CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 156/MP/2018

Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member

Date of Order: 3rd of June 2019

In the matter of

Petition under Section 79(1)(b) and 79 (f) of the Electricity Act, 2003 seeking compensation/ relief for increased expenses due to certain events of Change in Law as per the applicable provisions of the PPAs dated 18.1.2014 and 20.1.2014.

And
In the matter of

MB Power (Madhya Pradesh) Limited
239, Okhla Industrial Estate, Phase-III,
New Delhi-110 020

.....Petitioner

Vs

1. Uttar Pradesh Power Corporation Ltd.
7th Floor, Shakti Bhawan Extension,
14 Ashok Marg, Lucknow-226 001 Uttar Pradesh

2. Paschimanchal Vidyut Vitran Nigam Ltd.
Urja Bhawan, Victoria Park,
Meerut –250 001

3. Purvanchal Vidyut Vitran Nigam Ltd
DLW, Bhikharipur,
Varanasi - 221004

4. Madhyanchal Vidyut Vitran Nigam Ltd
4A, Gokhale Marg,
Lucknow - 226001

5. Dakshinanchal Vidyut Vitran Nigam Ltd
Urja Bhawan, NH-2, (Agra - Delhi Bypass Road),
Sikandra, Agra – 282002

6.PTC India Limited
2nd Floor, NBCC Tower 15,
Bhikaji Cama Place,
New Delhi-110066 **... Respondents**

Parties Present:

Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Ms. Aparajita Upadhayay, Advocate, MBPMPL
Shri Paramhans, Advocate, PTC India
Shri Ashish Anand Bernard, PTC India
Shri Rohit Kumar Gururani, MBPMPL

ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited, has developed a 1200 MW coal based thermal power project (hereinafter referred to as the 'Project") in District Anuppur in the State of Madhya Pradesh. The Project comprises of two units of 600 MW each. These units i.e. Unit-I and Unit-II of the Project were commissioned on 20.5.2015 and 7.4.2016 respectively.

2. The Petitioner has entered into the following Power Purchase Agreements (PPAs) for supply of power from the Project:

a. Supply of 361 MW to Paschimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Ltd., Madhyanchal Vidyut Vitran Nigam Limited and Dakshinanchal Vidyut Vitran Nigam Limited in terms of PPA dated 18.1.2014. These Discoms are collectively referred to as the UP Discoms hereinafter.

b. Supply of 30% of the installed capacity of the Project to Madhya Pradesh Power Trading Company Limited, Madhya Pradesh Poorva Kshetra Vidyut Vitran Nigam Ltd., Madhya Pradesh Madhya Kshetra Vidyut Vitran Nigam Ltd. and Madhya Pradesh Kshetra Vidyut Vitran Nigam Ltd.

c. Supply of 5% of the net output of the Project to Madhya Pradesh Power Trading Company Ltd.

3. On 18.1.2014, the Procurers, namely the UP Discoms through UPPCL and the Respondent No. 6 i.e. PTC India Ltd. (hereinafter referred to as PTC) entered into a Power Purchase Agreement (hereinafter referred to as the Procurer-PPA) for supply of 361 MW power for a period of twenty-five years from the Scheduled Delivery Date of the project, for onward sale on long term basis. On 20.1.2014, the Petitioner entered into back to back PPA (hereinafter referred to as the PTC-PPA) dated 20.1.2014 with PTC. The Procurer-PPA and the PTC-PPA are collectively referred to as the UP Discoms PPAs or simply as PPAs depending upon context.

4. The chronological dates of events with regard to the UP Discoms PPAs are as under:

Power Supply to	UPPCL under Long term (361 MW)
Cut-off date	17.9.2012
Date of submission of bid	24.9.2012
Procurers PPA with PTC	18.1.2014
Back to back PPA executed by the Petitioner with PTC	20.1.2014
Start of supply of power	From 22.8.2015

5. The Petitioner has sought for the following reliefs under change in law in respect of UP Discoms PPA:

I. <u>Change in rate and/or introduction of taxes, duties and charges:</u>

(a) Change in Clean Energy Cess (renamed as Clean Environment Cess) subsequently, replaced by Goods and Services Tax Compensation Cess), levied on the price of coal.

(b) Change in Chhattisgarh Infrastructure Development Cess, levied on the price of coal;

(c) Change in Chhattisgarh Environmental Cess, levied on the price of coal

(d) Change in Coal Sizing Charges, levied on the price of coal,

(e) Change in Surface Transportation Cost, levied on the price of coal,

(f) Change in Service Tax and introduction of Swachh Bharat Cess and Krishi Kalyan Cess, levied on coal transportation by Indian Railways;

(g) Introduction of Forest Tax, levied on the price of coal,

(h) Revision/addition of components in computation of Central Excise Duty, levied on the price of coal

(i) Change in MP Electricity Duty on Auxiliary Consumption and for self-consumption;

(j) Introduction of tax towards contribution to the National Mineral Exploration Trust, levied on the price of coal;

(k) Introduction of tax towards contribution to the District Mineral Foundation, levied on the price of coal;

(l) Introduction of Coal Terminal Surcharge, levied on coal transportation by India Railways;

(m) Introduction of evacuation Facility Charges for dispatch of coal by CIL; and

(n) Implementation of Goods and Services Tax.

II. <u>Amendment in New Coal Distribution Policy resulting in reduction of supply of domestic coal by SECL/CIL under FSA.</u>

III. <u>Additional capital expenditure on account of amendment in Environmental Norms</u>

IV. <u>Increase in Minimum Alternative Tax rate</u>

V. <u>Additional cost towards Fly Ash Transportation</u>

VI. <u>Carrying Cost</u>

6. The Petitioner has submitted that during the period commencing from 22.8.2015 (date of commencement of power supply) to 31.3.2018, it has already incurred huge additional expenditure on account of the various change in law events.

7. The Petitioner has submitted that the Central/ State Government has introduced and/or modified various taxes, duties and levies subsequent to cut-off date, i.e. 17.9.2012 which is seven days prior to the bid deadline i.e. 24.9.2012. Therefore, the Petitioner has to pay and will be paying in future additional amounts pursuant to such change in law events and, therefore, the Petitioner has to be compensated under provisions of the UP Discoms PPAs.

8. The Petitioner has submitted that the events of change in law have significant adverse financial impact on the costs and revenue of the Petitioner during the operating period for which

the Petitioner is entitled to be compensated in terms of Article 10 of the PPA. Accordingly, the Petitioner has made the following prayers:

> *"(a) Approve the principles and establish an appropriate mechanism for computing compensation to be given to restore the Petitioner (through monthly Tariff payments as contemplated in Article 10 of the Procurer(s) PPA), to the same economic position as if the Change in Law events specified above have not occurred, comprising,*
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> *(i) Relief/compensation on account of the Change in Law events specified in the present petition*
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> *(ii) Methodology suggested at Para 21 of the present petition.*
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> *(iii) Periodicity and duration of recovery.*
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> *(iv) Carrying cost for the period between effective date of Change in Law event [Article 10.5.1 (i)] and actual payment at the actual rate of interest incurred by the Petitioner.*
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> *(v) Procedure to be followed including raising of Supplementary Bills."*
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> *(b) Condone any inadvertent omissions/errors/rounding off differences/shortcomings and permit the Petitioner to add/alter the grounds and make further submissions as may be required by the Commission."*

9. The matter was heard on 26.7.2018 and notices were issued to the Respondents to file their replies to the Petition. The Petitioner, vide Record of Proceedings for the hearing dated 26.7.2018, was directed to submit the following additional information:

a. Copy of the long term PPAs entered into with MP Discoms;

b. Whether any Change in Law events reducing the cost have occurred during construction period and operation period;

c. Date of commissioning of Unit-II

d. Date of start of power supply to MP Discoms;

e. Copy of Gazette Notifications/ statutory documents issued by the Government with regard to increase in forest tax and evacuation facility charges; and

f. Letter from competent authority of Central Excise Department regarding inclusion/ addition of components in the assessable value of coal for the calculation of excise duty.

10. The Petitioner vide its affidavit dated 14.8.2018 has submitted the information called for.

11. Replies to the Petition have been filed by the Respondents, UPPCL and UP Discoms vide affidavits dated 16.8.2018 and the Respondent, PTC vide affidavit dated 13.9.2018. The Petitioner has filed its rejoinder vide its affidavits dated 29.8.2018 and 18.12.2018 to the said replies. The matter was heard on 17.9.2018. The Commission directed Respondent, UPPCL to file its reply as a last opportunity. UPPCL filed its reply vide affidavit dated 20.10.2018. The Petitioner was directed to file its written submission with regard to change in coal sizing charge, change in surface transportation cost and introduction of evacuation facility charges for despatch of coal by Coal India Limited. Accordingly, the Commission reserved order in the Petition. The Petitioner filed its written submissions in this regard on 27.9.2018. On specific request of the Respondent, UPPCL, the Petition was further listed for hearing on 19.12.2018. None appeared on behalf of UPPCL despite notice. The Commission vide Record of Proceedings for the hearing dated 19.12.2018 directed UPPCL to pay 75% of the compensation claimed by the Petitioner, subject to the adjustment after issue of final order in the Petition. The Commission further directed that if the payment received in terms of the interim order exceeds the amount due after issue of final order, the Petitioner shall refund the excess amount to UPPCL with 9% interest.

Maintainability of the Petition

12. The Petitioner in the Petition has submitted that it has a composite scheme for generation and sale of power to more than one State (as stated in Para 2 above). Therefore, this Commission has the jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the Act).

13. UPPCL in its reply dated 16.8.2018, has raised the issue only on the maintainability. UPPCL has submitted as under:

a. There is no contractual relationship between the Petitioner and the Respondents 1 to 5 (UPPCL and UP Discoms). The Procurer-PPA dated 18.1.2014 between the UP Discoms and PTC was approved by the UPERC (Uttar Pradesh Electricity Regulatory Commission) thereby conferring jurisdiction upon UPERC with respect to the disputes.

b. The provisions as contained in Article 14.1.1 and Article 14.3.1.1 (b) of the Procurer-PPA are completely covered by Section 64(5) of the Electricity Act, 2003 in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. The parties to the Procurer-PPA dated 18.1.2014 had subjected themselves to the jurisdiction of UPERC which has adopted the tariff.

c. As per Article 1.1 of the Procurer-PPA dated 18.1.2014, 'Appropriate Commission' shall be CERC, SERC or JERC referred to in Section 83 of the Act. In the present case, UPERC has adopted the tariff under Section 63 of the Act. Therefore, the parties are legally obliged to abide by the terms and conditions of the Procurer-PPA which includes their consent to jurisdiction of the Courts at Lucknow, in case of disputes between the UP Discoms and PTC.

d. There is nothing in the Procurer-PPA dated 18.1.2014 which would even suggest that the UP Discoms owed an obligation towards the Petitioner. It is only through the 'conduit' PTC that the Petitioner, in terms of the PTC-PPA dated 20.1.2014, could invoke its rights and duties.

e. PTC is obliged to perform its part as provided in the Procurer-PPA dated 18.1.2014 and there is no corresponding obligation in terms of the said PPA upon the UP Discoms towards the Petitioner. The Petitioner must restrict itself to the PTC-PPA dated 20.1.2014. There is no reciprocal contractual obligation upon the UP Discoms to be read ipso facto in the Procurer-PPA dated 18.1.2014 that is there in PTC-PPA dated 20.1.2014.

f. The Petitioner has got no right to invoke terms and conditions in Procurer-PPA dated 18.1.2014 and hence the Petition is not maintainable.

14. The Petitioner, vide its rejoinder affidavit dated 29.8.2018, has submitted as under:

(a) The PTC-PPA incorporates the terms and conditions of the Procurer-PPA as back to back arrangement for supply of power from the Petitioner's Project to the Respondents. Some of the provisions in the recitals of the PTC-PPA including Article 2, Article 6 and Article 14.11 of the PTC-PPA make it clear that PTC-PPA has been executed in order to enable PTC to fulfill its obligations under the Procurer-PPA and the terms and conditions of the Procurer-PPA are mirrored in the PTC-PPA.

(b) The purpose of executing the PTC-PPA was to enable the supply of power to the Respondents under the Procurer-PPA. The Procurer-PPA and PTC-PPA are co-terminus and one cannot exist without the other. The role of PTC is that of an intermediary, whereas the actual sale and purchase of electricity takes place between the Petitioner and the Respondents.

(c) When a trading license is not functioning as a merchant trader i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the purchaser under re-sale, then there is a link between the ultimate distribution company and the generator with the trader acting as only intermediary linking company.

(d) The Respondents at the time of bidding were aware that the Petitioner was the developer of the generation source for supplying power to the Respondents and actual sale of power would be done by the Petitioner and that PTC was only acting as a trading licensee for the entire transaction.

(e) The Respondents had raised similar contention in Petition No. 171/MP/2016. The Commission in its order dated 22.6.2018 rejected the contention of the Respondents and held that the Petition for adoption of tariff under Section 63 of the Act cannot be construed as a joint application under Section 64(5) of the Act. Therefore, the CERC and not the UPERC has the jurisdiction to adjudicate the claims of the parties.

