

(Published in Part - III Section 4 of the Gazette of India, Extraordinary)
Tariff Authority for Major Ports

G.No. 392

New Delhi,

22 October 2018

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal received from the Visakhapatnam Port Trust (VPT) seeking approval of handling charge for 10 additional cargo items to be handled by the Concessionaire viz. M/s. West Quay Multiport Private Limited (WQMPL) at WQ-6 berth a BOT Operator governed under Upfront Tariff fixation Guidelines of 2008 as in the Order appended hereto.

(T.S. Balasubramanian)
Member (Finance)

Tariff Authority for Major Ports
Case No. TAMP/44/2018-VPT

Visakhapatnam Port Trust

Applicant

QUORUM

- (i). Shri. T.S. Balasubramanian, Member (Finance)
- (ii). Shri. Rajat Sachar, Member (Economic)

O R D E R

(Passed on this 3rd day of October 2018)

This case relates to the proposal dated 19 September 2017 received from Visakhapatnam Port Trust (VPT) seeking approval of handling charge for 10 additional cargo items to be handled by the Concessionaire viz. M/s. West Quay Multiport Private Limited (WQMPL) at WQ-6 berth.

1.2. The Ministry of Shipping, Road Transport and Highways (MSRTH) announced the guidelines for upfront tariff setting for Public Private Participation (PPP) projects at Major Ports vide its communication No.PR-14019/25/2007-PG dated 12 February 2008. In compliance with the directions from the MSRTH under Section 111 of the Major Port Trusts Act 1963, this Authority notified the guidelines for upfront tariff setting vide Notification No.TAMP/52/2007-Misc. in the Gazette of India on 26 February 2008.

2.1. In pursuance of the said guidelines, this Authority has earlier passed an Order No.TAMP/39/2008-VPT dated 12 February 2009 approving upfront tariff for Multipurpose cargo berth no.WQ-6 at VPT following the upfront tariff guidelines of 2008. The Scale of Rates approved in said upfront tariff Order prescribes berth hire charge, handling charge, storage charge and miscellaneous charges on upfront basis for the said Public Private Partnership (PPP) Project of the VPT following the upfront tariff guidelines of 2008. The upfront tariff Order is for handling cargo items as listed below based on the proposal filed by the VPT at the relevant point of time.

- (i). CP Coke
- (ii). LAM Coke
- (iii). Steel
- (iv). Granite Blocks

2.2. The said Order was notified in Gazette of India vide Gazette No.26 dated 24 February 2009.

2.3. As per para 11.1 of the said Order dated 12 February 2009, the upfront tariff approved in the said Order is subject to automatic annual indexation at 60% of the WPI in line with clause 2.8 of the upfront tariff guidelines of 2008 issued by the Ministry of Shipping (MOS).

3.1. The VPT invited bids base on the upfront tariff approved by this Authority for the WQ-6 berth vide Order No.TAMP/39/2008-VPT dated 12 February 2009 and awarded the development of the West Quay-6 berth to the West Quay Multiport Private Limited (WQMPL) and has entered into a Concession Agreement dated 31 July 2010 with WQMPL in this regard for a period of 30 years for handling above listed cargo on Design, Build, Finance, Operate and Transfer (DBFOT) basis at VPT.

3.2. As per para 11.2 of the said Order, before commencement of operation, the WQMPL has approached this Authority for Notification of Scale of Rate (SOR) in its name. Accordingly, the SOR was notified in the name of WQMPL vide Order No.TAMP/49/2015-VPT dated 4 September 2015 for handling the four cargo items.

4.1. The VPT has filed a proposal dated 19 September 2017 before this Authority seeking approval for tariff for the following ten additional cargo items to be handled by the WQMPL at the same WQ-6 berth:

- (i). Pet Coke
- (ii). Granulated Blast Furnace Slag

- (iii). Bagged Fly Ash
- (iv). Aggregates in Bulk
- (v). Boulders
- (vi). Gypsum
- (vii). Limestone
- (viii). Bauxite
- (ix). Manganese Ore
- (x). Fertilizers (finished & raw materials)

4.2. The points made by the VPT in its proposal dated 19 September 2017 are summarized below:

- (i). The WQ-6 berth is grossly underutilized and not able to meet the Minimum Guaranteed Cargo (MGC) of 0.52 MT. The berth was occupied for 28 days and a quantity of 1.27 lakh tonnes of cargo was handled during the year 2015-16. The terminal occupation was 63 days and 4.13 lakh tonnes was handled during the year 2016-17.
- (ii). To improve the utilization of the berth, all the possibilities within the ambit of the Concession Agreement are explored. At the pre-bid stage itself, the VPT has replied to one of the queries raised by the prospective bidders that in case of non-availability of indicative cargoes, which is unlikely, Port will permit positively other cargoes that can be handled at this berth subject to approval of TAMP.

The query raised by the bidders in the pre-bid stage and the reply by VPT which forms part of the Concession Agreement is as under:

Sl. No.	Relevant Queries/ Comments & Suggestions by prospective bidders during pre-bid meeting by VPT.	Remarks of VPT thereon
15	Can the WQ-6 berth handle other cargo (other than CP coke, LAM coke, steel and Granite blocks)	In case of non-availability of indicative cargoes, which is unlikely, Port will permit positively other cargoes that can be handled at this berth subject to approval of TAMP.

- (iii). Consequently, the VPT submitted a proposal to TAMP under cover of its letter dated 8 November 2016 for fixation of tariff for additional cargoes on the request of the Concessionaire, after obtaining the approval of the VPT Board.
- (iv). TAMP vide its letter dated 13 December 2016 stated that there is no scope to revise upfront tariff or cover any other cargo in a post bid scenario other than the cargo for which the tariff has been fixed on upfront basis.
- (v). VPT held a meeting on 10 April 2017 with WQMPL and the lenders consequent on consultation notice dated 31 March 2017 issued by the Concessionaire. During the meeting, among other things, it was decided to take legal opinion about the correct meaning and purport of the pre-bid reply of additional cargoes and to address TAMP for notification of tariff for additional cargoes.
- (vi). Accordingly, VPT referred the subject matter to the external legal opinion. The legal counsel has opined to VPT that -

“The existence of a clarification in a pre-bid meeting which is part and parcel of the Concession Agreement indicates that the request made to TAMP does not amount to post BID modification and is a legitimate commercial action initiated by the contracting parties herein in accordance with the law.”

[The VPT has furnished a copy of the legal opinion of Standing Counsel of VPT Shri P. Sriram.]

- (vii). The VPT has stated that the bidders had prior information and knowledge of all the bidding parameters including upfront tariff fixed by TAMP, and the replies to all the queries raised by the prospective bidders in RFP stage. Therefore, consideration of additional cargoes may not be construed as post bid scenario.
- (viii). The WQMPL under cover of its letter dated 5 July 2017 has appealed to VPT to request TAMP to fix tariff for the additional cargoes.
- (ix). Keeping in view the gross under-utilisation of the WQ-6 berth and the request made by M/s.WQMPL, VPT proposes to consider the appeal of the WQMPL to handle the additional cargoes on **non-exclusive** basis. The additional cargoes will not be permitted to be handled at WQ-6 berth in case, the nominated/ designated cargo picks up in future and the terminal reaches its envisaged capacity.
- (x). The port has furnished re-assessed capacity of WQ6 berth at the same level i.e. 2087435 tonnes (20.87 lakhs tonnes as assessed in the February 2009 Order). The capacity assessed in the 12 February 2009 Order and the reassessed capacity after adding the ten additional cargo allowed by the VPT to be handled by the WQMPL are given below:

A. Capacity of WQ-6 as in TAMP Order No.TAMP/39/2008-VPT dated 12 February 2009

Cargo	% Share	Handling Rate (tonnes/ day)
Dry Bulk cargoes:		
(i). CP Coke	36% (S1)	10000 (P1)
(ii). LAM Coke	36% (S2)	10000 (P2)
Break Bulk cargoes:		
(i). Steel	18% (S3)	4000 (P3)
(ii). Granite blocks	10% (S4)	2500 (P4)

$$\text{Optimal Capacity in tonnes} = 0.7 * ((S1 * P1) + (S2 * P2) + (S3 * P3) + (S4 * P4)) * 365$$

$$= 0.7 * \{(36\% * 10000) + (36\% * 10000) + (18\% * 4000) + (10\% * 2500)\} * 365 = 2,087,435$$

B. Reassessed capacity by VPT in the current proposal considering 10 additional cargo items given roman number

Cargo	% Share	Handling Rate (tonnes/ day)
Dry Bulk cargoes: 1 CP Coke, 2. LAM Coke and additional cargoes viz., (i) PET Coke, (ii) Granulated Blast Furnace Slag, (iii) Aggregates in Bulk and (iv) Boulders, (v) Gypsum, (vi) Limestone, (vii) Bauxite, (viii) Manganese ore, (ix) fertilisers (finished & raw material)	72% (S1)	10000 (P1)
Break Bulk cargoes: 3. Steel and additional cargo viz. (x) Fly Ash bags	18% (S2)	4000 (P2)
4. Granite blocks	10% (S3)	2500 (P3)

$$\text{Optimal Capacity in tonnes} = 0.7 * ((S1 * P1) + (S2 * P2) + (S3 * P3)) * 365$$

$$= 0.7 * \{(72\% * 10000) + (18\% * 4000) + (10\% * 2500)\} * 365 = 2087435$$

The additional cargoes proposed to be handled viz., PET Coke, Granulated Blast Furnace Slag, Aggregates in Bulk & Boulders, Gypsum, Limestone, Bauxite, Manganese ore, fertilisers (finished & raw material) and fly ash bags are assigned on non-exclusive basis in order to improve the utilisation of the berth and make the project viable.

