

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELH**

Petition No: 255/MP/2017

Coram:

**Shri P.K. Pujari, Chairperson
Dr. M. K. Iyer, Member**

Date of Order: 30.04.2019

In the matter of

Petition under section 79(1) (b) and 79 (1) (f) of the Electricity Act, 2003 for claiming compensation on account of events pertaining to change in law as per the terms of Power Purchase Agreement dated 25.3.2011 (PPA) executed between the Petitioner and the Respondent No. 2 and as per the terms of the Power Supply Agreement (PSA) dated 05.01.2011 executed between Respondent No.1 and Respondent No. 2.

AND

IN THE MATTER OF:

Adhunik Power and Natural Resources Limited
9B, 9th Floor,
Hansalaya Building
15, Barakhamba Road, Connaught Place,
New Delhi- 110001

...PETITIONER

VERSUS

1. West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan, Block DJ,
Bidhannagar, Kolkata 700091

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

3. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKRR Maligai,
6th Floor, Eastern Wing,
144, Anna Salai,
Chennai-600 002
Tamil Nadu, India



4. Jharkhand State Electricity Board
Presently known as Jharkhand Bijli Vitran Nigam Limited
Engineer's Building, HEC, Dhurwa, Ranchi,
Jharkhand - 834004

...RESPONDENTS

Parties Present:

Shri Buddy Ranganathan, Advocate, APNRL
Shri Deepak Khurana, Advocate, APNRL
Shri Amit Griwan, APNRL
Shri Wasim Afzal, APNRL
Shri K. Manoj Raj, APNRL
Shri Vishrov Mukherjee, Advocate, WBSEDCL
Ms. Catherine Ayellore, Advocate, WBSEDCL
Shri Janmali M., Advocate, WBSEDCL
Shri Aashish Anand Bernad, Advocate, PTC India
Shri Paramhans, Advocate, PTC India
Shri S. Vallinayagam, Advocate, TANGEDCO

ORDER

The Petitioner, Adhunik Power and Natural Resources Limited (hereinafter to be referred as "the Petitioner") has filed the present Petition under Section 79 (1) (b) and 79 (1) (f) of the Electricity Act, 2003 (hereinafter referred to be as 'Act') read with Article 10 of the Power Sale Agreement (PSA) dated 5.1.2011 executed between West Bengal State Electricity Distribution Company Limited (WBSEDCL) and PTC India Limited (PTC), the terms of which have been incorporated in the Power Purchase Agreement (PPA) dated 25.3.2011 executed between the Petitioner and PTC. The Petitioner has made the following prayers:

A. Declare and adopt that the following events/notifications are change in law events within the meaning of Article 10 of the WBSEDCL PSA dated 5.1.2011 and APNRL PPA dated 25.3.2011 and allow compensation thereof:-

i. Additional expenditure incurred by the Petitioner due to change/increase in Royalty, Contribution to District Mineral Foundation and levy of contribution towards National Mineral Exploration Trust Vide Notification, being numbered as 349 dated 10.5.2012, Notification No. GSR 792 (E), dated 20.10.2015, Notification No. GSR 837 (E) and Notification No. GSR No. GSR 632 (E) dated 14.8.2015 issued under the



provisions of Mines and Mineral (Development and Regulation) Act, 1957;

ii. Additional expenditure incurred by the Petitioner due to increase in clean energy cess, which was later named as clean environment cess and levy of GST Compensation Cess under GST (Compensation to States) Act, 2017 w.e.f 01.07.2017;

iii. Introduction of Excise Duty on Coal vide Central Government Notification No. 1/2011, further increase in such excise duty vide CIL/S&M/GM(F)/2331 dated 17.03.2012 and notification no. 14/15 of 2015 dated 01.03.2015;

iv. Change in the components of Central Excise Duty vide Notification No. SECL/BSP/S&M/Sr.ES/1253 dated 07.06.2012 issued by the South Eastern Coal Fields Ltd. Notification No. SECL/BSP/S&M/504 dated 08.03.2018;

v. Increase in Sizing and Crushing charges vide Notification No. CIL/S&M/GM (F)/Pricing/2784 dated 16.12.2013;

vi. Increase in coal surface transportation charges vide Notification No. CIL/S&M/GM(F)/Pricing/2340 dated 13.11.2013;

vii. Increase in base freight of coal transportation vide Rate Circular No. 7 of 2012 dated 05.03.2012, RC 6 of 2013 dated 22.03.2013, RC 29 of 2013 dated 04.10.2013, RC 20 of 2014 dated 20.06.2014, RC 8 of 2015 dated 16.03.2015 and Corr. 4 to RC 8 of 2015;

viii. Increase in levy of Busy Season Charges and Development Surcharge vide rate Circular No. 58 of 2007 dated 29.05.2007, RC No. 38 of 2011 dated 12.10.2011, RC 28 of 2012 dated 27.09.2012 and RC 24 of 2013 dated 18.09.2013;

ix. Levy and subsequent increase in Service tax rate vide circular No. 27 of 2012 dated 26.09.2012, corrigendum 3 to RC 29 of 2012 dated 27.05.2015, corrigendum 5 to RC 29 of 2012 dated 12.11.2015 and corrigendum 6 to RC 29 of 2012 dated 31.05.2016;

x. Increase in Total Transportation Cost.

B. Direct the Respondent to make a payment of ₹ 70.29 Crore to the Petitioner, which amount has accrued on account of the Change in Law events, till 31.03.2017; and

C. Direct the Respondent No. 1 to continue to make payments accrued in favour of the Petitioner on account of Change in Law events mentioned in prayer (A), post 01.04.2017, in terms of the protocol/formula envisaged, till the validity of the WBSEDCL PSA dated 05.01.2011 and APNRL PPA dated 25.03.2011;

Background



2. The Petitioner has set up a thermal power project with an installed capacity of 540 MW (2 x 270 MW) ('the Project') at Saraikela - Kharsawn District in the State of Jharkhand. The Petitioner has entered into Power Purchase Agreement (Petitioner PPA) dated 25.3.2011 with PTC for supply of 100 MW of power for onward sale on long term basis. The Petitioner's PPA was executed on the understanding that PTC has executed Power Supply Agreement (WBSEDCL PSA) dated 5.1.2011 with WBSEDCL for the sale and supply of 100 MW power to WBSEDCL through the generating station of the Petitioner. The Petitioner has submitted that both the Petitioner's PPA and WBSEDCL PSA are inter- related and the Petitioner has to fulfil the obligations of the Seller, on behalf of PTC, with respect to the power supply obligations to the Respondent. The Petitioner has submitted that it has incurred additional costs on account of Change in law events which have adverse financial impact on the costs and revenue during the operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of WBSEDCL PSA.

