In the Appellate Tribunal for Electricity, New Delhi (Appellate Jurisdiction)

APPEAL NO. 111 OF 2017& IA NO. 450 OF 2018
AND
APPEAL NO. 290 OF 2017& IA NO. 519 OF 2017

Dated: 14th August, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N. K. Patil, Judicial Member

APPEAL NO. 111 OF 2017 & IA NO. 450 OF 2018

In the matter of:

M/s GMR Warora Energy Ltd.(GWEL)
(formerly known as Emco Energy Limited)
701/704, 7th Floor, Naman Centre, A-Wing,
BKC (Bandra Kurla Complex), Bandra, …. Appellant
Mumbai 400051.

Versus

1. **Central Electricity Regulatory Commission (CERC)**
   3rd& 4th Floor, Chanderlok Building
   36, Janpath, New Delhi- 110001 …. Respondent No.1

2. **Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)**
   5th Floor, Prakashgadh,
   Plot No. G-9, Anant Kanekar Marg …. Respondent No.2
   Bandra (East), Mumbai- 400051

3. **Electricity Department of Union Territory of Dadra and Nagar Haveli ("ED-DNH")**
   Vidhyut Bhavan,
   Opp. Secretariat Silvassa, 396230 …. Respondent No.3
   Dadra and Nagar Haveli.

4. Prayas Energy Group
Unit III A & B, Devgiri
Joshi Railway Museum
Lane, Khotrud Industrial Area
Kothud, Pune- 411038 …. Respondent No.4
("Impleaded Party")

Counsel for the Appellant(s) : Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Amit Kapur
Mr. Vishrov Mukerjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant

Counsel for the Respondent(s) : Mr. G. Saikumar
Ms. Tamanna Goyal
Ms. Nikita Choukse
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Ms. Anshula Laroiya for R-2

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg
Ms. Parichita Chowdhury for R-3

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Pulkit Agarwal
Mr. Shubham Arya for R-4

APPEAL NO. 290 OF 2017 & IA NO. 519 OF 2017

In the matter of:

1. DNH Power Distribution Co. Ltd. (DPDCL)
(Previously Electricity Department ,
Dadra & Nagar Haveli)
Vidyut Bhawan, Opp. Secretariat
Silvassa – 396230
Union Territory of Dadra & Nagar Haveli …. Appellant

Versus

1. **Emco Energy Ltd. (EEL)**
701/704, 7th Floor
Nariman Centre, A- Wing,
Bandra Kurla Complex (BKC),
Bandra, Mumbai – 400051 .... **Respondent No.1**

2. **Central Electricity**
Regulatory Commission (CERC)
3rd& 4th Floor, Chanderlok Building
36, Janpath, New Delhi- 110001 .... **Respondent No.2**

3. **Maharashtra State Electricity**
Distribution Co. Ltd. (MSEDCL)
5th Floor, Prakashgadh,
Plot No. G-9, Anant Kanekar Marg
Bandra (East), Mumbai- 400051 .... **Respondent No. 3**

4. **Prayas Energy Group**
Unit III A & B, Devgiri
Joshi Railway Museum
Lane, Khotrud Industrial
Area, Kothud, Pune- 411038 .... **Respondent No. 4**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. Amit Kapur
Mr. Vishrov Mukerjee
Ms. Raveena Dhamija
Mr. Yashaswi Kant for R-1

Mr. M.G. Ramachandran
Ms. Ranjitha Ramachandran
Ms. Poorva Saigal
Ms. Anushree Bardhan
Mr. Pulkit Agarwal
Mr. Shubham Arya for R-4

JUDGMENT

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeals are being aggrieved filed by M/s GMR Warora Energy Ltd. (hereinafter referred to as the **"GWEL"**) and DNH Power Distribution Co. Ltd. (hereinafter referred to as the **"Discom"**) under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the **"Act"**) against the Order dated 1.2.2017 (**"Impugned Order"**) passed by Central Electricity Regulatory Commission (hereinafter referred to as the **"Central Commission"**) in Petition No. 8/MP/2014 wherein the Central Commission has denied compensation on some Change in Law events to GWEL as detailed out in Appeal No. 111 of 2017 and wrongfully allowed compensation on some other Change in Law events sought by the GWEL as detailed out in Appeal No. 290 of 2017 under the Power Purchase Agreements dated 17.3.2010 (with MSEDCL) & 21.3.2013 (with DNH).

2. The Appeal No. 111 of 2017 has been filed by GWEL (formerly known as Emco Energy Ltd.) which is a generating company within the meaning of Section 2 (28) of the Act.

3. The Discom has filed the Appeal No. 290 of 2017. It is a Distribution Licensee distributing power in the Union Territory of Dadra & Nagar Haveli (DNH).

4. The Central Electricity Regulatory Commission (CERC) is the Central Commission discharging functions under the provisions of the Act and is the common Respondent in both the Appeals.

5. The present Appeals are connected Appeals. The other Respondents in Appeal No. 111 of 2017 are the Discom and the MSEDCL (Distribution Licensee in the State of Maharashtra has also entered into PPA with GWEL) and Prayas Energy Group (Impleaded party). The other Respondents in Appeal No. 290 of 2017 are MSEDCL and Prayas Energy Group, which is a consumer organisation and was a party to the proceedings before the Central Commission.

6. **Brief facts of the case are as follows:**

a) GWEL has set up a Thermal Power Station at Warora, Distt. Chandrapur in the State of Maharashtra with an installed capacity of 600 MW (2 x 300 MW) ("**TPS**"). The Commercial Operation Date (COD) of Unit 1 is 19.3.2013 and that of Unit 2 is 1.9.2013.

b) GWEL has entered into long term Power Purchase Agreements (PPAs) with the Discom for supply of 200 MW power on 21.3.2013 ("**DNH PPA**") and for supply of 200 MW power to MSEDCL on 17.3.2010 ("**MSEDCL PPA**").GWEL emerged as the successful bidder for supply of power to MSEDCL/the Discom under Case-1 bidding processes at the levelized tariff of Rs. 2.879/ 4.618 per unit. On 28.12.2010, Maharashtra Electricity Regulatory Commission ("**MERC**") adopted the tariff

determined through the said bidding process. On 19.02.2013, the JERC, granted approval for the DNH PPA. The scheduled delivery date under the MSEDCL PPA was 17.03.2014.The supply of power under the DNH PPA has commenced from 01.04.2013.GWEL is also supplying 150 MW power from the TPS to TANGEDCO by a way of back to back arrangement with trading company GMR Energy Trading Limited for which PPA was signed on 27.11.2013 ("TANGEDCO PPA").

c) In terms of the PPAs, the cut-off date which is seven days prior to bid deadline is to be considered for the purpose of claims under Change in Law. Following are the cut-off dates according to the said PPAs.

	DNH PPA	MSEDCL PPA	TANGEDCO PPA
Cut-off date	1.6.2012	31.7.2009	27.2.2013

d) Certain Change in Law events occurred related to the MSEDCL PPA and DNH PPA after the cut-off date affecting the TPS, which were notified by GWEL to MSEDCL/the Discom.On 13.1.2014, GWEL filed Petition 8/MP/2014 before the Central Commission seeking relief under Change in Law.

e) The Central Commission passed the Impugned Order on 1.2.2017. Vide the Impugned Order the Central Commission has allowed the claims of GWEL partly. The Change in Law events claimed by GWEL and the decision of the Central Commission is summarized below.

Change in Law claims disallowed by the Central Commission:

i. Withdrawal of deemed export benefit by DGFT
ii. Design changes in Coal Handling Plant (CHP)
iii. Increase in the rate of Minimum Alternate Tax (MAT)
iv. Increase in Busy Season Surcharge and Development surcharge on transportation of coal by Indian Railways (IR)
v. Increase in sizing charges and surface transportation charges by Coal India Ltd. (CIL)
vi. Increase in operating cost on account of specification of coal quality to be used for the TPS
vii. Change from UHV to GCV based pricing of coal
viii. Incremental increase in Interest on Working Capital (IWC) on account of increase in Project costs.

Change in Law claims allowed by the Central Commission:

i. Increase in CVD from 8% to 10 % and 10% to 12%
ii. Increase in Excise Duty
iii. Increase in Service Tax
iv. Increase in other taxes [Work Contract Tax (WCT), VAT, CST]
v. Change in Excise Duty on coal
vi. Increase in the rate of Royalty on coal
vii. Levy of Clean Energy Cess by Government of India (GoI)
viii. Increase in service tax on transportation of goods by IR
ix. Levy of Swachh Bharat Cess

Change in Law claims disallowed by the Central Commission with liberty to file application/ claim under Force Majeure (FM) provisions of PPA:

i. Levy of Niryatkar Tax by SECL

ii. Shortfall in linkage coal due to changes in the New Coal Distribution Policy (NCDP)

f) GWEL has been aggrieved by the decision of the Central Commission for not allowing the various events as above under Change in Law. The Discom has been aggrieved by the decision of the Central Commission for allowing certain events under Change in Law as above and compensating GWEL for the same.

g) Being aggrieved by the Common Impugned Order dated 1.2.2017 passed by the Central Commission, GWEL and the Discom have preferred the present Appeals.

h) Since these two Appeals arise out of Common Impugned Order and involve common issues, we are disposing of these Appeals by passing Common judgement.

7. Questions of Law:

A. GWEL has raised the following questions of law in the present Appeal No. 111 of 2017 for consideration are as follows:

a) Whether the Central Commission erred in holding that the design changes in the Coal Handling plant due to the Central Electricity Authority vide its Letter No. CEA/TE&TD-TT/2011/F-9 dated 19.04.2011 does not amount to change in law under the MSEDCL PPA?

b) Whether the Central Commission erred in holding that the increase in sizing and crushing charges and surface transportation charges pursuant to Notification issued by CIL does not amount to change in law under the respective PPAs?

c) Whether the Central Commission erred in holding that the requirement to use raw or blended or beneficiated coal with an ash content not exceeding 34% and gross calorific value not less than 4000 Kcal/kg by thermal power plants pursuant to the Ministry of Environment and Forests (MoEF) Notification dated 11.7.2012 does not amount to change in law under the respective PPAs?

d) Whether the Central Commission erred in holding that the shortfall in linkage coal on account of changes in the NCDP does not amount to change in law under the respective PPAs?

e) Whether the Central Commission has erred in holding that change from UHV to GCV based pricing is not a Change in Law event in terms of the MSEDCL PPA?

f) Whether the Central Commission erred in holding that the changes in the MAT Rate and corporate tax does not amount to change in law for which GWEL is to be compensated?

g) Whether the Central Commission erred in holding that the withdrawal of deemed export benefit pursuant to the Circular dated 28.12.2011 issued by the DGFT as well as the notifications dated 28.12.2011 and 21.03.2012 does not amount to change in law for which GWEL is to be compensated?

h) Whether the disallowance of certain change in law claims viz. Disallowed Claims is contrary to the provisions of the respective PPAs which allow compensation for change in law events occurring after the Cut-Off Date?

i) Whether the Central Commission has erred in holding that possible increase/revision in the railway freight charges would not be allowed as change in law?

j) Whether the Central Commission has erred in holding that GWEL is required to take into account laws and regulations and make a realistic assessment of changes in law for a period of 25 years and factor the same in its bid?

k) Whether the Central Commission has erred in not allowing IWC in relation to the increased operating costs on account of Change in Law which is contrary to the principle of restoration to the same economic position?

B. The Discom has raised the following questions of law in the present Appeal No. 290 of 2017 for consideration are as follows:

a) Whether change in Excise Duty on Coal amounts to Change in Law in terms of Article 10 of the PPA?

b) Whether increase in rate of royalty on coal can be passed on as Change in Law in terms of Article 10 of the PPA?

c) Whether Levy of Clean Energy Cess amounts to Change in Law in terms of Article 10 of the PPA?

d) Whether an increase in Service Tax on transportation of good by Indian Railways be passed on as Change in Law in terms of Article 10 of the PPA?

e) Whether the levy of Swacch Bharat Cess can be passed on as Change in Law in terms of Article 10 of the PPA?

f) Whether the Central Commission was justified in allowing compensation on account of alleged Change in Law events?

g) Whether the petition was within the jurisdiction of the Central Commission qua the Discom?

8. We have heard the learned senior counsel appearing for the Appellant and the learned counsel appearing for the Respondents at considerable length of time and also carefully gone through the written submissions and submissions put forth during the hearings. Submissions of the learned senior counsel and learned counsel appearing for the parties are considered hereunder.

