the State of Maharashtra. The Power Project comprises of two units of 300 MW each. Unit I and II of the Power Project were declared under commercial operation on19.3.2013 and 1.9.2013 respectively.

2. The Petitioner entered into the following long-term PPAs for supply of power from the Power Project:

(a) Supply of 200MW of power on long term basis in terms of the Power Purchase Agreement dated 17.3.2010 with Respondent No. 1, Maharashtra State Electricity Distribution Company Ltd. (MSEDCL PPA). The scheduled date of commencement of supply as per the MSEDCL PPA was 17.3.2014.

(b) Supply of 200 MW of power on long term basis in terms of the Power Purchase Agreement dated 21.3.2013 with Respondent No. 2, Electricity Department of Union Territory of Dadra and Nagar Haveli (DNH PPA). The

Petitioner commenced supply of power to Respondent No. 2 with effect from 1.6.2014.

(c) Supply of 150 MW of power on long term basis in terms of the Power Purchase Agreement dated 27.11.2013 between GMR Energy Trading Limited and the Tamil Nadu Generation and Distribution Corporation Limited with back to back PPA between GMR Energy Trading Limited and the Petitioner. The scheduled delivery date as per the TANGEDCO PPA was 1.6.2014. As on the date of filing of the petition, tariff was yet to be adopted by the Ld. Tamil Nadu Electricity Regulatory Commission.

3. In the present petition, the Petitioner has sought adjustment of tariff on account of the events of Change in Law affecting the Power Project during the Construction Period and Operating Period in terms of MSEDCL PPA and DNH PPA. The Petitioner has sought compensation under Change in Law during the Construction Period and Operating Period on account of the following events:

MSEDCL PPA

(A) Changes in Law which have occurred during the Construction Period:

(i) Increase in the rate of Customs Duty.

(ii) Increase in the rate of Excise Duty.

(iii) Increase in the rate of Service Tax.

(iv) Change in other taxes such as Work Contract Tax and VAT.

(v) Withdrawal of Deemed Export Benefit to non-mega power projexts.

(vi) Design changes in coal handling plant due to directions from CEA.

(B) Changes in Law during the Operating Period

(i) Change in effective Minimum Alternate Tax and Corporate Tax rates

(ii) Change in rate of Excise Duty on coal.

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

(iv) Change due to the inclusion of Royalty and SED on Excise Duty

(v) Increase in the rate of royalty on coal.

(vi) Levy of Clean Energy Cess

(vii) Change in costs due to notification of Ministry of Environment and Forests on coal quality.

(viii) Busy season surcharge by Railway Board, Ministry of Railways.

(ix) Change in Railway Development Surcharge.

(x) Levy of Swachh Bharat Cess.

(xi) Change in coal pricing policy from Useful Heat value(UHV) to Gross Calorific Value (GCV) .

(xii) Increase in sizing charge and surface transportation charges by Coal India Limited.

(xiii) Levy of Niryatkar by SECL in the coal invoice.

(xiv) Fuel cost pass through on account of changes in the New Coal Distribution Policy of the Ministry of Coal.

(xv) Increase in working capital requirement due to higher cost of imported coal.

(xvi) CST with C-form

ED–DNH PPA

(C) Changes in Law during the Operating Period.

(i) Change in effective Minimum Alternate Tax and Corporate Tax rates.

(ii) Change in Excise Duty on coal.

(iii) Increase in the rate of royalty on coal.

(iv) Increase in Clean Energy Cess.

(v) Increase in costs due to Ministry of Environment and Forests notification on coal quality.

(vi) Increase in busy season surcharge by Railway Board, Ministry of Railways.

(vii) Service Tax on transportation of coal by Indian Railways.

(viii) Levy of Swachh Bharat Cess

(ix) Increase in sizing charge and surface transportation charges by Coal India Limited.

(x) Levy of Niryatkar by SECL in the coal invoice.

(xi) Fuel cost pass through on account of changes in the New Coal Distribution Policy of the Ministry of Coal, dated 26.7.2013.

(xii) Increase in working capital requirement due to higher cost of imported coal.

Background of the Case

4. The Maharashtra State Electricity Distribution Limited (MSEDCL), issued Request for Proposal on 15.5.2009 and initiated the competitive bidding process for procurement of power on long term basis. The Petitioner submitted its bid on 7.8.2009 and emerged as one of the successful bidders with a levellised tariff of ₹2.879/kWh. On 20.11.2009, MSEDCL issued the Letter of Intent for procurement of 200 MW of power to the Petitioner. On 17.3.2010, the PPA was executed for procurement of 200 MW of power by MSEDCL on Long Term basis. This agreement was further amended on

25.11.2013.On 19.6.2010, MSEDCL filed Case No. 22 of 2010 before the Maharashtra Electricity Regulatory Commission (MERC) for adoption of tariff for procurement of 2000 MW (-20%/+30%) power on Long term basis under Competitive Bidding Process in terms of the PPA of MSEDCL. On 28.12.2010, MERC approved the bidding process and adopted the tariff of the successful bidders including the Petitioner.

5. In March 2012, the Electricity Department, Dadra and Nagar Haveli (DNH), issued RFP document for procurement of power through competitive bidding under Section 63 of the Act and the Competitive Bidding Guidelines. The Bid Due Date was 8.6.2012. The Petitioner submitted its bid on 7.6.2012 and emerged as one of the successful bidders, for supplying Aggregated Contracted Capacity of 200 MW to the DNH with a levellised tariff of ₹4.618 per Unit. On 14.8.2012, DNH issued the Letter of Intent to the Petitioner for procurement of 200 MW of power. On 25.9.2012, the DNH filed Petition No. 87/2012 before the Joint Electricity Regulatory Commission (JERC) for approval of DNH PPA and adoption of tariff. On 19.2.2013, the JERC granted approval for DNH PPA. On 21.3.2013, DNH PPA was executed for procurement of 200 MW of power by DNH on Long Term Basis.

6. The Petitioner at the time of bidding considered the availability of coal from South Eastern Coalfields Limited (SECL'), a subsidiary of Coal India limited (CIL) through coal linkage at normative availability for computation of tariff. The SECL had issued Letter of Assurance dated 9.11.2006 for 1.327 MTPA of Grade F coal from the Korba/Raigarh coalfield and Letter of Assurance dated 3.6.2010 for 1.3 MTPA of Grade F coal from the Korba/Raigarh coalfield of SECL. The Petitioner entered into FSA dated 22.2.2013 with

SECL for Unit I of the Project pursuant to Letter of Assurance dated 9.11.2006 (amended vide agreements dated 15.6.2013 and 16.9.2013) for annual contracted quantity of 9,52,380 tonnes of coal; and FSA dated 7.8.2013 for Unit II of the Project pursuant to the Letter of Assurance dated 3.6.2010 (amended vide agreements dated 30.11.2013) for annual contracted quantity of 7,15,165 tonnes of coal.

7. The Petitioner notified MSEDCL and DNH about the occurrence of Change in Law events from time to time and the impact of such events on the project of the Petitioner and supply of power to the Respondents under the respective PPAs. Thereafter, the Petitioner filed the present petition seeking reliefs for the events of change in law in terms of the MSECDL PPA and DNH PPA during the Construction Period and Operating Period.

Jurisdictional Issue

8. The Petitioner has submitted that in terms of section 79(1)(b) of the Electricity Act, 2003 (the Act), this Commission has jurisdiction to regulate the tariff of the generating company which has entered into or otherwise has a composite scheme for generation and sale of electricity in more than one State. Since the Petitioner is an inter-State generating station having a composite scheme for supply of power to more than one State, this Commission has jurisdiction to entertain the claims in relation to change in Law under Section 79(1)(f) of the Act. The Petitioner has submitted that the Commission in the similar facts of the case has decided its jurisdiction in : (i) order dated 16.10.2012 in Petition No. 155/MP/2012 (Adani Power Limited vs. Uttar Haryana

Bijli Vidyut Nigam Ltd.); (ii) in order dated 16.1.2013 in Review Petition No.26/2012 in Petition No. 155/MP/2012 (Adani Power Limited vs. Uttar Haryana Bijli Vidyut Nigam Ltd.); (iii) in order dated 24.12.2012 in Petition 160/GT/2012 (Udupi Power Corporation Limited vs. Power Company of Karnataka Ltd and Others) and (iv) order dated 16.12.2013 in Petition Nos. 79/MP/2013 and 81/MP/2013(GMR-Kamalanga Energy Limited and Another v. Dakshin Haryana Bijli Vitran Nigam Limited and Others).

9. MSEDCL and DNH in their replies have objected to the jurisdiction of the Commission to deal with the issues raised in the petition. The respondents have submitted that the PPAs were executed pursuant to competitive bidding process undertaken under Section 63 of the Act, conducted independently of each other at different points of time, with separate tariff under the supervision and control of the respective State Commissions and therefore, the Petitioner as a generating company cannot be said to have a composite scheme for generation and sale of electricity in more than one State. The respondents have submitted that in accordance with the competitive bidding guidelines issued by the Central Government under section 63 of the Act, in particular paragraph 2.4 thereof, the Commission would have jurisdiction only when there is joint procurement by more than one distribution licensee on common terms and conditions including common tariff. The Respondents have pointed out that the tariffs agreed under the respective PPAs and adopted by the respective State Commissions are not uniform. The Respondents relying on the Commission's order in Petition No. 103/2005 (Uttaranchal Jal Vidyut Nigam Ltd Vs Uttaranchal Power Corporation Ltd) have stated that in order to invoke the composite scheme, the two conditions that need to be satisfied are: (a) power supply from the generating station

should be to the identified States and (b) tariff for such sale should be uniform for all the States. In the light of narrated facts, the Respondents have urged that these two conditions are not satisfied in the present case and therefore, the Petitioner does not have a composite scheme in terms of section 79(1)(b) of the Act. The Respondents further urged that in the absence of a composite scheme, adjudication of disputes raised in the petition falls within the jurisdiction of the respective State Commissions under clause (f) of sub-section (1) of Section 86 of the Act.

10. After considering the submission of the respondents and Petitioner, the Commission vide order dated 15.10.2015 decided the issue of jurisdiction in the present petition as under:

> "11. The Commission has already examined the issue of composite scheme under Section 79 (1) (b) of the Act in the case of Mundra Power Project where the project developer, Adani Power Ltd. had entered into PPAs with Gujarat and Haryana at different point of time. The Commission after examining the provisions of the Act and the submission of the generating company came to the following conclusion in the order dated 16.10.2012 as under:
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>> "23. ..The generating company can be said to have entered into the composite scheme of generation and sale of electricity in more than one State once it commits sale of electricity in more than one State. Such a stage is reached when the generating company makes the binding commercial arrangement for supply of electricity to more than one State, that is, when it executes the PPAs in more than one State or enters into any other similar arrangement. To say that the composite scheme should be at the inception stage will amount to frustrating the legislative intent of the Act. Such a course is not open while interpreting a statutory provision. Further, such an interpretation will defeat the legislative mandate since in that case jurisdiction of this Commission can be ousted at the whims of the generating company. To illustrate this point, the generating company may initially sell electricity to one State and later on it may supply power to another State. Another situation is that the generating station may be commissioned as captive power plant but at subsequent stage the generating company may enter into the arrangement for sale of power to more than one State. If it is held that the composite scheme should be at the inception stage, such like cases would be taken out of the jurisdiction of this Commission. This could never be the intention of enacting clause (b) of sub-section (1) of Section 79. Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one

State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of sub-section (1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Adani as a generating company is within the jurisdiction of this Commission."

12. In the present case, the Petitioner has directly executed PPAs for supply of power to the State of Maharashtra and Union Territory of DNH and PPA with Tamil Nadu through GMR Energy Trading Company Ltd. which are located in three different States. In the light of the above decision, there can be no doubt that the Petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of subsection (1) of Section 79 of the Electricity Act. Even in case of this generating station, the Commission has decided the issue of jurisdiction in order dated 17.9.2015 in Petition No. 54/MP/2014 as under:

"27. In the present case, there is no dispute that the Petitioner has directly executed agreements for supply of power to the State of Maharashtra and Union Territory of DNH (which is a „State" as defined under the General Clauses Act). The Petitioner is also supplying power to the State of Tamil Nadu through GMR Energy Trading Company Ltd. In the light of the earlier decisions of this Commission noted above, there can be no doubt that the Petitioner has the composite scheme for generation and sale of electricity in more than one State and as such falls within the jurisdiction of this Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission or referred for arbitration under clause (f) of sub-section (1) of Section 79 of the Electricity Act."

13. It is pertinent to mention that the subsequent orders dated 2.4.2013 and 21.2.2014 in Petition No. 155/MP/2012 have been challenged in appeal before the Hon'ble Appellate Tribunal for Electricity in which the issue of composite scheme has been raised. Therefore, we are deciding the issue of composite scheme in the present case in the light of our decisions quoted above, subject to the final decision by the Appellate Tribunal in the appeals."

11. Prayas Energy Group (Prayas) sought impleadment vide its letter dated 25.10.2015. Being a Consumer Group empanelled with the Commission, Prayas was allowed to be impleaded and the Petitioner was directed to serve a copy of the petition

on Prayas. In its reply dated 29.2.2016, Prayas has submitted that mere sale of electricity from a generating station to more than one State cannot constitute a composite scheme within section 79(1)(b) of the Act for the following reasons:

(a) In view of the use of the word “composite scheme” in section 79(1) (b), simpliciter sale of electricity from a generating station to more than one State is not sufficient. The term “composite scheme” in the context of section 79(1) (b) envisages some commonality in the generation and sale of electricity in more than one State. The objective behind section 79(1) (b) is to have common approach to the tariff terms and conditions which is applicable only when there is commonality.

(b) Clause 2.4 of the Competitive Bidding Guidelines notified by the Central Government under Section 63 of the Act envisages that in case of combined procurement where the distribution licensees are located in more than one State, the appropriate Commission for the purpose of these bidding guidelines shall be the Central Electricity Regulatory Commission. Therefore the Central Commission’s jurisdiction is envisaged under section 79(1) (b) for such combined procurement process and not individual procurement by the States.