3. The Petitioner has claimed the relief for the following change in law events :

- a) Increase in Royalty on Coal;
- b) Imposition of charges towards District Mineral Foundation and National Mineral Exploration Trust;
- c) Change in Clean Energy Cess (presently known as Clean Environment Cess);
- d) Introduction of Excise duty on coal;
- e) Changes in the components of Central Excise Duty;
- f) Increase in coal sizing and crushing charges;
- g) Increase in coal surface transportation charges;
- h) Increase in base freight on coal transportation;
- i) Increase in busy season charges and Development surcharge; and



j) Increase in service tax rate on transportation of coal.

4. The Petition was admitted and notices were issued to the Respondents to file their replies. Replies to the Petition have been filed by WBSEDCL and PTC vide their affidavits dated 18.4.2018 and 8.9.2018, respectively and the Petitioner has also filed its rejoinder vide its affidavit dated 9.5.2018 to the reply filed by WBSEDCL.

5. WBSEDCL vide its affidavit dated 18.4.2018 has mainly submitted as under :

a) The issue of source of coal is pending before this Commission in Petition No. 305/MP/2015. The change in law events claimed by the petitioner in the present petition are to be determined with reference to a baseline both in terms of the fuel cost as well as applicable taxes and duties. Since in certain cases, taxes and duties such as excise duty are levied ad valorem and therefore, without adjudicating on the issue of fuel supply pending in Petition No. 305/MP/2015, the present petition cannot be adjudicated upon.

b) A number of claims such as excise duty, service tax etc. have been subsumed under GST. Assuming without admitting that the source of coal was the Ganeshpur Captive Coal Block, the Petitioner would **not** be liable to pay GST (excise duty and service tax has been subsumed in GST). Therefore, there is actually a reduction in costs which has to be passed on. These issues cannot be decided till the Petition No. 305/MP/2015 is decided.

c) As per Article 10.2 of the PSA, the Petitioner is entitled to be compensated for the change in law events that have occurred after



commencement of the supply of power and not from the effective date of PSA as claimed by the Petitioner.

d) The change in law principle relating to Power Purchase Agreements under Section 63 of the Electricity Act, 2003 will not be applicable in the present petition as the Petitioner has entered into PPA through negotiation route.

e) Increase in rate of royalty vide Gazette Notification dated 10.5.2012 has taken place before the cut-off date i.e. 8.7.2013 (date of supply). Therefore, increase in rate of royalty is not a change in law event under Article 10.2 of the PSA.

f) Since, there was no designated coal source to the Petitioner and cost of fuel from alternate source is capped at captive coal price in accordance with Article 2.5 of the PSA. Accordingly, any compensation on account of Petitioner's contribution to District Mineral Foundation, National Mineral Foundation Trust and Clean Energy Cess will be limited to the benchmarked costs of captive coal mine and will be subject to the outcome of Petition No. 305/MP/2015.

g) The introduction and subsequent Increase in excise duty of coal vide Gazette Notification No. 1/2011 dated 17.3.2012 and Change in components of Central Excise Duty vide Notification dated 8.3.2013 has already occurred before the cut-off date i.e. 8.7.2013. Therefore, levy and subsequent increase in excise duty on coal and change in components of central excise duty are not change in law events and therefore, the Petitioner is not entitled to be compensated under Article 10.2 of the PSA.



h) increase in crushing and sizing charge, coal surface transportation charge, busy season surcharge and development surcharge are not change in law events in terms of Article 10.1 of the PSA as the same do not fall under any of the categories of change in law events as they are not result of an enactment of any law, nor it is a change in interpretation of any law, nor it is change in consents or taxes or a mining related law. Further, the Petitioner has also not placed any document to prove that the said charges have been imposed by way of any notification or pursuant to any Act of the Parliament.

i) The Petitioner is not entitled for any relief on account of increase in base freight of Coal Transportation as the energy charges have been fixed under Article 2 read with Schedule A of the PSA. Further, increase in base freight charges are analyzed and escalated in accordance with escalation index issued by the Commission. Therefore, the Petitioner is not entitled for any relief in this regard.

j) The increase in Busy Season Surcharge and Development Surcharge, does not fall under any of the categories of change in law events since the same are not the result of an enactment of any law, nor it is change in interpretation of any law, change in consent of taxes or mining related laws. Further, Busy Season Surcharge and Development Surcharge is levied on the base freight rate and the Petitioner is not entitled to any compensation on account of change in base freight and accordingly busy season surcharge and development surcharge are not change in law events.

6. PTC India vide its affidavit dated 8.9.2018 has submitted that PTC does not have any liability to pay compensation to the Petitioner. PTC has entered into back



and back arrangements for purchase and sale of power. Thus, the entire arrangement with the Petitioner was on back to back basis.

7. The Petitioner in its rejoinder filed vide affidavit dated 9.5.2018 to the reply of WBSEDCL has submitted as under :

a) The present petition has been filed for seeking compensatory relief on account of various change in law events. Whereas, the Petition No. 305/MP/2015 has been filed claiming change in law due to cancellation of Ganeshpur coal block and limited to base price of coal. Therefore, issues in both the Petitions i.e. 305/MP/2015 and 255/MP/2017 are different. Further, it is well settled principle of law that compensation under change in law qua taxes and duties is always on the actual base price of coal.

b) The reliance of WBSEDCL upon Article 10.2 (ii) of the PSA to contend that the Petitioner is entitled to be compensated for the change in law events that have occurred after commencement of the supply of power is misplaced. Article 10.2 (ii) only conveys that the Petitioner is entitled to seek compensation under change in law only after commencement of power supply. However, change in law events have to be considered from the date of execution of the PSA.

c) Article 2.5 of the PSA is applicable only in those situations where the petitioner would have sourced coal from any other source during the operation of its coal block. However, the captive coal block allocated to the Petitioner has been cancelled by the Hon'ble Supreme Court even prior to operationalisation of coal block. Since, the judgment of the Hon'ble Supreme

Court was applicable retrospectively; the clauses of PPA and PSA relating to sourcing of coal from the captive coal block became redundant.

d) As per Article 10 of the PPA/PSA, any change in law event occurring after the cut-off date i.e. 5.1.2011 shall result in compensation to the Petitioner. Therefore, WBSEDCL's assumption of cut-off date from the date of commencement of supply of power is misplaced.

e) The Change in Law clause has been inserted in the PPA/PSA in order to enable the Petitioner to recover cost, which could not have been factored at the time of locking its tariff, which in the present case is the date of agreement for sale of electricity. The change in taxes and duties has taken place after the execution of PSA and therefore, the Petitioner could not have factored the changes in taxes and duties at the time of execution of PSA.

Analysis and Decision

8. After consideration of the submissions of the parties, the following issues arise for our consideration :

a) Issue No 1: Whether the Commission has the jurisdiction to adjudicate the disputes in the present Petition?

b) Issue No: Whether the Petitioner's claims are admissible under Change in law in terms of the provisions of the PSA.