All the dry bulk cargoes are grouped under one category and fly ash bags is grouped with steel keeping in view the output rates stipulated vide Annex-V of Guidelines for upfront tariff setting for PPP projects at Major Port Trusts, 2008.

- (xi). The VPT has maintained the total estimated ARR from the handling activity same as in February 2009 Order at ₹2570.59 lakhs. The port has furnished working for the handling rates by including the ten additional cargo following the same methodology in the February 2009 Order for the same estimated ARR.
- (xii). The revised handling charge proposed by the VPT considering ten additional cargo items are as follows:

Sl. No.	Commodity	Unit	Rate in Rupees	
			Foreign	Coastal
(a).	CP Coke, LAM Coke	Per Metric Tonne	78.50	47.10
(b).	Additional cargoes viz.,			
(i).	PET Coke,			
(ii).	Granulated Blast Furnace Slag,			
(iii).	Aggregates in Bulk,			
(iv).	Boulders,			
(v).	Gypsum,			
(vi).	Limestone,			
(vii).	Bauxite,			
(viii).	Manganese ore,			
(ix).	Fertilisers (finished & raw material)			
(c).	Additional break bulk cargo	Per Metric Tonne	202.30	121.40
(i).	viz., fly ash bags			
(d).	Granite	Per Metric Tonne	312.55	187.55

- (xiii). The VPT has stated that the storage charges notified for WQ-6 berth needs a re-look as the methodology adopted differed from the upfront tariff arrived for two other projects of the VPT viz., Vizag General Cargo Berth (VGCB) and EQ-1 at the port, as a result of which the rates notified for WQ6 berth are on high side. The higher storage charges at WQ-6 as compared to other terminals within the same port is found inappropriate and defeats the basic principle of normative tariff besides adversely affecting the throughput at the terminal.

The methodology adopted in respect of WQ-6 is as under:

Parameters:

Capacity : 2.08 MTPA, Free period : Import : 5 days, Exports : 15 days
Cargo assumed to attract storage : 30%

Calculation:

Quantity of cargo attracting storage=2.08 MT * 30%=6.24 lakh tonnes
Estimated ARR from storage = ₹54 lakhs
Storage charges = ₹54/ 6.24 = ₹8.60

Note:

- (a). The above rate of ₹8.60 is interpreted as rate per day per tonne for the first week after free period.
- (b). However, since the rates is for the first week, it should be reckoned as ₹8.60/7 = ₹1.23 per tonne per day during the first week after free period; in similar lines to that worked out for VGCB and EQ-1 berths.

The VPT has, therefore, requested to review the storage charges in respect of WQ-6 project in the above lines and notify storage charges as under:

Storage charges:

Free period:

Export : 15 days

Import : 5 days

Sl. No.	Duration	Per tonne per day or part thereof (in ₹)
1.	First week after expiry of free period	1.23
2.	Second week after expiry of free period	2.46
3.	Beyond 2 nd week	4.92

- (xiv). The VPT has stated that the matter is being put up for consideration of the Board in its ensuing meeting. TAMP is requested to notify tariff for the additional cargoes to be handled at WQ-6 berth on non-exclusive basis.

5. Bringing out the above position, the VPT has submitted the proposal for fixation of handling charges and storage charges for the additional cargoes to be handled at WQ-6 berth on non-exclusive basis. The VPT has further stated that it has prepared the proposal strictly adhering to the parameters considered by TAMP for determination of tariff viz., (i) the optimal capacity of 20.87 lakh tonnes of the terminal as estimated in February 2009 Order (ii) revenue requirement towards handling charges as estimated at ₹2570.59 lakhs as estimated in February 2009 Order and (iii) revenue requirement towards storage charges as estimated in the said Order. The VPT has further submitted that notification of the tariff for additional ten cargo items will enable optimal utilisation of the WQ-6 berth, increase the cargo throughput and revenue to the port.

6.1. To summarise, the handling charges approved by this Authority on upfront basis following the Upfront Tariff Guidelines of 2008 based on the proposal then filed by the VPT for the four cargo items in the tariff Order dated 12 February 2009 and the handling charges now proposed by the VPT in its proposal dated 19 September 2017 including handling charge for 10 additional cargo are tabulated below for comparison:

As per Tariff Order dated 12 February 2009					As per VPT proposal dated 19 September 2017				
Optimum Capacity: 20.87 Lakh Tonnes					Optimum Capacity: 20.87 Lakh Tonnes				
Annual Revenue Requirement from handling activity: ₹2570.59 Lakhs					Annual Revenue Requirement from handling activity: ₹2570.59 Lakhs				
Schedule- 3 Cargo Handling charges in the SOR					Schedule- 3 Cargo Handling charges				
Sl. No.	Commodity	Unit	Rate in Rupees		Sl. No.	Commodity	Unit	Rate in Rupees	
			Foreign	Coastal				Foreign	Coastal
(a).	CP Coke	Per Metric Tonne	78.50	47.10	(a).	CP Coke, LAM Coke.	Per Metric Tonne	78.50	47.10
(b).	LAM Coke	Per Metric Tonne	78.50	47.10	(b).	Additional cargoes viz.,			
					(i).	PET Coke,			
					(ii).	Granulated Blast			
					(iii).	Furnace Slag,			
					(iv).	Aggregates in Bulk,			
					(v).	Boulders,			
					(vi).	Gypsum,			
					(vii).	Limestone,			
					(viii).	Bauxite,			
					(ix).	Manganese ore,			
						fertilisers (finished & raw material)			
(c).	Steel	Per Metric Tonne	202.30	121.40	(c).	Steel and additional cargo viz.,	Per Metric Tonne	202.30	121.40
					(i).	fly ash bags			

(d).	Granite Blocks	Per Metric Tonne	312.55	187.55	(d).	Granite	Per Metric Tonne	312.55	187.55
------	----------------	------------------	--------	--------	------	---------	------------------	--------	--------

As can be seen from the above table, the optimum capacity of WQ-6 berth, annual revenue requirement from the handling activity and the tariff for the cargo items have been maintained intact. However, the VPT has enlarged the cargo items in its proposal dated 19 September 2017.

6.2. As stated earlier, before commencement of operation, the WQMPL approached this Authority for Notification of Scale of Rate (SOR) in its name. Accordingly, the SOR was notified in the name of WQMPL capturing the indexation factor vide Order No.TAMP/49/2015-VPT dated 4 September 2015. In the indexed SOR notified in the name of WQMPL in Order No.TAMP/49/2015-VPT dated 4 September 2015 the handling charge prescribed for the four cargo items are as follows:

Schedule - 3 Cargo Handling charges

Sl. No.	Commodity	Unit	Rate in ₹	
			Foreign	Coastal
(a).	CP Coke	Per Metric Tonne	106.04	63.62
(b).	LAM Coke	Per Metric Tonne	106.04	63.62
(c).	Steel	Per Metric Tonne	273.27	163.96
(d).	Granite Blocks	Per Metric Tonne	422.19	253.32

Notes: The handling charges prescribed above is a composite charge for (i) unloading of the cargo from the vessel including stevedoring and transfer of the same up to the point of storage, storage at the stackyard up to a free period of 5 days and loading on to trucks in respect of import cargo and (ii) unloading of the cargo from the trucks at the stackyard, storage at the stackyard up to a period of 15 days, transfer the cargo to the loading point and loading onto the ship including stevedoring. This composite charge includes wharfage and supply of labour, wherever necessary and all other miscellaneous charges not specifically prescribed in the Scale of Rates.

7.1. The VPT has also proposed to review the storage charges. The storage charges approved in the upfront tariff Order dated 12 February 2009 and the revised storage charges proposed in the proposal dated 19 September 2017 are tabulated below for comparison:

Storage charges as per Tariff Order dated 12 February 2009			Storage charges as per VPT proposal dated 19 September 2017		
(A).	Free period:		(A).	Free period:	
	Import cargo	5 days free		Export cargo	15 days
	Export cargo	15 days free		Import cargo	5 days
(B).	Storage charges after free period (per tonne per day)		(B).	Storage charges after free period (per tonne per day)	
	Description	Rate in Rs. per tonne per day		Duration	Per tonne per day or part thereof (in Rs.)
	First week after expiry of free period	Rs.8.60		First week after expiry of free period	1.23
	2 nd week after expiry of free period	Rs.12.90		Second week after expiry of free period	2.46
	Beyond 2 nd week	Rs.17.20		Beyond 2 nd week	4.92

7.2. As regards the modification proposed by the VPT on storage charges, as shown above the table, it is relevant here to state that the WQMPL had challenged the storage charges (apart from berth hire charges) fixed in the upfront tariff Order dated 12 February 2009 before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh on the ground that TAMP has erroneously fixed high storage charges for the WQ-6 berth as compared to the low storage charges fixed for the VPT and prayed before the Hon'ble High Court in its Writ Petition No.28595 of 2017 to quash the storage charges (and berth hire charges) and direct the TAMP to fix fresh tariff for storage charges (and berth hire charges).