(c) The Appellate Tribunal in order dated 23.11.2006 in Petition No.228 and 230 of 2006 (M/s PTC India Limited Vs. Central Electricity Regulatory Commission and others) has laid down the important ingredient for composite scheme under section 79(1) (b), namely, uniformity in the tariff. The Appellate Tribunal in its order dated 9.4.2012 in Appeal No.94 of 2012 (BSES Rajdhani Power Limited Vs. Delhi

Electricity Regulatory Commission) has held that by virtue of powers under section 79(1)(a) and (b) of the Act, the Central Commission will have to ensure for uniformity of the tariff amongst more than one State beneficiary; and common terms and conditions of supply to more than one State beneficiary as well as supply from the Central Sector Generating Companies.

(d) In the present case, there is no uniformity of the tariff amongst the three sets of PPAs entered into by the Petitioner with Maharashtra, Dadra and Nagar Haveli, and Tamil Nadu. The bidding processes for procurement of power by these States are different and tariff can always be determined and adopted separately for each generating unit.

(e) Section 79(1)(b) of the Act envisages uniformity in the tariff terms and conditions at the stage of generation, namely, when the power is injected at the Bus Bar of the generating station.

(f) Section 79(1) (b) uses the expression "entered into or otherwise having a composite scheme". The term entered into a composite scheme relates to the signing of the PPAs jointly by the procurers in more than one State. Examples are the Coastal Gujarat Power Limited and Sasan Power Limited selling power to more than one State through a combined procurement process with common terms and conditions. The term "otherwise having a composite scheme" describes something which is akin or similar to the PPA entered into commonly by the procurers of two or

more States. Example of this is the PPAS entered into by Udupi Power Corporation Limited with Kerala State Electricity Board and Punjab State Power Corporation Limited at the same terms and conditions of the PPA with the distribution companies of Karnataka.

(g) In the present case, PPA dated 7.3.2010 entered into by the Petitioner with MSEDCL and the PPA dated 21.3.2013 entered into by the Petitioner with DNH cannot constitute a composite scheme either by way of "entering into" or "Otherwise having" as DNH has no say or involvement in the procurement process of MSEDCL nor MSEDCL has any say or involvement in the procurement process of DNH; the quoted tariff under MSEDCL PPA is different from the quoted tariff under DNH PPA; MERC has approved the procurement process and adopted the tariff in case of MSEDCL whereas JERC has approved the procurement process and adopted the tariff in case of DNH. Therefore there is no commonality between the PPA of MSEDCL and the PPA of DNH.

12. The Commission's order dated 2.4.2013 and 21.2.2014 in Adani's case were challenged before the Appellate Tribunal in Appeal Nos. 100/2013 and 98/2014 and other related appeals. One of the issues raised in the appeal was whether Adani Power Limited had a composite scheme for generation and supply of electricity from Mundra Power Plant. The Appellate Tribunal in the full bench judgment dated 7.4.2016 in the said appeals dealt with the issue of composite scheme and the jurisdiction of the Central Commission under section 79(1)(b) of the Act, the Appellate Tribunal 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."

13. As regards the reliance on the judgements 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 v. Delhi Electricity Regulatory Commission) by the Respondents, 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 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. This view of ours is also supported by the written submissions filed by Mr. Ramachandran, learned counsel appearing for Prayas."
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> 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."

14. In view of the above decision of the Appellate Tribunal, the objections of Prayas with regard to existence of a composite scheme in case of the Petitioner cannot be sustained.

15. It is pertinent to mention that the Commission in order dated 15.10.2016 while holding the existence of composite scheme in case of the Petitioner had made it subject to outcome of the appeals filed against the Commission's order dated 2.4.2013 and 21.2.2014 in Adani case. In the light of the Full Bench judgment, it is reiterated that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Commission for adjudication of dispute under Section 79 (1)(f) of the Act is attracted in this case. Learned Counsel for MSEDCL sought to distinguish the Full Bench judgment with regard to jurisdiction in Adani Case from the present case. In our view, the Full Bench judgment lays down the law with regard to interpretation of Composite Scheme under Section 79 (1) (b) of the Act and the case of the generating station of the Petitioner is fully covered under the Full Bench judgment.

Reply of respondents on the issues on merit

16. MSEDCL in reply has submitted that though the installed capacity of the Petitioner's project is 600 MW, MSEDCL has a tie-up for 200 MW only. Certain cost incurred on the whole plant may relate to some independent facilities for a particular unit. MSEDCL has submitted that such cost may not be allowed to be passed on to MSEDCL. It has been further submitted that the Commission should allow such cost as pass through under Change in Law only on the base price quoted at the time of bid and that all the costs in relation to the capital cost might have incurred till the date of COD i.e. September 2013, therefore, there is no legal basis for reservation put forward by the Petitioner for any additional claims. About the specific claims, MSEDCL has submitted as under:

(a) With regard to withdrawal of deemed export benefit by DGFT, MSEDCL has submitted that DGFT circular was just a clarification of the applicability of the deemed export benefit to the goods manufactured in India and doesn't leave the country. Such clarification on the interpretational issue cannot be claimed as a Change in Law and the Commission should not allow such additional costs to pass on to MSEDCL.

(b) The claims due to design changes of coal handling plant due to advice of Central Electricity Authority (CEA) do not fall under the definition of Change in Law as it was not mandatory for the Petitioner to carry out such changes in the plant.

(c) The amount of equity, ROE and tax considered by the Petitioner at the time of bidding is not known to MSEDCL. Since the MAT is applicable on the book profit, the Petitioner is not entitled to claim increase in the rate of MAT under change in law.

(d) The Commission may allow the claims affecting energy charges during operating period after a detailed prudence check of operational parameters and financial calculation. Increase in the development charge and busy season surcharge might be included in the CERC escalation indices published from time to time. Therefore, such costs, subject to prudence check, should not be accepted by the Commission.

(e) The Central Government's notification on excise duty, clean energy cess, and service tax as well as notifications of other Ministries fall within the meaning of "Change in Law" and within the meaning and scope of "Law" including Rules and Regulations pursuant to such law including the change in tax or introduction of new tax. Prudence check needs to be carried out to determine the quantum of coal eligible for such additional cost. Also, under Clause 4.6 of the MSEDCL PPA, the generator needs to arrange the alternate source to provide power to the limit of the aggregate contracted capacity. Therefore, any additional cost due to change in source of fuel should not be allowed.

(f) With regard to revision in NCDP and shortfall in linkage coal supply, MSEDCL has requested to provide a formula for computation of quantity of coal with appropriate GCV for economical generation of power. The compensatory charge

shall be strictly for the shortfall quantity component as per CCEA approval mechanism in such a way that it provides a cap/ceiling limit.

Energy Gap (Kcal) = (ACQ * GCV) – (0.65ACQ*GCV)

(Note: GCV shall be as per original FSA. The Grade/ GCV indicated in original FSA will remain unchanged and will be used for calculation of compensatory charge)

(g) The framework for compensatory fuel charge shall consider issues like Coal accounting, Optimum Operational Technical Parameters, Reference prices, relevant indices etc.

17. DNH in its reply has submitted that in terms of Article 10.1.1 of the DNH PPA, every imposition or change in tax is not to be recognised as Change in Law but only to the extent wherein there is change in tax or imposition of tax for supply of power. Supply has been defined in the Act as sale of electricity. Therefore, all claims raised by the Petitioner in relation to changes in taxes etc. on goods and services not being on the sale of electricity are liable to be rejected. Further, increase of any nature on account of contractual and commercial arrangements of the Petitioner including with the Railways etc. cannot be covered under change in law. On specific claims, DNH has submitted as under:

(a) The claims regarding excise duty on coal, royalty and SED on excise duty on coal, service tax on transportation of coal o not constitute an imposition for supply of electricity and therefore, do not fall within the scope of Change in Law.

(b) MAT is on the book profit of the company and not an expense to the company and cannot be allowed as a pass through. The Commission in Sasan Power Case has held that MAT does not constitute change in law in terms of the PPA.

(c) There is no separate element of tariff that is disclosed or is required to be disclosed in the quoted bid tariff of the Petitioner. There is therefore no rationale in providing for any change in income tax rates as change in law and the same has not been provided for.

(d) Procurement of coal by the Petitioner is under a commercial arrangement with the coal supplier and not under a statutory mandate. The taxes and royalty etc. imposed on the coal is to be paid by the Petitioner in terms of the Fuel Supply Agreement with the Coal India Limited/its subsidiaries.

(e) The charges levied by Railways from time to time by way of increase or decrease in flight tariff are not in pursuance of any statutory declaration or levy but in terms of commercial arrangement between the parties. Therefore, claim for service tax, busy season surcharge etc. cannot be passed on to the Respondent.

(f) Claim for increased prices on account of New Coal Distribution Policy is misconceived as in case 1 bidding, it is the responsibility of the bidder to source fuel from any source and it is open to the Petitioner to source coal from any source, including changing the source from time to time. Under the Fuel Supply Agreement, there is no restriction on the supply of coal by Coal India Limited. It is

the position of Coal India Limited right from the Policy of the year 2007 that in case of shortage of coal, CIL reserves the right to import and supply coal. Further, the Letter of Assurance as well as the Fuel Supply Agreement do not mandate the supply of only domestic coal but enable the import of coal and supply to the Petitioner. Reliance placed by the Petitioner on the advice of Ministry of Power is misplaced as there is neither any mandate nor advice to reopen the bidding documents including the PPA and to provide additional tariff. The Petitioner's reliance on the notification of Ministry of Environment and Forest regarding use of blended, raw or beneficiated coal with ash content not exceeding 34% and GCV of not less than 400 KCal/kg is misplaced as there is no restriction on use of F grade coal which if supplied in terms of the Fuel supply Agreement is fully compliant with the environmental requirement.

(g) The Petitioner's claim for increased working capital is misconceived as there is no separate provision for working capital in tariff.

18. Prayas in its written submission dated 29.2.2016 has submitted as under:

(a) In terms of the definitions of "Change in Law" and "Law" under the PPA, not every imposition or change in tax is to be recognised as a Change in Law, but only to that extent wherein there is change in tax or imposition of tax "for supply of power" and this doesn't in any manner include change in tax on raw materials, services availed of or any other aspect apart from supply of power.

(b) In terms of provisions of the Electricity Act, 2003 wherein "Supply" is defined as sale of electricity, all the claims raised by the Petitioner in relation to alleged changes in taxes, etc. on goods and services not being sale of electricity, the same are liable to be rejected. Only increase in price on account of statutory levy of tax on supply of electricity is covered by the Change in Law clause and no increase of any nature on account of contractual and commercial arrangement of the Petitioner including with the Railways, etc. can be covered under the Change in Law clause. Accordingly, Excise Duty on coal, Royalty and SED on excise duty on coal, Service tax applicable on transportation of coal do not constitute an imposition for the supply of electricity and therefore cannot fall within the scope of Change in Law.

(c) Since MAT is applicable on the book profit, it is not an expense to the company. MAT doesn't constitute a Change in Law under the terms of the PPA and the tariff is also not determined under Section 62 wherein the income tax is pass-through in tariff.

(d) Taxes, etc. imposed on the coal are to be paid by the Petitioner in terms of the Fuel Supply Agreement with Coal India Limited/ subsidiary. The commercial rights and liabilities under the fuel supply agreement cannot be an issue of change in law to be a pass through in the tariff payable by the answering Respondent.

(e) With regard to changes on account of the New Coal Distribution Policy, the commercial decision of quoting escalable and non-escalable charges in the bid taken was at the freedom of Petitioner for assuming or passing on the risk of coal price increase and there can be no change to the risk assumption at this stage. Re-opening of the bidding documents and PPA to provide additional tariff is neither permissible nor there is any advice to do so.

(f) There is no separate provision for working capital in the tariff and the claim is liable to be rejected.

Submission of parties during hearing

19. Learned counsel for the Petitioner submitted that the Petitioner has given notices to the respondents in terms of the respective PPAs regarding 'change in law' which have impacted the capital cost during the construction period and revenue during the operating period. Learned counsel further submitted that the claims on change in law regarding custom duty, excise duty, service tax, other taxes during the construction period and excise duty, royalty on coal, clean energy cess and CCEA directive on coal pass through for short fall in supply of coal during the operating period, have been accepted by MSEDCL in its reply dated 22.8.2014, subject to prudence check. As regards Change in Law, learned counsel submitted that definition of law in Article 1.1 of the PPA is very wide and without limitation and change in law events are the enumerated events which results in recurring/non-recurring expenditure or income to the Petitioner. As regards the Indian Government Instrumentality, learned counsel submitted that in the case of the Petitioner, it would include all Ministries of Government

of India, Indian Railways, directorate General of Foreign Trade, Coal India Limited and Its subsidiaries, apart from the ministries and Departments etc. of the Government of Maharashtra and Dardra and Nagar Haveli. Learned counsel submitted that once change in law events have occurred, the consequences for the same have to be ascertained in terms of Article 10.2 and 10.3 of the PPAs. Relying on the judgement of the Hon'ble Supreme Court in Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission, learned counsel submitted that change in law provisions are not akin to indemnity clauses and have to be given wide and meaningful interpretation. Learned counsel submitted that Article 10.1.1 of the PPA includes all taxes and is not limited to taxes in connection with the supply of power and therefore, all provisions of Article 10.1.1 have to be harmoniously construed to give effect to each provision. Learned counsel referring to the amendment to the Tariff Policy dated 28.1.2016 submitted that increase in taxes and levies have been acknowledged as change in law events and have been allowed as pass through.

20. Learned counsel for the Prayas Energy Group submitted as under:

(a) The effect of Change in Law to be given should be restricted to the specific stipulation and conditions contained in Article 10.1.1 of the PPAs. Law has been defined in a clear and careful manner of including only the statutory laws, notifications, regulations, ordinances, codes, rules etc. and not a decision. The terms 'decision' and 'orders' are confined to those that may be passed by the Appropriate Commission. Since the words "any change in tax or introduction of any tax" is circumscribed by the qualification "made applicable for supply of

power by the Seller as per the terms of the Agreement", every change in tax or introduction of new tax would not be covered under the Change in Law provision and the additional condition that it should be related to the supply of power by the seller to the procurers needs to be satisfied.

(b) The claims made by the Petitioner include various items which are not in pursuance to any statutory levy or tax applicable for the supply of power, as envisaged in Article 10.1.1 to be change in law. The claims include the price or consideration payable by the Petitioner to coal companies or railways and are pursuant to a contractual or commercial arrangement and certainty not as a result of change in law as envisaged in the PPA. The increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the business aspects and are not a result of any change in law. These include royalty rate of coal, excise duty as well as reimbursement on domestic coal and busy season surcharge, development surcharge, reimbursement of service tax on freight etc. related to railways.