9. Mr. Basava Prabhu Patil, the learned senior counsel and Mr. Amit Kapur the learned counsel appearing for GWEL/Appellant submitted the following submissions for our consideration on the issues raised in the instant Appeals as follows:-

a) The Central Commission has erred in disallowing claims on the basis that GWEL was required to factor in all inputs,

contingencies, and possible revisions while quoting the bid. GWEL is only required to factor in statutory levies and charges prevailing as on Cut-off Date including tax/duty rates for the submission of the bid. GWEL was not required to take into account any changes in taxes and duties/ charges after the Cut-off Date which fall within the category of Change in Law.

b) The findings of the Central Commission for the disallowed items is contrary to the Full Bench judgment of this Hon’ble Tribunal in Appeal No. 100 of 2013 and batch in case of UHBVNL and Anr. v. CERC and Ors. The learned counsel has made the following submissions issue wise.

c) Withdrawal of Deemed Export Benefit in relation to the MSEDCL PPA:

i. The Central Commission has erred in holding that the withdrawal of deemed export benefit is not a Change in Law event. At the time of submission of the bid on 7.8.2009 by GWEL Deemed Export Benefits on capital goods that were imported under Chapter 8 of the Foreign Trade Policy 2009-2014 (FTP) were available. On 15.3.2011, the Policy Interpretation Committee of Directorate General of Foreign Trade (DGFT) clarified that Deemed Export Benefit would only be available for cases where the capital goods are manufactured in India. On 28.12.2011 the DGFT issued Policy Circular No. 50 / 2009-2014(RE 2010) clarifying that for Non-Mega power projects, capital goods such as boilers, turbines and generators would be entitled to Deemed Export

Benefit only if such boilers, turbines and generators were manufactured in India, Paragraph 8.4.4 (iv) was amended vide Notification No.92 (RE-2010)/2009-14 and the benefit of deemed export was limited to advance authorization as opposed to deemed export duty drawback and exemption from terminal excise duty. On 21.03.2012 the Foreign Trade Policy (FTP) was amended and Paragraph 8.7 introduced in terms of which deemed export benefit was withdrawn for all non-Mega power projects and on 5.6.2012 the Annual Supplement to the FTP was issued pursuant to which Paragraph 8.2(g) which referred to non-Mega Power Projects was deleted.

ii. At the time of bid submission, these benefits were available on imported capital goods and indigenous goods and accordingly the capital cost was estimated. In terms of Section 5 of the Foreign Trade Development and Regulation Act, 1992 read with Para 2.3 of the FTP 2009-14, the DGFT has been given the power to decide interpretation issues in relation to the FTP. The withdrawal of the deemed export benefit was pursuant to the decision of the Policy Interpretation Committee of DGFT dated 15.03.2011 and the Circular dated 28.12.2011 issued by the DGFT as well as the notifications dated 28.12.2011 and 21.03.2012 and the Supplement to the FTP. This constitute ‘Law’ under the MSEDCL PPA which includes all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification, or code, rule, or any interpretation of any of them by an Indian Government Instrumentality (“**IGI**”). The

withdrawal of deemed export benefit amounts to an interpretation of law by an IGI.

iii. The Central Commission has erred in relying on clause 2.6.1 of the Request for Proposal (RFP), to hold that since GWEL had chosen to import equipment, the risk solely lies with it and deemed export benefit would not be available to GWEL. In terms of Clause 2.6.1 of the RFP, GWEL was required to factor in inputs, conditions and circumstances having an effect on the Bid, that were prevalent on the Cut - Off Date. The risk assumed by GWEL is limited to that extent and is conditional. The said clause cannot be interpreted in a manner to exclude the remedy of Change in Law.

d) Design Changes in CHP due to direction from Central Electricity Authority (CEA)in relation to the MSEDCL PPA:

i. The TPS was conceived to use domestic coal and the capital cost was also estimated based on the same. Due to the shortage of domestic coal and the fact that the Fuel Supply Agreements (FSAs) entered into by CIL &its subsidiaries included a component of imported coal to make up for the shortfall, CEA vide its Letter No. CEA/TE&TD-TT/2011/F-9 dated 19.04.2011 advised all power generating companies/power equipment manufacturers that the boilers for all future indigenous coal based thermal power plants shall be designed for blend ratio by weight of 30:70 (or higher) imported coal: indigenous coal. It was also advised that the station facilities shall also be designed for unloading,

handling and blending of imported coal. The Design Changes were pursuant to the letter issued by CEA. CEA has been empowered under Section 73(b) and (m) of the Act to specify technical standards for construction of electrical plants and advising generating companies on matters enabling them to operate and maintain the electrical system in an improved manner. Thus, the letter dated 19.04.2011 was ‘Law’ under the MSEDCL PPA.

e) Increase Minimum Alternate Tax (MAT) Rate and Corporate Tax:

i. With respect to the MSEDCL PPA, on the cut-off date MAT rate was 10%. Vide amendment of Section 115 JB of Income Tax Act in 2012, the Income Tax Department, GoI increased the MAT rate to 18.50% applicable in FY 2009-10. The rate of surcharge was reduced to 5% in FY 2012-13 from 10% in FY 2009-10 which was again increased to 10% in the FY 2013-14.With respect to the DNH PPA, the increase in surcharge led to increase in effective rate of MAT and Corporate Tax from 20.1 % in FY 2012-13 to 20.96% in FY 2013-14.The increase in MAT rate and Corporate Tax were pursuant to amendment of the Income Tax, 2012 which falls in the definition of Law under the respective PPAs.

ii. Indian Accounting Standards (AS) (notified by the Ministry of Corporate Affairs which are converged with International Financial Reporting Standards (IFRS) provide the guidelines that Indian companies need to follow for preparation of their

accounts. AS-05 ("Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies") provides the guidelines on treatment of income and expenses.

iii. MAT is specifically included as a cost in terms of Accounting Standards - AS-22, Accounting Standards - AS-3 and Indian Accounting Standards INDAS-7.The balance sheet & profit and loss account of a company has to be prepared in accordance with the AS. This is mandated by section 211(3A) of Companies Act, 1956. The definition of tax expenses in AS-22 refers to the aggregate of current tax and deferred tax. Current tax is the amount of income tax that is determined to be payable on the taxable income for accounting period. If there is a loss, it is treated as "tax loss". Therefore, the fact that the liability for MAT is treated as a tax expense would indicate that an increase/ decrease in MAT rates comes within the purview of "Change in Law" as defined in Article 10. Higher the MAT, the greater will be the tax expense and this will directly impact the revenue. The word "revenue" has been used instead of the word "profit". The judgement of Hon'ble Supreme Court in the case of J.K. Industries Limited vs. UOI reported as (2007) 13 SCC 673 ("**JK Industries Case**") has been relied.

iv. This Tribunal vide the judgment in case of Jaiprakash Hydro Power Ltd. v. Himachal Pradesh State Electricity Regulatory Commission &Anr. in Appeal No. 39 of 2010 has allowed reimbursement of MAT rates claimed on account of Change in Law. MERC has also allowed increase in MAT Rate as a

Change in Law in its order dated 20.04.2015 in Petition 163 of 2014 after considering the judgments of this Tribunal. As per the revised Tariff Policy dated 28.01.2016 issued by the Ministry of Power (MoP), GoI increase in taxes and levies has been acknowledged as change in law events and allowed as pass-through.

f) Increase in Busy Season Surcharge, Development Surcharge and imposition of service tax:

i. The coal required for the TPS is transported by SECL through rail. GWEL is entitled to be compensated for any increase in the cost in terms of levies on transportation. The increase in Development Surcharge from 2% to 5% was done vide Circular dated 12.10.2011. The Busy Season Surcharge was increased from 5% to 12% vide Ministry of Railways (MoR) letter dated 27.09.2012. Both the circulars fall within the definition of law under the respective PPAs. Busy Season Surcharge was further increased to 15% by Circular No. 24 of 2013. The letter/circulars were issued by the MoR, GoI which is an Indian Governmental Instrumentality. MERC has allowed Busy Season Surcharge and Development Surcharge as Change in Law vide its order dated 20.04.2015 in Petition 163 of 2014.

ii. The Central Commission has erroneously held that increase in Busy Season Surcharge and Development Surcharge do not come within the ambit of Change in Law. Central Commission has erred in relying its Order dated 3.2.16 in Petition 79/MP/2013.

iii. On the issues of surcharges, GWEL has contended that in terms of Article 77 (3) of the Constitution of India Executive Powers of GoI have been allocated to various ministries. The levy of said surcharges are determined and enforced through Rate Circulars notified by MoR from time to time under Railways Act. The said Surcharges are statutory in nature in the form of orders by Indian Government Instrumentality (MoR) and are covered under events under Change in Law in terms of the PPA.

iv. Railways is not a commercial activity as the surcharges levied are statutory in nature imposed by sovereign and collected for the purpose of development of railway network, cross subsidy etc. and the Rate Circulars issued by MoR have force of law. The learned senior counsel has placed reliance on the judgements of Hon'ble Supreme Court in case of Rai Sahib Jawaya Kapur and Ors. V. State of Punjab AIR 1955 SC 549, Rashmi Metaliks v. UOI (1998) 5 SCC 126, Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 & (1973) 1 SCC 781 and Gulf Goans Hotels Company Ltd. v. Union of India & Ors. (2014) 10 SCC 673. Ultra Tech Cement Ltd. v. UOI 2014 (4) KHC 190 Kerala High Court and KIOCL Ltd. v. Railway Board & Ors. WP(C) 532 of 2010 of Karnataka High Court are also relied on Railway Circulars being policy decisions of GoI.

g) Change in Crushing/Sizing Charges notified by CIL & its subsidiaries: The Central Commission erred in holding that the increase in sizing/crushing charges do not constitute a Change in Law event. On the cut-off date for the MSEDCL PPA, the

prevailing crushing charges, where the top size of coal was limited to 100 mm, were Rs.55/tonne. In case of the DNH PPA, the prevailing crushing/sizing charges on the cut-off date were Rs. 61/tonne. Subsequently, the crushing/sizing charges were increased. The increase in crushing/sizing charges of coal was introduced by way of notifications issued by CIL an IGI which falls within the definition of Law under the respective PPAs.

h) Increase in Surface Transportation Charges: On the cut-off date for the MSEDCL PPA, the prevailing Surface Transportation Charges for transportation of coal for a distance from mine to loading point between 3 to 10 km. was Rs. 40/tonne. On the cut-off date for the DNH PPA, the prevailing transportation charges for a distance between 3 to 10 km. was Rs. 44/tonne. Subsequently, there has been an increase in the surface transportation charges of coal under both PPAs. The increase in surface transportation charges of coal was done by CIL an IGI which falls within the definition of Law under the respective PPAs.

i) Increase on account of coal quality prescription by MoEF Notification:

   i. The Central Commission has erred in disallowing compensation on account of the requirement to use raw or blended or beneficiated coal with an ash content not exceeding 34% and GCV not less than 4000 kcal/kg by thermal power plants which was imposed by the MoEF w.e.f

1.1.2014. At the time of bid submission, there was no requirement of using raw or blended or beneficiated coal with an ash content. Central Commission erred in holding that since the FSAs were signed after the Notification dated 11.07.2012, GWEL was aware of the requirement of using coal with an ash content not exceeding 34% and GCV not less than 4000 kcal/kg, and thus the same cannot qualify as a Change in Law event.

ii. The Central Commission has failed to consider that a change in law brought about by MOEF an IGI after the Cut-Off Date affecting the revenue of the TPS, needs to be compensated for the same in terms of Article 10 of the respective PPAs. Subsequent signing of the FSAs by GWEL does not exclude the applicability of Article 10 of the PPAs since, the bid was not premised taking into account the altered coal quality to be used with effect from 01.01.2014.

j) Shift of coal pricing from UHV to GCV based pricing regime in relation to the MSEDCL PPA:

i. After the change in the pricing system from UHV to GCV, there has been a steep rise in the price of coal, as the erstwhile UHV based price for each grade has been broken into two bands with differential pricing for these bands. The Central Commission has erred in relying on its Order dated 03.02.2016 in Petition No. 79/MP/2013 in holding that the switchover from UHV to GCV based pricing was merely a

change in the pricing methodology and did not constitute a Change in Law. The change in pricing regime is a modification of existing law as defined in the MSEDCL PPA which impacts the cost of coal.

ii. The Central Commission in the Impugned Order itself has allowed items like Royalty and Clean Energy Cess on coal on the ground that these items have an impact on the cost of coal and consequently the cost of generation of power for supply to the Distribution Licensees. The change in pricing regime is similarly placed since it has been introduced by way of a gazette notification. It is not a case of increase in cost on account of a general increase in price or inflation. The increase in cost of coal is a result of a gazette notification issued by the GoI.

iii. The Central Commission failed to appreciate that it had in the Order dated 03.02.2016, erred in relying on Clause 2.7.2.4 of the RFP and misinterpreting the judgment dated 12.09.2014 of this Hon'ble Tribunal in Appeal No. 288 of 2013.

k) Changes in the Fuel Supply Agreement and deviation from the NCDP and its impact on the TPS:

i. The Central Commission has erred in holding that the changes in the NCDP do not constitute a Change in Law event. As per Schedule 5 of the PPA the primary source of coal was domestic coal and the fuel source indicated was