7.3. The Hon'ble High Court in its Order dated 14 December 2017 has directed that this Authority to consider and dispose of the representation dated 16 June 2017 and 30 June 2017 of the WQMPL after affording an opportunity of being heard to the petitioner i.e. WQMPL and to the VPT.

7.4. In compliance of the Order passed by the Hon'ble High Court in the Writ Petition No.28595 of 2017, this Authority has passed an Order No.TAMP/85/2017-VPT dated 18 May 2018 disposing of the representations of WQMPL dated 16 June 2017 and 30 June 2017 after giving opportunity to the WQMPL and VPT.

7.5. The said Order was notified in the Gazette of India vide Gazette No.226 dated 12 June 2018. The TAMP has intimated VPT, WQMPL about the said Order. Also intimated, our Advocate-on-record to bring out the position to the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh.

7.6. In the said Order passed by this Authority dated 18 May 2018, this Authority has modified the Storage Charges as given below:

- (i). **Storage charge approved in upfront tariff schedule for multipurpose berth in the Order No.TAMP/39/2008-VPT dated 12 February 2009 under Schedule 4 B - Storage Charges per tonne per day shall stand modified as follows:**

Description	Rate in ₹ per tonne per day
First week after expiry of free period	₹1.24
2 nd week after expiry of free period	₹1.86
Beyond 2 nd week	₹2.48

- (ii). **Storage charge under Schedule 4 B - Storage Charges per tonne per day notified in the Order No.TAMP/49/2015-VPT dated 4 September 2015 notifying the Scale of Rates in the name of WQMPL shall stand modified as follows:**

Description	Rate in ₹ per tonne per day
First week after expiry of free period	₹1.67
2 nd week after expiry of free period	₹2.51
Beyond 2 nd week	₹3.34

7.7. To summarise, of the two items of the proposal of the VPT for (i). i.e. Revised handling charge to include 10 additional cargo items and (ii). Review of storage charge, the second part of the proposal is already taken care in the Order No.TAMP/85/2017-VPT dated 18 May 2018 in compliance of the Order passed by the Hon'ble High Court in the Writ Petition No.28595 of 2017 filed by the WQMPL.

7.8. Thus, the matter before this Authority is limited to approval for handling charge for the additional ten cargo items same as brought in the earlier paragraph.

8.1. The upfront tariff fixation guidelines of 2008 do not lend scope for review of upfront tariff during the currency of the project, in a post bid scenario. Since a review clause is absent in the upfront tariff fixation guidelines of 2008 to review the tariff or cargo profile during the currency of the project and bearing in mind that the VPT proposed to permit the WQMPL to handle the additional ten cargo items on non-exclusive basis and levy the tariff at the rates approved by this Authority for the four cargo items and withdraw the permission in case the nominated/ designated four cargo items pick up in future and the terminal reaches its envisaged capacity, the Ministry of Shipping (MOS) vide our letter dated 1 November 2017 was requested to examine and direct us on the matter to consider the proposal of VPT.

8.2. The VPT has also vide its e-mail dated 4 December 2017 requested MOS to issue necessary direction to this Authority for notification of tariff for additional cargoes proposed in the proposal of VPT dated 19 September 2017.

8.3. In this regard, the MOS vide its letter No.IWT-11/33/2018-DD(DW) dated 21 May 2018 has clarified the following to this Authority:

"Clarification provided during the pre-bid meeting by VPT is part and parcel of the Concession Agreement and fixing of rates for additional cargo is a part of the Concession Agreement. Therefore, observation of TAMP that this is a post bid change, is not substantiated. Accordingly, TAMP is requested to take further necessary action on the

proposal of VPT as per clarification given during the pre-bid meeting and Concession Agreement.”

9.1. The VPT has vide letter No.IRNP/STDS/PPP-GL/2016/113 dated 23 August 2016 earlier furnished a copy of Concession Agreement dated 31 July 2010 entered between VPT and WQMPL. Relevant extract of Clause 1.3 - Interpretation under Article 1 of the said Licence Agreement is reproduced below:

“1.3. Interpretation

“This Agreement constitutes the entire understanding between the Parties regarding the Project and supersedes all previous written and / or oral representations and / or arrangements regarding the Project. If there is any aspect of the Project not covered by any of the provisions of this Agreement, then and only in that event, reference may be made by the parties to the bid documents, inter alia including the RFP and RFQ documents, issued by the Concessioneing Authority and also including addendums, clarifications given in writing in the pre-bid meeting and the submissions of the Concessionaire and the bid submitted by the Concessionaire but not otherwise. In case of any contradictions in the terms of this Agreement and any such other bid documents as referred to above, the terms of this Agreement shall prevail.”

9.2. It is relevant here to note that the said clause of the Concession Agreement includes the Bid Document invited by the VPT, addendums and corrigendum to the Bid document issued by the VPT, copy of the letter No.IENG/EE(PROJECTS)/WQ6/Pt.VIII/262 dated 19/20 October 2009 issued by the VPT to the short listed bidders giving a statement of queries raised by short listed bidders and clarification of the VPT thereon amongst other items.

The relevant query raised by prospective bidder and the clarification furnished by the VPT to the prospective bidder ABG Infralogistics Ltd. at B. Commercial Sl. No.15 from the said statement in the said letter of VPT dated 19/20 September 2009 is reproduced below:

Commercial:

Sl. No.	Page No.	Clause No.	Content of the clause	Queries/comments & suggestions with relevant reasons/remarks	Remarks of the VPT
15				Can the WQ-6 berth handle other cargo (other than CP coke, LAM coke, steel and Granite blocks)	In case of non-availability of indicative cargoes, which is unlikely, Port will permit positively other cargoes that can be handled at this berth subject to approval of TAMP.

10. In view of the clarification received from MOS vide fax dated 21 May 2018 as brought out in the earlier paragraphs, this case was taken up for processing.

11.1. In accordance with the consultation process prescribed, a copy of the VPT proposal dated 19 September 2017 was circulated to the WQMPL and users/ potential users/ users bodies (as consulted in File No.TAMP/39/2008-VPT) seeking their comments. We have received comments only from M/s.K. Ramabrahman & Sons Private Limited, which was forwarded to VPT as feedback information. The VPT vide its e-mail dated 14 June 2018 has furnished its reply.

11.2. A joint hearing on this case was held on 18 June 2018 at VPT premises. At the joint hearing, the VPT and the concerned users/ user organisations have made their submissions at the joint hearing.

12.1. As agreed at the joint hearing, the Vizag Seaport Private Limited (VSPL) vide its letter dated 20 June 2018 has furnished its comments.

12.2. As agreed at the joint hearing, the VPT vide our letter dated 26 June 2018 followed by reminder dated 11 July 2018 was requested to take action on the following points:

- (i). To furnish a copy of Board resolution approving handling rate for ten additional cargo as agreed by VPT at the joint hearing.
- (ii). As agreed at the joint hearing, the VSPL has vide its letter dated 20 June 2018 furnished its comments on the subject proposal. A copy of the comments received from VSPL was forwarded to VPT for point-wise comments of VPT.

13. With reference to the action point no.12.2. (ii) above, the VPT vide its email dated 23 August 2018 has furnished its reply to the comments of VSPL.

14.1. Further, the Indian Private Ports and Terminals Association (IPPTA) an umbrella body of private terminal operators has vide its letter dated 27 June 2018 furnished its comments on the subject proposal filed by VPT.

A copy of the IPPTA letter dated 27 June 2018 was forwarded to VPT with a request to furnish point-wise comments on the points made by IPPTA.

14.2. In response, the VPT vide its email dated 23 August 2018 has furnished its comments. The IPPTA has mostly reiterated the comments furnished by VSPL dated 20 June 2018. The VPT has also reiterated its comments furnished vide its letter dated 23 August 2018 on the comments of VSPL while furnishing comments on IPPTA comments.

15.1. With reference to the action point no.12.2. (i) above, the VPT vide its e-mail dated 28 August 2018 has furnished the copies of three Board resolutions of the Board of Trustees of the VPT approving handling for ten additional cargo items by the WQMPL. The relevant parts of the approval of the Board of Trustees of the VPT with reference to the subject proposal are as given below:

- (i). The VPT Board of Trustees in its meeting held on 6 November 2015 vide Resolution No.180/2015-16 has approved the following:
 - (a). To permit handling of PET COKE also at the WQ-6 berth and to collect charges for Pet coke on par with LAM Coke provisionally and to submit the proposal to TAMP for fixation of tariff upon receipt of proposal from the concessionaire M/s.West Quay Multiport Pvt. Ltd.
 - (b). Not to handle gearless vessels with designated cargoes of WQ-6 including Pet Coke at VPT's own berths till end of exclusivity period, in order to put the existing facilities to optimum use.
- (ii). The VPT Board of Trustees in its meeting on 17 June 2016 vide Resolution No.50/2016-17 has approved the following:
 - (a). To consider the handling of Dry Bulk Cargoes viz. Granulated Blast Furnace Slag, Bagged Fly Ash, Aggregates in Bulk & Boulders as requested by M/s.WQMPL as the berth is not fully utilized subject to approval of tariff by the TAMP and also in the even necessary modification/ amendment required in CFO for West Quay-6 Berth from APPCB.
- (iii). The VPT Board of Trustees in its meeting on 13 October 2017 vide Resolution No.71/2017-18 has approved the following:
 - (a). The Concessionaire may be allowed to handle Gypsum, Limestone, Bauxite, Manganese Ore, Fertilizers on non-exclusive basis subject to declaration of tariff by TAMP and necessary modification of EC, CFO conditions if any and also subject to the condition that the concessionaire withdraws their claim of exclusivity as well as consultation notice issued by them.

