

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.88/MP/2018

Coram:

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

Date of Order: 15thNovember, 2018

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and (a) PPA dated 17.3.2010 between Maharashtra State Electricity Distribution Company Ltd. and EMCO Energy Limited.

And

In the matter of

GMR Warora Energy Limited
701/704, 7th Floor, Naman Centre, A-Wing,
Bandra Kurla Complex, Bandra,
Mumbai- 400051

.....Petitioner

Vs

1. Maharashtra State Electricity Distribution Company Limited
Fifth Floor, Prakashgadh, Plot No. G- 9,
AnantKanekarMarg, Bandra (East)
Mumbai- 400051

2. Electricity Department
Union Territory of Dadra & Nagar Haveli,
VidyutBhavan, Opposite Secretariat,
Silvassa, Dadra and Nagar Haveli- 396230

.....Respondents

Parties present:

ShriVishrov Mukherjee, Advocate, GMRWEL
Ms.RaveenaDhamija, Advocate, GMRWEL,
Ms.RimaliBatra, Advocate, MSEDCL

ORDER

GMR Warora Energy Limited (formerly EMCO Energy Ltd), the Petitioner herein, is a generating company, incorporated under the Companies Act, 1956,



which has developed a 600 MW coal based Thermal Power Project (hereinafter referred to as the “Project”) in the Warora Taluka, District Chandrapur in the State of Maharashtra. The Project comprises of two units of 300 MW each. Unit-I of the Project was commissioned on 19.3.2013 and Unit-II was commissioned on 1.9.2013.

2. The Petitioner has entered into the following long-term PPAs for supply of power from the Project:

(a) Supply and sale of 200 MW of power on long term basis to Maharashtra State Electricity Distribution Company Ltd (MSEDCL) in terms of PPA (MSEDCL PPA) dated 17.3.2010. The cut-off date for this PPA is 31.7.2009. Supply of power in terms of the PPA commenced from 17.3.2014.

(b) Supply and sale of 200 MW of power on long terms basis to Electricity Department, Union Territory of Dadra and Nagar Haveli (DNH) in terms of PPA (DNH PPA) dated 21.3.2013. The cut-off date of this PPA is 1.6.2012. Supply of power in terms of the PPA commenced from 1.4.2013.

(c) Supply and sale of 150 MW of power on long terms basis to TANGEDCO through back to back arrangements as follows:

(i) Power Sale Agreement (PSA) dated 1.3.2013 between GMR Energy Trading Limited (GMRETL) and Petitioner (GMRWEL) based on which bid was submitted to TANGEDCO;

(ii) PPA dated 27.11.2013 between GMRETL and TANGEDCO for supply of power from Petitioner to TANGEDCO. The cut-off date of this PPA is 27.2.2013.

(iii) PPA dated 3.5.2014 between Petitioner and GMRETL recording the terms and conditions in accordance with PPA between GMRETL and TANGEDCO. The supply of power under the PPA commenced on 22.10.2015.

3. The Respondent No. 1, MSEDCL issued RFP on 15.5.2009 and initiated the competitive bidding process for procurement of power on long term basis. The Petitioner submitted its bid on 7.8.2009 and emerged as one of the successful bidders with a levelised tariff of ₹2.879/kWh. Accordingly, the PPA was executed for procurement of 200 MW of power on 17.3.2010 by MSEDCL on long term basis. Similarly, in March, 2012, the Respondent No.2, DNH issued RFP for



procurement of power through competitive bidding and the Petitioner emerged as one of the successful bidders. On 21.3.2013, DNH PPA was executed for procurement of 200 MW of power by DNH on Long Term basis.

4. Petition No. 8/MP/2014 was filed by the Petitioner claiming compensation on account of the impact of the Change in Law events during the Operation period and Construction period under MSEDCL and DNH PPAs and the Commission by order dated 1.2.2017 had allowed/disallowed some of the claims of the Petitioner under Change in law. Aggrieved by the said order, the Petitioner filed Appeal No. 111 of 2017 before the Appellate Tribunal for Electricity (APTEL) in respect of the compensation claims disallowed by the Commission. Similarly, Appeal No. 290/2017 was filed by DNH Power Distribution Company Ltd against the said order dated 1.2.2017 disputing the compensation claims allowed to the Petitioner under some change in law events.