CIL linkage. GWEL had been granted coal linkage from SECL in terms of the Letter of Assurance dated 19.10.2006 for 1.327 MTPA and Letter of Assurance dated 03.06.2010 for 1.3 MTPA of Grade F coal from the Korba / Raigarh coalfield. On 18.10.2007, the GoI issued the NCDP. The addendums to the FSAs for capacity contracted under the respective PPAs were executed on 10.06.2014, after the Bid Deadline Date. Therefore, as on the Bid Deadline Date, there was an assurance of supply of coal up to 100% of the normative requirement. As per the FSA executed with SECL, shortfall in the level of delivery of the coal by CIL up to 65% of Annual Contracted Quantity (ACQ) as applicable for domestic coal shall not be liable for penalty till FY 2014-15 which will get changed to 70% of ACQ in FY 2015-16 and 75% of ACQ in FY 2016-17. SECL has not been supplying coal corresponding to 80% normative availability necessitating procurement of coal from alternate sources. To meet the shortfall in coal supply and to fulfill the obligation of 85% normative plant availability under the PPA, GWEL will have to procure coal from alternate sources.

ii. In terms of the PPAs if GWEL is unable to maintain the availability above 80% then it has to pay penalty to MSEDCL & the Discom. The Central Commission failed to appreciate that deviation from 100% assured supply of coal in terms of the ACQ and short supply of coal by SECL is a change in law event in terms of Article 10 of the respective PPAs.

iii. Shortfall in linkage coal has been accepted as a change in law event in terms of Statutory advice issued by the

Central Commission on 20.05.2013 to the Ministry of Power, Resolution dated 21.06.2013 by the Cabinet Committee on Economic Affairs (CCEA) whereby the Committee approved a mechanism for coal supply to power producers, on 31.08.2015, Ministry of Power issued an office memorandum in response to the clarification sought by Coal India Limited, along with a list of power plants covered under 78,000 MW capacity having long term PPAs which are commissioned/ likely to be commissioned by 2015-16.

iv. This Tribunal in the judgment dated 03.11.2016 in the case of Vidarbha Industries Power Limited v. Maharashtra Electricity Regulatory Commission &Anr. in Appeal No. 192 of 2016 recognized that additional costs incurred on account of shortfall in domestic coal, may be allowed as pass through by the Appropriate Commission on a case to case basis, as provided in the Revised Tariff Policy, 2016.

v. The Hon'ble Supreme Court has set aside the Full Bench Judgment dated 11.4.2017 of this Tribunal in case of Energy Watchdog v. CERC &Ors. ('Energy Watchdog Judgement') and has held that shortfall in domestic linkage of coal is a Change in Law event and GWEL is to be compensated for shortfall of coal arising out of NCDP. In view of the said judgement this issue is ought to be remanded to the Central Commission as being done by this Tribunal in order dated 4.5.2017 in case of Rattan India Power Ltd. v. MERC &Ors. in light of Energy Watchdog Judgement.

vi. The Hon'ble Supreme Court has considered the issue of "what is law" and has held that a government policy acquires the force of "law". In this regard, reliance may be placed on the judgements of Hon'ble Supreme Court in case of Gulf Goans Hotels Co. Ltd. V. UoI & Ors reported as (2014) 10 SCC 673, Secy., APD Jain Pathshala Vs. Shivaji Bhagwat More (2011) 13 SCC 99 (para 24 and 25), PU Myllai Hlychho Vs. State of Mizoram reported as (2005) 2 SCC 92 and Ram Jawaya Vs. State of Punjab AIR 1955 SC 549.

vii. Central Commission has granted liberty to GWEL to approach the Central Commission claiming additional expenditure incurred by it on account of procurement of coal from alternate sources as a force majeure event based on the findings of this Tribunal in the Full Bench Judgment. GWEL is filing the present Appeal without prejudice to its right to approach the Central Commission in this regard.

l) IWC and Carrying Cost:

i. Though there is no concept of return on equity and IWC in competitively bid tariff, the increase in costs due Change in Law events have indirect bearing on them. GWEL has factored in IWC and return on equity based on the costs prevalent at the time of bid. With the increase in the costs due to the Change in Law events the working capital requirement has also increased than what was prevalent at the time of bid.

ii. Carrying costs are in the nature of compensation for money denied at the appropriate time and the same has been held by this Tribunal in the Judgement dated 20.12.2012 in Appeal No. 150 and batch in case of SLS Power Ltd vs. Andhra Pradesh Electricity Regulatory Commission ("**SLS case**"). GWEL is entitled to carrying cost being in the nature of compensation in terms of Article 10 of the respective PPAs.

iii. The Hon'ble Supreme Court in case of R.C. Cooper v. Union of India AIR 1970 SC 564 noted that as per the dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage". The said principle has also been recognized by the Hon'ble Supreme Court in the case of N.B. Jeejeebhoy v. Assistant Collector, Thana Prant, Thana AIR 1965 SC 1096 in relation to Article 31 of the Constitution of India. Compensation is a comprehensive term and is aimed at restoring a party to the same position as if no injury was caused to him, as held by the Hon'ble Supreme Court in the case of Yadava Kumar v. The Divisional Manager, National Insurance Co. Ltd. and Anr., (2010)10SCC341.

iv. Judgements of this Hon'ble Tribunal in North Delhi Power Ltd v. DERC 2010 ELR (APTEL) 0891 and Tata Power Company Ltd v. Maharashtra Electricity Regulatory Commission 2011 ELR (APTEL) 336 are also relied.

m) The reliance of Parays Energy Group/ MSEDCL/ the Discom on various judgements of Hon'ble Supreme Court in relation to the

activities of CIL/IR as commercial activities are misplaced as the notifications / circulars issued by CIL/ IR have force of law as the activities undertaken by them flows from the acts of the parliament.

n) The reliance of Parays Energy Group/ the Discom on various judgements of Hon'ble Supreme Court in relation to tax on supply of power is misplaced as the provision of the PPA under change in law article covers tax on input costs also as the Hon'ble Supreme Court in case of State of A.P. v. NTPC (2002) 5 SCC 203 has held that the word 'supply' includes generation and cannot be restricted to only sale of power. The reliance of Prayas Energy Group on Adani Carrying Cost judgement of this Tribunal is also misplaced as the terms used in the said PPA are different from that in the present case.

o) The Central Commission has also rejected the contention of the Prayas Energy Group and the Discom limiting the applicability of taxes only to sale of power. Further, the Change in Law has been interpreted by this Tribunal vide judgement dated 19.4.2017 in case of Sasan Power Ltd. v. CERC in Appeal No. 161 & 205 of 2015 (Sasan Judgement) meaning changes in law which impact the cost or revenue from sale of power.

10. Mr. Anand K Ganesan, the learned counsel appearing for the Discom submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

a) The claims of GWEL needs to be considered within the scope of Article 10 of the MSEDCL/DNH PPAs dealing with Change in Law to be read with the definition of Law and Indian Government Instrumentality. The Central Commission while passing the Impugned Order has failed to take into consideration that the PPA is a binding contract between the parties and all claims of the parties have to be strictly in terms of the PPA. In terms of Article 10 of the PPA it is clear that not every imposition or change in tax is to be recognized as Change in Law, but only when there is a change in tax or imposition of tax "for supply of power". No increase of any nature on account of contractual and commercial arrangements of GWEL including with Railways etc. can be covered under the Change in Law.

b) The Central Commission has admitted certain claims of GWEL on account of Change in Excise Duty on Coal, Increase in Rate of Royalty on Coal, Levy of Clean Energy Cess, Increase in Service tax on transportation of goods by the Indian Railways and Levy of Swacch Bharat cess against the Discom.

c) The Central Commission has failed to appreciate that change in Excise Duty and Rate of Royalty on coal are not a Change in Tax "for the supply of power". The excise duty and Royalty on coal are payable on account of the commercial arrangement of GWEL in the FSA for taxes to be paid. The PPA only provides for tax on supply of power and not all taxes or input cost. The Central Commission has erred in not appreciating the fact that such commercial rights and liabilities of the parties under the

FSA cannot be an issue of Change in Law to be a pass-through in the tariff payable by the Discom.

d) The Central Commission has erred in allowing levy of Clean Energy Cess, and Swacch Bharat Cess as a Change in Law event in terms of Article 10.1 of the PPA. The Central Commission failed to appreciate that the said taxes do not constitute change in tax or imposition of tax “for the supply of power”, in terms of the PPA.

e) The Central Commission has failed to appreciate that the service tax on the transportation of coal could not have been covered under the Change in Law clause of the PPA. Apart from the fact that the said tax does not constitute a tax on supply of power, the reimbursement of such tax by the generator to the transporter is not by virtue of a statutory provisions, but under the terms of the contract between the parties.

f) The Central Commission has failed to appreciate that in the case of adoption of tariff by the JERC GWEL & the Discom were co-petitioners before the Joint Commission. The parties have agreed to the jurisdiction of the Joint Commission and the ingredients mentioned in Section 64(5) with regard to jurisdiction was satisfied. Therefore, it was not correct for the Central Commission to assume jurisdiction qua the Discom in the petition filed by GWEL.

g) On the issue of sovereign functions of the government the Discom has relied on the judgements of Hon’ble Supreme Court

in case of Agricultural Produce Market Committee v. Ashok Harikuni (2000) 8 SCC 61, Bakhtawar Singh Bal Kishan v. Union of India (1988) 2 SCC 293, Thressiamma Jacob v. Deptt. Of Mining & Geology (2013) 9 SCC 725, Tata Iron & Steel Co. Ltd. and Anr. v. State of Bihar &Ors. 2017 SCC online SC 1521, Distt. Council JowaiAutonomus Distt. V. Dwet Singh Rymbai (1986) 4 SCC 38 and Kuldeep Singh v. UOI AIR 1986 Del 56.

h) On the issue of carrying cost the Discom has submitted that the parties cannot travel beyond the pleadings as the said claim is being for the first time before this Tribunal. The judgements of Hon'ble Supreme Court in cade of UOI v. Eid Parry (2000) 2 SCC 223 and State of U P v. Ramkrish Burman and this Tribunal's judgement in NPL case have been relied. Further in terms of the PPA there is no provision of monthly billing for the claims arising out of change in law events and the same is being carried out in terms of the supplementary billing.

i) Other contentions of the Discom are similar as raised by the counsel of the Prayas Energy Group and hence the same are not reproduced again for the sake of brevity.

11. Mr. M G Ramachandran, the learned counsel appearing for the Prayas Energy Group submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

a) GWEL has sought compensation on 20 Change in Law events. The Central Commission has allowed compensation on account

of nine Change in Law events and rejected the other eleven Change in Law events. In the Appeal No. 111 of 2017, GWEL is claiming carrying cost for the first time. The Prayas Energy Group is supporting the Discom to challenge the allowed claims and supporting the Impugned Order on disallowed claims by the Central Commission.

b) As per the fifth bullet of the Article 10.1.1 of the PPAs the scope of Change in Law is restricted to taxes applicable for supply of power by GWEL as per the terms of the PPAs. The same does not extend to taxes on input materials for generation of power. The Central Commission has erred in allowing the nine claims under Change in Law which are not taxes for supplying power. The other claims of GWEL have been correctly disallowed by the Central Commission as the same are not by reason of any Change in Law and event causing such changes are not 'Law' in terms of the PPAs.

c) The term IGI defined in PPA has to be read *ejusdem generis/ noscitur a soccis* meaning covering those which are exercising statutory powers and have the power to mandate and the expression such as 'corporation' has to be given a meaning of same genus as the expressions GoI, Govt. of State, ministry, authority etc. The corporation cannot be given scope to include companies incorporated to undertake business.

d) The decisions of CIL/IR are commercial or contractual in nature and not in nature of statutory mandate/ sovereign function within the scope of Change in Law provisions of the PPA.

e) The reliance of GWEL on the judgement of Hon'ble Supreme Court regarding expression 'for' used in the fifth bullet of the Change in Law provision is misplaced as the context in which the word for has been considered is different. Important is the other references to a sense of 'appropriate' or 'adopted to', 'suitable to purpose' etc.

f) The expression 'for' was considered in the context of taxes etc. in the decisions of House of Lords judgement dated 19.5.1896 in case of Sir W J R Cotton v. Vogan& Co. The said decision has been noted with approval in case of The Municipal Corporation, Tuticorin v. T. Shanmuga Moopanar AIR 1926 Mad 219, C Gangadharan v. Alandur Muncipality (1977) 2 MLJ 159 and State of U.P. v. Ramkrishnan Verman (1970) 1 SCC 80. Accordingly, 'for' has to be interpreted in restricted sense. The judgemets of Hon'ble Supreme Court in case of Yesyem Arecanut v. State of Kerala (2015) 14 SCC 367 and V. Guruviah & Sons and Ors. v. State of T.N. &Ors. (1977) 1 SCC 234 has been relied.

g) The standard PPA issued by GoI does not have separate article for taxes as in the MSEDCL/DNH PPAs. The deviation in the PPAs was consciously made restricting taxes applicable for supplying power. This Tribunal in case of Adani Power Ltd. v. CERC in Appeal No. 210 of 2017 has also interpreted the limited application of taxes on water, fuel and generation of electricity. Different PPAs cover different scopes and hence taxes on 'sale of power' cannot be extended on other aspects

such as taxes on input goods and services. Further, the judgement of this Tribunal in case of Nabha Power Ltd. v. PSPCL in Appeal No. 283 of 2015 has been relied. The term 'supply' has been defined in the Act and accordingly the incidence of tax is applicable only on the transaction on the sale of electricity.