The Concessionaire may be allowed to handle the above said cargoes for a period of 5 (five) years from the scheduled project completion date or the average annual volume of cargo handled at the project facilities and services reaches a level of 75% of project capacity for 2 (two) consecutive years whichever is earlier and continuation of permission to handle the above cargoes may be reviewed thereafter.

15.2. Thus, as per the above said three resolutions of Board of Trustees of the VPT, the Board has approved handling of ten additional cargo viz. Pet coke, Granulated Blast Furnace Slag, Bagged Fly Ash, Aggregates in Bulk, & Boulders, Gypsum, Limestone, Bauxite, Manganese Ore, Fertilizers. The last Board resolution approved to allow Concessionaire to handle the additional cargoes for a period of 5 (five) years from the scheduled project completion date or the average annual volume of cargo handled at the project facilities and services reaches a level of 75% of project capacity for 2 (two) consecutive years whichever is earlier and continuation of permission to handle the above cargoes may be reviewed thereafter.

16. The proceedings relating to consultation in this case are available on records at the office of this Authority. An excerpt of the comments received and arguments made by the parties will be sent separately to the relevant parties. These details will also be made available at our website <http://tariffauthority.gov.in>.

17. With reference to the totality of the information collected during the processing of the case, the following position emerges:

- (i). The proposal mooted by the Visakhapatnam Port Trust (VPT) seeks approval of this Authority for handling charges of ten additional cargo to be handled by the Concessionaire M/s. West Quay Multiport Private Limited (WQMPL) at West Quay (WQ) Berth No.6 at VPT.
- (ii). The main grounds cited by the VPT for filing the current proposal seeking approval of handling charge for ten additional cargo are:
 - (a). The WQ-6 berth is grossly underutilized and not able to meet the Minimum Guaranteed Cargo (MGC) throughput of 0.52 MT. During the year 2015-16, the berth was occupied for 28 days and a quantity of 1.27 lakh tonnes of cargo was handled. In the year 2016-17, the terminal was occupied for 63 days and 4.13 lakh tonnes was handled during the year 2016-17.
 - (b). To improve the utilization of the berth, all the possibilities within the ambit of the Concession Agreement are explored by the port.
 - (c). At the pre-bid stage itself, the VPT has replied to one of the queries raised by the prospective bidders that in case of non-availability of indicative cargoes, which is unlikely, Port will permit positively other cargoes that can be handled at this berth subject to approval of this Authority.
 - (d). The Port obtained legal opinion about the correct meaning and purpose of the pre-bid reply furnished by VPT. The relevant concluding para of the opinion of the Standing Counsel vide e-mail dated 31 July 2017 to VPT is reproduced below:

“The existence of a clarification in a pre-bid meeting which is part and parcel of the Concession Agreement indicates that the request made to TAMP does not amount to post BID modification and is a legitimate commercial action initiated by the contracting parties herein in accordance with the law.”
- (iii). This Authority has, vide Order No.TAMP/39/2008-VPT dated 12 February 2009, approved upfront tariff based on the proposal of VPT and after consultation with stakeholders and prospective bidders including the Applicant of WQMPL viz. ABG Infralogistics Limited. The said Order was passed by this Authority following the

upfront tariff guidelines of 2008 issued by the Ministry of Shipping (MOS). The upfront tariff approved by this Authority is subject to only automatic annual indexation at 60% of the WPI during the project period.

The upfront tariff guidelines of 2008 do not prescribe provision to review the upfront tariff notified by this Authority in a post bid scenario. The crux of this proposal is that during the pre-bid stage itself the VPT has clarified that port will permit other cargoes that can be handled at the Berth No.WQ-6 subject to approval of this Authority in case of non-availability of designated four cargo items. Thus, in the contention of the VPT, the prospective bidders prior to bidding during the pre-bidding stage itself were made known by the VPT that in case of non-availability of indicative cargoes, Port will positively permit handling of other cargo at WQ-6 berth subject to approval of this Authority.

- (iv). The mandate given to this Authority is to fix tariff exercising the powers conferred on this Authority as per the relevant provisions of the Major Port Trusts Act, 1963. This Authority is also mandated to follow the tariff guidelines issued by the Government from time to time under Section 111 of the Act as its policy directions. From the view point of this Authority, the clarification given by the VPT, as brought out above, during the pre-bidding process to allow the successful bidder to handle additional cargo in the event of non-availability of designated cargo and the bid document becoming part of Concession Agreement entered between the parties is a contractual obligation of VPT. This Authority is not a party to the contract between the parties; whereas the tariff guidelines issued by the Government is binding on this Authority.
- (v). Therefore, in the absence of review clause in the upfront tariff fixation guidelines of 2008 to review the cargo profile during the currency of the project in the post bid scenario, MOS was requested vide our letter dated 1 November 2017 to examine the matter to issue direction to this Authority to consider the proposal of VPT. In this regard, the MOS vide its letter No.IWT-11/33/2018-DD (DW) dated 21 May 2018 has clarified that clarification provided during the pre-bid meeting by VPT is part and parcel of the Concession Agreement and fixing of rates for additional cargo is a part of the Concession Agreement. Therefore, observation of TAMP that this is a post bid change, is not substantiated. Accordingly, the MOS has requested this Authority to take further necessary action on the proposal of VPT as per clarification given during the pre-bid meeting and Concession Agreement.
- (vi). The MOS, being an Apex Authority for both this Authority and VPT, is in a position to recognise the Concession Agreement so far as granting permission to the WQMPL by VPT to handle additional cargo and the obligation of this Authority to fix tariff for the said additional cargo. Since this Authority is governed by the upfront tariff guidelines of 2008 on the matter in reference, it could not recognise its obligation under the Concession Agreement to fix tariff for the additional cargo.
- (vii). If the respective position of the MOS and this Authority is understood in a right perspective and considering the Legal opinion produced by VPT, the point made by the VSPL that the proposal of the VPT is a post bid scenario is found to be misplaced and does not merit consideration. In fact, the seed for fixation of tariff for additional cargo items was sown during the pre-bid stage itself.
- (viii). The Board of Trustees of VPT have accorded approval to the WQMPL for handling of the ten additional cargo for which the VPT has approached this Authority for fixation of tariff for handling charge till the nominated/ designated cargo picks up in future and the terminal reaches its envisaged capacity. Unless tariff is fixed for the additional cargo in reference, the VPT will not be in a position to discharge its contractual obligation. Therefore, the proposal is processed further for approval for the handling charge for ten additional cargo. The Scale of Rates approved by this Authority by tariff Order dated 12 February 2009 forms part of the bidding document. The WQMPL would have quoted the revenue share payable to the VPT based on

the revenue stream during the project period of 30 years calculated based on the Scale of Rates approved in February 2009. The schedule relating to handling charges fixed for the designated cargo forms part of the Scale of Rates; and, the handling charges are prescribed to realise the estimated Annual Revenue Requirement (ARR) of ₹2,570.99 lakhs operating the berth at the optimal capacity of 20,87,435 tonnes per annum. Therefore, the optimal capacity at 20,87,435 tonnes as considered in the upfront tariff Order of 12 February 2009 and ARR as estimated at ₹2,570.99 lakhs from the handling charge are to be maintained which was considered by this Authority to arrive at upfront handling charge for four cargo items in the upfront tariff Order dated 12 February 2009.

- (ix). (a). The VSPL has vehemently objected the current proposal of VPT. The Indian Private Ports and Terminals Association (IPPTA), an umbrella body of private terminal operators, has also reiterated the points made by VSPL. Apart from VSPL and IPPTA, no other users/ user associations have objected the proposal of VPT. In fact, M/s.K. Ramabrahman & Sons Private Limited have categorically stated that they have no objection for the facility to be utilized for bulk cargo till such time WQ-6 pickup and reach the designated capacity.
- (b). As regards the point made by VSPL and IPPTA that the pre-bid clarification is vague with regard to interpretation of few words cited by it, the VPT has categorically stated that there is no ambiguity in the reply given by VPT during the pre-bid meeting with regard to consideration of other cargoes at the terminal in the event of non-availability of indicative cargoes. The VPT has clarified that the project was planned based on the traffic volumes projected for the indicative cargoes and project viability as part of Techno Economic Feasibility Report (TEFR). However, in order to avoid any possible risk of the project becoming unviable which cannot be foreseen at the time of bidding, VPT had taken a stand that it will permit positively other cargoes that can be handled at this berth subject to approval of this Authority. The clause "cargoes that can be handled" clearly indicates that the port will permit only those cargoes which are not designated and specified to other PPP terminals; so as not to be detrimental to the business interests of other operators. The VSPL is awarded on BOT basis for handling multi cargoes and no exclusivity exists with regard to the additional cargoes proposed. Thus, the VPT has clarified the position on the point raised by the VSPL and IPPTA.
- (c). The VSPL has pointed out that this Authority is not the approving Authority for permitting handling of additional cargo to be handled by BOT operator. In this regard, it is to state that the mandate of this Authority is to determine the rates among other rates, for cargo related services provided by Major Port Trusts and service providers authorised by Major Port Trusts.

