

**[BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS no. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

Case no. HERC/Petition No 31 of 2021

Date of Hearing : 03.08.2022

Date of order : 30.09.2022

IN THE MATTER OF:

Petition under Sections 86 of the Electricity Act, 2003 seeking an order from the Commission holding that the MoEF & CC notification dated 25.01.2016 is a Change in Law event and allowing the consequent additional expenses incurred by the petitioner on account of such Change in Law event.

Petitioner

Lanco Amarkantak Power Limited (LAPL)

Respondents

1. Haryana Power Purchase Centre (HPPC)
2. PTC India Limited

Present on behalf of the Petitioner

Mr. Deepak Khurana, counsel for LAPL

Present On behalf of the Respondents

Ms. Sonia Madan, Counsel, HPPC
Mr. Gaurav Gupta, XEN, HPPC
Mr. A.P Singh, AEE, HPPC

Quorum

**Shri R.K. Pachnanda
Shri Naresh Sardana**

**Chairman
Member**

ORDER

Brief Background of the case

1. The present petition has been filed by Lanco Amarkantak Power Limited (herein after referred to as the petitioner or LAPL) seeking an order from the Commission holding that the MoEF & CC notification dated 25.01.2016 is a change in law event and allowing the consequent additional expenses incurred by the petitioner on account of such change in law event.
2. The petitioner has submitted as under:-
 - a. That the petitioner and resp-ondent no. 2 had entered into a Power Purchase Agreement dated 19.10.2005 (PPA) for sale of 273 MW (net power output) from the petitioner's 300 MW thermal Power Plant Unit – II in the State of Chhattisgarh.
 - b. That respondent no. 2 separately entered into a Power Supply Agreement dated 21.09.2006 (PSA) with Haryana Power Generation Corporation Ltd. (presently represented by respondent no. 1 herein) for sale of the power purchased by respondent no. 2 from the petitioner under the PPA.

- c. That issues arose in relation to the aforesaid PPA and PSA, which led to litigation between the parties. In the said litigation, the Hon'ble Appellate Tribunal for Electricity (APTEL) passed an interim order dated 23.03.2011 in Appeal no. 15 of 2011 putting in place interim arrangement for supply of power from the petitioner's plant to the respondents as well as to State of Chhattisgarh.
- d. That, in an Appeal (Civil Appeal no. 10329/2011), filed against the aforesaid order of the Hon'ble APTEL, the Hon'ble Supreme Court passed an interim order dated 16.12.2011 and the arrangement as per the interim order dated 23.03.2011 of the Hon'ble APTEL was continued.
- e. That the petitioner is supplying power to the State of Haryana in view of the aforementioned order dated 16.12.2011, passed by the Hon'ble Supreme Court. The Commercial Operation Date of the Plant is 07.05.2011. The following directions were passed by the Hon'ble Supreme Court vide the said order:

"Pending hearing and final disposal of the appeal, we issue following directions:

(i) The appellant will continue to supply electricity as per the interim order of the Tribunal dated 23rd March, 2011;

(ii) Without prejudice to the rights and contentions of the parties and pending further orders, the State Electricity Regulatory Commission, Haryana will fix/approve the tariff for sale and purchase of power for the period in question about which there is a dispute between the appellant and PTC.

The State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned orders passed before today, by the Appellate Tribunal and/or any other Authority in this case. All arguments on both sides are kept open. Liberty is given to the parties to make a proper application for determination of tariff supported by relevant documents before the State Electricity Regulatory Commission, Haryana, within four weeks

(iii) Prayer 'c' at Page 1165 of the Paper Book Vol. IV, which is reproduced hereinbelow, is granted, subject to further orders given below:

Issue an ad-interim order staying further proceedings pending before respondent no.1 in the Termination Petition being Case no. HERC/PRO-6/2011 till the outcome of the present proceedings".

Granting of above-quoted prayer 'c' would not mean that appellant would discontinue supply of electricity in the State of Haryana in terms of the order of the Appellate Tribunal."

The petitioner is, therefore, supplying power to Discoms in view of the order dated 16.12.2011 passed by the Hon'ble Supreme Court.

- f. That the Ministry of Environment, Forest and Climate Change (hereinafter referred to as MoEF & CC) issued a notification no. S.O. 254 (E) dated 25.01.2016. Vide the said notification dated 25.01.2016, the earlier notification dated S.O. no. 763(E) issued by the MoEF & CC dated 14.09.1999 was amended to the extent stated thereunder. The aforesaid amendment provides specific provisions on sharing of cost of transportation of fly ash generated from the power plant with the users of fly ash. It would be pertinent to note that due to the aforesaid amendment in the notification, additional costs have to be incurred by the petitioner for compliance of the same.
- g. That the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal of any law amounts to Change in Law, if the same results into additional recurring expenditure by the petitioner. The petitioner has to incur additional cost towards fly ash transportation on account of the notification dated 25.01.2016 issued by the MoEF & CC and thus, the petitioner is liable to be relegated to the same economic position as the Change in Law event never occurred, in terms of the 'Change in Law' Clause under the PSA read with implementation agreement.
- h. In view of the above, the petitioner issued Change in Law notices dated 04.05.2016 and 11.02.2021 to the respondents. Further, along with the aforementioned Change in Law notices the petitioner submitted the details of Fly Ash Generation, Fly Ash Transportation and the cost of transportation incurred by it. In this regard, the petitioner also enclosed a certificate which is certified by its Statutory Auditor certifying the incurred amount by the petitioner, due to the above 'Change in Law' event i.e. MoEF & CC notification dated 25.01.2016. Accordingly, the petitioner has preferred the present petition, inter alia, seeking an order holding that the MoEF & CC notification dated 25.01.2016 as a Change in Law event and for allowing the claim for additional cost towards the fly ash transportation along with carrying cost.
- i. That respondent no. 1, vide its letter dated 31.03.2021, replied to the aforesaid letter of the petitioner. Respondent no. 1 though did not dispute that the MoEF & CC notification dated 25.01.2016 is a change in law event leading to consequent additional expenditure due to sharing transportation cost of fly ash, however, sought certain information so that necessary action may be taken. A copy of the letter dated 31.03.2021 was annexed with the petition.
- j. That the petitioner, vide its letter dated 19.04.2021 replied to the aforesaid letter dated 31.03.2021 of respondent no. 1, wherein it furnished all the details sought by respondent no. 1. In view of the aforementioned, the petitioner once again requested the respondents to reimburse the cost incurred by the petitioner on account of the

aforementioned Change in Law event. A copy of the letter dated 19.04.2021 has been annexed with the petition.

- k. That it is relevant to note herein that respondent no. 1 did not reply to the aforementioned letter of the petitioner.
- l. Respondent no. 2 vide its letter dated 02.08.2021, replied to the aforementioned letter of the petitioner, wherein it referred to the letter dated 02.08.2021 issued by respondent no. 1. Respondent no. 1 vide the aforementioned letter dated 02.08.2021 requested respondent no. 2 to get the claims of the petitioner adjudicated by the Appropriate Commission. The copies of the letter dated 02.08.2021 issued by the respondent no. 2 and the letter dated 02.08.2021 issued by the respondent no. 1 have been annexed with the petition.
- m. That in view of the above facts, the petitioner is filing the present petition to obtain approval of this Hon'ble Commission regarding the applicability of 'Change in Law' i.e. the MoEF & CC notification dated 25.01.2016, pertaining to reimbursement of actual cost of fly ash transportation incurred by the petitioner.
- n. That this Hon'ble Commission has been given wide powers under Section 181 of the Electricity Act, 2003, to exercise regulatory powers and it has regulatory powers to pass necessary directions with regards to compensation for Change in Law, even in the absence of specific provisions.
- o. That the supply of power to the respondents is taking place pursuant to and in terms of interim directions issued by this Hon'ble Tribunal vide order dated 23.03.2011 and continued by the Hon'ble Supreme Court (vide order dated 16.12.2011) and therefore, the parties to the present are governed by the directions passed in the aforesaid orders. Thus, this Hon'ble Commission has the jurisdiction to adjudicate the present petition. It is further submitted that in the past too, this Hon'ble Commission has adjudicated various disputes between parties and thus, this Hon'ble Commission continues to exercise jurisdiction in the matters arising before it since 16.12.2011 (date of interim order of Hon'ble Supreme Court) and consequently the jurisdiction to entertain the present petition lies only with this Hon'ble Commission. In this regard, it is submitted that the Hon'ble Appellate Tribunal for Electricity in Judgment dated 30.06.2021 in Appeal no. 114 of 2019 titled 'Lanco Amarkantak Power Limited v. Haryana Electricity Regulatory Commission', wherein the Hon'ble APTEL was pleased to hold that this Hon'ble Commission has the jurisdiction to adjudicate the petition filed on behalf petitioner herein seeking approval of applicability of notification dated 07.12.2015 issued by MOEF&CC being a Change in Law event. In view of the above, this Hon'ble Commission has jurisdiction to adjudicate the disputes in the present petition.

p. Grounds for claiming relief

I MoEF & CC notification dated 25.01.2016- Change in Law event

The 'Change in Law' event is not defined under the HERC Tariff Regulations, 2008. Therefore, it would be pertinent to refer to the definition provided in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, which is extracted hereinbelow:

*“(9) Change In Law” means occurrence of any of the following events:
(a) enactment, bringing into effect or promulgation of any new Indian law; or
(b) adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or
(c) change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality which is the final authority under law for such interpretation or application; or
(d) change by any competent statutory authority in any condition or covenant of any consent or clearances or approval or licence available or obtained for the project; or
(e) coming into force or change in any bilateral or multilateral agreement/treaty between the Government of India and any other Sovereign Government having implication for the generating station or the transmission system regulated under these Regulations.”*

The aforesaid Change in Law provisions, provides a wide and expansive definition, to include within its purview the enactment of any law, as also, adoption, amendment, modification, repeal or re-enactment of any law. In the background of the aforementioned definition of the Change in Law event it would now be relevant to take note of the MoEF & CC notification dated 25.01.2016.

As on the date of Commercial Operation Date of the plant i.e. on 07.05.2011 as also, on the date of commencement of supply, the Fly Ash notification, 1999 was applicable to the petitioner's plant and thus, no norms towards sharing of the transportation cost with the users of fly ash were envisaged and thus, the petitioner was not required to bear any costs towards the same. Thereafter, the MoEF & CC, Govt. of India in exercise of its powers under the Environment Protection Act and Environment Protection Rules, vide notification no. S.O. 254 (E) dated 25.01.2016, made certain amendments to the Fly Ash notification 1999 and incorporated, inter alia, the following provisions:

“(10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.”

II Ref: orders passed by the Hon'ble CERC

The Hon'ble Central Electricity Commission in various orders has held that the incurring of additional cost towards fly ash transportation on account of the notification dated 25.01.2016 issued by the MoEF & CC by the Generators is a Change in Law and accordingly, the Generators are liable to be compensated for the same. In this regard, reference and reliance is placed on the following orders of the Hon'ble Central Electricity Regulatory Commission:

order dated 29.07.2020, in Petition no. 101/MP/2019, titled Damodar Valley Corporation Ltd. v. BSES Yamuna Power Ltd. and Ors.

order dated 05.11.2018, in Petition no. 172/MP/2016, titled NTPC Ltd. v. Uttar Pradesh Power Corporation and Ors.

III Ref: Impact of the aforementioned Change in Law event

The petitioner along with its Change in Law notice dated 19.04.2021 has submitted the Fly Ash Generation, Fly Ash Transportation cost and value incurred by it. In this regard, the petitioner has submitted a Certificate issued by its Statutory Auditor certifying the incurred amount of Rs. 6,90,46,394/- for the period from FY 17-18 till December, 2020 in its Unit-II. In view of the aforementioned, the petitioner has borne the aforementioned amount due to the above 'Change in Law' event, i.e., MoEF & CC notification dated 25.01.2016 and thus, the petitioner is to be compensated in view of the aforementioned Change in Law event.

q. Relief Sought

The petitioner has prayed as under:-

- i) pass an order holding that the MoEF & CC notification dated 25.01.2016 is a Change in Law event and allow the consequent claim for additional cost towards the Fly Ash Transportation along with carrying cost;
- ii) allow the claim of additional cost of Rs. 6,90,46,394/- incurred by the petitioner towards the fly ash transported quantity for the period from FY 17-18 till December, 2020 in respect of its Unit-II and direct the respondents to pay the same to the petitioner (respondent no. 1 through respondent no. 2), along with carrying cost;
- iii) direct the respondents (respondent no. 1 through respondent no. 2) to reimburse and make payments accrued in favour of the petitioner from January 2021 onwards on account of aforementioned Change in Law event on a regular basis;
- iv) pass such other and further orders as this Hon'ble Commission may deem fit in the facts and circumstances of the present case.

3. **Reply of Haryana Power Purchase Centre dated 16.11.2021**

In response to the petition, respondent no.1 (HPPC) filed the reply as under:

- a) That the respondent objects to the tenability of the claim of the petitioner on the ground that the same is barred by the law of limitation. The 2016 Fly Ash notification was issued on 25.1.2016 while the petitioner is seeking relief by filing a petition vide affidavit dated 01.09.2021. It is pertinent to set out hereunder pursuant to issuance of 2016 Fly Ash notification, the petitioner, without having intimated about any steps taken for disposal of fly ash, claimed the cost for transportation of fly ash for the very first time from the respondent vide letter dated 11.02.2021. The cause of action, if any, for raising a claim arising out of issuance of 2016 Fly Ash notification, has arisen on 25.01.2016 whereas the petitioner did not even made any communication in this regard with the respondent up till 11.02.2021, which is way beyond the limitation period of three years. It is further pertinent to mention that petitioner has made reference to letter dated 04.05.2016 in its petition intimating the factum of issuance of 2016 Fly Ash notification to respondent no. 2, i.e. PTC India Ltd. In the said letter, the petitioner intimated PTC India Ltd. that they are in discussion with various fly ash consumers for their expression of interest along with the cost of services including transportation cost to meet the new notified environmental norms, which shall be communicated. However, no communication with respect to issuance of such expression of interest or steps taken for utilization of fly ash was ever intimated to respondents thereafter. Apparently, this petition appears to be an afterthought on part of the petitioner and is liable to be dismissed on account of being barred by limitation.
- b) The petitioner is seeking a declaratory relief that the MoEF & CC 2016 Fly Ash notification constitutes 'Change in Law' and hence, expenditure incurred on account fly ash transportation for meeting the conditions imposed on the thermal power plants of the petitioner should be allowed as pass through in tariff. Part III of the Limitation Act, 1963, deals with suits relating to declaration. The limitation period for instituting the claim to obtain any declaration is three years from the date when the right to sue first accrues. Reliance in this regard is placed upon the judgment of Hon'ble Supreme Court in the matter of Andhra Pradesh Power Corporation Committee and Others vs Lanco Kondapalli Power Ltd and Others [2016 (3) SCC 468] wherein it was held that *"in the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of the nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceedings such as arbitration, on account of limitation."* In the light of the said judgement, the Limitation Act is applicable in the case of the proceedings or claims before the Hon'ble Commission. The first

accrual of right to sue in the declaratory suit relating to the 2016 Fly Ash notification would occur from the date of the notification. However, admittedly, the present petition has been filed way beyond the period of 3 years.

- c) That the applicability of law of limitation with respect to issue of filing of similar claim seeking relief of declaration of Change in law has been deliberated upon by Hon'ble CERC in Petition no. 101/MP/2019. This order has been relied upon by the petitioner in instant petition. The Hon'ble CERC in order dated 29.07.2020 in Petition no. 101/MP/2019 wherein Damodar Valley Corporation Ltd. sought recovery of additional expenditure incurred due to sharing of transportation cost of fly ash consequent to notification dated 25.01.2016 as 'Change in Law' event, adjudicated the objection raised by the Madhya Pradesh Power Management Company Limited (MPPMCL) regarding the claim being barred by limitation. In that view, it was held by the Hon'ble CERC that the first accrual of right to sue in the declaratory suit relating to the MoEF & CC notification would occur when the petitioner incurs expenditure pursuant to the said notification. Even considering the same as the initiation of cause of action of filing of petition, the petitioner has claimed such cost for FY 2017-18. As per the same, the petitioner ought to have raised the claim within 3 years thereon. Moreover, the conduct of the petitioner in having been in slumber for 5 long years and not even intimating the respondents of the action taken for utilization of fly ash since the operation of Plant speaks aloud of the malafides. Apparently, there appears to be no loss to the petitioner in disposal of fly ash in the Plant. Thus, seen from any aspect, the present petition is hopelessly barred by limitation and is liable to be dismissed on this short score alone.
- d) Without prejudice to foregoing objection, it is further submitted that in order to adjudicate as to whether the condition prescribed under 2016 Fly Ash notification tantamount to Change in Law in the present case, it is apposite to set forth the background of the issuance of said notification so as to explain the actual impact it has brought on Thermal Power Stations.

Background of the 2016 Fly ash notification –

- i) The Environment Protection Act, 1986 (herein referred to as "EP Act") was enacted by the Government of India on 23.5.1986 to provide for the protection and improvement of environment and for matters connected there with. Section 3(2)(v) of the EP Act provided the power to the Central Government to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Thereafter, on 19.11.1986, the Central Government notified the Environment (Protection) Rules, 1986 (herein referred to as "EP Rules"). Rule 5(3)(d) provides that the Central Government shall

impose prohibition or restriction on location of such industries and the carrying on of any process or operation in any area after considering the objections received against such notification.

- ii) Thereafter, the Ministry of Environment and Forests, Govt. of India in exercise of its powers under Section 3(2)(v) and Section 5 of the EP Act, issued directions for utilization of fly ash from coal or lignite based thermal power plants vide notification dated 14.9.1999 (herein referred to as the “Fly Ash notification 1999”). The said notification prescribed amongst others the mechanism for utilization of fly ash generated from coal or lignite based Thermal Power Plants and the methodology for utilization of Fly Ash from Coal or Lignite Based Thermal Power Plants (TPPs). It was responsibility of the petitioner to have 100 percent utilization of Fly Ash from the beginning. Fly Ash notification 1999 conferred complete financial liability on the TPPs to ensure making available fly ash which included making available the same for inter alia various activities from manufacture of cement to construction of roads and dams. To make available included making available through transportation without any payment or any other consideration.
- iii) Thereafter, vide notification dated 27.08.2003 (herein referred to as the “Fly Ash notification 2003”); MoEF & CC fixed the responsibilities of Thermal Power Plant to ensure the availability and utilization of fly ash. This notification amended the notification dated Fly Ash notification 1999 whereby the geographical radius of use of fly ash for construction activities was increased and a further stringent amendment whereby utilization of fly ash by TPP which was the earlier marginal heading of Fly Ash notification 1999, was amended to be the responsibilities of TPP. Further, thermal power plants had to ensure availability of fair quantity of ash to each user including brick kilns. Thus, complete responsibility was devolved on the TPP by way of the amending notification dated 28.08.2003. However, this notification did not alter or modify the responsibility to make available ash without payment or any consideration for the purpose of manufacturing ash based products such as cement, concrete blocks, bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity was completely and solely devolved on the Thermal Power Plant. This responsibility which was without payment or consideration included cost of transportation as ensuring availability without payment to the entities using fly ash as raw material continued entirely with TPP. Thus, according to the Fly Ash notifications 1999 and 2003, it was responsibility of Thermal Power Plant to ensure the 100 % utilization of fly ash.

