

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 217/MP/2016

**Coram:
Shri P. K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 21st August, 2020

In the matter of

Petition seeking compensation on account of Change in Law under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 10 of the Power Purchase Agreement dated 1.4.2013 entered into between Thermal Powertech Corporation of India Limited and Distribution Companies in the States of Andhra Pradesh and Telangana.

**And
In the matter of**

Thermal Powertech Corporation India Limited
(now, Sembcorp Energy India Limited)
6-3-1090, Block A, Level 5, TSR Towers
Rajbhavan Road, Somajiguda,
Hyderabad 500 082.

.....Petitioner

Vs.

1. Southern Power Distribution Company of Telangana Limited
Mint Compound, Hyderabad - 500 063.
2. Northern Power Distribution Company of Telangana Limited
D.No. 19-13-65/A, Kesavayanagunta,
Tiruchanoor Road, Tirupati.
3. Southern Power Distribution Company of Andhra Pradesh Limited
VidyuthBhavan, Nakkalagutta,
Hanamkonda, Warangal - 506 001.
4. Eastern Power Distribution Company of Andhra Pradesh Limited
P&T Colony, Seethammadhara,
Visakhapatnam - 530 013

.....Respondents

The following were present:

Shri Hemant Sahai, Advocate, SEIL

Shri Nitish Gupta, Advocate, SEIL
Ms. Anukriti Jain, Advocate, SEIL
Shri Milind Nigudkar, SEIL
Shri Sriharsha Peechara, Advocate, Telangana Discoms
Shri Rakesh Sharma, Advocate, AP Discoms

ORDER

The Petitioner, Thermal Powertech Corporation India Limited (Now Sembcorp Energy India Limited), has filed the present Petition under Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking compensation on account of Change in Law events in terms of Power Purchase Agreement (PPA) dated 1.4.2013 entered into with the Respondents, Eastern Power Distribution Company of Andhra Pradesh Limited, Southern Power Distribution Company of Andhra Pradesh Limited (collectively referred to as the 'AP Discoms'), Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana (collectively referred to as the 'Telangana Discoms') for supply of 500 MW power from the Petitioner's generating station.

Background

2. The Petitioner has set up a 1320 MW coal-based thermal generating station consisting of two units of 660 MW each (hereinafter referred to as 'the generating station') located at Krishnapatnam, SPSR Nellore in the State of Andhra Pradesh. Unit-1 and Unit-2 of the generating station achieved commercial operation on 2.3.2015 and 15.9.2015 respectively. The Petitioner is supplying power under the PPA w.e.f 20.4.2015.

3. On 17.5.2010, the distribution licensees of erstwhile undivided State of Andhra Pradesh, namely, Central Power Distribution Company of Andhra Pradesh Limited, Eastern Power Distribution Company of Andhra Pradesh Limited, Southern

Power Distribution Company of Andhra Pradesh Limited and Northern Power Distribution Company of Andhra Pradesh Limited (in short, the 'Undivided AP Discoms') issued a Request for Proposal for procuring 2000 MW +/- 20% of power on long-term basis under Case-1 bidding process.

4. In the said bidding process, the Petitioner emerged as one of the successful bidders and accordingly, was issued Letter of Intent on 31.1.2013. Subsequently, the Petitioner and the Undivided AP Discoms executed Power Purchase Agreement on 1.4.2013 for supply of 500 MW (net capacity) from the Petitioner's generating station at a levelised tariff of Rs. 3.675/kWh. The PPA was executed on the basis that 70% of fuel would be procured from Mahanadi Coalfields Limited (i.e. 4.273 million metric tonne per annum) and 30% of coal will be imported from Indonesia. Andhra Pradesh Electricity Regulatory Commission (APERC) vide its order dated 13.8.2013 in O.P No. 55 of 2013 adopted the tariff under the PPA as discovered under the competitive bidding process under Section 63 of the Act.

5. On 1.3.2014, the Andhra Pradesh Reorganization Act, 2014 (in short, "the AP Reorganization Act") was notified. Pursuant to this, w.e.f. 2.6.2014, the erstwhile State of Andhra Pradesh was bifurcated into the State of Telangana and Andhra Pradesh. In terms of AP Reorganization Act, Eastern Power Distribution Company of Andhra Pradesh Limited and Southern Power Distribution Company of Andhra Pradesh Limited (the AP Discoms) are now operating in the new State of Andhra Pradesh, whereas, Central Power Distribution Company of Andhra Pradesh Limited and Northern Power Distribution Company of Andhra Pradesh Limited became Southern Power Distribution Company of Telangana Limited and Northern Power Distribution company of Telangana Limited (the Telangana Discoms) respectively, which are operating in the State of Telangana. Accordingly, on 10.4.2015, the

Petitioner and the Respondents entered into an agreement to amend the PPA to, *inter-alia*, change the names of the parties to the PPA and to modify the Date of Commercial Operation of the generating station to 20.4.2015.

6. The Petitioner has submitted that under Article 10 of the PPA, the Petitioner is entitled to be compensated on account of occurrence of Change in Law events thereby resulting into additional recurring/ non-recurring expenditure by the Petitioner. The Petitioner has submitted that Change in Law events have occurred after the cut-off date i.e. 24.9.2010, which is seven (7) days prior to bid deadline date of 1.10.2010.

7. The Petitioner has sought compensation on account of the following Change in Law events during the Operating Period which have resulted into additional financial impact on the Petitioner for supply of power to the Respondents:

- (a) Increase in royalty on coal and additional levies (District Mineral Foundation and National Mineral Exploration Trust)
- (b) Increase in Clean Energy Cess
- (c) Imposition of Excise Duty on coal
- (d) Increase in Service Tax
- (e) Decrease in Customs Duty on imported coal
- (f) Imposition of Countervailing Duty on imported coal
- (g) Increase in Busy Season Surcharge
- (h) Increase in Development Surcharge
- (i) Increase in the rate of Minimum Alternate Tax
- (j) Increase in the Central Sales Tax
- (k) Imposition of coal Terminal Surcharge on railway freight.

8. The Petitioner has submitted that Bid Deadline was 1.10.2010 and any Change in Law event after cut-off date i.e. 24.9.2010 (seven 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. The Petitioner has submitted that Change in Law events have significant financial impact on the costs and revenue of the Petitioner during the Operating Period for which the Petitioner is entitled to be compensated and restored through monthly tariff payment to the same economic position as if such Change in Law has not occurred, in terms of Article 10 of the PPA dated 1.4.2013. The Petitioner has indicated the impact on account of the Change in Law events as under:

S. No	Description	FY15-16	FY16-17	FY17-18	FY18-19	FY19-20
		Audited	Audited	Audited	Audited	Unaudited
		Rs. crore	Rs. crore	Rs. crore	Rs. crore	Rs. crore
1	Royalty on coal and additional Levies (DMF & NMET Levy)	1.70	5.99	5.51	7.32	7.04
2	Clean Energy Cess/GST compensation cess on coal (Domestic & Imported coal)	31.91	67.14	74.15	74.60	83.45
3	Excise Duty on coal	6.66	8.42	2.23	0.00	0.00
4	Central Sales Tax/GST on domestic coal	0.51	1.26	2.90	4.66	4.36
5	Busy Season Surcharge on Railway Freight	3.44	3.76	3.14	-4.37	-4.24
6	Development Surcharge on Railway Freight	1.51	1.82	1.44	-1.75	-1.69
7	Coal Terminal Surcharge (Both Loading and unloading)	0.00	6.29	4.02	0.00	0.00
	Service Tax Claim (inclusive of Education Cess)					
8	Imported coal ocean transport freight and GST on imported coal	0.00	0.00	13.45	15.82	21.02
	Service tax/GST on Rail freight (including BSS and DS)	0.70	1.37	1.58	1.50	1.25
	Domestic coal Ocean transport freight	-1.39	-1.31	-1.21	-1.08	-1.16
	Port Cargo, Plot rent, Handling, Terminal & Vessel charges	0.71	1.05	1.23	1.62	1.57
	Unload port cargo charges for domestic and imported coal	2.57	3.03	4.62	5.71	7.00
9	Customs Duty	-12.46	-6.32	-10.97	-15.92	-19.26
10	Countervailing Duty on imported coal	5.20	5.00	3.10	-0.61	-0.82
11	Minimum Alternate Tax			2.45	2.82	-4.08
12	Carrying cost	1.59	8.58	19.81	32.92	46.66
13	Total (including Carrying Cost)	42.66	106.09	127.44	123.23	141.10

9. In the above background, the Petitioner has filed the present Petition with the following prayers:

“(a) Declare that the events and claims set out in Paragraphs 23 to 52 above as Change in Law Events during the Operating Period in terms of Article 10 of the PPA which have led to increase in the costs during the operating period of the Project;

(b) Evolve a suitable mechanism to offset the impact of such Change in Law Events during the operating period of the Project and restore the Petitioner to the same economic condition prior to occurrence of the Change in Law Events set out in Paragraphs 23 to 52 above;and

(c) Grant interest/carrying cost for any delay in reimbursement by the Respondents from the date of commercial operation of the Project.”

10. The Petitioner has submitted that pursuant to the AP Reorganization Act and bifurcation of the erstwhile undivided State of Andhra Pradesh, the Petitioner has been supplying power to the AP Discoms and the Telangana Discoms i.e. it is supplying power to more than one State. Therefore, the generating station of the Petitioner is having a composite scheme of generation and supply to more than one State, thereby satisfying the requirements under Section 79(1)(b) of the Act. Consequently, the Petitioner has filed the present Petition before this Commission seeking relief on account of Change in Law events under the PPA dated 1.4.2013.

Jurisdiction

11. The issue as to 'Whether the Central Commission has the jurisdiction to regulate the tariff of the generating company after the implementation of the AP Reorganization Act, 2014 had come up for consideration of the Commission in Petition No. 463/MP/2014 in the matter of GMR Vemagiri Power Generation Limited v. Andhra Pradesh Eastern Power Distribution Co. Ltd. and Ors. The Commission in its order dated 27.4.2015 after examining the said issue had, *inter-alia*, held that after coming into effect of the AP Reorganization Act, GMR Vemagiri Power Generation Limited had been generating and supplying power to more than one State and accordingly, the Commission had the jurisdiction to entertain the dispute arising out of the PPA therein. The relevant extract of the said order reads as under:

"(a) Whether the Central Commission has the jurisdiction to regulate the tariff of the generating company after the implementation of the Andhra Pradesh Re-organization Act, 2014

18. Section 79(1) of the 2003 Act provides as under:-
"79(1) The Central Commission shall discharge the following functions namely:
(a) To regulate the tariff of generating companies owned or controlled by the Central Government;
(b) To regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State.
(c) To regulate the inter-state transmission of electricity;
(d) To determine the tariff of inter-state transmission of electricity;
(e) xxxxxx
(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;

19. A perusal of Section 79 (1)(a) and (b) above would make it clear that the Central Commission has been vested with the power to regulate the tariff of generating companies owned and controlled by Central Government and the tariff of the generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The generating station of the petitioner does not fall under clause (a) of sub-section (1) of Section 79 of the 2003 Act. The petitioner has claimed that consequent to the re-organisation of the State of Andhra Pradesh, the generating company falls under clause (b) of sub-section (1) of Section 79 of the 2003 Act. Clause (b) of sub-section (1) of Section 79 requires the following conditions to be satisfied:

- (a) The generating company is neither owned nor controlled by the Central Government;
- (b) The generating company has a composite scheme for generation and sale of electricity in more than one state
- (c) The generating company has entered into a composite scheme for generation and sale of electricity in more than one state.
- (d) The generating company otherwise has a composite scheme for generation and sale of electricity in more than one state.

20. In the present case, the generating station of the petitioner which is located in the State of Andhra Pradesh is neither owned nor controlled by the Central Government. It was conceived and executed as an intra-state generating station in the undivided State of Andhra Pradesh supplying power to the distribution companies of the erstwhile state and in terms of Section 86(1) of the 2003 Act, the jurisdiction of the generating company was vested with the APERC.