In the instant case, the Board of Trustees of the VPT has decided to permit WQMPL to handle additional ten cargo items for reasons brought out earlier. The Port has also furnished approval of the Board of Trustees in this regard. The VPT has approached this Authority seeking approval of handling charge for the ten additional cargo based on approval of its Board. The MOS has also given clarification in the matter and requested this Authority to take further necessary action as per the clarification given during the pre-bid meeting and Concession Agreement as brought out in the earlier paragraph. This Authority is well within its power under the statute to fix the tariff for handling charge for cargo handling services provided by BOT operator authorised by the VPT. It has to be recognised that unless tariff is fixed for additional cargo, the VPT will not be in a position to discharge its contractual obligation under the Concession Agreement, as stated earlier.

- (d). Another point made by the VSPL is that it would set wrong precedent with similar claims from other BOT operators leading to chaos. It is relevant here to reiterate that this matter arises from the clarification furnished by VPT during the pre-bid stage and that clarification in pre-bid meeting formed part and parcel of the bidding process and the Concession Agreement.

If some other BOT operators are aggrieved and stressed, Government has evolved a redressal mechanism. A Committee constituted by MOS under Indian Ports Association (IPA) has given the report wherein a mechanism is made available to all the Major Port Trusts to bring out the stressed PPP projects. The MOS vide letter No.PD-13/1/2018-PPP Cell dated 11 July 2018 has directed all Major Port Trusts to adopt the procedure prescribed therein for review of projects periodically for optimum utilization of the facility created.

The instant case is different as the matter flows from the clarification issued by VPT during the bidding process in pre-bid stage itself and the clarification furnished by the VPT to the short listed bidders formed part and parcel of the bidding process and the Concession Agreement.

- (e). As regards the point made by the VSPL to clarify that no hook point delivery is to be allowed as there is no provision to fix tariff for such activity under 2008 guidelines. As rightly clarified by VPT, the proposal seeks tariff for additional ten cargo for composite handling charge. As per note below the Schedule 3 in the Order dated 12 February 2009 and indexed Scale of Rates approved in the name of WQMPL vide Order dated 4 September 2015, the handling charges prescribed in the schedule is a composite rate for (i) unloading of the cargo from the vessel including stevedoring and transfer of the same upto the point of storage, storage at the stackyard upto a free period of 5 days and loading onto trucks in respect of import cargo and (ii) unloading of the cargo from the trucks at the stackyard, storage at the stackyard upto a free period of 15 days, transfer of the cargo to the loading point and loading onto the ship including stevedoring. The component of services in the composite handling charges for the ten additional cargo will continue to be governed by the existing note prescribed in the existing Scale of Rates of WQMPL.
- (x). In the upfront tariff Order dated 12 February 2009, the handling charge prescribed is for four cargo items. As against that, the VPT has now proposed handling charge for nine additional dry bulk cargo at par with the existing rate for Lam coke and for fly ash bag at par with rate prescribed for Steel. While proposing the handling charge for ten additional cargo items, the VPT has maintained the optimal capacity at 2087435 tonnes (20.87 lakhs tonnes) as assessed in February 2009 Order and ARR estimated from the handling charge is also the same at ₹2,570.99 lakhs as considered in the said Order for arriving at the upfront handling charge. The methodology followed by VPT for distribution of overall capacity of 20.87 lakhs tonnes is given below:

- A. Capacity of WQ-6 as in TAMP Order No.TAMP/39/2008-VPT dated 12 February 2009

Cargo	% Share	Handling Rate (tonnes/ day)
Dry Bulk cargoes:		
(i). CP Coke	36% (S1)	10000 (P1)
(ii). LAM Coke	36% (S2)	10000 (P2)
Break Bulk cargoes:		
(i). Steel	18% (S3)	4000 (P3)
(ii). Granite blocks	10% (S4)	2500 (P4)

$$\text{Optimal Capacity in tonnes} = 0.7 * ((S1 * P1) + (S2 * P2) + (S3 * P3) + (S4 * P4)) * 365$$

$$= 0.7 * \{(36\% * 10000) + (36\% * 10000) + (18\% * 4000) + (10\% * 2500)\} * 365 = 2,087,435$$

- B. Reassessed capacity by VPT in the current proposal considering 10 additional cargo items given roman number

Cargo	% Share	Handling Rate (tonnes/ day)
Dry Bulk cargoes: 1 CP Coke, 2. LAM Coke and additional cargoes viz., (i) PET Coke, (ii) Granulated Blast Furnace Slag, (iii) Aggregates in Bulk and (iv) Boulders, (v) Gypsum, (vi) Limestone, (vii) Bauxite, (viii) Manganese ore, (ix) fertilisers (finished & raw material)	72% (S1)	10000 (P1)
Break Bulk cargoes: 3. Steel and additional cargo viz. (x) Fly Ash bags	18% (S2)	4000 (P2)
4. Granite blocks	10% (S3)	2500 (P3)

$$\text{Optimal Capacity in tonnes} = 0.7 * ((S1 * P1) + (S2 * P2) + (S3 * P3)) * 365$$

$$= 0.7 * \{(72\% * 10000) + (18\% * 4000) + (10\% * 2500)\} * 365 = 2087435$$

The additional cargoes proposed to be handled viz., PET Coke, Granulated Blast Furnace Slag, Aggregates in Bulk & Boulders, Gypsum, Limestone, Bauxite, Manganese ore, fertilisers (finished & raw material) and fly ash bags are assigned on non-exclusive basis in order to improve the utilisation of the berth and make the project viable.

All the dry bulk cargoes are grouped under one category and fly ash bags is grouped with steel keeping in view the output rates stipulated vide Annex-V of Guidelines for upfront tariff setting for PPP projects at Major Port Trusts, 2008.

- (xi). The assessed optimal capacity, estimated ARR and handling charges for four cargo items prescribed in February 2009 Order and that proposed now by including ten additional cargo as brought out in the earlier paragraphs is reproduced here for ease of reference:

As per Tariff Order dated 12 February 2009					As per VPT proposal dated 19 September 2017				
Optimum Capacity:		20.87 Lakh Tonnes			Optimum Capacity:		20.87 Lakh Tonnes		
Annual Revenue Requirement from handling activity:		₹2570.59 Lakhs			Annual Revenue Requirement from handling activity:		₹2570.59 Lakhs		
Schedule- 3 Cargo Handling charges in the SOR					Schedule- 3 Cargo Handling charges				
Sl. No.	Commodity	Unit	Rate in Rupees		Sl. No.	Commodity	Unit	Rate in Rupees	
			Foreign	Coastal				Foreign	Coastal
(a).	CP Coke	Per Metric Tonne	78.50	47.10	(a).	CP Coke, LAM Coke.	Per Metric Tonne	78.50	47.10
(b).	LAM Coke	Per Metric Tonne	78.50	47.10	(b).	Additional cargoes viz., (i). PET Coke, (ii). Granulated Blast Furnace Slag, (iii). Aggregates in Bulk, (iv). Boulders,			

					(v). (vi). (vii). (viii). (ix).	Gypsum, Limestone, Bauxite, Manganese ore, fertilisers (finished & raw material)			
(c).	Steel	Per Metric Tonne	202.30	121.40	(c). (i).	Steel and additional cargo viz., fly ash bags	Per Metric Tonne	202.30	121.40
(d).	Granite Blocks	Per Metric Tonne	312.55	187.55	(d).	Granite	Per Metric Tonne	312.55	187.55

From the above table, it can be seen that the VPT has clubbed existing CP coke and LAM coke for which same rate is prescribed under the first item. Apart from that, the VPT has added nine additional cargo items as given at Sl. No.(b)(i) to (ix) above and proposed the rate at par with the rate prescribed in February 2009 Order for LAM coke and CP coke. Further, for one additional cargo viz. Fly ash bags Sl. No.(c)(i), the Port has proposed the rate at par with the rate prescribed for Steel.

The upfront tariff guidelines of 2008 for multipurpose cargo berth prescribes productivity norms for dry bulk cargo, coal, limestone, minerals, etc., at 10,000 per day. The upfront tariff guidelines do not prescribe cargo-wise handling rate for dry bulk cargo. The productivity considered by VPT for dry bulk cargo LAM coke and CP coke in February 2009 Order is 10,000 T/ day and steel the productivity considered in the said Order is as prescribed in the upfront tariff guidelines of 2008 at 4,000 T/ day for steel and bagged cargo under break bulk cargo.

The port has stated that all dry bulk cargoes including the nine additional dry bulk are grouped under one category and fly ash bags is grouped with steel keeping in view the output rates stipulated vide Annex-V of Guidelines for upfront tariff setting for PPP projects at Major Port Trusts, 2008. The port, while furnishing comments on the comments of one of the users, has stated that handling of additional ten cargo will be similar to the handling method followed for the four cargo for which tariff is prescribed in February 2009 Order. Based on the clarification furnished by the port, this Authority goes with the proposal of the port.

- (xii). (a). In the original proposal, the VPT sought approval of handling charges for additional ten cargo only till such time the volume of designated cargoes picks up and terminal reaches the envisaged capacity. While furnishing clarification to one of the points raised by VSPL, the VPT has proposed the handling charge for ten additional cargo till terminal reaches the designed capacity. The VPT has used the words “designed capacity” in its comments.

In this context, it is relevant here to state that the upfront tariff approved by this Authority in February 2009 Order is for the “optimal capacity” assessed by VPT and considered by this Authority at 2087435 tonnes (20.87 lakhs tonnes). The handling charge proposed by VPT for ten additional cargo also retains the optimal capacity at 20.87 lakh tonnes. Hence, it is appropriate to link the handling charge approved for ten additional cargo items to “optimal capacity” of 20.87 lakh tonnes instead of terms “designed capacity” mentioned by VPT.