h) The taxes which do not fall under the fifth bullet of Article 10.1.1 cannot be considered to be as admissible under first bullet of the said article otherwise the fifth bullet would become redundant. It is settled principle that no provision can be ignored as redundant or superfluous and the judgements of Hon'ble Supreme Court in case of JSW Infrastructure Ltd. v. Kakinada Seaports Ltd. (2017) 4 SCC 170 and Life Insurance Corporation of India v. Dharam Vir Anand (1998) 7 SCC 348.When there is specific clause relating to taxes, the general clauses dealing with laws in general have to be interpreted excluding taxes. The judgement of Hon'ble Supreme Court in case of South India Corporation (P) Ltd. v. Secretary Board of Revenue Trivandrum &Anr. (1964) 4 SCR 280 has been relied. The exclusion of withholding tax on income and dividend under Article 10.1.1 cannot be interpreted to mean that all taxes other than withholding tax are covered under Article 10.1.1 fifth bullet or alternatively.

i) Scope of the term IGI- It does not cover CIL, IR etc acting in its commercial capacity. The well settled principles of ejusdem generis and Noscitur a Sociis will apply. The relevant judgements of Hon'ble Supreme Court are Pradeep Aggarbatti,

Ludhina v. State of Punjab &Anr. (1997) 8 SCC 511, CBI, AHD Patna v. Braj Bhusan Prasad &Anr. (2001) 9 SCC 432, Nirma Industries Ltd. v. SEBI (2013) 8 SCC 20. The term IGI has been used in context of statues, ordinance, regulations, notifications etc. The companies incorporated under the Companies Act and carrying business activities do not fall in the scope of IGI. Judgement of Hon'ble Supreme Court in case of G Claridge and Co. Ltd. v. CCE (1991) 2 SCC 229 has been relied. The price of commercial activity is not statutory imposition and therefore Law and hence changes in such prices from time to time are part of business aspect and not Change in Law events. The judgement of this Tribunal in case of Nabha Power Ltd. &Anr. v. PSPCL in Appeal No. 29 of 2013 has been relied.

j) The reliance of GWEL on Article 77 of the Constitution is misplaced as the correct Article to be applied to the charges payable to the IR/ CIL etc. is the Article 298 of the Constitution. The judgements of Hon'ble Supreme Court in case of Balmer Lawrie & Co. Ltd. v. Partha Sarathi Sen Roy (2013) 8 SCC 345 and Samsher Singh v. State of Punjab (1974) 2 SCC 831 have been relied.

k) The statutory / legislative function can be undertaken by GoI even without plenary legislation enacted by the Parliament in terms of residuary matters as per list 1, Schedule VII of the Constitution. By virtue of executive action, there can be mandate of law including in regard to taxation and other aspects.

l) In terms of Article 298 of the Constitution, GoI can exercise executive powers to carry out any trade or business and in such matters it cannot be said that GoI is exercising its sovereign power. References have been made to judgements of Hon'ble Supreme Court in case of Anraj v. State of Maharashtra (1984) 2 SCC 292, Chief Conservator of Forests &Anr. v. Jagannath Maruti Kondhare (1996) 2 SCC 293, Agricultural Produce Market Committee v. Ashok Harikuni & Anr. AIR 2000 SC 3116, Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617.

   References are also made to the judgement of Competition Commission in case of Arshiya Rail Infrastructure Ltd. v. Ministry of Railways &Anr. and High Court judgement in case of UOI v. Competition Commission of India & Ors. AIR 2012 Del 66

m) The maxim 'expressum facit cessare tactium' meaning when express inclusions are specified, anything which is not mentioned explicitly is excluded. The judgement of the Hon'ble Supreme Court in case of Union of India v. Tulsiram Patel (1985) 3 SCC 398 has been relied.

n) The plea of restitution of the economic position is applicable only when the conditions of Article 10.1.1 are satisfied.

o) The reliance of GWEL on the judgements of Hon'ble Supreme Court in case of Gulf Goan, Energy Watchdog and the decision of this Tribunal in case of Sasan Judgement have no merit. GWEL has failed to indicate as how the decisions in Energy

Watchdog case and Sasan Judgement case covers it claims. In fact these cases support the contentions of Prayas Energy Group. Further, the reliance of GWEL on the Guidelines issued by GoI providing Change in Law is misplaced as the same is part of the PPA. The draft PPA was part of the bid documents which has been approved by the respective Commissions.

p) On precedential value of the judgement the judgements in case of Delhi Administration v. Manohar Lal (2002) 7 SCC 222 and Arnit Das v. State of Bihar (2000) 5 SCC 488 have been relied.

q) The reliance of GWEL on the Tariff Policy 2016 is misplaced as the same cannot be applied retrospectively unless specifically provided. The Tariff Policy specifically recognises that the treatment of Change in Law is “unless provided otherwise in the PPA”. In view of the above contentions GWEL is not entitled to claim any relief for changes in price of goods and services under contractual arrangement and commercial dealings.

r) The Central Commission has applied the provisions of the Article 10.1.1 wrongly. The Central Commission while observing that change/new tax is applicable for supply of power had gone ahead in allowing nine Change in Law claims overlooking the aspect provided in the PPA. These claims relate to input goods or services.

s) The Disallowance of other eleven Change in Law claims by the Central Commission is correct as they are not as per the Article 10.1.1 of the PPA read with definition of the Law. They are as a

result of contractual/ commercial dealings between GWEL and agencies like CIL/IR.

t) Withdrawal of deemed export benefits: GWEL has failed to show as to how it has fulfilled the conditions of deemed export benefits. GWEL has not resorted to International Competitive Bidding (ICB) and the capital goods were not manufactured in India. GWEL has admitted that it has imported the capital goods. This Tribunal in case of Talwandi Sabo Power Ltd. v. PSERC &Anr. ('TSPL Case') in Appeal No. 32 & 47 of 2015 has held that the conditions of deemed exports are to be satisfied to get the benefits. Further, the Circulars dated 28.12.2011, 21.3.2012 and 5.6.2012 did not make any difference in the present case in view of above contentions. The clarification dated 15.3.2011 issued by DGFT cannot be considered as Change in Law as the implementing agencies had allowed the benefits wrongly and the same is not akin to interpretation by competent authority.

u) Costs incurred on account of design changes in CHP: The Case 1 bidding initiated by the MSEDCL & DNH was not based on any coal linkage specified by the Procurers. In terms of the RFP the responsibility of the fuel was entirely that of the GWEL including its infrastructure, transportation and handling. The claim is opposed to the tariff adopted based on competitive bid process. In terms of the FSA/ NCDP 2007 too GWEL was ought to design power plant based on the import of coal as on cut-off date. The contention of GWEL that advice of CEA in 2011 was the outcome of the NCDP 2013 is fallacious. The Central

Commission has rightly held that the advice of CEA is not mandatory as it was only in the letter form without referring to any Section of the Act. The advice cannot be considered as Change in Law.

v) MAT Rate: This Tribunal has already decided this issue in the Sasan Judgement. The Watchdog judgement does not deal with the said issue. The decision in case of Jai Prakash Hydro has been distinguished by this Tribunal in Sasan Judgement. Further, MAT is a tax on profit of the company and cannot be passed on to the consumers. The reliance of GWEL on the Accounting Standards is also misplaced as this Tribunal has also dealt the issue while upholding the decision of the Central Commission in Sasan Judgement considering the judgements of Hon'ble Supreme Court. Further, the Accounting Standard do not mean that MAT is related to expense/ cost of supply of power for determination of Change in Law. AS-05 & AS-22 lays down the principle for computing profit net of taxes since this is the amount left with the company. Net profit or loss is a post revenue item. The tax on income cannot be considered as pass through in competitive bidding process under Section 63 of the Act and cannot be compared to tariff determination under Section 62 of the Act.

w) Increase in cost of Railway Freight, Busy Season Surcharge and Development Surcharge: The activity of Railways is a business activity has been settled by Hon'ble Supreme Court vide judgements in case of Union of India (UOI) v. Ladulal Jain (1964) 3 SCR 624 and Railway Board v. Chandiram Das (2000)

2 SCC 465. The business/commercial activities are not related to exercise of sovereign power of the Government. The charges paid as per the rate circulars of the IR is the cost involved in procuring the inputs and not the statutory taxes, duties and levies thereof. Though changes in taxes, duties and levies can be allowed in Change in Law but not the cost of procurement of the inputs. The escalation index notified by the Central Commission provides for impact of change in freight rate of Railways as well as increase in price of coal. The reliance of GWEL on Nabha Power Case judgement of Hon'ble Supreme Court to claim all coal related costs to be allowed under Change in Law on 'business efficacy theory' is totally placed. Nabha power was Case 2 bidding and present case is of Case 1 bidding wherein escalabe and non escalabe charges were to be quoted by the Bidders. The escalation formula provides for freight and transportation escalation.

x) Increase in sizing/crushing charges and transportation charges: Fuel is the responsibility of GWEL and no relief can be granted to it for the same. These charges are commercial/ contractual issues between GWEL and CIL/SECL and cannot be termed as Change in Law. The coal pricing has been deregulated w.e.f 1.1.2000 and the coal prices are fixed by the coal companies based on the market forces. In Sasan Judgement this Tribunal while dealing with change in diesel prices has held that such change in prices are not Change in Law. The FSA also covers that change in transportation and sizing/ crushing charges shall be as determined by CIL/SECL. Further, such changes get

covered under escalation index issued by the Central Commission.

y) Increase in fuel cost due to MOEF notification restricting use of coal with ash content not more than 34% and GCV not less than 4000 kCal/kg: This claim of GWEL is erroneous as the notification relied by it was draft notification and is no longer in force as the same has been replaced by amendment dated January, 2014 which does not mention any specific GCV value. As per the notification the TPS is likely to fall in category of 500-749 km from pit head, the notification would be effective from June, 2016. The draft notification was issued on 11.7.2012 and GWEL could have taken care of such eventuality in signing of the FSA. The allocation of coal to GWEL was 'F' Grade which would have GCV more than 4000 kCal/kg. GWEL has also not demonstrated how there was additional recurring expenditure.

z) Change from UHV to GCV based pricing of coal: The grading methodology was changed from UHV to GCV basis w.e.f 1.1.2012 vide GoI notification dated 30.12.2011. This was only change in categorization of coal. The price of new categories are still determined by CIL based on market forces and cannot be considered as Change in Law. This Tribunal in Sasan Judgement has held that the decision of the GoI to create categories is not Change in Law and the said decision applies in present case also. Further, GWEL has quoted non-escalable energy charges taking all risks of price escalation. FSA was also entered by GWEL subsequent to changeover from UHV to GCV basis.

aa) Impact of NCDP: In terms of the Energy Watchdog Judgement the letter dated 31.7.2013 related to NCDP issued by Ministry of Power, GoI and Tariff Policy amounts to Change in Law. The impact under Article 10 of the PPA is yet to be determined on facts and circumstances of each case. If the availability of coal prior and post NCDP is almost same then there cannot be any claim under Change in Law. The impact regarding MSEDCL PPA is only in respect of 1.67%. Further, any shortage of coal below 65% is the matter of GWEL to be dealt with the coal companies and is not covered under Change in Law. The Change in Law provision is to be restricted to the year on year difference between 80% and as provided in NCDP as the COD of the Station was on 1.9.2013. The order of CERC in case of GMR Kamalanga Ltd. v. DHBVNL &Ors. is relied. Coal availability as per FSA with or without NCDP for GWEL is nearly the same, there is no impact of change in law. The Hon’ble Supreme Court has decided based on letter dated 31.7.2013 which provides for execution of FSA at the said percentages. If the reduced quantum is recognised in FSA before NCDP 2013 then there is no impact of any change in law.

bb) IWC and Return on Equity (RoE) on incremental working Capital: There is no concept of IWC or RoE in competitively bid projects under Section 63 of the Act. The Sasan Judgement of this Tribunal has been relied.

cc) Carrying Cost: GWEL has not raised any carrying cost issue in the Petition and hence there could be no finding in the

Impugned Order. GWEL has only sought IWC which was rightly rejected by the Central Commission. The parties cannot go beyond pleadings in the matter and NPL judgement of Supreme Court has been relied. Admissibility of carrying cost is to be considered in terms of Articles 10.2, 10.5 and 8.8 of the respective PPAs which provides for manner in which Change in Law shall be addressed. Combined reading of the said provisions reveals that carrying cost/ interest is applicable only after the due date of payment with respect to supplementary bills raised on account of Change in Law. The reliance on the judgement of Hon'ble Supreme Spurtin case of Enviro Legal Action v. UOI &Ors. (2011) 8 SCC 161 on principle of restitution is not correct.

dd) The PPAs only provide for late payment surcharge on the bills raised on account of Change in Law events and there is no provision of carrying cost in the PPAs. As held in SLS case by this Tribunal the interest will be due from due date of payment.

ee) The decision of Hon'ble Supreme Court in case of NTPC v. MPSEB (2011) 15 SCC 580 is also on determination of Tariff and there was no provision of interest payable between original tariff and redetermined tariff. The present case is also similar. Further, the claim of GWEL also does not fall in any category as decided by this Tribunal in case of Tata Power Co. v. MERC 2011 ELR (APTEL) 336.

ff) Any delay in determination of impact of Change in Law is on account of GWEL as it has not placed the complete information and supporting documents.