21. While so, the Andhra Pradesh Re-organization Act, 2014 (Act 6 of 2014) was enacted and the State of Telengana had come into existence on and from 2.6.2014 i.e the appointed day. Section 92 of the Act 6 of 2014 provides as under:

"The principles, guidelines, directions and orders issued by the Central Government, on and from the appointed day, on matters relating to coal, oil and

natural gas, and power generation, transmission and distribution as enumerated in the Twelfth Schedule shall be implemented by the successor States“

22. Clause (C) of the Twelfth Schedule read with Section 92 of the Act 6 of 2014 provides that:

“C. Power

1.Units of APGENCO shall be divided based on geographical location of power plants.

2.Existing Power Purchase Agreements (PPAs) with respective DISCOMS shall continue for both on-going projects and projects under construction.

3.The existing Andhra Pradesh Electricity Regulatory Commission (APERC) shall function as a joint regulatory body for a period not exceeding six months within which time separate SERCs will be formed in the successor States.”

4.xxxx

23. *It is evident from Clause (C) 2 Twelfth Schedule that the existing PPAs with the discoms for ongoing and new projects have been continued under the Andhra Pradesh Re-organization Act, 2014. Out of the four distribution companies located in the erstwhile State of Andhra Pradesh, two distribution companies each have been distributed between the States of Andhra Pradesh and Telengana respectively. As a result of this, the generating company is now supplying power to the two distribution companies located in the States of Andhra Pradesh and two distribution companies located in the State of Telengana. Thus, after coming into effect of the Andhra Pradesh Re-organization Act, 2014 from 2.6.2014, the generating company is generating and supplying power to more than one state. Thus, the second condition of Section 79(1)(b) is fulfilled in this case.*

24.*The third and fourth condition of Section 79(1)(b) is that the generating company has either entered into a composite scheme or otherwise has a composite scheme for generation and sale of electricity in more than one State. The petitioner company did not enter into a scheme to generate and supply electricity to more than one State at any point of time. The scheme for generation and supply of electricity has emerged with the implementation of the AP Re-organization Act, 2014. The words “or otherwise have” used in sub-clause (b) of clause (1) of Section 79 of the 2003 Act have to be a given a purposive interpretation. In our view, the words, “or otherwise have” do signify to the existence of a composite scheme, which has emerged otherwise than through entering into contract for generation and supply of power to more than one State. In the present case, the composite scheme for generation and supply of electricity to more than one State has emerged on account of operation of AP Re-organization Act, 2014, which allocated the distribution companies of erstwhile State of Andhra Pradesh between Telengana and Andhra Pradesh. In our view, the case of the petitioner is covered under the expression “otherwise has a composite scheme for generation and sale of electricity in more than one State.” Accordingly, we hold that the petitioner company satisfies the condition of clause (b) of sub-section (1) of Section 79 of the 2003 Act. Consequently, the tariff of generating station of the petitioner shall be regulated by the Central Commission and any dispute for adjudication involving the petitioner's company shall be adjudicable by the Central Commission under clauses (f) to sub-section (1) of Section 79of the 2003 Act.*

12. The above decision was also followed by the Commission in its order dated 15.6.2016 in Petition No. 183/MP/2015 in the case of Meenakshi Energy Private Limited v. Telangana State Power Coordination Committee & Ors. which also involved the similar issue of jurisdiction.

13. The aforesaid orders were challenged by the AP Discoms before the Hon`ble High Court of Judicature at Hyderabad, wherein Hon`ble High Court vide its interim order dated 28.6.2016 in WPMP No. 20633 & 25668 of 2015 in WP No. 15848 & 19894 of 2015 and interim order dated 14.7.2016 in WPMP No. 28097 of 2016 in WP No. 22850 of 2016 respectively stayed the Commission's aforesaid order dated 27.4.2015 in Petition No. 463/MP/2014 and order dated 15.6.2016 in Petition No. 183/MP/2015. Accordingly, when the present matter came up for hearing on 20.12.2016, the Commission directed to keep the instant Petition in abeyance and granted liberty to the Petitioner to mention the case for listing after the stay is vacated or the issue is finally decided by the Hon`ble High Court.

14. Hon`ble High Court of Judicature at Hyderabad vide its judgment dated 31.12.2018 in Writ Petition No. 15848 of 2015 and batch upheld the jurisdiction of this Commission in respect of the generating station supplying power to the Discoms of the States of Andhra Pradesh and Telangana after bifurcation of the erstwhile State of Andhra Pradesh. The relevant extract of the judgment of the Hon`ble High Court of Judicature at Hyderabad reads as under:

"...56. There can be no quarrel about the fact that if the disputes involving generating companies or transmission licensee do not relate to the matters contained in Clauses (a) to (d) of sub-section (1) of Section 79, they would not fall within the purview of the Central Commission. But to test whether or not, the disputes involving generating companies or transmission licensees relate to matters connected with Clauses (a) to (d), one has to find out whether the generating company involved (not being owned or controlled by the Central Government) had a composite scheme.

57. The only basis on which APERC sustained jurisdiction to itself was that there was single Power Purchase Agreement with four distribution companies and that at the

time when the agreement was entered into, those companies were in a single State. Therefore, the logic given by the APERC is that on the date of execution of the Power Purchase Agreement, there was a single State, in which all the four distribution companies were located.

58. But the fact remains that after the bifurcation of the State, two distribution companies have gone to one State and the others have gone to another State. As a consequence, what was otherwise one scheme, became a composite scheme for generation and sale of electricity in more than one State. To put it differently, on and from the appointed day, viz., 02.06.2014, one single scheme which the generating companies had, has become a composite scheme and that scheme was for generation and sale of electricity in two States, viz., the States of Telangana and Andhra Pradesh. Therefore, the APERC was wrong in thinking that there was no composite scheme and that the date of the agreement and the date of the dispute will determine jurisdiction. That APERC had jurisdiction on the date on which agreements were entered into and that the APERC had jurisdiction on the dates on which disputes were raised, are beyond any pale of doubt. But the moment the State was reorganized and the companies, with which the generating companies had agreements, came to be located in two different States, the nature of the dispute assumed as that of an interstate dispute.

.....

64. In **Energy Watchdog v. CERC**¹, the Supreme Court pointed out that under the scheme of the Electricity Act, 2003, it is the Central Government which is involved whenever there is interstate generation or supply of electricity. In paragraph-24 of the report, the Supreme Court made it clear that the moment generation and sale take place in more than one State, the Central Commission becomes the appropriate Commission under the Act. After holding so, the Supreme Court also went into the meaning of the expression "composite" since the expression "composite scheme" was not defined. In paragraph-26 of the report, the supreme, Court held that the expression "composite scheme" does not have any special meaning and that it is enough that the generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

65. Therefore, in the light of the interpretation given by the Supreme Court in Energy Watchdog, to the expression "composite scheme" and also to what is interstate and intra State transmission, it is not possible for anyone to contend that the disputes raised by the generating companies in the cases on hand did not fall within any one of the clauses (a) to (d) in sub-section (1) of Section 79.

71. The view taken by the Central Electricity Regulatory Commission on the basis of Section 79(1) (f) alone reflects the correct position in law. Therefore in our considered view, the orders passed by the CERC with regard to jurisdiction are liable to be upheld and the orders passed both by the APERC and by the TSERC are liable to be set aside.

..

76. Therefore, in fine, the writ petitions are disposed of to the following effect:

(i) W.P.Nos.19894 and 15848 of 2015 challenging the orders of CERC, dated 27.04.2015 are dismissed and the CERC is held entitled to decide the disputes covered by the said order, on merits after giving opportunities to all the parties.

(ii) W.P.No.22850 of 2016 challenging the order of the Central Electricity Regulatory Commission dated 15.06.2016 is also dismissed and the CERC is allowed to proceed further with the hearing of the case on merits."

15. Pursuant to the above-said judgment, the Petition was admitted by the Commission on 15.2.2019 and the parties were directed to complete the pleadings in the matter.

16. Subsequently, the AP Discoms challenged the judgment of the Hon`ble High Court of Judicature at Hyderabad dated 31.12.2018 before Hon`ble Supreme Court in SLP(c) No. 8016 of 2019 and Ors., wherein Hon`ble Supreme Court vide its order dated 8.4.2019 directed to maintain the status quo till further hearing. Hon`ble Supreme Court disposed of the said appeals vide its order dated 4.2.2020 and upheld the decision of the Hon`ble High Court. Hon`ble Supreme Court also observed that this Commission is the appropriate authority to hear and decide the dispute. Relevant portion of Hon`ble Supreme Court order is extracted as under:

“4. As the controversy involves State of Andhra Pradesh as well as the State of Telangana and ultimate effect is going to be on more than one State, considering the provisions contained in Section 105 of the Andhra Pradesh (Reorganization) Act, 2014, CERC is appropriate authority to hear and decide the dispute. In the facts and circumstances of the case, we find no ground to interfere with the decision of the High Court.

5. Let the dispute be decided by CERC, in accordance with law, after hearing the parties, as expeditiously as possible, within an outer limit of six months.”

17. Accordingly, the issue of jurisdiction of the Petition stands settled in terms of the above order of the Hon`ble Supreme Court.

Submissions during hearing

18. The Petition was admitted on 15.2.2019 and notice was issued to the Respondents to file their reply. In terms of the Circular No. 2/7(22)/2009-Policy/CERC dated 28.11.2009 and dated 7.7.2015, a copy of the Petition was also forwarded to a consumer organization, namely, Senior Fellow, Public Affairs Centre (in short, 'SFPAC') which has been empanelled to represent the interest of consumers before the Commission, to file the reply in the instant Petition. Reply to the Petition has been filed by the Respondents, the AP Discoms and Telangana

Discoms vide their affidavits dated 22.3.2019 and 31.3.2019 respectively as well as SFPAC vide affidavit dated 3.8.2017 and the Petitioner has filed its rejoinders thereof. .

19. The matter was heard on 30.6.2020. During the course of hearing, learned counsel for the Respondents, *inter-alia*, contended that though the tender inviting the bid was called for in the year 2010, it was awarded only in the year 2013 due to certain litigations. Therefore, the Petitioner along with other bidders were asked to submit a revised bid, which was submitted by the Petitioner on 30.1.2013. Accordingly, the cut-off date ought to be considered as 24.1.2013 instead of 24.9.2010 as the Petitioner ought to have taken into consideration all Change in Law events which would have occurred prior to that date while submitting the revised bid.

20. In response, learned counsel for the Petitioner submitted that the revised offer was submitted pursuant to negotiation where all the bidders were asked to submit revised offer and not pursuant to any fresh or revised bidding. The Petitioner submitted that it had offered reduction of 1 paise/kWh in bid tariff pursuant to discussion with 'Bid Negotiation Committee, without altering or amending the original bid structure. Therefore, all other provisions of the RfP and the PPA, including the provisions relating to Change in Law, cut-off date for reckoning such Change in Law and the Bid Deadline, remain unaltered. The Petitioner was already selected as L2 and, therefore, was already a successful bidder as contemplated in the RfP. Therefore, the submission of the revised offer by the Petitioner was not pursuant to any "revised bidding" and consequently the Bid Deadline remains unaltered. APERC's order dated 13.8.2013 also categorically records that the last date of submission of bid was 1.10.2010 and the reduction of Rs. 0.01/KWh on the levelized tariff of Rs. 3.685/kWh as offered by the Petitioner, was while maintaining the original

bid structure. Therefore, the cut-off date for reckoning of any Change in Law events in terms of PPA has to be considered as 24.9.2010.

21. Based on the request of the learned counsel for the parties, the Commission allowed the Petitioner and the Respondents to file their respective written submissions. The Respondents and the Petitioner filed their written submissions, mainly reiterating their earlier submissions, which are not repeated for sake of brevity.

