CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 97/MP/2017
&
I.A. No. 21 of 2018

Coram:
Shri P.K. Pujari, Chairperson
Shri A. K. Singhal, Member
Shri A. S. Bakshi, Member
Dr. M. K. Iyer, Member

Date of order: 31st of May 2018

In the matter of:

Petition invoking: (a) Sections 79 and 63 of the Electricity Act, 2003; (b) Clauses 4.7 and 5.17 of the Competitive Bidding Guidelines; and (c) Article 13 read with Article 17 of the PPAs dated 7.8.2008.

And
In the matter of:
Implementation of the Judgement dated 11.4.2017 passed by the Hon'ble Supreme Court in Civil Appeal No. 5399-5400 of 2016 and batch matters.

And
In the matter of:

Adani Power (Mundra) Limited
(formerly Adani Power Limited)
Shikhar, Near Mithakhali Circle,
Navrangpura, Ahmedabad-390 009 **........ Petitioner**

Versus

1) Uttar Haryana Bijli Vitran Nigam Limited
   Shakti Bhawan, Sector-6,
   Panchkula, Haryana

2) Dakshin Haryana Bijli Vitran Nigam Limited
   Shakti Bhawan, Sector-6,
   Panchkula, Haryana **...... Respondents**

I.A. No. 21 of 2018

In the matter of:

1) Uttar Haryana Bijlee Vitran Nigam Limited
2) Dakshin Haryana Bijlee Vitran Nigam Limited **….Applicants**

Parties Present:
Shri Amit Kapur, Advocate, APL
Ms. Poonam Verma, Advocate, APL
Ms. Abiha Zaidi, Advocate, APL
Ms. Apoorva Saxena, Advocate, APL'
Shri Jignesh Langalia, APL
Shri G. Umapathy, Advocate, Haryana Utilities
Shri M.G. Ramachandran, Advocate, Haryana Utilities
Shri Ravi Juneja, HPCC
Ms. Ranjitha Ramachandran, Advocate, Prayas
Ms. Anushree Barshan, Advocate, Prayas

ORDER

Background of the Case:

This petition has been filed by Adani Power Limited for determination of the relief pursuant to the directions of the Hon'ble Supreme Court in judgment dated 11.4.2017 in Civil Appeal No. 5399-5400 of 2016 (Energy Watchdog Vs. Central Electricity Regulatory Commission & Ors.) along with other related Appeals.

2. During the pendency of the petition before the Commission, the Petitioner vide its affidavit dated 2.1.2018 has submitted that Learned National Company Law Tribunal, Ahmedabad vide order dated 3.11.2017 has sanctioned the arrangement between Adani Power Limited (Transferor Company) and Adani Power (Mundra) Limited (Transferee Company) whereby the 4620 MW Mundra Power Project of Adani Power Limited stand vested with Adani Power (Mundra) Limited. The Petitioner has also placed a copy of the order of the Learned National Company Law Tribunal, Ahmedabad on record. The Petitioner has requested that the newly formed Adani Power (Mundra) Limited may be taken on record in place of Adani Power Limited. On perusal of the common order dated 3.11.2017 in CP (CAA) No. 104/NCLT/AHM/2017 with CP (CAA) No. 105/NCLT/AHM/2017, we find that the scheme of arrangement between Adani Power Limited and Adani Power (Mundra) Limited has been sanctioned by the Learned National Company Law Tribunal,

Ahmedabad. In para 25 of the order, it has been directed that "all concerned authorities to act on copy of this order along with the scheme duly authenticated by the Registrar of the Tribunal". The Petitioner has placed on record copy of the duly authenticated order along with the scheme. Accordingly, the name of the Petitioner has been change from Adani Power Limited to Adani Power (Mundra) Limited on the record of the Commission.

3. The Petitioner, Adani Power (Mundra) Limited (formerly Adani Power Limited), a subsidiary of Adani Enterprises Ltd, has set up a generating station, Mundra Power Project, with a total capacity of 4620 MW in the Special Economic Zone at Mundra in the State of Gujarat. The generating station has four phases, namely, Phase I and II comprising Unit Nos. 1 to 4 (4x330 MW), Phase III comprising Unit Nos. 5 and 6 (2x660 MW) and Phase IV comprising Unit Nos.7 to 9 (3x660 MW). The Petitioner has entered into PPAs dated 7.8.2008 with Uttar Haryana Bijli Vidyut Nigam Ltd and Dakshin Haryana Bijli Vidyut Nigam Ltd (Haryana Utilities) for supply of 1424 MW power from Phase IV of the generating station.