- (b). As stated earlier, the Board of Trustees of VPT has accorded approval to the Concessionaire to handle ten additional cargo items in three Board resolutions passed at different dates. It is pertinent here to state that in the latest resolution of Board of Trustees of VPT dated 13 October 2017, the

Board of Trustees of VPT has approved Concessionaire WQMPL to handle the additional cargo specified subject to declaration of tariff by TAMP and other non-tariff conditions to be met by WQMPL. The Board approval is for a period of 5 (five) years from the scheduled project completion date or the average annual volume of cargo handled at the project facilities and services reaches a level of 75% of project capacity for 2 (two) consecutive years whichever is earlier and continuation of permission to handle the above cargoes is subject to review by VPT thereafter. The five years period has already started from the scheduled project completion date. The scheduled project completion date and the date on which the five year period ends remain unexplained in the Board Resolution. If only the other part of the Board Resolution that the average annual volume of cargo handled at the project facilities reaches a level of 75% of project capacity for two consecutive years is retained, it may be an open ended condition. Therefore, this Authority, while approving the handling charges sought by the VPT for ten additional cargo as proposed by the VPT, accords approval for handling charge of ten additional cargo items by the operator i.e. WQMPL to handle the additional ten cargo till WQMPL reaches a level of 75% of optimal capacity i.e. 20.87 lakhs tonnes for 2 (two) consecutive years subject to review by VPT on completion of 5 years from the scheduled project completion date.

It is also brought out that the VPT being the Licensor Port shall ensure that on completion of period of 5 (five) years from the scheduled project completion date and WQMPL reaches a level of 75% of optimal capacity i.e. 20.87 lakhs tonnes for 2 (two) consecutive years, the WQMPL immediately ceases to handle the ten additional cargo for which the handling charge is approved by this Authority based on the proposal of the VPT.

Further, by way of abundant caution, this Authority also stipulates that handling charge approved for the ten additional cargo in the current exercise will automatically cease to apply after the project facility reaches a level of 75% of optimal capacity i.e.20.87 lakhs tonnes for 2 (two) consecutive years and which shall be subject to review by VPT on completion of 5 years from the scheduled project completion date. A Note in this regard is prescribed and inserted in the Scale of Rates.

- (c). The VPT has also agreed to implement this proposal in a fully transparent manner. The VPT being the Licensor Port is, therefore, requested to furnish the quarterly physical performance including the cargo-wise volume handled and financial performance of WQMPL within 15 days on the end of each quarter and annual performance within 2 months at the end of the financial year to this Authority.

The above points shall address the point made by VSPL about transparent implementation of this proposal of VPT and mechanism of enforceability to stop once WQMPL reaches the stated optimal capacity.

- (xiii). As regard the point made by M/s.K. Ramabrahman & Sons Private Limited, it is to state that the existing note under the schedule explicitly states that the composite handling charge includes wharfage and supply of labour, wherever necessary and all other miscellaneous charges not specifically prescribed in the Scale of Rates. The said note will continue to be applicable for the additional ten cargo as well.
- (xiv). (a). As regards the modification proposed by the VPT on storage charges, the WQMPL had challenged the storage charges fixed in the upfront tariff Order dated 12 February 2009 before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh on the ground that TAMP has erroneously fixed high storage charges for the

WQ-6 berth as compared to the low storage charges fixed for the VPT and prayed before the Hon'ble High Court in its Writ Petition No.28595 of 2017 to quash the storage charges and direct the TAMP to fix fresh tariff for storage charges. The Hon'ble High Court in its Order dated 14 December 2017 has directed that this Authority to consider and dispose of the representation dated 16 June 2017 and 30 June 2017 of the WQMPL after affording an opportunity of being heard to the petitioner i.e. WQMPL and to the VPT.

In compliance of the Order passed by the Hon'ble High Court in the Writ Petition No.28595 of 2017, this Authority after following the prescribed consultation process with the VPT and WQMPL and after giving opportunity of hearing to both has passed an Order No.TAMP/85/2017-VPT dated 18 May 2018 disposing of the representations of WQMPL dated 16 June 2017 and 30 June 2017. In the said Order, the storage charges has been rectified by this Authority and the revised (reduced) storage charge has been brought out in para as 7.6. above and hence not reiterated for the sake of brevity. That being so, the point made by the VPT for review of storage charge of the WQ6 project has already been addressed by this Authority in the said Order dated 18 May 2018.

- (b). Storage charge and miscellaneous charge will be applicable for the additional ten cargo items also.
- (xv). Since this Authority has notified the Scale of Rates in the name of the WQMPL and recognising that the rates approved for ten additional cargo items is for specified time, as stated in previous paragraphs, it is appropriate that the revised composite handling charge for ten additional cargo are prescribed separately in the indexed Scale of Rates notified by this Authority vide Order No.TAMP/49/2015-VPT dated 4 September 2015 in the name of the WQMPL instead of tinkering with Scale of Rates approved in the upfront tariff Order of February 2009.

18.1. In the result, and for the reasons given above, and based on collective application of mind, this Authority approves the cargo handling charge for ten additional cargo items as proposed by the VPT by incorporating the following Schedule 3.1 immediately after the existing schedule 3 Cargo Handling Charges and above the Notes in SOR approved by this Authority vide Order No.TAMP/49/2015-VPT dated 4 September 2015:

- (i). Insert the following Schedule 3.1. Cargo Handling Charge for Additional cargo immediately after the existing Schedule 3. Cargo Handling Charges and above the Notes in SOR approved by this Authority vide Order No.TAMP/49/2015-VPT dated 4 September 2015:

"Schedule 3.1.Cargo Handling Charges for Additional cargo

Sl. No.	Commodity	Unit	Rate in ₹	
			Foreign	Coastal
(a). (i). (ii). (iii). (iv). (v). (vi). (vii). (viii). (ix).	Additional Dry Bulk cargo PET Coke Granulated blast Furnace Slag Aggregates in Bulk Boulders Gypsum Limestone Bauxite Manganese ore Fertilisers (finished & raw material)	Per Metric Tonne	106.04	63.62
(x).	Fly Ash Bags	Per Metric Tonne	273.27	163.96

Note: The handling charge approved in the Schedule 3.1. for the ten additional cargo in the current exercise will automatically cease to apply after the project facility reaches a level of 75% of optimal capacity i.e. 20.87 lakhs tonnes for 2 (two) consecutive years which shall be subject to review by VPT on completion of 5 years from the scheduled project completion date.

18.2. The VPT, being the Licensor Port, is directed to ensure that on completion of period of 5 (five) years from the scheduled project completion date and WQMPL reaches a level of 75% of optimal capacity i.e.20.87 lakhs tonnes for 2 (two) consecutive years, the WQMPL immediately ceases to handle the ten additional cargo for which the handling charge is approved by this Authority based on the proposal of the VPT.

18.3. The VPT is also directed to furnish the quarterly physical performance including the cargo-wise volume handled and financial performance of WQMPL within 15 days on the end of each quarter and annual performance within 2 months at the end of the financial year to this Authority.

(T.S. Balasubramanian)
Member (Finance)

SUMMARY OF THE COMMENTS RECEIVED FROM THE PORT USERS/ USER ORGANIZATIONS AND ARGUMENTS MADE IN THIS CASE DURING THE JOINT HEARING BEFORE THE AUTHORITY

F.No. TAMP/44/2018-VPT - Proposal from the Visakhapatnam Port Trust seeking approval of tariff for 10 additional cargo items to be handled by the Concessionaire viz. M/s.West Quay Multiport Private Limited at WQ-6 berth.

A summary of the comments received from M/s.K. Ramabrahman & Sons Private Limited and reply furnished by Visakhapatnam Port Trust (VPT) is tabulated below:

Sl. No.	Comments received from M/s.K. Ramabrahman & Sons Private Limited	Reply furnished by VPT
(i).	Due to underutilization of the WQ-6 facility we apparently have no objection for the facility to be utilized for other bulk cargoes as detailed in the email till such time WQ-6 berth picks up in future and the terminal reaches its nominated/ designated cargo. So we understand that this is a non-exclusive and temporary permission provided to M/s.WQMPL and the proposal to TAMP for fixation of rates.	It is to reaffirm that the subject proposal of VPT for fixation of tariff for 10 additional cargoes is on non-exclusive basis.
(ii).	The re-assessed handling rates mentioned under for Foreign cargo @ INR 78.46 PMT for dry bulk cargoes and to elicit our comments we need to understand the scope the said handling rate covers. As in VPT, the wharfage charges vary from cargo to cargo we need to clarify if the above handling rate covers only stevedoring or is inclusive of wharfage and loading into trucks.	The proposed rate of ₹78.46 per tonne is the handling charge which is a composite charge for (i) unloading of the cargo from the vessel including stevedoring and transfer of the same up to the point of storage, storage at the stackyard up to a free period of 5 days and loading on to trucks in respect of import cargo and (ii) unloading of the cargo from the trucks at the stackyard, storage at the stackyard up to a period of 15 days, transfer the cargo to the loading point and loading onto the ship including stevedoring. This composite charge includes wharfage and supply of labour, wherever necessary and all other miscellaneous charges not specifically prescribed in the Scale of Rates.
(iii).	In VPT at the non-PPP berths, vessels are handled by stevedores on behalf for various principals for a total scope of work i.e. from stevedoring to rake/road loading and in case of fertilizer which includes godown bagging operations. As such it is important to understand the scope of work limits WQMPL can offer.	
(iv).	We understand that the backup area of WQMPL is limited unlike Transit areas available at VPT. Some of the SEZ customers we are patronizing for Import of ore require that cargo be stacked in Transit area in case the Direct delivery option is not accomplished. This can be a constraint in handling specific SEZ customers.	The WQ-6 terminal is provided with an area of 50,000 sq. mtrs., for storage of cargo. Free period for storage of cargo is 5 days for import cargo and 15 days for export cargo beyond which the storage charges will be levied.
(v).	There is no mention about the wharfage charges which would be proposed to TAMP by VPT on the Dry bulk cargoes (10 cargoes) as then the total costs at berth and additional handling operations at port plots or warehouse can only then be assessed by the stevedores for competitiveness.	As already mentioned above, the composite charge includes wharfage also. It is also to mention that the cargo stored in the storage area beyond free period attracts storage charges as notified by TAMP.
(vi).	We understand that only gearless vessels are presently provided priority at M/s.WQMPL. We need to understand as to whether this would apply also for the additional 10 dry bulk cargoes also.	There is no restriction for handling geared vessels at WQ-6 that carry the additional cargoes for which proposal is under consideration of TAMP for notification of tariff. However, the additional cargoes will be handled by the Concessionaire in
(vii).	At VPT we have options of discharging either by HMC or Ship crane or Ship grabs. If only	

