CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 126/MP/2016
Alongwith I.A. No. 29/2016

Coram:
Shri P.K. Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: 27th of April, 2018

In the matter of
Petition under section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 for claiming compensation on account of event pertaining to change in law as per Article 10 of the Power Purchase Agreement dated 23.8.2013 (PPA) executed between the Petitioner and the Respondent.

And
In the matter of

Bharat Aluminium Company Limited,
Balco Nagar,
Korba-495684
Chhattisgarh

.....Petitioner

Vs

1. Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO)
NPKRR Maligal, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai-600 002
Tamil Nadu, India

2. Power Trading Corporation (PTC)
2nd Floor, NBCC Tower 15
Bhikaji Cama Place,
New Delhi,
Delhi 110066

3. Kerala State Electricity Board (KSEB)
Vydyuthi Bhavanam,
Pattom, Thiruvananthapuram,
PIN - 695004,
Kerala, India.

4. Prayas Energy Group,
Unit III A and B, Devgiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,
Kothrud,
Pune-411038,
Maharashtra, India

5. Chhattisgarh State Power Distribution Company Ltd.,
O/o The Chief Engineer (EITC),
Energy Infer Tech Centre,
Block No. 8,
CS Power Companies Campus,
Daganiya,
Raipur-492013
Chhattisgarh, India

6. Chhattisgarh State Power Trading Company Ltd.,
O/o The Chief Engineer (EITC),
Energy Infor Tech Centre,
Block No.8, CS Power Companies Campus,
Daganiya, Raipur-492013,
Chhattisgarh, India

....Respondents

Parties Present:

1. Shri Sanjay Sen, Senior Advocate, BALCO
2. Shri Matrugupta Mishra, Advocate, BALCO
3. Shri Hemant Singh, Advocate, BALCO
4. Shri Nishant Kumar, Advocate, BALCO
5. Shri Md. Zeyauddin, BALCO
6. Shri G. Umapathy, Advocate, TANGEDCO
7. Shri S. Vallinayagam, Advocate, TANGEDCO
8. Ms. R. M. Mekhala, Advocate ,TANGEDCO
9. Ms. Arushi Singh, Advocate, KSEB
10. Shri M. G. Ramachandran, Advocate, UHBVNL
11. Ms. Anushree Bardhan, Advocate, UHBVNL
12. Shri V. K. Aggarwal, UHBVNL
13. Ms. Ranjitha Ramachandran, Advocate, Prayas
14. Ms. Poorva Saigal, Advocate, Prayas

ORDER

The Petitioner, Bharat Aluminium Company Limited (BALCO), has filed the present petition under Section 79(1) (b) and 79 (1) (f) of the Electricity Act, 2003 (The Act) read with Article 10 of the Power Purchase Agreement (PPA) dated

23.8.2013 executed between the Petitioner and Respondent No. 1 TANGEDCO [hereinafter referred to as "TANGEDCO PPA"], for supply of power from the Petitioner's plant, seeking certain reliefs under change in law during the operating period.

2. The Petitioner has set up a 810 MW (4x67.5 MW and 4x135 MW) and 1200 MW (4x300 MW) Thermal Power Project (hereinafter referred to as the 'Power Project') at Balco Nagar, Korbain the State of Chhattisgarh.

Background of the Case:

3. In the year 2012, TANGEDCO invited a bid for supply of power on long term basis through tariff based competitive bidding process under Case-1 bidding procedure for meeting its base load power requirements. Pursuant to the bidding process, the Petitioner was selected by TANGEDCO for sale and supply of 100 MW of power to TANGEDCO for a period of 15 years commencing from 1.2.2014 to 30.9.2028 for which a PPA was executed on 23.8.2013. The said PPA was amended on 10.12.2013 and the total quantum of the original PPA was enhanced to 200 MW.

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

(a) Supply of 5% of the net power generated from the Power Plant to the State of Chhattisgarh at the energy (variable) charges in lieu of assistance provided by the State of Chhattisgarh in obtaining applicable clearances/ approvals and incentives to the Project as per applicable Industrial Policy, etc. in terms of the Long term Power Purchase Agreement dated 19.1.2015 on back-to-back basis with Chhattisgarh State Power Trading Company

(CSPTrdCo.) for supply of 5% of net power generated from the said Power Plant to Chhattisgarh State Power Distribution Company Limited.

(b) Supply of 200 MW RTC Power to TANGEDCO under Long Term PPA dated 23.8.2013 entered into with TANGEDCO. The supply under this PPA has become effective from 3.9.2015 for the first 100 MW and from 1.12.2015 for the balance 100 MW.

(c) Supply of 100 MW RTC power to Respondent No. 3, Kerala State Electricity Board (KSEB) under back-to-back Medium Term PPA dated 13.6.2013 entered into between KSEB and PTC India Limited. The supply under this PPA has become effective from 1.3.2015 and was valid till 28.2.2017.

(d) Supply of 100 MW RTC power under Long Term PPA dated 26.12.2014 entered into with KSEB under the DBFOO guidelines. The supply under this PPA has become effective from 1.10.2017.

5. In the present petition, the Petitioner has sought compensation on account of the events of change in law affecting the power project during the Operating Period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of the TANGEDCO PPA.

6. The Petitioner has sought compensation for change in law events during the operating period on account of the following events which have impacted the cost and revenue of supply of power from the power project to the procurer:

I. Increase in coal cost on account of change in law events

(a) Royalty on Coal

(b) Service Tax on Royalty of Coal

(c) Increase in Niryatkar

(d) Increase in Environment Cess and Paryavaran Upkar

(e) Change in Infrastructure Development Cess

(f) Change in Clean Energy Cess (subsequently known as Clean Environment Cess)

(g) Change in the components of Central Excise Duty

(h) Increase/ Change in Entry Tax on account of changes in the individual components of such Tax

(i) Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax

(j) Increase in sizing and crushing charges

(k) Increase in Coal Surface Transportation charge

(l) Increase in base price of coal

II. Increase in cost due to Change in law events pertaining to Transportation of domestic coal

(a) Increase in base Freight of Coal Transportation.

(b) Levy of Busy Season charges

(c) Levy of Development Surcharge.

(d) Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from ₹150.20 to ₹205.60

(e) Increase in Service Tax Rate.

(f) Imposition of Swachh Bharat cess

(g) Increase in Trip Siding Charge.

(h) Imposition of Krishi Kalyan Cess on Railway freight.

7. The Petitioner vide its affidavit dated 1.3.2018 has submitted that during the period from 3.9.2015 to 31.1.2018, it has incurred additional expenses of ₹164.04

crore in generating and supplying power to TANGEDCO under the PPA due to the change in law events. The Petitioner has computed the impact on account of the change in law events as under:

S. No.	Events	Financial impact (₹crore)
1	Royalty on Coal	11.8
2	Service Tax on Royalty of Coal	4.1
3	Increase in Niryatkar	0.1
4	Increase in Environment Cess and Paryavaran Upkar	0.5
5	Change in Infrastructure Development Cess	0.5
6	Change in Clean Energy Cess (presently known as Clean Environment Cess)	67.1
7	Change in the components of Central Excise Duty	4.1
8	Increase/ Change in Entry Tax on account of changes in the individual components of such Tax	0.6
9	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	3.1
10	Increase in sizing and crushing charges	2.7
11	Increase in Coal Surface Transportation charge	8.2
12	Increase in base price of coal	30.9
13	Increase in base Freight of Coal Transportation	6.16
14	Levy of Busy Season charges	1.34
15	Levy of Development Surcharge	0.35
16	Withdrawal of Rebate & Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs. 205.60	12
17	Increase in Service Tax	0.98
18	Imposition of Swachh Bharat Cess	0.05
19	Increase in Trip Siding Charge	9.12
20	Imposition of Krishi Kalyan cess	0.03
Total		**164**

8. The Petitioner has submitted that it is supplying power in more than one State. Therefore, the Commission has the jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act.

9. Against the above background, the Petitioner has filed the present petition with the following prayers:

"a) Declare and adopt that the following events/ notifications are Change in Law events within the meaning of Article 10 of PPAs dated 23.8.2013 read with addendum dated 10.12.2013 and allow compensation thereof;

b)Direct the Respondent to make a payment of ₹48,97,00,000/- to the Petitioner, which amount has accrued on account of the Change in Law events, till June 30, 2016;

c)Direct the Respondent to continue to make payments accrued in favour of the Petitioner on account of Change in Law events mentioned in prayer (A), post the filing of the petition, in terms of the protocol/ formula envisaged in Annexure LL of the Petition, till the validity of the PPAs dated 23.08.2013 read with the Addendum dated 10.12.2013; and

d) Pass such other or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case."

10. The Petitioner has filed an Interlocutory Application(IA) with the following prayer:

"a) Grant leave to the applicant/ petitioner to claim reliefs pertaining to or arising out of change in law events mentioned in Para 5 of the present application [(i)recovery of incremental coal cost incurred by the Petitioner on account of promulgation of National Coal Distribution Policy 2013 and (ii)all Change in law events pertaining to Increase in construction cost resulting in an impact on the fixed cost of the Petitioner], in an independent proceeding;

(b) Pass such other or orders as this Commission deems appropriate under the facts and circumstances of the present case."

11. Notices were issued to the Respondents and Prayas Energy Group (Prayas) to file their replies to the petition. Replies to the petition have been filed by TANGEDCO vide affidavits dated 19.9.2016, 26.11.2016 and 6.12.2017, KSEB vide affidavit dated 29.12.2016 and Prayas vide affidavits dated 11.9.2017 and 13.3.2018. The Petitioner has filed its rejoinders to the said replies.

12. TANGEDCO vide affidavit dated 19.9.2016 has submitted as under:

(a) The Petitioner has already filed Petition No. 42 of 2015 before Tamil Nadu Electricity Regulatory Commission (TNERC) praying for directing the TANGEDCO to calculate the tariff without giving effect to the negative values

of -28.22% and -13.5% in the published CERC Escalation Index for the period October, 2013 to March, 2014 and April, 2014 to September, 2014. In both the petitions, the Petitioner is raising the issue of revision of tariff, on the ground of change in law. The cumulative impact of either of the petitions is increase in tariff, arising out of the PPA governing the parties due to change in law.

(b) The present petition may be dismissed as the same is not maintainable and render justice due to the fact that the same issue is raised before two different Commissions (TNERC and this Commission).It is not open to the Petitioner to agitate the same fact before two different Commissions.

13. The Petitioner vide its rejoinder dated 24.10.2016 to the reply of TANGEDCO has submitted as under:

(a) Petition No. 42 of 2015 was not adjudicated by the TNERC on merits and before any hearing on merits could have taken place, the Petitioner diligently withdrew the said petition. Therefore, the issues and questions raised by the Petitioner in the present petition are still open and the same can be adjudicated upon by this Commission.

(b) The scope of the two petitions is different. The scope of Petition No. 42 of 2015 was limited only to the CERC Escalation Index. However, the scope of the present petition is wide as it not only includes the escalation index but also includes additional expenditures, increase in freight charges, increase in different cess, increase in service tax, increase in siding charges, etc.

Therefore, considering the given fact, both the petitions cannot be considered as same on merits.

(c) The escalation index issued by this Commission does not reflect the actual impact of increase/ change in base price of coal (G10, G11 and G12 grade of coal), which renders the Petitioner with under recovery of the said component despite the fact that the Petitioner submitted its bid on a clear understanding that the increase in base price would be recoverable.

14. TANGEDCO vide its affidavit dated 26.11.2016, which was filed before the Commission on 30.3.2017, has made additional submissions as under:

(a) In the present case, the tariff was adopted by the State Commission under Section 63 of the Act. The provisions of Section 79(1) (b) are not applicable to tariff adopted by the Commission under Section 86 (1) (b) of the Act, which was determined through transparent process of bidding. The present petition filed under Section 79 (1) (b) and (f) is not maintainable as this Section deals with determination and regulation of tariff determined under Section 62 and not under Section 63 of Act. Therefore, the Petitioner is not entitled for any reliefs.

(b) The per unit tariff was quoted by the Petitioner after taking into account all eventualities. The PPA entered into by TANGEDCO was only after taking into consideration the impact of the proposed tariff on its consumers. The escalable energy charge components, increase in duties and levies are taken care in CERC escalation index published once in 6 months.

(c) As per Clause 2.4.1.1B (xi) of the RfP, the bidder shall take into account all costs including capital and operating costs, statutory taxes, levies, duties while quoting such tariff., Therefore, it is the responsibility of the project developer to factor in the capital and operating cost including statutory taxes, levies and duties in the quoted tariff for supply of power to the procurers.

(d) The purpose of long term planning for procurement of electricity by distribution licensees, keeping in view its economic viability, will be rendered otiose if all additional costs are allowed to the generator which causes undue burden on the consumers of the State.