4. The Petitioner in April, 2012 filed Petition No. 155/MP/2012 before the Commission seeking revision of tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (Article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulations by Indonesian Government. The Commission vide order dated 21.2.2014 in Petition No. 155/MP/2012 granted the Petitioner, the compensatory tariff from SCOD till the hardship on account of Indonesian Regulation persists. The Indonesian Regulations were to come into force in respect of term sale contract (long term) with effect from 23.9.2011 having an impact on the export price of coal from Indonesia. On account of the non-

availability of domestic coal linkage, the Petitioner is importing coal from Indonesia to meet about 58% of the requirement of coal for supply of power to the first and second respondents (the Haryana Utilities). Aggrieved by the Commission's order dated 21.2.2014 in Petition No.155/MP/2012, UHBVNL and DHBVNL filed Appeals Nos. 100 of 2013 and 98 of 2014, Energy Watchdog filed Appeal No.125 of 2014, and Prayas Energy Group filed Appeal No.134 of 2014 before the Appellate Tribunal for Electricity (hereinafter referred to as 'Appellate Tribunal'). The Full Bench of the Appellate Tribunal vide its judgment dated 7.4.2016 allowed the appeals and remanded the matter to the Commission to assess the impact of Force Majeure Event on the Mundra Power Project of the Petitioner and give such relief as may be admissible under the respective PPAs. Relevant portion of the Full Bench Judgment dated 7.4.2016 is extracted as under:

> "306. In the view that we have taken, Interim Order dated 2/4/2013 passed in Petition No.155/MP/2012, which is impugned in Appeal No.100 of 2013 and Interim Order dated 15/4/2013 passed in Petition No.159/MP/2012, which is impugned in Appeal No.151 of 2013 are set aside. Appeal No.100 of 2013 and Appeal No.151 of 2013 are, therefore, allowed. In view of answer to Issue No.5 above, we set aside the Final Order dated 21/2/2014 in Petition No.155/MP/2012 and Final Order dated 21/2/2014 in Petition No.159/MP/2012 granting compensatory tariff to Adani Power and CGPL respectively. Appeal No.125 of 2014, Appeal No.134 of 2014, Appeal No.98 of 2014, Appeal No.116 of 2014, Appeal No.124 of 2014, Appeal No.133 of 2014, Appeal No.97 of 2014, Appeal No.91 of 2014, Appeal No.100 of 2014, Appeal No.139 of 2014 and Appeal No.115 of 2014 are thus allowed.
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> 307. We remand Petition No.155/MP/2012 filed by Adani Power and Petition No.159/MP/2012 filed by CGPL to the Central Commission and direct the Central Commission to assess the extent of impact of Force Majeure Event on the projects of Adani Power and CGPL and give them such relief as may be available to them under their respective PPAs and in the light of this judgment after hearing the parties. The entire exercise should be done as expeditiously as possible and at any rate within a period of three months from today."

5. In the light of the judgment of the Appellate Tribunal, the Commission after hearing the parties, vide order dated 6.12.2016 in Petition No. 155/MP/2012 held as under:

"(a) In the light of the judgment of the Appellate Tribunal, it is held that the petitioner had Coal Sales Agreements or arrangement for the entire quantum of coal required for supply of power to the Procurers and the Indonesian Regulations has completely wiped out the premise on which the petitioner had quoted the tariff in the bid.

(b) The petitioner is entitled to relief for force majeure event in terms of Article 12.7 of the PPA.

(c) Relief is admissible in respect of the coal procured from Indonesia.

(d) In respect of Haryana PPAs, the relief shall be worked out first after accounting for generation on domestic coal consumed based on normative parameters, and the balance generation corresponding to the actual or scheduled generation during the month whichever is lower, based on imported coal.

(e) The petitioner shall obtain and provide to the procurers a certificate from Mahanadi Coalfield Ltd about the actual availability and actual supply of coal during each calendar year on the basis of the FSA dated 9.6.2012."

6. Further, the Commission in the order dated 6.12.2016 directed that this order shall be subject to the outcome of the Civil Appeal No. 5399-5400/2016 and related Civil appeals pending before the Hon`ble Supreme Court. Subsequently, the Hon'ble Supreme Court vide its order dated 15.7.2016 clarified that "the order passed by the CERC shall not be given effect to, without getting permission from this Court."

7. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 set aside the Appellate Tribunal's Judgment dated 7.4.2016 and the Commission's order dated 6.12.2016 following the Appellate Tribunal's said judgment. The Hon'ble Supreme Court directed the Commission to go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by the Supreme Court in the judgment dated 11.4.2017. Relevant Portion of the said judgment dated 7.4.2016 is extracted as under:

"53….. it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore,

through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission…

54... The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment."

8. Pursuant to the Hon`ble Supreme Court Judgment dated 11.4.2017, the Petitioner has filed the present Petition seeking relief with effect from 7.8.2012 under para 4.7 of the Competitive Bidding Guidelines and Article 13 of the PPA to restore the Petitioner to the same economic position as if the Change in Law event had not occurred. The Petitioner has *inter alia* prayed to direct the Haryana Utilities to provisionally pay compensation amount for the past period within one month subject to adjustment on final determination of relief by the Commission.