(c) With regard to change in law events during construction period such as change in custom duty rate on account of countervailing duty, education cess, increase in excise duty, increase in service tax and change in other tax rates such as works contract tax, VAT and CST, they are not admissible as the bidder is required to take into account all cost including capital and operating costs,

statutory taxes, levies, duties while quoting the tariff and therefore, it is not open to the Petitioner to claim such increase under Change in Law.

(d) The issue regarding VAT has already been decided and disallowed by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power limited V Madhya Pradesh Power Management Company Limited) & others and in order dated 3.2.2016 in Petition No. 79/MP/2013 (GMR Kamalanga Energy Limited V Dakshin Haryana Bijli Vitran Nigam Limited).

(e) With regard to the withdrawal of deemed export benefits, the circular dated 28.12.2011 amending the foreign trade policy did not make an difference to the present case as even earlier the benefit was not available to the non-mega power projects. The clarification issued by the Directorate General of Foreign Trade (DGFT) cannot be said to have the effect of change on interpretation and therefore, cannot be covered under change in law.

(f) The tax on income including MAT or income tax has nothing to do with the supply of power. The Income Tax is post revenue of the business and it is on the operating profit or net profit. Accordingly, the imposition of MAT or tax on income or any increase or decrease in the tax on income cannot be construed as change in law.

(g) Where the PPA is entered into in pursuance of a competitive bidding process as per Section 63 of the Electricity Act, 2003, the tariff is a per unit tariff allowed on the electricity generated and supplied. There is no separate element

of return of equity or reasonable return. These elements are factored in the bid price itself. In case of tariff determined based on capital cost under Section 62 of the Electricity Act, 2003, one of the components allowed as tariff is tax on income. The pass through on MAT or income under the tariff regulations is by virtue of the specific provision and not by virtue of affecting the supply of power by the generating company.

(h) With regard to increases in the rate of royalty on coal, increase in excise duty on coal and levy of clean energy cess are not be considered as tax on supply of power and therefore, do not fall within the definition under Article 10.1.1.

(i) With regard to change in railway development surcharge and other taxes by Ministry of railways, the tax imposed from time to time by way of increase or decrease are not in pursuance of any statutory declaration or levy.

(j) The increase in the price of coal due to the domestic shortage should have been anticipated and therefore cannot be considered as unprecedented. The New Coal Distribution Policy (NCDP) did not guarantee 100 % coal supply based on domestic production. The Petitioner submitted its bid based on the LoA and NCDP, 2007 which gives absolutely no assurance in terms of the quantity, quality or price of coal that would be supplied to the Petitioner and in face envisages meeting of shortfall through imports. Therefore, the Petitioner on its own with due knowledge has taken the commercial risk.

21. Learned counsel for the DNH adopted the submission of the Prayas group.

22. Learned counsel for the Petitioner refuted the submissions of learned counsel for Prayas and reiterated his earlier submissions. Learned counsel submitted that the Appellate Tribunal for Electricity in its Full Bench judgment dated 7.4.2016 in Appeal No. 100 of 2013 and Batch matter (UHBVNL and Anr. Vs CERC & Ors). ("Full Bench Judgment") has held that for grant of relief under such clauses (Force Majeure and Change in Law), the PPA is the guiding document and if a case for change in law is made out, the affected party is entitled to be compensated for the same. Further, the Appellate Tribunal for Electricity has noted that provisions such as Change in Law and Force Majeure are incorporated to provide for unforeseen eventualities. With regard to the claim for pass-through of cost of imported coal, learned counsel submitted that Paragraph 5 of the NCDP relied on by Prayas is not applicable in the present case since it only applies to new consumers. The Petitioner, being an existing LoA holder was covered under Paragraph 2.2 of the NCDP.

23. The Petitioner, vide its affidavit 22.2.2016, has submitted financial impact of Change in Law events as under:

Change in Law impact during Operating period (From commencement of PPA till December 2015)

(₹ in crore)

S. No.	Parameter	MSEDCL PPA	DNH PPA
1	Excise Duty on Coal	10.66	1.76
2	Change in Royalty Structure	2.06	0.42
3	Clean Energy Cess	25.47	15.17
4	Busy Season Surcharge	11.81	7.15
5	Development Surcharge	4.72	-
6	Service tax on Coal Transportation	7.06	9.06
7	Swachh Bharat Cess	0.10	0.07
8	Sizing Charges	4.43	3.46
9	Surface Transportation Charges	3.14	2.57
10	NiryatKar Tax	0.29	0.01

S. No.	Parameter	MSEDCL PPA	DNH PPA
11	CST with C-form	0.92	0.47
12	Shortfall in Linkage Coal	71.33	70.08
	Total	142.00	110.21

Change in Law impact during Construction period (From commencement of PPA till December 2015)

(₹ Crore)

<table>
<tr><th>S. No.</th><th>Parameter</th><th>MSEDCL PPA</th><th>DNH PPA</th></tr>
<tr><td>1</td><td>Change in MAT rate</td><td rowspan="7">18.55</td><td>2.29</td></tr>
<tr><td>2</td><td>Customs Duty</td><td rowspan="6">Not Applicable</td></tr>
<tr><td>3</td><td>Excise Duty</td></tr>
<tr><td>4</td><td>Service tax</td></tr>
<tr><td>5</td><td>Change Work Contract Tax, VAT and CST</td></tr>
<tr><td>6</td><td>Design Changes in Coal Handling Plant</td></tr>
<tr><td>7</td><td>Withdrawal of Deemed Export Benefit</td></tr>
<tr><td></td><td>Total</td><td>18.55</td><td>2.29</td></tr>
</table>

Analysis and Decision:

24. After going through the pleadings on record and during the hearing, the following issues arise for our consideration:

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

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

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

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

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

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

25. The claims of the Petitioner in the present petition pertain to the Change in Law events which have an impact of the cost or revenue of the project during the construction and operating period. Article 10.4 of the MSEDCL PPA envisages for notification of the Change in Law to the procurers. Article 10.4 of the MSEDCL PPA is extracted as under:

> **"10.4 Notification of Change in Law**
>
> 10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.
>
> 10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to all Procurers under this Article 10.4.2 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.
>
> 10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:
>
> (a) the "Change in Law"; and
> (b) the effects on the Seller"

Article 10.4 of the DNH PPA envisages similar provision for notification of the Change in Law to DNH and therefore, has not been quoted.

26. The Petitioner submitted that the Petitioner informed MSEDCL and DNH about the occurrence of events of Change in Law and their impact on the supply of power to

the Respondents in terms of the respective PPAs. In respect of MSEDCL PPA, the Petitioner has issued the following notices:

(a) Notice dated 27.8.2012 : (i) change in law affecting the capital cost of the project: change in taxes, (ii) Change in law affecting the energy charges: change in clean energy cess on coal, royalty on coal, change to Gross calorific value pricing of coal, Development surcharge by Indian Railways, Excise Duty on coal and VAT on coal.

(b) Notice dated 21.3.2013:(i) Change in Law affecting the capital cost of the project: Change in custom duty rate in relation to project import, education cess on countervailing duty and secondary higher education cess on countervailing duty, increase in excise duty, increase in service tax, withdrawal of deemed export benefit, and impact of the modified Coal Supply Agreement, (ii) Change in law events affecting the capacity charges: increase in MAT and reduction in surcharge rates, (iii) Change in law affecting the Energy charges: increase in fuel cost due to increase in taxes, duties, royalty and levies such as change in royalty, change in excise duty, introduction of clean energy cess, service tax on transport of goods by Indian Railways, change in railway development surcharge, busy season charge, terminal charges, niryatkar tax, switchover of coal pricing from UHV to GCV basis, and notification by the Ministry of Environment and Forest, (iv) Change in law events affecting both capacity charge and energy charge: Impact of modified coal supply agreement issued by Coal India Ltd., and increase in working capital.

(c) Notice dated 5.9.2013: Impact on the fuel cost on account of change in law relating to the Presidential directive dated 17.7.2013.

(d) Notice dated 6.12.2013: Tentative impact of the change in law as per Article 10.4.1 of the PPA.

In respect of DNH PPA, the Petitioner has issued the following notices:

(a) Notice dated 19.9.2013 : Change in law events affecting the capital cost of the project: impact of the modified Coal Supply Agreement, change in MAT and Corporate tax rates, increase in fuel cost due to increase in taxes, duties, royalty and levies such as change in excise duty, service tax on transport of good by Indian Railways, busy season surcharge, increase in fuel cost due to amendments to the fuel supply arrangements and notification by the Ministry of Environment and Forest.

(b) Notice dated 24.10.2013: Tentative impact of said change in law events.

27. The Petitioner has further served Notices and claims regarding Change in Law events subsequent to the filing of the petition:

(a) On 18.9.2014, the Petitioner notified MSEDCL and DNH of the Change in Law events: Increase in Clean Energy Cess; and Increase in Busy Season Surcharge.

(b) On 21.4.2015, the Petitioner notified MSEDCL and DNH of the Change in Law events: Further increase in Clean Energy Cess; Increase in Service Tax;

Levy of Swachh Bharat Cess; and Exemption of levy of Education, Secondary and Higher Education Cess on all excisable goods.

(c) On 9.7.2015, the Petitioner intimated MSEDCL and DNH about the increase in service tax from 12.36% to 14% pursuant to notification dated 20.05.2015 issued by the Government of India.

(d) On 17.11.2015, the Petitioner intimated MSEDCL and DNH of the notification dated 6.11.2015 issued by the Government of India, levying Swachh Bharat Cess at the rate of 0.5% with effect from 15.11.2015.

From the above narration of facts, it is evident that the Petitioner has from time to time informed the MSEDCL and DNH of the events that occurred after cut-off dates which according to the Petitioner, were the "Change in Law" events during the construction and operating period. Therefore, the Petitioner has complied with the requirement of notices under Article 10.4 of the MSEDCL and DNH PPAs.

Issue No.2: What is the scope of Change in Law under the PPAs?

28. Article 10 of the MSEDCL and DNH PPAs deal the events of Change in Law. Since the provisions in both PPAs are similar, Article 10 of the MSEDCL PPA is extracted as under:

10 ARTICLE 10: CHANGE IN LAW

10.1 Definitions

In this Article 10, the following terms shall have the following meanings:

10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any

additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*

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

- *the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*

- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*

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

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

10.2 Application and Principles for computing impact of "Change in Law"

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

29. The terms "Law" has been defined in Article 1.1 of the MSEDCL and DNH PPAs and the provisions are similar. Definition of "Law" in MSEDCL PPA is extracted 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".

30. The term “Indian Governmental Instrumentality” is also defined in Article 1.1 as under:

“MSEDCL PPA

“Indian Governmental Instrumentality” shall mean the Government of India (GOI), Government of state(s) of Maharashtra and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and Procurer”.

DNH PPA

“Indian Governmental Instrumentality” shall mean the Government of India (GOI), Government of Maharashtra and UT of Dadra and Nagar Haveli and any Ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government or both, any political sub-division of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and Procurer”.

31. A plain reading of the above provisions would reveal that the following requirements need to be satisfied for a claim to be admissible under “Change in Law”:

(a) The occurrence of events should have taken place after the date which is seven days prior to the bid deadline;

(b) Such occurrences should have resulted into any recurring or non-recurring expenditure by the Seller or any income to the Seller;

(c) The events shall include the following:

(i) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law;

(ii) A change in interpretation or application of any Law by any Indian Governmental Instrumentality having legal power to interpret or apply such law or any competent court of law;

(iii) The imposition of a requirement for obtaining any consents, clearances and permits which were not required earlier;

(iv) A change in terms and conditions prescribed or inclusion of any new terms and conditions for obtaining consents, clearances and permits, except due to any default of the seller;

(v) Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the agreement.

(d) Law is a defined term. It includes:

(i) all laws including electricity laws in force in India and any statute, ordinance, regulation, notification, code, rule;

(ii) their interpretation by Indian Government Instrumentality and having force of law;

(iii) all applicable rules, regulations, orders, notification by an Indian Government Instrumentality pursuant to or under all laws including any statute, ordinance, regulation, notification, code, rule;

(iv) all rules, regulations, decisions and orders of the Appropriate Commission.

(e) Indian Governmental Instrumentality is a defined term. It refers to Government of India and Government of Maharashtra in case of MSEDCL PPA and additionally Government of Dadra & Nagar Haveli in case of DNA PPA and

includes any Ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the State Governments or both, any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and Procurer.

32. Prayas has submitted that Law does not include any decision of the Government, and the decisions and orders are confined to those passed by the Appropriate Commission only. We find that interpretation of laws by Indian Government Instrumentality and having force of law is included in the definition of law. Further, change in interpretation or application of any Law by any Indian Governmental Instrumentality having legal power to interpret or apply such law is included under change in law. Indian Government Instrumentality in accordance with the MSEDCL PPA includes Government of India or Government of Maharashtra or and the Ministries and Department, board, authority etc. under the direct or indirect control of these governments and Appropriate Commission, tribunal, judicial or quasi-judicial body. In case of DNH PPA, it includes Government of India or Government of Maharashtra or Government of Union Territory of DNH and the Ministries and Department, board, authority etc. under the direct or indirect control of these governments and courts and appropriate Commission, tribunal, judicial or quasi-judicial body Therefore, under a statute, ordinance, regulation or code etc. which are included in the definition of law, if any Indian Government Instrumentality has been vested with the power to interpret or apply the law, change in the interpretation or application of any law by such Indian Government Instrumentality shall be construed as change in law. Therefore, change in

Law shall not be confined to the decisions or orders of the appropriate Commissions only but shall also extend to the interpretation or application by any of the authorities included in the definition of Indian Government Instrumentality which have been authorised by the law to make interpretations or applications and which result in additional recurring/non-recurring expenditure by the Petitioner or income to the Petitioner.

33. Sub-clause under Article 10.1.1 provides that "any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the agreement" is covered under change in law. In this connection, the Respondents and Prayas have submitted that "any change in tax or introduction of any tax" is circumscribed by the qualification "made applicable for supply of power by the Seller as per the terms of the agreement" which means that every change in tax or introduction of any tax will not be covered under change in law and the additional condition that it should be on the supply of power by the seller should be satisfied. DNH has submitted that all claims due to alleged changes in the taxes on goods and services not being on the sale of electricity should not be allowed under change in law. We have considered the submissions of the parties. Clause 2.4.1 (xi), (xii) and (xiii) of the RfP issued by MSEDCL and DNH provides as under:

> "(xi) The Quoted tariff, as in Format 4.10, shall be all inclusive tariff upto the interconnection point and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such tariff. It shall include any applicable transmission costs and transmission losses from the generation source upto the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the quoted tariff. Appropriate transmission charges from the Injection point to the delivery point as

per format 5.10 shall be added for Bid evaluation purpose.