Issue No 1 : Whether the Commission has the jurisdiction to adjudicate the disputes in the present Petition?

9. WBSEDCL has submitted that the change in law principle relating to Power Purchase Agreements under Section 63 of the Electricity Act, 2003 will not be applicable in the present petition as the Petitioner has entered into PPA through negotiation route.



10. We have considered the submissions of the parties. It is noted that the tariff has not been fixed under provisions of Section 62 or Section 64 (5) of the Act.

The relevant portions of PPA is extracted as under :

“ F. Parties have negotiated the sale of 100 MW capacity from the Project for a period of 25 years with WBSEDCL and consequently PTC has signed a Power Sale Agreement (PSA) with WBSEDCL dated 05.1.2011 (PSA) and the same shall be submitted by WBSEDCL to West Bengal Electricity Regulatory Commission for their approval. This Agreement is being entered on back to back basis between the Partied herein to enable PTC to fulfil its duties and obligations under the PSA and in furtherance of the requirement of the PSA. All obligations of PTC and the Seller under the PSA, have to be complied with by the Seller herein. The Seller has examined the provisions and of the PSA and has understood its role, obligations and duties to enable PTC fulfil its obligations under the PSA”.

11. It is observed that both the PSA and PPA are premised on the negotiated route. Further, it is also expressly recorded in the recitals of PSA that the parties i.e. PTC and WBSEDCL had entered into negotiations for the sale of power by PTC to the WBSEDCL on round the clock basis for a period of twenty five years. It is observed that PSA has been approved by West Bengal Electricity Regulatory Commission. However, PPA is neither approved nor adopted by the State Commission.

12. Further, it is well settled principle that when the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. The Hon'ble Appellate Tribunal for Electricity vide its judgment dated 4.11.2011 in Appeal No. 15 of 2011 has held as under :

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

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61. *It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created”.*

13. In the present case also, PTC is acting like an intermediary between the Petitioner and WBSEDCL. Since, West Bengal Electricity Regulatory Commission has recognised the contractual obligations i.e. purchase of 100 MW of power by WBSEDCL from the Petitioner’s generating station through PTC under the PSA executed between the PTC and WBSEDCL, claims related to change in law are maintainable under the relevant provisions of the PSA.

14. Further, the Commission vide its interim order dated 6.6.2018 in the Petition Nos. 305/MP/2015 & 255/MP/2017 has already observed that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and this Commission has the exclusive jurisdiction under Section 79(1)(b) to regulate the tariff of the Petitioner including adjudication of disputes relating to tariff. The relevant portion of the Commission’s order dated 6.6.2018 in the Petition Nos. 305/MP/2015 & 255/MP/2017 is extracted as under :

“12. As per the above findings of the Hon’ble Supreme Court, the State Commission’s jurisdiction is only where the generation and supply takes place within the State. The moment the generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. Dealing with the case of Adani, Hon’ble Supreme Court has held that since the generation and sale is in more than one State, Section 86 is not attracted. Hon’ble Supreme Court has ruled that, the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State. Applying the test in the instant case, had the Petitioner been supplying power only to JSEB/JBVNL, it would have been generation and supply within the State and the jurisdiction of the JSERC would have been attracted. It is, however, seen that prior to entering into PPA with JSEB/JBVNL, the WBSEDCL had entered into PSA with PTC on 5.1.2011 and PTC in turn had entered into PPA with the Petitioner on 25.3.2011. In other



words, prior to the PPA with JSEB/JBVNL, the Petitioner had an arrangement for inter-State supply of power. The Petitioner subsequently had an arrangement in December 2013 for supply of power to TANGEDCO. The entire scheme of generation and supply of power unmistakably indicates that the Petitioner has a composite scheme for generation and supply of power in more than one State.”

15. In light of above discussions, we are of the view that this Commission has necessary jurisdiction to adjudicate upon the Petitioner's claims related to change in law events.

16. Further, WBSEDCL has argued that the issue of source of coal is pending before this Commission in Petition No. 305/MP/2015. It has submitted that change in law events claimed by the petitioner in the present petition is to be determined with reference to a baseline both in terms of the fuel cost as well as applicable taxes and duties. Accordingly it has submitted that without adjudicating the issue of fuel supply in Petition No. 305/MP/2015, the present petition cannot be adjudicated by the Commission.

17. The Petitioner in its rejoinder has submitted while the present petition has been filed seeking compensatory relief on account of various change in law events. the Petition No. 305/MP/2015 has been filed claiming change in law due to cancellation of Ganeshpur coal block and is limited to base price of coal. Therefore, the issues in Petition 305/MP/2015 and 255/MP/2017 are different and hence the present Petition may be adjudicated without awaiting the decision in Petition No. 305/MP/2015.

18. We have considered the submissions of the parties. It is observed that Petition No. 305/MP/2015 relates to issue of source of coal and base price of coal on account of cancellation of coal blocks allotted to the Petitioner by the Hon`ble Supreme Court. However, the present Petition relates to the Petitioner's claim for



compensation on account of various change in law events under the provisions of PSA/PPA. The Petitioner in the present Petition has sought compensation with respect to the increase/decrease of revenue/expenses on account of Change in Law events. It is pertinent to mention that the Appellate Tribunal in its judgment dated 12.9.2014 in Appeal No.288 of 2013 (Wardha Power Company Limited versus Reliance Infrastructure Limited & Others) had held that the compensation under change in law qua taxes and duties is always on the actual cost of coal. The relevant portion of the judgment dated 12.9.2014 in Appeal No.288 of 2013 is extracted as under :

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

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

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

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30. According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.

19. Thus, compensation on account of increase in the expenditure due to Change in Law events has to be allowed as per actual cost of coal subject to verification of documents submitted by the Petitioner. Hence, we find no reason to accept the contention of WBSEDCL for adjudication of the present Petition after the disposal of Petition No. 305/MP/2015. Accordingly, we proceed to adjudicate the various change in law events claimed by the Petitioner.

Issue No 2: Whether the Petitioner's claims are admissible under Change in law in terms of the provisions of the PSA?

20. The Petitioner has filed the present Petition under Article 10 of the PPA/PSA for adjustment / compensation to offset the financial /commercial impact of change in law events. Article 10 of the PSA dated 5.1.2011 executed between PTC and WBSEDCL deals with the event of change in law and the same is extracted as under:

- (i) "Change in Law" means the occurrence of any of the following events ;
 - a) 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.
 - b) 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.
 - c) the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier.
 - d) 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.