Submission of the Petitioner:

9. The Petitioner has submitted that the Hon'ble Supreme Court, vide its judgment dated 11.4.2017has observed as under:

(a) The general regulatory power of this Commission under Section 79(1)(b) of the Electricity Act, 2003 (hereinafter referred to as the Act)is the source of the power to regulate, which includes the power to determine or adopt tariff. The Central Commission is bound by the Competitive Bidding Guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b) of the Act, only in accordance with those guidelines. In a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation, this Commission's general regulatory powers under Section 79(1)(b) can be exercised.

(b) Allowed the change in policies of the Government with respect to availability of domestic coal to the generating companies as an event of Change in Law in terms of Article 13 of the PPA dated 7.8.2008 entered into between the Petitioner and Haryana Utilities.

(c) The party affected by the Change in Law event will be compensated (though monthly tariff payments) to restore the affected party to the same economic position as if the Change in Law event had not occurred and directed that the compensation/relief under Article 13 will be determined by this Commission.

(d) The Hon'ble Supreme Court in Para 24 and 27 of the Judgment dated 11.4.2017 *inter alia* held that this Commission has jurisdiction on the Petitioner's PPA with the Haryana Utilities. Therefore, this Commission has the jurisdiction to grant relief to the Petitioner under the present Petition.

10. The Petitioner, in order to substantiate the claim for Change in Law under Article 13 of the PPA, has submitted as under:

(a) On 4.6.2007, Haryana Power Generation Company Ltd. issued a RFP to bidding companies who had qualified on the basis of their responses to RFQ.

(b) On 18.10.2007, The Government of India issued the New Coal Distribution Policy *("NCDP")*. The Policy provided that 100% of the quantity of coal required as per the normative requirement of an independent power plant would be considered by Coal India Ltd. for the supply of coal through an FSA at notified price including for future power plants. Therefore, the entire coal requirement to the Petitioner was assured under NCDP, 2007. However, Standing Linkage Committee (Long Term) for coal on 12.11.2008 decided to

grant only 70% of the normative coal requirement to the coastal power stations.

(c) On 24.11.2007, the Petitioner submitted its bid and entered into long term PPAs with the Haryana Utilities for supply of 1424 MW power (712 MW each) from Phase IV of the Mundra Power Plant at levelized tariff of Rs. 2.94 per kWhon7.8.2008. Subsequently, on 25.6.2009, the Letter of Assurance "LoA" was issued by Coal India Ltd. ("*CIL*") for capacity equivalent to only 70% of 1980 MW i.e. the installed capacity of the Unit Nos. 7, 8 and 9 of the Petitioner's power plant at Mundra. Due to shortfall/ non-availability in the supply of domestic coal, the Petitioner was forced to procure the high cost imported coal to generate and supply the power at the rate under PPAs.

(d) On 21.6.2013, Cabinet Committee on Economic Affairs ("*CCEA*") approved coal supply mechanism for power producers stating that higher cost of imported coal to be considered for pass through as per modalities suggested by this Commission and the Ministry of Coal has to issue suitable orders supplementing the NCDP. It further directed the Ministry of Power to issue appropriate advisory to Electricity Regulatory Commissions including modifications, if any, in the bidding guidelines to enable the appropriate Commission to decide the pass through of higher cost of imported coal on case to case basis.

(e) On 26.7.2013, Govt. of India amended NCDP, in view of the overall domestic coal availability, directing that FSAs will be signed for the remaining four years of 12thPlan for 65%, 65%, 67% and 75% of ACQ. Subsequently, the Ministry of Power vide its communication dated31.7.2013 informed that the higher cost

of import coal/market based e-auction coal can be considered for being made pass through on a case-to-case basis to the extent of shortfall in the quantity by CERC/SERC. The amended Tariff Policy dated 28.1.2016 issued under Section 3 of the Electricity Act, 2003 also contemplated pass through mechanism for the failure to meet the commitment made under NCDP. In the light of the above, the Petitioner was forced to procure the high cost imported coal (due to shortfall/unavailability of domestic coal to the extent of 70% as premised in its bid) to generate and supply the power at the rate under PPAs. The year wise actual coal quantity is as follows:

Year	ACQ	Coal Quantity (MT)	Shortfall Quantity (MT)	% Shortfall w.r.t. ACQ
2012-13	4.334	2.237	2.10	48.38%
2013-14	6.405	2.720	3.69	57.53%
2014-15	6.405	4.077	2.33	36.35%
2015-16	6.405	4.990	1.42	22.10%
2016-17	6.405	4.476	1.93	30.11%

(f) The Commission has approved methodology for relief on account of shortfall in domestic coal due to change in NCDP in terms of its order dated 03.02.2016 in Petition No. 79/MP/2013 (*GMR-Kamalanga Energy Ltd. & Anr.*Vs. *Dakshin Haryana BijliVitran Nigam Ltd. &Ors.*).The said methodology provides for pass through of higher cost of imported/market based e-auction coal in accordance with Ministry of Power letter dated 31.7.2013. Therefore, a similar methodology has been proposed in the present case for approval of this Commission.