(e) Power available at IEX is on an average of ₹2.72/kWh and varies from ₹2.50/kWh to ₹3.00/kWh. The power under long term contract, which is ₹3.08/kWh, is costlier than the IEX power. If the levies pursuant to change in law are permitted, the cost of power contracted with generators pursuant to bidding will have no sanctity and the price per unit under the contract will keep on increasing on the coming of every new law imposing a tax or levy affecting the generation of electricity which will cause unforeseen and undue burden on the consumers of TANGEDCO.

(f) If the levies and taxes were permitted to be recovered from the beneficiaries, the entire purpose of entering into long term PPA with generating stations under the competitive bidding process will defeat the purpose of safeguarding public interest, for which it was envisaged. The MOU route was a better option for TANGEDCO.

(g) The interest of generators is taken care of by the escalation rates notified by CERC for the purpose of payment for Procurement of Power by Distribution Licensees as per the PPA entered into, under clause 5.6(vi) of Ministry of Power guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005, as amended from time to time.

(h) Increase in price per unit of electricity is beyond its apprehension and control. Such an event results in a Force Majeure which TANGEDCO cannot factor in its financial planning and disturbs its economic viability. In the circumstances, TANGEDCO becomes an affected party under Article 9.2 of the PPA which affects its performance of the terms of the PPA and reserves its right to invoke the provisions of Article 9 of the PPA.

15. The Petitioner vide its rejoinder affidavit dated 10.8.2017 to the reply of TANGEDCO dated 30.3.2017 has submitted as under:

(a) Any compensation under change in law provisions of the PPA would be always over and above the quoted tariff, and as such have an impact on such tariff, the same cannot be denied and cannot be construed as interfering or altering the said tariff. The jurisdiction of this Commission flows from Section 79(1) (b) of the Act. Since the Petitioner`s generating station supplying power more than one State, it falls under a composite scheme. Therefore, only this Commission can adjudicate the dispute once TANGEDCO refuses to honour the terms of the PPA (i.e. change in law).

(b) The Petitioner is not claiming any double benefit out of escalation parameters and change in law event. In other words, the Petitioner is not claiming compensation which has been recovered under escalable parameters. Even if the Petitioner is allowed certain relief under the mechanism of the escalation index, it does not debar the Petitioner from claiming any under-recovery, not adequately compensated by the escalation index mechanism, by means of the change in law clause of the PPA.

(c) In the PPA approved by TNERC, TANGEDCO itself undertook to give compensation to the Petitioner. Therefore, TANGEDCO cannot resile from its obligation to pay compensation as per change in law provisions of the PPA.

(d) Clause 2.4.1.1(B)(xi) only requires the Petitioner to factor in any taxes/ duties, etc. at the time of the bidding and not thereafter. For any change in law events occurring post 7 days prior to the submission of the bid, the PPA itself provides for change in law claim, which now cannot be denied by TANGEDCO.

(e) TANGEDCO knowingly executed the PPA which contains a change in law clause, and TANGEDCO cannot now deny such claim based upon the prices prevalent at Energy Exchange. TANGEDCO has to be bound by the sanctity of the PPA which cannot be vitiated.

(f) It is a settled principle of law that merely on account of the fact that a contract has become onerous, the performance of the said contract cannot be avoided. In other words, a contract becoming onerous cannot be a force

majeure situation, and therefore, TANGEDCO has to respect the sanctity of the PPA, which provides for change in law provision.

16. TANGEDCO vide its additional submissions dated 6.12.2017 has submitted as under:

(a) The quoted tariff for TANGEDCO towards energy charge is more than the tariff quoted for Kerala (DBFOO basis) by Rs.0.925 per unit, even though the Petitioner had opted to evacuate power from the same plant and intend to supply to both TANGEDCO and Kerala using the linkage coal supplied from the same location. Therefore, the claim of the Petitioner that it is affected on account of Change in Law is wholly untenable and is liable to be rejected. The fuel price under DBFOO is the actual fuel price. The fuel price after applying escalation index of CERC is higher than the DBFOO fuel price. That means there is no loss due to change is law. Further, the effect of change in law is absorbed by the escalation index of this Commission. Therefore, no compensation can be claimed by the Petitioner.

(b) As per the Supreme Court judgment dated 11.4.2017 in Energy Dog Vs. CERC and others, the Commission has regulatory powers under Section 79(1)(b) to regulate the tariff of generating companies approved under Section 63 of Act. Therefore, in exercise of the regulatory powers, the Commission is entitled to consider all the aspects and determine whether the claim on account of Change in Law is tenable. The Commission in order to protect the interests of the consumers at large may be pleased to ascertain and determine whether at all there is any impact on account of Change in Law as claimed by the petitioner and ensure that the generators are not permitted to

levy exorbitant tariff to the detriment of the public at large who has to ultimately pay the tariff.

(c) The escalation index of the Commission has sufficiently taken care of the financial impact of Change in Law. The escalation was not only on the coal charge but also on the levies, taxes and cess, etc. i.e. on the tariff adopted under Section 63 of the Act. The Petitioner has not brought on record anything to even suggest that it had incurred loss after applying the escalation index of the Commission.

(d) As per Article 15.18.1 of the PPA, the seller is required to bear and to pay all statutory taxes, duties, levies and cess, assessed/ levied on the seller, contractors or their employees which are required to be paid by the seller as per the law in relation to the execution of the Agreement and for supplying power as per the terms of this Agreement. In other words, the PPA absolves the procurer from all future tax, duties, cess which the seller will be liable to pay while supplying power to the procurer.

17. The Petitioner vide its rejoinder dated 15.12.2017 to the reply of additional submissions of TANGEDCO has submitted as under:

(a) The additional submissions filed by TANGEDCO have been executed and notarized without any date thereby violating the procedures laid down under the provisions of Civil Procedure Code, 1908 read with Regulation 49 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999. TANGEDCO being a government undertaking is not expected to act in such a manner wherein attempt has been made on the part

of TANGEDCO to bypass the procedural mandate enshrined under the provisions of CPC.

(b) The comparison made by TANGEDCO between two separate PPAs executed by the Petitioner with TANGEDCO and KSEB (on DBFOO basis) is wholly misconceived, whereby TANGEDCO has failed to appreciate the fact that both the contracts have been executed under different mechanism, the quantum of power supply is different and the validity of such agreements is also different, and as such no comparison can be made between both the contracts.

(c) The PPA executed between the Petitioner and TANGEDCO is based upon the Case-I bidding guidelines issued by the Central Government, whereas the PPA executed between the Petitioner and KSEB is based upon the DBFOO guidelines issued by the Central Government. Therefore, the components of tariff as quoted by the Petitioner and duly approved by the respective State Commissions shall not be interlinked with each other. Therefore, there is no scope for comparing the tariff components as quoted by the Petitioner for the purpose of supply of power under two separate contracts. The comparison has been made by TANGEDCO to find a leeway in order to wriggle out of its obligations under the PPA executed between the parties. Further, by this comparison of quoted tariff in two different bids conducted by two different utilities under two different mechanism for procurement of power, has solely been done with the intent of evading its liability to pay compensation to the Petitioner on account of Change in Law events.

(d) With regard to the recovery of additional expenditure through the escalation index, the escalation index issued by the Commission deals only with the base price of coal and it does not include any other component such as Taxes, Duties and Cess, etc. Further, TANGEDCO has also failed to appreciate that the Petitioner is only claiming the differential amount between the actual base price of coal and the amount recovered through the escalation index issued by the Commission from time to time.

(e) With regard to the reliance placed by TANGEDCO on the Supreme Court judgment dated 11.4.2017 in Energy Dog Vs. CERC & Ors that the Commission has regulatory powers under Section 79(1)(b) to regulate/ alter the tariff of generating companies approved under Section 63 of Act, is completely misplaced. The Commission is empowered to exercise its regulatory powers in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used. However, in the present case, the tariff has been discovered in accordance with the guidelines issued by the Central Government and the said tariff discovered through the transparent competitive bidding process has been duly approved by the Appropriate Commission i.e. TNERC.

18. Prayas Energy Group (Prayas),vide its reply dated 11.9.2017, has submitted as under:

(a) 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. Such claims cannot be considered as Change in Law.

(b) Supply of power does not include all activities of the generator incidental to generation of power such as procurement of inputs, etc. Taxes on supply of power are taxes on sale of power by the generator to the procurer. The term 'supply' has defined in Section 2 (70) of the Act as sale of power.

(c) The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 and 7.4.2017 in Petition No. 112/MP/2016 has allowed taxes other than those on supply of power as change in law and the said order has been challenged before the APTEL vide Appeal No. 1476 of 2017. Similar issue is also pending before the APTEL. Only the impact of change in tax rate is to be considered as change in law and any increase due to increase in commercial charges cannot be included.

(d) The claims of the Petitioner include the price or consideration payable by the Petitioner to coal companies and are pursuant to a contractual or commercial arrangement and certainly 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. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner.

(e) The claims for price and consideration payable for inputs for generation of power, pursuant to contractual and commercial arrangement cannot be considered as change in law merely because the consideration is being paid to a Government Authority. Merely because the input is provided by the Government or Government Corporation does not change the commercial character of the service rendered and any charges paid for such input are commercial charges and not a tax or statutory levy. The taxes and levies are not charges in return for a specific input or service rendered to the payee as opposed to the charges for a commercial activity. The price for such commercial activity is not law and the increase or decrease in such prices from time to time by such entities supplying coal or goods are part of the business aspects and are not a result of any change in law.

(f) By seeking compensation for the increase in price of coal, the Petitioner is seeking to negate the purpose of a competitive bid under Section 63 of the Act. The Petitioner is seeking in effect to abandon the quoted energy charges and consider the fuel charges as a pass through which cannot be permitted.

(g) The Petitioner had the option of quoting escalable charges and participated in the bid being aware of the escalation. It is not open to the Petitioner to now claim that the escalation index mechanism is not adequate. The Petitioner has not challenged the escalation index. Further, the Petitioner had accepted the bid terms and conditions and knowingly participated in the bidding process.

(h) The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2017 and order dated 6.2.2017 in 156/MP /2014 has held that the revision in coal charges is a result of contractual arrangement between the Petitioner and the Coal India Limited subsidiaries and is not in pursuant to any law. The same conclusion squarely applies to the present case.

19. The Petitioner, vide Record of Proceedings for the hearings dated 15.2.2018, was directed to file the following information:

(a) Copy of long term PPA with CPSDCL.

(b) Documentary evidence showing that Service Tax is levied on Royalty.

(c) Documentary evidence for increase in impact of Niryatkar and VAT.

(d) Copy of Gazette Notification /Statutory documents pursuant to change in law with respect to Environmental Cess, Paryavaran Upkar Infrastructure Development Cess, Clean Energy Cess and Entry Tax.

(e) Letter from competent authority of Central Excise Department regarding inclusion/addition of components in the assessable value of coal for the calculation of the Excise Duty.

(f) Documentary evidence pertaining to the benefits taken by the Petitioner of the Escalation Index.

20. The Petitioner, vide its affidavits dated 1.3.2018 and9.3.2018, has filed the information called for.

21. KSEB vide its affidavit dated 29.12.2016has submitted that no PPA has been executed on 13.6.2013 between the Petitioner and KSEB and has denied the averments made by the Petitioner. KSEB has submitted that the Petitioner executed PPA on 13.6.2013 with KSEB for 100 MW RTC power. Therefore, inclusion of KSEB as a respondent to the present proceedings is not necessary. KSEB has submitted that on 13.6.2013, KSEB executed PPA with PTC India Limited for procuring 100 MW RTC power under medium term for 3 years as per the case-I competitive bidding procedure from the Balco's power generating facility.

22. The Petitioner vide Record of Proceedings for the hearing dated 14.9.2017, was directed to implead Chhattisgarh State Power Transmission Company Limited (CSPTCL) as party to the petition to decide the maintainability of the petition. Accordingly, the Petitioner impleaded CSPTCL as party to the Petition. However, no reply has been filed by CSPTCL.

23. Prayas Energy Group (Prayas), vide affidavit dated 13.3.2018, has filed additional submission based on the rejoinder and replies to RoP filed by the Petitioner. The Petitioner vide affidavit dated17.3.2018 has filed the reply to the additional submissions made by Prayas. The Petitioner and KSEB have filed written submissions which have been dealt with in succeeding paragraphs.

Analysis and Decision:

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

(a) Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to change in law event?

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

(c) What is the scope of Change in law in the PPA?

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

(e) The mechanism for compensation on account of Change in Law during the operation period.