5. During the pendency of the above said appeals, the Petitioner has filed this Petition seeking the following reliefs:

“(a) Confirm that the following operational parameters which are imperative of calculation of compensation due to the Petitioner on account of change in law events, are to be considered on actuals:

- (i) Auxiliary Power Consumption*
- (ii) Station Heat Rate*
- (iii) Gross calorific Value*

(b) Confirm that levy of Service Tax & Swachh Bharat Cess on coal transportation is on all components as per rail invoice;

(c) Release of amounts due to the Petitioner from Respondent No. 1, MSEDCL in light of the Commission’s order dated 1.2.2017 in Petition No. 8/MP/2014.”

6. The Petitioner in this Petition has submitted as under:

(a) Subsequent to Commission’s order dated 1.2.2017 in Petition No. 8/MP/2014 allowing the change in law events, the petitioner raised invoices on MSEDCL for the period from March, 2014 to October, 2017 for the change in law events. However, MSEDCL deducted an amount of ₹27,46,01,856 from the amount raised by the Petitioner.



(b) The Petitioner wrote to MSEDCL on 14.2.2018 to make full payment of the invoiced amount or alternatively to provide reasons for considering a lesser value than the invoices furnished by the Petitioner.

(c) The Respondent, MSEDCL vide letter dated 23.2.2018 stated that it has (a) supplied units instead of total generation submitted by the Petitioner (b) Mean GCV of linkage coal as per invoice 4150 kCal/Kg (c) SHR @ 2211 kcal/kWh as submitted in bid (d) Change in law calculations without Busy Season Surcharge and Development Surcharge as not approved by Commission.

(d) The Petitioner has a composite scheme for supply of power to more than one State as held in the Commission's order dated 1.2.2017. The issues raised in the Petition pertain to implementation of the Order dated 1.2.2017 as well as consequential relief and therefore the Commission has jurisdiction to entertain the Petition.

(e) The Commission in its order dated 1.2.2017 has held that the Petitioner is entitled to recover claims on allowed items based on actual coal consumed corresponding to scheduled generation and that the same shall be reconciled every year with the actual payment made with the books of accounts.

(f) As regards Service Tax on transportation of Coal, this Commission has clarified that the Petitioner shall be entitled to recover on account of change in Service Tax on transportation of coal in proportion to the actual coal consumed corresponding to the scheduled generation for supply of electricity of MSEDCL and DNH.

(g) Since the Petitioner is entitled to recover the claims allowed for the actual coal consumed corresponding to scheduled generation, the Petitioner has been computing claim on actual coal consumption taking into account actual plant parameters like Station Heat Rate (SHR), as received GCV at plant end, Auxiliary Power Consumption (APC) for supplying scheduled generation to MSEDCL. The Petitioner has also worked out the claims due to Service Tax on all components viz., Base freight, Busy Season Surcharge, Development Surcharge, Coal & Coke Terminal charges, as applicable in the Coal Transportation invoice. The Respondents have not disputed the bills raised by the Petitioner.

(h) The APTEL in Appeal No.288 of 2013 (Wardha Power Company Ltd V Reliance Infrastructure Ltd &ors) has recognized the principle that in order to restore the affected party to the same economic position, compensation for change in law claims has to be such, so as to reimburse the affected party for the expense actually incurred. The underlying principle of change in law is to determine the consequence of change in law and to compensate the affected party (herein Petitioner) such that the party is restored to the same economic position as if such change in law had not occurred.

(i) The Commission in IA No. 40/2017 (GWEL Vs MSEDCL&ors) has rightly allowed Excise Duty on assessable value including components like Sizing



charges and Surface transportation charges, although expenditure on these components were not allowed.

(j) GCV ought to be considered on 'as received' basis to arrive at the actual coal consumption in terms of Order dated 1.2.2017. The Hon'ble Supreme Court in its judgment dated 5.10.2017 in Nabha Power Ltd V PSPCL has held that the calorific value has to be taken at the Project site.

(k) In the Public Notification dated 14.11.2017 in Petition No. 244/MP/2016, CERC has placed on record the observations of CEA that a margin of 85-100 kcal/kg for pit head station and margin of 105-120 kcal/kg for non-pit head stations may be considered. The Petitioner is calculating the compensation considering as loss of GCV measured at wagon top at unloading point till the point of firing of coal in boiler.