- iv) Further, vide notification dated 03.11.2009 (herein referred to as the “Fly Ash notification 2009”); MoEF & CC issued elaborative guidelines in terms of Fly Ash Utilization, to bricks manufacture, construction agencies like building construction, road constructions, embankment construction etc., to compulsory use the fly ash to reduce the burden on power plants. The responsibility devolved on the Thermal Power Plant for which they could not charge any consideration or payment was substituted with Fly Ash notification 2009 to permit selling fly ash subject to the conditions. The amount collected from sale of fly ash was to be kept in a separate account and utilized for development of infrastructure and facilitation activities for use of fly ash. This permitted the TPPs to generate funds from sale of fly ash. The notification stipulated the percentage utilization of Fly Ash with the target dates ending with 100% utilization by five (5) years from the date of issue of the notification dated 3 november, 2009. Directives were also given for development works for mandatory use of ash and ash based products to building construction agencies, road embankment construction agencies and low lying areas work within 100 Km of any thermal power plant. TPPs were permitted to make available pond ash free of any charge on as is where is basis to manufacturers of bricks, blocks or tiles including clay fly ash product manufacturing unit(s), farmers, the Central and the State road construction agencies Public Works Department, and to agencies engaged in backfilling or stowing of mines. Fly Ash notification 2009 also differentiated between Pond Ash and Dry ESP Fly Ash. In respect of Pond Ash, no expenditure is contemplated on the part of the Generator. In respect of Dry ESP Fly Ash expenditure, if any, if incurred by the Generator is limited to 20%.
- v) Thereafter, the Ministry of Environment, Forests and Climate Change, Govt. of India vide notification no. S.O. 254 (E) dated 25.1.2016 in exercise of its powers under the EP Act and EP Rules, made certain amendments to the Fly Ash notification 1999 and incorporated, amongst others, the following provisions:
- “(8) Every coal or lignite based thermal power plants (including captive and or co-generating stations) shall, within three months from the date of notification, upload on their website the details of stock of each type of ash available with them and thereafter shall update the stock position at least once a Month.*
- (9) Every coal or lignite based thermal power plants shall install dedicated dry ash silos having separate access roads so as to ease the delivery of fly ash.*
- (10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.*

(11) The coal or lignite based thermal power plants shall promote, adopt and set up (financial and other associated infrastructure) the ash based product manufacturing facilities within their premises or in the vicinity of their premises so as to reduce the transportation of ash.

(12) The coal or lignite based thermal power plants in the vicinity of the cities shall promote, support and assist in setting up of ash based product manufacturing units so as to meet the requirements of bricks and other building construction materials and also to reduce the transportation.

(13) To ensure that the contractor of road construction utilizes the ash in the road, the Authority concerned for road construction shall link the payment of contractor with the certification of ash supply from the thermal power plants.

(14) The coal or lignite based thermal power plants shall within a radius of three hundred kilometres bear the entire cost of transportation of ash to the site of road construction projects under Pradhan Mantri Gramin Sadak Yojna and asset creation programmes of the Government involving construction of buildings, road, dams and embankments”.

- e) The Fly Ash notification 2016 dilutes the rigorous provision of the parent notification dated 14.09.1999 by providing for sharing of the cost of transportation between the user and the TPP for road construction projects, manufacturing ash based products and use as soil conditioner. Thus, Fly Ash notification 1999 stipulated a complete responsibility without any payment or consideration upon the TPP to utilize fly ash. However, the amending Fly Ash notification 2016 permits recovery of half the transportation charges. Therefore, this notification does not stipulate any onerous change. The amendment does not affect any change in the responsibility of generator as the Thermal Power Plant. If the Generator fails to utilize the 100% fly ash within the stipulated period which results in payment of transportation cost for distribution of the fly ash. Then, it is the failure of the Generator which cannot be passed on to the common Consumer.
- f) As per Fly Ash notification 2016, the petitioner ought to have made arrangement in their premises to utilize the fly ash so as to reduce the transportation of ash. However, since the petitioner had not provided or assessed the actual financial impact of that notification by providing requisite documents in support, the Hon'ble Commission cannot adjudicate the issue raised under the Change in Law provisions as being highly premature.
- g) From the foregoing, it is evident that the petitioner was well aware of the notifications of 1999, 2003, 2009 and others wherein it came to be ultimately stipulated that the fly ash utilization level will be 100% up to 4 years from COD. The petitioner ought to show that how much fly utilization was being done as per guidelines of MoEF & CC prior to issuance of Fly Ash notification, 2016. If petitioner would have utilized the fly ash, then transportation charges would not have been paid by them. If the Generator fails to utilize the 100% fly ash within the stipulated period which results in payment of

transportation cost for distribution of the fly ash, it is then the failure of the Generator which cannot be passed on to the common Consumer.

- h) To assess the actual impact of the Fly Ash notification 2016 and to adjudicate upon the issue as to whether condition stipulated in MoEF & CC can be considered as 'Change in Law' event qua the case of the petitioner, it is imperative that documents such as Environment Impact Assessment Report and Annual Implementation Report and the Action Plan submitted to the CPCB and SPCB, details of sale of fly ash, the funds earmarked for disposal of fly ash as per directives of MoEF & CC, permissions received from CPCB and SPCB, complete details of fly ash utilization including complete disclosure of end use, end user / vendor year wise have to be filed in the present proceedings and kept in the public domain to ensure complete transparency as every change-in-law claim translates into a financial burden on the common consumer. Complete transparency is contemplated in view of the directives contained in various notifications referred above and also desired in public interest.
- i) The petitioner, without complying with the above stated provisions which envisage action to be taken by the petitioner with the funds generated by sale of ash, has chosen the option of sharing the cost of transportation with the users of fly ash and thereby claiming such transportation cost to the extent of nearly Rs. 6 crore per annum on the beneficiaries which clearly goes against the interest of the consumers.
- j) The claim for additional cost towards Fly Ash Transportation in the petition is also not maintainable if the petitioner did not award the fly ash transportation contract through a transparent competitive bidding procedure. The petitioner never informed the answering respondent of the bidding process undertaken by it for awarding fly ash transportation contract. no communication indicating the price discovered through competitive bidding process for award of contract to transport fly ash made to the answering respondent is brought on record by the petitioner in the present petition. no document to show that the revenue generated from fly ash sales is maintained by the petitioner is brought on record by the petitioner for the period after 25.01.2016. This notification came into effect 5 years prior to the filing of instant petition.
- k) Reliance is placed upon the order dated 19 April, 2018, issued by Maharashtra Electricity Regulatory Commission, in Case no. 102 of 2016 (Petition of APML for compensation in Tariff on account of Change in Law). In this petition, APML was asked to submit information such as (i) Details of the extent and manner in which APML had complied with the requirements in force prior to the notification dated 25 January, 2016, and the costs incurred, (ii) the cost involved in ash disposal in the deposit of Fly Ash in the Ash Funds, including the cost of land and its financial implications, (iii) The details of the land required for the Ash Pond and associated infrastructure at the time of

Environmental Clearance (iv) Assessment of the financial implications of the supply of Ash to various user sites, along with its underlying basis (v) promotion, adoption and setting-up (financial and other associated infrastructure) for Ash-based product manufacturing facilities within or in the vicinity of its premises so as to reduce Ash transportation.

- l) Reliance is also placed upon order of the Hon'ble Maharashtra Electricity Regulatory Commission dated.....in Case no. 301 of 2018 filed by Adani Power Maharashtra Ltd. seeking compensation under Change in Law in respect of additional cost of Fly Ash Transportation in compliance with the notification issued by the MoEF & CC dated 25 January, 2016. It was ordered by the Hon'ble Commission as under –
- “...the admissibility of the claims is subject to prudence check of the following conditions on case to case basis for each station:*
- a) Award of fly ash transportation contract through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash.*
 - b) Details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors.*
 - c) Details of the Revenue generated from sale of fly ash/ fly ash products and the expenditure incurred towards Ash utilisation up to 25.1.2016 and from 25.1.2016 to till date, separately.*
 - d) Revenue generated from fly Ash sales maintained in a separate account as per the MoEF notification.”*

In view of the foregoing order, it can be concluded that the present petition cannot be entertained for lack of documents/ information given by the petitioner as regards the actual financial impact of the Fly Ash notification 2016.

- m) The quantum of additional cost claimed by the petitioner cannot otherwise also be reimbursed owing to the failure on the part of the petitioner to show that the all expenditure was made with prudence and is the reasonable inevitable expenditure. The petitioner has only appended an auditor certificate in support of the quantum of claimed cost, which by no means is a sufficient evidence to allow such cost. no supporting invoices and the documents have been adduced, in absence of which it is difficult to ascertain if the fly ash has been transported within 100 km radius or it has been transported in the 100-300 km radius. This information becomes material because should the fly ash be transported in the 100-300 km radius, the cost of transportation is required to be shared equally between the users and the generators.
- n) The petitioner has also not disclosed as to how much revenue was generated by the petitioner from disposal of fly ash. Admittedly, fly ash is a raw material in production of

cement and other products which has an immense value. As per MoEF & CC notification dated 25.1.2016, the generator is required to meet the transportation cost within a radius of 100 km and only if it is beyond 100 km that the cost is required to be shared between the generator and the user. However, the petitioner has not placed on record any information in this regard. The petitioner ought to demonstrate how much revenue had been generated since operation of plant or why no revenue has been generated from disposal of fly ash and that despite efforts by it, no revenue could be generated.

- o) There is a highly competitive market for fly ash and it appears that no attempt whatsoever was made to generate revenue from the sale of fly ash when admittedly the same generates immense value. Since CoD of the Plant was dated 07.05.2011, i.e. before the MoEFC and C notification dated 25.1.2016, any revenue generated/accumulated from fly ash sales ought to be offset against the alleged cost incurred for transportation of fly ash. The petitioner may be directed to submit the following information/clarification before any claim made in the instant petition is dealt by the Hon'ble Commission:-
- i) Certify that enough efforts have been made to sell fly ash produced from the generating station to cement companies or other users who purchase fly ash for their use; and
 - ii) Proof of efforts made such as advertisement in newspapers/ website or any correspondence made with the nearby users such as cement companies for sale of fly ash generated from the Power Plant.
- p) That the petitioner has not disclosed any information regarding how pond ash and dry Electrostatic Precipitator (ESP) fly ash was generated. The treatment provided under notification differs in respect of both. It is salient to consider the real data as regards the disposal of fly ash so as to assess the efforts made by the petitioner to comply with the directives of MoEF & CC and also to verify the actual financial impact of any such directions.
- q) That there is consequent saving to TPPs on account of lower O&M costs for ash handling. Land which is part of the capital cost of the thermal station acquired for ash disposal would also be freed. Such a resource has an opportunity cost which would need to be computed, otherwise it would unduly benefit thermal stations not adhering to the terms of environmental clearance while claiming transportation charges from the electricity users as change in law. As per above provision of the PPAs, for claiming impact of any Change in Law event, the petitioner needs to provide documentary proof of increase/decrease in cost or revenue/expenses. The relief for Change in Law cannot be decided on tabular statements especially when other related aspects of cost savings

on account of O&M costs, land resource, revenue generated from productive assets created within the premises and other ancillary savings have not been computed and included in the overall costs that include the additional transportation costs being claimed as change in law. Hence, present petition is premature being devoid of necessary information/ details.

- r) That the petitioner has relied upon an order of Hon'ble CERC dated 29.07.2020 in petition no: 101/MP/2019. Even in said petition, the ground contended by the petitioner for claiming change in law under pursuant to issuance of Fly Ash notification 2016 (Para 26 under Issue no. 3 of the order) was that as per MoEF & CC guidelines of 2009, budget from Ash Fund is being utilized for development of infrastructure facilities, promotional/ facilitation activities etc. It was therefore submitted in the said petition that the fund available in Ash Fund after deducting the already sanctioned fund for promotion of ash utilization is inadequate for meeting the requirements of the Fly Ash notification 2016. In the said petition, it was categorically intimated by the petitioner as under –

“The petitioner, in response, has submitted that it is supplying dry fly ash (DFA) to the bricks/ blocks manufacturers free of cost and DFA in turn is sold to the agencies, traders and cement manufacturers. Further, ash from ash pond is also being utilised in filling abandoned mines, stone queries and low lying areas. It has also informed that it has also executed an MoU with NHAI for supplying of ash from ash pond of its coal-based thermal power plants. In line with MoEF & CC notification dated 3.11.2009, separate account named “Ash Fund” is being maintained by the petitioner, which includes revenue earned from sale of fly ash and expenditure towards promotion of ash utilization.

- s) That Hon'ble CERC in Petition no. 172/MP/2016 which has also been relied upon by the petitioner in instant petition, by order dated 5.11.2018 decided as under:

“27. We have examined the matter. The main contention of the petitioner is that the additional expenditure incurred in respect of sharing of transportation cost of fly ash due to MOEFCC notification be permitted to be billed and recovered additionally on actual basis as revenue expenditure from the respondents in terms of Regulation 8 of the 2014 Tariff Regulations.....

.....

31. Accordingly, we in exercise of the regulatory power hold that the actual additional expenditure incurred by the petitioner towards transportation of ash in terms of the MOEFCC notification is admissible under “Change in Law” as additional O and M expenses. However, the admissibility of the claims is subject to prudence check of the following conditions/ details on case to case basis for each station:

(a) Award of fly ash transportation contract has been effected through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash.

(b) Details of the actual additional expenditure incurred on Ash transportation after 25.1.2016, duly certified by auditors.

(c) Details of the Revenue generated from sale of fly ash/fly ash products and the expenditure incurred towards Ash utilisation up to 25.1.2016 and from 25.1.2016 to till date, separately.

(d) Revenue generated from fly Ash sales maintained in a separate account as per the MoEF notification.”

(Emphasis Supplied)

In view of the foregoing orders of the Hon'ble CERC, it is submitted that even in the orders relied upon by the petitioner in its petition, the relief on account of 'Change in law' was allowed considering the information and documents supplied by the petitioner and subject to various prudence check involving offsetting of revenue generated from sale of fly ash and O&M saved owing to transportation of fly ash. In that view as well, the petition cannot be entertained for lack of relevant details/documents.

- t) Without prejudice to foregoing, it is submitted that the quantum of fly ash shall also be correlated to the actual quantum of coal utilized for supply of power to the State of Haryana under the PPA. However, the petitioner has failed to provide the apportionment of expenses in relation to State of Haryana towards transportation of fly ash.
- u) The petitioner's claim with regard to carrying cost is without any basis. The petitioner has not filed the adequate details/documents along with the petition. The question of award of carrying cost if at all be considered, the relevant date would be only from the date the claim has been made which is admittedly 01.09.2021.
- v) Further as per the PPA, the cost of transportation of fly ash generated, if any, is required to be confined to the quantum of power supplied to the respondents. As per Article 13.2 (b) of the PPA, compensation on account of Change in Law shall be payable only if increase in cost to the seller is in excess of an amount equivalent to one percent of Letter of Credit in aggregate for a contract year. However, the petitioner has not demonstrated in the petition that increase in cost to the petitioner is in excess of an amount equivalent to one per cent of LC.
- w) The Hon'ble Commission may adopt prudence check on the expenditure claimed and only after such prudence check if any amount is found to be payable, it has to be considered whether the same exceeds 1% of the aggregate letter of credit in terms of the PPA. The cost efficiency of the individual agreements entered into between the

petitioner and the cement companies ought to be examined by the Hon'ble Commission and for this purpose, the Commission may set up a separate committee to investigate the issue. The Hon'ble Commission may consider the case of other generators who are placed similarly as the petitioner to take a holistic view in regard to the issue of fly ash disposal and assess the prevalent rate of transportation of fly ash. The respondents have no wherewithal to comment on the costs being claimed by the petitioner and this may be verified by the Hon'ble Commission by applying strict prudence check based on such information from other similarly placed generators.

Proceedings of the Case

4. The Commission heard the matter on 24.11.2021. The case was adjourned with the direction to the petitioner to file the details of the amount collected and accumulated from the sale of fly ash over the years. After filing of the rejoinder, additional one week's time to the respondent was granted to file written submissions, if any.
5. Accordingly, rejoinder dated 10.12.2021 was filed by the petitioner to the reply filed by HPPC:-
 - a. Preliminary Submissions
 - i. On the issue of 'limitation', it has been submitted that objection of the respondent no. 1 is misconceived and untenable. Firstly, strict rules of limitation do not apply in regulatory proceedings/jurisdiction of the Commission, such as the present one, where issues of tariff are involved. Therefore, the objection of limitation taken by respondent no. 1 is bereft of any merit and does not deserve any consideration of this Hon'ble Commission.
 - ii. Without prejudice to the above, it is submitted that the effect and impact of the Change in Law event is continuous in nature and co-exists with the supply of power. Thus, Change in Law event has a continuous cause of action and therefore, the present petition based on Change in law is not barred by limitation. In view of the above as well, the objection raised by respondent no. 1 is meritless and misconceived.
 - iii. Without prejudice to the above, it is submitted that the objection of the respondent no. 1 qua limitation is even otherwise an afterthought. In this regard, it is submitted that vide letters dated 31.03.2021 and 02.08.2021, the respondent no. 1 has acknowledged the claims of the petitioner and in fact requested the petitioner to get its Change in Law Claims adjudicated by the appropriate Commission. In view of the stand taken by the respondent no. 1 it is not open for the respondent no. 1 to raise the issue of limitation, which, as brought out above, is otherwise an afterthought.

- iv. Without prejudice to the above, it is submitted that admittedly, the petitioner has claimed costs for Financial Year 2018-2019 onwards. In view of the above, the cause of action to file the present petition as per respondent no. 1 itself arose on 01.04.2018 i.e. from the date the claim could have been made by the petitioner. Therefore, if the limitation period itself commences from 01.04.2018, it accordingly ends on 31.03.2021, and the present petition would still be within the period of limitation, in view of the order dated 23.09.2021 passed by the Hon'ble Supreme Court in Miscellaneous Application no. 665 of 2021 in SMW(C) no. 3 of 2020. In terms of the said order, in computing the period of limitation, the period from 15.03.2021 till 02.10.2021 shall stand excluded. Thus, the present petition is well within the limitation and any submission to the contrary is misconceived and erroneous. True Copy of the order dated 23.09.2021 passed by the Hon'ble Supreme Court in Miscellaneous Application no. 665 of 2021 in SMW(C) no. 3 of 2020 was annexed with the rejoinder filed by the petitioner.
- v. Without prejudice to the above, the contention of respondent no. 1 as regards the applicability of Part III of the Limitation Act, 1963 is also erroneous and misconceived. In this regard, it is submitted that since the claim for the Change in Law as regards the present petition arose only on 01.04.2018 i.e. the date from which the claim is sought by the petitioner, the cause of action at the earliest arose on 01.04.2018, even as per the own case set up by respondent no. 1. The present petition is thus within limitation.
- vi. Without prejudice to the above, it is submitted that the reliance placed by the respondent no. 1 upon the order passed by the CERC in Petition no. 101/MP/2019 is misconceived. By relying on the said order, respondent no. 1 has submitted that since the cause of action will arise when the petitioner incurs expenditure pursuant to the said notification and since, the petitioner has claimed such costs of FY 2018-19, the present petition is barred in limitation. In this regard, it is submitted that even taking the submission of respondent no. 1 on the face value, in view of the order dated 23.09.2021 of the Hon'ble Supreme Court in Miscellaneous Application no. 665 of 2021 in SMW(C) no. 3 of 2020, as brought out above, the present petition is within the period of limitation. It is further submitted that the allegation of respondent no. 1 that there is any mala fide on part of the petitioner, apart from being false, incorrect and unsubstantiated is wholly nebulous and erroneous.

Ref: MOEFCC notification dated 25.01.2016

- vii. Respondent no. 1 has referred to various notifications issued by the MoEF & CC namely notifications dated 14.09.1999, 27.08.2003, 03.11.2009 and 25.01.2016 and

has contended that MoEF & CC's notification dated 25.01.2016 permits recovery of half the transportation charges and does not stipulate any onerous change. Respondent no. 1 has further averred that the amendment does not affect any change in the responsibility of generators as regards the Thermal Power Plant. Respondent no. 1 has further averred that if there is a failure of the generator to utilize the 100% fly ash within the stipulated period then the said failure cannot be passed on to the consumer.

At the outset, it is submitted that it is no more res integra that MoEF & CC's notification dated 25.01.2016 is a Change in Law event and even as per the submissions of respondent no. 1, it is not in dispute that the issuance of MoEF & CC's notification dated 25.01.2016 is a Change in Law event. Thus, reliance placed by the respondent no. 1 on various notifications issued by the MoEF & CC prior to 25.01.2016 notification as referred to by respondent no. 1 is misplaced.

Ref: Information/ Details sought by Respondent no. 1

viii. Respondent no. 1 has further averred that the petitioner has not supplied the requisite documents for adjudication of the claim raised in the present petition.