Analysis and Decision

22. Since the issues of jurisdiction and maintainability of the present Petition are already settled in terms of the order dated 4.2.2020 of the Supreme Court as discussed in paragraphs 11 to 16 above, following issues emerge for our consideration:

Issue No.1: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

Issue No.2: What is the scope of Change in Law in the Power Purchase Agreement?

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

Issue No.4: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

We now proceed to discuss the above issues and examine the claims of the Petitioner.

23. The chronology of events with regard to PPA dated 1.4.2013 as claimed by the Petitioner are as under (dispute regarding Bid Deadline and cut-off date has been dealt with in later part of this Order):

Power supply	AP Discoms and Telangana Discoms 500 MW (net) for the period of 25 years
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Cut-off date	24.09.2010
Bid Deadline	01.10.2010
PPA executed on	01.04.2013 Subsequent to bifurcation of the Andhra Pradesh State, on 10.04.2015, the Petitioner and the Respondents entered into an agreement to amend the PPA, <i>inter-alia</i> , to change the names of the parties
Start of supply of power	20.4.2015

Issue No. 1: Whether the provisions of the Power Purchase Agreement with regard to notice of an event of Change in Law have been complied with?

24. The claims of the Petitioner in the present Petition pertain to Change in Law events related to PPA dated 1.4.2013 read with dated 10.4.2015. Article 10.4 of the PPA deals with the issue of notification of an event of Change in Law and the same is extracted as under:

10.4 Notification of Change in Law

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

10.4.2. Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer(s) 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(s) contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer(s) 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) Change in Law; and*
- (b) the effects on the Seller ...”*

25. The Petitioner has submitted that in compliance to Article 10.4 of the PPA, on 3.2.2016, notice was issued to the Respondents along with details of all Change in Law events and it had requested the Respondents to approve the recurring additional expenditure on account of such Change in Law events. In response,

Andhra Pradesh Power Coordination Committee vide its letter dated 11.5.2016 rejected the Petitioner`s claim in this regard.

26. The Petitioner vide its letter dated 17.6.2016 issued further notice to the Respondents setting out details of Change in Law events along with details all the relevant Notifications/ Statutes/ Rules/ Regulations, having force of Law under the PPA and impacting the economic position of the Petitioner. However, the Respondents did not respond to the said letter.

27. We have considered the submissions of the Petitioner. Under Article 10.4 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as reasonably practicable after being aware of such events i.e. Change in Law events which occurred after cut-off date of 24.9.2010. The Petitioner had given Change in Law notice on 3.2.2016 to the Respondents indicating the events under Change in Law and impact of such events on tariff. However, the same was rejected by the Andhra Pradesh Power Coordination Committee on 11.5.2016. We note that the Andhra Pradesh Power Coordination Committee was constituted on 7.6.2005 to ensure coordination between the four distribution companies of erstwhile State of Andhra Pradesh. Thereafter, the Petitioner issued revised notice dated 17.6.2016 to the Respondents including the details of all Change in Law events beyond the cut-off date. Thus, in our view, the Petitioner has complied with the requirement of notice under Article 10.4 of the PPA.

Issue No. 2: What is the scope of Change in Law in the Power Purchase Agreement?

28. The claims of the Petitioner are with respect to events under Change in Law under Article 10 of the PPA. The same is extracted as under:

10. Article 10: CHANGE IN LAW

10.1 Definitions

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

10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:

- the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;*
- a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement*

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

10.2 Application and Principles for computing impact of Change in Law

10.2.1 While determining the consequences of Change in Law under 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 Standby Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer(s) and the Appropriate Commission documentary proof of such increase/decrease in cost of the Power Station or revenue/expenses 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.

29. Article 14 of the PPA provides for dispute resolution arising out of claim made by any party for any change in or determination of tariff or any matter relating to tariff.

The said Article is extracted as under:

14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

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

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

30. A combined reading of the above provisions reveal that the events covered under Change in Law are broadly 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, clearance and permits which was not required earlier, or

(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 seller, or

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

(f) If such Changes (as mentioned at (a) to (e) 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 Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such 'Change in Law' has not occurred.

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

31. The term 'Law' has been defined under Article 1.1 of the PPA as under:

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

32. The term 'Indian Governmental Instrumentality' has been defined in Article 1.1 of the PPA as under:

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of state(s) of Andhra 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 Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer(s);

33. As per the above definition, law shall include (a) all laws including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of Andhra Pradesh or any Ministry, Department, Board, Body Corporate agency or other authority under such Government; (c) all applicable rules, regulations, orders, notifications by a

Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurer, the same shall be considered as Change in Law to the extent it is contemplated under Article 10 of the PPA.

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

34. Based on the submissions and documents available on record, we proceed to examine the claims of the Petitioner. However, before dealing with specific claims of the Petitioner as regards Change in Law events, it would be appropriate to go into the preliminary objections raised by the Respondents and SFPAC regarding claims of the Petitioner.

35. The Respondents, the AP Discoms and Telangana Discoms have primarily contended that various taxes, duties, cess and other levies, in respect of which Change in Law has been claimed by the Petitioner, were already in existence as on cut-off date. Therefore, in terms of Clauses 2.6.1 and 2.4.1.1(B)XI of the RfP, the Petitioner was required take into account all the information, inputs, circumstances and factors that may have any effect on its bid and to include in its quoted tariff all costs involved in procuring inputs and all the possible revisions in these costs/charges while quoting the bid. The Respondents have also submitted that PPA provides for escalation in the capacity charges and energy charges and the quoted escalable tariff components are escalated as per the escalation rates/ indices notified by the Commission. Since the energy charge quoted by the Petitioner in the bid is inclusive of various statutory taxes, levies, duties and cess, etc. the same are

also escalated as per the escalation index issued by the Commission from time to time and accordingly, no compensation on this account is tenable.

36. In response, the Petitioner has submitted that merely because the Respondents have entered into long-term PPA as per the Standard Bidding Guidelines issued by Ministry of Power for Case-1 Bidding, it does not mean that the Petitioner is not entitled to claim Change in Law events in terms of Article 10 of the PPA. Clause 4.7 of the Standard Bidding Guideline itself provide that any Change in Law impacting cost or revenue from the business of selling electricity shall be adjusted separately. The Petitioner has submitted that interpretation of the provisions of the PPA and RfP by the Respondents is misconceived as these Articles by no stretch of imagination indicate that the Petitioner shall bear all increases in statutory taxes, duties, levies and cess for all times to come. Clauses 2.6.1 and 2.4.1.1(B)(xi) of RfP indicate that the bidder should have taken into account the existing laws, rules and risks, etc. However, the bidders cannot be expected to take into account any Change in Law events after the cut-off date. It is for the very reason that the Change in Law clause has been incorporated in the PPA along with the restitution principle of placing the seller at the same economic position as if the Change in Law had not occurred. The revised Tariff Policy dated 28.1.2016 issued by the Ministry of Power has also considered that the increase in taxes and levies are events under the ambit of 'Change in Law'. With respect to the argument of escalation index issued by the Commission, the Petitioner has placed reliance on the judgment of the Appellate Tribunal for Electricity (in short 'APTEL') dated 14.8.2018 in Appeal Nos. 119 of 2016 and 277 of 2016.

37. We have considered the submissions of the Petitioner and the Respondents. It is noted that similar issue has been dealt with by the Commission in its order dated

31.5.2018 in Petition No.170/MP/2016 in the matter of KSK Mahanadi Power Company Ltd. v. TANGEDCO. The relevant portion of the said order dated 31.5.2018 is reproduced as under:

“15. We have examined the submission of the Petitioner and Respondent, TANGEDCO. The contention of the Respondent is that any increase in duties and levies are covered in escalation index issued by the Commission and therefore it cannot be allowed as Change in law. We are unable to accept this contention as such interpretation will render the provisions of Change in Law in the PPA redundant. Moreover, the escalation indices notified by this Commission consider only the changes in the basic price of fuel and basic railway freight rates and do not include any change in rates of taxes, duties and cess. The respondents have further argued that as per RFP, the bidder is expected to take into account all costs within statutory taxes, levies, duties while quoting the tariff and the since the quoted tariff includes taxes, duties and cess assumed at the time of bid, the successful bidder gets escalation on the taxes, duties and cess also. In our view such an approach, if accepted, will lead to reopening of the bid which is not permissible in terms of the judgment of the Appellate Tribunal dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:

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

38. The contentions of the Respondents stand covered by the above decision of the Commission and accordingly, the same is rejected.

39. The AP Discoms and the Telangana Discoms have also contended that the various Change in Law events as claimed by the Petitioner are not on the business of generation or supply of electricity under the PPA and, therefore, such claims cannot be allowed under Change in Law events.

40. We note that this issue was considered by the APTEL in its judgment dated 14.8.2018 in Appeal Nos. 119 of 2016 and 277 of 2016 (Adani Power Rajasthan Ltd. v. Rajasthan Rajya Vidyut Vitran Nigam Limited) where a similar issue arose for interpretation in the context of PPA for generation and sale of electricity by a generating company to distribution companies. The relevant portion of the said judgment is extracted as under:

“11. (c) Before discussing the issues there is a need to address a common issue raised by the Discoms related to allowance of tax under Change in Law in terms of the PPA. According to the Discoms that as per the 5th bullet of the Article 10.1.1 of the PPA change in tax or introduction of any new tax is only applicable to supply of power which also means sale of power if definition of supply is taken in terms of the Act. The Discoms have contended that if there is specific provision dealing with the tax under Change in Law then other provisions of Change in Law Article are not allowed to deal with the tax and as such no other tax implications are allowed to be covered under Change in Law under the PPA. The Discoms have also relied on some judgements of Hon'ble Supreme Court on this issue. We have gone through the said judgements and we observe that according to the judgements relied by the Discoms, the taxes are dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

(d) APRL has submitted that the generator undertakes many activities to ensure supply of power to the Discoms. APRL has relied on the judgement of Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC203 wherein it has been held that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. According to the said judgement, the applicable taxes on inputs for generation of power can be construed to be taxes on supply of power. APRL has further contended that if the contention of the Discoms is accepted then the Change in Law provision would be applicable during the Operating Period and the applicability of the said provision will become redundant during Construction Period. There is some strength in the contention of APRL as there will be no applicability of Change in Law provisions if there are changes in tax/duties/levies etc. rates or imposition of new tax/duties/levies etc. during Construction Period and on input costs related to power generation.

(e) APRL has further contended that the reliance of the Discoms on the maxim “expressum facit cessare tactium” meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded is misplaced as the Hon'ble Supreme Court in case of Assistant Collector of Central Excise Calcutta Division v. National Tobacco Company of India Ltd. (1972) 2 SCC 560 has held that the rule of prohibition by necessary implication could be applied only where a specified procedure is laid down for performance of duty or where there is an express prohibition.

(f) The Discoms have also reproduced the definition of Change in Law under different PPAs under Section 63 of the Act. We have gone through the said provisions and we find that the other provisions of the PPA are similar to that in the other PPAs under Section 63 of the Act except the fifth bullet which is additional specifically covering tax on supply of power. The judgements of the Hon`ble Supreme Court relied upon by the Discoms were under different context and could not be equated to the scheme of power procurement by Discoms under Section 63 of the Act which is based on guidelines issued by Gol under different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

(g) In view of our discussions as above and after duly considering the earlier judgements of this Tribunal, we are of the considered opinion that any change in tax/levies/duties etc. or application of new tax/levies/ duties etc. on supply of power covers the taxes on inputs required for such generation and supply of power to the Discoms."

41. In the instant petition, the first and fifth bullet under Article 10.1.1 of the PPA have similar provisions as considered by APTEL and the same is extracted as under:

- *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"*

42. Therefore, in our view, the instant case is covered by the above judgment of APTEL. Therefore, the contention of the Respondents is not sustainable.