(l) MSEDCL is computing the GCV as 4150 kcal/kg based on coal invoices actual GCV on 'as received' basis, which is contrary to the methodology laid down by the Commission in order dated 1.2.2017 and the Nabha judgment. Hence, the GCV on 'as received' basis be taken for the purpose of calculating compensation on account of change in law events.

(m) There is difference in the following parameters taken into account by the Petitioner and Respondent MSEDCL in calculation of claims.

(i) While the Petitioner has computed claims based on actual APC of 8.25%, MSEDCL has taken it as 'nil'. The Petitioner is consuming additional coal to run the auxiliaries to deliver the scheduled generation to MSEDCL. Hence, cost incurred towards Auxiliary Power Consumption ought to be shared by beneficiaries including MSEDCL in proportion to the respective scheduled generation

(ii) The Petitioner has taken the actual SHR on month to month basis @2320 kcal/kWh while MSEDCL has considered SHR @ 2211 kcal/kWh, which is the design gross SHR as per bid document submitted to MSEDCL. The Petitioner has also submitted plant gross SHR as per CERC norms @2355 kcal/kWh in the same bid document submitted to MSEDCL. CERC has allowed 6.5% degradation factor to be applied on Design Heat Rate for the purpose of arriving at Normative Heat Rate, which comes to 2355 kcal/kWh.

(iii) The Petitioner is calculating claims considering the actual GCV as received at station (3800 kcal/kg) whereas MSEDCL has taken mean GCV as billed (4150 kcal/kg). In view of the settled laws, the Petitioner is entitled to claim on the basis of as received GCV at station.

(n) The Petitioner has raised supplementary bills amounting to ₹134.74 crore till October, 2017 against which MSEDCL has computed ₹107.28 crore and only paid an amount of ₹87.81 crore, deducting ₹19.47 crore towards Fuel Adjustment charges to the Petitioner. The MSEDCL PPA does not permit the unilateral deduction of amounts especially from bills not disputed by MSEDCL. It is therefore prayed that MSEDCL may be directed to remit the balance



amounts along with late payment surcharges applicable under MSEDCL PPA and make all future payments in accordance with the norms and methodology prayed herein.

7. The Petition was admitted on 31.5.2018 and notices were issued to the Respondents. Respondent No.1, MSEDCL vide affidavit dated 18.7.2018 has filed its reply and the Petitioner vide affidavit dated 21.8.2018 has filed its rejoinder to the said reply.

Reply of MSEDCL

8. The Respondent MSEDCL vide its reply affidavit dated 18.7.2018 has submitted the following:

(i) The present Petition is without jurisdiction as the Appropriate Commission to adjudicate the instant Petition would be the Maharashtra Electricity Regulatory Commission (MERC) in light of Section 64(5) of the 2003 Act.

(ii) The relief sought for by the Petitioner is not maintainable as the same is covered under the contractual arrangement entered into between the parties and is also not in accordance with the judgments of the Hon'ble Supreme Court.

(iii) The judgment in Nabha Power case which was based on Case 2 bidding cannot be directly applied to the PPA between MSEDCL and EMCO which is based on Case 1 bidding guidelines.

(iv) The Hon'ble Supreme Court in the said judgment had held that the contract should be performed as per bidding documents and there should not be any alteration/deviation in conditions clauses from bidding documents.

(v) The MERC in the case of APL V MSEDCL has held that GCV has to be considered as per the middle value of GCV range of the assured coal grade in LOA/FSA/MoU. Hence, the following shall be the basis for computing the impact of change in law.

(a) Station Heat Rate: Net SHR as submitted in the bid or SHR or Auxiliary Consumption norms specified for new thermal generating stations in MYT Regulations, 2011 whichever is superior.

(b) GCV of domestic coal supply by CIL: Middle value of the GCV range of the assured coal grade in LOA/FSA/MoU. GCV of alternate coal is actual as received. GCV cannot be considered on 'as received' basis but is to be considered on 'as billed' basis. If the actual GCV of coal is different from what is contended by the Petitioner then it has to be determined as per the quantum mentioned in the bills and invoices.



(c) FSA signed between RIPL and SECL clearly indicates that the range of GCV of coal is 4000-4300 and as per the FSA clauses, if any grade slippage in coal received, it is to be compensated by SECL to EMCO. The Petitioner cannot rely on Petition No.244/MP/2016 pending before CERC since the issue of GCV has not been decided in this case.