At the outset, it is submitted that the aforesaid contention of the respondent no. 1 is misconceived and erroneous and contrary to the facts/ documents on record. In this regard, it is submitted that respondent no. 1, vide its letter dated 31.03.2021, requested for the following information:

- (i) Details of Award of Fly Ash Transportation;
- (ii) Details of actual additional expenditure incurred on fly ash transportation duly certified by auditors;
- (iii) Details of revenue generated from sale of fly ash and expenditure incurred towards Ash Utilizations;
- (iv) Revenue generated from fly ash sales maintained in a separate account;
- (v) Distance between the Plant and Ash users.

ix. The petitioner, vide its letter dated 19.04.2021, categorically replied to each and every query raised and information sought raised by respondent no. 1. It is an admitted position that thereafter, no further information/clarification was sought for by respondent no. 1 herein. Thus, the objection now sought to be raised is nothing but an afterthought.

x. Without prejudice to the above, the following is point wise reply submitted by the petitioner to which there has been no rebuttal by respondent no. 1:

- (i) The petitioner submitted that the petitioner, vide its e-mails, had requested offers from various transporter service providers as well as cement

companies for transportation and disposal of fly ash from its power plant. Thereafter, the offers of the transport service providers and cement companies were evaluated. True copies of the e-mails in this regard are annexed with the rejoinder.

- (ii) The petitioner submitted the details of the actual expenditure incurred year wise from FY 2018-19 to FY 2020-21 (till December, 2020) towards the transportation of fly ash to cement plants, as verified and certified by the Statutory Auditor. True copies of the invoices are annexed with the rejoinder.
- (iii) The petitioner confirmed that there is no revenue being generated from sale of fly ash/ fly ash products, which has also been verified and certified by the Statutory Auditor. In this regard, it is pertinent to note that in Chhattisgarh, especially Korba area (where the Plant is situated), there are many coal based thermal power plants (approx. 20,000 MW) and very few cement plants. Ash generations from these thermal plants is many times the ash consumption requirement of the cement plants. Therefore, there is no possibility of sale of fly ash and any revenue from the sale. Instead, the generators have to make arrangements to deliver this fly ash to the doorsteps of cement plants by incurring transportation cost. The above has also been certified by the petitioner's Statutory Auditor.
- (iv) The petitioner once again confirmed that since there is no revenue generated from sale of fly ash, there is no question of maintaining a separate account.
- (v) The petitioner gave requisite details of the distance of different cement plants availing fly ash from the petitioner's Power Plant. The petitioner further confirmed that there are no cement Plants in the vicinity of the petitioner's Power Plant. Further, the petitioner submitted that collective demand for fly ash from nearby cement plants is much less compared to the huge fly generation in Korba area. Further, the petitioner informed that the market for collecting fly ash is dictated by the cement plants who make their own arrangements for off-taking and transporting fly ash from the Power Plants based on their individual cost economics at the door of respective cement plants. The petitioner further informed that off-taking of fly ash by cement plants from power plants is also dependent on the seasonal market demand of finished product cement which is beyond the control of the power plants. The petitioner further submitted that the claim raised by the petitioner is based on the invoices raised by the cement companies towards lifting of fly ash from the petitioner's Power Plant, which were also submitted along with

the letter dated 19.04.2021 to the respondent no. 1 along with a certification of transportation cost incurred by the petitioner's Statutory Auditor.

- xi. Respondent no. 1 herein replied to the aforementioned letter vide its letter dated 02.08.2021, wherein it requested the petitioner to get its claims adjudicated by the appropriate Commission. In view of the above, it is evident that the petitioner has provided all the necessary details/ information as regards the information/ details sought by respondent no. 1 at the relevant time. It was upon providing the said information and the respondent no. 1 having satisfied itself of the same, that it asked the petitioner to approach the Hon'ble Commission. Thus, the objections now sought to be raised by the petitioner is nothing but an afterthought.
- xii. Without prejudice to the foregoing, the petitioner is submitting the following documents in support of its claim:
 - a. Documents in support of competitive bidding procedure, issuance of inquiries/requesting offers from various transporter service providers as well as cement companies for transportation and disposal of fly ash from its power plant to the respective locations of cement plants of the cement companies;
 - b. Agreements/work orders with cement companies;
 - c. Invoices raised by cement companies;
 - d. Certificate issued by petitioner's Statutory Auditor verifying the quantities of fly ash transported to manufacturers of ash-based products such as cement companies as per MoEF & CC notification dated 25.01.2016 along with transportation cost incurred by the petitioner in its books of accounts.

Ref: Utilization of Fly Ash prior to the issuance of Fly Ash notification dated 25.01.2016

- xiii. Respondent no. 1 has further contended that the petitioner should place on record the data pertaining to utilization of fly ash prior to the notification dated 25.01.2016. At the outset, it is submitted that the aforesaid averment of respondent no. 1 is erroneous and misconceived. In this regard, it is submitted that respondent no. 1 has not even averred much less as it proved as to how is the data pertaining to prior utilization of the fly ash relevant for the purposes of the present 'Change in Law' petition. Even otherwise, the present 'Change in Law' petition pertains to compensation for the period FY 2018-19 onwards and thus, the events/data prior to the aforementioned period are extraneous and irrelevant for the purposes of the present petition. Without prejudice to the above, the petitioner is submitting the reports related to fly ash utilization regularly submitted to Chattisgarh Pollution Control Board (CPCB) for the period FY 2011-12 (COD of Unit 2 on 07.05.2011) till

FY 2020-21. True Copies of the Reports related to Fly Ash utilization submitted to CPCB for the period FY 2011-12 (COD of Unit 2 on 07.05.2011) till FY 2020-21 are annexed with the rejoinder.

Ref: Additional Documents sought by respondent no. 1

- xiv. Respondent no. 1, for the first time, after filing of the petition, has sought certain documents namely Environment Impact Assessment Report, Annual Implementation Report, Action Plan submitted to CPCB and SPCB, details of sale of fly ash, funds earmarked for disposal of fly ash, permission received from CPCB and SPCB, details of end use of fly ash.
- xv. At the outset, it is submitted that seeking the aforementioned documents is nothing but an afterthought in as much as the said documents were never sought by respondent no. 1 in their letter dated 31.03.2021. It is further submitted that the Environment Impact Assessment Report was prepared for both Unit 1 and 2 together during the period of March 2004 – February 2005 much before the financial closure and commercial operation date (07.05.2011) of Unit 2. In view of the aforementioned alone, the averment of respondent no. 1 deserves no consideration by this Hon'ble Commission. However, without prejudice to the above, the petitioner is herewith placing on record a letter dated 20.03.2019 along with supporting documents pertaining to fly ash utilization which were submitted to the Expert Committee for Ash utilization, MoEF & CC. True copy of the letter dated 20.03.2019 along with its supporting documents are annexed with the rejoinder.
- xvi. Without prejudice to the above, it is pertinent to note that apart from making a vague submission that the aforesaid documents are important for complete transparency, respondent no. 1 has not even averred much less has it established the relevancy of the said documents for the purpose of adjudication of the present petition. Further, the respondent no. 1 has wrongly averred that the fly ash transportation cost of Rs. 6 Crore per annum is being sought to be reimbursed from it. However, the factual position is that the petitioner has actually incurred approx. Rs. 6.90 Cr. in a period of about 3 years i.e. for the period from FY 2018-19 to FY 2020-21 (Upto December 2020) in Unit 2 as compared to Rs. 11.41 Crore incurred in its other Unit 1 supplying power to Discoms of Madhya Pradesh based on the actual quantity of fly ash transported from the petitioner's operating 2x300 MW power plant to the cement companies, verified and certified by the petitioner's Statutory Auditor in the petitioner's books of accounts during the above specified period. In view of the above, the misleading and vague averment of respondent no. 1 does not merit any consideration by this Hon'ble Commission.

Ref: Competitive Bidding/Prudence Check [Para 12-17]

- xvii. With reference to the averments made in Paras 12-17 of the Reply, it is submitted that the same are baseless and misconceived and denied save and except to the extent the same are consistent with the stand and submissions of the petitioner.
- xviii. It is submitted that the petitioner had initiated a transparent competitive bidding procedure by sending inquiries and requesting offers from various transporter service providers as well as cement companies for transportation and disposal of fly ash from its power plant to the respective locations of cement plants of the cement companies. That pursuant to the above, the petitioner received response from various transporter service providers as well as cement companies. Thereafter, a committee of the petitioner evaluated the offers of transport service providers and cement companies viz. M/s Ultratech Cement Ltd., M/s Shree Cement Ltd., M/s Nuvoco Vistas Ltd. (formerly known as M/s Lafarge Cement Ltd), M/s Nu Vista Cement Ltd. (formerly known as M/s Emami Cement Ltd) and M/s J K Lakshmi Cement Ltd. The cement plants availing fly ash for use at their plants are at different distances from the petitioner's Power Plant and accordingly, the cost economics of fly ash delivered at the location of one cement plant varies from other cement plants. The cement companies usually appoint transporters themselves and all negotiations with regard to the price are also done by the cement companies themselves. In line with the practice followed by the cement plants, the petitioner after detailed discussions and lots of persuasion and negotiations, managed to get reduced price(s) and accordingly entered into individual agreements with various cement companies for off take of fly ash from the petitioner's power plant. In one case, the agreement was entered between the petitioner and M/s Midland Carriers (for J K Lakshmi Cement Ltd.). True copies of the Agreement signed between the petitioner and the Cement Companies as well as the Work orders issued to the Cement Companies from time to time are annexed with the rejoinder.

It is pertinent to note that the final rates of transportation under the agreements executed with cement companies were lower than the quotes of transportation rates initially received from transport service providers and cement companies in response to the inquiries. Therefore, the petitioner has incurred the fly ash expenditure with prudence and is a reasonable inevitable expenditure which needs to be reimbursed to it. Further, it is confirmed that there is no schedule rate of Govt. of Chhattisgarh applicable for transportation of fly ash from power plants within Chhattisgarh.

- xix. The above details along with supporting invoices of cement companies and certificate from petitioner's Statutory Auditor were earlier submitted by the petitioner by its letter dated 19.04.2021 in reply to respondent no. 1's letter dated 31.03.2021. The invoices issued by Cement Companies against the fly ash transported from the petitioner's power plants were also verified by the Statutory Auditor and thereafter, the certificate enclosed along with above mentioned letter as proof for the verification of respondent no. 1. During the present proceedings, respondent no. 1 has been showing its ignorance of the reply received by it from the petitioner.
- xx. It is evident that the respondent no. 1 is not aware about the fly ash utilization scenario in the area where the petitioner's Plant is located and raising objections without any basis. The generating stations of HPGCL in Haryana selling fly ash to cement plants within Haryana cannot be compared with the fly ash utilization situation in the petitioner's Korba cluster region. It is submitted that in the petitioner's Plant in Korba and Champa Cluster region, due to proximity to coal mines of SECL, there is approx. 20,000 MW of installed and operating capacity which includes mega Thermal Power Plants (TPPs) like KSK Mahanadi, NTPC-Sipat, NTPC Korba, CSEB-Marwa, CSEB-Korba West, CSEB-Korba East, DB Power, RKM Power, Adani Korba West, BALCO, ACB group's TRN Energy and Maruti Clean Coal Power Ltd. etc. In these TPPs on an average around 1,00,000 MT of Ash is generated on a daily basis whereas the requirement of utilization of fly ash in the Cement Plants is limited to around 9000-10,000 MT only.
- It is further pertinent to mention that the Cement plants in the State of Chhattisgarh have been selectively picking up those TPPs which are located near to them for Fly Ash utilisation due to lower transportation costs involved which has reduced/affected the lifting of fly ash in spite of the petitioner having agreements/tie-up with such cement plants. The biggest hindrance is that the entire annual fly ash generation in Korba cluster is about 380 Lakh MT, whereas the annual requirement of fly ash by the cement plants (major utilizer of fly ash) is about 29 Lakh MT only which comes to meagre 7.6 %. Due to the demand-supply gap of fly ash and above constraints beyond the control of the petitioner, very small percentage of Fly Ash generated has been utilized against the demand of fly ash from the cement plants. Initially from 07.05.2011 to 20.03.2013, when the petitioner's Unit 2 had been supplying 65% power to respondent no. 2, during that time due to above mentioned constraints, the petitioner had supplied fly ash for road development works, nearby cement plants free of cost with the lifters making their own arrangements of transporting the fly ash to their respective cement plants/road development works. Thereafter, the petitioner's Unit 2 was shut down from 21.03.2013 till 04.12.2015

(more than 2 years and 8 months), due to non-supply of linkage coal by SECL and the petitioner was in extreme financial distress. Subsequently, after the Hon'ble Supreme Court order dated 18.09.2015 directing SECL to supply linkage coal, the petitioner's Unit 2 was restarted on 05.12.2015 and since then the petitioner has been regularly and continuously supplying 95% power from its Unit 2 to the respondent (except for scheduled annual overhaul and unscheduled outages).

The petitioner could not meet the 100% fly ash utilization targets due to the above specified various practical constraints and therefore, the petitioner had no choice but to dispose the fly ash slurry into the ash pond. The petitioner's Power Plant is designed to run on domestic coal which on burning generates about 40% ash. Out of the total ash generated from burning of domestic coal, about 80% is fly ash and balance 20% is bottom ash. To form a disposable ash slurry, about 4-5 parts of water is mixed with one part of fly ash to be disposed into the ash pond. Resultantly, the ash pond got filled up in 2017. Thereafter, the ash pond bund had been raised by 9 meters so far (3 meters every time for three times) to cater to the continuous generation of fly ash and wet ash from the power plant. The petitioner has already incurred approx. Rs. 46.24 Crore in both the units 1 and 2 towards raising of ash pond bund to accommodate the disposal of continuous ash generation.

It is once again confirmed that due to above mentioned constraints, the fly ash utilization percentage has always been lower and further there has been no sale of fly ash since the COD (07.05.2011) of Unit 2 and therefore no revenue could be generated on account of fly ash. The above has also been verified and certified by the Statutory Auditor of the petitioner in its certificate issued by it. It is reiterated that instead fly ash transportation cost as above has actually been incurred in the books and accounts of the petitioner.

Further, the approx. distance of different cement plants availing fly ash from the petitioner's 2x300 MW power plant is given in the table below:

S. no.	Cement Plant(s) with address	Approx Distance (in km)	Approx. Two-way Distance (in km)	Remarks
1	M/s Ultratech Cement Ltd. Rawan Cement Works, Simga, Baloda Bazar-Bhatapara, Chhattisgarh - 493 195	163	326	The transportation cost is usually charged by Cement plants on two-way distance basis
2	M/s Shree Cement Ltd. Semradih-Bharuwadih, Raipur, Chhattisgarh - 493101	150	300	
3	M/s Nuvoco Vistas Ltd. Nuvoco Lafarge Cement Factory, Off Bilaspur Road, Arasmeta, Chhattisgarh - 495663	95	190	
4	M/s Nu Vista Cement Ltd. (Earlier Emami Cement)	145	290	

S. no.	Cement Plant(s) with address	Approx Distance (in km)	Approx. Two-way Distance (in km)	Remarks
	Baloda Bazar, Suhela Road, Risda, Chhattisgarh-493332			
5	M/s J K Lakshmi Cement Ltd. Ahiwara, Kodiya, Bhilai, Chhattisgarh - 490036	207	414	

Respondent no. 1's reliance on the orders dated 19.04.2018 in Case no. 102 of 2016 and 301 of 2018 is not applicable to the petitioner's case as all the relevant details pertaining to fly ash earlier requested by respondent no. 1 have already been provided to establish bonafide claim of reimbursement of fly ash expenses.

xxi. It is further submitted that the reference and reliance placed upon various orders of the Commissions in Paras 13 and 14 of the Reply is misplaced. The said orders are not applicable to the facts of the present case. The petitioner seeks leave to refer to the said orders at the time of hearing of the present petition.

Ref: Para 18-19

xxii. With reference to the averments made in Paras 18 and 19 of the Reply, it is submitted that the same are baseless and misconceived and denied save and except to the extent the same are consistent with the stand and submissions of the petitioner.

xxiii. Respondent no. 1 has averred that the petitioner has not disclosed any information regarding how Pond Ash and Dry Electrostatic Precipitator (ESP) Fly ash is generated and the treatment provided under the notification differs in both. The objections now sought to be raised by respondent no. 1 is nothing but an afterthought. The petitioner submits that the aforesaid averment of respondent no. 1 is erroneous and irrelevant under the present case as the petitioner has claimed for transportation cost of Fly ash in accordance with the prevailing applicable MoEF & CC notification as amended from time to time. However, it is important to highlight that in the 2nd para of MoEF notification dated 03.11.2009, it is specified that for the purpose of this notification, the term "fly ash" means and includes all ash generated such as Electrostatic Precipitator (ESP) ash, dry fly ash, bottom ash, pond ash and mound ash as the objective is to utilize all the ashes. In this regard, the understanding of the respondent no. 2 that the treatment provided in the notification differs with regard to Pond Ash and Dry Electrostatic Precipitator (ESP) ash is not correct. The relevant extract of the MoEF notification dated 03.11.2009 is reproduced below:

"AND WHEREAS the term "fly ash" means and includes all categories or groups of coal or lignite ash generated at the thermal power plant and collected by

Electrostatic Precipitator (ESP) or bag filters or other similar suitable equipments; bottom ash is the ash collected separately at the bottom of the boiler; pond ash is the mixture of ESP fly ash and bottom ash, but, for the purpose of this notification, the term "fly ash" means and includes all ash generated such as Electrostatic Precipitator (ESP) ash, dry fly ash, bottom ash, pond ash and mound ash as the objective is to utilize all the ashes".

It is therefore submitted that the petitioner's claim for reimbursement of ash transportation cost is based on the real data in accordance to the prevailing MoEF & CC notification as amended time to time.

- xxiv. Respondent no. 1 in Para 19 of its Reply has averred that the land which is part of the capital cost of the thermal station acquired for ash disposal would also be freed. The petitioner submits that the aforesaid averment of respondent no. 1 is erroneous. The land acquired for ash disposal can never be freed.

Ref: Paras 20-21 of the Reply

- xxv. With reference to the averments made in Paras 20 and 21 of the Reply, it is submitted that the same are baseless and misconceived and denied save and except to the extent the same are consistent with the stand and submissions of the petitioner.

- xxvi. Respondent no. 1 in Para 20-21 of its Reply has averred that the budget from ash fund should be utilized for development of infrastructure facilities, promotional/facilitation activities etc. citing the orders dated 29.07.2020 and 05.11.2018 passed by the CERC in the matter of petitions filed by DVC and NTPC on the issue of reimbursement of fly ash transportation cost. The petitioner submits that the aforesaid averment of respondent no. 1 is erroneous as the petitioner due to above specified constraints has never been able to sell fly ash and earn any revenue out of it. Therefore, there is no question of ash fund which can come only to those power plants like DVC and NTPC which had generated revenues from sale of fly ash in some power stations and incurred transportation cost in some other power stations within the DVC and NTPC groups. In the current petitioner's case, there has been no revenue and consequent no ash fund due to no sale of fly ash. There is only transportation cost incurred for transportation of fly ash to cement plants. The reliance placed by the respondent no. 1 on the orders of the CERC is misplaced and the petitioner seeks leave of the Hon'ble Commission to refer to the said orders at the time of hearing of the present petition.

Ref: Paras 22-24 of the Reply

- xxvii. With reference to the averments made in Paras 22- 24 of the Reply, it is submitted that the same are baseless and misconceived and denied save and except to the extent the same are consistent with the stand and submissions of the petitioner.

Respondent no. 1 in Para 22 - 24 of its Reply has averred that the quantum of fly ash shall also be correlated to the actual quantum of coal utilized for supply of power to the State of Haryana under the PPA. In this regard, the petitioner submits that it has been supplying 95% power from its 300 MW Unit 2 to respondent no. 1 through respondent no. 2. The petitioner is herewith annexing the details of fly ash transported quantity, transportation cost incurred and coal consumption for Unit 2 and apportioned share of respondent no. 1 (95%), are annexed with the rejoinder.

xxviii. It is submitted that the Letter of Credit (LC) opened by respondent no. 1 for the power supply from the petitioner's Unit 2 to respondent no. 2 is for an amount of Rs. 50,66,56,430/- which is currently valid upto 30.07.2022. The cumulative fly ash expenses incurred and claimed as reimbursement under Change in Law shall be corresponding to 95% power supplied which would be approx. Rs. 6.56 Cr. for the period from FY 2018-19 to FY 2020-21 (Upto December 2020), which is much higher than the 1% of LC amount (1% of Rs. 50.66 Cr.=Rs. 50.66 lakhs). Therefore, the fly ash reimbursement expenses claimed based on the transportation of fly ash to cement plants under Change in Law is in excess of the amount equivalent of 1% of the LC amount.