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

25. The chronological dates of events with regard to TANGEDCO PPA are as under:

Power Supply to	**TANGEDCO (200 MW)**
Cut-off date	27.2.2013
Bid Submission date	6.3.2013
PPA executed on	23.8.2013
Start of supply of power	3.9.2015

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent with regard to Change in law event?

26. The Petitioner has submitted that the Commission has the jurisdiction to entertain the present petition and to provide the reliefs as sought for. The Petitioner has submitted that it is selling power to more than one State inasmuch as it has

PPAs with KSEB and TANGEDCO. The Petitioner has further submitted that under Section 79(1)(b) of the Act, this Commission has the powers to regulate tariff of generating companies if such companies have a composite scheme for generation and sale of electricity. Therefore, the Petitioner in terms of Section 79 (1) (b) has a composite scheme for generation and sale of electricity in more than one State. The Petitioner vide its affidavit dated 13.2.2018 has submitted the details of the PPAs executed by the Petitioner as under:

Date of signing of the PPA	Details of the PPA	Validity
23.8.2013	PPA executed with TANGEDCO for supply of 200 MW of power	30.9.2028
19.1.2015	PPA executed with CSPTrdCo for supply of 60 MW	Till the life of Petitioner's power plant
13.6.2013	PPA executed with KSEB for supply of 100 MW which was valid till28.2.2017	28.2.2017
26.12.2014	PPA executed with KSEB for supply of 100 MW	30.9.2042

27. TANGEDCO has submitted that the present petition is not maintainable as the Petitioner has raised the same issue before TNERC. The Petitioner has submitted that the Petition No. 42 of 2015 filed by the Petitioner before TNERC was not adjudicated by the TNERC on merits and before any hearing on merits could have taken place, the Petitioner diligently withdrew the said petition. Therefore, the issues and questions raised by the Petitioner in the present petition are still open and the same can be adjudicated upon by this Commission. TANGEDCO has argued that the tariff of the project was adopted by the State Commission under Section 63 of the Act. The provisions of Section 79(1) (b) are not applicable to tariff adopted by the Commission under Section 86 (1) (b) of the Act, which was determined through transparent process of bidding. The present petition filed under Section 79 (1) (b) and (f) is not maintainable as this Section deals with determination and regulation of

tariff determined under Section 62 and not under Section 63 of Act. Therefore, the Petitioner is not entitled for any reliefs. The Petitioner has submitted that as per the provisions of Section 79(1)(b) read with the Hon'ble Supreme Court judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400, this Commission has jurisdiction to determine/ regulate the tariff of electricity generated by the Petitioner`s generating station, which qualifies under the composite scheme.

28. We have considered the submissions of the Petitioner. For the claim period in the instant petition i.e. 3.9.2015 to 31.1.2018, the Petitioner has supplied power to discoms embedded in three States viz., Kerala, Chhattisgarh and Tamil Nadu. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission) has held that if a generating company is having a scheme for generation and sale of electricity in more than one State, then it is enough to construe that the generating company is having composite scheme. The Relevant portion of the said judgment is extracted as under:

> "22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 (1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b) and (d) and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to

observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

In the present case, the Petitioner has executed PPAs for supply of power to the States of Tamil Nadu, Chhattisgarh and Kerala which are three different States. Therefore, 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 Act. Therefore, any dispute on tariff related matters is to be adjudicated by this Commission under clause (f) of sub-section (1) of Section 79 of the Act.

Issue No. 2: Whether the provisions of the PPA with regard to notice have been complied with?

29. The claim of the Petitioner in the present petition pertains to Change in law events related to the PPA dated 23.8.2013. The cut-off date for consideration of any claim for change in law, namely 7 days before the bid deadline, is 27.2.2013. Article 10.4 of the PPA between the Petitioner and TANGEDCO envisages for notification of Change in Law events, respectively to the Procurer. Article 10.4 of the TANGEDCOPPA is extracted as under:

*“*10.4 Notification of Change in Law

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

10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

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

(a) The Change in Law; and

(b) The effects on the Seller."

30. The Petitioner served notices to TANGEDCO under Article10.4 of the PPA vide its letters dated 16.3.2016, 4.6.2016, 7.6.2016 and 7.7.2016 clearly indicating the change in events and additional expenditure incurred by the Petitioner on account of such events. Perusal of letters shows that they covers all change in law events which have been claimed in the Petition. In our view, the requirement of notice under Article10.4 of the PPA has been complied with by the Petitioner in so far as the change in law claims of the Petition in the present petition is concerned.

Issue No.3: What is the scope of Change in law in the PPA?

31. Article 10 of the PPA between the Petitioner and TANGEDCO deals with events of Change in Law during the operating period and is extracted for reference as under:

"10.1.1 "Change in Law" means the occurrence of any of the following events after the Cut -off 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.

10.3 Relief for Change in Law
****
10.3.2 During Operating Period

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

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

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

Further, Article 14 of the PPAs provides for resolution of dispute between the parties arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff. The said Article is extracted as under:

"14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) Where any Dispute arising from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

(b) Where SERC is appropriate Commission, all disputes between the procurer and the seller shall be referred to SERC."

32. A combined reading of the above provisions reveals the events broadly covered under Change in Law and that this Commission has the jurisdiction to

adjudicate upon the dispute between the Petitioner and TANGEDCO. These events are:

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

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

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

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

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

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

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

(h) The compensation for any increase/decrease in revenue or cost to the seller shall be determined and made effective from such date, as decided by the Commission which shall be final and binding on both the Petitioner and TANGEDCO, subject to rights of appeal provided under Act.

The term "Law" has been defined under Article 1.1 of the PPA as under:-

> "Law" shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission."

The term "Indian Governmental Instrumentality" is also defined in Article 1.1 as under:

> "Indian Governmental Instrumentality" shall mean the Government of India, Government of state(s) of Tamil Nadu, Chhattisgarh, Korba, New Delhi 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 Governments or both, any political sub-division of any of them including any court or Appropriate Commissions or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer."

As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Tamil Nadu, Government of Delhi or Government of Chhattisgarh (since the project is located in Chhattisgarh) or any Ministry, Department, Board, Body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the

procurers, the same shall be considered as change in law to the extent it is contemplated under Article 10 of the PPA.

33. In the light of above and in view of the broad principles discussed above, we proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

Issue No. 4: Whether compensation claims are admissible under Change in Law events in the PPA.

I. Increase in coal cost on account of change in law events

(A) Royalty on Coal

34. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of royalty on coal fixed by the Government of India, Ministry of Coal ("MoC"), vide Notification No. G.S.R. 349 (E) dated 10.5.2012, was @ 14% of the base price. Subsequently, the Ministry of coal vide Notification No. G.S.R. 792(E), dated 20.10.2015 issued under the provisions of Mines and Minerals (Development and Regulation) Act 1957, framed Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015. Under Rule 2(b) of the above Rules, Ministry of Coal imposed additional levy of 30% of the royalty payable in terms of the Notification dated 10.5.2012 towards the District Mineral Foundation. Subsequently, Ministry of Coal vide its Notification No. G.S.R 837 (E), amended the above notification dated 20.10.2015 whereby the above additional levy was made operative retrospectively w.e.f 12.1.2015. The above levy was imposed in addition to the royalty and is to be paid towards the District Mineral Foundation of the district in which the mining operation is carried out. The Petitioner has further submitted that South Eastern Coalfields Ltd. (SECL) vide its notice dated 13.11.2015 imposed an additional 2% levy over and above the already imposed 14% royalty on the base price towards

National Mineral Exploration Trust. The Petitioner has submitted that the above Notifications pertaining to base price of coal, royalty and additional levy are falling under Change in Law events within the meaning of Article 10 of the PPA for computing the compensation for change in law. The impact of the above change in law events are elucidated as under:

Sl. No.	Particulars	Description	As on 27.2.2013 ₹/tonne	Current Rate ₹/tonne
1	Basic Price		673	850
2	Royalty 14% on Basic Price	14% of (1)	94.27	119
3	Royalty (2%)-NMET	2% of the Royalty as per S. No. 1	0.00	2.38
4	Royalty (30%)-MMDR	30% of the Royalty as per S. No. 1	0.00	35.70

35. TANGEDCO has submitted that as the Petitioner quoted escalable energy charge components, rise in duties and levies are taken care in CERC escalation index published once in 6 months. Further, TANGEDCO has submitted that as per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc. Clause 2.4.1 (B) xi of the RfP provides as under:

> "xi. The quoted Tariff, as in format 4.10, shall be an inclusive Tariff up to the Interconnection Point and no exclusions shall be allowed. The Bidder shall take into account all cost including capital and operating costs, statutory taxes, levies duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from the generation source up to 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 process."

Article 10.1.1 of the PPA recognizes any change in tax or introduction of any tax made applicable for supply of power by the seller. Accordingly, the objection of TANGEDCO is rejected.

36. TANGEDCO has submitted that as per Article 15.18.1, the seller is required to pay all statutory taxes, duties, levies and cess assessed/levied on the seller, etc. for supplying power as per the terms of this agreement.

37. The Appellate Tribunal for Electricity in its judgment dated 19.4.2017 in Appeal No. 161/2015 and Appeal No. 205/2015 (Sasan Power Limited Vs. CERC & Ors. and Haryana Power Purchase Centre Vs. Sasan Power Ltd & Ors.) has dealt with the issue as under:

> "44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studies before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation to any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping in law in mind."

In view of the above, the objection of TANGEDCO does not survive and the Petitioner is entailed for compensation for change in taxes, duties, cess, etc.

38. Prayas vide its affidavit dated 11.9.2017 has submitted that there is no change in the rate of royalty being 14% under Section 9 of the MMDR Act, 1957 from the cut-off date. The amendments levying charges for District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) are statutory levies and part of royalty being paid. Since, this is not a tax or levy on supply of power but on coal, the same is not covered under Article 10.1.1. Prayas has further submitted that the issue of whether Royalty is a tax or not is pending before the Hon'ble Supreme Court and has been referred to a nine judge Bench in the case of Mineral Area

Development Authority v/s Steel Authority of India & Ors. reported in [(2011) 4 SCC 450]. Therefore, the decision of the Commission should be subject to the above.

39. We have considered the submissions made by the Petitioner and the Respondents. Regarding the admissibility of additional levy for royalty paid to the DMF and royalty paid to the NMET on merit, the issue was examined by the Commission vide order dated 17.2.2017 in Petition No. 16/MP/2016 as under:

> "32. We have considered the submissions of the Petitioner and the respondents. Through the Mines and Minerals (Development and Regulation) Amendment Act, 2015, the following provisions have been incorporated in the Mines and Minerals (Development and Regulation) Act, 1957:
>
> ''9B. District Mineral Foundation: (1) In any district affected by mining related operations, the State Government shall, by notification, establish a trust, as a non-profit body, to be called the District Mineral Foundation.
>
> (2) The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operation in such manner as may be prescribed by the State Government.
>
> (3) The composition and functions of the District Mineral Foundation shall be such as may be prescribed by the State Government.
>
> (4) The State Government while making rules under sub-section (2) and (3) shall be guided by the provisions contained in Article 244 read with Fifth and Sixth Schedules to the Constitution relating to administration of the Scheduled Areas and Tribal Area and the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.
>
> (5) The holder of mining lease or a prospecting licence-cum-mining lease granted on or after the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2015, shall in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operation are carried on, an amount which is equivalent to such percentage of the royalty paid in terms of the Second Schedule, not exceeding one-third of such royalty, as may be prescribed by the Central Government.
>
> (6) The holder of mining lease granted before the date of commencement of the Mines and Mineral (Development and Regulation) Amendment Act, 2015, shall, in addition to the royalty, pay to the District Mineral Foundation of the district in which the mining operations are carried on, an amount not exceeding and royalty paid in terms of the Second Schedule in such manner and subject to the categorization of the mining leases and the amounts payable by the various categories of leaseholders, as may be prescribed by the Central Government."

Section 9C provides as under:

"9C: National Mineral Exploration Trust: (1) The Central Government shall, by notification, establish a Trust, as a non-profit body, to be called the National Mineral Exploration Trust.
(2) The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government.

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

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

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

> "Amount of Contribution to be made to District Mineral Foundation.- Every holder of mining lease or a prospecting licence-cum-mining lease, in addition to royalty, pay to the District Mineral Foundation of the district in which mining operations are carried on, an amount at the rate of-
>
> (a) ten percent of the royalty paid in terms of the second schedule to the Mines and Minerals (Development and Regulation) Act, 1957 (57 of 1957) (herein referred to as the said Act) in respect of mining leases or, as the case may be, prospective licence-cum-mining lease granted on or after 12th January, 2015; and
>
> (b) thirty percent royalty paid in terms of the Second Schedule to the said Act in respect of mining leases granted before 12th January, 2015."