gearless vessels are permitted to berth at M/s.WQMPL as per present guidelines, then in the event of malfunctioning of HMC, what alternatives WQMPL can provide to continue discharge operations.	similar lines to that of the designated cargoes.
---	--

2. A joint hearing on this case was held on 18 June 2018 at VPT premises. At the joint hearing, the VPT and the concerned users/ user organisations have made the following submissions at the joint hearing:

West Quay Multiport Private Limited (WQMPL)

- (i). During pre-bid meeting various bidders had raised an issue as to whether WQ-6 berth can handle cargo other than CP coke, Lam coke, steel and granite blocks. The port had then clarified that in case of non-availability of indicative cargoes, which is unlikely, Port will permit positively other cargoes that can be handled at this berth subject to approval of TAMP.
- (ii). We started commercial operation in 2015. Capacity utilisation has been low even after 3 years.
- (iii). Hence, we requested port to allow us to carry additional cargo till the capacity utilisation is improved.
- (iv). The VPT took Board approval for tariff for additional cargo and has filed the proposal to TAMP.
- (v). We have seen tariff. We have no objection.

Vizag Seaport Private Limited (VSPL)

- (i). We were first BOT operator. We are licensed to handle multi cargo. The additional cargo included are the cargo which we handle.
- (ii). Additional cargo approval needs approval of the Ministry.
[VPT: MOS has given clarification in this matter.]
- (iii). What is the period of non-availability of cargo?
- (iv). Our cargo volume also increased after four years.
- (v). Earlier, the WQMPL asked for 2 additional cargo, then they added 8 additional cargo.
- (vi). The argument that cargo is not available is not realistic.
- (vii). Who will decide the enforceability that WQMPL will stop once it reaches capacity.
[Member (Finance), TAMP: Mandate of TAMP is to fix the tariff. It is for port to enforce that WQMPL will stop handling additional cargo once it reaches the envisaged capacity.]
- (viii). Is it not a post-bid scenario?
[Member (Finance), TAMP: Government has clarified that the clarification given during pre-bid forms part of bidding and has advised TAMP to go ahead.]
- (ix). Keep this pending till the clarification is obtained by VPT from ASG.
- (x). We will make our written submissions within 5 days.

Vizag General Cargo Berth Pvt. Ltd. (Vedanta)

- (i). We welcome the proposal.
- (ii). This may be applied in our case also.

Vizag Seaport Private Limited (VSPL)

- (i). Composite tariff is fixed under 2008 guidelines. Whether hook point delivery will be allowed under 2008 guidelines. We need to re-frame our plan. TAMP can permit tariff for composite services only under the Tariff Guidelines of 2008.

Visakhapatnam Port Trust (VPT)

- (i). TAMP will frame tariff for composite service.

3. A summary of the comments received from the VSPL as agreed at the joint hearing and reply furnished by VPT thereon is tabulated below:

Sl. No.	Comments received from VSPL	Reply furnished by VPT
1.	Vizag Seaport Private Limited	
(i).	As confirmed by TAMP vide our letter dated 13 December 2016, Vizag Seaport Private Limited (VSPL) has the same view that there is no scope to revise upfront tariff to cover any other cargo in a post bid scenario other than the cargo for which the tariff has been fixed on upfront basis.	<p>The view point of VSPL that there is no scope to revise upfront tariff or cover any other cargo in a post bid scenario other than the cargo for which tariff has been fixed on upfront basis is not tenable since, it is replied to one of the queries raised by the bidders during the pre-bid stage itself, duly clarifying that <i>"in case of non-availability of indicative cargoes, which is likely, port will permit positively other cargoes that can be handled at this berth subject to approval of TAMP."</i></p> <p><i>(VPT has furnished a copy of queries raised by the bidders and reply of VPT to which is form part of Concession Agreement signed by VPT and WQMPL on 31 July 2010)</i></p> <p>It is not out of place to mention that the replies to pre-bid queries raised by the bidders also forms part and parcel of the Concession Agreement and bound by the Law of Contracts. Notwithstanding, VPT has referred the matter for an external legal opinion. The legal counsel, among other things, categorically stated that <i>"The existence of a clarification in a pre-bid meeting which is part and parcel of the Concession Agreement indicates that the request made to TAMP does not amount to a Post Bid modifications and is a legitimate commercial action initiated by the contracting parties herein in accordance with the law."</i> <i>(copy of email received from Standing Counsel of VPT is furnished)</i></p> <p>In view of the above, the view point of VSPL is hereby refuted.</p>
(ii).	There are BOT Projects covered under 2005 as well as 2008 Tariff Guidelines of TAMP. In spite of several representations to amend the Tariff Guidelines, 2005 or allow migration to Tariff Guidelines, 2013 to enable collection of tariff based on market rates, same was not considered till date citing the sole reason that same would amount to post bid concession requiring	The TAMP / Ministry may look into the issue as the point relates to amendment of Tariff Guidelines 2005/ migration to Tariff Guidelines 2013.

	discovery of market rate of Revenue share by rebidding.																					
(iii).	<p>However, in the case of the BOT Project WQ-6 of VPT, for which upfront tariff was notified on 4.9.15 for handling intended cargos of CP Coke, LAM Coke, Steel and Granite, the landlord Port i.e., VPT has approached TAMP for fixation of tariff covering 10 new cargo items on the following grounds:</p> <p>(a). That the terminal WQ-6 is underutilized due to non-availability of intended cargo and</p> <p>(b). During the pre-bid meeting of this Project, it was clarified to the bidders that in case of non-availability of Indicative cargos, which is unlikely, port will permit positively other cargos that can be handled at this berth subject to approval of TAMP.</p>	<p>It is to clarify that the WQ-6 project was awarded on DBFOT basis and not on BOT basis. Further, it is to reiterate that VPT has submitted the subject proposal to TAMP on the request of the Concessionaire as per the provisions of the Concession Agreement duly obtaining the legal opinion with the intention of improving the capacity utilization of the WQ-6 terminal purely in the interest of business and on a holistic view, to avoid the investment made for the development of the facility infructuous and the amount lent by the Banks becoming NPA.</p>																				
(iv).	<p>The pre bid clarification is vague and the same is questionable under Law with regard to interpretations of the words “unlikely” “other cargoes” and “approval of the TAMP”. The circumstances under which the non-availability of Indicative cargoes is to be treated as Unlikely and the nature of cargoes to be allowed without detrimental to the interests of other BOT operators who were already allowed to handle similar cargoes were not spelt out in the said clarification. Further, TAMP is not the Approving Authority for permitting Additional Cargoes to be handled by the said BOT Operator. Therefore, the Bid Clarification is itself void under Law basis which the present relaxation is considered by VPT. It may be noted that such relaxations will result in several fresh disputes among the existing BOTs and the Landlord Ports.</p>	<p>There is no ambiguity in the reply given during pre-bid meeting, with regard to consideration of other cargoes at the terminal in the event of non-availability of indicative cargoes. The project is planned basing on the traffic volumes projected for the indicative cargoes and project viability as part of TEFRR. However, in order to avoid any possible risk of the project becoming unviable which cannot be foreseen at the time of bidding, VPT has replied that it will permit positively other cargoes that can be handled at this berth subject to approval of TAMP. The clause “cargoes that can be handled clearly indicate the port will permit only those cargoes which are not designated and specified to other PPP terminals; so as not to be detrimental to the business interests of other operators. The VSPL is awarded on BOT basis for handling multi cargoes and no exclusivity exists with regard to the additional cargoes proposed.</p> <p>With regard to approval for permitting additional cargoes, it is to state that the Ministry of Shipping has given a direction to TAMP to consider the proposal of VPT. Further, it is to state that such relaxations in respect of other PPP projects at VPT may not arise as there is no provision in the Concession Agreements to that effect.</p>																				
(v).	<p>The following table shall depict the factual position of Cargo volumes in VPT and WQ6</p> <p style="text-align: center;">In lakh Tons</p> <table border="1"> <thead> <tr> <th></th> <th>2015-16</th> <th>2016-17</th> <th>2017-18</th> </tr> </thead> <tbody> <tr> <td>Permitted Cargo handled in VPT</td> <td>09.86</td> <td>13.75</td> <td>18.57</td> </tr> <tr> <td>Year on Year Growth</td> <td>-</td> <td>39.45%</td> <td>35%</td> </tr> <tr> <td>Qty Handled by WQ-6</td> <td>0.39</td> <td>0.70</td> <td>0.30</td> </tr> <tr> <td>Percentage of Volumes handled by WQ-6 out of available cargoes</td> <td>3.91%</td> <td>5.09%</td> <td>1.62%</td> </tr> </tbody> </table>		2015-16	2016-17	2017-18	Permitted Cargo handled in VPT	09.86	13.75	18.57	Year on Year Growth	-	39.45%	35%	Qty Handled by WQ-6	0.39	0.70	0.30	Percentage of Volumes handled by WQ-6 out of available cargoes	3.91%	5.09%	1.62%	<p>Though there has been considerable increase in the volumes of designated cargoes during the last three years of VPT, these cargoes were also handled at the port berths already existing at the time of award of WQ-6 berth even after development of WQ-6 since they cannot be treated as competing facilities. Since there is no restriction on handling the designated cargoes at the port berths, some of the</p>
	2015-16	2016-17	2017-18																			
Permitted Cargo handled in VPT	09.86	13.75	18.57																			
Year on Year Growth	-	39.45%	35%																			
Qty Handled by WQ-6	0.39	0.70	0.30																			
Percentage of Volumes handled by WQ-6 out of available cargoes	3.91%	5.09%	1.62%																			