- e) 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.
 - f) any change in related to Mining Laws and Environmental Laws or Tax cess or duty affecting APNRL's input cost of fuel.
- (ii) But Change in Law shall not include :
- a) Any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or
 - b) Change in respect of UI Charges or frequency intervals by an Appropriate Commission
- (iii) Such change in Law could be but not restricted to any of the following cases where it :
- a) Results in any change in respect of Tax,
 - b) Affects Seller's or PTC obligation under this agreement.
 - c) Materially affects the construction, Commissioning or operation of the Project.

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

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

ii. Additional Expenditure during Operating Period

For Change in Law coming into force after the Pre-pone Delivery Date or the Schedule Delivery Date, as the case may be, any revision in tariff on account of such increases shall only be carried out after prior approval of the Appropriate Commission.

iii. In the event of Change in Law under Article 10.1(i), the Parties shall take all steps that may be reasonably required to comply with such Change in Law, including without limitation, extension of time to compensate for any delay in the Commissioning of the Project due to such Change in Law.

Similar provisions also exists in the PPA dated 25.3.2011 executed between the Petitioner and PTC.



21. The Petitioner has computed its claim for compensation due to change in law events from the date of execution of PSA between the PTC and WBSEDCL i.e. 5.1.2011. However, the Respondent WBSEDCL has relied upon Article 10.2 (ii) of the PSA and has submitted that the Petitioner is entitled for compensation only for those change in law events that have occurred after the commencement of supply of power to the Respondent.

22. We have considered the submissions of the parties. In case of tariff based on competitive bidding guidelines, there contains a provision of 'cut-off date' which is 7 days prior to bid deadline. No such provision has been specified in the PPA/PSA executed by the parties, since supply of power from the project of the Petitioner to Respondent, WBSEDCL through PTC is based on agreement between the parties. Also the WBERC had approved the PSA executed by PTC with the Respondent, PTC. In the absence of 'cut-off date' provision, we consider it appropriate to consider the date of signing of PSA i.e. 5.1.2011 as the 'cut-off date' for considering the change in law claims of the Petitioner in this Petition.

23. In the light of above, we proceed further to adjudicate the various change in law events claimed by the Petitioner considering 'cut-off date' as 5.1.2011 as under :

- a) Increase in Royalty on Coal;
- b) Imposition of charges towards District Mineral Foundation and National Mineral Exploration Trust;
- c) Change in Clean Energy Cess (presently known as Clean Environment Cess);
- d) Introduction of Excise duty on coal;
- e) Changes in the components of Central Excise Duty;
- f) Increase in coal sizing and crushing charges;
- g) Increase in coal surface transportation charges;



- h) Increase in base freight on coal transportation;
- i) Increase in busy season charges and Development surcharge; and
- j) Increase in service tax rate on transportation of coal.

Increase in Royalty on Coal

24. The Petitioner has submitted that as on the cut-off date, the Royalty on coal was computed as per rates notified by Ministry of Coal vide its Coal Gazette Notification No.552 dated 1.8.2007. As per the said notification, the notified rate of Royalty was with reference to a baseline both in terms of the fuel cost as well as applicable taxes and duties ₹70 + 5 % of CIL notified basic coal price. Subsequently, Ministry of Coal vide Gazette Notification No. 349 dated 10.5.2012 imposed the royalty @ 14% of the base price. According to the petitioner, the aforesaid increase in royalty after the cut-off date is a change in law event for which it needs to be compensated.

25. WBSEDCL has submitted that increase in rate of Royalty as per Gazette Notification No. 349 dated 10.5.2012 has occurred before the cut -off date of 8.7.2013. Accordingly, the increase in royalty is not a change in law in terms of Article 10.2 of the PSA and the Petitioner is not entitled for any compensation on account of the same.

26. We have considered the submissions of the parties. WBSEDCL has not disputed the fact that increase in rate of Royalty is a change in law event but has only submitted that the said change in Royalty had taken place prior to cut-off date i.e. 8.7.2013. We have already considered the cut- off date as 5.1.2011. Therefore, the increase in rate of royalty has occurred after the cut-off date i.e. 5.1.2011.



27. Increase in rate of royalty as change in law event has been decided in our earlier orders dated 1.2.2017 and 7.4.2017 in Petitions No. 8/MP/2014 and 112/MP/2015 respectively. The relevant portion of the order dated 7.4.2017 in Petition No. 112/MP/2015 is reproduced as under :

“In the light of the above decision, the claim of the Petitioners has been examined. The Increase in Royalty was effected vide Notification dated 10.5.2012 which is after the cut-off date of 4.4.2011. The increase in royalty has resulted in additional recurring expenditure by the Petitioners for supply of power to BSPHCL. Therefore, we hold that the Petitioners shall be entitled for compensation for applicable ad valorem price of coal per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by `55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess. In case, the rate of Royalty is reduced from applicable ad valorem price or `55 plus 5%, the Petitioners shall compensate BSPHCL for the reduction in cost of coal based on above principles.”

28. In the light of above order, the claim of Petitioner on account of increase in rate of Royalty pursuant to Gazette Notification No. 349 dated 10.5.2012 is allowed. It is clarified that the Petitioners shall be entitled to recover on account of increase in royalty on coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity to WBSEDCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in royalty on coal. The Petitioner and WBSEDCL, are directed to carry out reconciliation on account of these claims annually through PTC.

Imposition of charges towards District Mineral Foundation and National Mineral Exploration Trust

29. The petitioner has submitted that the Ministry of Coal vide its notification, G.S.R. 792(E), dated 20.10.2015 issued under the provisions of Mines and Minerals (Development and Regulation) Act 1957, framed Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015. Under Rule 2(b) of the above Rules the Petitioner was imposed with additional levy to the tune of 30% of the royalty payable



in terms of the notification dated 10.05.2012. Subsequently, through a notification, being G.S.R 837 (E) dated 31.08.2016, the above notification dated 20.10.2015 was amended whereby the above additional levy was made operative on a retrospective basis from 12.01.2015.

30. Further, Ministry of Mines vide its notification, bearing no. G.S.R. 632 (E) dated 14.08.2015 imposed an additional 2% levy over and above the already imposed 14% royalty on the base price towards its National Mineral Exploration Trust.

31. However, the Hon'ble Supreme Court of India vide its judgment dated 13.10.2017 in Transferred Case (Civil) No. 43 of 2016 has quashed the aforementioned notification being G.S.R 837 (E) dated 31.08.2016, thereby quashing the retrospective applicability of the said notification. Further it was also held that the effective date for levy of such contribution is 20.10.2015 (for coal) or the date when the establishment of District Mineral Foundation is notified by the State Government, whichever is later. In the present case, the DMF was notified by the Government of Jharkhand on 22.03.2016 whereas the DMF was established on 12.01.2015; therefore, the effective date of levy of such contribution is 22.03.2016. It has also been observed by the Hon'ble Supreme Court that no refund will be given to those parties which have paid for the contribution for the period determined in accordance with this judgment but the amount already paid will be adjusted with future contribution. The above amount was imposed, in addition to the royalty, to be paid towards the District Mineral Foundation of the district in which the mining operation is carried out.