12. Mr. G Sai Kumar, the learned counsel appearing for MSEDCL has also made arguments/submissions on similar lines as that of the Discom and the Prayas Energy Group and are not being repeated for the sake of brevity.

13. We have heard the learned senior counsel and learned counsel appearing for the Appellants and the learned counsel appearing for the Respondents in both the instant Appeals and we have gone through the written submissions of the Appellants and the Respondents on various issues raised in the instant Appeals and after critical evaluation of the entire relevant material available on records the following issues that arises for our consideration are as follows:-

a) GWEL has sought compensation on 21 Change in Law events. The Central Commission has allowed compensation on account of nine Change in Law events and rejected ten Change in Law events and the other two Change in Law events liberty was granted to GWEL on two issues. Out of the 21 Change in Law events eight Change in Law events were not applicable to the DNH PPA.

b) The case of the Discom is that the Central Commission has erred in allowing the nine Change in Law events to GWEL and

the balance Change in law events have been rightly disallowed. The case of GWEL is that it should have been allowed all the claimed Change in Law events.

c) GWEL and the Discom have raised various questions of law related to disallowed/ allowed events under Change in Law. It would be prudent for us to analyse the disallowed/ allowed Change in Law events issue wise instead of taking the questions of law which are related to the questions of law. It is a settled position in law that the rights and obligations of the parties arise from the PPA entered between them for procurement of power under Section 63 of the Act. The present claims of GWEL and the contentions of the Discom are to be viewed accordingly. This requires analysis of the claims of the parties under the provisions of the PPAs. The relevant Articles of the PPAs dealing with Change in Law provisions relied upon by the learned counsel for the parties are reproduced below:

MSEDCL PPA

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

The definition of IGI in DNH PPA is same except it includes Government of Maharashtra and UT of Dadra and Nagar Haveli.

Definition of 'Law' in both the PPAs is as below:

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

The article related to Change in Law in both the PPAs is same and is as below:

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.

……………………………..

10.3.2 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 Procurers and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1and 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."

From the above it can be seen that the an event qualifies under Change in Law if it occurs starting from seven (7) days prior to the Bid Deadline resulting in any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller. The events are classified as below:

- The enactment/coming into effect/adoption/ promulgation/ amendment/ modification or repeal of any law in India which also includes rules and regulations framed pursuant to such Law. Change in interpretation/ application of any

Law by any IGI having the legal power to interpret/ apply such Law, or any Competent Court of Law.

- Requirement for obtaining new consents/ clearance/permits or change in the terms and conditions prescribed for obtaining any Consents/ Clearances/ Permits or inclusion of any new terms or conditions for obtaining such Consents/ Clearances/ Permits.
- Any change in tax/introduction of any tax made applicable for supply of power by the Seller as per the terms of the PPA.

During Operating Period the compensation is payable only when the amount is in excess of an amount equivalent to 1% of the value of the Letter of Credit (LC) in aggregate for the relevant Contract Year.

The Seller is required to produce documentary proof of the Change in Law event and is also required to give notice to the Procurers as per the PPA.

A. Issues raised by GWEL:

i. Now let us take the claims of GWEL, which were disallowed by the Central Commission in the Impugned Order. Some of the issues have been clubbed for convenience and brevity.

ii. Let us first take the issue of withdrawal of Deemed Export Benefit in relation to the MSEDCL PPA which is a non-recurring in nature during the construction period. Let us

examine the impugned findings of the Central Commission on the said issue. The relevant extract is reproduced below:

> *"55. We have examined the submissions made by the Petitioner, MSEDCL and Prayas. The Foreign Trade Policy (FTP) 2004-2009 came into force on 1.4.2008.ThePetitioner submitted the bid on 7.8.2009 and the cut-off date in terms of the bid documents of MSEDCL was 1.8.2009. As on the cut-off date, the applicable Foreign Trade Policy was for the period 2004-2009. The relevant provisions of the FTP 2004-2009 are extracted as under:*
>
> > *"8.1 "Deemed Exports" refers to those transactions in which goods supplied do not leave country, and payment for such supplies is received either in Indian rupees or in free foreign exchange.*
> >
> > *8.2 Following categories of supply of goods by main/sub-contractors shall be regarded as "Deemed Exports" under FTP, provided goods are manufactured in India:*
> >
> > *(a) to (d)xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx*
> >
> > *(e) Supply of capital goods, including in unassembled / disassembled condition, as well as plants, machinery, accessories, tools, dies and such goods which are used for installation purposes till stage of commercial production, and*

spares to extent of 10% of FOR value to fertilizer plants;

(f) Supply of goods to any project or purpose in respect of which the MoF, by a notification, permits import of such goods at zero customs duty;

(g) Supply of foods to power projects and refineries not covered in (f) above.

Benefits of deemed exports shall be available under paragraphs (d), (e), (f) and(g) only if the supply is made under procedure of ICB."

As per the above provisions, the threshold condition for availing the Deemed Export benefit is that the goods supplied should be manufactured in India and the supply of goods should be pursuant to the procedure of International Competitive Bidding. The Petitioner does not claim to have satisfied these two conditions at the time of submission of the bid and therefore, the provisions of the FTP 2004-09 does not entitle the Petitioner for deemed export benefits. The Petitioner has relied on FTP 2009-2014 which came into force with effect from 27.8.2009. Therefore, FTP 2009-2014 was not applicable in case of the Petitioner as it was issued after the cut-off date. It is however noticed that FTP 2009-14 has the similar provisions as quoted above from FTP 2004-09and may be considered as continuation of policy with regard to deemed export benefits.

The Policy Interpretation Committee under DGFT in the Policy Circular dated28.12.2011 has clarified about the deemed export benefits as under:

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

A Combined reading of the provisions of the FTP 2004-09 and FTP 2009-14 and the Circular dated 28.12.2011 reveals that the Circular has only reiterated

the provisions in the FTPs that deemed export benefits under the FTP are admissible only if the goods are manufacture in India. The letter has further clarified that if the capital goods such as BTGs are imported and supplied to project authorities, then such supplies do not

amount to deemed exports, and hence deemed export benefit will not be admissible.

This clarification needs to be read in the context of the provisions in FTP 2004-2009 and FTP 2009-2014 that deemed export benefits are admissible only if the capital goods are manufactured in India. Reference to the non-mega power project in para 2 of the Policy Circular dated 28.11.2011 is in the form of an example and does not amount to withdrawal of deemed export benefits to non-mega power project. The Policy regarding the deemed export benefits remained the same as on the cut-off date as well as on the date of issue of the clarification. Therefore, the clarification issued vide Circular dated28.12.2011 cannot be considered as change in law. Accordingly, the claim of the Petitioner for withdrawal of deemed export benefits is not covered within the scope of Article 10 of the MSEDCL PPA and is accordingly rejected.

56. There is another reason as to why MSEDCL shall not be liable for compensating the Petitioner for the loss of deemed export benefits as claimed by the Petitioner. Para2.6.1 of the RfP of MSEDCL provides as under:

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

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

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

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

From the above it can be seen that the Central Commission while disallowing the claim regarding deemed export benefit has held that there was no change in FTP for the period 2004-09 and 2009-14 and the clarifications issued by DGFT and other circulars reiterate the contents of the policy. The Central Commission has observed that for deemed export benefits the goods were required to be manufactured in India/the project was to be awarded through ICB. The Central Commission has further observed that as on bid submission date GWEL does not qualify for Deemed Export Benefits. The Central Commission has also relied on the

provisions of the RFP/PPA that GWEL was required to consider all costs and risks before quoting the tariff and the same cannot be passed on to MSEDCL.

iii. We have gone through the findings of the Central Commission and the contentions of GWEL, MSEDCL &Prayas Energy Group and provisions of the FTP 2004-09/ 2009-14 and various circulars and clarifications issued by DGFT placed on record before us. It is observed that factually there is no difference in the provisions of the FTP to qualify for Change in Law and also GWEL does not meet the conditions to claim Deemed Export Benefits. The same has been rightly observed by the Central Commission and has dismissed the claim of GWEL on deemed export benefits.

iv. Further, as per the provisions of the RFP as reproduced by the Central Commission, GWEL was required to take into account all the relevant aspects including provisions related to deemed export benefits.

v. The Discom and the Prayas Energy Group has submitted that this Tribunal in TSPL Case has dealt similar matter and concluded that the conditions for deemed export benefits shall be satisfied for the claim. We have gone through the said judgement and find that this Tribunal has dealt the matter of deemed export benefit in detail and the findings of the said judgement are applicable to the present case. Here in the present case, GWEL is not eligible for deemed export

benefits and hence the question of alleged denial of the same does not arise.

vi. In view of the above discussions, we are of the considered opinion that there is no legal infirmity in the order of the Central Commission on this issue.

Hence, this issue is answered against the GWEL/Appellant.

vii. Next issue raised by GWEL is i.e. Design changes in Coal Handling Plant (CHP) is also related to the construction period and non-recurring in nature. This issue is related to MSEDCL only. Let us examine the impugned findings of the Central Commission on the issue. The relevant extract is reproduced below:

> *"61. We have considered the submissions made by Petitioner and the Respondents and Prayas. The Petitioner quoted the bid for Case 1 bidding where the responsibility for fuel vests in the Petitioner. The Request for Proposal issued by MSEDCL for procurement of power defines fuel as under:*
>
> > *"Fuel: The choice of fuel, including but not limited to coal or gas, it's sourcing and transportation is left entirely to the discretion of the bidder. The successful Bidder(s) shall bear the complete responsibility to tie up the fuel linkage and the infrastructural requirements for fuel transportation, handling and storage."*

Further para 2.6.1 of the RfP provides as under:

"……………………"

Thus as per the RfP, it is the responsibility of the bidder to tie up the fuel linkage and arrange for the infrastructural requirements for fuel transportation, handling and storage.

In terms of para 2.6.1 of the RfP, the bidder has acknowledged that price in quoted bid has been fixed after taking into account all contingencies and the bidder shall not seek any financial compensation whatsoever. A combined reading of both provisions of the RfP shows that the Petitioner has unconditionally assumed all responsibilities for the infrastructural requirements for fuel transportation, handling and storage. Therefore, the

expenditure on account of change in the specifications of the coal handling plant for handling imported coal is to the account of the Petitioner and cannot be passed on to MSEDCL. In view of the shortage in availability of domestic coal, CEA had issued advice to the project developers to make arrangement for handling facility for imported coal. The advice of CEA is not mandatory and it is upto the project developer to implement the said advice. Since the Petitioner has assumed the responsibility for fuel in terms of the bidding documents, relief for modification of the fuel handling system on the basis of advice of CEA cannot be granted under Change in Law."

From the above it can be seen that the Central Commission while disallowing the claim of GWEL has held that in terms of the RFP the responsibility of fuel and its related infrastructure facilities is the responsibility of GWEL without any additional cost to the MSEDCL. The Central Commission has further observed that the advice of CEA which was issued considering shortfall of coal in the country is not mandatory and it was left to the project developers to implement or not to implement it.

viii. GWEL has contended that CEA has been empowered under Section 73(b) and (m) of the Act to specify technical standards for construction of electrical plants and advising generating companies on matters enabling them to operate and maintain the electrical system in an improved manner. Prayas Energy Group has submitted that the Procurers have not provided any coal linkage and the Bidder has assumed all the responsibility for arrangement of fuel and its infrastructure. Further, it has been contested by the Discom/Prayas Energy Group that the said letter of CEA has not been issued as directions under the Act and is purely advisory in nature. NCDP 2007 also provide for keeping provision for the imported coal which was prior to the cut-off date.

ix. We have gone through the impugned findings of the Central Commission, perused the submissions made by the parties and the letter issued by CEA. We observe that the letter

issued by CEA does not mention any particular Section of the Act under which it has been issued. It is advisory in nature and it was left to the companies to follow it or not to follow it. Further, keeping in view of the provisions of the RFP quoted by the Central Commission we feel that there is no need for any intervention to the decision arrived at by the Central Commission.

In view of the above, this issue is answered against GWEL/Appellant.

x. Now, we take the claims arising out of notifications/ circulars issued by Ministry of Railways (MoR) i.e. increase in Busy Season Surcharge and Development Surcharge on coal freight. Let us examine the impugned findings of the Central Commission. The relevant extract from the Impugned Order on the said issues is reproduced below:

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

……………………….

84. The Commission has in the order dated 3.2.2016 in Petition No. 79/MP/2013 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualifies as Change in Law. Relevant para of the said order is extracted as under:

> *"60. We have considered the submission of the Petitioners. In our view, increase in the railway freight*

charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989.The Petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioners/PTC were expected in terms of para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the Petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed."

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

"30. Power to fix rates.-(1) The Central Government may, from time to time, by general or special order fix, for the carriage of passengers and goods, rates for the whole or any part of the railway and different rates may be fixed for different classes of goods and specify in such order the conditions subject to which such rates shall apply.