(f) Accordingly, the Petitioner has submitted that the contentions of the Respondents deserve no merit for consideration and is therefore liable to be rejected.

15. We have examined the matter. The Respondent, UPPCL/ UP Discoms had raised similar issues regarding jurisdiction of the Commission to adjudicate the dispute between the same parties and involving the same PPAs, in Petition No. 224/MP/2018 filed by the Petitioner on the ground that the provisions specified in Article 14.1.1 and Article 14.3.1.1 (b) of the Procurer-PPA are covered by Section 64(5) of the Act in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. Therefore, the adjudication of disputes raised in the Petition falls within the jurisdiction of the UPERC which has adopted the tariff. UPPCL/ UP Discoms had further submitted that PTC is obliged to perform its part as provided in the Procurer-PPA dated 18.1.2014 and there is no corresponding obligation in terms of the said PPA upon the Discoms towards the Petitioner. Therefore, the Petitioner has no right to invoke terms and conditions in

Procurer-PPA dated 18.1.2014. However, the Commission in its order dated 18.1.2019 rejected the contentions of UPPCL/ UP Discoms and held as under:

> *"13. The Hon'ble Supreme Court while interpreting the term 'composite scheme' under Section 79(1)(b) of the 2003 Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff has been adopted under Section 63 of the 2003 Act. Since the Petitioner, MBPL is supplying power to multiple States through PPAs, its generating station has a 'composite scheme' for generation and sale of power to more than one State. Hence, in the light of the decision of the Hon'ble Supreme Court we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) read with 79(1)(f) of the 2003 Act. Accordingly, the Petition is maintainable.*
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> *15. We have considered the submissions of the parties and examined the legal position on the issues raised. As stated earlier, Respondent No.1, UPPCL had initiated competitive bidding process by issuance of RFP dated 27.7.2012 for procurement of 6000 MW base load power on long term basis by UPPCL on Case-I basis. Clause 2.1.2.2 (g) of the said RFP provides that in case the bidder was a trading licensee, it should have executed an exclusive PPA for the quantity of power offered in its bid and copy of the same was to be furnished with the bid. The Petitioner desirous of supplying power to the Respondent discoms, entered into an exclusive PPA with PTC on21.9.2012 and the said PPA formed part of the bid submitted by PTC before UPPCL. Thereafter, PTC was selected as a successful bidder premised on the PPA dated21.9.2012. Thus, even at the time of bidding and after PTC was selected as a successful bidder and had signed the Procurer-PPA dated 18.1.2014, the Respondent, discoms were aware that PTC would be supplying power from the Petitioners Project.*
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> *16. It is observed that PTC had submitted its offer for 361 MW clearly indicating the source of supply of power from the generating station of MBPL. The offer of PTC was accepted by UPPCL and accordingly, LoI dated 11.12.2013 in favour of PTC was issued for supply of 361 MW of power to UPPCL on a long term basis. The relevant portion of the LOI dated 11.12.2013 is extracted hereunder:*
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> > *"This is to inform you that the process of evaluating the bids received pursuant to the final RFP, including the "bid" has been concluded. We are pleased to inform you that tour proposal and offer received by way of the bid for the generation source MB power (Madhya Pradesh) Limited for 361 MW has been accepted and M/s PTC India Limited is hereby declared as the successful bidder for the generation source MB Power (Madhya Pradesh) Limited as per clause 3.5 of the Final RFP and consequently, this Letter of Intent (hereinafter referred to as the "LOI") is being issued."*
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> *17. PTC after accepting the LOI had acted upon the same by entering into Procurer–PPA dated 18.1.2014 with the Respondent discoms and PTC-PPA dated 20.1.2014with the Petitioner, MBPL. The Respondent, UPPCL has submitted that there is nothing in the PPA dated 18.1.2014 which would suggest that the Procurers owed any obligation towards the Petitioner and it is only through the "conduit" PTC that the Petitioner, in terms of the PPA dated 20.1.2014 could invoke its rights and duties. In view of the above, we find that this submission of the Respondent discoms is devoid merit. Reference can also be made to some of the provisions of the Procurer-PPA and the PTC-PPA, as under:*
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18. It is evident from the above that both the PPAs are inextricably linked to each other and the rights and obligations arising out of any one PPA are also reflected in the other PPA. Further, the LOI issued by UPPCL on 11.12.2013 had recognised the generating station of the Petitioner as the source for supply of power to it through PTC. It is also undisputed that PTC had supplied power to UPPCL from the generating station of the Petitioner since August, 2015 in terms of the said LOI. Thus, the LOI dated 11.12.2013 read with the provisions of the PPAs unambiguously establish the nexus between the generating company MBPL and the Respondent discoms, even though power was supplied through PTC, which is an inter-State trading licensee.

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Hence, the contention of UPPCL that it has no privity of contract or arrangement with MBPL lacks merit. We, therefore, hold that the present Petition filed by MBPL for adjudication of disputes against Respondent, discoms of UP is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

(D) Jurisdiction of the Civil Courts at Lucknow or the State Commission

23. The Respondent, discoms of UP have further contended that in terms of Article14.1.1 of the PPA, any legal proceedings in respect of any matters, claims or disputes under the PPA shall be under the jurisdiction of the appropriate Courts in Lucknow. It has also submitted that the provisions of Article 14 of the said PPA is covered by section 64(5) of the 2003 Act and the Hon`ble Supreme Court in the Energy Watchdog case has approved the applicability of section 64(5).

24. The matter has been considered. It is noticed that Article 14.3.1 provides for Dispute Resolution by the "Appropriate Commission". Article 14.3.1.1(a) provides for the following:

> *“Where CERC is the Appropriate Commission, any dispute arising from a claim made by any party for any change in or determination of 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 such claims could result in change in tariff, shall be subjected to adjudication by the Appropriate Commission.”*

25. As stated earlier, the generating station of the Petitioner has a composite scheme for supply of power in more than one State. Hence, the "Appropriate Commission" in terms of Article 14.3.1.1(a) will be the Central Commission to deal with any of the claims/disputes raised by the Petitioner under the PPA dated18.1.2014 / 20.1.2014. The submissions of the Respondents, UP discoms are, therefore, rejected.

26. The Respondents, UP discoms have referred to the findings of the Hon`ble Supreme Court in the Energy Watchdog judgment as regards Section 64(5) of the 2003Act and has contended that the State Commission (UPERC) only has jurisdiction in the matter. Section 64(5) of the 2003 Act provides as under:

> *“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.*

27. With regard to Section 64(5), the Hon`ble Supreme Court in its judgment dated11.4.2017 had observed the following:

> *"Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases."*

28. In our view, the findings of the Hon`ble Supreme Court on Section 64(5) do not in any manner support the argument of the Respondent that the State Commission (UPERC) will have jurisdiction in matters relating to inter-state supply of power. In the above quoted para, the Hon`ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of the two States. In the present case, the Petitioner has entered into PPAs for generation and supply of power to two States i.e. State of MP and the State of UP on long term basis. In respect of the UP discoms PPA dated 18.1.2014, the Respondent, UP discoms have invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, even though the tariff discovered under competitive bidding process was adopted by a State Commission under Section 63 of the 2003 Act, Section 64(5) has no application in the present case since the generating station is supplying power to more than one State and in terms of the judgment of the Hon`ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the generating station of the Petitioner vests with this Commission. In view of this, we find no merit in the submission of the Respondent, UP discoms and accordingly the same is rejected."

16. The above findings of the Commission in the order dated 18.1.2019 in Petition No. 224/MP/2018 and the Hon`ble Supreme Court judgment dated 11.4.2017 in the case of Energy watchdog are squarely applicable to the present case between the same parties regarding supply of power by the Petitioner to the Respondent, UPPCL/ UP Discoms in terms of the same PPAs. Therefore, we reject the objections of the Respondents UP Discoms on the issue of jurisdiction. Accordingly, we hold that the Commission has the jurisdiction in the present matter. The Petition is, therefore, maintainable.

Issues on Merit

17. Having dealt with the objections of the Respondents, UPPCL and UP Discoms as above and held that the Petition is maintainable, we proceed to examine the issues raised by the Petitioner, on merits.

18. After consideration of the submissions of the Petitioner and the Respondents, the claim of the Petitioner has been dealt with below. Following issues arise for consideration:

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

b. What is the scope of Change in law in the PPA?

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

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

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

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

19. The claims of the Petitioner in the present petition pertain to Change in law events related to the UP Discoms PPAs dated 18.1.2014 and 20.1.2014. These PPAs have similar provisions; Article 10.4 of these PPAs dealing with notification of change in law is extracted as under:

> *"10.4 Notification of Change in Law*
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> *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.*
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> *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.*
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> *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."

20. The Petitioner has submitted that the Respondents were duly informed about the events of Change in Law in respect of the PPA and their impacts vide the following notices:

(a) Letter dated 10.11.2015 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/7178

(b) Letter dated 11.12.2015 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/7291

(c) Letter dated 26.2.2016 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/7547

(d) Letter dated 8.3.2016 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/7579

(e) Letter dated 18.3.2016 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP

(f) Letter dated 20.3.2017 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/9951

(g) Letter dated 13.9.2017 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/711

(h) Letter dated 16.11.2017 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/847

(i) Letter dated 16.12.2017 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/907

(j) Letter dated 6.2.2018 bearing Reference No. MBPMPL/ANP-I/COMMERCIAL/UP/1318

21. Under Article 10.4.2 of the PPAs, the Petitioner is required to serve notice about occurrence of change in law events as soon as practicable after being aware of such events. The Petitioner has given notices as stated above to the UP Discoms/ PTC indicating the change in law events. Through the said notices, the Petitioner has appraised the Procurers about the occurrence of change in law events and the impact of such event on tariff. Neither UP Discoms

nor PTC has placed on record any issues with regard to such notices of Change in Law by the Petitioner. Thereafter, the Petitioner has filed the present Petition. In our view, the Petitioner has complied with the requirements of Article 10.4.2 of the PPAs.

Issue No.2: What is the scope of Change in law in the PPA?

22. The Petitioner has approached the Commission under Article 10 of the PPAs read with Section 79 of the Act for adjustment/ compensation to offset the financial/ commercial impact of change in law during the operating period along with carrying cost.

23. Article 10 of the PPAs dealing with the events of Change in law is extracted 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.

10.2 Application and Principles for computing impact of change in law

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

10.3 Relief for Change in Law
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10.3.2 During Operating Period

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

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

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

The term "Law" has been defined under Article 1.1 of the PPAs 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, Governments of state(s) of Uttar Pradesh, New Delhi and Madhya Pradesh; 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 Procurers."

24. A combined reading of the above provisions would reveal that the Commission has the jurisdiction to adjudicate upon the dispute between the Petitioner and UPPCL/ UP Discoms with regard to 'Change in Law' events which occur after the cut-off date (17.9.2012) and which is seven days prior to the bid deadline (24.9.2012). The events broadly covered under 'Change in Law' are as under:

(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 UPPCL Discoms as per terms of the Agreement.

(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 Article 10, the affected Party to the same economic position as if such “Change in Law” has not occurred.

(h) The Petitioner 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;

(i) The decision of the Commission with regard to the determination of compensation and the date from which such compensation shall become effective shall be final and binding on both the parties, subject to rights of appeal provided under Electricity Act, 2003.

(j) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller (Petitioner) in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

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

25. The Bid deadline and the cut-off date in respect of the PPA dated 20.1.2014 are as under:

Bid Deadline date	24.9.2012
Cut-off date (seven (7) days prior to the Bid deadline)	17.9.2012

26. The Petitioner has raised claims under Change in Law in respect of events during the operating period, namely increase in Clean Energy Cess (renamed as Clean Environment Cess,

subsequently, GST Compensation Cess) levied on the price of coal, Change in Chhattisgarh Infrastructure Development Cess (levied on the price of coal), Change in Chhattisgarh Environmental Cess (levied on the price of coal), Change in Coal Sizing Charges (levied on the price of coal), Change in Surface Transportation Cost (levied on the price of coal), Change in Service Tax and Introduction of Swachh Bharat Cess and Krishi Kalyan Cess (levied on coal transportation by Indian Railways), Introduction of Forest Tax (levied on the price of coal), Revision/ addition of components in computation of Central Excise Duty (levied on the price of coal), Change in MP Electricity Duty on Auxiliary Consumption and for self-consumption, Introduction of tax towards contribution to the National Mineral Exploration Trust (levied on the price of coal), Introduction of tax towards contribution to the District Mineral Foundation (levied on the price of coal), Introduction of Coal Terminal Surcharge (levied on coal transportation by Indian Railways); Introduction of Evacuation Facility Charges for dispatch of coal by CIL, implementation of GST and Amendment to the NCDP resulting in reduction in supply of domestic coal by SECL/ CIL under the FSA. Keeping in view the broad principles that define an event as change in law in terms of the PPAs, we proceed to deal with the claim of the Petitioner under Change in Law during the Operating Period.