32. WBSEDCL has submitted that any compensation on account of Petitioner's contributions to District Mineral Foundation ("DMF") and National Mineral Exploration



Trust (“NMET”) will be limited to the benchmarked costs of captive coal mine, being the Ganeshpur coal mine.

33. We have already held that the contribution towards District Mineral Foundation and National Mineral Exploration Trust are change in law events in our earlier order dated 7.4.2017 in Petition No. 112/MP/2015. The relevant extract of the aforesaid order is reproduced as under :

“60. It is pertinent to mention that royalty on coal imposed under Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 are payable by the holders of mining lease to the Government Since the contributions to these funds are to be statutorily paid as a percentage of royalty, in addition to the royalty, they should be accorded the similar treatment. National Exploration Trust and District Mineral Foundations have been created through the Act of the Parliament after the cut-off date and therefore ,they fulfill the conditions of Change in Law. Accordingly, the expenditure on this account has been allowed under Change in Law. The Petitioners shall be entitled to recover the same corresponding to the scheduled generation for supply of electricity to BSPHCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service taxon transportation of coal. The Petitioners are directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to BSPHCL. The Petitioners and BSPHCL are further directed to carry out reconciliation on account of these claims annually”.

34. In the light of the above discussion, the claim of the Petitioner towards District mineral Foundation and National Mineral Exploration Trust is allowed. The Petitioner is directed to furnish along with its monthly bills, the proof of payment and computations duly certified by the auditor to WBSEDCL, through PTC, for claiming the expenditure under Change in Law. It is further directed that the reimbursement on account of contribution to DMF and NMET shall be on the basis of actual payments made to appropriate authorities and shall be in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or actual whichever is lower for supply of power to the procurers. If the generation is lower than the scheduled generation, then the relief shall be restricted to actual generation



Change in Clean Energy Cess or Clean Environment Cess:

35. The Petitioner has submitted that the rate of Clean Energy Cess of ₹ 50 per tonne was prevalent as on the cut-off date. The above Cess was revised to ₹ 100 per tonne w.e.f. 11.07.2014 vide notification no. 20/2014 dated 11.07.2014. Further the said Cess was revised to ₹ 200 per tonne w.e.f. 01.03.2015 vide Notification No. 1/2015 dated 1.3.2015. Further, the Ministry of Finance vide its Notification No. D.O.F No. 334/8/2016- Tru dated 29.2.2016 communicated that Clean Energy Cess has been renamed as Clean Environment Cess and has been increased to Rs 400 per tonne w.e.f. 1.3.2016, which is subsequent to cut-off date and was applicable till 30.6.2017. After the enactment of Goods and Services Tax, a new enactment has been notified in the name of Taxation Laws Amendment Act, 2017, which abolished the aforementioned Clean Environment Cess w.e.f. 1.7.2017. However, the levy of cess still continues under a new enactment in the name of Goods and Services Tax (Compensation to States) Act, 2017 at the rate of ₹ 400/- per MT of coal.

36. The Petitioner has also submitted that it is in the process of assessing the impact of introduction of GST regime and the same shall be notified to the beneficiary Discoms as soon as the Petitioner is able to assess the impact on generation of power due to introduction of GST regime. The Petitioner has submitted that the above said notifications of the Ministry of Finance, Gol enhancing the rate of Clean Energy Cess after the cut-off date, is a Change in Law event and may be allowed.

37. WBSEDCL has submitted that in terms of Article 2.5 of the PSA, cost of fuel from alternate sources is capped at captive coal price. Therefore, any compensation on account of levy of clean energy cess will be limited to the benchmarked costs of captive coal mine, being the Ganeshpur coal mine.



38. We have considered the submissions of the parties. The Clean Energy cess applicable at different points of time is as under:-

From	To	Applicable Clean Energy Cess (/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

39. We observe 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 WBSEDCL PPA. As on the cut-off date (i.e. 5.1.2011), Clean Energy Cess was applicable at the rate of ₹50/tonne. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Thereafter, the Commission vide Order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors) and Order dated 19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd Vs PTC India Ltd & ors) had allowed the increase in Clean Energy Cess as Change in law event. Thereafter, the Commission vide its order dated 31.5.2018 in Petition No. 170/MP/2016 (KSKMPCL Vs TANGEDCO) filed by the Petitioner therein respect of TANGEDCO PPA dated 27.11.2013 had considered the issue of Clean Energy Cess on coal as a Change in Law event in the light of the earlier orders and had allowed the said claim of the Petitioner. The relevant portion of the order dated 31.5.2018 in Petition No. 170/MP/2016 is extracted as under:-

“32 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 TANGEDCO PPA. As on the cut-off date (27.2.2013), Clean Energy Cess was applicable at the rate of ₹50/tonne. It is noticed that Clean Energy Cess was introduced by Government of India and this cess has undergone various revisions from the year 2014 onwards. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013. Thereafter, the Commission vide Order dated 1.2.2017 in Petition No. 8/MP/2014 (EMCO Energy Ltd Vs MSEDCL & ors) and Order dated



19.12.2017 in Petition No. 101/MP/2017 (DB Power Ltd Vs PTC India Ltd &ors) had allowed the increase in Clean Energy Cess as a Change in Law event. Subsequently, the Commission vide Order dated 16.3.2018 in Petition No. 1/MP/2017 (GWELVs MSEDCL & ors) had considered the issue of Clean Energy Cess as a Change in Law event in the light of the earlier orders and had allowed the said claim. The relevant portion of the order is extracted as under:

59.....The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean energy cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean energy cess from TANGEDCO as per applicable rate of Clean energy cess in proportion to the coal consumed for generation and supply of electricity to TANGEDCO.”

33.....The above decision is applicable in the case of the Petitioner. Therefore, the levy of Clean energy cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner is entitled to recover Clean energy cess from TANGEDCO as per applicable rate of Clean energy cess in proportion to the coal consumed for generation and supply of electricity to TANGEDCO. As on the cut-off date, Clean Energy Cess was ₹50/tonne which the Petitioner was expected to factor in the bid. Therefore, the applicable rate of Clean Energy Cess in case of TANGEDCO PPA shall be ₹50/tonne with effect from 11.7.2014, ₹150/tonne with effect 1.3.2015 and ₹350/tonne with effect from 1.3.2016 till 30.6.2017. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to TANGEDCO. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Clean Energy Cess on coal. The Petitioner and TANGEDCO 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 upto 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”.