(xii) The Bidders should factor in the cost of the secondary fuel into the quoted tariff and no separate reimbursement shall be allowed on this account.

(xiii)The Bidders are required to quote tariffs for a period of 25 years notwithstanding source/technology."

As per the terms of the RfPs, the bidders are required to quote an all-inclusive tariff for a period of 25 years notwithstanding source and technology. The quoted tariff shall include the capital cost and operating cost including taxes, duties, levies and duties. Further all costs involved in procurement of inputs for supply of power including statutory taxes, duties, levies thereof shall be reflected in quoted tariff. It is clear from the above that the capital cost and operating cost of the project which include cost of materials, equipment, services for installation of the project and production and supply of electricity, and taxes, duties and levies on such equipment materials, and services shall be the responsibility of the bidder. However if any recurring or non-recurring expenditure is required to be incurred by the Petitioner on account of occurrences of the events covered under Article 10.1.1 of the PPAs, then such expenditure will be admissible under change in law to the Petitioner. If any income accrues to the Petitioner on account of events covered under Change in Law, then such income shall be adjusted against tariff. One of the events covered under change in law is "the change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of the Agreement." In our view, this sub-clause cannot be read in isolation but has to be read with the provision that such occurrences should have the effect of "resulting into any recurring or non-recurring expenditure by the Seller or any income to

the Seller”. Therefore, if the Petitioner has to incur any recurring or non-recurring expenditure on account of the change in tax or introduction of any tax for supply of power to MSEDCL and DNH in terms of the respective PPAs, then such expenditure shall be admissible to the Petitioner under Change in Law.

Issue No.3: Which of the individual claims of the Petitioner are admissible under Change in Law in accordance with the provisions of the PPAs?

34. One of the conditions of Article 10.1.1 of the PPAs is that the events should have occurred after the date which is seven days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the seller or any income to the seller. Bid Deadline has been defined as “the last date and time for submission of the Bid in response to the RFP”. In terms of MSEDCL PPA, bid deadline was 7.8.2009. Therefore, cut-off date for considering the claims under change in law is 31.7.2009. Similarly, in case of DNH PPA, the bid deadline was 8.6.2012. Therefore, cut-off date for considering the claims under change in law is 1.6.2012.

35. Keeping in view the above broad principles, we proceed to deal with the claims of the Petitioner under Change in Law in respect of MSEDCL PPA and DNH PPA.

(A) Increase in rate of Customs Duty

36. The Petitioner has submitted that as on the Bid Deadline of 7.8.2009, applicable Counter Veiling Duty (CVD) was 8%. CVD is the additional duty on customs duty equivalent to excise duty. There has been increase in the Customs Duty on account of increase in the CVD from 8% to 10% in 2010 vide Notification No. 6/2010 – Central

Excise dated 27.2.2010 and from 10% to 12% in 2012 vide Notification No. 18/2012-Central Excise dated 17.3.2012 issued by Ministry of Finance, Government of India. The Petitioner has submitted that Ministry of Finance vide its Notification No. 13 and 14 /2012-Customs dated 17.3.2012 has exempted the levy of Education Cess of 2% and Secondary and Higher Education Cess of 1% on CVD. The Petitioner has submitted that the total impact due to such increase in customs duty on the capital cost of the project is ₹40.80 crore till September, 2013 in respect of MSEDCL PPA. The Petitioner has submitted that change in rate of customs duty on account of CVD would not affect the DNH PPA since the Change in Law events occurred before the cut-off date i.e. 1.6.2012.

37. MSEDCL has submitted that the long term tie up capacity is limited to only 200 MW. However, the installed capacity of the generating station is around 600 MW. Even though the Petitioner has calculated the impact of change in custom duty to the extent of 200 MW, such additional costs can be allowed to be pass through under change in law after the prudence check by the Commission on the base price quoted at the time of bid. MSEDCL has further submitted that since the project has achieved COD in September 2013, therefore no additional costs beyond that period should be allowed. Prayas has submitted that the Petitioner cannot claim any adjustment in customs duty on account of CVD as the same is not a tax on supply of power and does not fall within the scope of Article 10.1.1 of the MSEDCL PPA.

38. We have examined the submissions of the Petitioner, MSEDCL and Prayas. It is noted that the applicable Countervailing Duty as on seven days prior to the bid deadline

was 8% which was revised upward to 10% in 2010 and 12% in 2012 by Ministry of Finance, Government of India vide its Notification No.6/2010 dated 27.2.2010 and Notification No.18/2012 dated 17.3.2012. It is further noticed that Ministry of Finance, Government of India vide its Notification Nos. 13/2012 and 14/2012 exempted education cess 2% and secondary and higher education cess 1% on CVD. The above revisions in CVD have taken place after the cut-off date in terms of the MSEDCL PPA. The issue is whether the changes in rates of taxes which have impact on the project cost during the construction period can be admissible under change in law. In terms of Article 10.1.1 of the PPA, if the change in law event results in additional recurring or non-recurring expenditure by the Petitioner, it will be admissible under change in law. Since the impact of revision of CVD is on the capital cost, it is a non-recurring expenditure. Further, it is a change in tax which affects the tariff quoted by the Petitioner since the Petitioner has quoted an all-inclusive tariff including taxes, duties and levies. Therefore, the expenditure is covered under Change in Law and the Petitioner is entitled to relief proportionate to the contracted capacity with MSEDCL. The Petitioner is directed to share with MSEDCL the detailed computations of the impact of change in customs duty paid on account of CVD duly audited and certified by the statutory auditor while claiming the compensation.

(B) Increase in the Excise Duty

39. The Petitioner has submitted that at the time of submission of bid for MSEDCL i.e. on 7.8.2009, the applicable Excise Duty was 8%. It has undergone change from 8% to 10% in 2010 vide Notification No. 6/2010-Central Excise dated 27.2.2010 and from 10% to 12% in 2012 vide Notification No. 18/2012- Central Excise dated 17.3.2012

issued by Ministry of Finance, Government of India. The Petitioner has submitted vide affidavit dated 3.1.2014 that the total impact on account of these increases in Excise Duty on the Capital Cost of the project is ₹ 6.61 crore as under:

Year	Amount on which Tax applied (₹ in crore)	Tax rate applicable at the time of Bidding (%)	Amount of Tax at the time of bidding (₹ in crore)	Increased Tax Rate (%)	Amount of Tax as per rate applicable (₹ in crore)	Difference (₹ in crore)
2010-11	212.43	8.24%	17.51	10%, 2%,3%	21.56	4.05
2011-12	47.40	8.24%	3.91	10%, 2%, 3%	5.21	1.31
2012-13	39.73	8.24%	3.27	10%, 2%, 3%	4.50	1.22
2013-14 (Till Sept.)	1.54	8.24%	0.13	12%, 2%, 3%	0.16	0.03
Total	**301.1**		**24.82**		**31.43**	**6.61**

The Petitioner has submitted that the change in Excise Duty rate would not affect DNH PPA as the changes occurred before the cut-off date i.e. 1.6.2012.

40. MSEDCL has submitted that increase in excise duty falls under change in law and the Commission may allow such additional cost as a pass through on the base price quoted at the time of submission of bid after carrying out prudence check. Prayas has submitted that change in rate of excise duty may affect the financials of the project but is not in nature of tax on supply of power and therefore, does not fall under the scope of Change in Law within the meaning of Article 10.1.1 of MSEDCL PPA

41. We have considered the submission of the Petitioner, MSEDCL and Prayas. As on the cut-off date(i.e. 31.7.2009), the applicable excise duty was 8% as per the Ministry of Finance Notification No. 29/2004-Central Excise dated 9.7.2004 notified as GSR 420 (E),dated 9.7.2004. In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944, Ministry of Finance issued Notification

No.6/2010 increasing the excise duty from 8% to 10% and vide Notification No.18/2012 dated 17.3.2012, excise duty has been increased to 12%. The said changes from 8% to 10% and from 10% to 12% claimed by the Petitioner have occurred after the cut-off date and have an impact on the cost during construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid submitted to MSEDCL. Therefore, these increases in excise duty by Indian Government Instrumentality pursuant to the powers vested under Acts of the Parliament are admissible as Change in Law under Article 10 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty proportionate to the contracted capacity with MSEDCL.

(C) Increase in Service Tax

42. The Petitioner has submitted that at the time of submission of bid on 7.8.2009 to MSEDCL, the applicable Service Tax was 10%. Thereafter, after the Union Budget presented by Government of India, service tax has been increased 12% in FY 2012-13.vide No.162/13/2012-ST dated 6.7.2012 based on the provisions of the Finance Act, 2012. The Petitioner submitted vide affidavit dated 13.1.2014 that the total impact on project cost on account of Service Tax is ₹0.48 crore as under:

Year	Amount on which Tax applied (₹ in crore)	Tax rate applicable at the time of Bidding (%)	Amount of Tax at the time of bidding (₹ in crore)	Tax rate currently applicable	Amount of Tax as per rate applicable (₹ in crore)	Difference (₹ in crore)
2009-10	3.92	10.30%	0.40	10.30%	0.40	0.00
2010-11	8.38	10.30%	0.86	10.30%	0.86	0.00
2011-12	55.63	10.30%	5.73	10.30%	5.73	0.00
2012-13	17.27	10.30%	1.78	12.36%	2.13	0.36
2013-14	5.91	10.30%	0.61	12.36%	0.73	0.12

Year	Amount on which Tax applied (₹ in crore)	Tax rate applicable at the time of Bidding (%)	Amount of Tax at the time of bidding (₹ in crore)	Tax rate currently applicable	Amount of Tax as per rate applicable (₹ in crore)	Difference (₹ in crore)
(Till Sept.)						
Total	**91.11**		**9.38**		**9.86**	**0.48**

The Petitioner has submitted that the change in service tax rate would not affect DNH PPA as the change in law event occurred prior to the cut-off date i.e. 1.6.2012.

43. MSEDCL has submitted that the Commission may consider allowing the service tax after prudence check. Prayas has submitted that the Petitioner is not entitled for reimbursement of service tax as it is not a tax on the supply of power under the PPA and is not covered under Article 10.1.1 of the PPA.

44. We have considered the submissions of the Petitioner, MSEDCL and Prayas. The increase in Service Tax was affected through Finance Act, 2012. Since the enhanced rate of Service Tax is through an Act of Parliament after the cut-off date and has resulted in additional expenditure by the Petitioner, the same is covered as change in law under Article 10.1.1 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated by MSEDCL for the impact of difference in the rate of service tax on the project cost.

(D) Change in other taxes - Work Contract Tax, VAT, CST

45. The Petitioner has submitted that after the cut-off date, there are changes in the rates of Work Contract Tax, Value Added Tax and Central Sales Tax. The Petitioner,

vide its affidavit dated 22.2.2016, has submitted the following Notifications for imposition of said taxes:

(a) Ministry of Finance, Government of India notification no. 7/2008 regarding change in Work contract tax with effect from 1.3.2008.

(b) Ministry of Finance, Government of India Notification No. 10/2012 dated 17.3.2012 regarding change in Service tax with effect from 1.4.2012.

(c) Government of Maharashtra Notification No. VAT-1510/CR 47/taxation-1 dated 10.3.2012 regarding change in VAT with effect from 1.4.2010.

46. The Petitioner has estimated the overall impact on account of these changes in law events as reduction in the project cost by ₹0.70 crore as under:

Year	Amount on which Tax applied (₹ in crore)	Amount of Tax at the time of bidding (₹ in crore)	Amount of Tax as per rate applicable (₹ in crore)	Difference (₹ in crore)
2009-10	0.73	0.01	0.01	0.00
2010-11	190.13	4.47	4.27	-0.21
2011-12	552.10	14.49	14.79	0.30
2012-13	525.76	13.26	12.34	-0.92
2013-14 (Till Sept.)	195.35	6.76	6.89	0.13
Total	**1464.08**	**39.00**	**38.30**	**-0.70**

The Petitioner has submitted that changes in these taxes would not affect the DNH PPA as these events have taken place before the cut-off date i.e. 1.6.2012.

47. Prayas has submitted that these claims are not admissible under change in law as in terms of clause 2.4.1.1 of the PPA, the Petitioner is required to take into account

all costs including capital and operating cost, statutory taxes levies, duties while quoting such tariff. Prayas has further submitted that the Commission in order dated 30.3.2015 in Petition No.6/MP/2013 and order dated 3.2.2016 in Petition No.79/MP/2013 has disallowed changes in the rate of VAT under change in law.

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

49. The Petitioner has submitted the details of net impact on the capital cost of the project on account of taxes, duties and levies as under:

Year	Impact of Change in Taxes and Duties (₹ in crore)
2010-11	6.46
2011-12	22.74
2012-13	3.51
2013-14 (Till Sept)	0.33
Total	33.04

50. The Petitioner has submitted that the amount of ₹33.04 crore has been paid till September, 2013. In this regard, the Petitioner has placed on record the Auditor certificate certifying the amounts paid by it under various heads. MSEDCL has submitted that the long term tie up capacity is limited to only 200 MW whereas the installed capacity of the generating station is around 600 MW. MSEDCL has submitted that after prudence check, such additional cost can be allowed under Change in Law.

51. The Petitioner is directed to furnish its claims to MSEDCL in terms of our decision in paras 38, 41, 44 and 48 above duly supported by the auditor's certificate. The compensation shall be admissible in proportion to the contracted capacity in terms of the MSEDCL PPA.

(E) Withdrawal of Deemed Export Benefit by DGFT

52. The Petitioner has submitted that at the time of submission of bid on 7.8.2009, there was a Deemed Export Benefit on capital goods such as boilers, turbines and generators that were imported in terms of para 8.2 of the Foreign Trade Policy 2009-2014. Thereafter, following change in law events occurred leading to withdrawal of deemed export benefits to the Petitioner:

(a) On 15.3.2011, the Policy Interpretation Committee of Directorate General of Foreign Trade clarified that Deemed Export Benefit would only be available in cases where the capital goods are manufactured in India.