(vi) Service Tax and Swacch Bharat Cess were calculated and paid as per order dated 1.2.2017 considering the following:

(a) Change in law invoices are considered for the actual energy supplied as per injection data by REA.

(b) Linkage coal GCV and other domestic coal GCV is taken as 4150 kcal/kg throughout, whereas imported coal GCV is considered as weighted average GCV

(c) SHR is considered at 2211 kcal/kWh (Design Heat Rate as per bid document)

(vii) MSEDCL PPA does not permit late payment surcharge and therefore, does not fall within the scope of PPA. MSEDCL has paid the bills as per MERC and CERC orders and has rightly deducted the bills of EMCO. Accordingly, the claims of the Petitioner may not be considered.

Rejoinder of Petitioner

9. The Petitioner vide rejoinder affidavit dated 21.8.2018 has submitted the following:

(i) The issue of jurisdiction has already been decided by the Commission in order dated 1.2.2017 in Petition No.8/MP/2014 and since the same has not been challenged by MSEDCL, the decision of the Commission had attained finality.

(ii) The provisions of Section 64 of the 2003 Act are applicable to and lay down the procedure for determination of tariff under Section 62 of the Act. It is not applicable for adoption of tariff discovered through competitive bidding process under section 63.

(iii) This Commission has adopted 'as received' GCV in order dated 7.2.2016 in Petition No.79/MP/2013 and order dated 16.3.2018 in Petition No. 1/MP/2017.

(iv) The Petitioner is not seeking compensation for grade slippage. The mechanism proposed by MSEDCL by referencing GCV to the average GCV as given in the LOA/FSA has no basis and is contrary to the principle behind compensation for a change in law event and is thus contrary to the provisions of the PPA. This is also contrary to the Wardha judgment of the Tribunal.

(v) The CEA opinion dated 17.10.2017 in relation to petition No. 244/MP/2016



is relevant since CEA also acknowledges that there is loss of GCV from the point of view of 'as received' to the point of 'as fired'.

(vi) The SHR and APC ought to be computed on actuals for effective restoration, so as to offset the effect of Change in law events. MSEDCL has commenced making payments on the basis of actual APC and has conceded to the fact that compensation would be based on actual parameters.

(vii) The SHR referred to by MSEDCL do not form part of bid. The same was submitted for limited purpose for ascertaining sufficiency of coal linkage. In the case of the Petitioner, SHR was not part of bid evaluation. MSEDCL's reliance on Design SHR is misplaced and contrary to the Wardha judgment, since it does not take into account the margins to be allowed for the deviations in operating parameters at site conditions. Accordingly, SHR cannot be restricted when there is no such restriction contained in the PPA.

(viii) The Commission has allowed Service tax on transportation of coal. Thus, MSEDCL ought to pay for the Service tax on Railway freight, which takes into account all the components of Busy Season surcharge, Development surcharge and Coal Terminal surcharge.

(ix) Late Payment surcharge would be applicable in terms of Article 8.3.5 & 8.3.3 of the MSEDCL PPA in case of payments of amounts under a monthly tariff bill and supplementary bill.

10. During the hearing on 17.9.2018, the learned counsel for the Petitioner and the Respondent MSEDCL reiterated their submissions made in the Petition and the Replythereof. The Commission after hearing the parties reserved its order in the Petition. Based on the submissions of the parties, the following issues emerge for consideration:

Issue No. 1: Whether the Commission has the jurisdiction to decide the disputeraised in the Petition?

Issue No. 2: Whether the Petitioner is entitled for the reliefs sought for in the Petition?

Issue No. 1: Whether the Commission has jurisdiction to decide the dispute?

11. The Petitioner has submitted that it has a composite scheme for generation and sale of power to more than one State namely, Maharashtra, Dadra & Nagar Haveli and Tamil Nadu. Accordingly, it has submitted that the Commission has the jurisdiction to entertain the Petition and to adjudicate the dispute between



the parties. The Respondent, MSEDCL has submitted that the Appropriate Commission to adjudicate the dispute in the Petition is the Maharashtra Electricity Regulatory Commission (MERC) in the light of Section 64(5) of the 2003 Act.