I. Changes in Taxes, Duties and Cess

a. Clean Energy Cess

27. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, the rate of Clean Energy Cess on coal was Rs. 50 per tonne which was notified vide Notification No. 3/2010-Clean Energy Cess, dated 22.6.2010 issued by the Department of Revenue, Ministry of Finance, Government of India. Subsequently, Department of Revenue, Ministry of Finance vide its notification No. 1/2015-Clean Energy Cess dated 1.3.2015 enhanced the rate of Clean Energy Cess from Rs. 50 per tonne to Rs. 200 per tonne. Clean Energy Cess was further increased from Rs. 200 per tonne to Rs. 400 per tonne with effect from 1.3.2016 through the

notice bearing No. SEC/BSP/S& M/440 dated 29.2.2016 issued by SECL. Subsequently, the Government of India abolished the Clean Energy Cess through Taxation Law Amendment Act, 2017 with effect from 1.7.2017 and in place of Clean Energy Cess, GST Compensation Cess of Rs. 400 per tonne was levied from 1.7.2017. The Petitioner has submitted that the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 has declared GST Compensation Cess as Change in Law event. The Petitioner has submitted that due to above increase in the rate of Clean Energy Cess on coal, the cost of supply of power by the Petitioner to the Respondents under PPAs has increased and therefore, the Petitioner needs to be compensated for it as per Article 10.3 read with Article 10.5 of the PPAs. Accordingly, the Petitioner has prayed that the notifications issued by Department of Revenue, Ministry of Finance, Government of India, in terms of the Finance Acts, after the cut-off date, fall within the Change in Law events under the PPA and may be allowed.

28. The Respondents have not filed its specific comments on this issue.

29. We have considered the submission of the Petitioner. The Clean Energy Cess applicable at different point of time is as under:

From	To	Applicable Clean Energy Cess (Rs./tonne)
1.7.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	30.6.2017	400

30. It is noticed that Clean Energy Cess was introduced by the Government of India through the Finance Act, 2010 which was prior to the cut-off date in case of UP Discoms PPA. As on the cut-off date i.e.17.9.2012, Clean Energy Cess was applicable at the rate of Rs. 50/tonne. It is noticed that Clean Energy Cess introduced by Government of India 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 its various orders, namely order dated 30.3.2015 in Petition No. 6/MP/2013 (Sasan Power Ltd. Vs. MPMCL and others) and thereafter in order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs. MSEDCL and others), Order date 7.4.2017 in Petition No. 112/MP/2015 (GKEL & anr vs BSPHCL & anr) and order dated 31.5.2018 in Petition No. 170/MP/2016 (KSKMPCL Vs. TANGEDCO) and had allowed the said claim as a Change in Law event. The relevant portion of the order dated 7.4.2017 in Petition No. 112/MP/2015 is extracted as under:

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

From	To	Applicable Clean Energy Cess (Rs./tonne)
22.6.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	Till date	400

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

31. The above decision is also applicable in the case of the Petitioner in the instant case. Therefore, increase in Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the UP Discoms PPAs. Accordingly, the Petitioner is entitled to recover such increase in Clean Energy Cess from the UP Discoms as per applicable rate of

Clean Energy Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. As on the cut-off date, Clean Energy Cess was Rs. 50/tonne which the Petitioner was expected to factor in the bid. Thereafter, the applicable rate of Clean Energy Cess in case of UP Discoms PPAs for the purpose of change in law compensation computation shall be based on the relevant date/s on which changes in rate of Clean Energy Cess occurred. The change in law amount would be worked out, on the basis of the notified new rates less Rs. 50 as applicable as on cut of date, per tonne of coal consumed as per schedule given by the UP Discoms. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually. 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 in Clean Energy Cess has been allowed up to 30.6.2017. With effect from 1.7.2017, the Petitioner shall be entitled for GST Compensation Cess in terms of the Commission's order dated 14.3.2018 in Petition No. 13/SM/2017.

b. Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environmental Cess

32. The Petitioner has submitted that as on the cut of date, i.e. 17.9.2012, the Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess were Rs. 5/tonne each. Subsequently, vide Gazette Notification dated 16.6.2015, the Revenue and Disaster Management Department, Government of Chhattisgarh, increased in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess from Rs. 5/tonne to Rs 7.5/tonne each. Pursuant to the above Notification, SECL vide its notice dated 19.8.2015 notified the increase in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess to Rs

7.5/tonne each w.e.f. 16.6.2015. The Petitioner has submitted that Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess levied by the Government of Chhattisgarh under Section 3 read with Schedule I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam 2005 and under Section 4 read with Schedule I of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005, respectively are covered under Change in Law events as per Article 10.1.1 of the PPAs.

33. We have considered the submission of the Petitioner. The Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 provides for the 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:-*
>
> *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.*
>
> *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.

34. Subsequently, State 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 Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environmental Cess vide Notification No. 340 dated 16.6.2015 as under:

"Schedule I

Sl.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

Sl No	*Classification of Land*	*Rate of Environment 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*

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

35. The issue of change in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environmental Cess as a Change in Law event had been considered in Petition No. 18/MP/2017 (BALCO Vs KSEB &ors) and after examining the provisions of the Chhattisgarh (Adhosanrachna Vikas Evam Paryavaran) Upkar Adhiniyam, 2005 and its amendment thereof, this Commission allowed the said claim. The relevant portion of the order dated 18.4.2018 in Petition No. 18/MP/2017 is extracted here under:

> "48. It is noted that as on the cut of date, the rate of Infrastructure development cess and environmental cess was Rs.5 on each tonne of annual dispatch of mineral. Government of Chhattisgarh vide its Notification dated 18.9.2015 revised the Infrastructure development cess and Environment Cess from Rs. 5/MT to Rs. 7.50/MT which is applicable for all SECL coal dispatches from 16.6.2015 which has an impact on the cost of generation of electricity for supply to KSEB. Since, the Infrastructure development cess and Environment Cess has 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......"

36. In accordance with the above decision, the expenditure towards increase in rate of Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess are admissible as a Change in Law events under Article 10 of the PPAs. Accordingly, the Petitioner is entitled to recover such increase in Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess from the UP Discoms as per applicable rates of Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. As on the cut-off date, both Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment

Cess were Rs. 5/tonne each which the Petitioner was expected to factor in the bid. Thereafter, the applicable rates of both Chhattisgarh Infrastructure Development Cess and Chhattisgarh Environment Cess in case of UP Discoms PPA shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

c. Coal Sizing Charges and Surface Transportation Cost

37. The Petitioner has submitted that as on the cut-off date, coal sizing charges were Rs. 61/tonne of coal. Subsequently, Coal India Limited vide its notice dated 16.12.2013 increased the coal sizing charges to Rs. 79/tonne of coal (excluding impact of taxes and duties) w.e.f. which was further increased by CIL vide its notification dated 31.8.2017 to Rs. 87/tonne w.e.f. 1.9.2017.

38. With regard to change in surface transportation cost, the Petitioner has submitted that as on cut-off date i.e. 17.9.2012, surface transportation cost was Rs. 44/tonne for 3-10 km and Rs. 77/tonne for 10-20 km which was increased by Coal India Limited vide its notice dated 13.11.2013 to Rs. 57/tonne and Rs. 116/tonne of coal respectively. Subsequently, SECL vide its notice dated 15.11.2017 increased the surface transportation cost to Rs. 87/tonne for 3-10 km.

39. The Petitioner has submitted that mining of coal is a purely nationalized activity save and except the grant of captive coal blocks for limited end use. Mining of coal has to be carried out by a government company. This aspect has been dealt with in detail by the Hon'ble Supreme Court in the case of Manohar Lal Sharma v. Union of India [(2014) 9 SCC 516 [Para 162.6]]. Under the statutory scheme, coal distribution and its price fixation are completely under the control of the Ministry of Coal which exercises a direct control over CIL being its major shareholder. Coal distribution is controlled by CIL by signing of FSAs incorporating all the terms

and conditions governing such distribution. CIL regulates not only the supply of coal but also the price at which it is supplied across the country. For the purposes of distribution of coal, CIL issues notifications from time to time to specify the Coal Sizing Charges. The Petitioner has submitted that the Hon'ble Supreme Court in the case of Sri Sitaram Sugar Company v. Union of India &Ors. [(1990)3 SCC 223 (Para41-44)] has upheld the principle that determination of price (having general application) in pursuance of the statutory mandate is a legislative function. As such, the fixation of coal sizing charges by CIL is in the nature of a quasi-legislative function, and the notifications so issued, constitute 'law' within the meaning of the provisions of the PPA as they define the code qua charges which is uniformly followed by all subsidiaries of CIL for the distribution of coal irrespective of the actual cost that may be incurred for such activity.

40. The Respondent, UPPCL in its reply dated 20.10.2018 has submitted that since the Petitioner has not placed on record the documents to prove that the notifications increasing sizing charges of coal and surface transportation charges, have been issued pursuant to any Act of Parliament, these charges are not admissible under Change in law.

41. The issue pertaining to sizing and crushing charges has been dealt by this Commission earlier in various Petitions. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has already dealt with the issue of increase in sizing and crushing 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 dated22.2.2013 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 to250 mm 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."

42. The Appellate Tribunal vide its judgment dated 14.8.2018 in Appeal No. 111 of 2017 has upheld the Commission's order dated 1.2.2017 in Petition No. 8/MP/2014 pertaining to increase in Sizing and Crushing Charge and Surface Transportation Charges. The relevant portions of the Hon`ble Appellate Tribunal Order dated 14.8.2018 in Appeal No. 111 of 2017 (GMR Warora Energy Limited versus CERC & Ors) is extracted as under:

> *xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgement. In our opinion the findings of this Tribunal in the said judgement are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:*
>
> *Sizing Charges:*
> *"11. A*
> *xvii. ....*
> *The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL*
> *xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.*
>
> *We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required*

to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xix. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission.

Accordingly, this issue is decided against APRL.

Transportation Charges :

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

xxv. In view of the above, we are of the considered opinion that any change in surface transportation charges must have been taken care by APRL in its quoted tariff appropriately. Accordingly, the contention of APRL that the increase in transportation charges which forms part of coal cost by an Indian Government Instrumentality i.e. CIL would be covered under Change in Law provision of PPA is misplaced. Accordingly, we do not find any infirmity in the decision of the State Commission on this issue.

Hence, this issue is answered against APRL/Appellant."

xv. The present case is also similar to the case as in the Adani Judgement. The provisions of the RFP are also similar. Accordingly, in view of our decision Adani Judgement as reproduced above we are of the considered opinion that there is no merit in the contentions of GWEL on the issues of change in sizing charges of coal and surface transportation charges.

Accordingly, these issues are answered against GWEL/Appellant and we do not find any error on the face of record in the findings recorded by the Central Commission on these issues."

43. In line with the above decisions of the Commission and the Appellate Tribunal, the claim of the Petitioner for relief under "Change in Law" in respect of sizing/ crushing charges and surface transportation cost of coal, is disallowed.

d. Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess

44. The Petitioner has submitted that as on the cut-off date, i.e. 17.9.2012 Service Tax @ 12.36% (including Education Cess and Higher Education Cess) was applicable on all taxable services. Ministry of Railways vide letter no. TCR/1078/2011/2 dated 27.6.2012 notified that an abatement of 70% had been permitted on freight for taxable commodities and Service Tax @ 12.36% would be charged on 30% of the total freight inclusive of all charges on goods. Therefore, the total Service Tax implication on transportation of coal by Indian Railways was 3.708% (i.e. 30% of 12.36%) on the total freight. Subsequently, Ministry of Railways, Government of India, vide Notification No. TCR/1078/2015/15 dated 27.5.2015 notified the increase in Service Tax for transportation of coal from 12.36% to 14% (with an abatement of 70%) w.e.f. 1.6.2015 thereby increasing the Service Tax for transportation of coal by Indian Railways to 4.2% (i.e. 30% of 14%). Thereafter, vide Notification No. 21/2015 and 22/2015 dated 06.11.2015, Ministry of Finance, Government of India, introduced Swachh Bharat Cess @ 0.5% on all taxable services w.e.f. 15.11.2015. Thus, total Service Tax was increased from 14% to 14.5%, thereby increasing the effective Service Tax for transportation of coal from to 4.35% (i.e. 30% of 14.5%) from 4.2% (i.e. 30% of 14%) w.e.f. 15.11.2015. Subsequently, vide Notification Nos. 27 to 31/2016-Service Tax dated 26.5.2016, Ministry of Finance, Government of India introduced Krishi Kalyan Cess @ 0.5% on all taxable services w.e.f. 1.6.2016. Thus, total Service Tax was increased from 14.5% to 15%, thereby increasing the effective Service Tax for transportation of coal to 4.5% (i.e. 30% of 15%) from 4.35% (i.e. 30% of 14.5%) w.e.f. 1.6.2016. Thereafter, Government of India abolished Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess w.e.f. 1.7.2017. On 30.6.2017, Ministry of Railways, Government of India notified that GST

@ 5% shall be levied on transportation of goods (including coal) by Indian Railways w.e.f. 1.7.2017. Therefore, w.e.f. 1.7.2017, effective Service Tax of 4.5% for transportation of coal by Indian Railways was replaced by GST @ 5%.The Petitioner submitted that increase in service tax for coal transportation on account of said events squarely falls under Article 10.1.1 of the PPA and qualifies as Change in Law event for which the Petitioner is entitled to be compensated. The Petitioner has submitted that the Commission in its Order dated 14.3.2018 in Petition No. 13/SM/2017 has held that Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess have been subsumed in GST, and the same is a Change in Law event.