40. In the light of above decision, the levy of Clean Energy Cess on coal is a Change in Law event under Article 10 of the WBSEDCL PSA. Accordingly, the Petitioner is entitled to recover Clean Energy Cess from the WBSEDCL as per applicable rate of Clean Energy Cess in proportion to the coal consumed for generation and supply of electricity to WBSEDCL. As on the cut-off date, Clean Energy Cess was ₹50/ tonne which the Petitioner was expected to factor before the execution of PPA. Therefore, the applicable differential rate of Clean Energy Cess in case of WBSEDCL PSA shall be Rs 50/tonne with effect from 11.7.2014, Rs



150/tonne with effect from 1.3.2015 and Rs 350/tonne with effect from 1.3.2016 till 30.6.2017. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Clean Energy Cess on coal. The Petitioner and WBSEDCL are directed to carry out reconciliation on account of these claims annually through PTC.

41. We also observe that Clean Energy Cess has been abolished through Central Goods and Services Tax Act, 2017, with effect from 1.7.2017. Accordingly, the claim of 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.

Introduction of Excise Duty on Coal

42. The Petitioner has submitted that the Central Excise Duty was not applicable on coal procured for thermal plants as on cut-off date. However, the Central Government vide its Notification No. 1/2011 dated 1.3.2011 introduced Excise Duty to be levied on coal at the rate of 5.15% including 2% education cess and 1% higher education cess, with effect from 7.3.2012. Further, the said duty was increased to 6.18% including 2% education cess and 1% higher education cess vide amendment in Section 141 of the Finance Act, 2012. This was communicated by Coal India Limited vide fax No. CIL/S&M/GM(F)/2331 dated 17.3.2012 for the purpose of levying the same with effect from 17.03.2012. Further, the levy of education cess



and Higher education cess was withdrawn by the Ministry of Finance vide its Notification No. 14 of 2015 and 15 of 2015 dated 1.3.2015. The Petitioner has submitted that the above notifications pertaining to introduction of excise duty on coal is falling under Change in Law events within the meaning of Article 10 of the WBSEDCL PSA which needs to be taken into consideration for computing the amount required to be ascertained by the Commission for compensating the Petitioner on account of the consequences of the occurrence of Change in Law events.

43. WBSEDCL has submitted that the introduction and subsequent increase in rate of excise duty on coal as per Central Government Notification No. 1/2011 and fax no. CIL/S&M/GM(F)/2331 dated 17.03.2012 has occurred before the cut-off date. Accordingly, the levy and subsequent increase in rate of excise duty on coal is not a change in law event in terms of Article 10.2 of the PSA and the Petitioner is not eligible for any compensation on account of the same.

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

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

45. Since the change in Excise Duty has been introduced through an Act of Parliament, which has occurred after the cut-off date i.e. 5.1.2011, which has impacted



the expenditure of the Petitioner, the same is covered under Change in law in terms of Article 10.1.1 of the PSA.

46. Accordingly, the Petitioner is entitled to recover expenditure incurred towards Excise Duty from the WBSEDCL as per applicable rate of Excise Duty in proportion to the coal consumed for generation and supply of electricity to WBSEDCL. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Clean Energy Cess on coal.

Change in the components of Central Excise Duty

47. The Petitioner has submitted that the Central Excise Duty as on cut-off date was 5.15% on the summation of the base price of coal, surface transportation charge and sizing and crushing charge. Subsequently, the Central Excise Duty was increased from 5.15% to 6.18% vide Ministry of Finance (Department of Revenue) Notification No. 19/2012- Central Excise Budget 2012-13. Further, vide Notification No. 14/2015 and 15/2015 dated 1.3.2015, issued by Ministry of Finance, Government of India, the rate of Central Excise Duty was revised from 6.18% to 6%. However the overall burden in terms of the amount of money payable by the Petitioner towards Central Excise Duty has increased from ₹ 55.65 per tonne to ₹ 63.10 per tonne, on account of addition of incidents on which the said Duty is calculated upon and from ₹63.10 per tonne to Rs 87.89 per tonne as of now despite the downward revision in the Excise Rate. Earlier the said duty was calculated on the summation of the base price of coal, surface transportation charge and sizing



and crushing charge, whereas with the notification, being SECL/BSP/S&M/504 dated 8.3.2013, the said Duty is now calculated on the summation of Base Price of Coal, Crushing and Sizing Charge, SILO Charge, Surface Transportation Charge, Royalty, Stowing Excise Duty. Therefore, the downward revision of Excise Duty did not have any beneficial impact on the cost of the Petitioner, rather the Petitioner was subjected to additional expenditure pertaining to payment of Excise Duty, due to change in the underlying components on the basis of which, the said Excise Duty is imposed. The changes of components were effected after cut-off date and the revision in the Excise Duty took place with effect from 1.3.2015.

48. WBSEDCL has submitted that the change in components while assessing the central excise duty payable on coal as per Notification No. SECL/BSP/S&M/504 dated 8.3.2013 has occurred before the cut-off date. Accordingly, the said change in components of excise duty is not a change in law event in terms of Article 10.2 of the PSA and the Petitioner is not eligible for any compensation on account of the same.

49. We have considered the submissions of the Petitioner and the Respondents. The Petitioner has submitted that as on the cut-off date i.e. on 5.1.2011, excise duty on summation of base price of coal, sizing charges and surface transpiration charges of coal was 5.15%. Subsequently, Ministry of Finance, vide notification dated 1.3.2015 has revised the central excise duty from 6.18% to 6%. The Petitioner has submitted that there is an increase in the overall burden towards central excise duty. The reason furnished by the petitioner for the increase is due to the fact that, as on cut off date i.e. 5.1.2011 the central excise duty was applicable on the base price of coal, surface transportation charge and sizing and crushing charge. Subsequently, vide notification from SECL dated 8.3.2013, the said



duty was calculated on summation of basic values of coal, crushing & sizing charge, SILO charge, surface transportation charge, royalty and stowing excise duty.

50. The Petitioner has placed on record SECL letter dated 8.3.2013 about inclusion of Royalty and Stowing Excise Duty in the assessable value for payment of Central Excise Duty. The Petitioner has furnished SECL Notice No. SECL/ BSP/S&M/ /504 dated 8.3.2013 regarding inclusion of Royalty and Stowing Excise duty in the assessable value of coal for the payment of Central Excise Duty. Since this letter has been issued by SECL for payment of Excise Duty on coal, based on Notification of Ministry of Finance, GOI, the same shall be considered as Change in law.

51. The Commission in its order dated 31.5.2018 in Petition No. 170/MP/2016 (KSKMPCL V TANGEDCO) has considered this issue and had allowed the said claim in line with its decision in order dated 16.3.2018 in Petition No. 1/MP/2017 (GMRWEL vs MSEDCL & ors) 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.

52. As regards 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 of India & ors v/s Steel Authority of India & ors (2011 SCC 450).