In view of the above, it is submitted that the objections of the respondent no. 1 are unmerited and untenable. Accordingly, the petitioner prays that the present petition be allowed.

In view of the foregoing, it is most humbly prayed that the instant petition may be considered in light of the foregoing submissions, in the interest of justice.

6. Written submissions of Haryana Power Purchase Centre dated 07.03.2022:

- i. The present petition has been filed by the petitioner praying for approval of applicability of MoEF & CC notification dated 25.01.2016 ('2016 Fly Ash notification' for short) as Change in Law event and allow the consequent claim for additional cost towards the Fly Ash Transportation along with carrying cost. The petitioner has also prayed for additional cost of Rs. 6,90,46,394/- towards the fly ash transported for the period FY 2017-2018 till December 2020 in respect of its Unit-II. They have further sought directions for regular payments w.e.f. January 2021 on account of aforementioned Change in Law event. The submissions made hereunder are in addition to the submissions made in the Reply to the petition.
- ii. The claim of the petitioner claiming compensation for 'Change in Law' is untenable and liable to be dismissed outright. It is pertinent to note that Clause 12.3 of PSA

provides condition for notifying Change in Law, which have been breached by the petitioner. Clause 12.3 of PSA reads as under -

“ 12.3 notices relating to Change in Law

12.3.1 In the event a Change in Law notice is issued by the Company to PTC, PTC shall in turn forward such notice to the Purchaser as soon as it receives notice of such Change in Law event from the Company.

PTC shall respond to such Change in Law notices after receipt of written consent or disagreement from the Purchaser and in accordance with the same. In all such cases, the Purchaser shall notify in writing its consent to or disagreement with such notice to PTC within a period of thirty (30) days of receipt of such notice from PTC. If the Purchaser does not respond within such thirty (30) day period, then the Purchaser shall have deemed to have agreed with such request for Change in Law Tariff adjustment. The Purchaser may also request PTC to issue a notice to the Company for claiming a Change in Law under this Section after it becomes aware of such Change in Law event, but not later than five (5) months after the date of notification of such Change in Law. In the event the Change in Law notice is issued by the Purchaser to PTC, PTC shall notify in writing its consent to or disagreement with such notice to the Purchaser within a period of forty five (45) days of receipt of such notice after duly consulting and receiving a written consent or disagreement from the Company and in accordance with the same.

12.3.2 A Change in Law notice issued by any Party must, inter alia, contain:

- (i) precise details of the applicable Change in Law;*
- (ii) the estimated impact of such applicable Change in Law;*
- (iii) the estimated Tariff Adjustment of the Trading Margin; and*
- (iv) all documents and calculations in support of Change in Law claim.*

12.4 PSA Supplementary Bills relating to Change in Law

In the event of increase in Tariff Payments resulting from a Change in Law, following the settlement with the Company, if required, the Company may raise a Supplementary Bill on PTC. PTC shall, in turn, claim the Tariff increase from the Purchaser through. A PSA Supplementary Bill and the Purchaser shall pay in accordance with Section 10.B. In the event of decrease in Tariff Payments resulting from a Change in Law, following the settlement with the Company, if required, PTC shall raise a Supplementary Bill on the Company and notify the Purchaser of such bill. Accordingly, the Purchaser may claim such decrease in PTC Tariff Payment through a PSA Supplementary Bill and PTC shall pay to the

Purchaser within seven (7) days of payment of such amount by the Company to PTC.

12.4.1 PTC shall provide the Purchaser with a copy of the certificate, provided by the Company, stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and supporting documents to substantiate the same.

12.5 Dispute relating to Change in Law

In the event of any dispute regarding a Change in Law matter, the matter shall be resolved between PTC and the Purchaser in accordance with Section 14.7. It is acknowledged and agreed that in all such instances, PTC shall represent the Purchaser in any associated arbitration proceeding with the Company and any award(s) pursuant to such arbitration between the Company and PTC shall be binding upon the Purchaser.”

It is well settled that the conditions of PSA are sacrosanct and binding on the parties. It is incumbent upon the petitioner to follow the same scrupulously to be entitled for any claim under the PPA. In the instant case, petitioner has evidently not followed the above conditions and has not sent a valid notice in terms of Clause 12.3.2 mentioned above. The petitioner has placed on record a notice dated 04.05.2016 (Annexure P-5) sent to the PTC. Pursuant to the same no communication at all was made by the petitioner till 2021. A bare perusal of the said notice evince that the notice did not intimate any estimated amount, calculation, actual details etc. It is a notice *simplicitor* to intimate that they are in discussion with various fly ash consumers for their expression of interest which shall be further communicated. The petitioner cannot be permitted to take the conditions for the PPA for a ride. The petitioner is bound to send estimated amount prior to incurring any expenditure. It has intimated the amount expended after 4 years and brazenly claims entitlement to the expended amount. Moreover, the PSA provided a specific dispute resolution mode for any dispute arising for a claim pertaining to 'Change in Law'. The claim of the petitioner is therefore, untenable.

- iii. Without prejudice to the foregoing, it is submitted that in the event the Hon'ble Commission rejects the objection of the respondent as regards tenability of petition, even then the present claim cannot be adjudicated in the present petition in this form. Reliance in this regard is placed upon Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 notified on 22.10.2021, which provides a procedure for settlement of disputes with respect to 'Change in Law'. As per said rules, on occurrence of a Change in Law, the affected party, in the present case

the petitioner, and other party, in the present case the respondents/Procurers, are required to settle the Change in Law claims among themselves and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules. A copy of Rules is appended with the written submissions. The said rules are applicable retrospectively on all pending claims, as has been stated in the order of the Hon'ble CERC in Petition no. 513/MP/2020 dated 31.01.2020, is appended with the written submissions, the relevant extract of which reads as under –

“ We consider that the process and methodology as prescribed in the Change in Law Rules is simply a mechanism for time bound settlement of claims in a deterministic manner and the petitioner is not going to be prejudiced by adopting the said mechanism. We have already held in our earlier orders (e.g. order dated 06.12.2021 in Petition no. 228/MP/2021) that since the Change in Law Rules is in the nature of procedural law and under the Change in Law Rules, any substantive rights are not being taken away, it is to be applied retrospectively in all pending proceedings.

In view of foregoing discussions, the petitioner may approach the procurers for settlement of Change in Law claims among themselves in terms of the Change in Law Rules and approach the Commission only in terms of Rule 3(8) of the Change in Law Rules. The filing fees paid in the present Petition shall be adjusted against the petition to be filed in future in terms of Change in Law Rules.”

In view of the foregoing, the claims of the petitioner have to be settled in accordance with the foregoing procedure.

- iv. As regards the notice of Change in Law, the sole reliance of the petitioner is on notice dated 04.05.2016 served upon PTC, is appended with the written submissions. It is therefore, relevant to highlight the contents of said notice, the relevant extract of which reads as under –

“We hereby bring to your notice that recently Ministry of Environment, Forest and Climate Change (MoEF) has issued a notification making amendments in the MoEF no. S.O. 763(E), dated 14.10.1999 of the Environment (Protection) Act, 1986 (29 of 1986), which have come into force from the date of notification on 25.01.2016, on sharing of cost of transportation of fly ash generated from the power plant. A copy of said notification is attached herewith as Annexure 1 for your ready reference. As per the amendment Rules dated 25.01.2016 (Clause 2(b)(10), “the cost of transportation beyond the radius of hundreded kilometres and up to three

hundred kilometres shall be shared equally between the user and the coal based thermal power plant.”

The Cement manufacturing Industry is one of the major consumers of fly ash in India. In order to comply with the 100% fly ash utilisation norms, LAPL has made a survey of the cement Industries located in the vicinity of power plant located in District Korba. As per the preliminary survey, most of the cement manufacturing industries are located at a distance of 150-300 Km from LAPL Plant.

xxx”

From the contents of the alleged notice, it is evident that the petitioner had only intimated that it may have to spend 50% transportation cost for fly ash. However, in the claim raised in the present petition, no segregation whatsoever has been made as regards the break-up of the cost claimed. The petitioner is claiming aggregate amounts for each year without providing any breakup of the same invoice wise. In absence of such details, it is not even clear whether the transportation cost claimed is 50% or 100%. From the aggregate details given by the petitioner is appended with the written submissions (page 507 of the Rejoinder), the claim has been made under three heads, i.e. a) Fly ash transportation; b) Transportation Cost; and c) Coal Consumed. It is not understood as to what share of the transportation cost has been incurred by the petitioner and for what distance. The details of the same are not even forthcoming from the invoices placed on record by the petitioner. The petitioner has also not certified that the route travelled for disposal of fly ash is the best route. Without prejudice to the objection of the petitioner, it is therefore, most appropriate that the calculation at first is verified by the parties in accordance with the methodology given in the Change in Law Rules.

- v. It is further pertinent to point out the discrepancies in the documents placed on record by the petitioner. The petitioner has placed on record 'Fly Ash Offtake Agreement' dated 28.03.2018 (Page 328 of the Rejoinder) executed with M/s Shree Cement Ltd. In Clause 5.3 of the said agreement relating to 'Delivery Point', the amount to be reimbursed to the SCL per ton has been fiddled with thereby making it illegible. Further, Clause 5.2 provides that the fly ash had to be lifted by SCL from the Ash Silos of the Plant. no provision as regard sharing of transportation cost is stipulated in such agreement. Similarly, in another agreement dated 21.03.2018 executed with M/s Ultratech Limited (page 337 of the Rejoinder), the cost mentioned in Clause 2 and 3 has been omitted. In an agreement dated 28.06.2018 executed with M/s Emami Cement Ltd. (ECL), it Is

provided in Clause 2 that the ECL will arrange for transport and all cost towards transport would be borne by ECL. It is also evident from the agreements placed on record that the petitioner had been disposing off fly ash at the upfront payment per MT as stipulated in the agreement. However, no details are forthcoming as to how the amounts were settled subsequently with each cement company. In absence of such details, it is not feasible to verify the amounts claimed by the petitioner.

- vi. It is pertinent to mention that the petitioner had relied upon the letter of the respondent dated 02.08.2021 to contend that the respondent waived its right to assert legal objections with respect to validity of the claim. In this regard, it is submitted that the respondent had merely stated to get the adjudicated through Hon'ble Commission. However, no waiver at all was given with respect to objections that may be taken before the Hon'ble Commission. Furthermore, this letter was written prior to coming into force of Change in Law Rules. However, as per the said rules, the procedure prescribed under said rules now has to be followed in all pending proceedings.
- vii. It is further submitted that if the Hon'ble Commission allows the principal claim of the petitioner, the petitioner shall not be entitled to carrying cost for the period of inaction by them. The petitioner has delayed approaching the Hon'ble Commission for no valid reasons. The petitioner cannot be allowed to take advantage of its inaction. In that view, claim for carrying cost shall be rejected in entirety.

In view of the foregoing, it is most humbly prayed that the instant petition may be considered in light of the submissions made in Reply to the petition and the foregoing submissions, in the interest of justice.

7. Written Submissions filed by the petitioner dated 11.03.2022

- i. It has been submitted that the Respondent no. 1 has raised the following contentions in its written submissions. The issues raised and petitioner's reply:-
 - (a) The respondent no. 1 has contended that the Change in Law notice served by the petitioner is not in terms of the provisions contained in Clause 12.3.2 of the PSA as the notice did not intimate any estimated amount, calculation, actual details etc. The respondent no. 1 has further contended that the PSA provides for a specific dispute resolution mode for any dispute arising for a claim pertaining to Change in Law.
 - (b) The respondent no. 1 has placed reliance upon Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 ("Change in Law Rules") to

contend that the claims of the petitioner have to be settled in accordance with the procedure provided under the said rules.

- (c) The respondent no. 1 has raised issues with regard to break up of the cost claimed by the petitioner and has contended that the calculations ought to be verified by the parties in accordance with the methodology given in the Change in Law Rules.
- (d) The respondent no.1 has alleged discrepancies in the documents filed by the petitioner.
- (e) The respondent no. 1 has contended that it has not waived its right to assert legal objections with respect to validity of the petitioner's claim.
- (f) The respondent no. 1 also contended that the petitioner's claim for carrying cost is to be rejected in entirety owing to the alleged delay in approaching the Hon'ble Commission.

Re' Compliance with provisions relating to notice for Change in Law

- ii. Respondent no. 1's objection that the petitioner has not given notice of change in law as per Clause 12.3.2 of the PSA/PPA is misconceived and untenable. It is submitted that firstly, the parties are governed and bound by judgment dated 13.01.2014 passed by the Hon'ble APTEL in Appeal no. 65/2013 by which the Hon'ble APTEL held that supply of power by the petitioner to respondent no. 1 through respondent no. 2 is *de hors* the PPA/PSA. Thus, the reliance placed by respondent no. 1 on the provisions of the PPA/PSA is erroneous. Copy of the judgment dated 13.01.2014 is annexed with the written submissions.
- iii. Without prejudice to the above and in any event, the petitioner has complied with the provisions of the PPA/PSA relating to Change in Law notice. Admittedly, the petitioner has issued notice of change in law event to respondent no. 2, who in turn has issued similar notice to the respondent no. 1. Respondent no. 1 has admitted that the petitioner had sent a notice i.e. notice dated 04.05.2016 for the subject change in law event, however, it contends that the said notice did not intimate any estimated amount, calculation, actual details etc. and is therefore not in compliance with Clause 12.3.2 of the PSA. More specifically, the contention of the respondent no. 1 is that the petitioner did not inform the estimated amount prior to incurring any expenditure. In this regard, it is submitted that in the year 2016, after the issuance of the MOEFCC notification dated 25.01.2016, the petitioner started consultations with the nearby cement companies for disposal of fly ash, however, as brought out in the Rejoinder already filed by the petitioner, the cement companies were lifting fly ash from the power plants nearer to their cement plants. After a lot of persuasion and follow up with various cement companies, it was in the Financial Year 2018-19

only, that the cement companies gradually started making arrangements for lifting of fly ash. It is submitted that the exact amount under the change in law event of the said MOEFCC notification cannot be pre-estimated as the effect is ongoing during the life of plant as the MOEFCC notifications are to be mandatorily complied by all generating companies (both Govt. owned and private owned) across India. The amount to be incurred for disposal of fly ash cannot be pre-estimated as the fly ash lifting by cement companies is irregular and varying and depends on their requirements for production of cement which is again dependent upon the supply-demand scenario of cement. The generating company does not have any control on the ash lifting done by cement companies as can be seen clearly from the Statutory Auditor's certificate that yearly cost incurred has been varying since the commencement of fly ash lifting by cement companies.

- iv. It is further submitted that on 18.07.2017, the petitioner had filed a petition bearing Case no. HERC/PRO - 54 of 2017 before this Hon'ble Commission seeking approval for installation of FGD and SCR systems in its Unit 2 to reduce the emissions as a change in law event under another MOEFCC notification dated 07.12.2015. In the said petition, this Hon'ble Commission had passed an order dated 15.11.2018 holding as under:

"Commission's Analysis and order

9.

The Commission has examined the contents of the Petition filed/ additional submissions made by the parties and observed that the contention of the respondent i.e. HPPC regarding the jurisdiction of this Commission to decide the issue, has some force.....Till all these issues are settled, the Commission finds itself unable to decide the issue of jurisdiction.

10. In view of the above and without going into the merits of the case, the petition is disposed of for want of jurisdiction of the Commission in the matter.

The petitioner in order to have clarity on the issue of jurisdiction preferred an Appeal being Appeal no. 114 of 2019 before the Hon'ble APTEL against the aforesaid order dated 15.11.2018. The Hon'ble APTEL vide order dated 30.06.2021 held that this Hon'ble Commission has the necessary jurisdiction to decide the change in law events and directed this Hon'ble Commission to decide the said petition on merits noting that the power supply to respondents continued to be under the directions of the Hon'ble Supreme Court. It was on account of the uncertainty with regard to jurisdiction as well that the petitioner did not have any occasion to file a petition for reimbursement of fly ash expenses as a change in law event pursuant to MOEFCC notification dated 25.01.2016, when the appeal on the issue of jurisdiction of this

Hon'ble Commission on the change in law events was pending before the Hon'ble APTEL.

- v. It is an admitted position that the petitioner vide its notice dated 04.05.2016 had intimated to respondent no. 2 and in turn to respondent no. 1 the Change in Law event and had also communicated that the petitioner was in discussion with various fly ash consumers for the associated costs which has to be reimbursed to the petitioner as per the said change in law event. Accordingly, the petitioner had sufficiently intimated respondent no. 2 by providing it the precise details of the applicable Change in Law. This is substantial compliance and therefore, the petitioner cannot be non-suited on the ground of notice, as alleged by respondent no. 1.
- vi. Further to the said letter, the petitioner on 11.02.2021 furnished complete details pertaining to the expenses incurred on account of the aforesaid Change in Law event and accordingly sought reimbursement of the same. It is pertinent to note that the said letter contains all the relevant information required for the purposes of change in law claim. Respondent no. 1 in fact replied to the letter dated 11.02.2021 and requested for certain additional details which were duly furnished by the petitioner vide letter dated 19.04.2021. It is pertinent to note that these details were never disputed by respondent no. 1. Accordingly, vide its letter dated 02.08.2021 respondent no. 1 communicated to respondent no. 2 to have the said claims in relation to change in law adjudicated through appropriate commission i.e. this Hon'ble commission. Therefore, this somersault by respondent no. 1 in the present proceeding is impermissible. Further, it is submitted that under the PSA, the petitioner is not required to send estimated amount of a change in law event prior to incurring any expenditure. The petitioner managed to negotiate extremely competitive prices in relation to the costs incurred by it pursuant to the Change in Law event. Thus, the respondent's objections to the extent calling the conduct of the petitioner "*brazen*" is misconceived. Furthermore, the gap between the notices dated 04.05.2016 and 11.02.2021 is not even relevant, as the petitioner has raised its Claims/exercised its rights and filed this petition within the limitation period.
- vii. Respondent no. 1 has also raised an objection, albeit a feeble one, that the PSA provides for a specific dispute resolution mode for any dispute arising for a claim pertaining to change in law and therefore, the claim of the petitioner is untenable. In other words, HPPC is raising an objection to jurisdiction of this Hon'ble Commission by citing the arbitration mechanism provided in the PSA. In this regard, the petitioner reiterates the submission made in Para 2 above. The petitioner submits that this Hon'ble Commission has the necessary jurisdiction as the present

matter pertains to tariff, which, as directed by the Hon'ble Supreme Court vide order dated 16.12.2011 and further clarified by the Hon'ble APTEL vide judgment dated 30.06.2021 in Appeal no.114/2019, is in the domain of this Hon'ble Commission.

Re' Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021

- viii. In relation to the objection raised by respondent no. 1 that the petitioner ought to follow the procedure under the Electricity (Timely Recovery of Costs due to Change in Law) Rules 2021, the said objection is untenable in view of the following the Clarification dated 21.02.2022 issued by Ministry of Power with regard to the said Rules. The relevant portion of the clarification is reproduced below:-

"2. The matter has been examined in this Ministry and the following is clarified with respect to the applicability of the Electricity (Timely Recovery of Costs due to Change in, law) Rules, 2021:

i. The Electricity (Timely Recovery of Costs due to Change in law) Rules, 2021 were notified by Ministry of Power, vide notification dated 22nd October, 2021 in Gazette of India. As per sub-rule (2) of Rule 1, these Rules shall come into force on the date of their publication in the Official Gazette. These Rules have not stated to have been given any retrospective operation.

ii. The aforesaid Rules are applicable on the change in law events occurred on or after the date of notification of these Rules in the Official Gazette i.e. 22nd October, 2021. The change in law events occurred prior to the notification of these Rules shall be dealt in accordance with the prevalent dispensation/rule position at the time of occurrence of the event.

iii. The proceedings in the petitions, related to change in law matters, pending before the Appropriate Commissions, shall be dealt in accordance with stipulations made in para (ii) above."