45. The Respondents have not filed its specific comments on this issue.

46. We have examined the submissions. 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."*

47. Therefore, Swachh Bharat Cess and Krishi Kalyan Cess are Service Taxes on taxable service and have been introduced through an Act of Parliament and is, therefore, covered under change in law provisions of the PPAs. 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 22.6.2018 in petition No. 171/MP/2016 (EMCO Energy Limited/GMRWEL V MSEDCL &anr), order dated 6.2.2017 in Petition No. 156/MP/2014 (APL V UHBVNL & anr) and order dated 7.4.2017 in Petition No. 112/MP/2015 (GMRKEL & anr v BSPHCL & anr).

48. As regards Service tax on transportation of goods by Indian Railways, the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 had 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 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."*

49. By Ministry of Finance 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. Therefore, as on cut-off date in case of UP Discoms PPA i.e. 17.9.2012, the service tax on transportation of

goods by Railways was under exemption. Accordingly, the Petitioner could not have factored Service Tax on transportation of goods by Indian Railways at the time of submission of the UP Discoms bid. However, with effect from 1.10.2012, Service Tax on 30% of the transport of goods by rail became chargeable. Therefore, the Petitioner has accounted for 30% of 12.36% i.e. 3.708% after the cut-off date and the same shall be admissible under the UP Discoms PPA as on 1.10.2012. The 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 6.11.2015 to 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 transportation of goods @ 30% of Service tax**	**Admissible rate of service tax under Change in law**
17.9.2012 (cut-off date)	12.36%		
1.10.2012	12.36%	3.708%	0%
1.6.2015	14.00%	4.200%	0.492%
15.11.2015	14.50%	4.350%	0.642%
1.6.2016	15.00%	4.500%	0.792%

50. The Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 has already held that Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess have been subsumed in GST, and the same is a Change in Law event. Accordingly, the Petitioner shall be entitled to recover the above-mentioned increase in Service Tax on transportation of coal from the UP Discoms as per applicable rate of Service Tax in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually, consumed, whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms.

The Petitioner and UP Discoms are further directed to carry out reconciliation on account of these claims annually.

e. Forest Tax

51. The Petitioner has submitted that as on cut-off date i.e. 17.9.2012, there was no imposition of Forest Tax. Subsequently, Forest Tax@ Rs. 7 per tonne was levied w.e.f. 1.11.2012 under Chhattisgarh Transit (Forest Produce) Rules, 2001, for coal mined and transported from SECL mines located in forest area of Chhattisgarh. Subsequently, in pursuance to Notification dated 30.6.2015 of Government of Chhattisgarh, SECL vide its circular dated 12.10.2015 revised the Forest Tax rates from Rs. 7 per tonne to Rs. 15 per tonne w.e.f. 1.7.2015 for mining and transportation of coal located in Chhattisgarh. The Petitioner vide its affidavit dated 14.8.2018 has provided the copy of Gazette Notification dated 30.6.2015 of Government of Chhattisgarh with respect to increase in Forest Tax to Rs. 15 per tonne for coal mined and transported from SECL mines located in forest area of Chhattisgarh. The Petitioner has submitted that the above levy and increase in Forest Tax constitutes Change in law as per Article 10.1.1 of the PPA.

52. We have considered the submissions of the Petitioner.This issue has been dealt with by the Appellate Tribunal in Appeal No. 119 of 2016 and others (Adani Power Limited Vs. Rajasthan Electricity Regulatory Commission and others). In this matter, Rajasthan Electricity Regulatory Commission (RERC) in its impugned order dated 15.3.2016 had denied the levy of Forest Tax as a fee similar to toll/ entry fee on the ground that does not meet the criteria of Change in Law event. The above decision of RERC was challenged before the Appellate Tribunal by Adani Power Ltd. The Appellate Tribunal in its judgment dated 14.08.2018 in Appeal No. 119 of 2016 and others decided that the Forest Tax was a change in law event. Relevant portion of said judgment is extracted as under:

"xxii. It is observed that the claim of APRL for the said fee at the rate of Rs. 7/ton has been levied based on Chhattisgarh Government, Forest Department letter dated 6.10.2012, under Chhattisgarh Transit (Forest Produce Rule) 2001 on coal mined and transported from SECL mines located in Forest area with effect from 1.11.2012. There was no such fee applicable as on cut-off date of the bid deadline. Accordingly, APRL could not have envisaged for factoring it in its bid. The levy of Forest Tax/Fee cannot be considered as a part of pricing mechanism for coal and hence it cannot form part of CERC Escalation Rates for coal. Accordingly, there has been increase in expenses related to coal due to such levy and the same falls under the category of first bullet of Article 10.1.1 of the PPA read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA. This is also in line with the judgement of this Tribunal in Appeal No. 288 of 2013 as discussed above. Accordingly, the State Commission has not justified in rejecting the benefit claims of the APRL/Appellant."

53. As per the above decision of the Appellate Tribunal, Forest Tax @ Rs.7/tonne on coal mined and transported from SECL mines located in forest area had been levied with effect from 1.11.2012 under Chhattisgarh Transit (Forest Produce) Rule, 2001 based on Chhattisgarh Government, Forest Department`s letter dated 6.10.2012. Therefore, levy of Forest Tax constitutes 'Change in Law' in terms of Article 10 of the PPA. Based on Chhattisgarh Government, Forest Department letter dated 6.10.2012, Forest Tax @Rs.7/tonne of coal was levied with effect from 1.11.2012. As such, there was no Forest Tax as on cut-off date of 17.9.2012. Further, in pursuance to Notification dated 30.6.2015 of Government of Chhattisgarh, the Forest Tax was revised from Rs. 7/ tonne to Rs. 15/ tonne of coal with effect from 1.7.2015. Accordingly, the Petitioner is entitled to recover such levy and subsequent increase in Forest Tax from the UP Discoms as per applicable rate(s) of Forest Tax in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to the UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

f.Central Excise Duty

54. The Petitioner has submitted that as on the cut-off date i.e. 17.9.2012, the Central Excise Duty of 6.18% was applicable on the components of coal cost, namely, basic coal value, Crushing/ Sizing Charges and Surface Transportation charges. The Petitioner has stated that after 8.3.2013, SECL directed for inclusion of the components namely "royalty" and "stowing excise duty" for imposition of Central Excise Duty, applicable retrospectively from 1.3.2013. The Petitioner has further stated that the Parliament vide Finance Act, 2015 abolished the education cess and higher education cess w.e.f. 1.3.2015. Accordingly, SECL vide its notice dated 28.2.2015 revised the Central Excise Duty from 6.18% to 6% w.e.f. 1.3.2015. 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/RP/2016 in Petition No. 153/MP/2015 held that Royalty and stowing duty are to be included in the excisable value of coal. The Petitioner has further submitted that the increase in Central Excise Duty on account of inclusion of royalty and stowing charges has been allowed by the Commission as a Change in Law event in Petition No. 79/MP/2013. The Petitioner has submitted that it is entitled to inclusion the charges mentioned in the Petition for arriving at the assessable value of coal for the computation of excise duty payable on coal.

55. We have considered the submissions of the Petitioner and perused the documents on record. Pursuant to the Commission's direction dated 26.7.2018, the Petitioner approached the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty for the Period from 1.4.2012 to 30.6.2017. The Assistant Commissioner, Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh vide its letter dated 13.8.2018 has clarified as under:

> *"Please refer your letter C. No. MBPMPL/ANP-1/SECL/2018-19/573dtd.08.08.2018 submitted in this office on 13.08.2018 on the above subject.*

2. In this regard, it is to inform that as per Section 4 of Central Excise Act, 1944, for the period 1st April 2012 to 30th June 2017 following elements should be added for arriving the assessable value of coal for payment of Excise duty:

i. Value of Coal
ii. Royalty
iii. Stowing Excise Duty
iv. National Mineral Exploration Trust (NMET)
v. District mineral Foundation (DMT)
vi. Sizing Charge
vii. Surface Transportation Charge
viii. Niryat kar
ix. CG Development tax
x. CG Environment Tax
xi. Forest Cess

3. Further, it is to inform that M/s. South Eastern Coalfields Limited, Bilaspur had been paying Central Excise Duty on above considerations under protest after issuance of various show cause notices. The show cause notices have also been confirmed by the Adjudicating Authority."

56. Section 4 of the Central Excise Duty, 1994 provides as under:

"Section 4.Valuation of excisable goods for purposes of charging of duty of excise. (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall – (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value; (b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed. Explanation.- For the removal of doubts, it is hereby declared that the price-cum duty of the excisable goods sold by the assessee 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 assessee in connection with the sale of such goods, and 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.
(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,- (a) "assesse" means the person who is liable to pay the duty of excise under this Act and includes his agent; (b) persons shall be deemed to be "related" if - (i) they are inter-connected undertakings; (ii) they are relatives; (iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or (iv) they are so associated that they have interest, directly or indirectly, in the business of each other."

As per the above provisions of the Central Excise Act, 1944, the price-cum-duty of excisable goods sold by an assessee 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.

57. The Commission in its dated 16.3.2018 in Petition No. 1/MP/2017 has examined the issue as under:

> *“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, Niryat Kar, 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.”*

58. In view of the above decision taken by the Commission, we allow all the components mentioned by the Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh in its letter dated 13.08.2018 to be included in the assessable value of coal for the purpose of computation of Excise Duty. The Office of the Assistant Commissioner, CGST & Central Excise, Division Bilaspur, Chhattisgarh has provided clarifications only for the period from 1.4.2012 to 30.6.2017 and the petitioner has not placed any documents for the applicability of Central Excise Duty after the applicability of GST i.e. from 1.7.2017. Therefore, the claim shall only be provided from 1.3.2013 to 30.6.2017. Accordingly, the Petitioner is entitled to recover such change in Central Excise Duty from the UP Discoms as per applicable components of Central Excise Duty in proportion to the coal as per the parameters of the

applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

g. MP Electricity Duty on Auxiliary Consumption and self-consumption

59. The Petitioner has submitted that as per Section 3(3) of the Madhya Pradesh Vidyut Shulk Adhiniyam, 2012, every generating company, Captive Generating Plant and producer is required to pay to the State Government (at the prescribed time and in the prescribed manner) duty calculated at the rates specified in Part-C of the schedule on the units of electricity consumed by itself or sold to consumers within the State of Madhya Pradesh. Accordingly, on 25.4.2012, Government of Madhya Pradesh notified the levy of Electricity Duty @15% of the applicable Discom tariff on electricity consumed by the generating companies for their auxiliary and self-consumption. Therefore, Discom tariff prescribed by the MP Electricity Regulatory Commission (MPERC) stands incorporated into the notification and accordingly, forms one of the parameters/ factors to be considered for working out the electricity duty. The Petitioner has submitted that as per Retail Tariff Order issued by MPERC for FY 2012-13, the applicable Discom Tariff was Rs. 5.40 per unit which was subsequently revised to Rs. 6.05 per unit for the financial year 2015-16 (commencement of power supply to the Procurers under the Long Term PPA commenced in financial year 2015-16 i.e. August 2015) and further revised to Rs. 6.50 per unit for financial year 2016-17 and Rs. 6.80 for financial year 2017-18. Subsequently, the Department of Energy, Government of Madhya Pradesh vide Notification No. 2493-F-3-02-2011-XIII dated 1.4.2016, amended the Madhya Pradesh Vidyut Shulk Adhiniyam, 2012 thereby reduced the Electricity Duty from 15% to 12% of the applicable tariff w.e.f. 1.4.2016. The Petitioner has submitted that change in the rate of Electricity Duty on auxiliary consumption has

resulted in an additional financial impact on the Petitioner and change in electricity duty through an enactment is covered under Article 10.1.1 of the PPAs.

60. The Respondents, UPPCL and UP Discoms have submitted that as on cut-off date, 15% electricity duty was in force which was subsequently reduced from 15% to 10% by the Government of Madhya Pradesh vide its Notification dated 1.4.2016. Therefore, the consequential benefits should be passed on to the beneficiaries. The Respondents have further submitted that Discom tariff is reviewed annually and same was known to the Petitioner as on cut-off date. The Respondents have submitted that the Petitioner has not furnished documentary proof regarding actual payment of electricity duty to the Government of Madhya Pradesh and details of the calculations towards such electricity duty payable.