It is noticed from the above provisions that through an amendment to Act of Parliament, National Mineral Exploration Trust and District Mineral Foundations have been sought to be established. National Mineral Exploration Trust shall be established as a non-profit body in the form of trust. The object of the Trust shall be to use the funds accrued to the Trust for the purposes of regional and detailed exploration in such manner as may be prescribed by the Central Government. The District Mineral Foundations shall be established as non-profit body in the form of a trust. The object of the District Mineral Foundation shall be to work for the interest and benefit of persons, and areas affected by mining related operations in such manner as may be prescribed by the State Government. For running these trusts, the Amendment Act provided for payment of amounts in addition to the royalty by the holder of the mine lease or holder of prospective licence-cum-mining lease @ 2% of the royalty for National Mineral Exploration Trust and @10% to 30% of the royalty for District Mineral Foundations. These amounts collected are in the nature of compulsory exactions and therefore, partake the character tax. The Respondents have submitted that the payment or contribution to the National Exploration Trust and District Mineral Foundations are to be made by the holder of a mining lease or holder of a prospective license-cum-mining lease and therefore, it should not be passed on

to the Respondents. The Petitioner has submitted that the Petitioner is required to pay contribution at the prescribed rate to the National Exploration Trust and District Mineral Foundations in addition to royalty. The question therefore arises whether the contribution to National Exploration Trust and District Mineral Foundation Trust shall be borne by the lease-holder of the mines or shall be passed on to the procurers under change in law. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government and the Commission has allowed the increase in royalty on coal under Change in Law in order dated 30.3.2015 in Petition No.6/MP/2013. Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through Act of the Parliament after the cut-off date and therefore, they fulfill the conditions of change in law. Accordingly, the expenditure on this account has been allowed under Change in Law."

40. In our view, the case of the Petitioner is covered under the above order of the Commission. Therefore, the levy of @ 2% royalty as contribution to National Mineral Exploration Trust and 30% of the royalty for contribution to the District Mineral Foundations are admissible to the Petitioner under Change in Law. However, there is increase in base price of coal from ₹1092/MT to ₹1224/MT. In terms of the judgment of the Appellate Tribunal in Appeal No. 288 of 2013 (M/s Wardha Power Company Ltd. Vs. Reliance Infrastructure Ltd. and another), change in law has to be computed with reference to the actual price of coal paid by the developer. However, the Petitioner shall not be entitled for any relief on account of increase in the base price of coal as it is a part of bid tariff. Accordingly, the compensation on account of contribution to DMF and NMET shall be done with reference to the royalty calculated on the prevailing price of coal. The Petitioner shall furnish copies of the payment made supported by Auditor certificate, while claiming the expenditure under Change in Law. The reimbursement on account of contribution to National Mineral Exploration Trust and District Mineral Foundations shall be on the basis of actual payments made to other appropriate authorities and shall be restricted to the amount of coal consumed for supplying scheduled energy to the Procurer. It is clarified that the Petitioner shall be entitled to recover on account of payment to National Mineral

Exploration Trust and Payment to District Mineral Foundation in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to TANGEDCO. 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 payment to National Mineral Exploration Trust and Payment to District Mineral Foundation. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(B) Service Tax on Royalty of Coal

41. The Petitioner has submitted that Government of India imposed service tax on the royalty payable on coal. The above position was further made clear by virtue of a clarification issued by the Government of India vide Circular No.192/02/2016-Service Tax dated 13.4.2016 to the effect that service tax would be payable on Royalty on coal w.e.f 1.4.2016.

42. TANGEDCO has submitted that as per the Government of India circular No.192/02/2016/service tax dated 13.1.2016, service tax on Royalty is not applicable and hence the claim of the Petitioner is to be rejected.

43. Prayas vide its affidavit dated 11.9.2017 has submitted that Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. As per Notification dated 13.4.2016, service tax cannot be levied on any tax levied by State or Central Government. Since, Royalty is a tax, there is no application of service tax. Even assuming but not admitting that the Royalty is liable to service tax, the Petitioner is entitled to CENVAT credit which would reduce the impact of the tax liability and the same has to be considered. Prayas, in its additional

affidavit dated 13.3.2018 has submitted that the Petitioner has annexed the Notification dated 1.3.2016 without any explanation as to which section results in imposition of service tax on Royalty. The Notification is an amendment to an earlier Notification.

44. The Petitioner, vide ROP of hearing dated 15.2.2018, was directed to submit documentary evidence showing that service tax is levied on Royalty. The Petitioner vide its affidavit dated 17.3.2018 has submitted that the Circular Number 192/02/2016-Service Tax dated 13.4.2016 issued by the Ministry of Finance, Government of India in Point No. 6 specifically states that services by way of allocation of natural resources shall be chargeable to service tax except for those allocated to farmers. The Petitioner has further submitted that power is an exempted good and no CENVAT credit is availed by the Petitioner in the production of exempted goods in accordance with Rule 6 of the CENVAT Rules, 2004. The Petitioner has submitted that since, the Petitioner has not availed CENVAT credit, levy of service tax on Royalty qualifies as Change in Law event.

45. We have considered the submissions of the parties. According to the Petitioner, notifications pertaining to service tax on Royalty qualify as Change in Law events within the meaning of Article 10 of the TANGEDCO PPA. The Respondents have argued that Royalty is not a fee for the service provided by the Government and therefore, is not subject to service tax. Perusal of S. No. 6 in the Notification issued by the Ministry of Finance, Government of India vide Circular No. 192/02/2016-Service Tax dated 13.4.2016 reveals that services in nature of allocation of natural resources by Government other than those allotted to individual farmers would be leviable to Service Tax and since coal is a natural resource which

is allocated by the Government to the mine lease holder for which Royalty is paid, service tax can be levied on Royalty. As regards the contention of Prayas that royalty is a tax, we note that issue is sub-judice before nine judges Bench of the Hon`ble Supreme Court and in the absence of any clarity, we are of the view that service tax imposed on Royalty on coal shall be reimbursable under change in law subject to the final outcome of the matter before the Hon'ble Supreme Court. As regard the contention of Prayas that the Petitioner should avail CENVAT, the Petitioner has clarified that power is an exempted goods, and therefore, no CENVAT credit is available on exempted goods in accordance with CENVAT Rules, 2004. Since, the Petitioner is not availing benefit under CENVAT, the Petitioner is entitled for relief on service tax on Royalty.

46. Further, the Commission vide its order dated 13.3.2018 in Petition No. 175/MP/2016 has allowed the service tax paid on Royalty as a change in law. Relevant portion of the said order dated 13.3.2018 is extracted as under:

> "31. The Ministry of Finance, Government of India vide Notification No. 5/2015 dated 1.3.2015 amended the Rule 2 (1)(d)(i)(E) of Service Tax Rules, 1994 to the extent that it omitted the word "support" from support services". Therefore, all the services provided by the Government and local authorities have come within the ambit of Service Tax. The said Notification has been issued after the cut-off date i.e. 21.7.2007. Since, levy of service tax on royalty has an impact on the cost of coal and the cost of generation of power for supply to the respondents, service tax on royalty will be covered under change in law. Further, Krishi Kalyan Cess and Swachh Bharat Cess as part of service tax shall be admissible under change in law.
>
> 32. The Petitioner has submitted that it has paid Service Tax of ₹31.695 crore on royalty. However, the Petitioner has not placed on record any document in support of his claim towards service tax paid on royalty. The Petitioner is directed to furnish along with its monthly bill the proof of payment duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover on account of service tax on royalty in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to the respondents. 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."

47. The above decision is applicable in case of the Petitioner. The Petitioner has submitted that it has paid service tax of ₹1.69 crore on Royalty for the period from 1.3.2015 to 28.2.2017. The Petitioner has not placed on record any document in support of his claim towards service tax paid on Royalty. The Petitioner is directed to furnish documents to the TANGEDCO along with its monthly bill the proof of payment duly certified by the Auditor. It is clarified that the Petitioner shall be entitled to recover on account of service tax on Royalty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to TANGEDCO. 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.

(C) <u>Increase in Niryatkar</u>

48. The Petitioner has submitted that Niryatkar is levied on the summation of the base price of coal and sizing and crushing charge. The above levy is collected from the Petitioner and other consumers of coal and the fund so collected are deposited with the Municipal Corporation, Korba and Chhattisgarh. The office of Municipal Corporation, Korba vide its letter dated 23.4.2005 imposed Niryatkar @ 0.2% of the summation of the base price of coal and sizing and crushing charge. The Petitioner has submitted that though there is no change in the rate at which the aforesaid Niryatkar is levied, with the increase of base price as well as sizing and crushing charge on account of Change in Law events as enumerated in the present petition, there has been an increase in the Niryatkar imposed upon the Petitioner. The Petitioner has submitted that the impact on account of increase in the rate of

Niryatkar from the cut-off date i.e. 27.2.2013 to the current period is ₹1.42/ tonne to ₹1.80/ tonne.

49. TANGEDCO has submitted that the notification of Nagar Palika Nigam, Korba, Chhattisgarh dated 23.4.2005 relate to increase in export price. As per clause 2.4.1.1 (B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, duties and levies, etc. Therefore, the Petitioner was expected to take into account all cost including capital cost and operating cost, statutory taxes, duties levies while quoting tariff in the bid.

50. Prayas has submitted that there is no change in the rate of Niryatkar. However, the Petitioner has claimed an increase in assessable value for the tax. Prayas has submitted that to the extent that assessable value has increased due to increase in price of coal or other goods (base price or any other charges), there cannot be any change in law. Further, the change in price of coal is not a change in law and therefore, any consequential change in price of coal in the assessable value for levy of the tax, and thereby quantum of tax, is not a change in law.

51. We have considered the submissions of the Petitioner and the Respondents. The Petitioner vide ROP of hearing dated 15.2.2018 was directed to submit documentary evidence for increase in impact of Niryatkar. However, the Petitioner has not furnished any documentary proof and has relied only on the letter dated 23.4.2005 issued by the office of Municipal Corporation, Korba which is prior to the cut-off date of the PPA. The Petitioner has neither submitted any documentary evidence/ proof nor any Gazette Notification issued by any Government body/ statutory authority that can prove that the law or the prevailing rates have changed after the cut-off date regarding levy of Niryat Kar on components apart from base

price of coal. In the absence of statutory/required documents, we are not inclined to grant any relief at this stage. Therefore, the Petitioner's claim on this aspect is rejected. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

(D) Change in Chhattisgarh Environment Cess/Paryavaran Upkar and Change in Infrastructure Development Cess.

(a) Change in Chhattisgarh Environment Cess/Paryavaran Upkar

52. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of Chhattisgarh Environment Cess/ Paryavaran Upkar on lifting and dispatches of coal as per Section 4 read with Schedule-II of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 was ₹5 per tonne. The Petitioner has submitted that South Eastern Coalfields Limited (SECL) vide its notice dated 19.8.2015 informed about increasing of Environment Cess/ Chhattisgarh Paryavaran Upkar on dispatches/lifting of coal from ₹5 per tonne to ₹7.50 per tonne as per the amendment of Section 4 and Schedule-II of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005. The Petitioner has submitted that enhancement of Environment Cess on dispatches of coal/lifting of coal from ₹5 per tonne to ₹7.5 per tonne is a Change in Law event within the meaning of Article 10 of the PPA.

(b) Change in Infrastructure Development Cess

53. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the rate of Chhattisgarh Infrastructure Development Cess on lifting and dispatches of coal as per Section 3 read with Schedule-I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 was ₹5 per tonne. The Petitioner has submitted that South Eastern Coalfields Limited vide its notice dated 19.8.2015 informed about

increasing of Infrastructure Development Cessfrom ₹5 per tonne to ₹7.5 per tonne as per the amendment of Section 3 read with Schedule-I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 and same qualifies as Change in Law within the meaning of Article 10 of the PPA.

54. TANGEDCO has submitted that the Notifications of CG Paryavaran Evam Vikas Upkar of 27.5.2005 was prior to the cut-off date of 27.2.2013. Therefore, there is no Change in law. Further, as per clause 2.4.1.1(B) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc. As the petitioner has quoted escalable energy charge components, raise in duties and levies are taken care in the Commission's escalation percentage published once in 6 months

55. Prayas vide its affidavit dated 11.09.2017 has submitted that the Petitioner has only annexed the notices from SECL for claiming change in law. SECL is not a competent authority to impose any cess and therefore, unless the Petitioner can produce the statute or law of a competent Government Authority increasing the rate of cess, the same cannot be allowed as change in law.