Upon a bare reading of the clarification reproduced above, it is abundantly clear that the said Rules will only be applicable on the change in law events occurred on or after the date of notification of the rules in the Official Gazette i.e. 22.10.2021. In the present case, admittedly, the change in law event, is prior to 22.10.2021. In this view of the matter, the said Rules as well as the order of Hon'ble CERC in Petition no. 513/MP/2020 dated 31.01.2022 (which is prior to the issuance of the clarification dated 21.02.2022) are not applicable and/or relevant to the present case. Copy of the clarification dated 21.02.2022 issued by the Ministry of Power is annexed with the written submissions.

Re' Break-up of the cost claimed

- ix. In relation to the objection raised by the respondent disputing the quantum of amount claimed by the petitioner, the petitioner reiterates that it is claiming for reimbursement of only 50% of the total expenditure on transportation of fly ash in accordance with the MoEFCC notification. It is wrong on the part of respondent no. 1 that in the claim raised in the petition, no segregation has been made as regards the break-up of the cost claimed and in the absence of details, it is not clear whether the transportation cost claimed is 50% or 100%. In the petitioner, the petitioner has referred to and annexed Statutory Auditor's Certificate. It is submitted that the cost incurred and claimed by the petitioner is the petitioner's share which is 50% of the total transportation cost incurred. The balance 50% transportation cost is incurred by the cement companies. The cement companies make arrangements for transportation of fly ash either directly or through transport companies. The MOEFCC notification dated 25.01.2016 being a change in law event, the cost incurred by the petitioner have to be reimbursed by the respondent no. 1. Further, the petitioner has already placed on record detailed information and documents in relation to the transportation costs incurred by it which includes the invoices *raised* by the Cement Companies, Reports related to Fly Ash utilization submitted to CPCB and Statutory Auditor's Certificate. Further, certification of route travelled for disposal of fly ash is not even relevant for the purpose of the present claim as the rates were decided through competitive bidding procedure. Thus, the objection raised by the respondent no. 1, apart from being vague and unspecific is not justified and is untenable. as it has already been verified (from the invoices raised by cement companies) and also certified by the Statutory Auditor in the petitioner's books of accounts during the specified period.

Re' Discrepancies in the documents placed on record

- x. The respondent no. 1 has alleged certain discrepancies in the documents filed by the petitioner on record. It is submitted that the signed agreements/work orders are usually confidential and when shared with outside parties, the rates/prices are not disclosed and are hidden (Pg 330, 331 and 338 of the Rejoinder). It is submitted that two such agreements without rates were filed inadvertently. The petitioner is hereby filing those two agreements with cement companies with rates specified on it is annexed with the written submissions. As already submitted in the Rejoinder the petitioner had initiated a transparent competitive bidding procedure by sending inquiries and requesting offers from various transporter service providers as well as cement companies for transportation and disposal of fly ash from its power plant to

the respective locations of cement plants of the cement companies. That in pursuance of the above, the petitioner received response from various transporter service providers as well as cement companies. Thereafter, a committee of the petitioner evaluated the offers of transport service providers and cement companies. The cement plants availing ash for use in their plants are at different distances from the petitioner's power plant and accordingly the cost economics of fly ash delivered at the location of one cement plant varies for other cement plants. The cement companies usually appoint transporters themselves and all negotiations with regard to the price are also done by the cement companies themselves. In line with the practice followed by the cement plants, the petitioner after detailed discussions and lots of persuasion and negotiations, managed to get reduced price(s) and accordingly entered into individual agreements with various cement companies for off take of fly ash from the petitioner's power plant. The final rates of transportation under the agreements executed with cement companies were lower than the quotes of transportation rates initially received from transport service providers and cement companies in response to the inquiries. It is confirmed that the rates in Rs./MT of fly ash lifted are the rates for the petitioner's share of transportation cost to the cement companies/transporters. The petitioner has already submitted the distances of the cement companies from the power plant in its letter dated 19.04.2021 to the respondent no. 1. The invoices issued by Cement Companies against the fly ash transported from the petitioner's power plants were also verified and certified by the Statutory Auditor in the petitioner's books of accounts during the specified period. The petitioner has made payments after receipt of these invoices raised by Cement Companies from time to time. In addition, the petitioner submits that MOEFCC has issued a new notification dated 31.12.2021 on the utilization of ash. A copy of the latest MOEFCC notification is enclosed herewith and marked is annexed with the written submissions. The following are the salient points extracted from the said MOEFCC latest notification:

- A. "Responsibilities of thermal power plants to dispose fly ash and bottom ash.—
1. *Every coal or lignite based thermal power plant (including captive or co-generating stations or both) shall be primarily responsible to ensure 100 per cent utilisation of ash (fly ash, and bottom ash) generated by it in an eco-friendly manner as given in sub-paragraph (2);*
 2. *The ash generated from coal or lignite based thermal power plants shall be utilised only for the following eco-friendly purposes, namely:-*
 - i. *Fly ash based products viz. bricks, blocks, tiles, fibre cement sheets, pipes, boards, panels;*
 - ii. *Cement manufacturing, ready mix concrete;*
 - iii. *Construction of road and fly over embankment, Ash and Geo-polymer based construction material;*

- iv. *Construction of dam;*
 - v. *Filling up of low lying area;*
 - vi. *Filling of mine voids;*
 - vii. *Manufacturing of sintered or cold bonded ash aggregate;*
 - viii. *Agriculture in a controlled manner based on soil testing;*
 - ix. *Construction of shoreline protection structures in coastal districts;*
 - x. *Export of ash to other countries;*
 - xi. *Any other eco-friendly purpose as notified from time to time.*
- B. For the purpose of utilisation of ash, the subsequent sub-para shall apply.—

1. *All agencies (Government, Semi-government and Private) engaged in construction activities such as road laying, road and flyover embankments, shoreline protection structures in coastal districts and dams within 300 kms from the lignite or coal based thermal power plants shall mandatorily utilise ash in these activities:*

Provided that it is delivered at the project site free of cost and transportation cost is borne by such coal or lignite based thermal power plants.

Provided further that thermal power plant may charge for ash cost and transportation as per mutually agreed terms, in case thermal power plant is able to dispose the ash through other means and those agencies makes a request for it and the provisions of ash free of cost and free transportation shall be applicable, if thermal power plant serves a notice on the construction agency for the same.”

- xi. Therefore, the petitioner has incurred the fly ash expenditure with prudence and it is a reasonable inevitable expenditure which needs to be reimbursed to it under the change in law event of MOEFCC notification dated 25.01.2016, which has been further supplemented by another MOEFCC notification dated 31.12.2021.

Re’ HPPC’s letter dated 02.08.2021

- xii. It is submitted that respondent no. 1 never disputed petitioner’s letter dated 19.04.2021, which was written in reply to queries raised by respondent no. 1 itself in its previous letter. Having been provided with the requisite information and documents and sought and after satisfying itself of the same, respondent no. 1 advised respondent no. 2/petitioner to get the claims adjudicated through this Hon’ble Commission. Therefore, the petitioner is right in contending that the objections now being raised are an afterthought and were never earlier raised. The respondent no. 1 has not been able to give any justification as to why it did not raise any objections contemporaneously at the first instance, as are being sought to be raised now. The letters issued by the respondent no. 1 clearly show that the respondent no. 1 had examined the documents and it was after being satisfied with

the same that it had advised the petitioner to get the claims adjudication by this Hon'ble Commission. no objection with regard to delay, non-submission of estimated expenditure etc. were raised by the respondent no. 1.

Re' Carrying Cost

- xiii. In relation to respondent no. 1's objection in relation to grant of carrying cost for the period of alleged inaction by the petitioner, it is submitted that the petitioner has approached this Hon'ble Commission within limitation and hence, there is no inaction on part of the petitioner. Further, the legal position as regards carrying cost/interest is well settled that it is based on the principle of time value of the money and principle of restitution. Therefore, the respondent no. 1's objection on grant of carrying costs is unfounded.

In view of the above, the petitioner prays that the present petition may kindly be allowed.

8. In the next hearing on 16.03.2022, Ms. Sonia Madan, learned advocate, respondent referred to the provisions of PSA/PPA w.r.t. the notice which is to be served in the case of change in law by either party and also the legal issues raised by the petitioner first time in its written submissions dated 11.03.2022, including termination of PPA and jurisdiction of the Hon'ble Commission. Hence, she requested for some time to file reply on the legal issues raised by the petitioner in their written submissions as well as the data/information provided by the petitioner herein.

The Commission has also taken a note of the submissions of the learned counsel for the petitioner, Sh. Deepak Khurana, that he is willing to provide all the necessary documents as may be required and requested by the respondent i.e. HPPC.

In view of above, vide Interim order dated 16.03.2022, acceding to the request of the respondent, the Commission allowed a weeks' time to the respondent to file the requisite reply.

9. HPPC vide memo no. Ch-27/CE/HPPC/STP/21 dated 01.04.2022, sought certain documents from the petitioner. In response, the petitioner submitted the documents vide letter no LAPL/PWR/COM/CON/L3/PTC-HPPC/2022-23/228369 dated 11.04.2022.

The reply filed by petitioner to the queries raised by HPPC is as under:

- i. The month-wise breakup of transportation cost paid to each Cement Company account wise and respective MT fly ash quantity supplied to Cement Company during April 2018 to December 2020 is attached with letter. The invoices raised by the Cement Companies towards lifting of Fly Ash along with a certificate from Statutory Auditor verifying and certifying the transportation cost incurred during April 2018 to December

2020 have already been submitted by LAPL vide its letter dated 19.04.2021 to HPPC through PTC.

- ii. It is once again submitted that there were/are no schedule rates of Govt. of Chhattisgarh for transportation of fly ash during April 2018 to December 2020 from power plants within Chhattisgarh.
- iii. LAPL have been supplying 95% power from its Unit 2 to Haryana Discoms through PTC India Ltd. w.e.f. 05.12.2015. The remaining 5% power has been supplied as home state share at variable charges to Chhattisgarh Discom. LAPL has so far not claimed reimbursement of fly ash transportation cost for the 5% power supplied during April 2018 to December 2020 from Chhattisgarh Discom. Further, LAPL is yet to file a Change in Law petition towards claim of transportation charges due to MOEFCC notification dated 25.01.2016 before the Hon'ble CSERC. LAPL has another operating 300 MW Unit no. 1 from which power is supplied on long term basis to Madhya Pradesh Discoms through PTC India Ltd. The Hon'ble MPERC has already passed an order dated 29.11.2011 allowing reimbursement of ash transportation cost from Discoms. LAPL has already claimed the fly ash transportation cost from M.P. Discoms.
- iv. Prior to April 2018, fly ash was disposed of in slurry form in ash pond. Prior to the MOEFCC notification dated 25.01.2016, LAPL's Unit 2 was under shut down from 21.03.2013 till 04.12.2015 (more than 2 years and 8 months), due to non-scheduling by HPPC which was mainly due to non-supply of linkage coal by SECL. The tariff was redetermined by Hon'ble HERC in its order dated 23.01.2015, however the differential amount under the revised tariff was subsequently paid by HPPC after Hon'ble HERC passed an order dated 12.07.2016 directing HPPC to pay the differential amount in three equal monthly instalments. LAPL remained in extreme financial distress due to under recovery in tariff. Meanwhile, after the Hon'ble Supreme Court order dated 18.09.2015 directing SECL to supply linkage coal, LAPL's Unit 2 was restarted on 05.12.2015 and since then LAPL has been regularly and continuously supplying 95% power from its Unit 2 to the Respondent (except for scheduled annual overhaul and unscheduled outages). Subsequently, after the MOEFCC notification dated 25.01.2016, LAPL started transportation of fly ash to cement plants. There is no question of any estimated savings due to disposal of fly ash in the ash pond.
- v. As such there was no envisaged date and budgetary allocation for raising of ash dyke prior to MOEFCC notification dated 25.01.2016. As stated earlier in the rejoinder filed by LAPL in the same petition before Hon'ble HERC, LAPL could not meet the 100% fly ash utilization targets during the above specified period due to various practical constraints and therefore LAPL had no choice but to dispose the fly ash slurry into the ash pond. To form a disposable ash slurry, about 4-5 parts of water is mixed with one

part of fly ash disposed into the ash pond. Resultantly, the ash pond got filled up in the year 2017. Thereafter, the ash pond bund had been raised by 9 meters so far (3 meters in three times) to cater to the continuous generation of fly ash and wet ash from the power plant. LAPL has already capitalised aggregate amount of approx. Rs. 46.24 Crore in its books of accounts of both Unit 1 & 2 in three stages towards raising of ash pond bund to accommodate the disposal of continuous ash generation, which was more than the utilisation of ash. Therefore, approx. Rs. 23.12 Crore (50% of the total amount) has already been capitalised by LAPL on account of raising of ash pond bund in its books of accounts of Unit 2.

10. Thereafter, vide Interim order dated 13.04.2022, acceding to the request of Ms. Sonia Madan, the Commission granted fifteen days' time to the respondent to study the documents and submit their final written arguments.
11. The case was next heard on 01.06.2022 and vide its interim order dated 01.06.2022, the Commission took serious note of the delay in filing the reply by the respondent- HPPC leading to non-compliance of the directive of the Commission i.e. to file reply at least three days prior to the date of hearing, and levied a token fine of Rs. 1/- to be deposited in the Commission's account. The Commission further directed HPPC, to file a comprehensive reply within one week with an advance copy to the petitioner and the petitioner to file a rejoinder within one week.
12. **Written Submissions of the respondent no. 2, i.e. HPPC filed on 01.06.2022:**
 - i. The present petition has been filed by the petitioner praying for approval of applicability of MoEF & CC notification dated 25.01.2016 ('2016 Fly Ash notification' for short) as Change in Law event and allow the consequent claim for additional cost towards the Fly Ash Transportation along with carrying cost. The petition is pending adjudication before this Hon'ble Commission.
 - ii. The Hon'ble Commission has heard the submissions of both the parties in the present matter. On the issues deliberated during the course of hearing and pursuant to the order of the Hon'ble Commission dated 16.03.2022, the respondent-HPPC vide letter dated 01.04.2022 enclosed with the submission of HPPC dated 27.05.2022 sought following information from the petitioner –
 - a) Cement company wise accounts for lifting of dry fly ash in the period April 2018 to December 2020. Month wise break up of transportation cost paid to each Cement Company and total MT fly ash supplied to the cement company.
 - b) Copy of notified scheduled rates of the Chhattisgarh Government for transportation of fly ash during April 2018 to December 2020.

- c) Information regarding claim raised for transportation cost from Chhattisgarh State Government for 5% supply of power. The details and status of petition filed before the Hon'ble Chhattisgarh State Electricity Regulator Commission, if any, regarding adjudication of claim for 5% transportation cost due to MoEF & CC notification dated 25.01.2016.
 - d) How the fly ash was being disposed of prior to April 2018? If the fly ash was disposed in slurry form in the pond, details of estimated savings on account of non-disposal of fly ash in pond?
 - e) What was the envisaged date and budgetary allocation for raising of ash dyke prior to MoEF & CC notification dated 25.01.2016?
- iii. The petitioner vide letter dated 11.04.2022 enclosed with the submission of HPPC dated 2705.2022 submitted the response to the information sought by HPPC. The response of the petitioner shall be dealt with hereunder under individual heads. The submissions made by HPPC are in addition to the submissions made earlier in the present matter and the same are not being repeated hereunder for the sake of brevity.
- iv. From the claims raised in the present petition, the documents placed on record in support of the same and the submissions of the respondent, following broad issues arise for the consideration of this Hon'ble Commission –
- a) Was the petitioner bound to notify the occurrence of 'Change in Law' event and the steps taken by it prior to incurrence of such cost?
 - b) Whether the conditions of PSA/PPA with respect to 'Change in Law' applicable on the parties?
 - c) Whether the quantum claimed is prudently expended and offsets the savings/ revenue, if any?

Based on the documents placed on record of the Hon'ble Commission, the submissions of HPPC on foregoing issues are as under -

Issue a) - Was the petitioner bound to notify the occurrence of 'Change in Law' event and the steps taken by it prior to incurrence of such cost?

and

Issue b) - Whether the conditions of PSA/PPA with respect to 'Change in Law' applicable on the parties?

- v. Ordinarily, the agreements for purchase of power specify conditions for 'Change in Law' wherein the Generator is made liable to notify not only the occurrence of Change in Law event but also provide the requisite documents/ information with respect to impact of the same within stipulated timeframe. The intent behind incorporation of such provision is that the 'affected party', i.e. the Purchaser of

Electricity is aware of and has the opportunity to monitor and if possible, mitigate the impact of such 'Change in Law' event. However, in the instant case, the petitioner did not even raise a whisper of the alleged expenditure up till 11.02.2021. It is only pursuant to filing of detailed reply in the present petition that the respondent-HPPC was made aware of following – (i) no Ash fund had been maintained by the petitioner; (ii) the petitioner had not attained fly ash utilization in accordance with previous notifications of MoE&F and was in breach of the same; (iii) the contract for lifting of dry fly ash was not issued by way of competitive bidding; (iv) the negotiated rates were based on transportation cost of two-way distance; the per MT rates paid to all cement companies is same, i.e. Rs. 201/- per MT and shows no nexus to the distance travelled; (v) no attempts have been shown to sell fly ash etc. The significance of notifying change in law and apprising the Purchaser of the amounts to be expended is to give the purchaser an opportunity to monitor that the expenditure made is inevitable and necessary. Irrespective of any statutory provisions, regulations or conditions of agreement, the said opportunity/ right of purchaser is a natural corollary to the well-settled general principles of law and natural justice.

- vi. The petitioner has contended that none of the conditions of the PSA/PPA are applicable as the power is being supplied de hors the provisions of PPA/PSA. In this regard, the petitioner has relied on the Judgment of the Hon'ble APTEL dated 03.01.2014 in Appeal no. 65/2013. It is pertinent here to note that Clause 12.3 of PSA provides condition for notifying Change in Law as under –

“12.3 notices relating to Change in Law

12.3.1 In the event a Change in Law notice is issued by the Company to PTC, PTC shall in turn forward such notice to the Purchaser as soon as it receives notice of such Change in Law event from the Company.

PTC shall respond to such Change in Law notices after receipt of written consent or disagreement from the Purchaser and in accordance with the same. In all such cases, the Purchaser shall notify in writing its consent to or disagreement with such notice to PTC within a period of thirty (30) days of receipt of such notice from PTC. If the Purchaser does not respond within such thirty (30) day period, then the Purchaser shall have deemed to have agreed with such request for Change in Law Tariff adjustment. The Purchaser may also request PTC to issue a notice to the Company for claiming a Change in Law under this Section after it becomes aware of such Change in Law event, but not later than five (5) months after the date of notification of such Change in Law. In the event the Change in Law notice is issued by the Purchaser to PTC, PTC shall notify in writing its consent to or

disagreement with such notice to the Purchaser within a period of forty five (45) days of receipt of such notice after duly consulting and receiving a written consent or disagreement from the Company and in accordance with the same.

12.3.2 A Change in Law notice issued by any Party must, inter alia, contain:

- (i) precise details of the applicable Change in Law;*
- (ii) the estimated impact of such applicable Change in Law;*
- (iii) the estimated Tariff Adjustment of the Trading Margin; and*
- (iv) all documents and calculations in support of Change in Law claim.*

12.4 PSA Supplementary Bills relating to Change in Law

In the event of increase in Tariff Payments resulting from a Change in Law, following the settlement with the Company, if required, the Company may raise a Supplementary Bill on PTC. PTC shall, in turn, claim the Tariff increase from the Purchaser through. A PSA Supplementary Bill and the Purchaser shall pay in accordance with Section 10.B. In the event of decrease in Tariff Payments resulting from a Change in Law, following the settlement with the Company, if required, PTC shall raise a Supplementary Bill on the Company and notify the Purchaser of such bill. Accordingly, the Purchaser may claim such decrease in PTC Tariff Payment through a PSA Supplementary Bill and PTC shall pay to the Purchaser within seven (7) days of payment of such amount by the Company to PTC.

12.4.1 PTC shall provide the Purchaser with a copy of the certificate, provided by the Company, stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and supporting documents to substantiate the same.