12. The submissions have been considered. It is observed that the Respondents, MSEDCL and DNH in their replies filed in Petition No. 8/MP/2014 had objected to the jurisdiction of the Commission to deal with the issues raised therein. These Respondents had submitted that the Central Commission would have jurisdiction only where there is a joint procurement by more than one distribution licensees on common terms and conditions, including common tariff. They had also urged that in the absence of the composite scheme, adjudication of disputes raised in the said Petition falls within the jurisdiction of the State Commission under section 86(1)(f) of the 2003 Act. The submissions of these Respondents were rejected by the Commission in its order dated 1.2.2017 and it was held that the Central Commission has the jurisdiction to adjudicate the dispute under section 79(1)(f) of the 2003 Act. The relevant portion of the said order is extracted hereunder:

“15. It is pertinent to mention that the Commission in order dated 15.10.2016 while holding the existence of composite scheme in case of the Petitioner had made it subject to outcome of the appeals filed against the Commission’s order dated 2.4.2013 and 21.2.2014 in Adani case. In the light of the Full Bench judgment, it is reiterated that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and the jurisdiction of the Commission for adjudication of dispute under Section 79 (1)(f) of the Act is attracted in this case. Learned Counsel for MSEDCL sought to distinguish the Full Bench judgment with regard to jurisdiction in Adani Case from the present case. In our view, the Full Bench judgment lays down the law with regard to interpretation of Composite Scheme under Section 79 (1) (b) of the Act and the case of the generating station of the Petitioner is fully covered under the Full Bench judgment.”

13. It is noticed that in Appeal No.111/2017 filed by the Petitioner challenging the Commission’s order dated 1.2.2017, the Respondent, MSEDCL had objected



to the jurisdiction of this Commission and the Tribunal vide its judgment dated 14.8.2018 rejected the submissions of MSEDCL and upheld the jurisdiction of this Commission as under:

(B) iii. We hold that, the Central Commission based on Full Bench Judgement of this Tribunal has held that the jurisdiction of GWEL lies with it as it is having composite scheme of sale of power to more than one State i.e. Maharashtra, DNH and Tamil Nadu. We have perused the Full Bench Judgement and find that all the relevant aspects related to the jurisdiction for sale of power to more than one State has been examined by this Tribunal before arriving at the decision. Accordingly, we hold that the contentions of the Discom/MSEDCL on this issue are unsustainable. Hence, this issue is answered against the Discom/MSEDCL.”

14. It is pertinent to mention that the Hon'ble Supreme Court vide its judgment dated 11.4.2017 in the Civil Appeals titled Energy Watchdog v CERC &ors (2017 (4) SCALE 580) upheld the jurisdiction of this Commission and has held that where generation and sale of power takes place in more than one State, the same amounts to a composite scheme and the jurisdiction for the same lies with the Central Commission. The relevant portion of the judgment dated 11.4.2017 is extracted hereunder:

“22..... On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.

...

26. Another important facet of dealing with this argument is that the tariff policy dated 6th June, 2006 is the statutory policy which is enunciated under Section 3 of the Electricity Act. The amendment of 28th January, 2016 throws considerable light on the expression “composite scheme”, which has been defined for the first time as follows:

“5.11 (j) Composite Scheme: Sub-section (b) of Section 79(1) of the Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

Explanation: The composite scheme as specific under section 79(1) of the Act shall mean a scheme by a generating company for generation and sale of electricity in more than one State, having signed long-term or medium-term PPA prior to the date of commercial operation of the project (the COD of the last unit of the project will be deemed to be the date of



commercial operation of the project) for sale of at least 10% of the capacity of the project to a distribution licensee outside the State in which such project is located.”

27. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State.”

15. The Respondent, MSEDCL has further submitted that the present petition is without jurisdiction in the light of section 64(5) of the 2003 Act. In this regard, Section 64(5) of the 2003 Act provides as under:

“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.

16. This provision clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission based on the application of the parties concerned even in cases involving inter-state supply. In our view, Section 64(5) has no application in cases of tariff discovered under competitive bidding process and adopted by the Commission under Section 63 of the 2003 Act. It is observed that the Hon’ble Supreme Court in the ‘Energy Watchdog case’ while analyzing the expression ‘composite scheme’ under Section 79(1)(b) had also examined the Section 64(5) of the 2003 Act and had upheld the jurisdiction of the Commission in its judgment dated 11.4.2017. The relevant portion of the judgment is extracted as under:

“Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply



if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

17. In the light of the decisions of the Hon’ble Supreme Court and the Tribunal as above, this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79 (1) (b) of the 2003 Act and to adjudicate the disputes in terms of Section 79 (1) (f) of the 2003 Act. Thus, the issue of jurisdiction of this Commission having been settled in terms of the above orders/judgments, the same issue cannot be raised by the Respondent, MSEDCL again in this Petition, on extraneous grounds. Accordingly, the submissions of the Respondents, MSEDCL are rejected.