56. We have considered the submissions of the parties. The Petitioner vide ROP of hearing dated 15.2.2018 was directed to submit copy of Gazette Notification/Statutory documents pursuant to change in law with respect to Environmental Cess/Paryavaran Upkar and Infrastructure Development Cess. The Petitioner vide its affidavit dated 9.3.2018 has placed on record the Gazette Notification No. 469 dated 18.9.2015 issued by Department of Revenue and Disaster Management, Government of Chhattisgarh with regards to increase in Environmental Cess/Paryavaran Upkar and Infrastructure Development Cess.

57. It is noted that Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 provides for levy of cess on land for raising funds to implement infrastructure development projects and environmental improvement projects. The relevant portion of said Act is extracted as under:

> Preamble:
> An Act to provide for levy of cess on land for raising funds to implement infrastructure development projects and environment improvement projects.
> Whereas it is expedient to provide for additional resources for augmenting the development activities and improvement of environment in the State.
> Be it enacted by the Chhattisgarh Legislature in the fifty sixth year of the Republic of India as follows:-
> X xxx
> Section 3-Infrastructure development cess
>
> (1) On and from the date of commencement of this Act, there shall be levied and collected an infrastructure development cess on all lands on which land revenue or rent by whatever name called is levied.
>
> Provided that Infrastructure development cess shall not be levied on land which for the time being is exempt from payment of land revenue or rent, as the case may be.
>
> (2) The Infrastructure development cess shall be levied at the rate specified in Schedule-I.
>
> Section 4- Environment Cess
>
> (1) On and from the commencement of this Act, there shall be levied and collected an environment cess on all lands on which land revenue or rent, by whatever name called, levied:
>
> Provided that Environment Cess shall not be levied on land which for the time being is exempt from payment of land revenue or rent, as the case may be.
>
> (2) The Environment Cess shall be levied at the rate specified in Schedule-II.
>
> Section 7- Assessment and Collection of cess
>
> (1) Cess levied under Section 3 and 4 of the Act shall be assessed in such manner as may prescribed.
>
> (2) The cess levied under this act shall be collected as an arrear of land revenue and provision of the Chhattisgarh Land Revenue Code, 1959 (No. 20 of 1959) shall apply mutatis mutandis for such collection and recovery.
>
> Section 8- Amendment of Schedules
>
> (1) The State Government may, by a notification to be published in the Official Gazette, amend any Schedule to this Act for revising the rate of any cess;

Provided that the rate of any cess shall not be revised more than once in any consecutive period of three years:

Provided further that the rate of any cess shall not be increased by more than fifty percent of the existing rate by any notification to be issued under this sub-section.

(2) Every notification issued under sub section (1) shall be laid immediately before the Legislature Assembly of the State if it is in session, and if it is not in session, in the session immediately following the date of such notification.

Schedule I

S. No.	Classification of Land	Rate of Development Cess
1.	On land covered under coal and iron ore mining leases	Rupee 5 on each tonne of annual dispatch of mineral
2.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
3.	On land covered under coal and iron ore mining leases	Rupee 5 on each tonne of annual dispatch of mineral
4.	On land covered under mining leases other than (1) above	5 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	5 percent of the amount of land revenue or rent, as the case may be, payable annually

Subsequently, Government of Chhattisgarh, in exercise of the powers conferred under sub-Section (1) of Section 8 of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 amended the Schedule I and Schedule II imposing the Development Cess and Environmental Cess vide Notification No. 469 dated 18.9.2015 as under:

Schedule I

S. No.	Classification of Land	Rate of Development Cess
1.	On land covered under coal, iron ore, lime stone, bauxite and dolomite mining leases	Rupee 7.50 on each tonne of annual dispatch of mineral
2.	On land covered under mining leases other than 1 above	7.50 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	7.50 percent of the amount of land revenue or rent, as the case

		may be, payable annually

Schedule II

S. No.	Classification of Land	Rate of Environment Cess
3.	On land covered under coal, iron ore, lime stone, bauxite and dolomite mining leases	Rupee 7.50 on each tonne of annual dispatch of mineral
4.	On land covered under mining leases other than (1) above	7.50 percent of the amount of royalty payable annually
3.	On land other than land covered under (1) and (2) above	7.50 percent of the amount of land revenue or rent, as the case may be, payable annually

By order and in the name of the Governor of Chhattisgarh
P.Nihalani, Joint Secretary"

58. It is noted that as on the cut-off date, the rate of Infrastructure Development Cess and Environmental Cess was ₹5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification No. 469 dated 18.9.2015 revised the Infrastructure Development Cess and Environment Cess from ₹5/MT to ₹7.50/MT which is applicable for all SECL coal despatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to TANGEDCO. Since, the Infrastructure Development Cess and Environment Cess have been imposed by an Act of Chhattisgarh State legislature, it fulfils the conditions of Change in Law event under Article 10 of PPA. Accordingly, the Petitioner is entitled for the expenditure incurred on this account. The Petitioner is directed to furnish a certificate from Auditor certifying the expenses in this regard to TANGEDCO for claiming the expenditure under Change in Law. It is clarified that the Petitioner shall be entitled to recover on account of Infrastructure Development Cess and Environment Cess in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to TANGEDCO. 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 Infrastructure Development Cess and Environment Cess. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

(E) Increase in Clean Energy Cess

59. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, Clean Energy Cess was levied on coal @ ₹50 per tonne w.e.f. 1.7.2010. Subsequently, Ministry of Finance, Government of India vide its Notification No. 1/2015 dated 1.3.2015, increased the rate of Clean Energy Cess from ₹50 per tonne to ₹200 per tonne. SECL vide its notice dated 28.2.2015 informed the Petitioner that by Clause 232 of the Finance Bill, 2016, Clean Energy Cess has been named as Clean Environment Cess and has been increased to ₹400 per tonne w.e.f. 1.3.2016, which is after the cut-off date. The Petitioner has submitted that the above charges are in the nature of tax incurred by the Petitioner qua the purposes of supply of power to the distribution licensee, and as such fall within the definition of change in law. The Petitioner has claimed an amount of ₹67.1 crore on account of increase in levy of Clean Energy Cess on coal from 3.9.2015 to 31.1.2018.

60. TANGEDCO has submitted that as the Petitioner has quoted escalable energy charge components, rise in duties and levies are taken care in the Commission's escalation index published once in 6 months.

61. Prayas vide its affidavit dated 11.9.2017 has submitted that the taxes other than tax on supply of power are not covered by Article 10 of the PPA. The Petitioner has not annexed the law relating to increase in Clean Energy Cess. Further, the Petitioner has only annexed the notices from SECL for claiming change in law. SECL

is not a competent authority to impose any cess and therefore, unless the Petitioner can produce the statute or law of a competent Government Authority increasing the rate of cess, the same cannot be allowed as change in law. Prayas in its additional submission vide affidavit dated 13.3.2018 has submitted that the Petitioner has annexed Finance Bill, 2016 as tabled before the Lok Sabha and not the actual Act or Notification.

62. We have considered the submissions of the parties. The Petitioner vide its affidavit dated 9.3.2018 has placed on record the copy of the relevant notifications. Clean Energy Cess on coal has been introduced through the Finance Act, 2010 and is being modified through subsequent Finance Acts. The Clean Energy Cess applicable at different points of time is given in the table below.

S. 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	1.3.2016	30.6.2017	400

63. It is noticed that Clean Energy Cess was introduced prior to the cut-off date in case of TANGEDCO PPA. As on the cut-off date i.e. 27.2.2013, Clean Energy Cess was applicable at the rate of ₹50/tonne. It is noticed that Clean Energy Cess was introduced by Government of India and this cess has 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. Thereafter, the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors) had allowed the increase in Clean Energy Cess. Subsequently, the Commission vide order dated 19.12.2017 in

Petition No. 101/MP/2017 (DB Power Ltd Vs PTC India Ltd & ors.) had considered the issue of Clean Energy Cess as a Change in Law event and had allowed the said claim of the Petitioner. The relevant portion of the order dated 19.12.2017 is extracted as under:

> "……..The above decision is applicable in case of the Petitioner. Therefore, levy of Clean Energy Cess on coal or increase in the rate of the cess is admissible to the Petitioner as Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover Clean Energy Cess from Rajasthan Discoms in proportion to the coal consumed for generation and supply of electricity to Rajasthan Discoms."

64. The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean Energy Cess from TANGEDCO as per applicable rate of cess in proportion to the coal consumed for generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to TANGEDCO. 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 is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually.

65. It is pertinent to mention that the Clean Energy Cess has been abolished through Taxation Laws (Amendment) Act, 2017 with effect from 1.7.2017. Accordingly, the change in law on Clean Energy Cess has been allowed upto 30.6.2017.

(F) Change in the components of Central Excise Duty

66. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the Central Excise Duty was at 6.18% on the summation of the base price of coal, surface transportation charge and sizing and crushing charge. The Ministry of Finance, Government of India vide its Notification(s) No. 14/2015 and 15/2015 dated 1.3.2015, revised the rate of Central Excise Duty from 6.18% to 6%. However, the overall burden in terms of the amount of money payable by the Petitioner towards Central Excise Duty had increased from ₹48.78 per tonne to ₹64.64 per tonne, on account of addition of incidents on which the said Duty is calculated upon. Earlier, the said duty was calculated on the summation of the base price of coal, surface transportation charge and sizing and crushing charge, whereas as per SECL`s Notification No. SECL/BSP/S&M/RS/619 dated 25.3.2013, the above duty is now calculated on the summation of base price of coal, Crushing and Sizing Charge, SILO Charge, Surface Transportation Charge, Royalty, Stowing Excise Duty, Terminal Tax, Forest Cess and Chhattisgarh Paryavaran Evam Vikas Upkar. Therefore, the downward revision of Excise Duty did not have any beneficial impact on the cost of the Petitioner, rather the Petitioner was subjected to additional expenditure pertaining to payment of Excise Duty, due to change in the underlying components on the basis of which, the said Excise Duty is imposed. The Petitioner has claimed an amount of ₹4.1 crore on account of change in the components of Central Excise Duty from 3.9.2015 to 31.1.2018.

67. TANGEDCO has submitted that the Commission vide orders dated 30.3.2015 and 3.2.2016 in Petition Nos. 6/MP/2013 and 79/MP/2013 respectively held that excise duty on coal adds to the input cost for generation of electricity. As per clause 2.4.1.1(B) (xi) of the RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc.

As the Petitioner has quoted escalable energy charge components, rise in duties and levies are taken care in CERC escalation index published once in 6 months.

68. Prayas vide its affidavits dated 11.9.2017 and 13.3.2018 has submitted that the rate of central excise duty on coal has reduced from 6.18% to 6%, which is a change in law event in favour of the Procurer. The Petitioner has claimed change in law with regard to change in incidence of tax and has relied on SECL`s letter dated 25.3.2013. Prayas has submitted that there is no change in Central Excise Act or Rules or Notifications thereto in relation to assessable value. The Petitioner has not furnished any document being the interpretation of the Authority (competent to interpret the Excise Act) as on cut-off date, which provided that the excise duty is only on base price of coal, crushing and sizing charges and surface transportation charges or royalty, stowing duty, terminal tax, forest cess and Chhattisgarh Paryavaran Evam Vikas Upkar were not included in the assessable value. Prayas has submitted that only excise authorities are the competent authority to interpret and apply the law and there is no such interpretation by the said authorities.

69. The Petitioner vide its affidavit dated 1.3.2018 and 9.3.2018 has submitted that in terms of the increase in the incidences for the purpose of determination of the excisable value of coal, the Commissioner, Excise Department vide its order dated 29.9.2014has clarified and held that for the purpose of determining the excise duty, the transaction value of coal shall include the following:

i. Base price of coal,
ii. Crushing and Sizing Charge,
iii. SILO Charge,
iv. Surface Transportation Charge,
v. Royalty,
vi. Stowing Excise Duty,
vii. Terminal Tax,

viii. Forest Cess, and
ix. Chhattisgarh Paryavaran Evam Vikas Upkar.

70. Prayas in its additional submission vide affidavit dated 13.3.2018 has submitted that the issue is not whether these charges are included in assessable value or not, but rather whether their inclusion is due to a change in law subsequent to the cut-off date. The Petitioner is required to establish that such charges were not included in assessable value as on cut-off date and were included by way of a law subsequent to the cut-off date. Prayas has submitted that the order dated 29.9.2014 passed by the Commissioner of Excise Department, Raipur, in no manner modifies or varies any pre-existing order or interpretation of the Excise Authorities. Prayas has submitted that in the said order, notices were issued to SECL for contravention of the provisions of the Central Excise Act and Central Excise Rules for evasion of excise duty on account of non-inclusion of various elements. A taxing authority issuing notice for evasion of tax and collecting the tax cannot be considered as a change in interpretation of tax law. In fact, there is a specific observation in the order that SECL has failed to show the basis of its belief on the issue of eligibility for deduction from the transaction value. Therefore, this is not a new interpretation of law.