12.5 Dispute relating to Change in Law

In the event of any dispute regarding a Change in Law matter, the matter shall be resolved between PTC and the Purchaser in accordance with Section 14.7. It is acknowledged and agreed that in all such instances, PTC shall represent the Purchaser in any associated arbitration proceeding with the Company and any award(s) pursuant to such arbitration between the Company and PTC shall be binding upon the Purchaser."

- vii. The reliance of the petitioner on judgment of the Hon'ble APTEL dated 03.01.2014 is misplaced owing to following reasons –

- a) The issues for consideration in Appeal no. 65/2013 were limited to whether this Hon'ble Commission was right in enforcing capped tariff agreed under PPA.
 - b) The Hon'ble Supreme Court by way of ad hoc interim arrangement, pending further orders in the Appeal, passed limited direction to the State Commission to fix the tariff for supply of power by Lanco to HPPC de hors the terms of the PPA including the capped tariff by directing it to carry out its determination uninfluenced by any of the previous orders. It further directed Lanco to continue to supply in terms of the interim order of the Hon'ble APTEL dated 23.3.2011, and stayed further proceedings in the petition filed by HPPC challenging the termination of the PPA by Lanco. Thus, the ad-hoc interim arrangement ordered by the Hon'ble Supreme Court was limited to fixation of tariff de hors the PPA. The Court in its order did not suspend the other conditions of the PPA from which it could be inferred that the supply of power by Lanco to HPPC will be unregulated and any consequent claims arising thereon will have no obligations on Lanco. PPA clearly identify and address the liabilities and rights of parties in the event of any change in circumstances. Further, the other conditions of PPA such as 'Change in Law' were never in dispute between the parties and therefore, the parties are bound to comply with the same when termination proceedings have been stayed by the Hon'ble Supreme Court.
 - c) It has been mentioned in the order that the Hon'ble Supreme Court expressly stayed the proceedings of the challenge to the termination of the PPA by Haryana Power before the State Commission.
 - d) It was held that keeping in view the termination, as also other facts and circumstances of the case regarding viability, the Hon'ble Supreme Court directed supply to continue but at a viable tariff as an interim arrangement to be determined by State Commission, and not as per the PPA. Therefore, it was only the tariff determination that was to flow outside the canons of PPA in terms of the order of the Hon'ble Supreme Court and APTEL. no unfettered right was given to petition to sell power without considering any restrictive conditions specified in PPA which were never a subject matter of dispute between the parties.
- viii. In the instant case, petitioner has evidently not followed the above conditions and has not sent a valid notice in terms of Clause 12.3.2 mentioned above. The petitioner has placed on record a notice dated 04.05.2016 enclosed with the submission of HPPC dated 2705.2022 sent to the PTC. Pursuant to the same no

communication at all was made by the petitioner till 2021. A bare perusal of the said notice evince that the notice did not intimate any estimated amount, calculation, actual details etc. It is a notice simplicitor to intimate that they are in discussion with various fly ash consumers for their expression of interest which shall be further communicated.

- ix. In view of the foregoing, it is submitted that in the event the claim of the petitioner is allowed in-principle, the same would set a wrong precedence where the petitioner will have no regard to the significance of the notification of impact of change in law and may prejudice the rights of the respondent adversely.

Issue c) - Whether the quantum claimed is prudently expended and offsets the savings/revenue, if any?

- x. The petitioner has prayed for reimbursement of additional cost of Rs. 6,55,94,075 being 95% of the total amount of Rs. 6,90,46,394/- towards the fly ash transported for the period FY 2018-2019 till December 2020 in respect of its Unit-II. The respondent vide letter dated 01.04.2022 had asked the petitioner to provide month-wise breakup of transportation cost paid to each Cement Company. The tabular statement provided by the petitioner along with letter dated 11.04.2022 shows that payments have been made to 3 Cement Companies- i.e. Shree Cement Ltd., Nuvoco Vistas Corp Ltd. and Emami Cement. The payment details further go on to show that each cement company has been paid a net rate of Rs. 201/- per MT irrespective of the distance travelled.
- xi. It is the case of the petitioner that the work order for fly ash transportation was issued on Cement Companies after rounds of negotiations. The emails placed on record in support of the same fail to substantiate as to what factors were considered in fixing a standard rate of Rs. 201/- per MT. As to why the selective cement companies have been selected has also not been explained. The petitioner has placed on record MOU with Ultratech Cement which mentions that the 'UTCL undertakes to arrange for transport and all cost towards transportation shall be borne by UTCL. However, LAPL shall release an advance equivalent to one month off-take quantity @ Rs. 300 per tonne plus GST @ 18% extra....' The similarly worded clauses have been included in other Agreements placed on record by the petitioner executed with Shree Cement and Emami Cements. However, the rate agreed with Shree Cement and Emami Cements is Rs. 201/- per MT. What is also pertinent to note is that in the agreements executed with Shree Cement and Emami Cement, nothing has been mentioned regarding the distance to be travelled whereas in the agreement executed with Ultra tech Cement, it is mentioned that the

plant of M/s Nuvoco Vistas Corp Ltd., where the fly ash has to be taken in 95 Km away and two way distance is 190 Km, for which totally cost shall be Rs. 304 per MT. As the notification dated 25.01.2016, the petitioner was bound to pay only Rs. 152/- per MT. However, the payment has been made at Rs. 201/- per MT.

- xii. The notification dated 25.01.2016 provides that the generating plant is liable to incur 50% of the transportation cost for fly ash lifted within 100-300 km. This also is the understanding of the petitioner as has been stated by them in their pleadings. Apparently, the rates settled by the petitioner for lifting of fly ash fails to show transparency and strict compliance of the notification dated 25.01.2016. The respondent HPPC had admittedly been kept in dark about the process of selection of Cement Companies and the selection of rates. The details of the petitioner fail to inspire any confidence with the prudence and transparency exercised in execution of agreements for lifting of fly ash.
- xiii. The petitioner did not award the fly ash transportation contract through a transparent competitive bidding procedure. The petitioner never informed the answering respondent of the bidding process undertaken by it for awarding fly ash transportation contract. It has come to the knowledge of HPPC in the present proceedings that no efforts had been made to sell fly ash prior to notification dated 25.01.2016 and no 'Ash fund' has been constituted. All this evinces the imprudence of the petitioner in complying with the norms of MoEF & CC issued from time to time.
- xiv. It is pertinent here to highlight that the Ministry of Power on 22.09.2021 issued an advisory to power plants to auction fly ash through a transparent bidding process only. It was emphasised that the transportation cost wherever required to be borne by the power plants, as per provisions of a notification by the environment ministry, shall be discovered on competitive bidding basis only. Further, vide circular dated 22.02.2022, Ministry of Power specifically observed that Fly ash is a valuable commodity and shall be sold through transparent bidding process. It was mentioned that Ash is emerging as a valuable commodity and so giving it free, and also meeting the transportation costs will lead to malpractices. Further, it was mentioned that if after bidding/auction, some quantities of ash still remain un-utilised, then only, as one of the options, it could be considered to be given free of cost on first come, first serve basis, if the user agency is willing to bear the transportation cost and the transportation cost, wherever required, will be as per the provisions of the notification of MoEF & CC. All the advisories issued by Ministry of Power from time to time makes the process of awarding contracts for listing of dry fly ash significant and therefore, it was bounden duty of the petitioner to have kept the respondent

apprised of the steps taken by them in compliance to notification dated 21.05.2016. Having failed to do so, the petitioner does not deserve any reimbursement of costs which is apparently not incurred fairly and wisely.

xv. It is further relevant to highlight that in response to query of HPPC as regards status of claim for reimbursement of transportation cost from Chhattisgarh, it was submitted by the petitioner that they have not claimed reimbursement of fly ash transportation cost for the 5% power supplied during April 2018 to December 2020 from Chhattisgarh Discom. The petitioner has not even referred to any notice sent to Chhattisgarh Discom. As to why no amount has been claimed from Chhattisgarh has not been explained by the petitioner. In fact, the stand of Chhattisgarh Discom is very significant in this matter as the actual condition of fly ash lifting in Chhattisgarh and the genuineness of rates can be best verified by Chhattisgarh Discoms. Thus, in light of the statement made by the petitioner, it is prayed that the present petition may also be kept in abeyance and the opinion of Chhattisgarh Discom may also be sought so as to ensure that the cost allowed, if any, is in no manner unjustified and unreasonable.

xvi. Further, the petitioner has referred to the order of the Hon'ble MPERC dated 29.11.2011 to contend that the MPERC had allowed the claim for reimbursement of transportation cost towards lifting of fly ash for Unit-1. It is pertinent to highlight that Hon'ble MPERC had only allowed the claim in principle on the basis of limited contention raised by the MP Discom's. However, with respect to the quantum of the claim, it was ordered as under –

“However, the recovery of the ash transportation expenses by the petitioner/generating company shall be subject to fulfillment of following conditions by the petitioner/generating company and verification of the following conditions for each station by the procurer / MP Power Management Company Ltd.: i. Award of fly ash transportation contract through a transparent competitive bidding procedure. Alternatively, the schedule rates of the respective State Governments, as applicable for transportation of fly ash. ii. Details of the actual additional expenditure incurred on Ash transportation after MoEFCC notification dated 25.01.2016, duly certified by the Auditors. iii. Details of the Revenue generated from sale of fly ash/ fly ash products and the expenditure incurred towards Ash utilisation from 25.1.2016 to till date, separately. iv. Revenue generated from sale of Fly Ash is maintained in a separate account as per the MoEFCC notification. v. The generating companies are also required to provide the following details to the procurer /MPPMCL duly certified by the statutory Auditor:

xxxx

27. The generating companies shall provide the copy of the bids if any, floated for disposal of fly ash from their generating station and copy of all the agreements entered into with the fly ash procurer companies to the procurer / MPPMCL. The generating companies shall claim the actual expenses towards ash transportation on monthly basis with annual reconciliation based on the Annual Audited Accounts.”

- xvii. It is evident from the foregoing order of Hon'ble MPERC that the quantum of claims has not been considered by the Hon'ble Commission at all. Rather, the Hon'ble MPERC had directed that payment will be subject to satisfaction that the amounts claimed are a result of competitive bidding and offsets revenue from sale of fly ash. It is further brought to the notice of the Hon'ble Commission that MP Discom has not made any payment as yet. Therefore, the claim of the petitioner by no means has attained any finality even with respect to Unit-1.
- xviii. The petitioner in its reply dated 11.04.2022 has also mentioned that LAPL could not meet the 100% fly ash utilization targets since the setting up of the Plant. It was also mentioned that the ash pond bund had been raised by 9 meters so far (3 meters in three times) to cater to the continuous generation of fly ash and wet ash from the power plant. LAPL has already capitalized aggregate amount of approx. Rs. 46.24 Crore in its books of accounts of both Unit 1 and 2 in three stages towards raising of ash pond bund to accommodate the disposal of continuous ash generation, which was more than the utilization of ash. Therefore, approx. Rs. 23.12 Crore (50% of the total amount) has already been capitalized by LAPL on account of raising of ash pond bund in its books of accounts of Unit 2. Evidently, LAPL was aware of the geographical constraints and the difficulty in lifting of fly ash in the said area. In that view, LAPL must have formulated a budgetary allocation of ash dyke raising and maintenance. Pursuant to notification dated 25.01.2016, owing to lifting of fly ash in FY 2018-19 and FY 2019-20, it is certain that LAPL has saved amounts towards ash dyke repair and maintenance. Such savings ought to have been offset against the amounts claimed by them towards impact of issuance of notification dated 25.01.2016.
- xix. Without prejudice to foregoing, it is further submitted that if the Hon'ble Commission allows the principal claim of the petitioner, the petitioner shall not be entitled to carrying cost for the period of inaction by them. The petitioner has not intimated the impact of Change in Law to HPPC at the appropriate time and has also delayed approaching the Hon'ble Commission for no valid reasons. The conduct of petitioner smacks of malafides. The award of interest otherwise, also is the discretion of the Hon'ble Commission. The facts and circumstances in the present case warrant non-

award of any interest. The petitioner cannot be allowed to take advantage of its inaction. In that view, claim for carrying cost shall be rejected in entirety.

In view of the foregoing, it is prayed that the instant petition may be considered in light of the submissions made by the respondent in the present petition, in the interest of justice.

13. Further, the case was heard on 28.07.2022, wherein the arguing counsel of the petitioner was not present and the counsel present on behalf of the petitioner requested for adjournment which was granted by the Commission and accordingly, the case was adjourned to 03.08.2022.

14. **Written note of Arguments dated 09.08.2022 filed by the Petitioner to the objections raised by HPPC in its Written Submissions dated 27.05.2022:**

i. The present written submissions are filed pursuant to the order dated 03.08.2022 of this Hon'ble Commission hereby the Hon'ble Commission has allowed the Petitioner to file its written note of arguments to the objections/arguments raised by HPPC. It may be noted that HPPC had filed its final written submissions dated 27.05.2022 before this Hon'ble Commission. The objections/issues raised by HPPC are summarized in Para 4 of the said written submissions. The said objections/issues as well as the petitioner's response to the same are as under: -
HPPC's Objection/Issue

a. Was the Petitioner bound to notify the occurrence of 'Change in Law' event and the steps taken by it prior to the incurrence of such cost?

And

b. Whether the conditions of PSA/PPA with respect to 'Change in Law' applicable to the parties?

[Ref: Page 4-8 of HPPC's written submissions dated 27.05.2022]

ii. It is an admitted position between the parties that the notification dated 25.01.2016 issued by the MoEFCC is a Change in Law event. The objection of HPPC is that the provisions of the PPA/PSA require a Change in Law notice to be issued by the Petitioner & the Petitioner has not sent a 'valid notice' in terms of the said provisions of the PPA/PSA. It is therefore apparent that the objection of HPPC is not that no notice was sent by the Petitioner notifying the said Change in Law event. HPPC admits that the Petitioner had sent a notice dated 04.05.2016. However, it contends that the said notice was not a 'valid notice' as it did not intimate any estimated amount, calculation, actual details etc. and is a notice simplicitor. [Ref. Para 8 of HPPC's written submissions dated 27.05.2022]. HPPC has further contended that

in the event the Change of Law claim is allowed the same would set a wrong precedent and may prejudice the rights of HPPC adversely.

Petitioner's Response

- iii. It is submitted that the petitioner has complied with the provisions of the PPA/PSA relating to Change in Law notice. Admittedly, the petitioner has issued notice of change in law event to PTC, who in turn has issued similar notice to HPPC. HPPC has admitted that the petitioner had sent a notice i.e. notice dated 04.05.2016 for the subject change in law event and such notice was received by it, however, it contends that the said notice did not intimate any estimated amount, calculation, actual details etc. and is therefore not in compliance with Clause 12.3.2 of the PSA. More specifically, the contention of HPPC is that the petitioner did not inform the estimated amount prior to incurring any expenditure.
- iv. In this regard, it is submitted that in the year 2016, after the issuance of the MOEFCC notification dated 25.01.2016, the petitioner started consultations with the nearby cement companies for disposal of fly ash. However, as brought out in the Rejoinder Affidavit dated 10.12.2021 already filed by the petitioner, the cement companies were lifting fly ash from the power plants nearer to their cement plants. After a lot of persuasion and follow up with various cement companies, it was in the Financial Year 2018-19 only, that the cement companies gradually started making arrangements for lifting of fly ash. It is submitted that the exact amount under the change in law event of the said MOEFCC notification cannot be pre-estimated as the effect is ongoing during the life of plant as the MOEFCC notifications are to be mandatorily complied by all generating companies (both Govt. owned and private owned) across India. The amount to be incurred for disposal of fly ash cannot be pre-estimated as the fly ash lifting by cement companies is irregular and varying and depends on their requirements for production of cement which is again dependent upon the supply-demand scenario of cement. The generating company does not have any control on the ash lifting done by cement companies as can be seen clearly from the Statutory Auditor's certificate (Page 137 of the petitioner) that yearly cost incurred has been varying since the commencement of fly ash lifting by cement companies. [Ref. Paras 24-27 of the Rejoinder dated 10.12.2021]
- v. In furtherance of the above, it is pertinent to note that on 18.07.2017, the petitioner had filed a petition bearing Case no. HERC/PRO - 54 of 2017 before this Hon'ble Commission seeking approval for installation of FGD and SCR systems in its Unit 2 to reduce the emissions as a change in law event under another MOEFCC notification dated 07.12.2015. In the said petition, this Hon'ble Commission had passed an order dated 15.11.2018 holding as under:

“Commission’s Analysis & order

9.

The Commission has examined the contents of the Petition filed/ additional submissions made by the parties and observed that the contention of the Respondent i.e. HPPC regarding the jurisdiction of this Commission to decide the issue, has some force.....Till all these issues are settled, the Commission finds itself unable to decide the issue of jurisdiction.

10. In view of the above and without going into the merits of the case, the petition is disposed of for want of jurisdiction of the Commission in the matter.”

- vi. The petitioner in order to have clarity on the issue of jurisdiction preferred an Appeal being Appeal no. 114 of 2019 before the Hon’ble APTEL against the aforesaid order dated 15.11.2018. The Hon’ble APTEL vide order dated 30.06.2021 held that this Hon’ble Commission has the necessary jurisdiction to decide the change in law events and directed this Hon’ble Commission to decide the said petition on merits noting that the power supply to the respondents continued to be under the directions of the Hon’ble Supreme Court. It was on account of the uncertainty with regard to jurisdiction (created due to the objection raised by HPPC) that the petitioner did not have any occasion to file a petition for reimbursement of fly ash expenses as a change in law event pursuant to MOEFCC notification dated 25.01.2016, when the appeal on the issue of jurisdiction of this Hon’ble Commission itself on the change in law events was pending before the Hon’ble APTEL.
- vii. It is an admitted position that the petitioner vide its notice dated 04.05.2016 (Annexure P-5 of the Petition) had intimated to respondent no. 2 and in turn to HPPC the Change in Law event and had also communicated that the petitioner was in discussion with various fly ash consumers for the associated costs which has to be reimbursed to the petitioner as per the said change in law event. Accordingly, the petitioner had sufficiently intimated to HPPC by providing it the precise details of the applicable Change in Law. This is substantial compliance & therefore, the petitioner cannot be non-suited on the ground of notice, as alleged by HPPC. It is a well-settled law that as long as there is substantial compliance, the same is valid.
- viii. Further to the said letter, the Petitioner on 11.02.2021 (Annexure P-6 (Colly.) at Page 134 of the petition) furnished complete details pertaining to the expenses incurred on account of the aforesaid Change in Law event and accordingly sought reimbursement of the same. It is pertinent to note that the said letter contains all the relevant information required for the purposes of change in law claim. HPPC in fact replied to the letter dated 11.02.2021 and requested for certain additional details which were duly furnished by the petitioner vide letter dated 19.04.2021. It is

pertinent to note that these details were never disputed by HPPC. Accordingly, vide its letter dated 02.08.2021 (Annexure P-9 (Colly.) at Page 146 of the petition), HPPC communicated to PTC/petitioner to have the said claims in relation to change in law adjudicated through appropriate commission i.e. this Hon'ble commission. Therefore, this somersault by HPPC in the present proceeding is impermissible. Further, it is submitted that under the PSA, the petitioner is not required to send estimated amount of a change in law event prior to incurring any expenditure. The petitioner managed to negotiate extremely competitive prices in relation to the costs incurred by it pursuant to the Change in Law event. Furthermore, the gap between the notices dated 04.05.2016 and 11.02.2021 is not even relevant, as the petitioner has raised its claims/exercised its rights and filed this petition within the limitation period.