Issue No. 2: Whether the Petitioner is entitled for the reliefs sought for in the Petition?

A. Levy of Service Tax

18. The Petitioner has submitted that the Commission vide order dated 1.2.2017 had allowed Service Tax on transportation of coal. It has further submitted that the increase in Busy Season Surcharge, Development Surcharge and Coal Terminal surcharge have increased the railway freight for transportation of coal, thereby increasing service tax on transportation of coal. The Petitioner has pointed out that the Tribunal in its judgment dated 14.8.2018 in Appeal No. 111/2017 has relied upon its judgment dated 14.8.2018 in Appeal No.119/2016 (Adani Power Lt V RERC &ors) and held that the Petitioner is entitled to compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under change in law. Accordingly, the Petitioner has submitted that the Respondent, MSEDCL ought to pay service tax on railway freight which takes into account all components -Busy Season



Surcharge, Development Surcharge and Coal Terminal Surcharge. The Respondent, MSEDCL has submitted that Service Tax has been calculated as per Commission's order dated 1.2.2017 in Petition No. 8/MP/2014.

19. The submissions of the parties have been considered. The Commission in the order dated 1.2.2017 in Petition No. 8/MP/2014 held that Service tax on transportation of goods by Indian Railways qualifies as Change in Law. Relevant portion of the said order dated 1.2.2017 is extracted as under:

“89. ... By Finance Act of 2006, though service tax on transportation of goods by rail was introduced, an exception was made in case of Government Railways. By Finance Act of 2009, this restriction was removed by providing that service tax is leviable “to any person by another person, in relation to transport of goods by rail in any manner”. Therefore, transport of goods by Indian Railways became subject to service tax by Finance Act of 2009. Actual levy of service tax on transportation of goods by railways was exempted by Notification No. 33 of 2009 dated 1.9.2009. By Notification no. 26 of 2012 dated 20.6.2012, Ministry of Finance issued notification by exempting transport of goods by rail over and above 30% of the service tax chargeable with effect from 1.7.2012. By a Notification No. 43 of 2012 dated 2.7.2012, service tax on transportation of goods by Indian Railways was fully exempted till 30.9.2012. With effect from 1.10.2012, service tax on 30% of the transport of goods by rail is chargeable. Therefore, the basis of the service tax on transport of goods by Indian Railways is traceable to the Finance Act of 2009 which was enacted after the cut-off date in case of MSEDCL PPA. The rate Circular No. 27 of 2012 dated 26.9.2012 issued by Railway Board implemented the provisions of the Finance Act, 2009 at the ground level. In our view, since the imposition of service tax on transport of goods by Indian Railways is on the basis of the Finance Act, 2009 which has come into force after the cut-off date, the expenditure incurred by the Petitioner on payment of service tax on transport of goods by the Indian Railways is covered under change in law and the Petitioner is entitled for compensation in terms of the MSEDCL PPA.... Subsequent changes in service tax shall be admissible under change in law.”

Since transportation of goods by Railways included Basic freight charges, Busy Season Surcharge and Development Surcharge, Service Tax on all these elements of transportation of goods by Railways was applicable under Change in law. Therefore we are not in agreement with MSEDCL that Service Tax is not applicable on Busy Season Surcharge and Development Surcharge.

20. It is further noticed that the Tribunal vide its judgment dated 14.8.2018 in Appeal No.111/2017 had allowed compensation to the Petitioner on account of



the change in Busy Season Surcharge and Development Surcharge by Railways under Change In Law. The relevant portion of the judgment is extracted as under:

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

21. In terms of the judgment of the Tribunal, Busy Season Surcharge and Development Surcharge are covered under change in law and therefore, MSEDCL can no more take the technical objection for payment of Service tax on Busy Season Surcharge and Development Surcharge. Therefore, the Petitioner shall be entitled for Busy Season Surcharge and Development Surcharge till 30.6.2017. It is pertinent to mention that Service Tax was applicable till 30.6.2017 and thereafter, it has been subsumed under GST. Hence, with effect from 1.7.2017, the Petitioner shall be entitled for GST on Busy Season Surcharge and Development Surcharge.