(g) The Petitioner has submitted the indicative computation for the FY 2016-17as under:

Particulars	Unit	Formula	2016-17	Remark
Step 1: Energy Charge quoted				
Energy Charge Rate (ECR) quoted	Rs./kWh	A	2.198	As per PPA
Energy from Domestic coal	MU	B = R	5,274	As shown in Table below.
Step 2: Energy Charge for Other Coal				
ECR - other coal excluding Transmission Charges	Rs./kWh	C = V	2.569	As shown in Table below.
Transmission Charges	Rs./kWh	D	0.415	PoC Charges applicable for the month towards the LTA for the PPA with Haryana Utilities.
ECR - other coal (at Delivery Point) Including Transmission Charges	Rs./kWh	E = C + D	2.984	
Balance Energy from Imported Coal	MU	F = S	2,560	As shown in Table below.
Step 3: Change in Law Relief				
Wt. Avg. ECR chargeable at Delivery Point	Rs./kWh	G = [(AxB) + (ExF)]/ (B+F)	2.455	
Loss per Unit	**Rs./kWh**	**H = G-A**	**0.257**	
Scheduled Energy at Haryana Periphery	MU	I = K	6,956	At Haryana Periphery; Based on REA
Change in Law Relief	**Rs. Crs.**	**J = HxI/10**	**178.66**	

(h) In the proposed methodology, the Petitioner has worked out other parameters including Energy Charge Rate for Other Coal as under:

Parameter	Unit	Formula	Value	Remark
Common Parameters				
70% of Scheduled Energy at Haryana Periphery	MU	K	6,956	At Haryana Periphery; Based on REA
Transmission Loss	%	L	3.85%	PoC loss as per NLDC
Normative Auxiliary Consumption	%	M	**7.67%**	As per CERC Norms provided in Tariff Regulations, 2009 and 2014 plus 1.92% for FGD.
Gross Generation	MU	N = K / (1-L)/ (1-M)	7,835	
Gross SHR	Kcal/kwh	O	2,309	As per CERC Norms provided in Tariff Regulations, 2009 and 2014
Domestic Coal				
Actual Domestic Coal Quantum corresponding to PPA	M Tons	P	35,85,319	

Domestic Coal GCV	Kcal/Kg	Q	3,397	As certified by 3rd party sampling agency
Energy from Domestic coal	MU	R = PXQ/O/ 1000	5,274	
Imported / Alternate Coal				
Balance Energy from Imported Coal	MU	S = N-R	2,560	
GCV of Imported Coal	Kcal/Kg	T	4,490	As certified by 3rd party sampling agency
Wt. Avg. price of imported coal	Rs./MT	U	4,435	As per Auditor certificate
ECR - other coal excluding Transmission Charges	Rs./kWh	V = (O*U)/[T*(1-L)*(1-M)]/ 1000	2.57	

(i) The Petitioner based on the proposed methodology, has furnished year-wise Change in Law relief from the date of cause of action till March, 2017 as under:

Particulars	Rs in crore
2012-13	114.88
2013-14	321.92
2014-15	146.11
2015-16	91.32
2016-17	178.66
Total	**852.89**

(j) Interest for Deferred Payments: The Petitioner has submitted that the Petitioner approached the Commission *inter alia* seeking relief on account of shortfall/non-availability of domestic coal in July 2012.The Commission *vide* orders dated 2.4.2013 and 21.02.2014 granted relief to the Petitioner from the date of commencement of supply under the PPA. Subsequently, the Appellate Tribunal vide its judgment dated 7.4.2016 also granted relief to the Petitioner. The adjudication process was ultimately concluded by the Hon'ble Supreme Court in April 2017. Therefore, it is clear that all the forums have consistently recognized that the Petitioner is entitled for relief. However, the Petitioner is yet to receive any monetary relief while it has continued to perform its

obligations since 2012.Consequent to shortfall in domestic coal availability, the Petitioner is forced to procure imported coal/ market coal by incurring additional fuel cost. This has further aggravated the situation as the additional fuel cost was to be funded by additional borrowing which in turn has resulted in additional interest burden. Further, as the moisture content in imported coal is very high as compared to domestic coal, there will be substantial increase in Station Heat Rate and there will be additional financial loss on this account. All these factors will also contribute to increase in interest on working capital as well.

(k) Article 13 of the PPA contemplates that the affected party is to be restored to the same economic position as if such change in law had not taken place. This aspect was also recognized by the Hon'ble Supreme Court in its Judgment dated 11.4.2017.Therefore, it is legitimate that the Petitioner is required to be allowed carrying cost from the date of cause of action till the payment of compensation. The Petitioner has claimed the interest amount applicable for the period from date of commencement of supply till March 2017 is Rs.301 crore which is worked out as per actual interest rate. The principle of recovery of cost of funding is an established philosophy of regulatory jurisprudence as carrying cost. The Hon'ble Supreme Court in the case of (a) Secretary, Irrigation Department, Govt. of Orissa Vs. GC Roy reported as ([1992) 1 SCCC 508 (CB)]: para 43 (b)Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age reported as [(1996) 1 SCC 516: paras 3 & 4] has held that if a person is deprived of the use of money to which he is legitimately entitled to, has a right to be compensated for the deprivation, call it by any name. Interest *pendent lite* is not a matter of substantive law.