(b) On 28.12.2011, the Directorate General of Foreign Trade issued Policy Circular No. 50/2009-2014(RE 2010) dated 28.12.2011 clarifying that for Non-Mega power projects, capital goods such as boilers, turbines and generators would be entitled to Deemed Export Benefit only if such boilers, turbines and generators were manufactured in India.

(c) On 28.12.2011, Paragraph 8.4.4 (iv) was amended vide Notification No.92 (RE-2010)/2009-14 and the benefit of deemed export was limited to advance authorization as opposed to deemed export duty drawback and exemption from

terminal excise duty.

(d) On 21.3.2012, the Foreign Trade Policy was amended and Paragraph 8.7 was introduced in terms of which deemed export benefit was withdrawn for all non-Mega power projects.

(e) Consequently, on 5.6.2012, the Annual Supplement to the Foreign Trade Policy was issued pursuant to which Paragraph 8.2(g) which referred to non-Mega Power Projects was deleted.

53. The Petitioner has contended that in terms of the Section 5 of the Foreign Trade Development and Regulation Act, 1992 read with Para 2.3 of the Foreign Trade Policy, 2009-14, DGFT has been given the power to decide interpretation of issues in relation to the Foreign Trade Policy. Further, the definition of 'Law' under the MSEDCL PPA includes 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 Government Instrumentality. Therefore, the decision of the Policy Interpretation Committee of Directorate General of Foreign Trade constitutes change in law and would qualify as a Change in Law in terms of the MSEDCL PPA. The Petitioner has submitted that it has made a total of 10 claims amounting to ₹243.33 crore to DGFT till June 2013 which are pending with DGFT. The Petitioner has submitted that at this stage it is difficult to assess the impact on this account and the Petitioner reserves its right to claim the aforesaid amount of ₹243.33 crore, should the claims are rejected by DGFT. The Petitioner has submitted that the withdrawal of deemed export benefits would not affect the DNH PPA as the change in law event occurred after the cut-off date i.e. 1.6.2012.

54. MSEDCL has submitted that on 15.3.2011, the Policy Interpretation Committee of Directorate General of Foreign Trade clarified that the deemed export benefit would only be available in cases where the capital goods are manufactured in India. The Directorate General of Foreign Trade issued Policy Circular No. 50/2009-2014 (RE 2010)dated 28.12.2011 clarifying that for Non-Mega Power Projects, capital goods such as boilers, turbines and generators would be entitled to Deemed Export Benefit only if such boilers, turbines and generators were manufactured in India. Therefore, the circular issued by Directorate General of Foreign Trade is just a clarification of the applicability of the deemed export benefit to the goods manufactured in India. The interpretational issue is an error by the Petitioner and the liability for the same cannot be passed onto MSEDCL and its end consumers. Therefore, the Petitioner is not entitled for such additional cost. Prayas has submitted that there was no provision in the Foreign Trade Policy at any time to allow the benefit of deemed exports in respect of capital goods imported for non-mega power project. There was therefore no question of decision being revised at a later date. Prayas has submitted that the project developers cannot take advantage of their own wrong by a wrong interpretation and thereafter, claim that there was change in law when the concerned authorities pointed out the erroneous interpretation and claimed that all the money should be adjusted/claimed back. Prayas has submitted that clarification relates back to the date of notification and in this connection has relied upon the judgement in Collector of Central Excise V Woodcraft Products {(1995) 3 SCC 454}, Tamil Nadu Electricity Board & Anr V Status Spinning Mills Limited & Anr {(2008) 7 SCC 353} and judgement of Delhi High Court dated 18.10.2013 in WP(C) 1217 of 2013 {R.C.P Singh &Ors V UOI &Ors}.

55. We have examined the submissions made by the Petitioner, MSEDCL and Prayas. The Foreign Trade Policy (FTP) 2004-2009 came into force on 1.4.2008.The Petitioner submitted the bid on 7.8.2009 and the cut-off date in terms of the bid documents of MSEDCL was 1.8.2009. As on the cut-off date, the applicable Foreign Trade Policy was for the period 2004-2009. The relevant provisions of the FTP 2004-2009 are extracted as under:

> "8.1 "Deemed Exports" refers to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange.
>
> 8.2 Following categories of supply of goods by main/sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:
> (a) to (d)xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> (e) Supply of capital goods, including in unassembled / disassembled condition, as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till stage of commercial production, and spares to extent of 10% of FOR value to fertilizer plants;
>
> (f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;
>
> (g) Supply of foods to power projects and refineries not covered in (f) above.
>
> Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and (g) only if the supply is made under procedure of ICB."

As per the above provisions, the threshold condition for availing the Deemed Export benefit is that the goods supplied should be manufactured in India and the supply of goods should be pursuant to the procedure of International Competitive Bidding. The Petitioner does not claim to have satisfied these two conditions at the time of submission of the bid and therefore, the provisions of the FTP 2004-09 does not entitle the Petitioner for deemed export benefits. The Petitioner has relied on FTP 2009-2014

which came into force with effect from 27.8.2009. Therefore, FTP 2009-2014 was not applicable in case of the Petitioner as it was issued after the cut-off date. It is however noticed that FTP 2009-14 has the similar provisions as quoted above from FTP 2004-09 and may be considered as continuation of policy with regard to deemed export benefits. The Policy Interpretation Committee under DGFT in the Policy Circular dated 28.12.2011 has clarified about the deemed export benefits as under:

> "2. Deemed export benefits are admissible in terms of Paragraph of 8.2 of FTP, if goods are manufactured in India. In the case of non-mega power projects, for instance, if capital goods such as Boilers, turbines, Generators (BTGs) are being supplied to Project Authorities, then deemed export benefit are admissible only if such BTGs are manufactured in India. If these are imported and supplied as such, then such supplies do not amount to deemed exports, and hence deemed export benefit will not be admissible.
>
> 3. Accordingly, in continuation to PIC Clarification, as given in Paragraph 1 above, it is further clarified that in case capital goods have been imported by the contractor/sub-contractor and supplied as such to project authorities, then customs duties paid on such imports cannot be refunded back as deemed export duty drawback under Paragraph 8.3(b) of the FTP.
>
> 3. All regional authorities may take note of this clarification for processing/review of deemed export claims."

A Combined reading of the provisions of the FTP 2004-09 and FTP 2009-14 and the Circular dated 28.12.2011 reveals that the Circular has only reiterated the provisions in the FTPs that deemed export benefits under the FTP are admissible only if the goods are manufacture in India. The letter has further clarified that if the capital goods such as BTGs are imported and supplied to project authorities, then such supplies do not amount to deemed exports, and hence deemed export benefit will not be admissible. This clarification needs to be read in the context of the provisions in FTP 2004-2009 and FTP 2009-2014 that deemed export benefits are admissible only if the capital goods are manufactured in India. Reference to the non-mega power project in para 2 of the Policy

Circular dated 28.11.2011 is in the form of an example and does not amount to withdrawal of deemed export benefits to non-mega power project. The Policy regarding the deemed export benefits remained the same as on the cut-off date as well as on the date of issue of the clarification. Therefore, the clarification issued vide Circular dated 28.12.2011 cannot be considered as change in law. Accordingly, the claim of the Petitioner for withdrawal of deemed export benefits is not covered within the scope of Article 10 of the MSEDCL PPA and is accordingly rejected.

56. There is another reason as to why MSEDCL shall not be liable for compensating the Petitioner for the loss of deemed export benefits as claimed by the Petitioner. Para 2.6.1 of the RfP of MSEDCL provides as under:

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

As per the above provision, the Bidder has to fix the price in the bid after taking into account all relevant conditions, risks and other contingencies which may influence or affect the supply of power and shall not be entitled to any financial compensation for any reason whatsoever. The Petitioner has selected imported equipment for its power plant in which MSEDCL has no say. Article 3.1.1(e) of the MSEDCL PPA dealing with condition subsequent to be fulfilled by the Petitioner within 12 months from the effective date provides as under:

> "e) The Seller shall have awarded the Engineering, Procurement and Construction contract ("EPC contract") or main plant contract for boiler, turbine and generator ("BTG"), for setting up the Power Station and shall have given to such contractor an irrevocable NTP and shall have submitted a letter to this effect to the Procurer;"

The above provision merely requires the Petitioner to inform MSEDCL about the award of the EPC contract or main plant contract for BTG. The choice of source for such EPC or BTG contract is entirely left to the Petitioner. Where a Petitioner has chosen import as the source of such contract and as per the FTP as well as the decision of the DGFT, deemed export benefits are not available for such imported equipment, the risk lies with the Petitioner and cannot be passed on to MSEDCL.

(F) Design changes in coal handling plant due to Direction from CEA

57. The Petitioner has submitted that the Project was conceived based on domestic coal. The capital cost of the Project was estimated based on designs and plans which envisaged use of domestic coal for the Project. The Petitioner has submitted it had entered into two agreements with GMR Infrastructure Limited for setting up the Coal Handling Plant, namely Civil Works Engineering Erection Testing and Commissioning Agreement and Agreement for Onshore Supply of Coal Handling Plant. The Petitioner has submitted that due to the shortage of domestic coal and the fact that the fuel supply arrangements being entered into by Coal India and its subsidiaries compulsorily included a component of imported coal to make up for the shortage, Central Electricity Authority vide its letter No. CEA/TE&TD-TT/2011/F-9 dated 19.4.2011 advised all power generating companies, power project developers and power equipment manufacturers that the boilers for all future indigenous coal based thermal power plants shall be designed for blend ratio by weight of 30:70 (or higher) imported/high GCV coal:

indigenous coal. CEA also advised that the station facilities shall also be designed for unloading, handling and blending of imported/high GCV coal. The Petitioner has submitted that as per the requirement to provide for coal blending, the Petitioner had to install a coal blending system which led to increase in the capital cost of the project pursuant to following reasons:

(a) Shortage of domestic coal and FSAs being entered into by Coal India and its subsidiaries compulsorily included a component of imported coal to make up for the shortage.

(b) CEA directive vide letter no. CEA/TE&TD-TI/2011/F-9 dated 19.4.2011 regarding design of equipment and loading, unloading and blending facilities at the power plants to accommodate the blend ratio by weight of 30:70 (or higher) [imported/high GCV coal] : [indigenous coal].

58. The Petitioner has submitted that due to the above essential design changes in the coal handling plant, the Petitioner amended the (i) civil works engineering erection and testing contracts and (ii) on shore supply contract; together increased the contract value by ₹11.50 crore. The Petitioner has placed on record the copies of the agreements in support of the said increase. The Petitioner has submitted total impact of additional scope in Coal Handling Plant is ₹11.50 crore as under:

Particulars	Original Contract Price (₹ in crore)	Revised Contract Price (₹ in crore)	Variation (₹ in crore)
Contract 1	69.24	76.87	7.63
Contract 2	105.76	109.63	3.87
Total	**175.00**	**186.50**	**11.50**

The Petitioner has submitted that change in Design of Coal Handling Plant would not affect the DNH PPA since change in law events occurred prior to the cut-off date.

59. MSEDCL has submitted that letter issued by CEA in this regard was merely an advice and it was not mandatory. Based on the advice of CEA, the Petitioner has installed coal blending system leading to increase in capital cost of coal handling plant by ₹11.50 crore. Therefore, this is not covered under Change in Law. Prayas has submitted that the contention of the Petitioner is wrong as the LOA dated 3.6.2010 issued to the Petitioner by SECL under NCDP 2007 clearly stipulated that in case of shortages, coal would be imported to meet the shortfall and the price of such import would be borne by the Petitioner. Prayas has submitted that since part of the requirement was likely to be met through imported coal at some point of time, the Petitioner was required to make arrangement for the same. Prayas has further submitted that date of the LOA is 3.6.2010 which is prior to the advice of CEA on 10.4.2011 and the design parameters cannot be termed as change in law pursuant to the same. According to Prayas, the Petitioner has already arranged its affairs in such a manner so as to accommodate coal handling and blending of imported coal and had taken into account such expenditure before the issuance of CEA advice and it is not appropriate to attribute such capital expenditure towards the advice issued by CEA to prospective thermal plants.

60. The Petitioner has submitted that Letter of Assurance to the Petitioner was issued by South Eastern Coal Fields Ltd (SECL) on 19.10.2006 which was prior to the

National Coal Distribution Policy, 2007. The Petitioner has submitted that its case is covered under para 2.2 of the NCDP which provides as under:

> "100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared or notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements have already been assessed and accepted by the Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."

The Petitioner has submitted that since there was no stipulation of imported coal, the Petitioner had planned the technical specifications of its project premised on 100% domestic coal. The Petitioner has submitted that the stipulation issued by Central Electricity Authority requiring change in specification is clearly a change in law event issued as CEA has been empowered under Section 73(b) and (m) of the Act to specify technical standards for construction of the electrical plants and advising the generating companies on matters enabling them to operate and maintain the electrical system in an improved manner. The Petitioner has submitted that the advice from CEA to generating companies to adopt the blending mechanism is valid and essential for operation of the plant and would constitute a change in law in terms of clause 10 of MSEDCL PPA.

61. We have considered the submissions made by Petitioner and the Respondents and Prayas. The Petitioner quoted the bid for Case 1 bidding where the responsibility for fuel vests in the Petitioner. The Request for Proposal issued by MSEDCL for procurement of power defines fuel as under:

> "Fuel: The choice of fuel, including but not limited to coal or gas, it's sourcing and transportation is left entirely to the discretion of the bidder. The successful Bidder(s) shall bear the complete responsibility to tie up the

> fuel linkage and the infrastructural requirements for fuel transportation, handling and storage."

Further para 2.6.1 of the RfP provides as under:

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

Thus as per the RfP, it is the responsibility of the bidder to tie up the fuel linkage and arrange for the infrastructural requirements for fuel transportation, handling and storage. In terms of para 2.6.1 of the RfP, the bidder has acknowledged that price in quoted bid has been fixed after taking into account all contingencies and the bidder shall not seek any financial compensation whatsoever. A combined reading of both provisions of the RfP shows that the Petitioner has unconditionally assumed all responsibilities for the infrastructural requirements for fuel transportation, handling and storage. Therefore, the expenditure on account of change in the specifications of the coal handling plant for handling imported coal is to the account of the Petitioner and cannot be passed on to MSEDCL. In view of the shortage in availability of domestic coal, CEA had issued advice to the project developers to make arrangement for handling facility for imported coal. The advice of CEA is not mandatory and it is upto the project developer to implement the said advice. Since the Petitioner has assumed the responsibility for fuel in terms of the bidding documents, relief for modification of the fuel handling system on

the basis of advice of CEA cannot be granted under Change in Law.