43. The AP Discoms, the Telangana Discoms and SFPAC have further contended that the cut-off date for reckoning Change in Law claims should be considered as 24.1.2013 i.e. seven days prior to 30.1.2013, the date on which the Petitioner submitted its revised bid offering a discount of Rs.0.01/kWh.

Consequently, all the Change in Law events prior to 24.1.2013 ought not to be allowed.

44. *Per contra*, the Petitioner has submitted that the revised offer was submitted by the Petitioner pursuant to negotiation and not pursuant to fresh/ revised bidding. The Petitioner had offered reduction of 1 paise/kWh in bid tariff pursuant to discussion with Bid Negotiation Committee without altering or amending the original bid structure. Therefore, all other provisions of the RfP and PPA, including the provisions relating to Change in Law, cut-off date for reckoning such Change in Law and the Bid Deadline, remain unaltered. APERC's order dated 13.8.2013 also categorically records that the reduction of Rs. 0.01/KWh on the levelized tariff of Rs. 3.685/KWh as offered by the Petitioner, was while maintaining the original bid structure.

45. We have considered the submissions of the parties. It is not in dispute that the last date of submission of bid in response to the RfP was 1.10.2010. The expression 'Bid Deadline' has been defined in the PPA dated 1.4.2013 to "*mean the last date and time for submission of the Bid in response to the RfP*" (i.e. Bid Deadline was 1.10.2010). Consequently, cut-off date for reckoning Change in Law event in terms of Article 10.1.1 of the PPA i.e. 7 days prior to the Bid Deadline has also remained unaltered. The only issue for consideration is whether the Petitioner should have factored the Change in Law events that took place between the cut-off date (24.9.2010) and the date when it submitted the revised offer pursuant to negotiations (30.1.2013).

46. It is noted that though the RfP for procurement of 2000 MW (\pm 20%) was issued on 17.5.2010 (and revised on 17.8.2010), the bid process got delayed on

account of certain litigations. Due to this delay, the bids submitted by the bidders (bid validity) were sought to be extended from time to time. In terms of Clause 2.9 of the RfP, the authorised representative is entitled to solicit bidders' consent for extension of the period of bid validity and in terms of said clause, the bidders are not permitted to modify its bid in case they chose to extend their bids. The relevant extract of Clause 2.9 of the RfP read as under:

"2.9.2. The Authorized Representative may solicit the Bidders' consent for an extension of the period of validity of the Bid. The request and the response in this regard shall be in writing. In the event any Bidder refuses to extend its Bid validity as requested by the Authorized Representative, the Authorized Representative shall not be entitled to invoke the Bid Bond. A Bidder accepting the Authorized Representative request for validity extension shall not be permitted to modify its Bid...."

47. The Petitioner has placed reliance upon order of APERC dated 13.8.2013 (wherein it adopted tariff of the bidders) to claim that there was no change in Bid Deadline or cut-off date and it merely submitted a revised offer pursuant to negotiations. The relevant extract of the APERC's order dated 13.8.2013 is as under:

"c) The last date of submission of bid was 1st of October 2010.

.....

k) Meanwhile, APCPDCL requested the Bidders for extension of bid validity and Six (6) Bidders with eight (8) Bids out of 13 qualified bids have extended Bid validity till 29th November, 2011.

.....

x) The bid evaluation committee ranked the successful bidders as follows:

S. No.	Name of the Bidder	Quantum offered in MW	Ranking	Levelized Tariff Rs/kWh
1	<i>M/s PTC India Limited (M/s East Coast Energy Private Limited)</i>	300	L1	3.466
2	<i>M/s Thermal Powertech Corporation India Limited</i>	500	L2	3.685
3	<i>M/s Krishnapatnam Power Corporation Limited</i>	250	L3	3.782

.....

y) During the meeting held on 28.9.2012, the Bid Evaluation Committee directed APCPDCL to constitute a bid negotiation committee with the following members:

.....

z) Discussions were conducted by the bid negotiation committee on 16.12.2012, 17.12.2012 and 24.12.2012.

aa) Further M/s Thermal Powertech Corporation India Limited lastly submitted the revised offer on 30th January 2013 which envisages offer of 500 MW with a reduction of Rs. 0.01/kWh on the levelized tariff of Rs. 3.685 while maintaining the original bid structure and the details are as follows:

S. No.	Name of the bidder	Capacity	Levelized Tariff (Rs./kWh)	Rank
1	M/s Thermal Powertech Corporation India Limited	500	3.675	L2

dd) Bid validity has been extended upto 31.03.2013 by M/s Thermal Powertech Corporation India Limited.

....”

48. It is clear from APERC's order dated 13.8.2013 that owing to delay in bid process, the validity of the Petitioner's bid in response to the RfP dated 17.5.2010 was extended up to 31.3.2013 (in terms of Clause 2.9 of RfP quoted above). Based on instructions of the 'Bid Evaluation Committee' during the meeting held on 28.9.2012, 'Bid Negotiation Committee' was constituted, which further undertook discussions with the successful bidders including the Petitioner and pursuant thereto, the Petitioner submitted its revised offer on 30.1.2013 with reduction of Rs. 0.01/kWh on levelised tariff while maintaining 'the original bid structure'. Thus, it is clear that it was in terms of the original bid itself i.e. bid submitted in response to RfP dated 17.5.2010 that further negotiations took place and the Petitioner offered discount of Rs. 0.01/kWh on levelised basis maintaining 'the original bid structure'. It is also noted that negotiation was undertaken by the 'Bid Negotiation Committee' only with the successful bidders declared on the basis of original bid. In our view, the discount of Rs. 0.01/kWh given by the Petitioner pursuant to the discussion with 'Bid Negotiation Committee' was a revised 'offer' on the existing bid and not a revised 'bid'. Had it been the intent of the Respondents that while submitting the 'revised offer' during the negotiations, the Petitioner was to factor in various Change in Law events between Bid Deadline and 30.1.2013 (date of submission of revised offer), the Respondents ought to have either expressly communicated the same to the

Petitioner or have caused appropriate modification/amendment to the PPA in respect of 'Bid Deadline' and date of reckoning of Change in Law events. However, none of these happened and it is not the case before us. The terms 'Bid Deadline' and 'Change in Law' including the date of reckoning of Change in Law events in the PPA (that has been signed on 1.4.2013) have remained unaltered. As no modification/amendment in any of the relevant provisions in the PPA or any other agreement have been effected, we are not inclined to accept the argument of the Respondents at this stage that the Petitioner should have factored in the Change in law events while submitting the revised offer. Therefore, as per Article 10.1.1 of the PPA, the cut-off date for reckoning Change in Law events under the PPA remains 24.9.2010 i.e. 7 days prior to the Bid Deadline (1.10.2010).

49. SFPAC has contended that since the various taxes and duties in respect of which Change in Law are claimed have been subsumed in the Goods and Service Tax (GST) w.e.f. 1.7.2017, it is necessary to estimate the impact of reduction in prices on account of introduction of GST for the remaining tenor of the PPA.

50. In response, the Petitioner has submitted that as regards various taxes and duties being subsumed under GST, the Petitioner will take into account the impact of GST and revise the calculation for relief on account of Change in Law. However, since the GST has come into effect w.e.f. 1.7.2017, the quantum of impact of Change in Law for the period between cut-off date i.e. 24.9.2010 and 1.7.2017 remains unchanged and unaffected by GST.

51. We have noted that submissions of parties. We have dealt with the impact on account of GST in later part of this order while dealing with such taxes and duties. Moreover, the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017

has, *inter-alia*, held that the introduction of GST w.e.f. 1.7.2017 and subsuming/abolition of specific taxes and duties, etc. in GST is in the nature of Change in Law event. The Commission in the said order dated 14.3.2018 has further observed that 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. Relevant extract from the order dated 14.3.2018 is as under:

“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.”

52. Having dealt with preliminary objections, we now proceed to deal with the claims of the Petitioner under Change in Law during the Operating Period.

(a) Increase in royalty on coal and additional levies towards District Mineral Foundation and National Mineral Exploration Trust

53. The Petitioner has submitted that as on cut-off date, the rate of royalty on coal was Rs. 55 plus 5% of base price of ROM coal. Subsequently, Ministry of Coal, Government of India vide its Notification No. G.S.R. 349 (E) dated 10.5.2012, increased the rate of royalty on coal to an *ad-valorem* rate of 14% on base price of

ROM coal. Further, Ministry of Coal, Government of India vide its Notification No. 792(E) dated 20.10.2015, issued under the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 (hereinafter referred to as 'the DMF Rules') read with Notification No. 715(E) dated 17.9.2015 issued by Ministry of Coal under Section 9B(6) of the Mines and Minerals (Development and Regulation) Act, 1957, (hereinafter referred to as 'the MMDR Act') has imposed an additional levy of 30% of the royalty towards District Mineral Foundation (in short 'DMF') of the district in which mining operation is being carried out.

54. The Petitioner has submitted that under Section 9C (2), (3) & (4) and Section 13 of the MMDR Act, the National Mineral Exploration Trust Rules, 2015 (NMET Rules, 2015) have been framed. Rule 7(3) of the NMET Rules, 2015 provides that the holder of the mining lease and prospecting licence-cum-mining lease shall make payment for contribution to National Mineral Exploration Trust (in short 'NMET') @2% under Section 9C(4) of the MMDR Act to the State Government simultaneously with the payment of royalty.

55. The AP Discoms and the Telangana Discoms have submitted that royalty charges cannot be treated as tax but constitute as fee and the same were in existence at the time of submission of bid and therefore, do not qualify as Change in Law. It has been further submitted that the rate of royalty as notified under the MMDR Act is liable to change once in three years and it is on the part of the developer to anticipate the possible increase in the rate before quoting the bid. Similarly, the contribution to NMET and DMF do not qualify as Change in Law in terms of the PPA. The said levies are on the holder of a mining lease or the prospecting license-cum-mining lease and contribution made therein is part of coal business.

56. SFPAC has submitted that the Petitioner is not entitled to increase in the rate of royalty on coal and additional levies as the increase was notified before 24.1.2013.

57. *Per contra*, the Petitioner has submitted that it is entitled to claim relief on account of increase in the rate of royalty and additional levies as they are pursuant to Notifications issued by the Ministry of Coal, Government of India subsequent to the cut-off date as per the PPA.

58. We have considered the submissions of the Petitioner, the Respondents and SFPAC. The Commission has considered the issue of change in royalty on coal vide its order dated 3.2.2016 in Petition No. 79/MP/2013 as under:

“32. We have considered the submissions of the Petitioners and Haryana Discoms. As per the Notification No.349 (E) dated 10.5.2012 of Ministry of Coal, Government of India, the royalty on coal has been fixed as under:

“(1) Royalty on Coal: The rate of royalty on coal shall be @ 14% (Fourteen percent) ad-valorem on price of coal, as reflected in the invoice, excluding taxes, levies and other charges.”

Through this notification dated 10.5.2012, Second Schedule of the Mines and Minerals (Development and Regulations) Act, 1957 has been amended. The Notification has been issued after 16.11.2007. As change in rate of royalty on coal has an impact on the cost of coal and hence, the cost of generation of power for supply to the Haryana Discoms, the change will be covered under change in law. The Petitioner will now be required to pay the increased cost of coal including royalty on coal @ 14% ad-valorem on the price of coal as reflected in the invoice, excluding taxes, levies and other charges. The Petitioner has submitted that at the time of bid, the rate of royalty on coal was Rs.55 + 5% of the ROM price per tonne which formed the basis of its bid. The Petitioner has prayed that the difference between the rate of royalty on coal prevalent as on the date of submission of the bid and the rate of royalty on coal revised through the Notification dated 10.5.2012 may be allowed to the Petitioner on the ad valorem price of coal as reflected in the invoice excluding taxes, duties and levies. The Appellate Tribunal for Electricity in its judgement dated 12.9.2014 in Appeal No.288 of 2013 (M/s Wardha Power Company limited Vs Reliance Infrastructure Limited &Another) has observed as under:

“26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant’s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to correlate the compensation on account of

Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.”