(l) Interim Relief: During the period of litigation, the loss on account of the additional fuel cost incurred, has kept mounting which was financed by the Petitioner through extra borrowing to keep the operations running. This borrowing has further increased costs due to its interest burden; and by now it has reached to a position where EBDITA is not even sufficient to service interest cost. Under the circumstances, the financial institutions are no more willing to support and fund further cash losses of the Petitioner forcing closure of Mundra projects, unless immediate cash flow support is provided in terms of increased tariff revenue.

11. Notices were issued to the respondents including Prayas Energy to file their replies. HPPC and Prayas have filed their replies and the Petitioner has filed its rejoinders.

12. The Commission vide its Record of Proceedings for the hearing dated 10.8.2017 directed the Petitioner to submit certain information/documents related to the relief sought by the Petitioner. The Petitioner vide its affidavit dated 20.9.2017 has submitted the required information. Prayas on 25.9.2017 has furnished its comments on the information furnished by the Petitioner vide affidavit dated 20.9.2017.

Reply of Prayas Energy Group:

13. Prayas Energy Group vide its reply dated 13.7.2017 has submitted that the matter relating to the alleged claim for shortage of domestic coal made by the Petitioner is to be considered in the light of the following factual aspects:

(a) The consideration is related to the PPA dated 7.8.2008 entered into between the Petitioner and the Haryana Utilities for generation and sale of electricity with the contracted capacity of 1424 MW from the three generating units of 660 MW each aggregating to 1980 MW.

(b) It is the Petitioner, which has willfully and voluntarily assumed a proportion of 70% domestic coal and 30%, imported coal for running the concerned units under the PPA. In this regard, two things need to be noted, namely (i), the Petitioner, while submitting its bid, had relied on imported coal as one of the fuel sources as per schedule 12 of the PPA and while describing characteristics of the fuel, the Petitioner has stated the fuel type to be "Imported/indigenous coal". This makes it clear that the Petitioner always had plans to use imported coal for running the project. Therefore, the claim that the PPA tariff assumes 100% domestic coal allocation based on the 2007 New Coal Distribution Policy (NCDP) is patently false and erroneous, (ii) between 2012-15, when the country was facing coal shortage, FSAs were signed by CIL with only those generators, which had a valid PPA. Therefore, the fact that the Petitioner could sign the FSA with MCL was on account of the PPA it had with the Haryana utilities and not the other way round. Accordingly, all the coal supplied by MCL should be used for meeting generation obligation as per the PPA.

(c) It is the case of the Petitioner that the generation and sale of electricity under the PPA dated 7.8.2008 entered into with the Haryana Utilities is premised on the domestic coal to the extent of 70% and imported coal to the extent of 30%.

(d) The obligation of the Petitioner is to generate and sell electricity to the Haryana Utilities qua the contracted capacity of 1424 MW. The Petitioner has been supplying electricity to the Haryana Utilities only to the targeted availability of 80% and not in excess thereof. The 80% of the contracted capacity works out to 1139 MW, namely, 79.98% of 1424 MW.

(e) The Petitioner has entered into a FSA with MCL dated 9.6.2012 in pursuance to LOA given by MCL in favour of the Petitioner on 25.2.2009. LOA and FSA with MCL was given to the Petitioner based on Long term PPAs dated 7.8.2008 with Haryana with reference to which the coal linkage was given. Therefore, the entire quantum of coal available from MCL is required to be first accounted for generation and supply of electricity to Haryana Utilities under the said PPA, namely the contracted capacity of 1424 MW.

(f) The Coal Supply Agreement with MCL provides for the supply of domestic coal to the extent of 70% of unit capacity, namely 70% of 1980 MW, which is 1386 MW. The assured quantum is 80% of the 70% (1386 MW) = 1109 MW. This is sufficient to meet targeted PLF qua Haryana of 1139 MW.

(g) After excluding 30% of the generation of electricity being based on the imported coal, the targeted PLF for generation and supply to the Haryana Utilities of 1139 MW is to be achieved by the Petitioner with domestic coal availability of 70% of 1139 MW which is equivalent to 797.3 MW.

(h) As against the above, under the FSA dated 9.6.2012 with MCL, the Petitioner has been assured a quantum of domestic coal to enable generation to the extent of 1109 MW. In fact, if the Petitioner uses domestic coal to run the entire 1139 MW of capacity or in excess 70% of the required quantum of coal

at the appropriate GCV (which includes the 30% capacity based on imported coal) it will make profits, as cost of domestic coal is much lower than that of imported coal and there is no issue of dollar-rupee conversion rate.