I. Change in Law impact during Operating period

62. The events of Change in Law should occur after seven (7) days prior to the Bid Deadline Date. For MSEDCL PPA, the Bid Deadline Date was 7.8.2009; therefore, the Change in Law Event should occur on or after 31.7.2009. For DNH PPA, the Bid Deadline Date was 8.6.2012; therefore, the Change in Law Event should occur on or after 1.6.2012. The individual claims of the Petitioner are discussed in the succeeding paragraphs.

MSEDCL PPA and DNH PPA

(A) Change in Effective Minimum Alternate Tax

63. The Petitioner has submitted that as on the cut-off date for MSEDCL PPA, MAT rate was 10%. The Petitioner has submitted that as per the amendment in Income Tax Act in 2012, the MAT rate has increased from 10% to 18.5% in FY 2009-10. The Petitioner has further submitted that the rate of surcharge was 10% in 2009-10 which was reduced to 5% in 2012-13 and again increased to 10% in 2013-14. The Petitioner has submitted that these changes have direct impact on the non-escalable capacity charge and impact on account of same be approved under Change in Law. In respect o DNH PPA, the Petitioner has submitted that the MAT rate was 20.1% in 2012-13 and 20.96% in 2013-14 and corporate tax rate was 3245% in 2012-13 and 33.99% in 2013-14. The Petitioner has submitted that the change in MAT rate and Corporate Tax rate is on account of change in surcharge which has a direct impact on non-escalable capacity charge and its impact may be approved under Article 10 of the PPA.

64. The Respondents have submitted that the tax on income including MAT or income tax as nothing to do with the cost or revenue from the business of selling electricity. Since, the tax is post revenue of the business and levied on the operating profit or book profit, the Petitioner is not entitled to increase in MAT or Corporate Tax.

65. We have considered the submission of the Petitioner. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 where in the Commission has not considered MAT under change in law. The relevant portion of the said order is extracted as under:

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

66. In the light of the above decision, the claim of the Petitioner for relief under change in law on account of increase in MAT rate is not admissible and is accordingly disallowed.

(B) Change in Excise Duty on coal

67. The Petitioner has submitted that at the time of submission of bid in case of MSEDCL PPA, there was no excise duty applicable on coal. The Government of India vide Finance Act, 2012 levied excise duty @6% on the determined sale price of coal. The excise duty will be levied on sale price of coal procured by the Petitioner which includes ROM, Royalty, stowing excise duty, sizing charges, surface transportation and loading charges. According to the Petitioner, Coal India Limited vide its letter No. CIL/C-3(A)/Central Excise dated 5.3.2013 advised all the coal producing subsidiaries for inclusion of Royalty and Stowing Excise Duty to arrive at the assessable value for levy of Central Excise Duty with effect from 1.3.2013. The Petitioner has submitted that the sale price of coal is ₹897.58 per MT which covers Run of Mine (ROM) price of ₹640/MT, royalty, stowing excise duty, sizing charges, surface transportation and loading charge components. The Petitioner has submitted that the estimated impact of the excise duty for MSEDCL PPA is expected to be ₹58.52/MT till 28.2.2015 and ₹58.34/ MT w.e.f. 1.3.2015. The estimated impact of the excised duty for DNH PPA is expected to be ₹8.25/MT. The Petitioner has submitted that the amount would be claimed on the basis of actual quantity of coal supplied to the project and actual financial impact.

68. The respondents have submitted that since the Commission has already allowed increased in Excise Duty on coal in other cases, such additional charges can be allowed after detailed prudence check. Prayas has submitted that change in excise duty on coal is not payable and the decision in the case of Sasan Power Limited is distinguishable from the present case.

69. We have considered the submission 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 as a change in law event under the relevant 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".

70. The levy of excise duty on coal through the Finance Act, 2012 was introduced which was after the cut-off date and has impact on the cost of generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid the Excise Duty on coal which was not in existence as on cut-off date. Therefore, levy of excise duty on coal are covered under change in law. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty on coal in case of MSEDCL PPA. In case of DNH PPA, the cut-off date was 1.6.2012 and accordingly, the change in the rate of excise duty after the said date (i.e. Notification dated 5.3.2013) will be admissible in case of DNH PPA. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioner is directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioner may approach the Commission for appropriate directions.

71. The Petitioner is directed to furnish along with its monthly bill the proof of payment to coal companies and computations duly certified by the auditor to MSEDCL and DNH. It is clarified that the Petitioner shall be entitled to recover on account of increase in excise duty on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL and DNH. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in excise duty on coal. The Petitioner, MSEDCL and DNH are directed to carry out reconciliation on account of these claims annually.

(C) Increase in the rate of royalty on coal by the Ministry of Coal

72. The Petitioner has submitted that at the time of submission of bid, the prevalent/notified rate of royalty on coal was ₹55+5% of ROM price per tonne which formed the basis of the winning bid submitted by the Petitioner. Subsequently, Ministry of Coal, Government of India vide its Notification No. 349 (E) dated 10.5.2012 increased the rate of royalty on coal to an ad-valorem rate of 14% on price of coal. The Petitioner has submitted that as per the said notification, the ad valorem rate of 14% will be levied on the price of coal as reflected in the invoice excluding taxes, levies and other charges. The Run-of-the-Mine price of coal proposed to be procured for the power project is ₹640 per MT as per the Notification dated 1.1.2012 issued by Coal India Limited. The Petitioner in Annexure-45 to its submission date 22.2.2016has estimated impact of the royalty @ ₹8/MT from 1.5.2012 and @ ₹39.36/MT from 1.11.2015 for MSEDCL PPA and @ ₹31.36/MT from 1.11.2015 for DNH PPA.

73. MSEDCL has submitted that such charges can be allowed by the Commission after prudence check of operational parameters and financial calculation. Prayas has submitted that the royalty payable is by the coal mining company for coal mining operation and there is no liability on the part of Petitioner to pay any royalty. Prayas has further submitted that the royalty is not applicable on "supply of power by the seller" in terms of Article 10 of the PPA and cannot be construed to be a Change in Law.

74. We have considered the submissions made by the Petitioner, the respondents and Prayas. The Commission has considered the issue of change in royalty excise duty on coal vide order dated 3.2.2016 in Petition No.79/MP/2013 as under:

> "32. We have considered the submissions of the Petitioners and Haryana Discoms. As per the Notification No.349 (E) dated 10.5.2012 of Ministry of Coal, Government of India, the royalty on coal has been fixed as under:
>
> > "(1) Royalty on Coal: The rate of royalty on coal shall be @ 14% (Fourteen percent) ad-valorem on price of coal, as reflected in the invoice, excluding taxes, levies and other charges."
>
> Through this notification dated 10.5.2012, Second Schedule of the Mines and Minerals(Development and Regulations) Act, 1957 has been amended. The Notification has been issued after 16.11.2007. As change in rate of royalty on coal has an impact on the cost of coal and hence, the cost of generation of power for supply to the Haryana Discoms, the change will be covered under change in law. The Petitioner will now be required to pay the increased cost of coal including royalty on coal @ 14% ad-valoremon the price of coal as reflected in the invoice, excluding taxes, levies and other charges. The Petitioner has submitted that at the time of bid, the rate of royalty on coal was Rs.55 + 5% of the ROM price per tonne which formed the basis of its bid. The Petitioner has prayed that the difference between the rate of royalty on coal prevalent as on the date of submission of the bid and the rate of royalty on coal revised through the Notification dated 10.5.2012 may be allowed to the Petitioner on the ad valorem price of coal as reflected in the invoice excluding taxes, duties and levies. The Appellate Tribunal for Electricity in its judgement

dated 12.9.2014 in Appeal No.288 of 2013 (M/s Wardha Power Company limited Vs Reliance Infrastructure Limited &Another) has observed as under:

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

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.

75. In the light of the above decision, the claim of the Petitioner has been examined. The increase in Royalty was introduced after the cut-off date i.e.31.7.2009 in case of MSEDCL PPA and has impact on the cost of generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid, the increase in Royalty at the time of bid. Therefore, we hold that the Petitioner shall be entitled for compensation for applicable ad valorem price of coal per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by ₹55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case the rate of Royalty is

reduced from applicable ad valorem price or ₹55 plus 5%, the Petitioner shall compensate MSEDCL for the reduction in cost of coal based on above principles.

76. It is noted that liability of MSEDCL for payment of royalty on coal shall be in proportion to the coal consumed for generation corresponding to schedule supply of power to MSEDCL. The Petitioner is directed to furnish along with its monthly bill the proof of payment to coal companies and computations duly certified by the auditor to MSEDCL. It is clarified that the Petitioner shall be entitled to recover on account of royalty on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of royalty on coal. The Petitioner and MSEDCL are directed to carry out reconciliation on account of these claims annually.

77. In case of DNH PPA, the increase in the rate of royalty on coal took place before the cut-off date and therefore, the Petitioner was expected to take into account the prevailing rate of royalty in the energy charge and therefore, the claim is not covered under Change in Law. If any change in royalty takes place after the cut-off date, then the Petitioner shall be entitled for compensation to the extent of change in rate.

(D) Levy of Clean Energy Cess by the Government of India

78. The Petitioner has submitted that at the time of submission of the bid, there was no Clean Energy Cess in MSEDCL PPA. However, Government of India introduced Clean Energy Cess in the Finance Act, 2010, whereby a statutory cess of ₹100 per tonne has been levied on coal, lignite and peat and subsequently, Ministry of Finance vide its notification dated 22.6.2010 reduced the cess to ₹50 per tonne. The Petitioner has submitted the details of clean energy cess applicable at different point of time as under:

Sr. No.	From	To	Applicable Clean Energy Cess (₹/Tonne)
1	1.7.2010	10.7.2014	50
2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.4.2016	Till date	400

79. For DNH PPA, the Petitioner has submitted that at the time of bidding, the applicable Clean Energy Cess was ₹50/ MT. Thereafter, the Clean Energy Cess was revised thrice i.e. on 11.7.2014, 1.3.2015 and 1.4.2016. The Petitioner in its submission dated 22.2.2016 has placed on record the notifications relating to clean energy cess issued from time-to-time.

80. We have considered the submission of the Petitioner. It is noticed that the clean energy cess was introduced by Government of India through the Finance Act, 2010 which was prior after the cut-off date in case of MSEDCL PPA. As on the cut-off date in case of DNH PPA (i.e.1.6.2012), clean energy cess was at the rate of ₹50 per tonne. Subsequently, clean energy cess undergone various revisions from the year 2014 onwards. 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….”

81. The above decision is applicable in case of the Petitioner. Therefore, levy of clean energy cess on coal is admissible to the Petitioner as a change in law event under Article 10 of the MSEDCL and DNH PPAs. Accordingly, the Petitioner is entitled to recover clean energy cess from MSEDCL and DNH as per applicable rate of clean energy cess in proportion to the coal consumed for generation and supply of electricity to MSEDCL and DNH respectively. The applicable rate in case of MSEDCL PPA shall be ₹100 per tonne with effect from 11.7.2014, ₹200 per tonne with effect from 1.3.2015 and ₹400 per tonne with effect from 1.4.2016. In case of DNH PPA, the applicable rate shall be ₹50 per tonne from 11.7.2014, ₹150 per tonne from 1.3.2015 and ₹300 per tonne from 1.4.2016. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to MSEDCL and DNH. It is clarified that the Petitioner shall be entitled to recover on account of clean energy cess on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL and DNH. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of clean energy cess on coal. The Petitioner, MSEDCL and DNH are directed to carry out reconciliation on account of these claims annually.

(E) Increase in Busy Season Surcharge and Development Surcharge on Coal Transportation:

82. The Petitioner has submitted that the coal required for the project is supplied from SECL which is transported through rail. The Petitioner has further submitted that Central Government vide its circular dated 12.10.2011 increased the development surcharge on (normal tariff rate+ busy season surcharge) from 2% to 5%. The Petitioner has submitted that Ministry of Railways vide its letter dated 27.9.2012 increased the busy season surcharge from 10% to 12% on normal tariff rate. Subsequently, vide circular No. 24 of 2013, the busy season surcharge was further increased to 15% with effect from 18.9.2013. The Petitioner has submitted that entire amount paid by the Petitioner towards Busy Season Surcharge and Development Surcharge on Coal Transportation needs to be reimbursed. The Petitioners has submitted that the increase in freight charges are a direct result of the decision of the Ministry of Railways, Government of India and therefore, the same amounts to Change in Law.The Petitioner in Annexure-45 to its submission dated 22.2.2016 has estimated the impact of Busy Season Surcharge @ ₹63.90/MT and Development surcharge @ ₹25.56/MT (MSEDCL PPA) and Busy Season Surcharge @ ₹12.57/MT w.e.f. 1.4.2013 and @ ₹18.85/MT w.e.f. 18.9.2013 (DNH PPA)

83. MSEDCL has submitted that levy of Development Surcharge and Busy season surcharge is purely a commercial risk constituting part of Railway freight. Levy of Development Surcharge does not constitute Change in Law but is a purely commercial risk which the Petitioner has not factored while bidding. MSEDCL has submitted that CERC published escalation index of transportation charges after every six months after

considering railway freight. Therefore, the change in development surcharge might be duly taken care by the Commission while publishing index of transportation charges. MSEDCL has further submitted that the Busy Season Surcharge varies based on the season and was also applicable at the time of the bid. It is a normal commercial practice whereby busy season surcharge changes based on the time at which the goods are transported. MSEDCL has submitted that these charges are seasonal in nature whereby rates varies according to the seasons and are not applicable throughout the year. Considering the same as a normal business risk, the Petitioner has not factored the same while quoting the tariff. An increase in costs is bound to be due to inflation or other factors which cannot be construed to be a Change in law.

84. The Commission has 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."

85. The Commission has taken the view in the above quoted order that increase in

the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989 and the Petitioners in that case were expected to factor in these charges in the bid in terms of Clause 2.7.2.4 of the RfP and therefore, these charges are not covered under Change in Law. Section 30 of the Railways Act is extracted as under:

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

The above provisions enable the Railway Board to fix 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.

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

> "2.6.1 The Bidder shall make independent inquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on its Bid. Once the Bidder has submitted the Bid, the Bidder shall be deemed to have examined the laws and regulations in force in India, the grid conditions, and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder, it shall not be relieved from any of

> its obligations under the RFP documents nor shall be entitled to any extension of time for commencement of supply or financial compensation for any reason whatsoever."