61. We have considered the submissions of the Petitioner and the Respondents. The Commission in its order dated 30.12.2015 in Petition No. 118/MP/2015 has decided that the event of electricity duty on auxiliary consumption increased by the State Govt. qualifies as Change in Law. Relevant Paras of the said order dated 30.12.2015 are extracted as under:

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

62. In the light of the decision as quoted above, the claim of the Petitioner for reimbursement on account of Change in MP Electricity Duty on Auxiliary Consumption and for self-consumption

is allowed under Change in Law. Accordingly, the Petitioner is entitled to recover such increase in Electricity Duty on Auxiliary Consumption and for self-consumption from the UP Discoms as per applicable annual rate of MP Discom Tariff revised from time to time for such Electricity Duty in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed, whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

h. Tax towards contribution to the National Mineral Exploration Trust and District Mineral Foundation

63. The Petitioner has submitted that as on the cut-off date, there was no provision for payment to be made to National Mineral Exploration Trust and/or District Mineral Fund. On 27.3.2015, the Government of India amended the Mines and Minerals (Development and Regulation) Act, 1957 and enacted the Mines and Minerals (Development and Regulation) Act, 2015 in which Section 9B (Creation of DMF) and Section 9C (Creation of NMET) were introduced. Pursuant to MMDR Amendment Act, on 14.8.2015, the Ministry of Mines issued the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 and imposed tax @2% in terms of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957. As per Rule 7(3) of the National Mineral Exploration Trust Rules, 2015, the amount towards contribution to National Mineral Exploration Trust is required to be paid simultaneously along with royalty to the State Government. The Petitioner has submitted that as per Rule 2 of the said Rules, every holder of a mining lease or a prospecting licence-cum-mining lease shall, in addition to the royalty paid to the DMF, an amount at the rate of (a) 10% of the royalty paid in terms of the Second Schedule to the Mines

and Minerals (Development and Regulation) Act, 1957, in respect of the mining lease or, as the case may be, prospecting licence-cum mining lease granted on or after 12.1.2015; and (b) 30% of the royalty paid in terms of the Second Schedule to the Mines and Minerals (Development and Regulation) Act, 1957, in respect of mining leases granted before 12.1.2015. The Petitioner has submitted that pursuant to enactment of above Rules by Ministry of Mines, Government of India, SECL vide its notice dated 13/14.11.2015 imposed tax @2% and 30% of the royalty on per tonne of coal w.e.f. 14.8.2015 and 12.1.2015 towards contribution to National Mineral Exploration Trust and District Mineral Foundation respectively. The Petitioner has submitted that the Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014, order dated 17.2.2017 in Petition No. 16/MP/2017 and order dated 17.4.2017 in Petition No. 112/MP/2015 had considered the imposition of contribution towards DMF and NMET as change in law events.

64. We have considered the submissions made by the Petitioner. Regarding the admissibility of additional levy for the DMF and the NMET, the issue was examined by the Commission in 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."

65. In our view, the case of the Petitioner is covered under the above order of the Commission. Therefore, the levy of @ 2% of the Royalty towards contribution to National Mineral Exploration Trust and @ 30% of the Royalty for contribution to the District Mineral Foundations is admissible under Change in Law. Accordingly, the Petitioner is entitled to recover such increase caused due to imposition of tax towards contribution to National Mineral Exploration Trust and District Mineral Foundation from the UP Discoms as per their respective applicable rate(s) in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

i. Coal Terminal Surcharge

66. The Petitioner has submitted that as on cut of date, there was no levy of Coal Terminal Surcharge. Subsequently, the Railway Board, Ministry of Railways vide Circular No. TCR/1078/2017/07 dated 22.8.2016, imposed a Coal Terminal Surcharge w.e.f. 22.8.2016 at Rs. 55/tonne at both loading and unloading of coal (totalling to Rs. 110/tonne) for distance beyond 100 km. The Petitioner has submitted that the Coal Terminal Surcharge introduced by way of Railway Circular and effective after the cut-of date is change in law event. The Petitioner has submitted that subsequently, Railway Board vide its Circular dated 6.7.2017 abolished Coal Terminal Surcharge w.e.f. 10.7.2017.

67. The Respondents, UPPCL and UP Discoms in their joint reply have submitted that levy of Coal Terminal Surcharge on coal transportation by the Ministry of Railways vide Circular dated 22.8.2016 is in the nature of change in base freight charges and the Petitioner was expected to take into account the possible revision in these charges while quoting the bid. It has further stated that the Petitioner is compensated for any revision in base freight rate through changes in escalation indices notified by the Commission from time to time.

68. We have considered the submissions of the Petitioner and the Respondents. The Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 119 of 2016 & IA Nos. 668 & 674 of 2016 has held that the circulars issued by Ministry of Railways (MoR) have a force of law. The relevant portion of the said judgment dated 14.8.2018 (Page No. 50) is extracted as under:

> *"xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law."*

69. Further, the Commission in its order dated 2.4.2019 in Petition No. 72/MP/2018 has considered levy of Coal Terminal Surcharge by Indian Railways as a Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

> *"32. Accordingly, the Petitioner is entitled to recover the Coal Terminal Surcharge from the Respondents as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Coal Terminal Surcharge was nil. Thereafter, the applicable rates of Coal Terminal Surcharge shall be paid based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and /or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually".*

70. The above decision of the Commission is also applicable in the present case. As on cut-off date i.e.17.9.2012, there was no Coal Terminal Surcharge on transportation of coal. Subsequently, Ministry of Railways vide its circular dated 22.8.2016, levied Coal Terminal Surcharge of Rs. 110/tonne (Rs. 55/tonne on each terminal) on transportation of coal with effect from 22.8.2016 and the same was subsequently abolished with effect from 10.7.2017 vide Ministry of Railways circular dated 6.7.2017. Since circulars issued by Ministry of Railways have force of law, therefore introduction of Coal Terminal Surcharge by Ministry of Railways vide its circulars constitutes 'Change in Law' in terms of Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover such Coal Terminal Surcharge from the UP Discoms as per its applicable rate in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

j. Evacuation Facility Charges

71. The Petitioner has submitted that as on the cut-off date, there was no levy of Evacuation Facility Charges on despatch on coal. Subsequently, Coal India Ltd. vide its price notification No. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 levied 'Evacuation Facility Charges' @Rs. 50/ tonne on despatch of coal. The Petitioner has submitted that the said levy is applicable on the procurement of coal by the Petitioner for the purpose of generating electricity.

72. We have considered the submissions of the Petitioner and perused the price notification dated 19.12.2017 issued by Coal India Ltd. with regard to levy of Evacuation Facility Charges. The Petitioner has submitted that Coal India Limited is an Indian Government Instrumentality and the notifications issued by Coal India Limited with regard to Evacuation Facility Charges is covered under the definition of law and any change in such charges is covered under Change in Law.

73. The issue of levy of Evacuation Facility Charges by CIL has been dealt with by the Commission in its order dated 2.4.2019 in Petition 72/MP/2018 and the Commission has allowed such levy of Coal Evacuation Facility charges by CIL as Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

> *"42. We have considered the submission made by the Petitioner. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of 'evacuation facility charges' at the rate of Rs.50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017ELR(APTEL)508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence,*

we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event.

43. Accordingly, the Petitioner is entitled to recover the Evacuation Facility Charges as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or coal actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Evacuation Facilities Charges were Nil. Thereafter, the applicable rates of Evacuation Facilities Charges shall be used based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually."

74. The above decision of the Commission is also applicable in the present case. CIL being an Indian Government Instrumentality, its notification dated 19.12.2017 with respect to levy of Evacuation Facility Charges on coal price constitutes Change in Law in terms of Article 10 of the PPAs. Further these Evacuation Facility Charges is not a part of the escalation index notified by this Commission periodically. Hence, introduction of Evacuation Facility Charges by CIL beyond the cut-off date is admissible to the Petitioner as a Change in Law.

75. Accordingly, the Petitioner is entitled to recover such Evacuation Facility Charges from the UP Discoms as per applicable rates of Evacuation Facility Charges in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to UP Discoms. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

k. GST

76. The Petitioner has submitted that in order to introduce a unified indirect tax structure in the form of Goods and Services Tax (GST), the Parliament has enacted the certain legislations. These legislations have come into effect from 1st July 2017. Therefore, the taxes and duties which were admissible under Change in Law provisions of the PPAs have been replaced by

either Central GST or State GST. In addition, certain existing taxes have been abolished and certain new taxes have been introduced. The Petitioner has submitted that the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 had inter alia held that the introduction of GST and subsuming/ abolition of specific taxes, duties, etc. in the GST is a change in law event. The Petitioner has prayed to allow the above events as change in law.

77. We have considered the submission of the Petitioner. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess, initiated a suo motu Petition No. 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. The Commission in the above Petition vide order dated 14.3.2018 decided as under:

"32. At the same time GST and IGST were also introduced from 01.07.2017 and some of the taxes, duties and levies were abolished or subsumed therein. The Commission through the instant petition tried to ascertain the impact of the same on the generators and discoms/beneficiary States by seeking detailed submissions from all concerned.

33. It has been observed that some of the generators and discoms have submitted the calculations of impact of change in law. These calculations show varying impact of such changes on different generators and discoms on various dates. The impact worked out by the discoms was different from that submitted by the generators. Further, the generators have also not submitted a clear declaration as called for that there are no other taxes, duties, cess etc., which have been reduced or abolished or subsumed. From the forgoing, the Commission feels that due to varied nature of such taxes, duties and cess etc. that have been subsumed/ reduced, it is not possible to quantify in a generic manner, the impact of change in law for all the generators.

34. Hence, we are of the opinion that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/ beneficiary States. Since, these are change in law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.

35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission."

78. The above decision of the Commission is applicable in the present case of the Petitioner.

II. Amendment in NCDP

79. The Petitioner has submitted that the power project was conceived on the basis of domestic coal to be sourced from linkage coal to be supplied by CIL/ its subsidiary, SECL under the assured long term coal linkage granted in terms of the New Coal Distribution Policy, 2007 issued by the Ministry of Coal on 18.10.2007. In terms of the above policy, Coal India Limited or its subsidiaries were responsible for supply of 100% of the domestic fuel quantity to all the IPPs including the Petitioner. The Petitioner was issued LOAs by Southern Coalfields Ltd on 6.6.2009 as modified on 6/7.9.2011 providing firm linkage coal. The Petitioner has submitted that pursuant to the NCDP, FSA was executed by the Petitioner with SECL on 26.3.2013. Therefore, as on the cut of date, i.e. 17.9.2012, the Petitioner was entitled to receive the entire coal required for generation and supply of power to the Procurers under the Procurers-PPA dated 18.1.2014 by way of domestic linkage coal to be supplied by SECL/ CIL.

80. The Petitioner has submitted that on 24.9.2012, it submitted its winning bid through Respondent No. 6 i.e. PTC for supply of 361 MW (net) power from its Project premised on the entire fuel requirement for supply to the Procurers being met by domestic linkage coal to be supplied by CIL/ its subsidiary SECL under the assured long term coal linkage granted in terms of the New Coal Distribution Policy ("NCDP") issued on 18.10.2007 by MoC read with Letter of Assurances dated 6.6.2009 as modified on 6/7.9.2011.

81. The Petitioner has submitted that on 21.06.2013, the Cabinet Committee on Economic Affairs, Government of India (CCEA) approved coal supply mechanism for power producers stating that higher cost of imported coal to be considered for pass through as per modalities suggested by this Commission and MoC (Ministry of Coal) to issue suitable orders supplementing the NCDP. MoP (Ministry of Power) was to issue appropriate advisory to Central/

State Commission(s) including modifications, if any, in the bidding guidelines to enable Appropriate Commission to decide the pass through of higher cost of imported coal on case to case basis.

82. The Petitioner has submitted that by Office Memorandum dated 26.7.2013; MoC amended the NCDP, relevant extracts being as under:

> *"2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. Cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. To meet its balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.*
>
> *3. Para 2.2 and 5.2 of the New Coal Distribution Policy issued vide OM No. 23011/4/2007-CPD dated 18.10.2007 stand modified to the above extent."*

83. On 31.7.2013, in consonance with the aforesaid Office Memorandum, MoP issued a letter to the Commission, informing that after considering all aspects and the advice of the Commission, the Government has decided the following in June 2013:

> *(i) Taking into account the overall domestic availability and actual requirements, FSA to be signed for domestic coal component for the levy of disincentive at the quantity of 65% of ACQ for financial year 2013-14 and financial year 2014-15, 67% of the ACQ for financial year 2015-16 and thereafter 75% of ACQ .*
>
> *(ii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants on cost plus basis. Thermal Power Plants may also import coal themselves if they so opt.*
>
> *(iii) Higher cost of imported coal to be considered for pass through as per modalities suggested by the Commission.*

84. Petitioner in its submission has cited the provision of revised Tariff policy, relevant extract of which is given below, dealing with the aspect of shortage of linkage coal.

> *"However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL,vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-*

auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC(Vol-III) dated 31.7.2013."

85. Petitioner has submitted that amendment to NCDP by MoC on 26.07.2013, from the original NCDP which assured supply of 100% of required normative coal quantity, is Change in law as per the provisions of PTC-PPA and Procurers-PPA. Petitioner has quoted the findings of Hon'ble Supreme Court in Energy Watchdog & Ors vs Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80

> *"53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground.*
> *****
> *Both the letter dated 31st July, 2013 and the revised tariff policy is statutory documents being issued under Section 3 of the Act and has the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not*
> *occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission…."This being the case, we are of the view that though change in Indonesian law would not qualify as a Change in Law under the guidelines read with the PPA, change in Indian law certainly would."*

86. The Petitioner has submitted that in continuation of the CCEA decision dated 21.6.2013, CCEA on 17.5.2017 approved the signing of FSA with LoA holders and introduced a revised policy for coal allocation for power sector, namely, SHAKTI Scheme. The CCEA decision dated 17.05.2017 inter alia envisages the allocation of coal into two regimes: For existing regime (Project with FSAs) and New Regime i.e. SHAKTI Scheme. Based on this decision, MoC issued a letter notifying the policy guidelines. As per clause (A)(iii) of the Policy Guidelines, notified by Ministry of Coal on 22.5.2017, the existing LoA holders as per the CCEA decision dated 21.6.2013 would continue to get coal at 75% of the ACQ even beyond 31.3.2017 as against the assured ACQ of 100%. The Petitioner has submitted that as per the Hon`ble Supreme Court decision in Energy Watchdog case, such policy decisions are statutory in nature, binding and

have the force of ‘law’. Therefore, such reduction in assured quantity of coal is a Change in Law event and the change in NCDP resulting in reduction in assured quantity of coal continues beyond 31.3.2017.