(i) In the case of PPAs dated 7.8.2008 with Haryana Utilities, there has hardly been any need to import coal from Indonesia and consequently there has been little or no impact of promulgation of the Indonesian Regulations. Even if the Petitioner had to import some quantum of coal from Indonesia at times, the quoted energy charges under the PPAs dated 7.8.2008 of the relevant years till date was more than adequate to cover the entire 30% of the total quantum of Coal which the Petitioner claims that it is required to import from Indonesia.

(j) During the proceedings before the Appellate Tribunal on 7.5.2015, the Petitioner was confronted with the quantum of coal availability from Mahanadi Coalfields Limited for generation and supply of electricity to Haryana Utilities. The claim made by the Petitioner was then of receipt of only 42% of the 1424 MW of capacity contracted with the Haryana Utilities. The Petitioner was directed to place on affidavit the details of the Coal Availability from Mahanadi Coal fields Limited. In terms of the above, the Petitioner filed an affidavit dated 8.5.2015 admitting that coal availability for the linked capacity of 1386 MW is to be towards Haryana PPA and it also does not dispute or refute the submissions of the respondents that the Petitioner had coal availability to the extent of 80.64%.

(k) In the minutes of the RCCC meeting held with the coal companies on 27.6.2013, the representative of the Petitioner had accepted that the

Petitioner is much satisfied with the quality of coal dispatched by MCL but sometimes short supply of coal is received which is negligible. He further stated that power houses linked with Talchar field are not getting 100% materialisation due to less supply of rakes by Railways. He requested the MCL authorities and RCCC members to take up the matter at appropriate level for improvement in rake supply so that power houses can generate more power which will be benefitted to the nation. He further drew the attention of MCL authorities towards improvement of infrastructure at siding like periodical maintenance of siding, cleaning of railway tracks at siding and cleaning of slurries by which lot of problems are occurred.

(l) In terms of the above, the total quantum of domestic coal available to the Petitioner for generation and sale of electricity to the Haryana utilities as per the assurance of MCL is much more than 70% committed by MCL under the FSA dated 9.6.2012. There has been no shortage of domestic coal availability to the Petitioner for fulfillment of its obligation under the PPA dated 7.8.2008 entered into with the Haryana Utilities. As per the terms of the allocation of coal by the Government of India to the Petitioner, the entire quantum of domestic coal available is to be utilised for generation and sale of electricity to the Haryana Utilities. The Petitioner has confirmed the same in the affidavit dated 8.5.2015 filed before the Hon'ble Appellate Tribunal. In any event, from the date of the COD of the three generating units till today, the Petitioner has not entered into a Long Term PPA with any other Procurer (other than Haryana Utilities). Accordingly, the entire quantum of domestic coal available from MCL is required to be used towards fulfillment of the obligation assumed by the Petitioner to Haryana Utilities.

(m) Considering the claim made by the Petitioner that the bid under the PPA dated 7.8.2008 was premised on the blending of coal of 70% domestic and 30% imported coal, it becomes evident that if domestic coal is available and being used for the running of 80% of the contracted capacity, then it means that the Petitioner is making profits, as cost of domestic coal is much lower than that of imported coal and there is no issue of dollar-rupee conversion rate.

(n) The Petitioner has not furnished the complete details with regard to the supply of coal by MCL. The Petitioner was to produce the Bill of Lading of the coal' supplied by MCL both through rail and through sea. While, there were certain problems in rail transportation of coal from MCL, there was no such issue so far as the transportation of coal through sea from Paradip Port in the State of Orissa to Mundra Port in the State of Gujarat was concerned. Such transportation was also cheaper. The Minutes of the Meeting of the Coal Companies filed by Prayas vide its submission dated 25.5.2016 in Petition No. 155/MP/2012 clearly establish that the Petitioner did not have any serious issue in regard to either the quantum of supply or the quality of coal received. The Petitioner has not filed the copies of the invoices raised by MCL, Bill of Lading (sea or rail) disclosing the necessary details of the GCV and quantum of supply made.

(o) The Petitioner is required to procure a certificate from MCL about the actual availability of coal from MCL during the relevant period (i.e. after July 2013) and further the efforts made by the Petitioner to procure the increased quantum of coal from MCL. The Petitioner has not given the exact quantum of coal which MCL was willing to supply to the Petitioner during the relevant

period and if there was a shortage in the supply, the reasons therefor. The Petitioner has so far not given the month-wise opening and closing stock of the domestic coal. Therefore, in the absence of data and details being available from the Petitioner and in the light of the above and unimpeachable documents, the claim of the Petitioner that there was a shortage of domestic coal and that too to the extent of 30% for generation and supply of electricity to the Haryana Utilities is patently erroneous. The claim is therefore, liable to be rejected.

14. The Prayas has submitted that in the premise, the Commission may consider the following:

(a) Relief, if applicable can be considered only for period *after* July 2013, that is, after the said change in law events occurred. The Hon`ble Supreme Court in Para 54 of the judgment has categorically stated that "...the change in law has taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources, it is to this limited extent that change in law is held in favour of the respondents." Therefore, there can be no relief for the period before July, 2013.