71. Per contra, the Petitioner vide its affidavit dated 17.3.2018 has placed on record the relevant clarification dated 15.3.2018 issued by the Office of the Superintendent, Central Goods and Service Tax Range-III, Korba, Chhattisgarh. It has been clarified to the Petitioner that in terms of Section 4 of the Central Excise Act, 1944, the following elements shall be added for arriving at the assessable value of coal for payment of Excise Duty:

i. Royalty,

ii. Crushing/ Sizing Charge,
iii. SILO Charge,
iv. Surface Transportation Charge,
v. Stowing Excise Duty,
vi. Terminal Tax,
vii. Forest Cess, and
viii. Chhattisgarh Paryavaran Evam Vikas Upkar.

72. The Petitioner has submitted that the Commission in its order dated 22.6.2017 in IA No. 55 of 2016 in Review Petition No. 19/2016 (in Petition No. 153/MP/2015) had allowed the royalty and stowing Excise Duty to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon'ble Supreme Court. The Petitioner has submitted that the said component of change in law has been allowed by the Commission based on the clarification issued by the Department of Revenue.

73. We have considered the submissions of the parties and perused all the relevant documents placed on record. Pursuant to the Commission's directions vide RoP dated 15.2.2018 and Prayas averments vide affidavit dated 13.3.2018, the Petitioner approached the Office of the Superintendent, Central Goods and Service Tax Range-III, Korba, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty. The Superintendent (Customs), Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh vide its letter dated 15.3.2018 has clarified as under:

> "Please refer your letter dated 15.03.2018 seeking clarification as to whether certain duties and taxes are to be added in the at arriving the assessable value of coal.
>
> In this regard, it is to clarify that as per Section 4 of Central Excise Act, 1944, following elements shall be added for arriving the assessable value of coal for payment of Excise duty:
>
> a. Royalty,
> b. Crushing/ Sizing Charge,
> c. SILO Charge,
> d. Surface Transportation Charge,

e. Stowing Excise Duty,
f. Terminal Tax,
g. Forest Cess and
h. Chhattisgarh Paryavaran Evam Vikas Upkar.

This has been the position of law before the UST period."

74. The Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above cited elements in the assessable value of coal. Similar letter was issued by the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh in case of GMR Warora Energy Limited, based on which the Commission vide order dated 16.3.2018 in Petition No. 1/MP/2017 has examined the provisions of Section 4 of the Central Excise Act, 1944as under:

"....
160. As per the above provisions of the Central Excise Act, 1944, the price-cum duty of excisable goods sold by an assesse shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assesse in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

161. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, NiryatKar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of "Price-cum-duty" and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:

> "(a) Whether "royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?"

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon'ble Supreme Court."

162. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.) Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty."

75. Based on the decision taken by the Commission in the above case, we allow all the components mentioned by the Superintendent (Customs), Office of the Superintendent, Central Goods & Service Tax Range-III, Korba, Chhattisgarh in its letter dated 15.3.2018 to be included in the assessable value of coal for the purpose of computation of Excise Duty. However, it is clarified that allowing the charges such as Crushing/Sizing Charge, SILO Charge, Surface Transportation Charge, Stowing Excise Duty, Terminal Tax and Forest Cess for inclusion in the assessable value for computation of excise duty shall not be construed that these charges are allowed under Change in Law. Rather change in excise duty on assessable value of coal is a change in law event. Further, inclusion of Royalty is allowed subject to the pending adjudication before the Hon'ble Supreme Court regarding whether royalty is in the nature of tax. It is further clarified that the Petitioner shall be entitled to recover the excise duty in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for supply of electricity to TANGEDCO. 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 Excise Duty.

(G) <u>Increase in Entry Tax</u>

76. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the Entry Tax was levied @ 1% on the summation of base price of coal, Royalty,

Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, Niryat Kar, Infrastructure Development Cess, Forest Tax, Environment Cess, Excise Duty and Clean Energy Cess. As per the provisions of the Chhattisgarh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (Entry Tax Act), the taxable goods are taxed on the purchase price of such goods at the time of entry of such goods into a local area. The Petitioner has submitted that after the submission of bid, there was no change in the rate of entry tax. However, the base components or incidences on which such entry tax is computed, have undergone changes. The Petitioner has referred the additional 2% levy on the royalty payable towards National Mineral Exploration Trust and levy of additional 30% on Royalty under the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015, which have invariably contributed towards a rise in the total exposure of the Petitioner towards Entry Tax quantum payable is concerned. The Petitioner has submitted that the rates of Development Cess, Environment Cess and Sizing and Crushing Charges, etc. have also changed after 7 days prior to the bid submission date, which needs to be reckoned while ascertaining the amount payable to the Petitioner under the provisions of Change in Law.

77. TANGEDCO has submitted that the Petitioner is not entitled to claim Entry Tax under the head “change in law“. These are State specific increases in various cesses, which were not anticipated by TANGEDCO. These cess and other revenues published by the State of Chhattisgarh had led to an increase in the tariff agreed to between the Petitioner and TANGEDCO to such an extent that it is not financially viable for TANGEDCO to continue with the PPA.

78. Prayas vide its affidavits dated 11.9.2017 and 13.3.2018 has submitted that there is no change in the rate of entry tax. However, the Petitioner has claimed an increase in assessable value for the tax. Prayas has submitted that to the extent that assessable value has increased due to increase in price of coal or other goods (base price or any other charges), there cannot be any change in law. Prayas has further submitted that the change in price of coal is not a change in law event and therefore, any consequential change in price of coal in the assessable value for levy of the tax and thereby quantum of tax is not a change in law. Prayas has submitted that the Petitioner has not produced any documents showing the increase in assessable value due to any change in law and not due to change in price of coal or other goods (base price or any other charges). Therefore, the Petitioner is not entitled to any relief on this account.

79. We have considered the submissions of the parties. It is noted that the Petitioner has not submitted documents in support of its claim in the absence of which no view can be taken as regards the admissibility under Change in Law. However, the Petitioner is granted liberty to claim this expenditure under Change in Law through an appropriate application with relevant details.

(H) <u>Increase in Value Added Tax</u>

80. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, VAT was levied at the rate of 5% on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, NiryatKar, Infrastructure Development Cess, Forest Tax, Environment Cess, Excise Duty, Clean Energy Cess and Entry Tax. The Petitioner has submitted that though, the rate of VAT remained unchanged, with the change in the rate at which the

aforesaid components are levied, there has been an overall impact on the net tax out flow qua VAT in contradistinction to what the Petitioner was liable to pay at the time of 7 days prior to submission of the bid. Therefore, the same is covered under Change in Law.

81. TANGEDCO has submitted that the Commission vide order dated 3.2.2016 in Petition No.79/2013 (GMR Kamalanga v/s Haryana) did not allow change in VAT to be brought under "Change in Law". Government of India, Ministry of Finance Notification dated 17.3.2012 notifying the change in Excise duty, Notification dated 30.5.2008 notifying the change in rate of Central Sales Tax and Madhya Pradesh VAT (Amendment) Act, 2010 notifying the changes in VAT rates are not covered under Change in Law.

82. Prayas vide its affidavits dated 11.9.2017 and 13.3.2018 has submitted that there is no change in the rate of VAT. However, the Petitioner has claimed an increase in assessable value for the tax. To the extent that assessable value has increased due to increase in price of coal or other goods (base price or any other charges), there cannot be any change in law. Prayas has submitted that the change in price of coal is not a change in law and therefore, any consequential change in price of coal in the assessable value for levy of the tax and thereby quantum of tax is not a change in law. Prayas has submitted that the Petitioner has not produced any documents to show that the increase in assessable value is due to any change in law and not due to change in price of coal or other goods (base price or any other charges). Therefore, the Petitioner is not entitled to any relief on this account.

83. We have considered the submissions of the parties. It is noted that the Petitioner has not submitted required documents in support of its claim including the

State whose VAT is applicable in this case. Therefore, in the absence of statutory/required documents, we are not inclined to grant any relief at this stage. Therefore, the Petitioner claim on this aspect is rejected. However, the Petitioner is granted liberty to approach the Commission for appropriate relief along with all required documents.

(I) Increase in Sizing/ crushing Charges and Surface Transportation charges by Coal India Limited

(a) Increase in Sizing/ crushing charges

84. The Petitioner has submitted that as per the Price Notification No. CIL: S&M: GM (F): Pricing 1907 dated 26.2.2011 issued by Coal India Limited, the sizing charges for 200-250 mm of coal through manual facilities or mechanical means was ₹39 per metric tonne. However, by virtue of another Price Notification bearing No. CIL: S&M: GM (F): Pricing 2784 dated 16.12.2013 issued by Coal India Limited, the said sizing charges for 200-250 mm of coal through manual facilities or mechanical means were increased to ₹51 per metric tonne. The increase in sizing charges of coal as stated above by Coal India Limited vide Price Notification dated 16.12.2013 is a Change in Law event within the meaning of Article 10.1 of the PPA. The Petitioner has claimed ₹2.7 croreon account of increase in rate of sizing charges of coal from 3.9.2015 to 31.1.2018.

85. TANGEDCO has submitted that the Petitioner is not entitled to increase in rate of sizing charges of coal under “Change in Law”. The said charge does not qualify to come under the “Change in Law” clause.

(b) Increase in Surface Transportation charges

86. The Petitioner has submitted that the surface transportation charges of coal by the coal companies as on 11.9.2012 fixed by Coal India Limited, vide Price Notification No. CIL: S&M:GM (F): Pricing 1907 dated 26.2.2011 was ₹77 per tonne for a distance of more than 10 Km but not more than 20 Km from the loading point. However, by virtue of another Price Notification No. CIL: S&M: GM (F): Pricing 2340 dated 13.11.2013 issued by Coal India Limited, the surface transportation charges for a distance of more than 10 Km but not more than 20 Km from the loading point was enhanced to ₹116 per tonne. The Petitioner has submitted that surface transportation charges of coal by the Coal India Limited vide Price Notification dated 13.11.2013 is a Change in Law event within the meaning of Article 10.1 of the PPA. The claim of the Petitioner on account of increase in surface transportation charges of coal from 3.9.2015 to 31.1.2018 is ₹8.2 crore.

87. TANGEDCO has submitted that increase in surface transportation charges of coal is not admissible under the Change in Law. TANGEDCO has further submitted that CERC publishes escalation index of Inland transportation charges of domestic coal every six months considering coal freight rate. Variance in the freight rate is based on the factors attributable to the freight rate. These changes in the components have been taken care of by the Commission while publishing the escalation index. The allowance of additional costs under change in law may lead to duplication.

88. Prayas vide its affidavit dated 11.9.2017 has submitted that the price or consideration payable by the Petitioner to coal companies are pursuant to a contractual or commercial arrangement between the Petitioner and the Coal

Company and 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. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner. Prayas has submitted that by claiming compensation for the increase in price of coal or transport of coal, the Petitioner is seeking to negate the purpose of a competitive bid under Section 63 of the Act. The Petitioner is seeking in effect to abandon the quoted energy charges and to consider the fuel charges as a pass through which cannot be permitted.

89. We have considered the submissions of the parties and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of increase in sizing charges and surface transportation charges as under:

> "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."

90. In the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in sizing charges on coal and increase in surface transportation charges under change in law as per Article 10 of the PPA is not admissible and accordingly, disallowed.

(J) <u>Increase in base price of coal</u>

91. The Petitioner has submitted that as per FSA dated 28.8.2013 between the Petitioner and SECL, it was agreed to supply 250 mm size of coal of F Grade having GCV band of G10, G11& G12. At the time of submission of bid, the base price of coal as notified by the Coal India Ltd. (CIL) vide notification no. CIL/S&M/GM(F)/pricing/1965 dated 31.1.2012, was as under:

GCV Band	Price notified vide notification dated 31.1.2012(₹/tonne)
G12(GCV of 3700 to 4000)	600.00
G11(GCV of 4000 to 4300)	640.00
G10(GCV of 4300 to 4600)	780.00

92. The Petitioner has submitted that pursuant to a subsequent price notification issued after 7 days prior to the bid submission deadline, Coal India Limited vide its Price Notification No. CIL:S&M:GM (F):pricing235 dated 27.5.2013, increased the base price of coal as under:

GCV Band	Price notified vide notification dated 27.5.2013 (₹/tonne)
G12(GCV of 3700 to 4000)	660.00
G11(GCV of 4000 to 4300)	700.00
G10(GCV of 4300 to 4600)	860.00

93. The Petitioner has submitted that CIL vide its Price Notification No-01:CIL:S&M:GM(F)/ Pricing 2016/294 dated 29.5.2016, revised the base price of coal as under:

GCV Band	Price notified vide notification dated 29.05.2016 (₹/tonne)
G12(GCV of 3700 to 4000)	760.00
G11(GCV of 4000 to 4300)	810.00
G10(GCV of 4300 to 4600)	980.00

94. The Petitioner has submitted that the above Price Notification came into effect from 30.5.2016 and is a change in law event in terms of Article 10 of the PPA. The Petitioner has provided the details of notifications issued by the various Government Departments and enclosed a chart reflecting the computation of compensation and invoices which have resulted in an increased expenditure on the Petitioner for the purposes of supply of power to TANGEDCO.