87. The Petitioner has submitted that due to the said reduction in the quantity of the linkage coal, the Petitioner was constrained to procure balance coal from other sources like e-auction, open market, coal supplied by SECL through Road as Mode of Transportation (viz. “as-is-where-is” basis coal, coal through washery circuit, beyond trigger level coal, additional coal etc.) at a much higher price than the price of regular linkage coal (i.e. linkage coal supplied by SECL through rail transportation mode under FSA) to fulfil its power supply obligations under the PPAs. The Petitioner has further submitted that in addition to regular linkage coal supplied by SECL in accordance with the Schedule-I of the FSA, i.e. through rail transportation mode, SECL, has also offered coal (by publishing notifications) on “as-is-where-is” basis through road transportation mode, coal through washery circuit, beyond trigger level coal, additional coal, etc. on optional basis, wherein the Petitioner has the option to procure this coal but this is not an obligation on the Petitioner. Since this coal, though expensive than the regular linkage coal supplied by SECL under FSA through the stipulated rail transportation mode, is much cheaper than the open market and e-auction coal, the Petitioner procured coal from SECL, with a view to minimize the overall average cost of coal procurement which resulted in additional cost. Consequently, the cost of power supply by the Petitioner to the Procurers under the PPAs has increased significantly and the Petitioner needs to be compensated for it.

88. Petitioner has sought for restoration to the same economic position in terms of provisions of Article 10.2.1 of the PPAs under change in law. The petitioner has submitted the followings:

a) As per the original NCDP (18.10.2007), the Petitioner was assured 100% of the coal quantity ACQ corresponding to normative requirement of the Petitioner's Project.

b) Due to coal shortages and resultant change in NCDP (2013), the Petitioner was provided with reduced quantity of coal. Such shortages of coal due to the change in the policy has been held to be a change in law event.

c) As per the FSA executed on 26.03.2013 with CIl, the Petitioner was to be provided the assured quantity of coal by rail from any source of supply. Clause 4.3.1 of the FSA executed with CIL (subsequently amended vide Addendum # 1dated 20.03.2014) states:-

"4.3.1 The Seller shall endeavour to supply Coal from own sources as mentioned in Schedule I. In case the Seller is not in a position to supply the Scheduled Quantity (SQ) of Coal from such sources as indicated in Schedule I, the Seller shall have the option to supply the balance quantity of Coal through import which shall not, unless otherwise agreed between the parties, exceed 15% of the ACQ in the year 2012-13, 13-14 and 14-15, 13% of ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards. Seller may at its discretion make such arrangement for supply of imported coal through CIL, and/or other enterprises. Accordingly, the Purchaser has to enter into a Side Agreement with CIL and/or Seller, as the case may be, in addition to this Agreement. The Side Agreement dealing with the terms and conditions for supply of Imported Coal would be an integral part of this Agreement."

89. According to the Petitioner, Schedule I of the aforesaid FSA (subsequently amended vide Addendum # 1 dated 20.3.2014) provides the Annual Contracted Quantity as under:

Annual Contracted Quantity

S.No	Name & location of the Power Plant owned by Purchaser	Unit wise Installed Capacity of the Power Station (in MW)	Balance life ** of plant/unit in Years (w.e.f. date of Installation)	Name of Rake Fit Station	Original LOA Quantity (Tonnes)	Annual Contracted Quantity (Tonnes) (##)	Mode of Transport	Source Coal field of the Seller*
1	MB Power (Madhya Pradesh) Limited, IPP 1200 (2X600) MW, Units-1 & 2, Anuppur Thermal Power Project, Mouhari, Anuppur Distt. (Madhya Pradesh)	600	25 years	Jaithari Station (Code JTI)	49,93,920	16,47,993	Rail	Any Source/ Coalfield of SECL
		600	25 Years					

90. According to the Petitioner, Schedule III of the aforesaid FSA (subsequently amended vide Addendum # 1 dated 20.3.2014) provides the Quality of Coal as under:

S No.	Name & Location of the Power Plant owned by the Purchaser	Top-size of Coal(mm)	Grade(s) as mentioned in LOA on UHV basis	Corresponding in terms of equivalent GCV (**)
1	MB Power (Madhya Pradesh) Limited, IPP 1200 (2x600) MW, Units-1 & 2, Anuppur Thermal Power Project, Mouhari, Anuppur Distt. (Madhya Pradesh)	250 mm	F	G10, G11 & G12

91. According to the Petitioner, in addition to the regular linkage coal supplied by SECL in accordance with the above schedule I, SECL since October 2014 has from time to time offered coal by publishing notifications on "as-is-where-is" basis through road transportation mode. Though the above is optional and not obligatory, Petitioner has been procuring the same since November 2015 as it has the option to procure this coal to mitigate the shortfall in Linkage coal. Though, expensive than regular linkage coal, this coal is much cheaper compared to the other alternatives available for mitigating shortfall of linkage coal i.e. open market and e-auction coal. By accepting such coal offered by SECL, Petitioner has stated to have exercised the principle of prudence in the best interest of beneficiaries. Petitioner has, therefore, requested that the incremental cost of such coal be considered for pass through under change in law. Petitioner has also submitted that in line with the above rationale, it has procured other additional coal offered by SECL through road transportation mode viz. coal through washery circuit, beyond trigger level coal, additional coal etc. incremental cost of which warrants consideration of the Commission for allowance as pass through under change in law.

92. The Respondent Nos. 1 to 5, UPPCL and UP Discoms, have submitted that the Petitioner has not submitted any actual data of shortage in supply of linkage coal and Petitioner may claim compensation after ascertaining the shortage. The Petitioner is required to submit detailed break-up of the linkage coal received by it onerous to its various long term contracts and should demonstrate that the linkage coal should have been first utilized for meeting the PPA obligations with the Respondents in the present case. The Respondents have submitted that the normative parameters considered by the Petitioner are significantly higher than the normative parameters approved by the Commission in Petition No. 101/MP/2017 and norms allowed by the Commission in the said Petition No. 101/MP/2017 may be allowed in the instant Petition as well. The Respondents have submitted that the compensation sought by the Petitioner through a normative formulation has significantly deviated in various aspects of such formulation from the formula approved by the Commission in Petition No. 101/MP/2017.

93. The Petitioner, in its rejoinder dated 18.12.2018, has mainly submitted that once the change in law events claimed by the Petitioner are approved by the Commission, the relevant audited and certified data pertaining to shortfall in coal for calculating the compensation for Change in Law would be shared inter-se between the Petitioner and the Respondents. The Petitioner has submitted that since it has considered the normative parameters as specified by the Commission in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, there is no occasion for the Respondents to compare the same with the parameters approved in Petition No. 101/MP/2017. The Petitioner has contended that the methodology approved by the Commission in its order dated 3.2.2016 in Petition No. 79/MP/2013 for calculating compensation for shortage of linkage coal provides for pass through of higher cost of imported/ market based/ e-auction coal in accordance with Ministry of Power's letter dated 31.7.2013. Therefore, a similar methodology has been adopted by the Petitioner in the present case. The contentions of Respondent Nos. 1 to 5 with respect to deviation in the

formulations proposed by the Petitioner *vis-à-vis* the approach approved by the Commission in Petition No. 101/MP/2017 does not hold good since the Petitioner's case may not be compared to that of DB Power Ltd. as the Petitioner's Power project is different from that of DB Power's having different power purchase agreements and fuel supply arrangements. The Petitioner has submitted that the contention of the Respondents that the Petitioner ought to have first utilized its linkage coal only for meeting its PPA obligations with the Respondents is incorrect, unlawful and impractical. The Petitioner has been allocated coal linkage for all its long term PPA obligations. Under the circumstances, in Commission's view, since the Petitioner is supplying power to other procurers (apart from the Respondents) under long term PPAs, the Petitioner has to utilize the linkage coal as allocated to specific long term PPA under FSA. Therefore, in view of the Commission, the Respondent cannot claim that the entire linkage coal available to the Petitioner under FSA ought to be utilized first for the PPA obligations with the Respondents. The Petitioner has submitted that the methodology adopted by the Petitioner has been upheld by the Commission in its order dated 20.3.2018 in Petition No. 105/MP/2017.

94. Based on submissions of the Petitioner and the Respondents, the issue is examined in succeeding paragraphs.

95. On 18.10.2007, the Government of India issued the New Coal Distribution Policy (NCDP 2007). In terms of Para 2.2 of the NCDP 2007, the existing linkage holders were assured supply of 100% of normative requirement. Paragraph 2.2 is as under: -

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

96. On account of shortage of coal, the Ministry of Coal, Government of India vide its O.M. dated 26.7.2013 (referred to as "NCDP 2013") modified the ACQ for last four years of the 12th

Plan for power plants having normal coal linkage. Relevant provisions of O.M. dated 26.7.2013 (NCDP 2013) are extracted as under:

> *"2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 1.4.2009 to 31.3.2015. Taking into account the overall domestic availability and the likely actual requirement of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th plan for the power plants having normal coal linkage."*

Thus, the above OM modified the trigger level for penalty for domestic coal supply by reducing the ACQ from 100% to 65%, 65%, 67% and 75%.

97. Therefore, as per NCDP 2013, the minimum domestic coal supply quantity has been reduced from the assured 100% to 65%, 65%, 67% and 75% of ACQ respectively for the remaining four years of the 12th plan i.e. for the years 2013-14 to 2016-17. Accordingly, Ministry of Power, Government of India (MoP) issued letter dated 31.7.2013 and had advised the Electricity Regulatory Commissions as under:

> *"4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the12th Plan for the already concluded PPAs based on tariff based competitive bidding.*
> *5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government."*

98. Further, the Revised Tariff Policy, 2016 made specific provisions regarding pass through of the cost of imported coal/ market-based e-auction coal for meeting the shortfall between the assured quantity/ quantity indicated as ACQ in the LOA/ FSA and reduced quantity of coal supplied by CIL. Relevant provisions of the Tariff Policy (Para 6.1) are extracted as under:

> *"However, some of the competitively bid projects as per the guidelines dated 19thJanuary, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by*

Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC(Vol-III) dated 31.7.2013.”

99. The MoP letter dated 31.7.2013 and the Revised Tariff Policy, 2016 have been held by the Hon’ble Supreme Court in the Energy Watchdog case as having the force of law and these read in context with Article 10 of the PPAs, constitute Change in Law. The relevant portion of the judgment is extracted hereunder:

“53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or license available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows:

** * * * * * **

Both the letter dated 31st July, 2013 and the revised tariff policy is statutory documents being issued under Section 3 of the Act and has the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission….”

100. Further, the submission of the petitioner as regards to "SHAKTI Scheme" is noted. On this issue, this Commission vide its order dated 16.5.2019 in Petition No. 8/MP/2014 & Petition No.284/MP/2018 in the case of GMR Warora Energy Limited versus MSEDCL and DNH has decided as under:

"43. xxxx. As per the judgment in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP, 2007 is a change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Both NCDP, 2013 and the Shakti Scheme have been issued by the Ministry of Coal

and both alter the assurances provided in the NCDP, 2007. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the cut-off dates) provides as under:-

"xxxx

(A) Under the old regime of LoA-FSA:

(i) FSA may be signed with the pending LoA holders after ensuring that the plants are commissioned, respective milestones met, all specified conditions of the LoA fulfilled within specified timeframe and where nothing adverse is detected against the LoA holders. The outer time limit within which the power plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022, failing which LoA would stand cancelled. Coal supply to these capacities may be at 75% of ACQ. The coal supply to these capacities may be increased in future based on coal availability.

(ii) The 583 pending applications for LoA need not be considered and may be closed.

(iii) The capacities totaling about 68,000 MW as per the decision of CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017. The coal supply to these capacities may be increased in future based on coal availability.

(iv) About 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.3.2015, Coal supply to these capacities may be allowed at 75% of ACQ against FSA provided these plants are commissioned within 31.3.2022. The coal supply to these capacities may be increased in future based on coal availability.

(v) Actual coal supply to power plants shall be to the extent of long-term PPAs with DISCOM/State Designated Agencies (SDAs) and medium term PPAs to be concluded in future against bids to be invited by DISCOMs as per bidding guidelines issued by Ministry of Power.

With these, the old regime of LoA-FSA would come to finality and fade away.

xxxx"

44. As stated, the NCDP 2013 as well as the Shakti Scheme have been notified by the Ministry of Coal, Government of India being an Indian Government Instrumentality in terms of the provisions of the respective PPAs. From the provisions of the Shakti Scheme, we observe that Paragraph (A) of the Scheme deals with cases of old regime of LoA-FSA covering about 68,000 MW. Paragraph (A)(iii) mentions about the decision of CCEA dated 21.6.2013; that the LoA-FDA holders would continue to get coal at 75% of ACQ; that this 75% would be the limit even beyond 31.3.2017; and that the coal supply to these capacities may be increased in future based on coal availability.