- ix. In any event of the matter, the parties are governed and bound by judgment dated 13.01.2014 passed by the Hon'ble APTEL in Appeal no. 65/2013 by which the Hon'ble APTEL held that supply of power by the petitioner to HPPC through respondent no. 2 is de hors the PPA/PSA. Thus, the reliance placed by HPPC on the provisions of the PPA/PSA is erroneous. [Copy of the judgment dated 13.01.2014 is annexed with written submissions dated 11.03.2022 filed by the petitioner]

Issue (c)- Whether the quantum claimed is prudently expended and takes into consideration the savings/revenue on account of notification dated 25.01.2016? [Ref. Paras 10-19 of HPPC's Written Submissions dated 27.05.2022]

Petitioner's Reply

- x. In relation to the objection raised by HPPC disputing the quantum of amount claimed by the petitioner, the petitioner reiterates that it is claiming for reimbursement of only 50% of the total expenditure on transportation of fly ash in accordance with the MoEFCC notification. It is wrong on the part of HPPC to state that in the claim raised in the petition, no segregation has been made as regards the break-up of the cost claimed and in the absence of details, it is not clear whether the transportation cost claimed is 50% or 100%. In the petition, the petitioner has referred to and annexed Statutory Auditor's Certificate (Annexure P-6 (Colly.) of the Petition at Page 137). It is submitted that the cost incurred and claimed by the petitioner is the petitioner's share which is 50% of the total transportation cost incurred. The balance 50% transportation cost is incurred by the cement companies. The cement companies make arrangements for transportation of fly ash either directly or through transport companies. The MOEFCC notification dated 25.01.2016 being a change in law event, the cost incurred by the petitioner have to

be reimbursed by HPPC. Further, the petitioner has already placed on record detailed information and documents in relation to the transportation costs incurred by it which includes the invoices (Annexure P-3 (Colly.) of the Rejoinder) raised by the Cement Companies, Reports related to Fly Ash utilization submitted to CPCB (Annexure P-4 (Colly.) of the Rejoinder) and Statutory Auditor's Certificate (Annexure P-6 (Colly.) of the Petition). Further, certification of route travelled for disposal of fly ash is not even relevant for the purpose of the present claim as the rates were decided through competitive bidding procedure. Thus, the objection raised by HPPC, apart from being vague and unpecific is not justified and is untenable, as it has already been verified (from the invoices raised by cement companies) and also certified by the Statutory Auditor in the Petitioner's books of accounts during the specified period.

- xi. HPPC has submitted that there is no mention of the distance travelled for ash transportation in Petitioner's letter dated 11.04.2022 (Para 10 of HPPC's written submissions dated 11.03.2022). In this regard, it is pertinent to note that the bids were invited on the basis of fixed rate in Rs./MT of fly ash transportation cost and not on the basis of distance travelled or on per km basis. Bidders submitted their offers for offtake of fly ash in accordance to the terms of bids i.e. on the basis of fixed rate in Rs./MT of transportation of fly ash irrespective of the distance travelled between petitioner's plant and cement companies. Transportation contracts of fly ash were finalized by cement companies only and Petitioner's role was limited to the agreed unit rate with cement company (in the form of freight subsidy). Therefore, there does not arise any occasion to specifically indicate the distance travelled for transportation of fly ash. It is further pertinent to note that the requirement/utilization of fly ash for compliance of applicable MoEF&CC notification on utilization of fly ash through supply of fly ash to respective cement companies depends on demand /supply scenario in the respective zone it is located which formed the basis of bidding as fixed rate in Rs./MT rather than on the basis of distance travelled. As a result of above bidding, the net rate as arrived was Rs. 201/MT (without GST) which remained same for all the three cement companies i.e. (all of which are reputed corporations and not fly by night operators). As there is no relevance of distance travelled under the above bidding process, the petitioner did not have to indicate the distance of cement companies from its power plant as alleged by HPPC. However, on a query from HPPC vide its letter dated 31.03.2021, the petitioner submitted the To and Fro distance travelled by the ash bulkers to cement companies from petitioner's power plant in its letter dated 19.04.2021.

- xii. As regards to factors that were considered for arriving rate of Rs. 201/MT (Paras 11&12 of HPPC's written submissions dated 27.05.2022), it is submitted that the offers of cement companies were evaluated and multiple rounds of negotiations were held with all the participating bidders and as a part of a competitive bidding process, the lowest price discovered was Rs. 201/MT. The terms and conditions on which the agreement/Contracts executed have already been provided to HPPC as part of the agreements/Contracts. Further since the claim of transportation cost is not dependent on the basis of the distance travelled between the petitioner's power plant and cement companies, the same was not required to be mentioned in the contract /agreements.
- xiii. As regards to allegations made by HPPC that the petitioner was bound to pay only Rs. 152 as per notification dated 25.01.2016 (Paras 11 and 12 of HPPC's written submissions dated 27.05.2022), it is to be submitted that Rs. 201/MT which has been arrived as lowest cost after several rounds of negotiation during the bidding process is not the total cost of transportation of fly ash as incurred by the cement companies, rather it is freight subsidy as offered to cement companies to encourage fly ash utilization by the Power Plants. The total cost incurred for transportation of fly ash as paid by the cement companies to the transporters is much more than the cost borne by the power generators in the form of freight subsidy. For the sake of example/clarification, reference can be made to the email communications dated 20.02.2018 during bid evaluation/negotiation process between the petitioner and Emami Cements Ltd (now Nu Vista Corp Ltd) wherein Emami Ltd stated that:-
"--the freights of flyash transportation from lanco Power to ECL Risda Plant and M/s Durga Carrier given the L1 rates i.e Rs. 705 per Ton. Accordingly, we will engage Durga Carrier for transportation of flyash from Lanco Power to ECL Risda Plant. As per proposal, please arrange to release freight subsidy @ 320/per ton for trial order of 500 tons to start flyash.
(Page 432 of Petitioner's Rejoinder dated 10.12.2021)
- xiv. After several rounds of negotiations, the freight subsidy of Rs. 320/Ton was reduced and finalized at Rs. 201/Ton on account of efforts made by the petitioner (Ref. email 20.02.2018 above). The above details show that petitioner has undertaken due prudence check before arriving at the above price of Rs. 201/MT and made bonafide efforts to arrive at lowest price. The above also shows that the petitioner has not incurred total cost of transportation, rather only a part of cost is borne by the petitioner which is not more than 50% of the total transportation cost and it complies the MoEF&CC notification dated 25.01.2016. Hence the allegation made by HPPC that petitioner is bound to pay Rs. 152/Ton and failed to show transparency and

strict compliance of MoEF&CC notification dated 25.01.2016 is baseless, erroneous and misconceived.

- xv. As regards the allegations pertaining to the bidding process adopted by the Petitioner (Para 13 of HPPC's written submissions dated 27.05.2022), it is submitted that each cement company has multiple sources of fly ash and logistics arrangements for its transportation. They are free to express interest / lift the fly ash from a thermal power plant based on their own considerations. In order to dispose fly ash, the petitioner had invited offers from cement manufacturers interested in lifting of fly ash within a radius of 300 km from petitioner's plant. The offers were evaluated and multiple rounds of negotiations were held with all the participating bidders as a part of a competitive bidding process to discover the lowest price. Contracts were executed on the lowest offer basis (i.e. @Rs 201/ MT).
- xvi. With regard to the issue raised by HPPC about bonafide effort for sale of fly ash by the petitioner, it is submitted that before proceeding the case for freight sharing, the petitioner had approached all the nearby cement companies for sale of ash, but no agency/company agreed to lift the fly ash on chargeable basis. Fly ash requirement for cement plants is only approximately 25% of total ash generation in entire Chhattisgarh region. Due to this reason, cement plants were reluctant to lift fly ash free of cost and started demanding freight subsidy.
- xvii. With regard to the compliance of the advisory of Ministry of Power dated 22.09.2021 and 22.02.2022 on the guidelines for Supply of Ash to the perspective user agencies (Para 14 of HPPC's written submissions dated 27.05.2022), the Petitioner floated tenders for sale of Ash through competitive bidding process on chargeable and free basis on 25.04.2022 and 09.05.2022 respectively. However, no proposal received for supply of Ash on chargeable as well as free basis. A copy of the tender documents enclosed as Annexure- A. The outcome of this bidding process reflects the Ash demand and mismatch scenario in the region. Hence the allegation of HPPC that the cost incurred is not fair and wise is baseless.
- xviii. In furtherance of the above, it is submitted that the petitioner is supplying only 5% power to Chhattisgarh, with the major power share of 95% being supplied to Haryana Discoms. The petitioner has recently filed a petition claiming reimbursement of fly ash before the Chhattisgarh State Electricity Regulatory Commission. The petitioner does not understand the logic of that the transportation rates can best be verified by Chhattisgarh Discoms. It tantamount to submitting that Chhattisgarh Discom should be called as a witness in the present proceeding. Such a submission cannot be countenanced. It is submitted that the rates of transportation cost for which agreements were signed with transporters were much

lower than the initial quotes received from cement plants in the bidding. In this regard, a power plant in Chhattisgarh i.e. DB Power Ltd. has been regularly receiving reimbursement of fly ash based on CERC order dated 06.01.2020 passed in Petition no. 208/MP/2020 (please refer Para 50 and 51). Therefore, this petition cannot be kept in abeyance, as contended by HPPC. It is further submitted that State of Chhattisgarh has not notified any rates for fly ash transportation. HPPC has not placed any such notification notifying the rates by the Chhattisgarh Govt. on record of the present proceeding. Further, HPPC's contention with regard to MP Discoms having not paid any amount pursuant to the order of the MPERC, it is submitted that the claim of the petitioner is being processed by the MP Discoms. In any event, such processing of claim by another Discom has no bearing. The relevant point is that the MPERC has allowed the petitioner's claim of MoEFCC's notification being a change in law event.

- xix. As regards to raising of Ash Dyke by 9 meter and cost incurred to the extent of Rs. 46.24 Cr., HPPC has alleged that the petitioner must have been aware of the geographical constraint and difficulty in utilization of Ash at the time of setting the plant for formulating budgetary allocation for Ash dyke and its maintenance (Para 18 of HPPC's written submissions, dated 27.05.2022).
- xx. In this regard, it is submitted that the thermal power plant of the petitioner was implemented in the year 2007-10 in accordance with the prevailing norms of environment including Ash utilization as stipulated by appropriate authorities. The ash utilizations were also planned as per the norms as applicable during the plant set up period.
- xxi. It is submitted that the petitioner's power plant is in Korba and Champa cluster region, due to proximity to coal mines of SECL, there is approx. 20,000 MW of installed and operating capacity in this region which includes mega Thermal Power Plants (TPPs) like KSK Mahanadi, NTPC-Sipat, NTPC Korba, CSEB-Marwa, CSEB-Korba West, CSEB-Korba East, DB Power, RKM Power, Adani Korba West, BALCO, ACB group's TRN Energy and Maruti Clean Coal Power Ltd. etc. In these TPPs, on an average around 1,00,000 MT of Ash is generated on a daily basis whereas the requirement of utilization of fly ash in the cement plants is limited to around 9000 -10,000 MT only. The cement plants in the Chhattisgarh state have been selectively picking up those TPPs who are nearer to them for ash utilisation due to lower transportation costs involved which has reduced/affected the lifting of fly ash in spite of the petitioner having signed agreements/tie-up with such cement plants. The biggest hindrance is that the entire annual fly ash generation in Korba cluster is about 380 Lakh MT, whereas the annual requirement of fly ash by the

cement plants (major utilizer of fly ash) is about 29 Lakh MT only which comes to meagre 7.6 %. Due to the demand-supply gap of fly ash and above constraints beyond the control of the petitioner, very small percentage of ash generated has been utilized against the demand of fly ash from the cement plants.

- xxii. The petitioner could not meet the 100% fly ash utilization targets due to the above specified various practical constraints and therefore it had no choice but to dispose the fly ash slurry into the ash pond. Resultantly, the ash pond got filled up in 2017. Thereafter, the ash pond bund had been raised by 9 meters so far (3 meters every time for three times) to cater to the continuous generation of fly ash and wet ash from the power plant.
- xxiii. The petitioner made bonafide efforts at all times since the commissioning of its power plant in 2010 to maintain/increase ash utilization as per the applicable norms. Hence the allegation of HPPC, for the petitioner to be aware of geographical constraint and formulating budgetary allocation during plant set up is an afterthought, erroneous and misconceived.
- xxiv. In relation to HPPC's objection in relation to grant of carrying cost for the period of alleged inaction by the petitioner (Para 19 of HPPC's written submissions dated 27.05.2022), it is submitted that the petitioner has approached this Hon'ble Commission within limitation and hence, there is no inaction on part of the petitioner. Further, the legal position as regards carrying cost/interest is well settled that it is based on the principle of time value of the money and principle of restitution. Therefore, HPPC's objection on grant of carrying costs is unfounded.
- xxv. The petitioner reiterates and reaffirms the contents of its petition, the rejoinder dated 10.12.2021 as well as the written submissions dated 11.03.2022 filed by it in the present proceeding.

Commission's order

- 15. The Commission heard the arguments of the parties at length as well as perused the written submissions placed on record by the parties. Upon perusal of the submissions of the parties and the documents referred to and placed on record, the Commission at the outset observes that the petitioner has given conflicting submission on two issues viz. the period of claim and applicability of the terms of the PPA, as explained hereunder: -
 - 15.1 The petitioner in its petition has claimed the additional cost incurred towards the fly ash transportation quantity for the period from the FY 2017-2018 till December, 2020. However, while addressing the objection raised by HPPC regarding the claim being barred by

limitation, the petitioner in its rejoinder dated 10.12.2021 submitted that the claimed cost is for the period from the FY 2018-19 onwards. The Hon'ble Supreme Court in the matter of Andhra Pradesh Power Corporation Committee and Others vs Lanco Kondapalli Power Ltd and Others [2016 (3) SCC 468] has held as under: -

“in the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of the nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceedings such as arbitration, on account of limitation.”

Further, the Hon'ble CERC in the matter of Damodar Valley Corporation Ltd. vs. Madhya Pradesh Power Management Company Limited (MPPMCL), dated 29.07.2020 (Petition No. 101/MP/2019) held that the first accrual of right to sue in the declaratory suit relating to the MoEF & CC Notification would occur when the petitioner incurs expenditure pursuant to the said notification. The petitioner has claimed such cost from the FY 2017-18 and onwards. As per the same, the petitioner ought to have raised the claim within three years thereon.

In the light of the above judgement, the Limitation Act is applicable in the case of the proceedings or claims before the Commission. The limitation period for instituting the claim to obtain any declaration is three years from the date when the right to sue first accrues. The first accrual of right to sue in the declaratory suit relating to the 2016 Fly Ash notification would occur from the date of the notification. However, admittedly, the present petition has been filed way beyond the period of three years. The petitioner has filed the present petition with affidavit dated 01.09.2021, claiming cost since the FY 2017-18, under the notification issued on 25.01.2016. The petitioner has claimed cost for transportation of fly ash for the very first time from the respondent vide letter dated 11.02.2021, which is way beyond the limitation period of three years. The reference made by the petitioner to letter dated 04.05.2016, intimating the issuance of Fly Ash notification, 2016 was in fact issued to the respondent no. 2, i.e. PTC India Ltd, intimating that they are in discussion with various fly ash consumers for their expression of interest along with the cost of services including transportation cost to meet the new notified environmental norms, which shall be communicated. However, no communication with respect to issuance of such expression of interest or steps taken for utilization of fly ash was ever intimated to the respondents.

In order to counter the claim of HPPC on this account, the respondent in its reply dated 10.12.2021 averred that such costs have been claimed from the FY 2018-19 and the present petition is within the period of limitation.

However, the Commission has not gone further into the details in view of the orders dated 23.03.2020 and 23.09.2021 passed by the Hon'ble Supreme Court permitting the relaxation in the period of limitation due to the outbreak of the COVID19 pandemic.

15.2 The petitioner in its petition claimed the additional cost incurred towards fly ash transportation as the 'Change in Law' event, in terms of the 'Change in Law' Clause under the PSA read with Implementation Agreement. (emphasis supplied). However, while addressing the objection raised by HPPC regarding the breach of condition prescribed under clause 12.3 of the PSA executed between the parties w.r.t. notifying the change in law by the petitioner, the petitioner in its rejoinder dated 11.03.2022, retracting from its submissions in the petition submitted that the PSA stands terminated and the provisions of PSA are not applicable.

16. In the light of the above preliminary discussions, the Commission frames the following issues for its deliberations and decisions:-

Issue No. 1. Whether the terms of PSA/PPA are enforceable in view of the Hon'ble Supreme Court's Judgement dated 16.12.2011.

Issue No. 2. Whether MOEF&CC notification under which LAPL has claimed the present relief is a 'Change in Law'.

Issue No. 3. Whether the petitioner has complied with the terms of PSA/PPA.

Issue No. 4. Whether the procedure for 'Fly Ash' disposal was followed.

The Commission has carefully perused the terms of PSA, MOEF&CC notification issued from time to time and the orders passed by the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal for Electricity (APTEL) as well as the obligations of the parties hereto, facts and circumstances of the case and the Regulations occupying the field. The findings of the Commission on the issues framed above are as follows: -

Issue no. 1. Whether the terms of PSA/PPA are enforceable in view of the Hon'ble Supreme Court's Judgement dated 16.12.2011.

The petitioner has claimed the additional cost incurred towards fly ash transportation as the 'Change in Law event', in terms of the 'Change in Law' Clause under the PSA read with Implementation Agreement. However, while addressing the objection raised by HPPC regarding the breach of condition prescribed under clause 12.3 of the PSA executed

between the parties w.r.t. notifying the change in law by the petitioner, the petitioner first time in its rejoinder dated 11.03.2022, retracting from its submissions in the petition submitted that the PSA stands terminated and the provisions of PSA are not applicable.

The petitioner in its changed version contended that the terms and conditions of the PSA/PPA are not applicable as the power is being supplied to Haryana under the order(s) of the Hon'ble APTEL and the Hon'ble Supreme Court in the narrow confines of continuation of power supply to Haryana and tariff determination for the disputed period. To the contrary, the respondent laid emphasis on the fact that the Hon'ble Supreme Court has stayed the proceedings of the challenge to the termination of the PPA by Haryana Discoms before the State Commission.

In view of the rival contentions, the Commission observes that Lanco entered into a Power Purchase Agreement dated 19.10.2005 (as amended vide Supplemental Agreement dated 18.09.2006) for sale of 273 MW from its 300 MW thermal power plant unit II in the state of Chhattisgarh to PTC for a period of 25 years from the COD of the Project at a levelised capped tariff rate of Rs.2.32 per unit. Lanco and PTC together then identified the Haryana Distribution Licensees for sale of the above quantum of power. Pursuant to the above, PTC entered into Power Sale Agreement dated 21.9.2006/14.09.2007 with the Haryana Utilities for onward sale of power made available by Lanco under the Power Purchase Agreement dated 19.10.2005. LAPL terminated the PPA with PTC vide letter dated 11.01.2011. A petition no. 6 of 2011 was filed by the Haryana Utilities before the State Commission on 13.03.2011 challenging the unilateral termination of the Power Purchase Agreement by Lanco, contrary to the provisions of the PPA.

Further, an Appeal No. 15 of 2011, was filed in the Hon'ble Appellate Tribunal for Electricity (APTEL), wherein Hon'ble APTEL passed an interim order dated 23.03.2011 putting in place interim arrangement for supply of power from the petitioner's plant to the respondents as well as to the State of Chhattisgarh. The relevant extract of the judgement of the Hon'ble APTEL dated 23.03.2011 is as under:-

"10.

(d)..... However, we do no want to enter into the merits of the matter with regard to termination of PPA in this matter.

11. Thus, we are inclined to grant an interim stay of impugned order to the extent indicated above. Accordingly, the Appellant is permitted to supply 35% of power to Chhattisgarh Government Company and is directed to supply the balance power to the PTC (R-3) so that PTC (R-3) can discharge its obligation to the Power General Corporation (R-2) in pursuance of the PSA entered into between them."

Thus, the Hon'ble APTEL has not dwelt into the merits of termination of PPA and the continuation of supply of power was ordered in order to enable the PTC to fulfil its obligation under the PSA, which is the outcome of valid PPA between the parties.

Thereafter, in Civil Appeal No. 10327/201, filed against the aforesaid order of the Hon'ble APTEL, the Hon'ble Supreme Court passed an interim order dated 16.12.2011 wherein the arrangement as per the interim order dated 23.03.2011 of the Hon'ble APTEL was continued. By order dated 16.12.2011, the Hon'ble Supreme Court in Civil Appeal No. 10329 of 2011 directed as under:

"Pending hearing and final disposal of the appeal, we issue following directions:

Judgment In A.No.107 of 2015 & 117 of 2015

(i) Lanco will continue to supply electricity as per the interim Order of the Tribunal dated 23rd March, 2011;

(ii) Without prejudice to the rights and contentions of the parties and pending further orders, the State Electricity Regulatory Commission, Haryana will fix/approve the tariff for sale and purchase of power for the period in question about which there is a dispute between Lanco and PTC.