22. It is further pertinent to mention that Busy Season Surcharge and Development Surcharge was separately shown as component of basic freight charges and with effect from 15.1.2018, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the freight charges. Accordingly, Service Tax and GST shall be applicable as under:

- (a) Service Tax shall be applicable on Busy Season Surcharge and Development Surcharge, in addition to basic freight charges, till 30.6.2017;
- (b) With effect from 1.7.2017, GST shall be applicable on Busy Season Surcharge and Development Surcharge, in addition to basic freight charges, till 14.1.2018;



(c) With effect from 15.1.2018, GST shall be applicable on the freight charges as Busy Season Surcharge and Development Surcharge have been subsumed;

(d) GST shall be applicable to (b) and (c) above in accordance with our Order dated 14.3.2018 in Petition No. 13/SM/2017.

23. As regards the Coal Terminal Surcharge, the same is imposed by the Ministry of Railways, GOI. This surcharge is akin to the Busy Season Surcharge and Development Surcharge. The Petitioner had not claimed Coal Terminal Surcharge as a change in law event in Petition No. 8/MP/2017. Since Service tax or GST is imposed on Coal Terminal Surcharge by an Act of the Parliament, the same shall be covered under Change in law. Accordingly, the Petitioner is entitled to recover the Service Tax and GST on Coal Terminal Surcharge as stated in para 22 above.

B. Parameters for Actual Coal Consumption (APC, SHR and GCV)

24. The Petitioner has submitted that in terms of the Commission's order dated 1.2.2017 in Petition No.8/MP/2014, it is entitled to recover claims on allowed items based on actual coal consumed corresponding to scheduled generation and that the same is to be reconciled every year with the actual payment made with the books of accounts. The relevant portion of the said order dated 1.2.2017 is extracted hereunder:

121. ...To approach the Commission every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed and summarized as under in terms of Article 10.3.2 of the PPA in the subsequent years of the contracted period:

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

(b) Increase in royalty on coal, clean energy cess, excise duty on coal and service tax on transportation of coal and Swachh Bharat Cess shall be computed based on coal



consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.

(c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by MSEDCL and ED DNH during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries.

(d) Xxx

25. The Petitioner has further submitted that it has been computing the claim on actual coal consumption taking into account the actual plant parameters like SHR, “as received” GCV and APC for scheduled generation. The Petitioner has submitted that the Respondent, MSEDCL has considered different operational parameters in the calculation of claims as per the decision of MERC in the matter of APL vsMSEDCL and hence the Commission may issue clarification as prayed for in the Petition. Based on the submissions of the parties, we now examine the claims of the Petitioner as under:

Auxiliary Power Consumption

26. The Petitioner has computed claims based on actual APC whereas MSEDCL has considered it as ‘nil’. However, the Petitioner during the hearing of the Petition on 17.9.2018 has submitted that the Respondent has commenced making payments based on actual APC and therefore this issue is not pressed. In view of this, the relief sought for by the Petitioner has not been considered in this order.

Station Heat Rate and GCV

SHR

27. The Petitioner has submitted that for calculation of compensation, it has taken SHR on monthly basis as 2320 kcal/kWh (approx), while the Respondent,



MSEDCL has considered SHR of 2211 kcal/kWh, which is a design gross SHR as per bid document submitted to MSEDCL. The Petitioner has further submitted that there is no bid SHR in the present case, since this is a Case-1 project and the SHR referred to by MSEDCL does not form part of the bid. The Petitioner while pointing out that SHR was submitted for the limited purpose of ascertaining coal linkage has submitted that the Commission had allowed 6.5% degradation factor to be applied on Design Heat Rate for the purpose of arriving at the normative heat rate, which comes to 2355 kcal/kWh. MSEDCL has submitted that SHR is considered at 2211 kcal/kWh (Design Heat Rate as per bid document) as per the decision of MERC.