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

(F) Increase in Service Tax on Transport of Goods by Indian Railways:

87. The Petitioner has submitted that at the time of bid submission on 7.8.2009 and 8.6.2012 in case of MSEDCL PPA and DNH PPA respectively, there was no service tax imposed on transportation of goods by Indian Railways. With effect from 1.10.2012, service tax at the rate of 3.708% (12.36% with an abetment of 70%) has been imposed on the transportation of goods by Indian Railways. The rate of Service Tax was increased from 12% to 14% by amending Section 66D of the Finance Act, 2004, vide Finance Act, 2015. Therefore, w.e.f. 1.6.2015, effective Service Tax payable on transportation of coal by rail has increased from 3.708% (30% of 12.36%) to 4.2% (30% of 14%). The Petitioner has further submitted that Ministry of Finance, Government of India vide its Notification No. D.O.F.No.334/5/2015-TRU dated 28.2.2015 increased

Service Tax from 12.36% to 15%. According to the Petitioner, Ministry of Finance, Government of India vide its notification dated 20.5.2015 increased service tax from 12.36% (including Education Cess and Secondary and Higher Education Cess) to 14% overall, with effect from 1.6.2015.The Petitioner in Annexure 31-32 of its submission dated 22.2.2016 has placed on record the notification regarding further increase in Service Tax to 14% w.e.f. 1.6.2015. The Petitioner in Annexure-45 to its submission dated 22.2.2016 has estimated the impact of Service Tax @ ₹36.73/MT from 1.10.2012 and @ ₹41.91/MT from 1.6.2015 (MSEDCL PPA); and @ ₹36.11/MT w.e.f. 1.10.2012 and @ ₹41.63/MT w.e.f. 1.6.2015 (DNH PPA).

88. MSEDCL has not opposed to allowing service tax under change in law. However, both DNH and Prayas have submitted that service tax on railway transportation is not admissible under change in law. Prayas in its written submission dated 29.2.2016 has submitted that changes in cost and charges viz. Service Tax on transportation of goods by Indian Railways are not covered under change in law. These charges are pursuant to contractual arrangement with regard to procurement of inputs. Prayas has further submitted that increase or decrease in such prices from time to time by such entities supplying coal or goods or providing services of transportation are part of the contractual price and are not a result of any change in law.

89. We have considered the submissions of the parties. By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was

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

chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to the MSEDCL and DNH. It is clarified that the Petitioner shall be entitled to recover on account of change in service tax on transportation of coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL and DNH. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioner, MSEDCL and DNH are directed to carry out reconciliation on account of these claims annually.

(G) Levy of Swachh Bharat Cess

90. The Petitioner in its affidavit dated 17.12.2015 has submitted that at the time of filing of the petition, there was no levy of Swachh Bharat Cess. However, subsequent to the filing of the Petition, Ministry of Finance, Government of India vide its Notification No. D.O.F.No.334/5/2015-TRUdated 28.2.2015 introduced Swachh Bharat Cess @ 2% on the value of any taxable service. The Petitioner also submitted that Government of India, Ministry of Finance vide its notification dated 6.11.2015 levied Swachh Bharat Cess @ 0.5%. The Petitioner in Annexure-45 to its submission dated 22.2.2016 has estimated the impact of Swachh Bharat Cess @ ₹1.58/MT w.e.f. 15.11.2015; and @ ₹1.68/MT w.e.f. 1.6.2015 (DNH PPA).

91. We have considered the submissions of the Petitioner and the Respondents. As on cut-off date in case of both PPAs, there was no Swachh Bharat Cess. It was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. Therefore, it is a new enactment which has come into effect subsequent to cut-off dates. In our view, Swachh Bharat Cess on the service tax paid on transportation of coal is admissible under Change in Law. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to the MSEDCL and DNH. It is clarified that the Petitioner shall be entitled to recover on account of Swachh Bharat Cess on the service tax on transportation of coal required in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to MSEDCL and DNH. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Swachh Bharat Cess. The Petitioner, MSEDCL and DNH are directed to carry out reconciliation on account of these claims annually.

(H) Increase in sizing charge and surface transportation charges by Coal India Limited.

92. The Petitioner in its affidavit dated 22.2.2016 has placed on record the copy of the notifications issued by Coal India Limited regarding increase in sizing charges and surface transportation charges. Also, the Petitioner at Annexure-45 of the submission dated 22.2.2016 has estimated the impact on account of sizing charges @ ₹24/MT (MSEDCL PPA) and @ ₹18/MT (DNH PPA); the estimated impact on account of surface transportation charges @ ₹17/ MT (MSEDCL PPA) and @ ₹13/MT (DNH PPA)

93. 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 and surface transportation charges. 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 22.2.2013 between the Petitioner and SECL 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 and transportation charges have been defined as under:-

> "9.2.1 Transportation Charges:
>
> Where the coal is transported by the seller beyond the distance of 3(three) kms from Pithead to the Delivery Point, the Purchaser shall pay the transportation charges as notified by CIL/seller from time to time.
>
> 9.2.2 Sizing/Crushing Charges
>
> 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 and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law.

(I) Levy of Niryatkar by SECL

94. The Petitioner in its affidavit dated 22.2.2016 submitted coal invoice of SECL, the subsidiary of Coal India Ltd. regarding levy of Niryatkar. The Petitioner has not submitted the details regarding Niryatkar in the absence of which no view can be taken as regards the admissibility under change in law. Accordingly, the Petitioner is granted liberty to claim this expenditure under change in law through an appropriate application with relevant details.

(J) Ministry of Environment and Forest Notification on coal Quality

95. The Petitioner has submitted that at the time of submission of bid, there was no requirement in relation to coal based thermal power plants using raw or blended or beneficiated coal with an ash content. However, as per Notification No. G.S.R.552 (E) dated 11.7.2012 of Ministry of Environment and Forests, all coal based thermal power plants are required to use raw or blended or beneficiated coal with an ash content not exceeding 34% and gross calorific value not less than 4000 Kcal/kg on daily average basis effective from Ist day of January, 2014.

96. The Petitioner has submitted that it would get linkage coal from Southern Eastern Coalfields Ltd and typically the GCV of coal received is below the above mentioned threshold, while the ash content is above the prescribed ceiling as mentioned above. Therefore, in order to comply with the regulation, the Petitioner with effect from 2.1.2014 was required to procure better quality coal from alternate sources which would increase the variable cost. However, at this stage, it is difficult to assess the impact on this

account. The Petitioner has requested the Commission to approve the same as Change in Law and allow recovery of any increase in fuel cost resulting from the above change on actual basis.

97. MSEDCL has submitted that as per notification issued by MoEF dated 11.7.2012, all the thermal plants are not included but the notification is applicable to only the following thermal plants:

- Standalone thermal plant beyond 500 kms from pit-head;
- Captive thermal plant with installed capacity of 100 MW and above and located beyond 500 MW from pithead; and
- Any captive plant above 100 MW or standalone thermal plant located in urban area or ecologically sensitive area notified by Central Government or critically industrially polluted cluster or area irrespective of its distance from pithead except any pithead power plant;

98. MSEDCL has submitted that as per the notification, any thermal power plant using Circulating Fluidized Bed Combustion or Atmosphere Fluidized Bed Combustion or integrated gasification cycle technology or any other clean technology are also exempted from such coal specific requirement. MSEDCL has submitted that the Petitioner has not specified that under which para of the thermal plant it qualifies for using the coal quality as specified in the notification. Also, an option was also available with the Petitioner to install the fluidized bed as specified in the notification to avail exemption from such coal quality requirement. A cost benefit analysis is a must in the given case to assess the impact on tariff in both the cases. MSEDCL has submitted that

as per the clause 10.4 of the PPA, the Petitioner is required to give a notice to MSEDCL for carrying out any such alternate fuel activity, which has not been complied with by the Petitioner. Therefore, the Petitioner`s claim on this account is liable to be rejected. MSEDCL has submitted that as per Article 4.6 of PPA, it is the obligation of seller to arrange for the fuel and in case of the inability of same, the generator needs to arrange the alternate source to provide power to the limit of aggregate contracted capacity. Therefore, any additional coal cost due to change in source of fuel should not be allowed. Prayas has submitted that

99. We have considered the submissions of the Petitioner and the respondent. As per notification issued by MoEF dated 11.7.2012, all the thermal power plants are required to use coal with GCV not less than 4000 Kcal/kg and an ash content not exceeding 34%. The Fuel Supply Agreement for MSEDCL was signed with SECL on 22.2.2013 and addendum was issued on 16.9.2013. Fuel Supply Agreement for ED DNH was signed with SECL on 7.8.2013 and addendum was issued on 30.11.2013. Therefore, the Petitioner was aware of the situation of using coal of GCV more than 4000kCal/kg and ash content less than 34%. Accordingly, the Petitioner should have included the coal quality/ grade of coal with GCV more than 4000kCal/kg and ash content less than 34%. Therefore, this event cannot be said to be a Change in Law. Under the circumstances, the Petitioner should have complied with provisions of notification of MOEF for using coal of GCV of 4000 kCal/kg of more and ash content less than 34%. The Petitioner should have approached the coal companies/coal supplier for supply of coal with above parameters so that the same could have been taken up in the FSA. From the submission of the Petitioner, it appears that the Petitioner

has not made any efforts to avail the coal of required quality as per the MOEF notification. In the light of these facts, we are not inclined to allow this event as a change in law.

(K) Shortfall in linkage coal due to changes in the New Coal Distribution Policy of the Ministry of Coal

100. The Petitioner has submitted that at the time of bidding it has considered the availability of coal from Southern Eastern Coal Fields Limited (SECL), a subsidiary of Coal India Ltd. through coal linkage at normative availability for computation of tariff. Thereafter, there have been substantial changes in the Coal Policy and availability which has affected the project economics. On 18.10.2007, Government of India introduced the New Coal Distribution Policy (NCDP) in terms of which Coal India Limited or its subsidiaries were responsible for supply of 100% of the fuel quantity to all the IPPs including the Petitioner. GWEL was issued LoA s by SECL on 9.11.2006 and 3.6.2010 providing firm linkage of 1.327 MTPA of Grade F coal and 1.3 MTPA respectively in terms of the NCDP. Further, Petitioner entered into FSA with SECL dated 16.9.2013 for supply of 9,52,380 tonnes of coal and FSA dated 30.11.2013 for supply of 7,15,165 tonnes of coal. The Petitioner has submitted that the assured supply of 100% of the coal requirement was the fundamental premise on which power could be supplied under the Competitive Bidding Regime. Subsequent to MSEDCL bid submission, there were substantial deviations from the New Coal Distribution Policy (NCDP) and the stipulations in the model FSA due to decision of the Government of India. As per the FSA, SECL may not supply ACQ of domestic linkage coal required to maintain the normative plant availability of 85% as per PPA. The Petitioner has

submitted that under such circumstances, to meet the shortfall in coal supply and to fulfil the obligation of 85% normative plant availability under the PPAs, the Petitioner will have to procure coal from alternate sources. The Petitioner has submitted that such deviation from 100% assured supply of coal in terms of the annual contracted quantity is a change in law as per the provisions of the PPAs. The Petitioner has submitted that the capacity charges quoted during the time of bidding were based on assumption of full fixed charges recovery at 85% normative availability as stipulated in the PPAs and as per clause 4.2.5 of the PPAs signed with the respondents, if Petitioner is unable to maintain the availability above 85% then it has to pay penalty to the respondents. The reduction in availability of plant due to shortage of coal would result in the reduction in fixed cost recovery as well as penalty. In case, the Petitioner purchases coal from alternative sources including purchase of imported coal from Coal India Ltd to maintain the availability, the same will increase the energy charge component of tariff. The Petitioner has submitted that (a) ACQ as per LoA/ FSA between Petitioner and SECL may not be supplied due to short supply of domestic coal by CIL and its subsidiaries. (b) The balance coal may have to be procured by the Petitioner from alternative source to supply electricity to the Respondents @ 85% Normative Availability. (c) SECL may supply imported coal as part of its obligations under the FSA. In surcharges, the cost of imported coal would be more than the cost of domestic coal. (d) In reference to the statutory advice dated 20.5.2013 of this Commission to Ministry of Power and the directive dated 21.6.2013 issued by Cabinet Committee of Economic Affairs (CCEA), that this Commission can grant fuel cost pass through for the balance quantity of coal either purchased by GWEL directly or through SECL. The Petitioner at Annexure-45 of

its affidavit dated 22.2.2016 estimated impact of ₹71.33 crore (MSEDCL PPA) and ₹70.08 crore (DNH PPA) due to shortfall in linkage coal supply from commencement of PPA till the end of December 2015.

101. On the issue of revision in NCDP and shortfall in linkage coal supply, MSEDCL has requested the Commission to provide a formula for computation of quantity of coal with appropriate GCV for economical generation of power and further submitted that the compensatory charge shall be strictly for the shortfall quantity component as per CCEA approval mechanism in such a way that it provides a cap/ ceiling limit. Respondent No. 2 (DNH) has submitted that the commercial decision of quoting escalable and non-escalable charges in the bid taken was at the freedom of the Petitioner for assuming or passing on the risk of coal price increase and there can be no change to the risk assumption at this stage. Re-opening of the bidding documents and PPA to provide additional tariff is not permissible and nor there is any advice to do so.

102. Prayas in its written submission dated 29.2.2016 has submitted that the PPAs entered into by the Petitioner with the respondents were under a case-1 bidding process. The competitive bidding guidelines define case-1 as a type of bidding: 'where the location, technology, or fuel is not specified by the procurer". Therefore, it was the discretion of the Petitioner to decide on the location and the source of the fuel. Therefore, in a case-1 bidding, the responsibility to tie-up and ensure adequate fuel supply is entirely with the bidder and the bidder has the option of passing through these coasts, transparently at the time of bidding. Thus, the developer of a case-1 project is free to change the fuel source at any point of time during the term of the contract.