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

59. In light of the above decision, the claim of the Petitioner has been examined.

There has been increase in royalty after the cut-off date i.e. 24.9.2010 and has impact on the cost of generation of power for supply to AP Discoms and Telangana Discoms. Therefore, the Petitioner shall be entitled for compensation for applicable ad valorem price of coal per MT as reflected in the invoice excluding taxes, duties and levies which shall be reduced by the rate of royalty that existed as on cut-off date i.e. Rs. 55 plus 5% of the ad valorem price of coal excluding taxes, duties and cess.

60. Further, the issue of admissibility of additional levy towards DMF and NMET as Change in Law events was examined by the Commission in its 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 Mineral (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 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.

61. The Petitioner's case is covered under the above order of the Commission. Therefore, additional levy of royalty @2% towards NMET and @30% towards DMF is admissible under Change in Law. Therefore, the Petitioner shall be entitled to recover on account of increase in royalty on coal and payment to NMET and DMF in proportion to the coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and the Telangana

Discoms. 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 Change in Law. The Petitioner shall furnish to the AP Discoms and the Telangana Discoms, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and the AP Discoms and the Telangana Discoms shall reimburse on the basis of actual payments. The Petitioner, the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of these claims on annual basis.

(b) Increase in rate of Clean Energy Cess including GST Compensation Cess

62. The Petitioner has submitted that as on cut-off date i.e. 24.9.2010, Clean Energy Cess was levied @ Rs. 50/MT in terms of Notification No. 3/2010-Clean Energy Cess dated 22.6.1010 issued by Ministry of Finance, Government of India. Subsequently, Clean Energy Cess was increased by Ministry of Finance vide its Notification dated 10.7.2014 to Rs. 100/MT, vide Notification dated 1.3.2015 to Rs. 200/MT and vide Notification dated 29.2.2016 to Rs. 400/MT. The Petitioner has submitted that the said Notifications of the Ministry of Finance, enhancing the rate of Clean Energy Cess after the cut-off date, are Change in Law events as per Article 10.1.1 of the PPA.

63. The Petitioner has further submitted that after the introduction of Goods and Service Tax (GST) with effect from 1.7.2017, Clean Energy Cess has been abolished and GST Compensation Cess/ State Compensation Cess is being levied @Rs. 400/MT on quantum of coal procured. The Commission, in its order dated 14.3.2018 in Petition No. 13/SM/2017, has already recognized the introduction of GST Compensation Cess w.e.f. 1.7.2017 as Change in Law. Accordingly, the State

Compensation Cess levied under Goods and Services Tax (Compensation to States) Act, 2017, being concordant to GST Compensation Cess, also constitutes Change in Law event.

64. The AP Discoms and the Telangana Discoms have submitted that Clean Energy Cess is not on the business of generation or sale of electricity and is levied only on the production of coal. Further, Clean Energy Cess was already prevailing/ existing at the time of the submission of bid and the Petitioner should have taken into account the possible revision while quoting the tariff in the bid. It has been further submitted that the Change in Law event has occurred before the issue of Lol and even prior to approval of tariff by the APERC. However, at that time the Petitioner did not approach the Respondents with proposal for change in tariff. Further, while escalating the escalable components of quoted tariff, the statutory taxes, duties and levies inbuilt in the quoted tariff are also escalated as per the escalation index/ factor notified by the Commission from time to time. Therefore, the question of Change in Law on account of change in taxes, levies and duties, etc. does not arise.

65. SFPAC has submitted that principally the Petitioner is entitled to increase in Clean Energy Cess subsequent to cut-off date. However, considering substantial reduction expected in the prices on account of introduction of GST with effect from 1.7.2017, the Commission may direct the Petitioner to arrive at a new price.

66. *Per contra*, the Petitioner has submitted that the Petitioner is claiming for additional expenditure incurred due to increase in Clean Energy Cess vide Notifications dated 10.7.2014, 1.3.2015 and 29.2.2016 issued by the Ministry of Finance subsequent to the bid deadline. Further, Article 10.1.1 of the PPA includes any tax and is not limited to taxes in connection with supply of power. All the

provisions of Article 10.1.1 have to be harmoniously construed to give effect to each provision. If the intention was to only provide for those taxes which are imposed on supply of power, there would be no need for excluding changes in withholding taxes from the ambit of Change in Law. The Commission in its order dated 30.3.2015 in Petition No.6/MP/2015 has already held that increase in Clean Energy Cess is covered under the ambit of Change in Law event.

67. We have considered the submissions of the Petitioner, the Respondents and the SFPAC. Clean Energy Cess on coal has been introduced through Finance Act, 2010 and has been modified through subsequent Finance Acts. Clean Energy Cess (later Clean Environment Cess) applicable at the different points in time is as under:

S. No.	From	To	Applicable Clean Energy Cess (Rs./MT)
1	1.7.2010	10.7.2014	50
2	11.7.2014	28.2.2015	100
3	1.3.2015	29.2.2016	200
4	1.3.2016	30.6.2017	400

68. It is noticed that Clean Energy Cess was introduced by Government of India through the Finance Act, 2010. As on cut-off date i.e. 24.9.2010, Clean Energy Cess was applicable at the rate of Rs. 50/MT. The issue of Clean Energy Cess as a Change in Law event has been considered by the Commission in its order dated 7.4.2017 in Petition No. 112/MP/2015 in the case of GMR Kamalanga Energy Limited and Anr. v. Bihar State Power Holding Company Limited and Anr. Subsequently, the Commission in its order dated 19.12.2017 in Petition No. 101/MP/2017, in order dated 19.12.2017 in Petition No. 229/MP2016, in order dated 16.3.2018 in Petition No. 1/MP/2017 and various other orders has considered increase in Clean Energy Cess as Change in Law event and has allowed the same. Relevant portion of the Commission's 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)
1.7.2010	10.7.2014	50
11.7.2014	28.2.2015	100
1.3.2015	29.2.2016	200
1.3.2016	Till date	400

30. 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.”

69. The above decision is also applicable in the case of the Petitioner. Clean Energy Cess/ Clean Environment Cess was abolished with effect from 1.7.2017. Therefore, increase in Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event (up to 30.6.2017) under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover increase in Clean Energy Cess from AP Discoms and Telangana Discoms as per applicable rate of Clean Energy Cess in proportion to the coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and the Telangana Discoms. 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 Change in Law. As on the cut-off date, Clean Energy Cess was levied at Rs. 50/MT and the Petitioner was expected to factor the same in the bid. Thereafter, the applicable rate of Clean Energy Cess 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/MT as applicable as on cut-off date, per MT of coal consumed. The Petitioner shall furnish to the AP Discoms and the Telangana Discoms, the details of payments made, supported by Auditor's Certificate, while claiming the expenditure and the AP Discoms and the Telangana Discoms shall reimburse to the Petitioner on the basis of actual payments made. The Petitioner and the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of these claims on annual basis.

70. Since the Clean Energy Cess has been abolished through Taxation Laws Amendment Act, 2017 with effect from 1.7.2017, increase in Clean Energy Cess has been allowed as a Change in Law event 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 (relevant extract quoted in earlier part of this order).

(c) Levy of Excise Duty on Coal

71. The Petitioner has submitted that Excise Duty was not applicable on coal procured for thermal plants as on cut-off date. Ministry of Finance vide its Notification dated 28.2.2011 levied Excise Duty on coal @5% (including Education cess, the effective Excise Duty was 5.15%). This rate was thereafter increased by the Ministry

of Finance vide its Notification dated 16.3.2012 to 6% (including Education cess, the effective Excise Duty was 6.18%). Ministry of Finance, Government of India, vide its Notification No. 14/2015 dated 1.3.2015 read with Notification No. 15/2015 dated 31.3.2015, further revised the applicable rate of Central Excise Duty from 6.18% to 6% as the Education Cess and Secondary and Higher Education Cess were no longer levied on the Excise Duty. The Petitioner has submitted that the above Notifications pertaining to introduction/ increase of Excise Duty on coal constitute Change in Law events within the meaning of Article 10 of the PPA.

72. The AP Discoms and the Telangana Discoms have submitted that the Excise Duty was introduced on 28.2.2011 after the cut-off date and the Government of India has reduced the tax burden on coal produced by placing coal under 5% tax bracket under the GST Law.

73. SFPAC has submitted that pursuant to introduction of GST, domestic coal would be in the 5% tax slab while imported coal will continue to attract basic Custom Duty. The introduction of GST will lead to price reduction in coal leading to the reduction in electricity prices by 6-7 paise per unit which should be passed on to the consumer under anti-profiteering clause in GST Law. It has been submitted that increase in taxes and duties were subsumed in Goods and Services Tax from 1.7.2017 and in the interest of consumers, it is necessary to estimate the impact of reduction in price on account of Change in Law consequent to introduction of GST for the remaining tenure of PPA which is 23 years.

74. *Per contra*, the Petitioner has submitted that since the notifications for increase in Excise Duty were introduced subsequent to the cut-off date, compensation towards the same should be allowed. The Commission has already

allowed the increase in Excise Duty pursuant to the cut-off date as Change in Law under the similar PPA in its order dated 30.3.2015 in Petition No. 6/MP/2013 in the case of Sasan Power Ltd. vs. M.P. Power Management Company Ltd. & ors. The Petitioner has further submitted that it shall take into account the impact of GST and revise the calculations for reliefs on account of Change in Law. However, the quantum of impact of Change in Law for the period between the cut-off date under the PPA up to 1.7.2017 remains unchanged and unaffected by GST since GST came into effect from 1.7.2017.

75. We have considered the submissions of the parties. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 has considered the issue of Excise Duty on coal as Change in Law event under the PPA. The relevant portion of the 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”.

76. Since the levy/ changes in Excise Duty has been introduced through an Act of Parliament, which has occurred after the cut-off date i.e. 24.9.2010, the same is covered under Change in Law in terms of Article 10.1.1 of the PPA. Accordingly, the Petitioner is entitled to recover expenditure incurred towards Excise Duty from the AP Discoms and the Telangana Discoms in proportion to the coal consumed corresponding to scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and Telangana Discoms. 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 Change in Law. The

Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the Auditor to AP Discoms and Telangana Discoms. The Petitioner and AP Discoms and Telangana Discoms are further directed to carry out reconciliation on account of these claims annually. With introduction of GST regime w.e.f. 1.7.2017, order of the Commission dated 14.3.2018 in Petition No. 13/SM/2017 shall be applicable (relevant extract of the order quoted in earlier part of the order).

(d) Increase in Service Tax and GST

(i) Increase in Service Tax on Railway Freight, Domestic Coal Ocean Transport Freight, Port Vessel Charges, Port Cargo Charges, Port Handling Charges, Terminal Charges, unload Port cargo Charges

77. The Petitioner has submitted that as on cut-off date i.e. on 24.9.2010, Service Tax applicable on railway freight, domestic coal ocean transport freight, port vessel charges, port cargo charges, port handling charges, terminal charges and unload port cargo charges was 10.30% (inclusive of Education Cess, and Secondary and Higher Education Cess). Subsequently, Ministry of Finance vide its Notification No. 2/2012-Service Tax dated 17.3.2012 rescinded Notification No. 8/2009 dated 24.2.2009, wherein the services specified under Section 65 (105) of the Finance Act, 1994 including contracts related to electricity were exempted from the Service Tax as per Section 65 of the Act. Consequently, the Service Tax increased to 12.36% (inclusive of Education Cess). Thereafter, Ministry of Finance vide its Notification dated 19.5.2015, increased Service Tax to 14% (inclusive of Education Cess), with effect from 1.6.2015. This was followed by a Notification dated 6.11.2015, issued by Ministry of Finance, wherein the rate of Service Tax was increased by 0.5% towards Swachh Bharat Cess, with effect from 15.11.2015. On 29.2.2016, vide Notification issued by Ministry of Finance, the rate of Service Tax was further increased by 0.5%

towards Krishi Kalyan Cess, with effect from 1.6.2016, making the effective Service Tax at 15% for the financial year 2016-17.