(2) The Central Government may, be a like order, fix the rates of any other charges incidental to or connected with such carriage including demurrage and wharfage for the whole or any part of the railway and specify in the order the conditions subject to which such rates shall apply."

The above provisions enable the Railway Board to fix the different charges for carriage of passengers and goods and any other charges incidental to or connected with such carriage. These provisions were existing before the cut-off date and the Petitioner was aware that the various charges levied by the Railway Board are subject to revision from time to time.

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

"……………………………"

The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and

> *therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board."*

From the above it can be seen that the Central Commission has disallowed the claim of GWEL on Busy Season Surcharge and Development Surcharge by saying that these costs are related to input costs for procuring coal in form of change in freight rates and it was expected of GWEL to take into account all the costs involved in procuring the inputs/ possible revision in such charges while quoting the bid in terms of the RFP.

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*

<u>read with the definitions of the 'Law' and 'Indian Government Instrumentality' under the PPA.</u>

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.

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

Accordingly, these issues are decided in favour of GWEL.

xiii. Now we move on to the next issue i.e. increase in Sizing Charges and Surface Transportation Charges for coal charged by CIL. Let us first examine the impugned findings of the Central Commission. The relevant extract from the Impugned Order is reproduced below:

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

……………………………..

93. We have considered the submissions of the Petitioner and the respondents and perused the notifications issued by Coal India Ltd. with regard to Sizing Charges of coal and surface transportation charges. The Petitioner has not placed on record any document to prove that these notifications have been issued pursuant to any Act of the Parliament. On the other hand, a perusal of the Fuel Supply Agreement dated22.2.2013 between the Petitioner and SECL shows that under Para 9.0, the delivery price of coal for coal supply pursuant to the Fuel Supply Agreement has been shown as the sum of basic price, other charges and statutory charges as applicable at the time of delivery of coal. Base price has been defined in relation to a declared grade of coal produced by the seller, the pit head price notified from time to time by CIL. Under Para 9.2 of the FSA, other charges include transportation charges, Sizing/crushing charges, rapid loading charges and any other charges as notified by CIL from time to time.

Sizing/crushing charges and transportation charges have been defined as under:-

> *"9.2.1 Transportation Charges:*
>
> *Where the coal is transported by the seller beyond the distance of 3(three) kms from Pithead to the Delivery Point, the Purchaser shall pay the*

> > *transportation charges as notified by CIL/seller from time to time.*
> >
> > *9.2.2 Sizing/Crushing Charges*
> >
> > *Where coal is crushed/sized for limiting the top-size to 250mm or any other lower size, the purchaser shall pay sizing/crushing charges, as applicable and notified by CIL/seller from time to time."*
>
> *Therefore, the revision in sizing charges of coal and transportation charges by Coal India Limited from time to time is the result of contractual arrangement between*
>
> *the Petitioner and SECL in terms of the FSA dated 22.2.2013 and is not pursuant to any law as defined in the PPAs and therefore cannot be covered under Change in Law."*

The Central Commission has held that increase in Sizing Charges and Surface Transportation Charges for Coal are part of the methodology for the calculation of the cost of coal decided by CIL/SECL. The Central Commission has further held that CIL/SECL merely being Indian Government Instrumentality the revision in sizing charges of coal and transportation charges by them from time to time is the result of contractual arrangement between GWEL and CIL/SECL and in terms of the FSA do not qualify for Change in Law event and disallowed the claim of GWEL.

xiv. We consider that similar issues have been decided by this Tribunal in the Adani Judgement. In our opinion the findings of this Tribunal in the said judgement are directly applicable to the instant case. The relevant portion from the said judgement is reproduced below:

Sizing Charges:

"11. A.

xvii. ……………..

<u>The State Commission based on the order of CERC has held that increase in Sizing Charges for Coal is part of the methodology for the calculation of the cost of coal decided by CIL and merely CIL being Indian Government Instrumentality the change in method of charging made by it for coal pricing does not qualify for Change in Law event and dismissed the claim of APRL</u>.

xviii. APRL has contended that the GoI under Sub Section 3 of the CC Rules, 2004 (notified under MMDR Act) has the power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade or size of coal and hence any change in sizing charges of coal by CIL an Indian Government Instrumentality qualifies for Change in Law event.

<u>We observe that GoI under the said Rules have power to categorise the coal including its classes, grades and sizes and the specifications for each such class, grade</u>

or size of coal. Here the case is not that the GoI have changed the sizing of coal under the said Rules, the case is that CIL has changed the sizing charges for coal for sizes, which already existed as specified by the GoI. The change in sizing charges of coal by CIL is part of coal pricing mechanism. Further, in terms of the RFP, APRL was required to quote an all-inclusive tariff including coal costs in escalable/ non-escalable components based on the risks perceived by APRL. Accordingly, this contention of APRL is misplaced.

xix. In view of our discussions as above, perusal of the Impugned Order and the order of the CERC quoted by the State Commission and the judgement of this Tribunal quoted by CERC, we are of the considered opinion that any change in sizing charges for coal must be reflected in the price of coal charged by CIL and gets covered in the CERC Escalation Rates for coal. We agree to the findings of the State Commission.

Accordingly, this issue is decided against APRL.

………………………..

Transportation Charges:

xxiv. We have gone through the Schedule 8 (Quoted Tariff) of the PPA executed between the Discoms and APRL. After careful perusal of the same we find that the tariff quoted by APRL comprises of Non- escalable and escalable components of tariff elements viz. Capacity Charges, Energy Charges and Inland

Transportation Charges. There is no separate component surface transportation charges either in the bid or in the standard bidding documents. We observe that APRL was supposed to consider all the cost inputs for generation of power in its bid as per the RFP. It is presumed that the surface transportation charges charged by CIL forms part of cost of coal and it was the responsibility of APRL consider the same in its bid appropriately.

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

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

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

change in sizing charges of coal and surface transportation charges.

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

xvi. Now we take the next issue i.e. Shortfall in linkage coal due to changes in the NCDP issued by the Ministry of Coal. Let us first examine the findings of the Central Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

> *"107……………………..*
> *Therefore, in the light of the judgement of the Appellate Tribunal, the Petitioner has got the opportunity to pursue the remedy of force majeure for the additional expenditure incurred by it on account of procurement of coal from alternative sources due to shortage in supply of domestic coal upto normative availability of 85% by SECL.*
>
> *108. <u>Since, force majeure has not been argued by the Petitioner as well as the Respondents and Prayas, it is considered appropriate to grant liberty to the Petitioner to file an appropriate application on the issue of shortage of domestic coal with all relevant details in</u>*

terms of the provisions of force majeure under MSEDCL and DNH PPA."

The Central Commission in view of the Full Bench Judgement of this Tribunal has granted liberty to GWEL to file an application on this issue in terms of force majeure clause of MSEDCL/DNH PPA.

xvii. It has been argued by GWEL that the Full Bench Judgement of this Tribunal has been set aside by Hon'ble Supreme Court in Energy Watchdog Judgement and hence change in NCDP has to be considered as a Change in Law event and the Impugned Order on this issue is required to be remanded to the Central Commission. The Discom/ Parayas Energy Group has also not objected to consider the Change in NCDP as Change in Law event in view of the Energy Watchdog Judgement. But they have contended that the same is to be seen in circumstances of the case and has tried to make a case that there is little difference in coal allocation/FSA coal quantities to GWEL pre and post change in NCDP. We observe that the parties are in agreement that change in coal quantities due to change in NCDP is a Change in Law event. We are of the view that this issue needs to be re-examined by the Central Commission thoroughly for the quantity of coal on which compensation can be allowed to GWEL in accordance with Law.

xviii. In view of the above development, this issue is remanded to the Central Commission for further examination as directed

above and allowing compensation to GWEL in terms of the Energy Watchdog Judgement by considering change in NCDP as a Change in Law event.

xix. On next issue i.e. shift from UHV based pricing to GCV based pricing mechanism the Central Commission has held as below. The relevant extract from the Impugned Order is reproduced below:

> *"111. We have considered the submissions of the Petitioner and the Respondents. The Commission dealt with the same issue in order dated 3.2.2016 in Petition No. 79/MP/2013 as under:*
>
> > *"58. We have considered the submissions of the Petitioner. Prior to 1.1.2000, the Central Government under Section 4 of the Colliery Control Order, 1945, was empowered to fix the grade-wise and colliery-wise prices of coal. Subsequently, based on the recommendations of Bureau of Industrial Costs and Prices (BICP), Government of India decided to de-regulate the prices of all grades of coking coal and A, B, and C grades of non-coking coal from 22.3.1996. Subsequently, based on the recommendation of the Committee on Integrated Coal Policy, the Government of India decided to de-regulate the prices of soft coke, hard coke and D grade of non-coking coal with effect from12.3.97. The Government also decided to allow CIL and SCCL*

to fix prices of E, F and G grades of non-coking coal once in every six months by updating the cost indices as per the escalation formula contained in the 1987 report of the BICP and on 13.3.1997, necessary instructions were issued to CIL and SCCL in this regard. The pricing of coal was fully deregulated after the Colliery Control Order, 2000 notified on 1.1.2000 in supersession of the Colliery Control Order, 1945. Under the Colliery Control Order, 2000 the Central Government has no power to fix the prices of coal. Therefore, the prices of coal from CIL and its subsidiaries were market based. Only the pricing methodology was UHV basis at the time of bid submission which was switched over to GCV based pricing w.e.f. 1.1.2012 vide Govt. of India notification dated 30.12.2011. In our view, any decision affecting the price of inputs for generating electricity including coal cannot be covered under Change in Law except the statutory taxes, levies and duties having an impact on the cost of or revenue from the supply of electricity to the procurers. As already noted, para 2.7.2.4 of the RfP required the bidders to reflect all costs involved in procuring the inputs (including statutory taxes, duties and levies thereof) in the quoted tariff. Moreover, the Petitioner has quoted stream 1 tariff consisting of non-escalable capacity charges and non-

escalable energy charges, thereby taking all risks of price escalation in inputs including coal. Therefore, change from UHV to GCV based pricing cannot be covered under change in law. Hon`ble Appellate Tribunal For Electricity in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has observed as under:

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

In the light of above judgement also, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law."

112. In the light of above order, the change in the base price of fuel on account of switchover from the UHV method to GCV method of coal pricing is not admissible under change in law."

The Central Commission based on the judgement of this Tribunal and considering deregulation of price of coal has

decided that change in the basis of pricing mechanism is not admissible under Change in Law.

xx. We observe that any change in base price of coal is not envisaged in the PPA and the same is reflected in the CERC escalation rate index published on half yearly basis. Any such change in base price of coal could be taken care in the form of escalation. However, it depends on the way the bidder has quoted the energy charges in escalable and non escalable components considering market risks. The bidder is free to quote only escalable energy charges or only non escalable energy charges or a combination of both. In any case the bidder is not eligible for compensation due to change in base price of coal as it has already inbuilt in its bid the perceived risks. We also observe that GWEL has quoted only the escalable energy charges and would have been adequately compensated for such change in pricing mechanism. The Central Commission has also observed that GWEL has also not quantified the claim in its petition before the Central Commission due to such change in pricing mechanism.

xxi. This Tribunal in the judgment dated 12.9.2014 in Appeal No. 288 of 2013 has clearly concluded that as per the provisions of the said PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in

Law. The same view has been reiterated by this Tribunal in the Sasan Judgement. The provisions in the PPA in the instant case are similar to that dealt by this Tribunal in Appeal No. 288 of 2013 on issue of base price of coal.

xxii. In view of the above, we are of the opinion that there is no legal infirmity in the order of the Central Commission on this issue.

Accordingly, this issue is answered against GWEL.

xxiii. Now we take the issue of Change in MAT rate. We first examine the impugned findings of the Central Commission. The relevant extract is reproduced below:

> *"65. We have considered the submission of the Petitioner. The similar issue has been considered by the Commission in its order dated 30.3.2015 in Petition No. 6/MP/2013 where in the Commission has not considered MAT under change in law. The relevant portion of the said order is extracted as under:*
>
> > *"46. We have considered the submission of the Petitioner and the respondents. The question for consideration is whether the Finance Act, 2012 changing the rate of income tax and minimum alternate tax are covered under Article 13.1.1(i) of the PPA. The income tax rates are changed from time to time through various Finance Acts*

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

“Change in Law” for the purpose of Article 13.1 of the PPA.”