Prayas has further submitted that the transient events relating to the increase in the price of coal due to the domestic shortage should have been anticipated as unprecedented. Prayas has submitted that during the period between the notification of the NCDP and filing the bids by the Petitioner i.e between October 2007 to August, 2009, CIL submitted before the Standing Committee on Linkages (Long Term) that there was a gap of 163 MT between its then commitments and had projected that production during the 11th Five Year Plan, and issues of logistics and pricing would have to be addressed if CIL were to import coal to meet the domestic shortfall. Thereafter, CIL expressed similar fears during the meetings held in August and October/November 2008. With regard to the Petitioner's submission that NCDP did not guarantee 100% coal supply based on domestic production, Prayas has submitted that NCDP in fact takes cognizance of the fact that the domestic coal production may not be sufficient to meet the entire demand and makes it clear that CIL will import coal from time to time, if necessary, to meet the coal supply target and the price for such import would be recovered from the coal consumer. Prayas has submitted that the Petitioner has willingly and voluntarily assumed that he entire quantity of coal mentioned in the LoA would be made available as per the stated grade price notified by CIL, although there is no contractual reason to assume so. Such assumption, therefore, is clearly a commercial risk that has been knowingly and willingly taken by the Petitioner to win the contract. Prayas has submitted that bidding framework gave the Petitioner the option of factoring in quoted tariff such risk transparently at the time of bidding. As per the Standard Bidding documents and documents circulated to the bidders, the bidders were allowed the option of quoting either the escalable fuel charges or non-escalable fuel

charges or even part of the fuel charges as escalable and the remaining to be non-escalable along with capacity charges, freight charges etc. The bid document as well as PPA provides a formula for escalation based on indexes to be notified by the Commission from time to time. It was open to the generators to quote the fuel charges entirely escalable, partially escalable or entirely non-escalable based on its commercial decision to compete with others. Therefore, it is misleading to claim that NCDP assured 100% coal supply based on domestic coal and any change is falls under change in law event as per the PPA.

103. Learned counsel for the Petitioner submitted during the hearing that Paragraph 5 of the NCDP which has been relied on by Prayas is not applicable in the present case since that only applies to new consumers. EMCO, being an existing LOA holder was covered under Paragraph 2.2 of the NCDP. Further the pass through of cost of imported coal on account of short supply of domestic coal has been permitted as change in law. Learned counsel for Prayas submitted during the hearing that the Full Bench of the Appellate Tribunal has held that change in NCDP will not be covered under change in law and therefore, shortage of linkage coal on account of change in NCDP is not admissible under Change in Law.

104. Learned counsel for the Petitioner submitted that the reliance of respondents on para 188 of the Full Bench judgment of the Appellate Tribunal dated 7.4.2016 in Adani Case misplaced as the present case is factually different as per the following details:

EMCO	Adani Power
The project was premised on domestic coal. The Petitioner had been granted letter of assurance on 19.10.2006, before enactment of NCDP (01.08.2007).	GUVNL PPAs premised on assurance of supply of coal from Gujarat Mineral Development Corporation, which never materialized. Haryana PPAs premised on imported / domestic coal.
Source of coal and fuel supply arrangement as well as quantity was specified in the PPA in Schedule 5.	Gujarat PPA was based on in principle approval by Gujarat Mineral Development Corporation, which never materialized. Source of fuel was not indicated in the Haryana PPAs.
Coal linkage and 100% assurance of supply of fuel guaranteed well before PPA executed.	Coal linkage for Haryana PPAs granted after execution of PPAs.

Learned counsel further submitted that as per clause 6.1 of the revised tariff policy issued by Ministry of Power on 28.1.2016, *the cost of imported/market-based imported coal supplied to overcome the shortage of linkage coal can be considered as pass-through as per the Advisory dated 31.7.2013.*Therefore, shortage of linkage coal and additional cost incurred on account of procurement of coal from alternate sources to overcome such short-fall ought to be allowed as change in law

105. We have examined the submissions of the Petitioners and the respondents. The case of the Petitioner is that the annual contracted quantity of domestic coal assured in terms of the LOAs and FSAs between the Petitioner and SECL may not be supplied to the Petitioner due to short supply of domestic coal by CIL and its subsidiaries. The balance coal may have to be procured by the Petitioner from the alternative sources to supply electricity to the Respondents at 85% normative availability. The Petitioner has submitted that SECL may supply imported coal as part of its obligations under the FSA

and in such cases, the cost of imported coal may be more than the cost of domestic coal. The Petitioner has submitted that in terms of the statutory advice of the Commission and the decision of the Cabinet Committee on Economic Affairs, the Commission may grant fuel cost as pass through for the balance quantity of coal either purchased by the Petitioner or through SECL.

106. The Petitioner was selected to supply power to MSEDCL and DNH based on the competitive bidding carried out under section 63 of the Act. The Appellate Tribunal for Electricity in its judgement dated 7.4.2016 in Appeal No.100 of 2013 and other related appeals has held as under:

> "163. In the ultimate analysis, we hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted under the adjudicatory power. Accordingly, Issue No.5 is answered in the negative. We also hold that the Appropriate Commission, independent of Force Majeure and Change in Law provisions of PPAs, has no power to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the said Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of Force Majeure or Change in Law is made out under the PPA………"

In the light of the above decision, the Commission can grant relief to the Petitioner if a case under Change in Law or Force Majeure is made out. The Petitioner has claimed relief under change in law as well as in the light of the statutory advice of the Commission, the decision of the Cabinet Committee on Economic Affairs and clause 6.1

of the Revised Tariff Policy. In the light of the decision of the Appellate Tribunal in Full Bench judgement, no relief can be granted outside the provisions of force majeure and change in law in the PPA. Consequently, the Commission cannot grant relief to the Petitioner in terms of the statutory advice by the Commission and advisory of the Government in the light of the decision of CCPA unless such provision is duly included in the PPAs. As regards whether change in NCDP amounts to change in law, the Appellate Tribunal has held as under:

> "188. It was also urged that change in policy would, under certain circumstances, be included in Change in Law. It is not possible to stretch the definition of the term 'Change in Law' to include change in policy. We reject this submission.
>
> 190. In view of the above, we hold that Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal. Accordingly, we answer Issue No.10 in the negative. We also hold that in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation do not constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA. Issue No.11 is accordingly answered in the negative."

There is a clear-cut finding that the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal does not constitute an event of Change in Law. Therefore, relief on account of higher purchase cost of coal due to reduced availability of domestic coal cannot be granted to the Petitioner under Change in Law. The Petitioner has tried to distinguish between the present case and Adani case in respect of which Full Bench judgement has been rendered. We do not find any merit in the submission of the Petitioner. We are of the

view that the findings of the Appellate Tribunal are equally applicable in case of the Petitioner in so far as its claim on account of reduced availability of domestic coal due to change in NCDP is concerned.

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

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

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

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

(L) Increase in working capital requirement due to higher cost of imported coal.

109. The Petitioner has submitted that change in law events will have an impact on the interest on working capital due to increase in investment in value of coal stock including alternate coal, imported coal sourced at significantly higher cost. This will have

an impact on interest on working capital resulting from Change in Law event and the Petitioner is eligible for tariff relief on account of increase in working capital in such a manner that it is restored to the same economic position as before such change. In this connection it is clarified that there is no concept of interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. The claim on this account is rejected under Change in Law.

(M) Change in coal pricing policy UHV to GCV by Ministry of Coal.

110. The Petitioner has submitted “Switch over of coal pricing from UHV to GCV basis” as one of the claimed Change in Law events. The Petitioner vide its affidavit dated 22.2.2016 has provided notification issued by Ministry of Coal. However, the Petitioner has not provided estimated impact on account of this claimed event. We have considered the submissions of the Petitioner.

111. We have considered the submissions of the Petitioner and the Respondents. The Commission 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 from12.3.97. 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:

> *"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."

112. In the light of above order, 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.

(N) Change in Railway Development Surcharge

113. The Petitioner has submitted that as on the cut-off date in case of MSEDCL PPA, the Railway Development Surcharge was 2%.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. The Petitioner has submitted that the increase in Railway Development Surcharge from 2% to 5% has a direct impact on the Escalable Inland Transportation Charges. As regards DNH PPA, the Petitioner has submitted that change in rate of Railway Development Surcharge occurred after the cut-off date and therefore would not be covered under Change in Law.

114. The Commission has in the order dated 3.2.2016 in Petition No. 79/MP/2013 has examined whether changes in the rates of 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."

In the light of the above decision, 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.

Issue No. 3: The mechanism for compensation on account of Changes in Law: Construction period

115. The Petitioner has submitted that as per Article 10.3 of the MSEDCL PPA, for every cumulative increase/decrease of ₹1.25 lakh in the capital cost during construction

period, the quoted capacity charges shall be increased/ decreased at the rate of 0.267% of the non-escalable capacity charges. The Petitioner has submitted that Article 10 is a restitutive provision and is aimed at providing ameliorative relief to the party so affected by the Change in Law and the mechanism provided in Article 10.3 of the MSEDCL PPA is to ensure that Petitioner is restored to the same economic position.

116. We have considered the submissions of the Petitioner and the respondents. Article 10.3.1 of the PPA provides as under:

> "**10.2 Application and Principles for computing impact of Change in Law**
>
> 10.2 1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 1 0, the affected Party to the same economic position as if such Change in Law has not occurred.
>
> **10.3 Relief for Change in Law**
>
> 10.3.1During Construction Period As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:
>
> For every cumulative increase/ decrease of each Rupees One lakh twenty five thousand (Rs 1.25 lakhs) in the Capital Cost during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven percent (0. 267%) of the Non Escalable Capacity Charges. In case of Dispute, Article 14 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 One lakh twenty five thousand (Rs 1.25 lakhs) in the per MW capital cost, in relation to the Installed Capacity.

117. Thus, as per the above provisions, the Petitioner is entitled for compensation at the rate of 0.267% of the non-escalable capacity charges for every cumulative increase/decrease in capital cost for an amount of ₹1.25 lakh per MW capital cost in relation to the installed capacity. In the light of the change in law events during the

construction period allowed in this order, the Petitioner shall calculate the compensation in terms of Article 10.3 of the PPA with MSEDCL and if the cumulative increase in the capital cost crosses the threshold limit then the Petitioner shall be entitled for reimbursement in the form of increase in non-escalable capacity charges from MSEDCL.

Operating period

118. The Petitioner has submitted that the minimum value of “Change in Law” should be more than 1% of the Letter of Credit amount in a particular year. As per Article 10.3.2 of MSEDCL and DNH PPAs, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current year from any additional units expected to be put on COD during that year on normative availability.

119. The Petitioner has submitted that in case of MSEDCL PPA, the tariff for the contracted capacity for the first year is ₹2.848 per unit. At 85% normative availability of total capacity, the total units sold in the first year would be 1489.2 MU (assuming COD of 1st Unit and 2nd Unit as 19.3.2013 and 1.9.2013 respectively). Consequently, the average monthly bill based on the aforesaid Normative Availability would be ₹35.34crore. The letter of credit amount which is 1.1% of the average aggregate monthly billing based on Normative Availability is about ₹38.87 Crore. As per Article 10.3.2 of the MSEDCL PPA, the threshold amount beyond which compensation for

change in law can be claimed is 1% of the aggregate letter of credit amount for a contract year which will amount to about ₹0.3887 lakh. The Petitioner has submitted that since the aggregate amount claimed for "Change in Law" is over ₹28.12 crore and is more than the threshold amount prescribed under Article 10.3.2 of the PPA and the Petitioner is entitled to be compensated for the same.

120. The Petitioner has submitted that in case of DNH PPA, the tariff for the contracted capacity for the first year is ₹4.588 per unit. At 85% normative availability of total capacity, the total units sold in the first year would be 1489.2 MU (assuming COD of 1st Unit and 2nd Unit as 19.3.2013 and 1.9.2013 respectively). Consequently, the Letter of Credit submitted by DNH is for ₹45 crore. As per Article 10.3.2 of the DNH PPA, the threshold amount beyond which compensation for change in law can be claimed is 1% of the aggregate letter of credit amount for a contract year which will amount to about ₹0.45 crore. The Petitioner has submitted that since the aggregate amount claimed for "Change in Law" is over ₹6.1 crore and is more than the threshold amount prescribed under Article 10.3.2 of the PPA and the Petitioner is entitled to be compensated for the same.

121. The Commission has devised a mechanism considering the fact that compensation for such Change in Law shall be paid in subsequent contract years also. To approach the Commission every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the following mechanism prescribed to be adopted for payment of

compensation due to Change in Law events allowed and summarized as under in terms of Article 10.3.2 of the PPA in the subsequent years of the contracted period:

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

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

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

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

MSEDCL and DNH.

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

(f) We are not going to compute the threshold value for eligibility of getting compensation due to Change in Law during Construction and Operation period. However, the Petitioner shall be eligible to receive compensation if the impact due to Change in Law exceeds the threshold value as per article 10.3.1 during Construction period and 10.3.2 during Operation period. Accordingly, the compensation amount allowed shall be shared by the MSEDCL and ED DNH based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.1 and 10.3.2 of the PPA.

Summary:

122. 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:

Construction Period

S. No.	Parameter	MSEDCL PPA	DNH PPA
1	Change in rate of Customs Duty	Allowed	Not applicable
2	Change in rate of Excise Duty	Allowed	Not applicable
3	Change in rate of Service tax	Allowed	Not applicable
4	Change in rate of other Taxes (WCT, VAT, CST)	Allowed	Not applicable
5	Design Changes in Coal Handling Plant	Not Allowed	Not applicable
6	Withdrawal of Deemed Export Benefit	Not allowed	Not applicable
Note: In case of "Not applicable", the change in law event has occurred prior to the cut-off date			

Operating Period

S. No	Parameter	MSEDCL PPA	DNH PPA
1	Excise Duty on Coal subject to the observation regarding Excisable value in Para 69	Allowed	Allowed
2	Change in Royalty	Allowed	Allowed
3	Clean Energy Cess	Allowed	Allowed
4	Busy Season Surcharge	Not Allowed	Not Allowed
5	Development Surcharge	Not Allowed	Not Applicable
6	Service tax on Coal Transportation	Allowed	Allowed
7	Swachh Bharat Cess	Allowed	Allowed
8	Sizing Charges	Not Allowed	Not Allowed
9	Surface Transportation Charges	Not Allowed	Not Allowed
10	Niryat Kar Tax	Not decided and liberty granted	Not decided and liberty granted
11	Shortfall in Linkage Coal	Not decided and liberty granted	Not decided and liberty granted
12	Shift from UHV based pricing to GCV	Not allowed	Not Applicable
13	Increase in working capital requirement	Not allowed	Not allowed
14	Change in MAT rate	Not Allowed	Not Allowed
15	MOEF notification on coal quality	Not Allowed	Not Allowed
Note: In case of "Not applicable", the change in law event has occurred prior to the cut-off date			

123. 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**