(b) Determine whether the total quantum of coal made available by MCL is sufficient for supporting actual generation of electricity to the extent of 70% of 1139 MW for supply to the Haryana Utilities, namely, 1139 MW being the targeted availability of 80% related to the contracted capacity of 1424 MW under the PPA and 30% of 1139 MW is required to be generated by the Petitioner by the use of imported coal;

(c) If the domestic coal availability is sufficient to generate 797.3 MW and above, there is no adverse implication on account of any change in the New Coal Distribution Policy of the Government of India and accordingly, no relief is admissible to the Petitioner in pursuance to the directions given by the Hon'ble Supreme Court in the order dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016;

(d) Having reserved the quantum in excess of 1424 MW for merchant trading and thereby taking the risk and reward of such generation to sell electricity at market price, the Petitioner is required to consider such sale contributing to the blending of coal to the extent required to achieve 80% of the plant capacity.

(e) If the quantum of coal to be supplied by MCL is not sufficient to support 70% of the actual generation, the Petitioner will need to first demonstrate that it has taken adequate and appropriate action against MCL to get the assured quantum of 5.125 MMT. It cannot simply claim relief for such shortages. Moreover, the Petitioner has not placed on record any evidence to show any shortage in availability of coal from MCL.

(f) Further, in order to compute the actual impact (even assuming that there is an impact) there is a necessity to consider the various factors, namely the quantum of coal requirement on normative parameters such as targeted PLF, station heat rate, auxiliary consumption, such quantum based on the GCV of the coal supplied by MCL, coal used on a monthly and yearly basis, coal offered by MCL but not taken by the Petitioner, the quantum of actual

generation during a year etc. It cannot be calculated in a simplistic manner as proposed by the Petitioner.

(g) The Commission will need to consider month-wise actual generation, actual domestic coal realisation and actual coal import, if any, only to the extent of shortfall in the domestic coal supply for meeting the 70% of the actual generation, which is to be supported by domestic coal. If in a given year, the domestic coal supply is sufficient to meet more than 70% of the actual generation then, such "excess" coal supply in any year should be used to offset impact of coal import in the subsequent years. This is both appropriate and necessary as FSAs were signed to meet the demand of the capacity that was tied under the PPA.

(h) Since, the period of consideration can only be after July 2013, for the period from August 2013 to March 2017, the Commission should direct the generator to make available all the necessary data month-wise. Further, all this data should be available in the public domain on the Commission's website which is essential to ensure adequate transparency of the process.

(i) The judgment of the Hon'ble Supreme Court granting relief in case of domestic coal non-availability is restricted to such quantum, which MCL after having issued the LOA and entered into a FSA does not supply by reason of the policy decisions taken by the Government of India. It does not apply to contractual issues between the Petitioner and MCL and non-fulfillment of the obligation by MCL in making available the requisite quantum of coal when the same is not by reason of any policy decision taken by the Government of India.

(j) The claim of the Petitioner taking into consideration the above salient aspects cannot be entertained in pursuance to the petition filed by it. The Petitioner is seeking to narrowly interpret the judgment of the Hon'ble Supreme Court dated 11.4.2017 in a manner advantageous to it.

(k) The computation made by the Petitioner is incorrect. The Petitioner is vaguely referring to the New Coal Distribution Policy without going to the issue as to how and to what extent such policy has affected the availability of domestic coal to the Petitioner. The methodology proposed by the Petitioner in Paragraphs 15 to 18 of the petition is not correct.

Submissions of Uttar Haryana Bijli Vitran Nigam Ltd and Dakshin Haryana Bijli Vitran Nigam:

15. Uttar Haryana Bijli Vitran Nigam Ltd and Dakshin Haryana Bijli Vitran Nigam (the 'Haryana Utilities'), vide their joint reply dated 31.7.2017, have submitted as under:

(a) The PPA dated 7.8.2008 mandated for the generation and sale of electricity with a contracted capacity of 1424 MW from three generating units, each of which aggregated to 1980 MW. The Petitioner entered into an FSA with MCL dated 09.06.2012 which ensures that the entire quantum of coal available from MCL is first required to complete all obligations of generation and supply of electricity towards the Respondents.

(b) The Coal Supply Agreement entered into with MCL by the Petitioner mandated the supply of domestic coal up to the extent of 70%, which is equivalent to 1386MW (70% of 1980MW) and an assured quantum of 80% of

the 70% which is equivalent to 1109MW. This in turn was sufficient to meet the Targeted PLF towards the Respondents of 1139MW.

(c) If the Petitioner uses domestic coal to run the entire 1139MW of capacity or in excess of the 70% (as mandated within the PPA with the Respondents) of the required quantum, it shall result in the increase in the profit margin of the Petitioner since the cost of domestic fuel is much lower as compared to that of imported coal.

(d) With regard to the consumption of coal, the Petitioner filed an affidavit dated 8.5.2015 before APTEL in which the Petitioner admitted that the entire actual domestic coal received from MCL would be allocated towards the power supplied under the Haryana PPAs for the purpose of computation of compensatory tariff. Therefore, the actual coal received from MCL is required to be considered towards power supplied under Haryana PPAs for the purpose of relief under force majeure.