45. NCDP 2013 was issued consequent upon approval of CCEA on 21.6.2013. As per NCDP 2013, the revised assured coal allocation was 65%, 65%, 67% and 75% of ACQ for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Paragraph (A)(iii) of the Shakti Scheme (quoted above) deals with capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013 which would continue to get coal at 75% of ACQ even beyond 31.3.2017. The capacity of the generating station of the Petitioner falls within the said 68000 MW capacity covered by the decision of CCEA. Moreover, through Shakti Scheme, coal is continued to be made available at 75% of ACQ for the period after 31.3.2017. This percentage (75%) of coal allocation after 31.3.2017 is in continuation of the percentage coal allocation assured in the year 2016-17 of NCDP 2013. In other words, the phrase "the capacities totalling 68,000 MW as per decision of the CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017" in Paragraph(A)(iii) of the Shakti Scheme would imply that the said scheme is in continuation of the decision in NCDP, 2013.

46. In addition, Paragraph (A)(iii) of the Shakti Scheme provides that "The coal supply to these capacities may be increased in future based on coal availability." Thus, the said scheme, as in case of NCDP 2013, recognizes that availability of coal is not commensurate with the demand and that once coal availability increases, the supply to these capacities of power plants may be increased. A combined reading of the provisions of the Shakti Scheme as regards the old regime of LoA-FSA holders leaves no room for doubt that Paragraph (A) of the Shakti Scheme extends the provisions of NCDP 2013 beyond 31.3.2017.

47. In our considered view, the shortfall in supply of coal is a continuous cause of action and the Shakti Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013. In the above background, consideration of relief on account of shortfall in supply of coal beyond 31.3.2017 falls within the ambit and scope of remand by the Tribunal. Accordingly, we proceed to examine the relief sought for by Petitioner on account of change in law for shortfall in supply of coal for the period beyond 31.3.2017.

48. As mentioned in Paragraph A(iii) of the Shakti Scheme, the Petitioner will continue to get only 75% of ACQ for its FSA signed under old regime, till improvement happens in coal availability. Such shortage of coal linkage allocation needs to be seen with respect to assurance of 100% normative coal requirement for its power station under NCDP 2007 which was prevailing at the time of cut-off date. Accordingly, in our view, the Petitioner needs to be compensated for shortfall of coal on account of reduction in coal supply allocation under Shakti Policy beyond 31.3.2017, as against 100% normative requirement assured under NCDP 2007. There can be no difference in the treatment for the period before 31.3.2017 and after that.

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would be covered within the definition of 'Change in Law'. 'Indian Government Instrumentality' as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of 'an Indian Government Instrumentality' under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon'ble Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be compensated, so as to restore it to the same economic position, as if such change in law had not occurred."

101. Since the Petitioners plant is also covered in the capacity totalling 68000 MW, the above cited decision of this Commission is squarely applicable in the instant case of the Petitioner.

Thus, the Petitioner is entitled for relief, to be restored to the same economic position, under change in law in terms of Article 10.2.1 of the PPA for the period till shortfall continues including the period covered by NCDP 2013 and subsequently continued by SHAKTI Scheme beyond 31.3.2017. Further, as discussed in Para 87 and 91 of this order, the Commission observes that the Petitioner has submitted that it has procured "as-is-where-is" basis coal, coal through washery circuit, beyond trigger level coal, additional coal etc. and has sought incremental cost of such coal be considered for pass through under change in law. Further, we note that as per the provisions of FSA, the entire coal requirement for supply of power to UP Discoms under the PPAs was to be met from the linkage coal having Grade G10, G11 and G12 to be supplied by SECL under FSA through Rail Mode i.e. the regular linkage coal. Any additional coal requirement on account of shortfall of regular linkage coal supply by SECL due to change in NCDP or supply of any other grade of coal (except Grade G10, G11 and G12) coal or supply of coal by SECL by any mode of transportation other than Rail Route was not envisaged at the time of bid submission and subsequent shortfall of regular linkage coal has an adverse financial impact on the Petitioner, which is one of the requirements of claiming relief for a change in law event. In the light of the above Order of the Commission dated 16.5.2019, the claim of the Petitioner is admissible under Change in Law. It is further noticed that for meeting this coal shortfall for supply of power to UP Discoms under PPA, apart from procuring additional coal from open market and e-Auction coal, the Petitioner has also exercised its option to procure the coal offered by SECL over and above the regular linkage coal i.e. “as-is-where-is” basis through road transportation mode, coal through washery circuit, beyond trigger level coal, additional coal, etc. which is although expensive than regular linkage coal but still cheaper than the market coal. The Petitioner had an option to refuse this coal and instead procure the corresponding coal from open market. However, in such an event the compensation under Change in Law would have increased. Hence, we are of the view that the Petitioner is entitled to receive the compensation under Change in Law for the additional coal procured by it from various sources

like e-auction, open market, optional coal from various modes like as-is-where-is coal, coal through washery circuit, beyond trigger level coal, additional coal, etc. for meeting the coal requirement for supply of power to UP Discoms under PPA.

102. Further, the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017 & I.A No. 21 of 2018 had held that the compensation on account of coal shortage is required to be worked out for the entire actual coal shortage and is not be restricted to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. The relevant portion of the said order dated 31.5.2018 is extracted as under:

> *"33. …The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.*
>
> *34. …As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes."*

103. The above decision of the Commission shall also be applicable in the present case. It is, however, made clear that any compensation paid by the Coal Company to the Petitioner for shortfall in supply of domestic coal shall be adjusted from the claim for compensation under change in law allowed in this order.

104. Further, with respect to the contentions of the Respondents, UPPCL/UP Discoms that the normative parameters and methodology considered by the Petitioner for computation of coal shortfall is significantly different from the normative parameters and methodology approved by the Commission in Petition No. 101/MP/2017, we are of the view that the present matter is adjudicated based on its merits which vary from case to case basis. The normative parameters considered by the Petitioner and approved in this order are based on the normative parameters

specified in the applicable Tariff Regulations of this Commission. The Commission after extensive stakeholders' consultation has specified the normative parameters like SHR and Auxiliary Energy Consumption, etc. in the Tariff Regulations. Therefore, it would be appropriate to consider the normative parameters specified in the applicable Tariff Regulations of this Commission as a reference point instead of parameters suggested by UPPCL/ UP Discoms.

105. In light of the above, we approve the following methodology duly incorporating all decision of the Commission in this matter, as under:

This methodology, as already stated above, would be applicable for all period/s covering before (under NCDP 2013) and after 31.3.2017 (as extended by Shakti Scheme):

Step - 1: ECR Linkage Coal $_{\text{(Delivery point)}}$ = ECR Quoted

Step - 2: ECR Other Coal $_{\text{(Delivery point)}}$ = {[GSHR / Weighted Average GCV of $_{\text{Other Coal}}$ ($_{\text{i.e .imported + e-auction + others\#}}$)] x [Weighted Average Price of $_{\text{Other Coal}}$ ($_{\text{i.e. imported + e-auction + others\#}}$)] x [1 / (1 - Aux Consumption)] x [1 / (1 - Applicable Transmission Losses)]}

Step - 3: ECR Chargeable $_{\text{(Delivery point)}}$ = {(G x ECR at Step - 1) + [ECR computed at Step - 2 x (1 - G)]}

Where,

G = % Generation achievable based on Actual Linkage Coal received;

GSHR = Normative Gross Station Heat Rate as worked out on the basis of applicable CERC Regulations or actual, whichever is lower;

Auxiliary Consumption = Normative auxiliary consumption as per applicable CERC Regulations or actual, whichever is lower;

Weighted Average GCV of Other Coal (to be computed in line with applicable CERC Regulation) = {(GCV $_{\text{imported}}$ x Qty $_{\text{imported}}$) +(GCV $_{\text{e-auction}}$ x Qty $_{\text{e-auction}}$)+(GCV $_{\text{others\#}}$ x Qty $_{\text{others\#}}$) / (Qty $_{\text{imported}}$ + Qty $_{\text{e-auction}}$ + Qty $_{\text{others\#}}$)};

And

Weighted Average Price of Other Coal = {(Price $_{\text{imported}}$ x Qty $_{\text{imported}}$) + (Price $_{\text{e-auction}}$ x Qty $_{\text{e-auction}}$) + (Price $_{\text{others\#}}$ x Qty $_{\text{others\#}}$) / (Qty $_{\text{imported}}$ + Qty $_{\text{e-auction}}$ + Qty $_{\text{others\#}}$)}

Step - 4: Compensation = {(ECR as computed at Step - 3 ***minus*** ECR Quoted) x Scheduled Generation at Delivery Point}.

Note:

1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.

2) All facts, figures and computations in this regard should be duly certified by the auditor.

3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.

4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.

5) Other# implies "Coal procured through open market including but not limited to additional coal supplied by SECL (over and above regular linkage coal) through rail / road transportation mode (viz. "as-is-where-is" basis coal, coal through washery circuit, beyond trigger level coal, additional coal, etc.)"

106. Accordingly, the Petitioner be compensated on account of coal shortage to be worked out in accordance with the parameters of the applicable Tariff Regulations of this Commission for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ.The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to UP Discoms. The Petitioner and UP Discoms are directed to carry out reconciliation on account of these claims annually.

III. Additional capital expenditure on account of amendment in Environmental Norms

107. The Petitioner has submitted that Ministry of Environment, Forest and Climate Change (MoEFCC) vide its Gazette Notification dated 7.12.2015 has amended the Environment (Protection) Rules, 1986 thereby imposing new condition and/or making the existing environmental norms more stringent related to water consumption and emission standards (Particulate Matter, Sulphur Dioxide, Oxides of Nitrogen and Mercury) by Thermal Power Plants.

The Petitioner has submitted that for any operational thermal plant, like that of the Petitioner's, compliance to these newly prescribed set of environment norms shall necessitate installation/ augmentation/ retrofitting of the new and existing plant equipment like ESPs, FGDs, Cooling Towers, etc., besides leading to reduced plant efficiency and net availability capacity due to increase in SHR and Auxiliary Power Consumption.

108. The Petitioner has further submitted that compliance with these newly prescribed environment norms would require substantial additional capital expenditure ("CAPEX") followed by recurring operational expenses ("OPEX") and would also result in deterioration of operating parameters like Gross SHR and Auxiliary Energy Consumption etc. consequently resulting in a considerable increase in cost of power supplied to UP Discoms under the PPAs. The Petitioner has submitted that since these stringent environment norms were not applicable as on the cut-off date i.e. 17.9.2012 and have been subsequently imposed by MoEFCC w.e.f. 7.12.2015, through the amendment of the Environment (Protection) Rules, 1986, the same is covered under change in law in terms of Article 10.1.1 of the PPA.

109. We have considered the submissions of the Petitioner. The Commission in its order dated 17.9.2018 in Petition No. 77/MP/2017 has dealt with the issue of 'Additional capital expenditure on account of amendment in Environment Norms'. The summary of the Commission's decisions in the above order dated 17.9.2018 is extracted as under:

> *"49. Summary of our decisions in this order are as under:*
>
> *(a) MoEFCC Notifications, 2015 prescribing the revised environmental norms in respect of thermal Power plants which has been issued after the cut-off date of Mundra UMPP are in the nature of Change in Law in terms of the PPA dated 22.4.2007 and the MoP directions issued under Section 107 of the Act.*
>
> *(b) The Petitioner has given notice regarding Change in Law arising out of MoEFCC Notification in terms of the PPA.*
>
> *(c) The Petitioner is required to take steps to implement revised norms in respect of Sulphur Dioxide, Nitrogen Oxide and water consumption. The Petitioner has taken up the matter with MoEFCC for exemption from implementing the norms for water consumption and therefore, the*

implementation of the norms of water consumption shall be dependent on the decision of MoEFCC in this regard.

(d) Mundra UMPP meets the norms prescribed in MoEFCC Notification, 2015 with regard to particulate matters and mercury and accordingly, the Petitioner has not claimed the relief under Change in Law.

(e) The Commission has directed CEA vide its order dated 22.7.2018 in Petition No. 98/MP/2017 to prepare guidelines specifying the suitable technology for each plant and operational parameters such as auxiliary consumption, Station Heat Rate, O&M expenses, norms of consumption of water, lime stones etc. for implementation of revised environmental norms. The Petitioner shall implement the revised norms as per the MoEFCC Notification, 2015 in consultation with CEA.

(f) There is no provision for in-principle approval in the PPA. However, the Commission has decided that MoEFCC Notification, 2015 is in the nature of Change in Law. Accordingly, the Petitioner shall approach the Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the Guidelines to be issued by CEA and the mode of recovery of the same through monthly tariff."

110. The above decision is also applicable in the instant case. The event of 'Additional capital expenditure on account of amendment in Environment Norms' is a Change in law event as decided by this Commission in the above-mentioned case. Accordingly, the Petitioner is directed to proceed with implementation of the revised norms in consultation with CEA as decided in the above matter and approach this Commission for determination of increase in cost or/and revenue expenditure on account of implementation of revised norms in accordance with the guidelines to be issued by CEA.