53. Since the change in the components for the purpose of calculating Central Excise Duty has been introduced based on Notification of Ministry of Finance, GOI, and has occurred after the cut-off date i.e 5.1.2011 impacting the expenditure of the petitioner the same amounts to Change in Law. However, the claim of royalty in the assessable value of coal shall be subject to the decision of the Hon^{ble} Supreme Court in the concerned case.

54. Accordingly, the Petitioner is entitled to recover expenditure incurred towards change in excise duty due to change in components for the purpose of calculating exercise duty from the WBSEDCL in proportion to the coal consumed for generation and supply of electricity to WBSEDCL. The Petitioner is directed to furnish along with its monthly bill the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Clean Energy Cess on coal.

Increase in Sizing and Crushing Charge and Surface Transportation Charges

55. The Petitioner has submitted that as on cut-off date the prevailing sizing / crushing charges, where the top size of coal was limited to 200-250 mm and 100 mm, were ₹ 39/tonne and ₹61/tonne, respectively. Subsequently, CIL vide Price Notification No. CIL/S&M/ GM(F)/ Pricing/ 2784 dated 16.12.2013, increased the coal sizing and crushing charges as under :

- (i) ₹51 per tonne - Where top size of coal is being limited to any maximum limit within the range of 200 mm to 250 mm; and
- (ii) ₹79 per tonne - Where the top size of coal is being limited to any maximum limit within the range of 100 mm.



56. The Petitioner has elucidated the impact of increase in sizing and crushing charges as under :

S.No.	Particulars	As on 05.03.2013 ₹/tonne	As on 31.03.2017 ₹/tonne
1.	Coal sizing and crushing charge within the range of 200 mm to 250 mm	39.00	51.00
2.	Coal sizing and crushing charge within the range of 100 mm	61.00	79.00

57. The Petitioner has submitted that increase in coal surface transportation charges are notified by Coal India Limited. As per the Price Notification No. CIL/S&M/GM (F) /Pricing: 1181 dated 15.10.2009, surface transportation charge applicable as on 1.1.2012 was ₹44 per tonne for a distance of 3-10KM and ₹77 per tonne for a distance of 10-20 KM. However, after the cut-off date CIL vide its notification No. CIL/S&M/GM(F)/Pricing/2340 dated 13.11.2013, increased the surface transportation charges to ₹ 57 per tonne for a distance of 3-10KM and ₹116 per tonne for a distance of 10-20 KM.

58. The petitioner has submitted that the increase in the rate of sizing and crushing charges and increase in coal surface transportation charge has occurred after the cut-off date and therefore, qualifies for Change in Law event under Article 10 of the WBSEDCL PSA.

59. WBSEDCL has submitted that increase in sizing and crushing charges are not change in law events in terms of Article 10.1 of the PSA since the same do not fall under any of the categories of change in law events as they are not the result of an enactment of any law, nor is it a change in interpretation of any law, nor is it a



change in consents or taxes or a mining related law. WBSEDCL has further submitted that the Petitioner did not have any designated source of coal and therefore, in terms of Article 2.5 of the PSA, cost of fuel from alternate sources is capped at captive coal price. Accordingly, compensation, if any, on account of increase in crushing and sizing charges will be limited to the benchmarked costs of captive coal mine, being the Ganeshpur coal mine.

60. 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 charge and surface transportation charges as under:-

“93. We have considered the submissions of the Petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated 22.2.2013 between the Petitioner and SECL shows that under Para 9.0, the delivery price of coal for coal supply pursuant to the Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time. Sizing/crushing charges and transportation charges have been defined as under:-

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

9.2.2 Sizing/Crushing Charges Where coal is crushed/sized for limiting the top-size to 250 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.”



61. 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 17 (GMR Warora Energy Limited versus CERC & Ors) is reproduced 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 Gol 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 Gol 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 Gol 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 Gol. 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.

ix. 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 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

62. In line with the above decisions, the claim of the Petitioner for relief under ‘Change in Law’ in respect of sizing / crushing charges and surface transportation of coal, is disallowed.

Increase in Base Freight of Coal Transportation:

63. The Petitioner has submitted that its power plant is located within 204 KM of CCL mines. The base freight applicable as on cut-off date was ₹ 223.80/ tonne, in accordance with Rate Circular No. 33 of 2010 dated 20.12.2010 issued by the Ministry of Railway, Government of India. The freight was increased to Rs 283.2 /Tonne, Rs 299.7/Tonne, ₹304.7/Tonne, ₹324.5/Tonne, ₹345/Tonne and finally to



₹421/Tonne in accordance with various Circulars and corrigendum issued by Ministry of Railways, Government of India, post the cut-off date i.e. 05.01.2011.

64. WBSEDCL has submitted that the Petitioner is not entitled to transportation charges of any nature since the energy charges have been fixed in terms of Article 2 read with Schedule A of the PSA. Further, increase in base freight charges are analyzed and escalated in terms of the escalation index issued by this Commission. Since increase in base freight is considered while applying the escalation index, the petitioner is not entitled to claim the same as a change in law event. The respondent has further submitted that there is no designated source of coal and in terms of Article 2.5 of the PSA, cost of fuel from alternate sources is capped at captive coal price. Accordingly it is submitted that any compensation on account of increase in base freight will be limited to the benchmarked costs of captive coal mine, being the Ganeshpur coal mine.

65. We have perused the submissions made by the parties. The Commission vide order dated 6.2.2017 in Petition No.156/MP/2014 with respect to change in class from 140 to 150 for Railway freight for coal for trainload movement had disallowed the claim under change in law. The relevant portion of the said order dated 6.2.2017 is extracted as under:-

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



passed on through the escalation rates notified by the Commission from time to time. It is pertinent to mention that the escalation index notified by the Commission aims at taking care of the escalations arising out of the market forces. Since the change of class of railway freight is included in the computation of escalation rates, this cannot be treated as Change in Law as per Article 13 of the PPA and accordingly, the petitioner's claim in this regard has been disallowed."

66. The Appellate tribunal vide its judgment dated 14.8.2018 in Appeal No. 119 of 2016 has also disallowed increase in base freight of railway transportation as change in law event. The relevant portions of the said judgment is extracted as under

"We also hold that such changes in classification of railway freight for coal is reflected in the escalation rate for transportation issued by CERC and hence automatically gets factored into the tariff and as such could not be considered as a Change in Law event. In the present case, although it was projected to be beneficial to the Discoms but the said benefits are automatically being passed on to the Discoms by a way of CERC escalation rates."

67. In the light of the above decision, we are of the view that it is a common practice followed by Ministry of Railways that the rates are revised from time to time and any person availing the services of Railways is expected to factor in such change in charges in the bid. Further, the Escalation Index notified by the Commission which uses Base Freight Rate, includes the impact of change in railway freight for coal. Considering increase in freight as change in law would tantamount to double benefit to the petitioner which is not allowed. The impact of change in freight rate due to change in freight class is being passed on through the escalation rates notified by the Commission from time to time. Hence, it cannot be considered as change in law event and accordingly, the claim of the petitioner for increase in base Freight of Coal Transportation is disallowed.