The State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned Orders passed before today, by the Appellate Tribunal and/or any other Authority in this case. All arguments on both sides are kept open. Liberty is given to the parties to make a proper application supported by relevant documents before the State Electricity Regulatory Commission, Haryana, within four weeks".

The petitioner has further averred in its submissions dated 09.08.2022 that the parties are governed and bound by the judgement dated 03.01.2014 passed by the Hon'ble APTEL in Appeal No. 65/2013 which upholds that the supply of power by the petitioner to the HPPC through PTC is de hors the PPA/PSA.

The Commission observes that the issue before the Hon'ble APTEL which led to the passing of the judgement dated 03.01.2014 was whether the capped tariff in the PPA i.e. Rs. 2.32 per unit as mentioned in the PPA shall prevail. In this context, the Hon'ble APTEL directed the State Commission to re-determine the tariff in the light of the interim arrangement de hors the PPA, pending disposal of the Appeal in the Hon'ble Supreme Court. The Hon'ble Supreme Court has not yet decided on the issue of unilateral termination of the PPA by LAPL; but, keeping in view the termination, as also other facts and circumstances of the case regarding viability as pointed out by the petitioner, directed supply to continue but at a viable tariff as an interim arrangement and not as per the PPA. Undoubtedly, the decision on unilateral termination of PPA by M/s. LANCO, is pending

before the Hon'ble Supreme Court. But, the supply has been restored as an interim arrangement and the continuity of supply of power has to be governed by certain terms and conditions. The decision of the Hon'ble Supreme Court on the continuation of PPA/PSA shall be applicable w.e.f. the date of the decision and not from the period of power supply, made under the interim arrangement.

In view of the above discussions, the inevitable conclusion which is liable to be drawn is that the petitioner is bound to comply with other terms and conditions of the PPA except for continuation of power supply in the future period and tariff determination.

Accordingly, the Commission answers the issue framed above in affirmative i.e. the terms of PSA/PPA are enforceable, for the period of interim supply of power.

Issue No. 2. Whether MOEF&CC notification under which LAPL has claimed the present relief is a 'Change in Law'.

The Commission observes that clause 12.1 of the PSA defines 'Change in Law' as under:-

- (i) *the adoption, promulgation, amendment, re-enactment or repeal of any law or a change in its interpretation, or*
- (ii) *the imposition by any Governmental instrumentality of any material condition in connection with the issuance, renewal, modification, revocation or non-renewal (other than for cause) of any consent after the date of this agreement,*

The Environment Protection Act, 1986 (hereinafter referred to as 'Act') was enacted by the Government of India to provide protection and improvement of environment and other matter pertaining to the environmental norms. Under Section 3(2)(v) of the Act, the Central Government is empowered to take such measures which include the restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Thereafter, the Ministry of Environment and Forests, Govt. of India in exercise of its powers under Section 3(2)(v) and Section 5 of the Act, issued directions for "Utilisation of fly ash from coal or lignite based thermal power plants" **vide Notification dated 14.09.1999 (hereinafter referred to as 'Fly Ash Notification 1999')**. The said Notification prescribed amongst others the mechanism for utilization of fly ash generated from coal or lignite based Thermal Power Plants (TPP). It was the responsibility of the petitioner to have 100 percent utilization of Fly Ash from the beginning. The Fly Ash Notification 1999 imposed complete financial liability on the TPPs to make available fly ash which included making available the

same for inter alia various activities from the manufacture of cement for construction of roads and dams.

Similarly, vide notification dated 27.08.2003, complete responsibility to ensure the utilization of fly ash was fixed for Thermal Power Plant. Therefore, this notification did not alter or modify the responsibility to make available ash without payment or any consideration for the purpose of manufacturing ash based products such as cement, concrete blocks, bricks, panels or any other material or for construction of roads, embankments, dams, dykes or for any other construction activity was completely and solely devolved on the Thermal Power Plant.

Vide, Fly Ash notification 2009, dated 03.11.2009, the responsibility devolved on the Thermal Power Plant for which they could not charge any consideration or payment was substituted with allowing the thermal power plants for selling fly ash subject with the conditions. This permitted the TPPs to generate funds from the sale of fly ash. The notification stipulated the percentage utilization of Fly Ash with the target dates ending with 100% utilization by five years from the date of issue of the notification i.e. 03.11.2009.

Thereafter, the MoEF & CC, Govt. of India vide notification dated 25.01.2016, made certain amendments to the Fly Ash Notification 1999 and incorporated, inter alia, the following provisions:-

“(10) The cost of transportation of ash for road construction projects or for manufacturing of ash based products or use as soil conditioner in agriculture activity within a radius of hundred kilometres from a coal or lignite based thermal power plant shall be borne by such coal or lignite based thermal power plant and the cost of transportation beyond the radius of hundred kilometres and up to three hundred kilometres shall be shared equally between the user and the coal or lignite based thermal power plant.”

The Ministry of Power, Government of India, vide letter dated 22.09.2021 recognised fly ash as the valuable commodity and framed the following guidelines for disposal of the same:-

- i) The power plants shall provide the Fly Ash to end users through a transparent bidding process only.
- ii) If after bidding/auction, some quantity of Fly Ash still remains un-utilized, then only, it could be considered to be given free of cost on first come first serve basis, if the user agency is willing to bear the transportation cost.
- iii) If ash remains unutilised ever after the steps taken in paras 1 and 2 above, Thermal Power Plant (TPP) shall bear the cost of transportation of fly ash.

- iv) The end users shall be obligated to source the fly ash from the nearest TPPs to reduce the cost of fly ash transportation. If the nearest TPP refuses to do so, the end user project shall approach the Ministry of Power for appropriate directions.
- v) The transportation cost wherever required to be borne by TPP, shall be discovered on competitive bidding only. Thermal Power Plants shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50km, which may be used for the period.
- vi) The power plants may offer fly ash subject to their technical restrictions such as all precautions required for Dyke Stability and Safety etc. The power plants having lower ash utilizations shall make all efforts to increase the fly ash utilization.

Accordingly, the MoEF & CC, Govt. of India issued notification dated 31.12.2021 followed by a letter dated 22.02.2022, issued by Ministry of Power (MoP), specifying the revised procedure to be followed for disposal of fly ash. The salient features of the said notification and MoP letters are as under:-

- i) The provisions of supply of ash free of cost and free transportation is to be applicable only if thermal power plant serves a notice on the construction agencies/mine owner for the same.
- ii) Ash is emerging as a valuable commodity and so giving it free, and also meeting the transportation costs will **lead to malpractices**. Therefore, providing such a valuable commodity through bidding process would help in providing the cheaper power to the consumers. In order to maintain transparency and to restrict malpractices, competitive bidding process is the most suitable method to determine the rate of supply of goods and services. Therefore, it is necessary to streamline the procedure to dispose off the ash by thermal power plants (TPPs) in a transparent manner and also to monetize the sale of ash so as to reduce the tariff burden on the consumers.

On the date of Commercial Operation Date (CoD) of the Plant i.e. on 07.05.2011, the Fly Ash Notifications, 1999/2003/2009 were applicable and thus, no norms towards sharing of the transportation cost with the users of fly ash were envisaged. However, the responsibility of petitioner was fixed for 100% disposal of fly ash. The intention behind framing these notifications was 100% utilization of fly ash by the generator. Undoubtedly, the notification dated 25.01.2016 imposed cost of transportation of fly ash on the generator. But, it has been done because the generators were not discharging their obligations fixed in the earlier notifications i.e. 100% fly ash utilisation.

The petitioner has contended that its plant is situated in Korba and Champa Cluster region, where approx. 20,000 MW of thermal power plants are installed. In these TPPs on an average around 1,00,000 MT of Ash is generated on a daily basis whereas the requirement of utilization of fly ash in the cement plants is limited to around 9000-10,000 MT only. The Cement plants in the State of Chhattisgarh have been selectively picking up those TPPs which are located near to them for fly ash utilisation due to lower transportation costs involved which has reduced/affected the lifting of fly ash in spite of the petitioner having agreements/tie-up with such cement plants. Due to the demand-supply gap of fly ash and above constraints beyond the control of the petitioner, very small percentage of fly ash has been utilized against the demand of fly ash from the cement plants.

The Commission observes that the petitioner was well aware of the ground reality prevailing at the time of installation of power plant in that region. Further, the notifications issued by MoEF & CC in the years i.e. 1999/2003/2009, existing before the CoD of the plant, have fixed the responsibility of the generators to achieve fly ash utilization level at 100% up to 4 years from COD. The petitioner should have prepared the action plan to utilise fly ash in such circumstances at the time of conceiving the idea of installing a power plant in such a region. It should have prepared documents such as Environment Impact Assessment Report and Implementation Report and the Action Plan, details of fly ash generation vis a vis utilisation, the funds earmarked for disposal of fly ash as per directives of MoEF & CC etc. The petitioner was already under obligation to dispose off 100% fly ash and now vide notification dated 25.01.2016, the generator has been asked to bear certain cost of transportation of fly ash for disposal of fly ash i.e. an obligation which otherwise also the petitioner was required to perform at the time of executing the agreement for sale of power after making provision for the cost of disposal of fly ash. Keeping in view the above stated scenario, the petitioner can only seek reimbursement of some extra cost, which otherwise was not required to be incurred prior to the notification dated 25.01.2016. To this extent, the Commission answers the issue framed above in affirmative i.e. the MOEF&CC notification is a 'Change in Law' for the additional cost incurred i.e. the cost which the petitioner was required to incur under the notifications of 1999/2003/2009 vis-à-vis the cost incurred under the notification of 25.01.2016 and the same shall be allowed upto 22.09.2021 i.e. the date of instructions/guidelines of MoP wherein it has been observed that fly ash is emerging as a valuable commodity and it should be auctioned through a transparent bidding process. Thus new notification of MOP dated 22.09.2021 supersedes the earlier notification. Needless to add, the petitioner (for the period from 22.09.2021

onwards) may provide fly ash (including pond ash) for national assets creation projects (including NHAI) under their existing commitments based on transportation rates arrived at on the basis of transparent bidding/state schedule of rates, whichever is lower as per the Central Electricity Regulatory Commission (CERC) norms.

Issue No. 3. Whether the petitioner has complied with the terms of PSA/PPA.

Having decided issue no. 1 that the terms of PSA/PPA are enforceable, for the period of interim supply of power, the Commission now proceeds to examine Clause 12.3 of the PSA which reads as under -

“12.3 notices relating to ‘Change in Law’

12.3.1 In the event a ‘Change in Law’ notice is issued by the Company to PTC, PTC shall in turn forward such notice to the Purchaser as soon as it receives notice of such Change in Law event from the Company.

PTC shall respond to such ‘Change in Law’ notices after receipt of written consent or disagreement from the Purchaser. In all such cases, the Purchaser shall notify in writing its consent to or disagreement with such notice to PTC within a period of thirty (30) days of receipt of such notice from PTC. If the Purchaser does not respond within such thirty (30) day period, then the Purchaser shall have deemed to have agreed with such request for Change in Law Tariff adjustment. The Purchaser may also request PTC to issue a notice to the Company for claiming a Change in Law under this Section after it becomes aware of such Change in Law event, but not later than five (5) months after the date of notification of such Change in Law. In the event the Change in Law notice is issued by the Purchaser to PTC, PTC shall notify in writing its consent to or disagreement with such notice to the Purchaser within a period of forty five (45) days of receipt of such notice after duly consulting and receiving a written consent or disagreement from the Company and in accordance with the same.

12.3.2 A Change in Law notice issued by any Party must, inter alia, contain:

- (i) precise details of the applicable Change in Law;*
- (ii) the estimated impact of such applicable Change in Law;*
- (iii) the estimated Tariff Adjustment of the Trading Margin; and*
- (iv) all documents and calculations in support of Change in Law claim.*

12.4 PSA Supplementary Bills relating to Change in Law

In the event of increase in Tariff Payments resulting from a ‘Change in Law’, following the settlement with the Company, if required, the Company may raise a Supplementary Bill on PTC. PTC shall, in turn, claim the Tariff increase from the Purchaser through a PSA

Supplementary Bill and the Purchaser shall pay in accordance with Section 10.B. In the event of decrease in Tariff Payments resulting from a Change in Law, following the settlement with the Company, if required, PTC shall raise a Supplementary Bill on the Company and notify the Purchaser of such bill. Accordingly, the Purchaser may claim such decrease in PTC Tariff Payment through a PSA Supplementary Bill and PTC shall pay to the Purchaser within seven (7) days of payment of such amount by the Company to PTC.

12.4.1 PTC shall provide the Purchaser with a copy of the certificate, provided by the Company, stating that the adjustment in the Tariff Payment is directly as a result of the Change in Law and supporting documents to substantiate the same.

12.5 Dispute relating to Change in Law

In the event of any dispute regarding a Change in Law matter, the matter shall be resolved between PTC and the Purchaser in accordance with Section 14.7. It is acknowledged and agreed that in all such instances, PTC shall represent the Purchaser in any associated arbitration proceeding with the Company and any award(s) pursuant to such arbitration between the Company and PTC shall be binding upon the Purchaser.”

The petitioner has approached this Commission through the present petition seeking an order that the notification dated 25.1.2016 issued by MoEF&CC is a 'Change in Law' event. The petitioner had contended that MoEF&CC vide its notification no. S.O. 254 (E) dated 25.01.2016 has amended the Environment (Protection) Rules, 1986 which has imposed additional cost on account of fly ash transportation. The petitioner had submitted that due to said increase in the cost of operation and maintenance of the power plant, the cost of supply of power by the petitioner to the respondent under the PPAs has increased. Consequently, the petitioner has to be compensated as per the 'Change in Law' provisions. Per contra, the respondent submitted that Clause 12.3 of PSA provides conditions for notifying 'Change in Law', which have been breached by the petitioner.

The Commission observes that the petitioner, has referred to letters dated 04.05.2016 and 11.02.2021, to show that it had informed the respondents about the issuance of the MoEF & CC notification dated 25.01.2016. The Commission has examined the letter dated 04.05.2016 addressed by M/s. Lanco to M/s. PTC. A bare perusal of the said notice evince that the notice did not intimate any estimated amount, calculations, actual details etc. It was a notice to intimate that they are in discussion with various fly ash consumers for their expression of interest which shall be further communicated. The petitioner cannot be permitted to take the conditions of the PPA for a ride. The petitioner is bound to provide estimated amount details prior to incurring of any expenditure. It has intimated the amount expended on 11.02.2021 i.e. after 4 years and claims entitlement to the expended amount along with the interest. Whereas, under clause 12.3.2 of the PSA, a 'Change in Law' notice

should contain (i) precise details of the applicable Change in Law; (ii) the estimated impact of such applicable Change in Law; (iii) the estimated Tariff Adjustment of the Trading Margin; and (iv) all documents and calculations in support of the Change in Law claim. It was not expected from the effected party to give the exact calculations in support of the 'Change of Law' claim. But some approximations should have been provided by it. M/s. LANCO in its letter dated 11.02.2021 has given the approximate cost of Rs. 7.72 crores, for the period since FY 2018-19 to Dec., 2020.

Further, as per Clause 12.3.1 of the PSA a 'Change in Law' notice issued by the LANCO to PTC was required to be forwarded to the HPPC as soon as it received notice of such change in law event from the LANCO, which was not done.

The Commission is of the considered view that when the law or the contract executed between the parties prescribes a certain procedure to be followed, it cannot be allowed to deviate from the same and the party has to follow the procedure meticulously. It necessarily prohibits the doing of the act in any other manner than that which has been prescribed. A reading of the said provision i.e. clause no. 12.3 of the PSA, establishes the fact that meaning/interpretation of the said provision is plain and simple and the same by no stretch of imagination is open to more than one interpretation, which may require interference of the Commission or any court of competent jurisdiction to choose the interpretation which represents the true intent of the said clause. Hence, the effect of the same has to be necessarily given to it irrespective of the consequences. Accordingly, the Commission answers the issue framed above in negative i.e. the petitioner has not complied with the terms of PSA/PPA and has not notified the occurrence of "Change in Law" event, till 11.02.2021. Accordingly, the claim for the period till 11.02.2021 is not admissible.

Issue no. 4. Whether the procedure for 'Fly Ash' disposal was followed.

After having decided the issue no. 3 in negative, that the claim for the period till 11.02.2021 is not admissible, the issue framed i.e. '*whether the procedure for 'Fly Ash' disposal was followed*' is required to be examined in respect of the claim of the petitioner pertaining to the period after 11.02.2021. It is required to examine that whether the petitioner had followed due diligence and the relevant procedure for fly ash transportation in the petition i.e. transparent competitive bidding procedure.

The counsel for the petitioner in its arguments submitted that they had initiated a transparent competitive bidding procedure by sending inquiries and requesting for offers from various transporter service providers as well as cement companies for transportation and disposal of fly ash from its power plant to the respective locations of cement plants of

the cement companies. The petitioner received responses from various transporter service providers and cement companies. In line with the practice followed by the cement plants, the petitioner managed to get reduced price(s) and accordingly entered into individual agreements with various cement companies for taking of fly ash from the petitioner's power plant. Further, they confirmed that there is no scheduled rate of Govt. of Chhattisgarh applicable for transportation of fly ash from power plants within Chhattisgarh.

To the contrary, the respondent emphasised that the petitioner ought to have made arrangement in their premises to utilize the fly ash so as to reduce the transportation of ash. Also, if the petitioner would have utilized the fly ash, then transportation charges would not have been paid by them. The petitioner did not award the fly ash transportation contract through a transparent competitive bidding procedure. The petitioner never informed the respondent of the bidding process undertaken by it for awarding the fly ash transportation contract. No communication indicating the price so discovered through competitive bidding process, for award of contract to transport fly ash was made to the respondent. This notification came into effect five years prior to the filing of instant petition. There is a highly competitive market for fly ash and it appears that no attempt was made to generate revenue from the sale of fly ash when admittedly the same generates immense commercial value. Since CoD of the Plant (07.05.2011), i.e. before the MoEF&CC notification dated 25.1.2016, any revenue generated/ accumulated from fly ash sales ought to be offset against the alleged cost incurred for transportation of fly ash.

The Commission observes that the requisite procedure of the Fly Ash transportation was to adopt the competitive bidding. From the information submitted later by the petitioner, it is evident that (i) the petitioner had not utilized fly ash in accordance with previous notifications of MoEF&CC (ii) the contract for lifting of dry fly ash was not issued by way of competitive bidding; (iii) the negotiated rates were based on transportation cost of two-way distance; per MT rates paid to all cement companies is same, i.e. Rs. 201/- per MT and shows no nexus to the distance travelled; (iv) no attempts have been shown to sell fly ash. The petitioner has tried to justify the attempts he has made but nowhere has he gone for competitive bidding as mandated in the notification.

In view of the above, the Commission answers the issue framed above in negative i.e. proper procedure for 'Fly Ash' disposal was not followed.

Therefore, it is held that MOEF&CC notification is the 'Change in Law' event, so far as the additional cost is incurred i.e. the cost which the petitioner was required to incur under notifications of 1999/2003/2009 vis-à-vis the cost incurred under the notification of 25.01.2016. Such additional cost shall be admissible for the period

from the date of notification of the “Change in Law” event i.e. 11.02.2021 upto 22.09.2021 i.e. the date of instructions/guidelines of MoP wherein it has been observed that fly ash is emerging as a valuable commodity and it should be auctioned through a transparent bidding process. However, the recovery of the ash transportation expenses by the petitioner/generating company is subject to the fulfilment of the following conditions by the petitioner and verification by HPPC:-

i) Award of fly ash transportation contract through a transparent competitive bidding procedure. The petitioner shall provide a copy of the bids, if any, floated for disposal of fly ash from the generating station. Alternatively, the schedule rates of the State Government, shall be applicable.

ii) Details of actual additional expenditure incurred on ash transportation after MoEFCC notification dated 25.01.2016, duly certified by the Auditors, for the period from 11.02.2021 to 22.09.2021.

16. The present petition is disposed of in terms of the above order.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 30.09.2022.

Date: 30.09.2022
Place: Panchkula

(Naresh Sardana)
Member

(R.K Pachnanda)
Chairman