IV. Additional cost towards Fly Ash Transportation

111. The Petitioner has submitted that as on the cut-off date, Petitioner was not required to incur any additional cost towards the fly ash transportation. However, the Ministry of Environment, Forests and Climate Change, Government of India (MoEFCC) vide its Notification No. S.O. 254 (E) dated 25.1.2016 amended the Environment (Protection) Rules, 1986 thereby amending its previous notification dated 3.11.2009 and imposed the additional cost towards fly ash transportation. The Petitioner has further submitted that the above amendment is covered under Change in Law event within the meaning of Article 10 of the PPA. The Petitioner has submitted that compliance to the above-mentioned notification of MoEFCC dated 25.1.2016

would have significant effect on the Operation and Maintenance costs in respect of fly ash disposal from the Petitioner's Project.

112. We have considered the submissions of the Petitioner. The question of levy of charges for transportation of fly ash as a "Change in Law" event was considered by this Commission in its order dated 19.12.2017 in Petition No. 229/MP/2016 and this Commission by order dated 19.12.2017 disposed the same as under:

> *"97. As per Article 10.1.1 of the PPA, any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law is covered under Change in law if this results in additional recurring/ non-recurring expenditure by the seller or any income to the seller. Since, the additional cost towards fly ash transportation is on account of amendment to the Notification dated 25.1.2016 issued by the Ministry of Environment and Forests, Govt. of India, the expenditure is admissible under the Change in law in principle. However, the admissibility of this claim is subject to the following conditions:*
>
> *a) Award of fly ash transportation contract through a transparent competitive bidding procedure so that a reasonable and competitive price for transportation of ash/ Metric Tonne is discovered;*
>
> *b) Any revenue generated/ accumulated from fly ash sales, if CoD of units/ station was declared before the MoEF notification dated 25.01.2016, shall also be adjusted from the relief so granted;*
>
> *c) Revenue generated from fly ash sales must be maintained in a separate account as per the MoEF notification; and*
>
> *d) Actual expenditure incurred as claimed should be duly certified by auditors and the same should be kept in possession so that it can be produced to the beneficiaries on demand. The Petitioner is granted liberty to approach the Commission with above documents to analyse the case for determination of compensation."*

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

V. Increase in Minimum Alternative Tax (MAT) rate

114. The Petitioner has submitted that as on the cut-off date, the effective rate of Minimum Alternative Tax (including surcharge and cess) was 20.08% as under:

Effective MAT Rate = [MAT Rate: 18.5% + Surcharge: 5% (= 0.925%) + Education Cess and Secondary and Higher Education Cess: 3 % (=0.58275%)] = 20.08%.

115. The Petitioner has submitted that the rate of surcharge, which is included in computation of effective MAT rate, has been increased to 12% vide Finance Act 2016 which resulted in increase in the effective MAT rate. The Petitioner has given the computation of the revised effective MAT rate is as under:

Effective MAT Rate = MAT Rate: 18.5% + Surcharge: 12% (= 2.22%) + Education Cess and Secondary and Higher Education Cess: 3% (=0.6216%) = 21.3416%.

116. The Petitioner has submitted that change in the effective MAT rate due to change in surcharge has a direct impact and, therefore, the Petitioner is entitled to claim compensation for the same.

117. We have considered the submission of the Petitioner. It is observed that the claim of the Petitioner for change in effective MAT was considered by this Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 and the Commission had disallowed the said claim. The relevant portion of the order is extracted as under:

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

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

tariff discovered through competitive bidding where the bidder is required to quote an all-inclusive tariff including the statutory taxes and cesses. Thus, the change in rate of income tax or minimum alternate tax cannot be construed as "Change in Law" for the purpose of Article 13.1 of the PPA."

96. It is noticed that the order of the Commission dated 30.3.2015 (Sasan Power Ltd v MPPMCL &ors) disallowing the claim of change in Income Tax rate from 33.99% to 32.45% and MAT rate from 11.33% to 20.01% based on the Finance Act, 2012 as a change in law event under the provisions of Article 13.1.1 of the PPA was examined by the Tribunal in Appeal No. 161/2015 (Sasan case) and the Tribunal by its judgment dated 19.4.2017 had disallowed the same. The relevant portion of the judgment is extracted under:

> *"28. Thus, when a tax on income is paid by the company, it cannot be said that a part of the income of the company was received for and on behalf of the Revenue. The Income Tax is charged upon the profits; the thing which is taxed is the profit that is made. Profit has to be ascertained first and Income Tax being a part of profits – namely, such part as the Revenue is entitled to take, is to be deducted from profits. When the net gains of the business determined after making all permissible deductions, are taxed, the deduction to meet such taxes cannot be deducted. Income Tax is not allowed as a deduction in making assessment of income. Income Tax or MAT are not part of the expenses of the company incurred for the purpose of carrying on the business and earning profits. Income Tax and MAT are post profit. Income Tax and MAT are the application of the profits when made. Income Tax and MAT are not an expenditure laid out for the purpose of the business of the company. xxxx "40……..In view of the above, the CERC's finding that changes in Income Tax or increase in MAT are not Changes in Law must be confirmed and is accordingly confirmed."*

97. In the said judgment, the Tribunal had considered and rejected the contentions on Accounting Standards and other judgments, which has also been raised by the Petitioner herein in the present Petition. The Petitioner has submitted that the decision of the Tribunal in the Sasan case on the issue of MAT ought not to be made applicable since the same has been challenged before the Hon`ble Supreme Court. The Petitioner has also submitted that the Hon`ble Supreme Court has in the Energy Watchdog case confirmed that Article 13.1.1(i), (ii) and (iii) are different instances of change in law and ought to be read as distinct from each other. It has stated that TANGEDCO PPA provides for "any change in tax or introduction of tax made applicable for supply of power by the Seller as per terms of this Agreement" as opposed to the PPAs in case of Sasan Power Ltd. The Petitioner has added that the expression "for supply of power makes it evident that the taxable event is not limited to the act of supply and includes taxes on all elements necessary for generating and supply of power.

98. We do not agree with the above submissions of the Petitioner. Firstly, there is no stay on the operation of the judgment of the Tribunal dated 19.4.2017 by the Hon`ble Supreme Court in the appeal filed by the Petitioner. Secondly, the Tribunal in its judgment dated Order 19.4.2017 had examined the Article 13.1 of the PPA and had rejected the prayer for change in law on the issue of MAT..."

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

VI. Carrying Cost

119. The Petitioner in its prayer at Para (a)(iv) has sought a direction to the Respondents to pay carrying cost for the period between the effective date of change in law event and actual

payment at the actual rate of interest incurred by the Petitioner to restore the Petitioner to the same economic position as existed prior to the change in law events.

120. The Petitioner has submitted that whenever a payment is deferred or delayed, then carrying cost is payable along with the deferred payment. The principle of carrying cost has been well established in the various judgments of the Hon'ble Supreme Court and the Appellate Tribunal. The carrying cost is the compensation for time value of money or the monies denied at the appropriate time and paid after a lapse of time.

121. We have considered the submission of the Petitioner. The Petitioner has submitted that the Petitioner should be restored to the same economic position in terms of Article 10.2.1 as if the Change in Law had not occurred. The Appellate Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (APL v CERC & ors) has allowed the carrying cost on the claim under change in law and held as under:

> *"In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA…*
>
> *From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.*
>
> *Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian*

Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority…"

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

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

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

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

123. Article 10.2.1 of the PPAs provides as under:

"10.2.1. While determining the consequences of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article10, the affected party to the same economic position as if such Change in Law has not occurred."

124. In view of the provisions of the PPAs, the principles of restitution and the recent judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law events from the effective date of Change in Law till the actual payment to the Petitioner. The Commission vide Record of Proceedings for

the hearing dated 19.12.2018 had directed UPPCL to pay 75% of the compensation claimed by the Petitioner, subject to the adjustment after issue of final order in the Petition. The Commission further directed that if the payment received in terms of the interim order exceeds the amount due after issue of final order, the Petitioner shall refund the excess amount to UPPCL with 9% interest. Any payment made by the Respondents in terms of the aforesaid ROP shall be duly adjusted. Once a supplementary bill is raised by the Petitioner in terms of this Order, the provisions of Late Payment Surcharge in the PPAs would kick in if payment is not made by the Respondents within due date.

125. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L v UHBVNL & ors) had decided the issue of carrying cost as under:

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

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

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.

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

126. In line with above Order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds (supported by Auditor's Certificate) or the Rate of Interest on Working Capital rate as per the

applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest.

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

127. The Petitioner has submitted that as the Bid deadline was 24.9.2012, any Change in Law event after 17.9.2012 (seven (7) days prior to the Bid deadline) resulting in additional recurring or non-recurring expenditure incurred by the Petitioner falls within the ambit of Change in Law as per the provisions of the PPAs. The Indian Governmental Instrumentalities have introduced and/or modified various taxes, duties and levies subsequent to the cut-off date of 17.9.2012 as detailed in the present Petition. As a result, the Petitioner has to pay and will be paying in future additional amounts pursuant to such Change in Law, which have to be compensated to the Petitioner under the PPA. Unless the tariff is adjusted accordingly, to compensate for the effect of such Change in Law, the Petitioner will be subject to an adverse position financially from what the Petitioner had contemplated at the time of bidding.

128. The Petitioner has further submitted that the compensation for Change in Law will be payable only if the increase in expenses of the Petitioner during a contract year on account of change in law events is in excess of an amount equivalent to 1% of the value of Letter of Credit ("LC") in aggregate for the relevant contract year. The Petitioner has submitted that no LC has been established by the Respondents so far. Even otherwise, the value of LC @ Rs. 4.14/ unit (the supply rate for the month of March 2018) works out to about Rs.100 crore. The annual impact due to the above listed factors of Change in Law would be significantly higher than the threshold limit of 1% of the value of the LC i.e. Rs. 1 crore as provided in Article 10.3.2 of the Procurer(s)-PPA.

129. Articles 10.2, 10.3 and 10.5 of the PPAs provide for the principle for computing the impact of change in law as under:

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

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

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 Procurers 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."

10.5 Tariff Adjustment Payment on account of Change in Law

10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:
(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or

(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law."

130. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed.

131. However, it is clarified that the Petitioners shall be entitled to claim the compensation if the expenditure allowed under Change in Law during operating period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of the Letter of Credit in aggregate

and for this purpose the Petitioner shall furnish all the relevant documents like taxes and duties paid supported by Auditor Certificate.

132. The Article 10 the PPAs provide for the principle for computing the impact of change in law during the operating period. These provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/ decrease in revenues or of cost shall be admissible to the Petitioner. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of supply of electricity to the Procurers or from the date of occurrence of Change in Law event, whichever is later. We have specified a mechanism, in the following paragraphs, considering the fact that compensation for the change in law events allowed as per PPAs shall be paid in subsequent years of the contract period:

a) 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 procurers 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.

b) For Change in Law events related to the operating period, the 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 of the PPAs.

c) If the Petitioner is eligible to receive compensation for Change in Law as per provisions of the PPA the compensation amount allowed shall be shared by the procurers based on the scheduled energy.

d) The financial impact on account of Change in Law event with respect to coal shortfall due to Change in NCDP shall be computed in accordance with the methodology detailed out by the Commission in Para 105 of this order. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to the procurers (UP Discoms).

Summary of Decisions:

133. Based on the above analyses 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. Change in rate and/or introduction of taxes, duties and charges:		
a	Clean Energy Cess	Allowed
b	Change in Chhattisgarh Infrastructure Development Cess and Change in Chhattisgarh Environmental Cess	Allowed
c	Change in Coal Sizing Charges and Surface Transportation Cost by Coal India Ltd.	Not Allowed
d	Change in Service Tax and introduction of Swachh Bharat Cess and Krishi Kalyan Cess on transportation of coal	Allowed
e	Introduction of Forest tax	Allowed
f	Revision/ Addition of components in computation of Central Excise Duty	Allowed
g	Change in MP Electricity Duty on Auxiliary Consumption and self-consumption	Allowed
h	Introduction of tax towards contribution to the National Mineral Exploration Trust and District mineral Foundation	Allowed
i	Introduction of Coal Terminal Surcharge on coal transportation	Allowed
j	Introduction of Evacuation Facility Charges	Allowed
k	Introduction of GST	Allowed
II.	Amendment in NCDP resulting in reduction in supply of coal by Coal India Limited and its subsidiaries	Allowed to the extent as covered in Para 79 to 105.
III	Additional capital expenditure on account of amendment in Environmental Norms	Liberty granted to approach the Commission once CEA finalizes norms
IV	Increase in Minimum Alternative Tax rate	Not allowed
V	Additional cost towards Fly Ash Transportation	Liberty granted to approach the Commission along with full details

S.No.	Change in Law events	Decision
VI	Carrying cost	Allowed

134. For the above to be applicable, the Petitioner is directed to ensure that 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.

135. Petition No. 156/MP/2018 is disposed of in terms of above.

Sd/- Sd/-

(Dr. M.K. Iyer)
Member

(P.K. Pujari)
Chairperson