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

The Central Commission has held that all events cannot be said to covered under Change in Law event unless such amendments result in change in the cost of or revenue from the business of selling electricity by the seller and accordingly, change in MAT rate cannot be construed to be Change in Law event as it does not affect the cost or revenue from business of selling electricity.

xxiv. From perusal of the provisions of the Change in Law Article we find that the change in MAT is not resulting in change in cost or revenue of GWEL for selling electricity to MSEDCL/the Discom. Accordingly, there is no legal infirmity in the observations of the Central Commission on this issue.

xxv. GWEL has relied on the judgement of Hon’ble Supreme Court in the JK Industries Case on this issue. We have gone through the said judgement and we find that the issue in the said judgement and the issue in hand are different and hence in view of facts and circumstances of the present case the said judgement is not applicable to the present case.

xxvi. GWEL has also relied on the judgement of this Tribunal in case of Jaiprakash Hydro Power Ltd. v. Himachal Pradesh State Electricity Regulatory Commission &Anr. in Appeal No. 39 of 2010 (JP Judgement) wherein reimbursement of MAT was allowed on account of Change in Law. The order dated 20.04.2015 in Petition 163 of 2014 of MERC is also relied for allowing increase in MAT Rate as a Change in Law. We have gone through the JPJudgement of this Tribunal and we find that there was a specific provision in the PPA in the said case for payment of tax on income by the Himachal Pradesh Electricity Board based on which the change in MAT rate was allowed by this Tribunal. In the present case there is no such provision in the PPA for allowing payment of tax on income by the Procurer. Hence, the said judgement is not applicable to the present case. Accordingly, the reliance on the JPJudgement and the order of the MERC which is based on the JPJudgement and other judgements of this Tribunal is misplaced. The other two judgements of this Tribunal quoted by MERC in the said order has no relevance to the present case as they are not related to bidding under Section 63 of the Act. Reliance of GWEL on new tariff policy which was issued in 2016 is also misplaced as the bidding was conducted based on the earlier tariff policy issued by GoI.

In view of our discussions as above, this issue is answered against GWEL/Appellant.

xxvii. Now we take the next issue i.e. increase in working capital requirementdue to Change in Law events. Let us examine

the findings of the Central Commission in the Impugned Order. The relevant extract is reproduced below:

> ***"(L) Increase in working capital requirement due to higher cost of imported coal.***
>
> *109. The Petitioner has submitted that change in law events will have an impact on the interest on working capital due to increase in investment in value of coal stock including alternate coal, imported coal sourced at significantly higher cost. This will have an impact on interest on working capital resulting from Change in Law event and the Petitioner is eligible for tariff relief on account of increase in working capital in such a manner that it is restored to the same economic position as before such change. In this connection it is clarified that there is no concept of interest on working capital in competitively bid tariff and the bidders are required to quote all inclusive tariff. The claim on this account is rejected under Change in Law."*

The Central Commission has held that there is no concept of IWC in competitively bid projects and the bidders are required to quote all-inclusive tariff under Section 63 of the Act and rejected the claim of GWEL.

xxviii. After perusal of the RFP/PPA, we also observe that the tariff to be quoted was all-inclusive tariff and there is no provision for separately allowing IWC arising out of Change in Law events. GWEL has contended that it has to be restored to

the same economic position and hence it is entitled for compensation on account of increase in IWC. We observe that the Change in Law provision is to restore GWEL to same economic position as if the Change in law event has not occurred by way of increase/decrease in tariff. This does not mean that the differential tariff (if any) is to be determined component wise as done for Section 62 based PPAs as the bidder was required to quote an all inclusive tariff for a period of 25 years considering all relevant aspects. Hence, the contention of GWEL is unsustainable.

Accordingly, this issue is not applicable to the facts of the case.

xxix. Now we take the next issue i.e. MOEF notification on coal quality. Let us first examine the impugned findings of the Central Commission. The relevant extract from the Impugned Order is reproduced below:

> *"99. We have considered the submissions of the Petitioner and the respondent. <u>As per notification issued by MoEF dated 11.7.2012, all the thermal power plants are required to use coal with GCV not less than 4000 Kcal/kg and an ash content not exceeding 34%. The Fuel Supply Agreement for MSEDCL was signed with SECL on 22.2.2013 and addendum was issued on 16.9.2013. Fuel Supply Agreement for EDDNH was signed with SECL on 7.8.2013 and addendum was issued on</u>*

> *30.11.2013.Therefore, the Petitioner was aware of the situation of using coal of GCV more than4000kCal/kg and ash content less than 34%. Accordingly, the Petitioner should have included the coal quality/ grade of coal with GCV more than 4000kCal/kg and ash content less than 34%. Therefore, this event cannot be said to be a Change in Law. Under the circumstances, the Petitioner should have complied with provisions of notification of MOEF for using coal of GCV of 4000 kCal/kg of more and ash content less than 34%. The Petitioner should have approached the coal companies/coal supplier for supply of coal with above parameters so that the same could have been taken up in the FSA. From the submission of the Petitioner, it appears that the Petitioner has not made any efforts to avail the coal of required quality as per the MOEF notification. In the light of these facts, we are not inclined to allow this event as a change in law."*

From the above it can be seen that the Central Commission has held that the FSA was signed after the notification of the MOEF and GWEL has not made any effort to sign the FSA as per the requirement of the MOEF notification and disallowed the claim of GWEL.

xxx. We hold that in terms of the PPA the Change in Law event is to be treated with respect to the cut-off date and the present issue is required to be dealt accordingly. The cut-off date for MSEDCL was 31.7.2009 and that for the DNH PPA was

1.6.2012. The MOEF notification was dated 11.7.2012 which is after the cut-off dates of MSEDCL & DNH PPAs. The Central Commission has not held that the said notification of MOEF is not a Change in Law event but it simply held that before signing of the PPAs the information regarding MOEF notification was available with it and GWEL has not made efforts to secure the requisite quality of coal while signing the FSAs. The Prayas Energy Group has submitted that the said notification was draft and the notification actually came in force only in 2016. It further added that GWEL was allocated 'F' Grade coal which was also having GCV of 4000 kCal/kg and GWEL has also not quantified its claim.

xxxi. We observe that that on face of it the notification issued by MOEF being IGI is a Change in Law event falling under second bullet of the Article 10.1.1 of the PPA. The Central Commission has also not denied as a Change in Law event. The Central Commission has erred in linking it with signing of the FSA after issuance of the MOEF notification instead of cut-off date. The issue is to be seen in light of the premise on which the bid was based and the changes made after the cut-off date by MOEF. This issue is required to be analysed in detail by the Central Commission based on the contentions of the parties to arrive at a justified compensation, if any to GWEL considering the MOEF notification as a Change in Law event.

xxxii. In view of the above, this issue is remanded to the Central Commission to pass appropriate order in light of our observations as above.

Hence, this issue is decided in favour of GWEL.

B. Issues raised by the Discom:

i. The Discom has been aggrieved by the nine Change in Law events allowed to GWEL by the Central Commission and has also opposed the claims of GWEL on other issues.

ii. The Discom/ MSEDCL have objected to the jurisdiction of the Central Commission to deal with the issues raised in the Petition filed before the Central Commission. The Central Commission has dealt the jurisdiction issue in detail in the Impugned Order. The relevant extract from the Impugned Order is reproduced below:

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

under section 79(1)(b) of the Act, the Appellate Tribunal as under:

> *"107. The Central Commission's jurisdiction under clause (b) of sub-section (1) of Section 79 of the said Act is attracted the moment the generating company executes PPAs to supply electricity to be generated by it to more than one State or it undertakes actual supply to more than one State under some other binding arrangement. The submission that the above interpretation would lead to floating jurisdiction is misconceived. Once the jurisdiction vests in the Central Commission in the aforesaid manner, it generally continues with the Central Commission and the question of floating jurisdiction does not arise. The jurisdiction over a generating company is required to be considered at the time of filing of petition. It is the date of institution of proceedings which is material when jurisdictional condition precedents are evaluated.*
>
> *108. It must be stated here that the Composite Scheme may come into existence at any time, whether in the beginning or at a later stage as Section 79(1)(b) does not put any limitation of time. No such limitation can therefore be imposed by this Tribunal."*

13. As regards the reliance on the judgements of the Appellate Tribunal in AppealNo.228 of 2006 and 230 of2005 (M/s PTC India Limited v. Central Electricity Regulatory Commission and Others) and Appeal No.94of 2012 (BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission) by the Respondents, the AppellateTribunal observed as under:

> *"114. <u>The plain language of Section 79(1)(b) persuades us not to accept the submissions of the Procurers based on PTC India (I) and BSES Rajdhani that Section 79(1)(b) is attracted only when there is uniformity of tariff and common terms and conditions of generation and sale. Section 79(1)(b) of the said Actenables the Central Commission to regulate tariff of generating companies other than those owned or controlled by the Central Government, if such generating enter into or otherwise have a Composite Scheme for generation and sale of electricity in more than one State. This provision does not even remotely refer to uniform tariff or uniform terms and conditions of supply of electricity. It is, therefore, not possible to incorporate any words in this Section. The courts cannot add any words to the statute. This would amount to usurping the function of the legislature.</u>*
>
> *…..*

115. In view of the above, it is not possible for us to read common tariff and common terms and conditions inspection 79(1)(b) of the said Act.

117. In the circumstances, we are of the view that PTC India(I) and BSES Rajdhani do not lay down the correct law so far as they hold that "uniform tariff amongst more than one State beneficiary" and "common terms and conditions" for supply of electricity in more than one State are the requisites of the Composite Scheme as envisaged under Section 79(1)(b) of the said Act. This view of ours is also supported by the written submissions filed by Mr. Ramachandran, learned counsel appearing for Prayas."

118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, ipsofacto, qualifies as "Composite Scheme" to attract the jurisdiction of the Central Commission under Section 79 of the said Act."

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

15. It is pertinent to mention that the Commission in order dated 15.10.2016 while holding the existence of composite scheme in case of the Petitioner had made

it subject to outcome of the appeals filed against the Commission's order dated 2.4.2013 and21.2.2014 in Adani case. <u>In the light of the Full Bench judgment, it is reiterated that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Commission for adjudication of dispute under Section 79 (1)(f) of the Act is attracted in this case.</u> Learned Counsel for MSEDCL sought to distinguish the Full Bench judgment with regard to jurisdiction in Adani Case from the present case. <u>In our view, the Full Bench judgment lays down the law with regard to interpretation of Composite Scheme under Section 79 (1) (b) of the Act and the case of the generating station of the Petitioner is fully covered under the Full Bench judgment.</u>

From the above it can be seen that in light of Full Bench Judgement of this Tribunal the Central Commission has held that GWEL has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Central Commission for adjudication of dispute under Section 79 (1)(f) of the Act lies with it.

iii. We hold that, the Central Commission based on Full Bench Judgement of this Tribunal has held that the jurisdiction of GWEL lies with it as it is having composite scheme of sale of power to more than one State i.e. Maharashtra, DNH and Tamil Nadu. We have perused the Full Bench Judgement and find that all the relevant aspects related to the jurisdiction for

sale of power to more than one State has been examined by this Tribunal before arriving at the decision. Accordingly, we hold that the contentions of the Discom/MSEDCL on this issue are unsustainable.

Hence, this issue is answered against the Discom/MSEDCL.

iv. Before dealing the issues there is need to deal one major issue related to tax which will settle many of the issues raised by the Discom. This issue is related to fifth bullet of Article 10.1.1 of the Change in Law event. The Discom/ MSEDCL/ Prayas Energy Group have contended that the any change in tax or levy of new tax is to be seen as tax on supply of power and not the taxes on the input costs for generation of electricity.

v. Thus, we hold that this issue has been dealt by this Tribunal in detail in the judgement dated 14.8.2018 of this Tribunal in Adani Judgement. The issue has been decided in favour of the Adani (generator/Seller) in the said judgement. The relevant extract from the Adani Judgement is reproduced below:

“11.

………………..

d) 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 once dealt in a particular clause of a contract then there is no scope for considering taxes under other clauses of a contract.

e) *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 SCC 203 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 than 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.

f) *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.*

g) *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 GoI under*

different scenarios wherein the treatment of taxes depends upon the specific conditions of the RFP and tariff quotes by the bidders.

h) *In view of our discussions as above and 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."*

This Tribunal has decided that any tax or application of new tax on supply of power also covers the taxes on inputs required for such generation and supply of power to the Distribution Licensees

vi. Now, we will consider the issues raised by the MSEDCL. Let us first consider the issues related to Construction Period. These issues are change in rates of Customs Duty/ Excise Duty/ Service Tax/ Other Taxes (WCT, VAT, CST). Let us first examine the findings of the Central Commission on these issues. The relevant extracts from the Impugned Order are reproduced below:

"38. We have examined the submissions of the Petitioner, MSEDCL and Prayas. It is noted that the applicable Countervailing Duty as on seven days prior to the bid deadline was 8% which was revised upward to 10% in 2010 and 12% in 2012 by Ministry of

Finance, Government of India vide its Notification No.6/2010 dated 27.2.2010 and Notification No.18/2012 dated 17.3.2012. It is further noticed that Ministry of Finance,

Government of India vide its Notification Nos. 13/2012 and 14/2012 exempted education cess 2% and secondary and higher education cess 1% on CVD. The above revisions in CVD have taken place after the cut-off date in terms of the MSEDCL PPA. The issue is whether the changes in rates of taxes which have impact on the project cost during the construction period can be admissible under change in law. In terms of Article 10.1.1 of the PPA, if the change in law event results in additional recurring or non-recurring expenditure by the Petitioner, it will be admissible under change in law. Since the impact of revision of CVD is on the capital cost, it is a non-recurring expenditure. Further, it is a change in tax which affects the tariff quoted by the Petitioner since the Petitioner has quoted an all-inclusive tariff including taxes, duties and levies. Therefore, the expenditure is covered under Change in Law and the Petitioner is entitled to relief proportionate to the contracted capacity with MSEDCL. The Petitioner is directed to share with MSEDCL the detailed computations of the impact of change in customs duty paid on account of CVD duly audited and certified by the statutory auditor while claiming the compensation.