GCV

28. The Petitioner has submitted that it has calculated claims considering the actual GCV as received at station (3800 kcal/kg) whereas MSEDCL has considered mean GCV as billed (4150 kcal/kg). It has further submitted that the Hon'ble Supreme Court in Nabha Power Ltd V PSPCL had held that the calorific value has to be taken at the Project site. The Petitioner has pointed out that the computation of GCV as 4150 kcal/kg (as billed) by MSEDCL based on coal invoices is contrary to the methodology laid down by this Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 and Commission's order dated 16.3.2018 in Petition No. 1/MP/2017 (GWEL V MSEDCL&ors). MSEDCL has submitted that linkage coal GCV and other domestic coal GCV has been considered as 4150 kcal/kg throughout whereas imported coal GCV is considered as weighted average GCV. The Petitioner has also submitted that the recommendations of CEA in Petition No. 244/MP/2016 for a margin of 85-100 kcal/kg for pit head station and 105-120 kcal/kg for non-pit head station may be allowed as loss of GCV.



29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/sWardha Power Company Limited V Reliance Infrastructure Limited &anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents for establishing the coal requirement. The relevant observations of APTEL are extracted as under:

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

30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also relied on MERC order with regard to GCV. As regards SHR, it was also suggested by MERC that net SHR as submitted in the bid or SHR norms specified for new thermal stations as per MYT Regulations, whichever is superior, shall be applicable. In our view, the decision in the said order has been given in the facts of the case and does not have any binding effect in case of the projects regulated by this Commission. Moreover, the SHR given in the bid are under test conditions and may vary from actual SHR. The Commission after extensive



stakeholders' consultation has specified the SHR norms in the 2014 Tariff Regulations. Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.

31. In the present case, the Petitioner has considered SHR of 2355 kcal/Kwh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211×1.065) and 2310 kcal/kWh (2211×1.045) for the period 2009-14 and 2014-19 respectively. Accordingly, we direct that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually.

32. In case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on 'as billed' basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on 'as billed' basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on 'as received' basis. Therefore, it will be appropriate if the GCV on 'as



received' basis is considered for computation of compensation for Change in law.

Late Payment Surcharge

33. The Petitioner has raised supplementary bills amounting to ₹134.74 crore till October, 2017 against which MSEDCL has computed ₹107.28 crore and only paid an amount of ₹87.81 crore, deducting ₹19.47 crore towards Fuel Adjustment charges to the Petitioner. It has submitted that the MSEDCL PPA does not permit unilateral deduction of amounts especially from bills not disputed by MSEDCL and therefore MSEDCL may be directed to remit the balance amounts along with late payment surcharges applicable under MSEDCL PPA. The Respondent MSEDCL has submitted that the MSEDCL PPA does not permit late payment surcharge and therefore, does not fall within the scope of PPA. MSEDCL has submitted that it has paid the bills as per MERC and CERC orders and has rightly deducted the bills of the Petitioner. Accordingly, the claims of the Petitioner may not be considered. The Petitioner has clarified that the late Payment surcharge would be applicable in terms of Article 8.3.5 & 8.8.3 of the MSEDCL PPA in case of payments of amounts under a monthly tariff bill and supplementary bill.

34. The matter has been considered. Article 8.3.5 of the MSEDCL PPA provides as under:

“8.3.5 In the event of delay in payment of monthly bills by any procures beyond its due date, a late payment surcharge shall be payable by such procures to the seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill.”

8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable in the same terms applicable to the Monthly Bill in Article 8.3.5.”



35. Due date has been defined in the PPA as under:

“Due Date” means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such monthly bill or supplementary bill is payable by such Procurer.”

36. Due date has been defined as the thirtieth day after a monthly bill or supplementary bill is received and duly acknowledged by the Procurers. Article 8.3.5 deals with late payment surcharge in case of delay in payment of monthly bills by the Procurer beyond the due date. In terms of Article 8.8, the claim for change in law shall be raised as supplementary bills. Article 8.8.3 deals with late payment surcharge in case of delay in payment of supplementary bills. In both cases, if the payments are not made by the due date, then the Petitioner is entitled to late payment surcharge. Therefore, receipt of monthly bills or supplementary bills by the procurers and non-payment of bills by the due dates are condition precedent for allowing late payment surcharge. In the present case, supplementary bills for the change in law events which were raised by the Petitioner were unilaterally deducted by the Respondent, MSEDCL. In our view, the principle of late payment surcharge as envisaged in Articles 8.3.5 and 8.8.3 is applicable towards payment of the balance amounts by the Respondent, MSEDCL in respect of the relief under change in law.

37. Petition No. 88/MP/2018 is disposed of in terms of the above.

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

Sd/-
(P.K.Pujari)
Chairperson