95. TANGEDCO has submitted that as per Para 2.4.1.1(B) (xi) of the RFP, bidders are required to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. As the petitioner has quoted escalable energy charge components, increase in duties and levies are taken care off in CERC escalation percentage published once in 6 months for the purpose of payments.

96. Prayas vide its affidavit dated 11.9.2017 has submitted that price or consideration payable by the Petitioner to coal companies are pursuant to a

contractual or commercial arrangement and certainly 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. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner. The Petitioner had the option of quoting escalable charges and participated in the bid being aware of the escalation. It is not open to the Petitioner to now claim that the escalation index mechanism is not adequate. The Petitioner has not challenged the escalation index. Prayas has submitted that the Petitioner had accepted the bid terms and conditions and knowingly participated in the bidding process. Prayas has further submitted that the Commission in its orders dated 1.2.2017, 7.4.2017 and 6.2.2017 in Petition Nos. 8/MP/2014, 112/MP/2017 and 156/MP/2014 respectively has observed that the revision in coal charges is a result of contractual arrangement between the Petitioner and the Coal India Limited subsidiaries and not in pursuant to any law. The same conclusion squarely applies to the present case. Therefore, the above charges are not admissible.

97. We have considered the submissions of the parties. The Petitioner has submitted that pursuant to Price Notifications issued by the Coal India Limited from time to time, base price of coal was increased after the cut-off date i.e. 27.2.2013. According to TANGEDCO and Prayas, increase in base price is not pursuant to any change in law as the same is being covered with the escalation index notified by the Commission and the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner. The Petitioner vide RoP for the hearing dated

15.2.2018 was directed to submit documentary evidence pertaining to the benefits taken by the Petitioner of the Escalation Index. However, the Petitioner has not submitted any documentary evidence to substantiate its claim in this regard. The Petitioner has not annexed the FSA executed with Coal India Limited/ SECL for supply of coal to examine whether the increase in base price of coal falls under Change in law. However, we have examined a standard FSA of CIL/ SECL wherein the clause 9.1 clearly defines the Base Price of coal as quoted below:

> "**9.1 Base Price**
> The Purchaser shall pay the Base Price of Coal in accordance with the provisions of this Agreement. It is expressly clarified that the Base Price in relation to the Indigenous coal and Imported Coal shall be notified/ declared by the Seller/ CIL, as the case may be from time to time."

98. It is observed from the above that in FSA, it is stated that base price of indigenous coal shall be notified/ declared by CIL from time to time and the procurer/ petitioner has agreed on the same. Therefore, CIL notification(s) issued from time to time notifying increase in base price of coal is a change in contracted price of coal based on FSA and is not a Change in law.

99. Further, the Appellate Tribunal for Electricity vide its judgment dated 12.9.2014 in Appeal No. 288 of 2013 in the case of M/s Wardha Power Company Limited Vs. Reliance Infrastructure Limited and other has held that there is no co-relation of the base price of electricity by the seller and computation of compensation as a consequence of change in law. Relevant portion of the said judgment is extracted as under:

> "24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.

25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal."

100. In the light of the above decision, the increase in base price of coal does not constitute a change in law as the same is through a commercial agreement between the Petitioner and Coal India Limited. The Petitioner has already quoted an escalable component of energy charges and shall be compensated for any revision in base price of coal through escalation index. Therefore, the Petitioner was expected to take into account the possible revision in these charges while quoting the bid. Accordingly, the claim of the Petitioner on this account is disallowed.

I. Increase in cost due to Change in law events pertaining to Transportation of domestic coal

(A) Increase in base Freight of Coal Transportation

101. The Petitioner has submitted that as on the cut-off date i.e. 27.2.2013, the applicable base freight was ₹150.2/tonne as the Petitioner's plant is located within 50 km of SECL mines in accordance with Rate Circular No. 7 of 2012 dated 5.3.2012 issued by the Ministry of Railway, Government of India. Subsequently, Ministry of Railway, Government of India vide its Rate Circular No. 8 of 2015 dated 16.3.2015 increased base freight to ₹205.6/tonne. Therefore, there is an increase of ₹55.4/tonne post the bid submission date.

102. TANGEDCO has submitted that the Petitioner is not entitled to claim the increase in freight of coal transport in a tariff which was agreed to under competitive bidding process and approved under Section 63 of Act. The impact of change in

freight rate is being passed on through the escalation rate notified by CERC once in 6 months and therefore, it would not be appropriate to once again allow the impact through provisions of Change in Law. Otherwise, the tariff will keep on increasing with every increase in any of the charges being paid by the Petitioner and the price at which power was agreed to be purchased will keep on revising.

103. Prayas has submitted that the price or consideration payable by the Petitioner to the Railways for transport of coal is pursuant to a commercial arrangement and arrangement and not a change in law. The Railways Act only authorizes the Central Government to fix the rates from time to time not as a statutory levy. The charges paid to the Railways for transportation is a commercial arrangement by a generator. Merely because the commercial arrangement is with the Government would not make the charges paid a tax or statutory levy. Transportation cost paid to any other private transporter would not qualify as change in law and similarly, there is no reason to consider transportation cost paid to the Railways as change in law.

104. We have considered the submissions of the parties. As on the cut-off date i.e. 27.2.2013, the base freight rate was applicable at ₹150.20/ tonne on the basis of Ministry of Railway`s Rate Circular No. 7 of 2012 dated 5.3.2012. Subsequently, on 16.3.2015, Ministry of Railway vide Rate Circular No. 8 of 2015 revised the rates from ₹150.20/ tonne to ₹205.60/ tonne. The Commission vide order dated 6.2.2017 in Petition No. 156/MP/2014 has already dealt with the issue of increase in base freight rate by the Railways. The relevant portion of the said order dated 6.2.2017 is extracted as under:

> "70. We have considered the submissions of the petitioner and respondents. As on the cut-off date, the classification of coal for trainload movement was Class 140. By Rate Circular No. 70 of 2008 dated 28.11.2008, classification of coal was

revised from Class-140 to Class-150 and by Rates Circular No. 8 of 2015 dated 16.3.2015, it has been further revised to class 145. The petitioner has submitted that since the Rate Circulars have been issued under section 31 of the Railways Act, 1989, it is covered under Change in Law. In our view, Rate Circulars issued by Ministry of Railways under section 31 of the Railways Act, 1989 cannot be considered as change in law as it is a common knowledge that Ministry of Railways has been empowered to fix the rates from time to time and any person availing the services of Railways is expected factor in such change in charges in the bid. It is further noted that the Escalation Index notified by the Commission which uses Base Freight Rate linked to the class of goods, includes the impact of change in class for railway freight for coal from 140 to 150/145. Therefore, the impact of change in freight rate due to change in freight class is being passed on through the escalation rates notified by the Commission from time to time. It is pertinent to mention that the escalation index notified by the Commission aims at taking care of the escalations arising out of the market forces. Since the change of class of railway freight is included in the computation of escalation rates, this cannot be treated as Change in Law as per Article 13 of the PPA and accordingly, the petitioner's claim in this regard has been disallowed."

105. In the light of above decision, the claim of the Petitioner for relief under change in Law on account of increase in base freight rate by the Railways under Change in law as per Article 10 of the PPA is not admissible and accordingly disallowed.

(B) <u>Levy of Busy Season Charges and Levy of Development Surcharge</u>

106. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, levy of busy season charge was 12% of the base freight rate in accordance with the Railway Board Notification dated 27.9.2012 and Levy of Development Surcharge was 5% of the base freight rate in accordance with Rate Circular No. 38 of 2011 dated 12.10.2011. Subsequently, Railway Board vide notification dated 20.7.2015 increased the levy of busy season charge from 12% to 15%, which has also impacted the Levy of development surcharge which is calculated on the Tariff rate arrived after applying busy season charges on the base freight rate. Therefore, even in the absence of any change of rate at which development surcharge is imposed, due to rise in the base freight rate and busy season charges, there has been a net increase of ₹3.25/Tonne in levy of Development Surcharge.

107. TANGEDCO has submitted that the Commission vide order dated 3.2.2016 in Petition No. 79/2013 (GMR Kamalanga Vs. Haryana) held that increase in the railway freight charges on account of development surcharge and busy season surcharge is 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.

108. Prayas has submitted that the Commission in order dated 1.2.2017 in Petition No. 8/MP/2014 has held that busy season surcharge and Development Surcharge is commercial consideration payable to the Railways and any increase in the rates or assessable value is not a change in law under Article 10 of the PPA.

109. We have considered the submissions of the parties. The issue whether change in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as a Change in Law event has been considered by the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013. Based on merits, the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 has disallowed the change in the rates of busy season surcharge and development surcharge levied by Railway as a Change in law. Thereafter, the Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors), order dated 7.4.2017 in Petition No. 112/MP/2015 and order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd. Vs PTC India Ltd & ors.) disallowed the busy season surcharge and development surcharge under Change in law. The relevant portion of the order dated 1.2.2017 in Petition No. 8/MP/2014 is extracted as under:

> "86.....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."

110. 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. Accordingly, the claim is not allowed as a Change in law event.

(C) Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from Rs. 150.20 to Rs. 205.60

111. The Petitioner has submitted that the Petitioner's plant is located within 50 km of SECL mines. As on cut-off date i.e. 27.2.2013, there was freight concession of 50% for all traffic including coal booked upto 100 km in accordance to the Ministry of Railways Notification No. TCR/1078/2003/1 dated 27.3.2003 (Rates Instruction No. 11 of 2003). However, the Ministry of Railways vide Notification No. TCR/1078/2014/06 dated 16.5.2014 (Rate Circular No. 15 of 2014) withdrew the aforementioned concession. Due to the above withdrawal, the Petitioner has been deprived of 50% rebate amounting to ₹75.10 per tonne. Further with the increase in the base freight rate from ₹150.20 per tonne to ₹205.6 per tonne, the Petitioner is now deprived of rebate amount of ₹75.10 + ₹27.70 = ₹102.80/tonne, which is an additional monetary impact on account of the net expenditure of the Petitioner as a result of Change in Law events as per Article 10.1.1 of the PPA.

112. TANGEDCO has submitted that the Petitioner should take into account the possible revision in these charges while quoting the bid. The change is freight charge due to withdrawal of rebate and additional rebate loss due to change in base freight rate does not come under change in Law.

113. Prayas has submitted that the Railways Act only authorises the Central Government to fix the rates from time to time not as a statutory levy but as may be considered appropriate for the Railways to discharge its commercial functions. The Railways, though a Government Department, is undertaking a commercial activity and not a sovereign activity in regard to transportation services and the charges paid to the Railways for transportation is a commercial arrangement by a generator entered into with the Railways. Therefore, withdrawal of concession is a commercial decision of Railways and the impact of such withdrawal on the price of input cannot be regarded as a change in law.

114. We have considered the submissions of the parties. It is noted that short lead concession in charging of freight was provided by the Ministry of Railways vide Notification No. TCR/1078/2003/1 dated 27.3.2003 based on which the Petitioner was entitled to 50% rebate in the freight charges since the plant was located within the range of 50 KM from SECL mines. However, Ministry of Railways vide its Notification No. TCR/1078/2014/06 dated 16.5.2014 (Rate Circular No 15 of 2014) withdrew the rebate of 50% in the year 2014. Perusal of both Notifications reveals that short lead concession is a type of freight charges as rightly mentioned in the subject line of both the Notifications i.e. Adjustment in Freight Rates. Since, the Commission has already decided that increase in freight charges is not a change in law, withdrawal of freight concession provided by Railways is also not covered under Change in law. The Railway Board has revised these freight charges (withdrawal of concession of 50%) in exercise of its power conferred under Sections 30 to 32 of the Railways Act, 1989. In our view, Rate Circulars issued by Ministry of Railways under Sections 30 to 32 of the Railways Act, 1989 cannot be considered as change in law as it is a common knowledge that Ministry of Railway has been empowered to fix the

rates from time to time and any person availing the services of Railways is expected to factor in such change in freight in the bid. Further, this revision of rates by Railways through Rate Circular Notification does not falls in any of the bullet points of Change in law definition as specified in Article 10.1.1 of the PPA. Therefore, the Petitioner cannot be granted relief under Change in Law on account of withdrawal of freight concession provided by Railway Board. Accordingly, the claim on this account is rejected.