…………………..

41. We have considered the submission of the Petitioner, MSEDCL and Prayas. As on the cut-off date(i.e. 31.7.2009), the applicable excise duty was 8% as per the Ministry of Finance Notification No. 29/2004-Central Excise dated 9.7.2004 notified as GSR 420 (E),dated 9.7.2004. In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944, Ministry of Finance issued Notification No.6/2010 increasing the excise duty from 8% to 10% and vide Notification No.18/2012 dated 17.3.2012, excise duty has been increased to 12%. <u>The said changes from 8% to 10% and from 10% to 12% claimed by the Petitioner have occurred after the cut-off date and have an impact on the cost during construction period. Since these changes have occurred after the cut-off date, the Petitioner cannot be expected to factor the same in the bid submitted to MSEDCL. Therefore, these increases in excise duty by Indian Government Instrumentality pursuant to the powers vested under Acts of the Parliament are admissible as Change in Law under Article 10 of the MSEDCL PPA. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty proportionate to the contracted capacity with MSEDCL.</u>

…………………

44. We have considered the submissions of the Petitioner, MSEDCL and Prayas. The increase in Service Tax was affected through Finance Act, 2012.

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

…………………

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

The Central Commission has held that change in customs duty have impact on project cost and as per Article 10.1.1 of the PPA, any change in recurring/ non-recurring cost have been considered as change in law event and is required to allowed. The changes in Excise Duty/ Service Tax was done by IGI pursuant to powers vested under the Act of the Parliament and the same was changed after the cut-off date which could not be factored in by GWEL at the time of bid submission and hence to be allowed under Change in Law. The Central Commission has also held that change in tax/ introduction of new tax for supply of power is recognised as

Change in Law in terms of the PPA and has allowed change in WCT, VAT and CST under Change in Law.

vii. From the above it is crystal clear that the Central Commission has considered the tax on supply of power as tax on inputs for supply of power and allowed the same under Change in Law. Further, the State Commission has considered that change in duties/ tax imposed by IGI under Act of the Parliament resulting in change in cost of the project is to be considered under Change in Law. We agree to this conclusion arrived at by the Central Commission as we have also concluded the same while allowing the Busy Season Surcharge and Development Surcharge imposed by MoR, IGI under the Act of the Parliament for transportation of coal which has resulted in change in cost to GWEL as such change in cost could not be factored in by GWEL at the time of bid submission.

viii. Accordingly, in view of discussions as above, we are of the considered opinion that the Central Commission has rightly allowed the above claims in favour of GWEL.

Hence, these issues are answered against the MSEDCL.

ix. Now we take up the issues related to Operating Period. These issues are Excise Duty on Coal, Clean Energy Cess, Service Tax on coal transportation and Swachh Bharat tax. Let us examine the Impugned findings of the Central Commission. The relevant extract from the Impugned Order is reproduced below:

"69. We have considered the submission of the Petitioner and the respondents. <u>The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2015 considered the issue of excise duty as a change in law event under the relevant PPA.</u> The relevant portion of the said order dated 30.3.2015 is extracted as under:

> *<u>"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".</u>*

70. <u>The levy of excise duty on coal through the Finance Act, 2012 was introduced which was after the cut-off date and has impact on the cost of generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid the Excise Duty on coal which was not in existence as on cut-off date. Therefore, levy of excise duty on coal are covered</u>

under change in law. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty on coal in case of MSEDCL PPA. In case of DNH PPA, the cut-off date was 1.6.2012 and accordingly, the change in the rate of excise duty after the said date (i.e. Notification dated 5.3.2013) will be admissible in case of DNH PPA.

…………….

…………………..

80. We have considered the submission of the Petitioner. It is noticed that the clean energy cess was introduced by Government of India through the Finance Act, 2010 which was prior after the cut-off date in case of MSEDCL PPA. As on the cut-off date in case of DNH PPA (i.e.1.6.2012), clean energy cess was at the rate of `50 per tonne. Subsequently, clean energy cess undergone various revisions from the year 2014 onwards. The issue of clean energy cess as a Change in Law event has been considered by the Commission in order dated 30.3.2015 in Petition No. 6/MP/2013.Relevant portion of said order dated 30.3.2015 is extracted as under:

> *"33. We have considered the submissions made by both Petitioner and the respondents on the clean energy cess. The clean energy cess on coal was introduced by the Government of India through the Finance Act, 2010 for the first time which is after the due date i.e. seven days prior to the bid deadline. Since there was no clean*

> *energy cess on the date of submission of the bid, the Petitioner could not be expected to factor in the impact of such cess in the bid. Moreover, clean energy cess adds to the input cost of production of electricity. Therefore, the claim is covered under Article 13.1.1(i) of the PPA and consequently the liabilities shall be borne by the procurers….”*

81. The above decision is applicable in case of the Petitioner. Therefore, levy of clean energy cess on coal is admissible to the Petitioner as a change in law event under Article 10 of the MSEDCL and DNH PPAs.………………………

……………………..

89. We have considered the submissions of the parties. By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. ……………. 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 dated26.9.2012 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.…………

……………………….

91. We have considered the submissions of the Petitioner and the Respondents. As on cut-off date in case of both PPAs, there was no Swachh Bharat Cess. It was introduced by the Finance Act, 2015 and was implemented with effect from 15.11.2015. Therefore, it is a new enactment which has come into effect subsequent to cut-off dates. In our view, Swachh Bharat Cess on the service tax paid on transportation of coal is

admissible under Change in Law.………………..”

From the above it is manifest that the Central Commission has allowed excise duty/ clean energy cess/ service tax on transportation of coal on account of being came into existence after the cut-off date for Discom/MSEDCL PPAs. Similarly, Swachh Bharat Cess was allowed under both the PPAs as the new enactment was after the cut-off dates.

x. Thus we hold that, the Central Commission has considered that GWEL could not have factored in the costs/ change in costs related to excise duty/ clean energy cess/ service tax/ Swachh Bharat tax as the same were not applicable as on the cut-off date. The imposition/change of the said taxes/duty/ cess has resulted in increase in cost of generation for GWEL. We have already held that such imposition/change in taxes/duty/ cess qualify for Change in Law event and GWEL is required to be compensated for the same.

   Accordingly, these issues are answered against the Discom/MSEDCL.

xi. Now we take up the next issue i.e. change in Royalty on coal. Let us first examine the findings of the Central Commission on this issue. The relevant extract from the Impugned Order is reproduced below:

> *"74. We have considered the submissions made by the Petitioner, the respondents and Prayas. <u>The Commission has considered the issue of change in</u>*

royalty excise duty on coal vide order dated 3.2.2016 in Petition No.79/MP/2013 as under:

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

+ 5% of the ROM price per tonne which formed the basis of its bid. The Petitioner has prayed that the difference between the rate of royalty on coal prevalent as on the date of submission of the bid and the rate of royalty on coal revised through the Notification dated 10.5.2012 may be allowed to the Petitioner on the ad valorem price of coal as reflected in the invoice excluding taxes, duties and levies. The Appellate Tribunal for Electricity in its judgement dated 12.9.2014 in Appeal No.288 of 2013 (M/s Wardha Power Company limited Vs Reliance Infrastructure Limited &Another) has observed as under:

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

the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred."

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

75. In the light of the above decision, the claim of the Petitioner has been examined. The increase in Royalty was introduced after the cut-off date i.e.31.7.2009 in case of MSEDCL PPA and has impact on the cost of

generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid, the increase in Royalty at the time of bid. Therefore, we hold that the Petitioner shall be entitled for compensation for applicable ad valorem price of coal per tonne as reflected in the invoice excluding taxes, duties and levies which shall be reduced by `55 plus 5% of thead valorem price of coal excluding taxes, duties and cess. In case the rate of Royalty is reduced from applicable ad valorem price or `55 plus 5%, the Petitioner shall compensate MSEDCL for the reduction in cost of coal based on above principles."

The Central Commission based on its decision in earlier order wherein the judgement of this Tribunal was also considered has held that the change in Royalty after the cut-off date has impact on cost of generation of power and has to be considered under Change in Law irrespective of the quote made by the Bidder in its tariff bid.

xii. We have allowed claims similar to the change in Royalty resulting in impact on cost of power generation to GWEL under Change in Law. On similar premise we are of the opinion that there is no legal infirmity in the order of the Central Commission on this issue.

Accordingly, this issue is answered against the Discom/MSEDCL.

xiii. Now we have reached to the final issue raised by GWEL related to carrying cost on the allowed Change in Law events. For the sake of brevity we are not discussing the claims of GWEL and counter claims of the Discom/Prayas Energy Group on this issue as the said issue has been decided by this Tribunal vide judgement dated 13.4.2018 in Appeal No. 210 of 2017 in case of Adani Power Ltd. v. CERC wherein this Tribunal after detailed analysis has allowed carrying cost on the allowable Change in Law events. We straight way come to the relevant portion of the said judgement which is reproduced below:

> *"12 d)*
>
> *…………….*
>
> *ix. <u>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</u>*

of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment

payment as per Article 13.4 of the PPA. The relevant extract is reproduced below:

> *"13.4 Tariff Adjustment Payment on account of Change in Law 13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from (a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*
>
> *(b) the date of order/ judgement of the Competent Court or tribunal or Indian Government instrumentality, it the Change in Law is on account of a change in interpretation of Law.(c) the date of impact resulting from the occurrence of Article 13.1.1.*
>
> *From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less then re-determination of the existing tariff.*

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."*

This Tribunal vide above judgement has decided that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event (s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/ judgement.

xiv. Now let us analyse the provisions of the PPA in the present case in light of the above judgement of this Tribunal. The relevant extract from the PPA is reproduced below.

> *"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."*

From the above it can be seen that due to Change in Law event the affected party is to be restored to the same economic position as if Change in Law event has not occurred.

xv. We consider that the PPA in the present case is having similar provisions as in case of the Adani Judgement of this Tribunal on carrying cost. Hence, GWEL is entitled for carrying cost for allowed Change in Law event (s).

xvi. The Discom/ MSEDCL/the Prayas Energy Group have contended that GWEL has not raised this issue in the petition before the Central Commission and it is raising the issue for the first time before this Tribunal and hence this issue cannot be entertained in the present Appeal. It has been contended that the parties cannot travel beyond the pleadings as the said claim is being presented for the first time before this Tribunal and the judgements of Hon'ble Supreme Court in case of UOI v. Eid Parry (2000) 2 SCC 223 & State of U P v. Ramkrish Burman and this Tribunal's judgement in NPL Case have been relied. It is also contended that in terms of the PPA there is no provision of monthly billing for the claims arising out of Change in Law events and the same is being carried out in terms of the supplementary billing.

xvii. Thus we hold that GWEL has not raised this issue specifically before the Central Commission. There are also judgements on the issue of raising any issue for the first time before the superior court wherein such claims have been denied. The principle of allowing carrying cost in Section 63 PPAs have been decided by this Tribunal in favour of generators/Sellers in the Adani Judgement quoted above and shall be applicable to the PPAs having similar provision as covered in the said judgement. Having decided so merely GWEL not raising the contention in the petition before the Central Commission would deprive it of the carrying cost of allowed Change in Law events, on the ground of principles of natural justice we grant liberty to GWEL/Appellant to file petition before the Central Commission for redressal of their grievances in this regard keeping in view of our above observations on carrying cost.

In view of the above, this issue is answered accordingly.

ORDER

After careful evaluation of the oral, documentary and other relevant materials available on the file and for the foregoing reasons as stated supra, we are of the considered opinion that:-

i) the issues raised in Appeal No. 111 of 2017 have merit as discussed above.

Accordingly, the Appeal No. 111 of 2017 and the IA No. 450 of 2018 are hereby partly allowed.

The Impugned Order dated 1.2.2017 passed by the Central Commission in Petition No. 8/MP/2014 on the file of Central Electricity Regulatory Commission is hereby set aside.

The matter stands remanded back to the Central Commission to pass consequential orders so far as it relates to our observations/directions as indicated above on the issues related to Busy Season Surcharge, Development Surcharge, MOEF Notification on coal quality, change in NCDP and Carrying Cost.

ii) We are of the considered opinion that the issues raised in Appeal No. 290 of 2017 by the Discom have no merit. The Central Commission has rightly justified in recording the findings in answering the issues against the Appellant. Therefore, interference of this Tribunal does not call for.

Hence, the Appeal No. 290 of 2017 is hereby dismissed devoid of merit. The IA No. 519 of 2017 also stand disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **14th day of August, 2018.**

(Justice N. K. Patil)
Judicial Member

(I.J. Kapoor)
Technical Member

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REPORTABLE/NON-REPORTABLE

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