78. The AP Discoms and the Telangana Discoms have submitted that Service Tax on railway freight, sea freight, port vessel charges, port cargo charges, port handling charges, terminal charges and unload port cargo charges was already in existence at the time of bid submission. Therefore, the Petitioner was very much aware of the existing tax before the submission of bid and in terms of Clauses 2.6.1 and 2.4.1.1(B)(XI), the Petitioner was required to include in its quoted tariff all costs involved in procuring inputs and all the possible revisions in these costs/ charges while quoting the bid. It is not fair to pass on the Service Tax burden to the distribution utility. Further, in terms of RfP and Case-1 Bidding Procedure, the choice of the fuel was entirely of the bidder. Therefore, the Petitioner cannot now impose this liability on to the distribution utility. It has been further submitted that distribution of electricity by a distribution licensee comes under negative list and, therefore, is not subject to Service tax, Swachh Bharat Cess and Krishi Kalyan Cess. Therefore, it is not fair to pass on the burden to the distribution utility.

79. SFPAC has reiterated its submissions that for increase in taxes and duties, which have been subsumed in Goods and Services Tax with effect from 1.7.2017, it is necessary to estimate the impact of reduction in prices on account of Change in Law consequent to introduction of GST for the remaining tenure of PPA.

80. Per contra, the Petitioner has submitted that generic awareness of tax being applicable cannot be a ground for denying any expenditure incurred by the Petitioner in case there is a revision in the same. Taxes and Cess are decided and declared by the Govt. Authorities and any notification for increase or decrease of the same will

qualify as Change in Law event in terms of the PPA. While the responsibility of fuel under Case-I Bidding Procedure is of the Petitioner, all taxes involved in the process of generation of power are covered under the ambit of Change in Law. The Petitioner has taken prudent care to quote the tariff during the bid process. However, any revision in taxes is beyond the control of the Petitioner and the same has been held by the Commission in its various orders. In this regard, the Petitioner has relied upon the Commission's order dated 17.3.2017 in Petition No.157/MP/2015.

81. We have noted the submissions made by the parties. As on cut-off date i.e. 24.9.2010, the applicable Service Tax in respect of port vessel charges, port cargo charges, port handling charges, terminal Charges and unload port charges was 10.3% (inclusive of Education Cess and Secondary and Higher Education Cess). Subsequently, the applicable Service Tax on the above activities was increased to 12.36% pursuant to Notification No.2/2012 dated 17.3.2012 issued by Ministry of Finance, Govt. of India. Thereafter, vide Notification No. 14/2015-ST, dated 19.5.2015 read with Section 108 of Finance Act, 2015, the Service Tax was further increased to 14% w.e.f. 1.6.2015. Since the above activities are directly related to the input cost (fuel) for generation and sale of power by the Petitioner to the procurers and such increase is pursuant to Acts of Parliament and Notifications of Ministry of Finance after the cut-off date resulting into an additional expenditure by the Petitioner, the same is covered as Change in Law under Article 10.1.1 of the PPA. Accordingly, the Petitioner is entitled to be compensated for the difference (with respect to the Service Tax of 10.3% that was applicable as on cut-off date) in the rate of Service Tax on the above components.

82. Similarly, Swachh Bharat Cess and Krishi Kalyan Cess have also 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.”

83. Further, Section 161(2) and (3) of the Finance Act, 2016 provide 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.”

84. Therefore, Swachh Bharat Cess and Krishi Kalyan Cess are Service Taxes on taxable services and have been introduced through an Act of Parliament and are, therefore, covered under Change in Law. The Commission has already allowed Swachh Bharat Cess and Krishi Kalyan Cess as Change in Law events vide order dated 1.2.2017 in Petition No. 8/MP/2014, order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 7.4.2017 in Petition No. 112/MP/2015.

85. As regards Service Tax on transportation of goods by Railways, the Commission in its order dated 1.2.2017 in Petition No. 8/MP/2014 has held that Service Tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant portion of the said order dated 1.2.2017 is extracted as under:

“89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable “to any person by another person, in relation to transport of goods by rail in any manner”.

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

86. As on cut-off date (i.e. 24.9.2010), the service tax on transportation of goods by Railways was under exemption. Therefore, as on cut-off date, the Petitioner could not have factored any service tax on transportation of goods by Indian Railways. With effect from 1.10.2012, Service Tax on 30% of the value of transport of goods by rail is chargeable. 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 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 came into force after the cut-off date, the expenditure incurred by the Petitioner on

payment of service tax on transport of goods by the Indian Railways is covered under Change in Law and the Petitioner is entitled for compensation in terms of the PPAs.

87. In view of the above, the Petitioner is entitled for the following relief as regards Service Tax on transportation by Railways:

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
24.9.2010 (cut-off date)	10.3%	0	0
1.10.2012	12.36%	3.708%	3.708%
1.6.2015	14.00%	4.200%	4.200%
15.11.2015	14.50%	4.350%	4.350%
1.6.2016 (till 30.6.2017)	15.00%	4.500%	4.500%

88. Accordingly, the Petitioner is entitled to recover expenditure incurred towards Service Tax on railway freight, port vessel charges, port cargo charges, port handling charges, terminal charges and unload port cargo charges and Swachh Bharat Cess and Krishi Kalyan Cess from the AP Discoms and the Telangana Discoms in proportion to the coal consumed corresponding to schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and Telangana Discoms. 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 Change in Law. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the Auditor to AP Discoms and Telangana Discoms. The Petitioner and AP Discoms and Telangana Discoms are further directed to carry out reconciliation on account of these claims annually.

89. With introduction of GST regime w.e.f. 1.7.2017, order of the Commission dated 14.3.2018 in Petition No. 13/SM/2017 shall be applicable (relevant extract of the order quoted in earlier part of the order).

90. In respect of domestic coal ocean transport freight, the Petitioner has indicated that there has been saving on this account pursuant to various Notifications of Ministry of Finance, Govt. of India after the cut-off date. and has sought to pass on the benefits to the procurers. Accordingly, the benefits/ savings on this account shall be passed on to the AP Discoms and the Telangana Discoms in ratio of scheduled generation from generating station of the Petitioner.

(ii) Increase in Service Tax on Ocean Freight (imported coal)

91. The Petitioner has submitted that as on cut-off date i.e. 24.9.2010, Service Tax levied on ocean freight to transport imported coal was nil in terms of the negative list set out in Section 66D(p)(ii) of the Finance Act, 1991. However, pursuant to Section 149 of Finance Act, 2016, Section 66D(p)(ii) of the Finance Act, 1994 has been omitted from the negative list. Accordingly, transportation of goods by vessel from outside India up to the Custom Station of clearance in India is liable to Service Tax with effect from 1.6.2016.

92. The AP Discoms and the Telangana Discoms have submitted that as per Article 4.1.1 of the PPA, Scheduled Delivery date is four years from the signing of the PPA, which means that the Petitioner has quoted the bid after taking into consideration the future cost. Further, in Case-I bidding, quoted tariff consists of fixed charges and energy charges and the successful bidder has agreed to supply power on the above charges. In the fixed charges, all the components of tariff have already been envisaged while quoting the tariff. Therefore, the Change in Law issue,

for the same will not arise as O&M charges for 25 years should have been considered and factored while quoting the bid. Also, the arrangement of fuel being the responsibility of the Petitioner, it is not binding on the Respondents to accept all the costs involved in arrangement of fuel to supply power to procurers.

93. *Per contra*, the Petitioner has submitted that it is a settled position that as per Article 10 of the PPA, the Petitioner is entitled to compensation for the Change in Law events affecting the Petitioner, which have occurred after the cut-off date i.e. 24.9.2010. Further, while the responsibility of fuel under Case-I bidding process is that of the Petitioner, all taxes involved in the process of generation of power are covered under the ambit of Change in Law. The Petitioner has taken prudent care to quote the tariff during the bidding process. However, any revision in taxes is beyond the control of the Petitioner and is covered under the ambit of Change in Law.

94. We have considered the submissions of the parties. The issue of imposition of Service Tax on ocean freight to transport imported coal was examined by the Commission in its order dated 17.3.2017 in Petition No. 157/MP/2015 in the case of Coastal Gujarat Power Limited v. Gujarat Urja Vikas Nigam Limited and Ors. The relevant extract of the said order is as under:

"We have considered the submissions of the parties. The Petitioner has submitted that Mundra UMPP was awarded as an imported coal based project where the coal is shipped from outside India. As on cut-off date, i.e 30.11.2006, no service tax was payable on transportation of goods by a vessel from a place outside India to the custom station landing in India. Subsequently, Government of India, Ministry of Finance vide Finance Act, 2012 through Section 66 D (p) (ii) exempted transportation of goods by an aircraft or a vessel from a place outside India to the first customs station of landing in India from payment of service tax. Relevant portion of the Finance Act, 2012 is extracted as under:—

66B. Charge of service tax on and after Finance Act, 2012: There shall be levied a tax(hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

66D. *Negative list of services: The negative list shall comprise of the following services, namely:*

(a) to (o) *****

(p) *Service by way of transportation of goods-*

(ii) *by an aircraft or a vessel from a place outside India to the first customs station of landing in India.*

24. *Subsequently, Ministry of Finance, Government of India vide its Notification No.25/2012 dated 20.6.2012 exempted the services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India from the service tax in excess of 50% of the taxable value. Ministry of Finance, Department of Revenue vide its Notification No. 9/2016 dated 1.3.2016 by amending the said notification and the negative list therein, exempted the transportation of goods by an aircraft from payment of Service Tax. Relevant portion of the said Notification is extracted as under:—*

53.....*Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India.*

From the above amendment, it appears that transportation of goods by an aircraft is exempted from the service tax. However, service tax on transportation of goods by vessel is applicable. The Government of India vide its Notification No. 26/2012 dated 20.6.2012 exempted the taxable services by way of transportation of goods by a vessel in excess of 50% of the taxable value. Subsequently, vide Notification No. 8/2014 dated 11.7.2014, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 50% to 40% of the taxable value. Further, vide Notification No. 8/2015 dated 1.3.2015, the Government of India exempted the taxable services by way of transportation of goods in a vessel in excess of 30% of the taxable value. The Government of India, vide Notification No. 9/2016 introduced Service Tax on Transportation of imported goods with effect from 1.6.2016 and the applicable rate of service tax as on 1.6.2016 was 15% inclusive of Swachh Bharat Cess and Krishi Kalyan Cess i.e. (14% of Service Tax + 0.5 % each of Swachh Bharat Cess and Krishi Kalyan Cess). Since, the service tax on transportation of good in a vessel is chargeable only to the extent of 30%, the applicable rate of service tax on transportation of goods from a vessel would come to 4.5% i.e. 30% of the rate of 15% inclusive of corresponding Swachh Bharat Cess and Krishi Kalyan Cess. i.e. Service tax at the rate of 4.20% and Swachh Bharat Cess and Krishi Kalyan Cess at the rate of 0.15% each. As per the said Notification Nos. 26/2012, 8/2014 and 8/2015, the said rate of Service Tax is applicable only subject to this condition that the CENVAT credits on inputs, capital goods and input services, used for providing the taxable service, has not been availed by the petitioner under the provisions of the CENVAT Credit Rules, 2004.

25. *In view of the above, said notifications levying the service tax on goods transported by a vessel from a place outside India to the custom station of clearance on India qualifies as change in law under Article 13.1.1(i) of the PPA. Accordingly, the same is admissible.*

26. *The Government of India Notification Nos. 26/2012, 8/2014 and 8/2015 provides that the abatement of service tax is applicable only to the condition that CENVAT credits on inputs, capital goods and input services, used for providing taxable service has not been taken. Therefore, the service tax @ 4.5% is applicable only when the CENVAT credit has not been availed. Since, the Petitioner has not availed CENVAT credit, it is entitled to service tax paid on the transportation of coal by a vessel from a place outside India to the first Custom station of landing in India."*

95. The above decision is squarely applicable in the case of the Petitioner. Accordingly, the Petitioner shall be entitled for reimbursement of Service Tax paid on the transportation of coal by a vessel from a place outside of India to the first Custom Station of landing in India, subject to the condition that the Petitioner has not availed CENVAT credit as noted in the above decision.