(D) Increase in Trip Siding Charges

115. The Petitioner has submitted that after the cut-off date i.e. 27.2.2013, there has been a considerable increase in Trip Siding Charges by the Railways. South East Central Railways vide its Notification No. C/SECR/BSP/Sdg. Charge/Policy/4387 dated 28.6.2013 increased the Trip Siding Charge for Diesel from ₹1,38,631/BOXN Rake (₹1,14,781/BOXN Rake + ₹23,850/BOXN Rake) as existed on 1.07.2012 to ₹1,48,396/BOXN Rake (₹1,22,866/BOXN Rake + ₹25,530/BOXN Rake) with effect from 1.7.2013. Further, South East Central Railways vide Rate Circular No. 110 (G)/2015 dated 26.6.2015, made the trip siding charge ₹2,87,655/Rake with effect from 1.7.2015. The Petitioner has submitted that as per the online freight calculator of Ministry of Railway, 1 BOXN Rake consists of 59 wagons and permissible carrying capacity of such rake is 67 tonne. Therefore, the maximum carrying capacity of 1 BOXN rake is 59x67 = 3953 tonne. Therefore, in ₹/Tonne, there is an increase of trip siding charge of ₹35.07/Tonne as existed on 1.7.2012 to ₹72.77/Tonne with effect from 01.07.2015. This increase in amount of ₹37.7/Tonne falls under Article 10 of Change in law.

116. TANGEDCO has submitted that the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 (GMR Kamalanga Vs. Haryana) held 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.The Petitioners should take into account the possible revision in these charges while quoting the bid.

117. Prayas has submitted that the price or consideration payable by the Petitioner to coal companies is pursuant to a contractual or commercial arrangement between the Petitioner and the Coal Company and 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. The very fact that the coal prices were de-regulated demonstrates that the price of coal is a commercial price as opposed to a regulated price. Therefore, the changes in commercial prices of coal are part of the business risk undertaken by the Petitioner.

118. We have considered the submissions of the parties. It is noticed that South East Central Railway vide its Rates Circular Notification has revised the trip siding charges from time to time. In our view, the revision in trip siding charges by the South East Central Railwayis 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 (Chapter VI- Fixation of Rates).Section 30 of the Railways Act provides as under:

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

The above provisions enable the Railway Board to fix different charges for carriage of passengers and goods and any other charges incidental to or connected with such carriage. These provisions were in force 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. Therefore, the Petitioners were expected to take into account the possible revision in these charges while quoting the bid

119. Further, on the basis of Sections 30 to 32 of the Railways Act, 1989, the Commission has already taken a view and disallowed similar events i.e. Busy Season Surcharge and Development Surcharge under Change in law vide order dated 3.2.2016 in Petition No. 79/MP/2013, order dated 1.2.2017 in Petition No. 8/MP/2014 and order dated 19.12.2017 in Petition No. 101/MP/2017. The relevant portion of the said order dated 3.2.2016 in Petition No. 79/MP/2013is 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."

120. Therefore, trip siding charges levied by the Railways is a part of freight charges which ultimately is a cost involved for procuring coal being an input for generating power and does not falls under change in law. The Central Government has empowered the Ministry of Railway to fix the rates from time to time under Sections 30 to 32 of the Railways Act, 1989 and any person availing the services of Railways is expected to factor in such change in charges in the bid. Therefore, the claim of the Petitioner for relief under change in Law on account of increase in trip siding charges by the Railways under change in law as per Article 10 of the PPA is not admissible and accordingly disallowed.

(E) Increase in Service Tax Rate and Imposition of Swachh Bharat cess and Krishi Kalyan Cess on Railway freight and Trip Siding Charges

121. The Petitioner has submitted that as on cut-off date i.e. 27.2.2013, the applicable service tax rate on the Railway Freight and trip siding charges was 3.708% (30% of prevailing service tax of 12.36%) in accordance to the Ministry of Railways Notification No. TCR/1078/2011/2 dated 28.9.2012 (Rate Circular No. 29 of 2012). However, after the cut-off date, the Ministry of Railway vide its Notification No. TCR/1078/2015/15 dated 27.5.2015 increased the service tax rate on the railway freight and trip siding charges from 3.708% to 4.2% (30% of 14%). Apart from this, Government of India vide Notification No. 21/2015-Service Tax, dated 6.11.2015 and Notification No. 27/2016-Service Tax, dated 26.5.2016 imposed Swachh Bharat Cess and Krishi Kalyan Cess respectively at the rate of 0.5%. Therefore, both Swachh Bharat Cess and Krishi Kalyan Cess started getting levied at the rate of 0.15% each (30% of 0.5%) on the total freight charges, which is an additional monetary impact on account of the net expenditure of the Petitioner as a result of change in law events as per Article 10.1.1 of the PPA.

122. TANGEDCO has submitted that service tax was already in existence i.e. before the bid dead line and increase in service tax on railway freight cannot be accounted under Change in Law. TANGEDCO has submitted that since as per clause 2.4.1.1(B) (xi) of RFP, the quoted tariff is inclusive of all taxes, levies, duties, etc., the claim of the Petitioner is liable to be rejected.

123. Prayas has submitted that the increase in service tax is not pursuant to the Ministry of Railway Notifications but of Ministry of Finance. The Petitioner has not annexed the appropriate Notifications in this regard. Further, the impact due to increase in rate of service tax is to be considered and any increase in railway freight and trip siding charges cannot be included.

124. We have considered the submissions of the parties. The Petitioner has placed on record the concerned notifications. The objections of TANGEDCO have been dealt within Para 35 to 37 above. Swachh Bharat Cess and Krishi Kalyan Cess have been imposed by an Act of Parliament on the taxable services at the rate of 0.5%. Section 119 (2) and (3) of the Finance Act, 2015 provides as under:

> "119 (2). There shall be levied and collected in accordance with the provisions of this "Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two percent, on the value of such services for the purposes of financing and promoting Swachh Bharat initiative or for any other purpose relating thereto.
>
> 119 (3). The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable services under Chapter V of the Finance Act, 1994 or under any other law for the time being in force."

Further, Section 161 (2) and (3) of the Finance Act, 2016 provides as under:

> "161 (2). There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 percent, on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

(3) The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable to such taxable service under Chapter V of the Finance Act, 1994, or under any other law for the time being in force."

Therefore, Swachh Bharat Cess and Krishi Kalyan Cess is a service tax on taxable service and have been introduced through an Act of Parliament and is therefore, covered under change in law. The Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as change in law events vide order dated 1.2.2017 in Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2015.

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

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

effect from 1.10.2012, service tax on 30% of the transport of goods by rail became chargeable. This date being after the cut-off date in case of DNH PPA, the same shall be admissible under DNH PPA. Subsequent changes in service tax shall be admissible under change in law."

In the light of the above decision, the claim of the Petitioner for relief under change in law on account of service tax on railway freight and trip siding charges by Indian Railways is admissible. Further, it is noted that w.e.f. 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable which is before the cut-off date i.e. 27.2.2013. Therefore, the Petitioner has accounted for 30% of 12.36% i.e. 3.708% at the time of submission of bid. However, Ministry of Finance, Department of Revenue vide its notification No. 14/2015-Service Tax dated 19.5.2015 has revised the rates of service tax from 12.36% to 14% which was further revised vide notification No. 21/2015-Service Tax dated 6.11.2015to 14.5%. Subsequently Ministry of Finance, Department of Revenue vide notification No. 27/2016-Service Tax dated 26.5.2016 revised the rate of service tax from 14.5% to 15%. In view of the above, the Petitioner is entitled for the following relief:

Applicability date	**Rate of Service tax**	**Service tax on Railway freight & Trip siding charges @ 30% of Service tax**	**Admissible rate of service tax under Change in law**
27.2.2013 (cut-off date)	12.36%	3.708%	0% (Petitioner has accounted 3.708% in its bid)
1.6.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016 (till 30.6.2017)	15.00%	4.500%	0.792%

The Petitioner shall be entitled to recover on account of change in service tax on transportation of coal through Railways in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of this Commission or actual, whichever is lower, for

supply of electricity to TANGEDCO. 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 is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are further directed to carry out reconciliation on account of these claims annually.

Issue No. 5: The mechanism for compensation on account of Change in Law during the operation period:

126. 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 the PPA, the letter of credit amount for first year would be equal to 1.1 times of the estimated average monthly billing based on normative availability and for subsequent years, the letter of credit amount will be equal to 1.1 times of the average of the monthly tariff payments of the previous contract year plus the estimated monthly billing during the current billing during the current year from any additional units expected to be put on COD during that year on normative availability.

127. The Petitioner has submitted that the above levies, changes, revisions and enactments are directly affecting the Petitioner, i.e. the expenses of the Petitioner/Seller, by more than 1% of the value of the Standby Letter of Credit (LC) in aggregate for the relevant Contract Year. The Petitioner has submitted that the compensation for change in law events would be in excess of an amount equivalent to 1% of Letter of Credit in aggregate for each contract year. The total claim made by the Petitioner during the claim period i.e. from 3.9.2015 to 31.1.2018 is ₹164 crore.

128. Articles 10.3.2 and 10.3.4 of the PPA provides for the principle for computing the impact of change in law during the operating period as under:

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

The above provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/decrease revenues or cost shall be admissible to the Petitioner. Moreover, the compensation shall be payable only if the increase/ decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. In our view, the effect of change in law as approved in this order shall come into force from the date of commercial operation of the concerned unit/unit of the generating stations or from the date of change in law, whichever is later. We have specified a mechanism considering the fact that compensation of change in law shall be paid in subsequent contract years also. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to change in law events allowed as per Article 10.2.1 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 respondent or from the date of change in law, whichever is later.

(b) Increase in royalty on coal, service tax on royalty of coal, Environment Cess, Infrastructure Development Cess, Clean Energy Cess, change in Central Excise Duty on the assessable value of coal and service tax on transportation of coal shall be computed as given in respective head.

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

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

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

(f) The Commission has not computed the threshold value for eligibility of getting compensation due to change in law during Operation period. However, the

Petitioner shall be eligible to receive compensation if the impact due to change in law exceeds the threshold value as per Article 10.3.2 of the PPA during Operation period. Accordingly, the compensation amount allowed shall be shared by TANGEDCO based on the scheduled energy. Year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision under Article 10.3.2 of the PPA.

Summary of Decision:

129. Based on the above analysis and decisions, the summary of our decision under the change in law during the operating period of the project is as under:

S. No.	Change in Law events	Decision
I. Increase in coal cost on account of change in law events		
1	Royalty on Coal	Allowed
2	Service Tax on Royalty of Coal	Allowed
3	Increase in Niryatkar	Not Allowed but granted liberty
4	Increase in Environment Cess /Paryavaran Upkar	Allowed
5	Change in Infrastructure Development Cess	Allowed
6	Change in Clean Energy Cess (subsequently known as Clean Environment Cess)	Allowed
7	Change in the components of Central Excise Duty	Allowed. However, royalty is subject to the outcome of the decision of the Hon'ble Supreme Court.
8	Increase/ Change in Entry Tax on account of changes in the individual components of such Tax	Not Allowed but granted liberty
9	Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of such Tax	Not Allowed but granted liberty
10	Increase in sizing and crushing charges	Not Allowed
11	Increase in Coal Surface Transportation charge	Not Allowed
12	Increase in base price of coal	Not Allowed

S. No.	Change in Law events	Decision
II. Increase in cost due to Change in law events pertaining to Transportation of domestic coal		
13	Increase in base Freight of Coal Transportation	Not Allowed
14	Levy of Busy Season Charges & Levy of Development Surcharge	Not Allowed
15	Withdrawal of Rebate and Additional Rebate loss due to change in base freight rate from ₹150.20 to ₹205.60	Not Allowed
16	Increase in trip siding charges	Not Allowed
17	Increase in Service Tax Rate and imposition of Swachh Bharat Cess and Krishi Kalyan Cess on Railway freight and trip siding charges	Allowed

130. The Petitioner is directed to ensure that provisions of this order to remain applicable, it has always composite scheme for generation and sale of electricity in more than one State in terms of Section 79 (1) (b) of the Act.

131. Petition No. 126/MP/2016 alongwith I.A. No. 29/2016 is disposed of in terms of above.

sd/-	**sd/-**	**sd/-**	**sd/-**
(Dr. M.K. Iyer)	**(A. S. Bakshi)**	**(A. K. Singhal)**	**(P.K. Pujari)**
Member	**Member**	**Member**	**Chairperson**