Increase in Busy Season Charges and Development Surcharge

68. The Petitioner has submitted that as on cut-off date the applicable rate for levy of Busy Season Surcharge was 5% of the base freight rate and Development



Surcharge was 2% of the base freight rate and busy season surcharge. However, after the cut-off date, Indian Railways increased the busy season charge from 5% to 10% vide circular no. 38 of 2011 dated 12.10.2011, from 10% to 12% vide circular no. 28 of 2012 dated 27.09.2012 and from 12% to 15% vide circular no. 24 of 2013 dated 18.9.2013 and the net increase of “Dynamic Pricing Policy-Levy of busy season charge” has been ₹38.97/Tonne.

69. The Petitioner has further submitted that, after the cut-off date, Indian Railways increased the development surcharge from 2% to 5% vide circular number RC 38 of 2011. Since, the busy season charges is imposed on base freight rate, the final amount after imposition of the above charge on the base freight rate amounts to normal tariff rate. However, Development Surcharge is imposed on summation of normal tariff rate and Busy Season Surcharge. Therefore, even in the absence of any change of rate at which Development Surcharge is imposed, due to rise in the base freight rate and Busy Season Charges, there has been a net increase of ₹18.78/Tonne in levy of Development Therefore, increase in Busy Season Surcharge and development surcharge is a change in law event under Article 10 of the WBSEDCL PSA.

70. WBSEDCL has submitted that the increase in busy season surcharge and development surcharge are not change in law events in terms of Article 10.1 of the PSA as they do not fall under any of the categories of change in law events and the same are not the result of an enactment of any law, nor is it a change in interpretation of any law, nor is it a change in consents or taxes or a mining related law. However, the said charges are levied on the base freight rate. Therefore, the Petitioner is not entitled to any compensation on account any change in base freight rate. The respondent has further submitted that there is no designated source of coal



and in terms of Article 2.5 of the PSA, cost of fuel from alternate sources is capped at captive coal price. Accordingly any compensation on account of increase in base freight will be limited to the benchmarked costs of captive coal mine, being the Ganeshpur coal mine.

71. The Appellate Tribunal for Electricity in its judgment dated 14.8.2018 in Appeal No. 111 of 2017 (GMR Warora Energy Limited v. CERC & Ors) has held Levy of Busy Season Surcharge and Development surcharge as a change in law event. The relevant portion from the said judgment is reproduced below:-

“xi. At the outset we observe that similar issues have been decided by this Tribunal in its judgement dated 14.8.2018 in Appeal Nos. 119 & 277 of 2016 in case of Adani Power Ltd. v. RERC & Ors. (‘Adani Judgement’). In our opinion the said findings of this Tribunal are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:

“11. A.

xiii .From the above discussions it is 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.

xvi. From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which does not exist at the time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA.

According to these issues are decided in favour of APRL.”

This Tribunal has concluded that the circulars issued by MOR have force of law. CERC escalation rate notifications cover only basic freight and other prevailing charges were to be factored in by APRL at the time of bidding. Accordingly any change in such surcharges/levy of new surcharge was to be treated as Change in Law event requiring compensation to be paid to APRL.



xii. In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNH-PPA.

Accordingly, these issues are decided in favour of GWEL

72. In the light of above decisions, we are of the view that the Petitioner shall be entitled to compensation on account of increase in Busy Season Surcharge and Development Surcharge. Accordingly, the claim of the Petitioner in this regard is allowed in proportion to the coal consumed for generation and supply of electricity to WBSEDCL. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of the impact due to Increase in "Busy Season Charges" and "Development Surcharge".

Increase in Service Tax rate on transportation of Coal

73. The Petitioner has submitted that as on the cut-off date i.e. 5.1.2011, the Levy of service tax was kept in abeyance till 30.9.2012 through various notifications. However, the same was made applicable at the rate of 3.708% (Service Tax of 12% charged on 30% of freight; equivalent to 3.6% of total freight and Education Cess & Higher Education Cess of 2% and 1% respectively amounting to 0.072% and 0.036% of total freight) from 1.10.2012 through the rate circular no. 27 of 2012 dated 26.9.2012. The Service Tax rate has increased from 3.708% to 4.2% (Service Tax of 14% charged on 30% of freight; equivalent to 4.2% of total freight and Education



Cess & Higher Education Cess of 2% and 1% respectively were discontinued) vide the corrigendum 3 to RC 29 of 2012 to be levied with effect from 1.6.2015. Further, the same was increased from 4.2% to 4.35% (Service Tax of 14% and 0.5% of Swach Bharat Cess charged on 30% of freight; equivalent to 4.35% of total freight) vide corrigendum 5 to RC 29 of 2012 with effect from 15.11.2015. Thereafter, the same was again increased from 4.35% to 4.5% (Service Tax of 14%, 0.5% of Swach Bharat Cess and 0.5% of Krishi Kalyan Cess charged on 30% of freight; equivalent to 4.35% of total freight) vide corrigendum 6 to RC 29 of 2012 with effect from 01.06.2016.

74. We have already observed in our order dated 1.2.2017 in Petition No. 8/MP/2014 that service tax on transportation of goods by Indian Railways qualifies as Change in Law event. Relevant portion of the said order dated 1.2.2017 is extracted as under:-

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



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

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

75. In the light of above, the Petitioner shall be entitled to recover on account of change in service tax on transportation of coal through Railways in proportion to the coal consumed corresponding to the scheduled generation. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of service tax on transportation of coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC.

Summary

76. Based on the above analysis and decisions, the summary of our decision for the claim under “Change in Law” events during the Operation are as under:-

S.NO	Change in Law Event	Decision
1.	Increase in Royalty on Coal	Allowed.
2.	District Mineral Foundation and National Mineral Exploration Trust	Allowed.
3.	Change in Clean Energy Cess (presently known as Clean Environment Cess)	Allowed.



4.	Introduction of Excise duty on coal	Allowed
5.	Changes in the components of Central Excise Duty	Allowed (Subject to the decision of the Hon'ble Supreme Court)
6.	Coal sizing charges and Surface transportation charges	Not Allowed.
7.	Increase in base freight on coal transportation	Not Allowed.
8.	Increase in busy season charges and Development surcharge	Allowed.
9.	Increase in service tax rate	Allowed.

77. The Petitioner is directed to submit documentary proof of payments along with monthly bills while claiming the impact of above change in law events allowed by the Commission.

78. Petition No. 255/MP/2017 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/-
(P. K. Pujari)
Chairperson