96. 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 on account of change in Service Tax, Swachh Bharat Cess and Krishi Kalyan Cess on the above noted heads in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and the Telangana Discoms. 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 Tax, Swachh Bharat Cess and Krishi Kalyan Cess. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), proof of payment and the computation duly certified by the Auditor to the AP Discoms and the Telangana Discoms. The Petitioner and the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of these claims on annual basis.

(e) Decrease in Customs Duty on imported coal

97. The Petitioner has submitted that as on cut-off date i.e. 24.9.2010, applicable Customs Duty on imported coal was 5%. The Government of India, Ministry of Finance vide its Notification No. 46/2011-Customs dated 1.6.2011 withdrew the

Customs Duty for coal originating in Indonesia and ASEAN countries. Thereafter, in terms of Notification No. D.O.F No. 334/5/2015-TRU dated 28.2.2015 and Notification No. 12/2016-Customs dated 1.3.2016 as issued by Ministry of Finance, Government of India, the Customs Duty @2.50% (inclusive of Education Cess, Secondary and Higher Education Cess levied @2.75%) was liable to be paid in respect of imported coal from financial year 2015-16. Thus, there is a decrease in Customs Duty on imported coal from 5% to 2.50%, which has led to benefit to the procurers and falls within the purview of Change in Law as defined under the PPA.

98. We have examined the submissions of the Petitioner. As on cut-off date i.e. 24.9.2010, the applicable Customs Duty on the imported coal was @5% in terms of Notification No.44/2004-Customs issued by Ministry of Finance, Government of India. Subsequently, Ministry of Finance, Government of India, vide its Notification No. 46/2011-Customs dated 1.6.2011 withdrew the Customs Duty for coal originating in Indonesia and ASEAN countries. Thereafter, vide Notification No. D.O.F No. 334/5/2015-TRU dated 28.2.2015 and Notification No. 12/2016-Customs dated 1.3.2016 issued by Ministry of Finance, Government of India, Customs Duty on imported coal was levied @2.5%. Thus, there is a change in Customs Duty on imported coal from 5% to nil and then from nil to 2.50%. Accordingly, the benefits accrued to the petitioner due to this shall be passed on to the AP Discoms and the Telangana Discoms in proportion to their scheduled generation in generating station of the Petitioner. This rate of Customs Duty is exclusive of Education Cess and Secondary and Higher Education Cess. While passing on the benefits to the AP Discoms and the Telangana Discoms, the Petitioner shall take these also into account.

(f) Imposition of Countervailing Duty on imported coal

99. The Petitioner has submitted that the Countervailing Duty (CVD) applicable on imported coal as on the cut-off date i.e. 24.09.2010 was Nil. Thereafter, on 1.3.2013, vide Notification No.12/2013 issued by Ministry of Finance, CVD was leviable on imported coal at the rate of 2.06% (inclusive of Education Cess, and Secondary and Higher Education Cess). The increase in CVD is a Change in Law event under Article 10.1.1 of the PPA and, hence, the Petitioner should be compensated for the same.

100. The AP Discoms and the Telangana Discoms have submitted that as per Article 4.1.1 of the PPA, Scheduled Delivery date is 4 years from the signing of the PPA i.e. 1.4.2017, which means the Petitioner has quoted the bid after considering the future cost and that in Case-I bidding process, arrangement of fuel being the responsibility of the Petitioner, it cannot bind the Respondents to accept all the cost involved in the arrangement of fuel to supply power to the procurers.

101. *Per contra*, the Petitioner has submitted that fuel cost is also a part of the tariff quoted by the Petitioner and covered under the ambit of Change in Law under Article 10 of the PPA. The Commission in its order dated 17.3.2017 in Petition No. 157/MP/2015 in the case of Coastal Gujarat Power Limited vs. Gujarat Urja Vikas Nigam Ltd.& Ors. has already held that levy of Countervailing Duty on coal is admissible as a Change in Law event the PPA.

102. We have examined the submissions of the Petitioner. It is noted that applicable Countervailing Duty as on cut-off date was nil. Thereafter, Ministry of Finance, Government of India vide its Notification No. 12/2013 dated 1.3.2013 imposed the CVD @ 2.06% (inclusive of Education Cess, and Secondary and Higher

Education Cess). Thus, revision in the CVD has taken place after the cut-off date in terms of the PPA i.e. after 24.9.2010.

103. The issue of CVD being a Change in Law event or not has been considered by the Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015. Relevant portion of the said order is extracted as under:

“5. The Petitioner challenged the above order of the Commission in Appeal No. 210 of 2017 before the Appellate Tribunal for Electricity (Appellate Tribunal). The Appellate Tribunal in its order dated 13.4.2018 upheld the decision of the Commission with regard to matters relating to denial of impact of duties for import / procurement of any other goods/ spares and service tax on the taxable service in respect of Bid 1 PPA of GUVNL and the Gross Station Heat Rate. The Appellate Tribunal allowed the appeal with regard to reimbursement of impact of levy and duties under the Custom Act, 1962, Custom Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1955 in respect of all the PPAs and the relief regarding carrying cost in respect of Bid-02 and Haryana PPAs. The Appellate Tribunal in its judgement dated 13.4.2018 partially set aside the order of the Commission and remanded the matter to pass consequential order in terms of its observation at Paragraphs 12 (b) and 12(d). The directions of the Appellate Tribunal in its judgement dated 13.4.2018 are extracted as under:

“12. (b) XV. The notifications issued by the Ministry of Commerce and Industry from 2009 to 2016 qualify as Change in Law event and Adani Power is required to be compensated for the same considering that all exemptions were available to it as on cut-off date for the respective PPAs,

xxxx

15. In the light of the judgment of the Appellate Tribunal, the claims of the Petitioner are examined as under:

xxxx

(b) Levy of countervailing Duty on imported coal:

17. The Commission in its order dated 4.5.2017 held that since Countervailing Duty is the additional duty on customs duty equivalent to Central Excise Duty levied on similar goods produced in India and no such levy was applicable as on the date of bid guidelines, the Petitioner shall be entitled for reimbursement of the same. In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner shall be entitled for reimbursement of countervailing Duty on imported coal. Countervailing Duty was imposed @1% with effect from 1.2.2011 and @2% with effect from 1.2.2013. Therefore, the Petitioner shall be entitled for reimbursement of Countervailing Duty at @2% with effect from 1.4.2015. The Petitioner shall be entitled to recover Countervailing Duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the applicable Tariff Regulations of the Commission or actual whichever is lower, corresponding to the scheduled generation for supply of electricity to GUVNL. 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 Countervailing Duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually.”

104. The above decision is applicable in the case of Countervailing Duty on imported coal. Therefore, levy of Countervailing Duty on imported coal is admissible as a Change in Law event under Article 10 of the PPA as it has been levied pursuant to the cut-off date. The Petitioner shall be entitled to recover Countervailing Duty on imported coal in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to the AP Discoms and the Telangana Discoms. 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 Countervailing Duty on imported coal. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), proof of payment and the computation duly certified by the Auditor to the AP Discoms and the Telangana Discoms. The Petitioner and the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of this claim on annual basis.

(g) and (h) Increase in Busy Season Surcharge and Development Surcharge on railway freight

105. The Petitioner has submitted that the Busy Season Surcharge applicable on the railway freight as on the cut-off date i.e. 24.9.2010 was 5%. Thereafter, Railway Board, Ministry of Railways, Government of India vide its Circular No. TCR/1078/2015/14 dated 20.7.2015 increased the Busy Season Surcharge to 15%.

106. The Petitioner has further submitted that the Development Surcharge applicable on the railway freight as on the cut-off date was 2%. Thereafter, Railway

Board, Ministry of Railways, Government of India vide its Circular No. TCR/1078/2015/14 dated 20.7.2015 increased the Development Surcharge to 5%. According to the Petitioner, increase in the Busy Season Surcharge as well as Development Surcharge on the railway freight falls within the purview of Change in Law as defined under the PPA.

107. The AP Discoms and the Telangana Discoms have submitted that the surcharge is purely a commercial cost which is seasonal in nature and the rate varies according to the season and is not applicable throughout the year. Considering it as a normal business rise, the Petitioner ought to have factored it while quoting the tariff. Increases in cost are bound to take place because of inflation or other factors which cannot be construed as Change in Law. Also, the Development Surcharge is applicable on railway freight. The Commission publishes the escalation index of transportation charges every six months after considering the railway freight. Thus, change in Development Surcharge may have been taken care of by the escalation Index.

108. SFPAC has submitted that principally, the Petitioner is entitled to increase in the Busy Season Surcharge and Development Surcharge on Railway Freight subsequent to the cut-off date. However, considering that there would be substantial reduction in the prices on account of introduction of GST, the Commission may direct the Petitioner to submit a new price.

109. *Per contra*, the Petitioner has submitted that APTEL in its judgment dated 21.12.2018 in IA No. 449 of 2018 and Appeal No. 193 of 2017 has already held that the Busy Season Surcharge and Development Surcharge on railway freight are allowed under the Change in Law. While the Commission brings out escalation index

every six months, the same is not on actual, and is not specific to each plant. Also, though the choice of the fuel was upon the Petitioner, any taxes involved in the process of generation of power are covered under the ambit of Change in Law.

110. We have examined the matter. APTEL in its judgment dated 14.8.2018 in Appeal No. 111 of 2017 and judgment dated 14.8.2018 in Appeal No. 119 of 2016 has held that Busy Season Surcharge and Development Surcharge by Railways are Change in Law events. The relevant portion of the judgment dated 14.8.2018 in Appeal No. 111/2017 is extracted as under:

“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 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.....”

In line with the above judgment of the APTEL, increase in Busy Season Surcharge and Development Surcharge qualify as Change in Law events and Petitioner is

entitled to claim the same. The Petitioner shall be entitled to recover the increase in Busy Season Surcharge and Development Surcharge in proportion to the coal consumed corresponding to the schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to AP Discoms and Telangana Discoms. If actual generation is less than the schedule generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of increase in Busy Season Surcharge and Development Surcharge. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computation duly certified by the Auditor to the AP Discoms and the Telangana Discoms. The Petitioner and the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of these claims on annual basis.

111. Busy Season Surcharge and Development Surcharge were being separately levied by Railways over and above basic freight. However, the Ministry of Railways, Government of India vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the basic freight with effective date of 15.1.2018. Accordingly, these surcharges would be allowable as change in law events only till 14.1.2018. With effect from 15.1.2018, these charges having been subsumed in the basic freight by Railways, are accounted for through the escalation indices published by the Commission, and the Petitioner is claiming it in terms of the escalable component of tariff quoted by it while bidding. Therefore, these charges can no longer be claimed under Change in Law w.e.f. 15.1.2018.

(i) Increase in rate of Minimum Alternate Tax

112. The Petitioner has submitted that the applicable rate of Minimum Alternate Tax (MAT) as on the cut-off date i.e. 24.9.2010 was 19.93% [18% base rate + 7.5% Surcharge + 3% (inclusive of Education Cess, and Secondary and Higher Education Cess on base rate and surcharge)]. Thereafter, Income Tax Department vide its Circular No. 02/2012 dated 22.5.2012 amended Section 115 JB of the Income Tax Act whereby Minimum Alternative Tax was increased from Base Rate of 18% to 18.5%. On 14.5.2015, vide Section 2(3)(b)(ii) of the Finance Act, 2015, the

Surcharge was increased to 10%. On the said basis, the effective applicable rate of Minimum Alternate Tax from financial year 2015-16 is 21.34%. The Petitioner has submitted that change in effective MAT rate and surcharge has direct impact on the non-escalable capacity charges and fall within the purview of Change in Law as defined in the PPA. Also, MAT is a statutory expenditure and levied on the book profits of the Company, regardless of whether the company has taxable profit under the Income Tax Act, 1961. MAT is a cost being imposed on the Company and thus any incremental MAT impact after the cut-off date ought to be compensated as it is covered under the first two and last bullets of Article 10.1.1 of the PPA.