	<p>From the above table, it is evident that there is substantial growth in the cargo volumes permitted as per the concession agreement of WQ-6. Year on year, there is a minimum 35% growth. Therefore, it can not be deducted that indicative cargoes are not available. Even in the available cargo, it may be seen that the volumes handled by WQ-6 is abysmally low. The throughputs of WQ-6 are low because of other inherent inconsistencies in the project and not because of non-availability of cargo, which is obvious. We feel, this may be due to lack of adequate marketing efforts from their side. Therefore, the contention of non-availability of intended cargoes for WQ-6 is not correct.</p>	<p>users still handle these cargoes at the port berths according to their convenience and preference.</p>
(vi).	<p>The ground of allowing handling of additional cargos citing the reason that same is due to non-availability of intended cargos is not logical, that too within three years of commencement of operations. None of the BOT Operators in VPT were considered any such relaxation in the past two decades though they too suffered the same problem. The cargo pick up period for several Port Projects has been after five years only. They feel any such relaxation during operation phase of Concession Period, would confer unintended benefit and wrong incentive to Projects that fail to efficiently market their Project Facilities and Services despite cargo availability.</p>	<p>The rationale for allowing additional cargoes at the WQ-6 terminal has adequately been mentioned as part of comments to point No.3 above.</p> <p>Being a business partner, VPT has been constantly striving and considering all possible ways for making the PPP projects viable purely on the basis of the provisions of Concession Agreements and there has been no bias in respect of any of the terminals / operators.</p>
(vii).	<p>Such a relaxation by allowing handling of additional cargos not envisaged while fixing upfront tariff by TAMP and signing of Concession Agreement would set a wrong precedent with similar claims from other BOT operators leading to chaos and anomalies among the various BOT Projects and the Landlord Ports.</p>	<p>As already stated, considering additional cargoes is strictly in accordance with the provisions of the Concession Agreement and specific to WQ-6 project. Further, it may be stated that there cannot be a scope for any of the operators including WQMPL to claim for any relaxation/ concession beyond the scope of the provisions of Concession Agreement.</p>
(viii).	<p>Further, TAMP has not been entrusted with any such power of modifying any Upfront tariff fixed and indicated in the bid document under the 2008 Tariff Guidelines except under Clause 1.4 and Clause 2.7.1 of the Tariff Guidelines, 2008 and both of the said clauses are not applicable for covering additional cargos not envisaged while calling bid or fixing upfront tariff for notifying in the bid document.</p>	<p>The TAMP / Ministry may look into the issue. [The MOS has issued clarification vide its letter No.IWT-11/33/2018-DD(DW) dated 21 May 2018 which has been brought out in the earlier paragraphs]</p>
(ix).	<p>Though there is a condition imposed by the landlord Port, VPT, that this relaxation will be allowed till such time the designated cargo picks up in future and the terminal reaches its envisaged capacity, same is flawed for the following reasons: (a). There is no transparency to determine the timing of cargo pick up or period upto which additional cargos to be allowed.</p>	<p>It may be seen from the reply given during pre-bid meeting with regard to allowing additional cargoes, that there is no specific duration of time mentioned. However, VPT has taken a rational decision to allow the additional cargoes on (i) non-exclusivity basis and (ii) only till such time when the volume of designated cargoes picks up and the terminal reaches its designed capacity.</p>

	<p>(b). Terminal reaching designated capacity is also not a transparent and fair condition as the Project may continue to handle additional cargos despite availability of designated cargos for its own reasons.</p> <p>(c). In the absence of any such relaxation to other such Projects suffering for the same reasons or the Projects which are already licensed to handle the cargos that are now proposed to be allowed as additional cargos, a scenario of unintended competition and absence of level playing field is created which is undesirable as the same would impair the growth of this industry.</p>	<p>Further, it is to state that TAMP has invited VSPL along with other stakeholders for the joint hearing held on 18 June 2018. As such, it is clear that the process of allowing additional cargoes at WQ-6 terminal is being carried out in a totally transparent manner.</p>
(x).	<p>Notwithstanding the above position, the Authorities are also requested to clarify that no hook point delivery of cargo is allowed in respect of this proposal. Because, if the Authorities allowed hook point delivery, there is no provision to fix tariff for such activity as under 2008 guidelines tariff has been uniformly fixed only for composite services by TAMP. Any attempt to fix now for WQ6 for hook point delivery will materially change the upfront tariff for composite service and change in upfront tariff is clearly a post bid concession and as such not permissible.</p>	<p>It is to clarify that the said proposal envisages fixation of tariff for additional cargoes comprising of handling charges which is a composite charge “for (i) unloading of the cargo from the vessel including stevedoring and transfer of the same upto the point of storage, storage at the stackyard upto a free period of 5 days and loading onto trucks in respect of import cargo and (ii) unloading of the cargo from the trucks at the stackyard, storage at the stackyard upto a free period of 15 days, transfer of the cargo to the loading point and loading onto the ship including stevedoring.”</p>
(xi).	<p>The VSPL, therefore, request the Authorities to desist from any such action of relaxing the condition of handling intended cargo as per bid document and not to proceed with fixation of any tariff for such additional cargos in contravention of the Tariff Guidelines, 2008.</p>	<p>In view of the above, it is realistic to consider allowing handling of additional cargoes as requested by WQMPL as per the provisions of the Concession Agreement and the request of VSPL may not be considered.</p>

4. The Indian Private Ports and Terminals Association (IPPTA) an umbrella body of private terminal operators has furnished its comments on the subject proposal filed by VPT. The IPPTA has mostly reiterated the comments furnished by VSPL. The VPT has also reiterated its comments furnished on comments of VSPL while furnishing comments on IPPTA. That being so, they are not reiterated here. Only on one point made by IPPTA, the VPT has furnished elaborated comments. A summary of the said comment received from IPPTA and reply furnished by VPT thereon is tabulated below:

Sl. No.	Comments of IPPTA	Reply furnished by VPT
(i).	<p>In our view, TAMP has not been entrusted with any such power of modifying any upfront tariff fixed and indicated in the bid document under the 2008 Tariff Guidelines except under Clause 1.4 and clause 2.7.1 of the Tariff Guidelines, 2008 wherein the said clauses are not applicable for covering additional cargos not envisaged within the scope of the project. The landlord Port VPT though has put in a rider saying that this relaxation will be allowed till such time the designated cargo picks up in future and the terminal reaches its envisaged capacity, we believe that these terms are fundamentally flawed for the following reasons:</p>	<p>It has been considered consciously in the business interests of all the stakeholders in a holistic manner to allow handling of additional cargoes as per the provisions of the Concession Agreement and after obtaining legal opinion.</p> <p>The Concessionaire has to compete with the existing BOT operators as well as VPT's own berths to handle these cargoes as no exclusivity is contemplated. Therefore, emergence of a situation where the Concessionaire avoids handling designated cargoes in lieu of additional cargoes is irrational and hypothetical.</p>

<p>(a). There is no apparent formula to determine the timing of cargo pick up or period up to which additional cargoes to be allowed. This clause is very subjective and ambiguous to say the least.</p> <p>(b). Terminal reaching designated capacity is also not a transparent and fair condition as the Project may continue to handle additional cargoes despite availability of designated cargoes for its own reasons.</p> <p>(c). The relaxation envisaged is extremely arbitrary and in the absence of any such relaxation to other such Projects suffering for the same reasons and existence of Projects which are already licensed to handle the cargoes that are now proposed to be allowed as additional cargoes, a scenario of unintended competition and absence of level playing field is created which is undesirable as the same would hamper the prospects of the other Terminals in the port.</p>	<p>It is to reiterate that the proposal to consider additional cargoes for WQ-6 facility is rational and that the additional cargoes proposed are not exclusive to any other PPP terminal.</p>
---	--