113. The AP Discoms and the Telangana Discoms have submitted that tax on income including MAT has nothing to do with the cost or revenue from business of generation and sale of electricity and it pertains to book profits. MAT is a tax on the profit earned by the Company as a whole, which comprises its other activities also. The profit of the plant due to generation activity is not shown separately. Therefore, it would not be appropriate to pass on any change in the rate of MAT on the overall activities of the Company.

114. SFPAC has also submitted that MAT is levied on the book profit of the Company which has no relevance to the bidding rate. MAT payment is a credit which is adjustable against future income tax payments of the Petitioner. Hence, there is no loss to the Petitioner.

115. *Per Contra*, the Petitioner has submitted that MAT is a statutory expenditure and is covered under the ambit of Change in Law under Article 10 of the PPA. Revised Tariff Policy dated 28.1.2016 issued by Ministry of Power, Govt. of India also acknowledges increase in taxes and levies as a Change in Law event and

provides pass through of the cost involved. In terms of Energy Watchdog Judgment of Hon'ble Supreme Court, the Revised Tariff Policy is stated to be have force of law. As per extant Accounting Standards, Income Tax and MAT are to be treated as expenses. Therefore, compensation in this regard has to be allowed. In this regard, reliance has been placed on the judgment of APTEL dated 21.10.2011 in Appeal No. 39 of 2010.

116. We have considered the submissions of the parties. We note that issue as to whether change in MAT rate qualifies for Change in Law event or not was considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013.

The relevant portion of the 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.”

117. It is further noticed that the above order of the Commission 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 APTEL in Appeal No. 161/2015 in the case of Sasan Power vs. CERC and Ors. and the APTEL by its

judgment dated 19.4.2017 had upheld the order of this Commission. The relevant portion of the judgment is extracted as 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.

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.”

118. In line with the above decision, the claim of the Petitioner to allow MAT as Change in Law is not permissible and stands rejected.

(j) Imposition of Coal Terminal Surcharge on railway freight

119. The Petitioner has submitted that Coal Terminal Surcharge on railway freight as on cut-off date i.e. 24.9.2010 was NIL. Thereafter, Railway Board, Ministry of Railways, Government of India via Corrigendum No. 14 dated 22.8.2016 levied the Coal Terminal Surcharge @ Rs.55/MT both at loading and unloading terminals for traffic of coal beyond 100 km. Imposition of Coal Terminal Surcharge on railway freight falls within the purview of Change in Law as defined under the PPA.

120. SFPAC has submitted that principally, the Petitioner is entitled to increase in the Coal Terminal Surcharge subsequent to the cut-off date. However, considering that there would be substantial reduction expected in the prices on account of introduction of GST, the Commission may direct the Petitioner to submit a new price.

121. We have considered the submissions of the Petitioner and SFPAC. APTEL 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 have a force of law. The relevant portion of the said judgment dated 14.8.2018 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.

122. In pursuance to the above judgement of the APTEL, 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”.

123. The above decision of the Commission is also applicable in the present case. As on cut-off date, i.e. 24.9.2010, 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/MT (Rs. 55/MT on each terminal) on transportation of coal with effect from 22.8.2016. However, the same was subsequently withdrawn with effect from 10.7.2017 vide Ministry of Railways circular dated 6.7.2017. Accordingly, the Petitioner is entitled to recover Coal Terminal Surcharge from the AP Discoms and the Telangana Discoms as per applicable rate in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or coal actually consumed whichever is lower, for supply of power to AP Discoms and Telangana 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 AP Discoms and Telangana Discoms. The Petitioner and AP Discoms and Telangana Discoms are directed to carry out reconciliation on account of these claims annually.

(k) Increase in Central Sales tax due to Change in Law events

124. The Petitioner has submitted that Central Sales Tax is applicable at the rate of 2% on the total sum of coal value which includes levies and payments towards royalty, Clean Energy Cess and Excise Duty. However, the Central Sales Tax as on cut-off date and factored in the bid has undergone a change due to Change in Law events, namely, increase in Clean Energy Cess, change in royalty structure and imposition of Excise Duty. Therefore, the increase in Central Sales Tax falls within the purview of Change in Law as defined under the PPA.

125. SFPAC has submitted that the Central Sales Tax as applicable before the cut-off date has been subsumed in the GST. Hence, the Petitioner has to pass on the benefits to the Respondents.

126. We have examined the matter. APTEL, in its judgment dated 19.4.2017 in Appeal No.161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 in Sasan Power Limited vs. CERC & Ors. in respect of Excise Duty, Central Sales Tax and VAT has observed as under:

“46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event.”

127. In the light of above decision of APTEL, the claim of the Petitioner for relief on account of increase in Central Sales Tax is admissible as a Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner shall be entitled to recover the increase/ change in Central Sales Tax from the AP Discoms and the Telangana

Discoms in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to AP Discoms and Telangana Discoms. 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 Central Sales Tax. 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 AP Discoms and the Telangana Discoms. The Petitioner and the AP Discoms and the Telangana Discoms are directed to carry out reconciliation on account of this claim on annual basis.

(I) Carrying Cost

128. The Petitioner has submitted that as per Article 10.2.1 of the PPA, the Petitioner is entitled to be compensated in such a way that it is restored through monthly Tariff Payment to the same economic position as if such Change in Law has not occurred. The Petitioner has further submitted that Article 10.5 of the PPA dated 1.4.2013 shows that the adjustment in monthly Tariff Payment shall be effective from the date of Change in Law. Further, Article 8.3.5 of the PPA provides for payment of Late Payment Surcharge at a rate of MCLR + 2% (Marginal Cost of Lending Rate plus 2%) on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of delay. As per the law laid down by APTEL in its judgment dated 14.8.2018 in Appeal No. 111 of 2017, the Petitioner is entitled to payment of carrying cost/ interest from the date of incremental payments made on account of each Change in Law claim as aforesaid at the rate of provided in Article 8.3.5 of the PPA. Further, the Petitioner is also entitled to

pendente lite interest and; interest from the date of the order till actual payments at the same rate provided in Article 8.3.5 of the PPA.

129. We have considered the submissions of the Petitioner. APTEL in its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in the matter of Adani Power Limited v. Central Electricity Regulatory Commission &Ors. has allowed the carrying cost on the claim under Change in Law and held as under:

“ix. 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.....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 than re- determination of the existing tariff.

x. 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. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.

xi. Accordingly, this issue is decided in favour of the Appellant in respect of above mentioned PPAs other than Gujarat Bid – 01 PPA.”

130. The aforesaid judgment of APTEL 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 Bijli Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld the judgement of APTEL regarding 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 04.05.2017 that 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.”

131. Article 10.2.1 of the PPA provides as under:

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.

132. In view of the provisions of the PPA, the principles of restitution and the judgment of 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 is made to the Petitioner. Once a supplementary bill is raised by the Petitioner in terms of this order, the provisions of Late Payment Surcharge in the PPA would kick in if the payment is not made by the Respondents within Due Date.

133. 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 for such 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 per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under: -

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
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.”

134. 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: What should be the mechanism for processing and reimbursement of admitted claims under Change in Law?

135. The Petitioner has also prayed to evolve a suitable mechanism to offset the impact of Change in Law events during the operating period of the Project. The

Petitioner has submitted that aggregate amount for Change in Law claims is more than 1% of the value of the Standby Letter of Credit (LC) [in aggregate for the relevant Contract Year] and thus, fulfils the condition laid down in Article 10.3.2 of the PPA for claiming the additional cost/ expenses incurred by the Petitioner in supplying power to the Respondents under the PPA.

136. Articles 10.2 and 10.3 of the PPA provides or the principle for computing the impact of Change in Law during the operating period 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

10.3.1 During Construction Period, in case the Seller is not a Trading Licensee

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below: For every cumulative increase/ decrease of each Rupees one point two five (1.25) lakh per MW of Contracted Capacity in the Capital Cost during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. In case of Dispute, Article 14 shall apply.

It is clarified that the abovementioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease exceeds amount of Rs one point two five (1.25) lakhs in per MW Capital Cost, in relation to the Installed Capacity.

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 Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer(s) 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.

137. 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.

138. However, it is clarified that the Petitioner shall be entitled to claim the compensation after the expenditures allowed under Change in Law during Operating Period (including the reliefs allowed for operating period, if any) exceeds 1% of the value of 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.

139. Article 10 of the PPA provides 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 Procurer or from the date of occurrence of Change in Law event, whichever is later. Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process, which may result in payment of carrying cost. We have, therefore, specified a mechanism, in the following paragraphs, considering the fact that compensation for Change in Law events allowed as per PPA shall be paid in subsequent years of the contract period:

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

(b) 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 Auditor and adjustment shall be made based on the energy scheduled by procurer 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 the Procurers.

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

(d) If the Petitioner is eligible to receive compensation for Change in Law as per the provisions of the PPA, the compensation amount allowed shall be shared by the Procurers (the AP Discoms and the Telangana Discoms) based on the scheduled energy.

(e) The mechanism prescribed above is to be adopted for payment of compensation due to Change in Law events allowed as per Article 10.3.2 of the PPA for the subsequent period as well.

Summary of Decision

140. The summary of our decision under Change in Law during the Operating Period is as under:

S. No.	Change in Law event	Decision
1	Increase in royalty on coal and additional levies (DMF & NMET levy)	Allowed
2	Increase in rate of Clean Energy Cess including GST Compensation Cess	Allowed
3	Imposition of Excise Duty on Coal	Allowed
4	Increase in Service Tax and GST on Railway Freight, Domestic Coal Ocean Transport, Port Vessel Charges, Port Cargo Charges, Port Handling Charges, Terminal Charges, Unload Port Cargo Charges and Imported Coal Ocean Transport Freight	Allowed
5	Decrease in Customs Duty on Imported Coal	Allowed
6	Imposition of Countervailing Duty on Imported Coal	Allowed
7	Increase in Busy Season Surcharge on Railway freight	Allowed

8	Increase in Development Surcharge on Railway freight	Allowed
9	Increase in rate of Minimum Alternate Tax	Not Allowed
10	Imposition of coal Terminal Surcharge on railway freight	Allowed
11	Increase in Central Sales Tax	Allowed
12	Carrying Cost	Allowed

141. The Petitioner while calculating reliefs on account of above Change in Law events shall duly take into account any reduction of decrease of taxes/levies/ duties/ charges.

142. As regards introduction of GST regime w.e.f. 1.7.2017, order of the Commission dated 14.3.2018 in Petition No. 13/SM/2017 shall be applicable.

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

144. The Petitioner, vide affidavit dated 9.5.2017, has submitted that the name of the Petitioner company has been changed from 'Thermal Powertech Corporation India Limited' to 'Sembcorp Energy India Limited' with effect from 10.2.2018. The Petitioner has further submitted that it has complied with all the requirements under the relevant provisions of the Companies Act, 2013 and has filed on record the fresh Certificate of Incorporation issued by Registrar of Companies, Andhra Pradesh & Telangana effecting change in the name of the Petitioner Company. Based on the above, the Petitioner has requested the Commission to take note of the above changes, change the name of the Petitioner Company on its record and pass further orders/ reliefs in the name of Sembcorp Energy India Limited. The above prayer of

the Petitioner is allowed. The name of the Petitioner Company is changed to Sembcorp Energy India Limited on the record of the Commission.

145. Petition No. 217/MP/2016 is disposed of in terms of the above.

Sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(P.K.Pujari)
Chairperson