(e) The Hon'ble Supreme Court by its judgment dated 11.4.2017did not accept the submissions of the Petitioner that the promulgation of Indonesian Regulation and the shortfall in domestic coal are Force Majeure events under the relevant PPAs and also denied the promulgation of Indonesian Regulation as Change in Law. However, the Hon'ble Supreme Court in para 53 and 59 of its judgment admitted change in National Coal Distribution Policy ("NCDP") as Change in Law under the PPA.

(f) Therefore, the scope of the limited exercise pursuant to the directions of the Hon'ble Supreme Court is that the Commission is required to determine the

relief under Article 13 of the PPA only to the limited extent of Domestic coal shortfall.

(g) Hon'ble Supreme Court has also held that the shortage in domestic coal supply from CIL in modification of the assurance given under NCDP is Change in Law and as such, the consequential relief shall be applicable from the period of June 2013 only. Accordingly, the Petitioner even if considered eligible for relief, shall be entitled for relief under Article 13 of PPA from June 2013, even though the supply under PPA had commenced from August 2012.It is submitted that the Petitioner has not furnished or brought before the Commission any evidence or details with regard to its supply of coal by the MCL. Furthermore, the Petitioner also did not suffer any hardship with respect to transportation of coal *via* sea {from the Paradip Port, Odisha to the Mundra Port, Gujarat) and instead profited further on account of the low cost of transportation involved as established by the Minutes of Meeting filed by Prayas in its submissions dated 25.5.2016. Therefore, any claim towards of the same of the Petitioner on this count cannot be entertained in a Court of law as it is neither well-supported nor conclusive in nature.

(h) The Petitioner is not entitled to receive any interest costs towards deferred or interim payments. The Petitioner is not entitled to carrying cost in line with the decision taken by the Commission vide orders dated 6.2.2017 and 4.5.2017 in Petitions Nos. 156 of 2014 and 235 of 2015 respectively.

Analysis and Decision

16. The Petitioner has filed the present petition pursuant to the direction of the Hon`ble Supreme Court in judgment dated 11.4.2017 in Civil Appeals Nos. 5399-

5400 of 2016 seeking relief with effect from 7.8.2012 under para 4.7 of the Competitive Bidding Guidelines and Article 13 of the PPA to restore the Petitioner to the same economic position as if the Change in Law event had not occurred. The Hon`ble Supreme Court in the judgment dated 11.4.2017 directed as under:

> "53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows :
>
> FU-12/2011-IPC (Vol-III)
> Government of India
> Ministry of Power
>
> Shram Shakti Bhawan, New Delhi
> Dated 31st July, 2013
>
> To,
> The Secretary,
> Central Electricity Regulatory Commission,
> Chanderlok Building, Janpath,
> New Delhi
>
> Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.
> Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13
>
> Sir,
>
> In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement (FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.
>
> 2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%,65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.
ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.
iii) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years of the 12th Plan (copy enclosed).

4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the12th Plan for the already concluded PPAs based on tariff based competitive bidding.

5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.

This issues with the approval of MOS(P)I/C.

Encl: as above

Yours faithfully,
Sd/-
(V.Apparao)
Director

This is further reflected in the revised tariff policy dated 28th January, 2016, which in paragraph 1.1 states as under:

1.1 In compliance with Section 3 of the Electricity Act 2003, the Central Government notified the Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

> Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January,2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.
>
> Clause 6.1 states:
> 6.1 Procurement of Power
> As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines

issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC (Vol-III) dated 31.7.2013.

Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would.

54. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment."

17. In accordance with the above directions of the Hon'ble Supreme Court, the issue now before the Commission is to decide the extent to which the Petitioner was affected on account of non-availability/short supply of domestic coal due to change in law on account of change in policy and the relief to be granted to the Petitioner in terms of the PPAs dated 7.8.2008 between the Petitioner and Haryana Utilities.

18. For analysis of the above issues in proper perspective, the relevant events/dates in chronological sequence are noted as under for ease of reference:

(a) National Coal Distribution Policy dated 18.10.2007

(b) PPAs dated 7.8.2008 between the Petitioner and the Haryana Utilities

(c) Minutes of the Standing Linkage Committee (Long Term) meeting held on 12.11.2008

(d) Letter of Assurance dated 25.6.2009 issued by Coal India Limited

(e) Fuel Supply Agreement dated 9.6.2012 between the Petitioner and Mahanadi Coal Field Limited

(f) Cabinet Committee on Economic Affairs approval dated 21.6.2013

(g) Amended National Coal Distribution Policy, 2013

(h) Amended Tariff policy 28.01.2016

19. Ministry of Coal (MoC) vide Office Memorandum dated 18.10.2007 published the New Coal Distribution Policy (NCDP 2007) which provided for distribution of coal to the Power Utilities including IPPs as under:

> "2.2 Power Utilities including Independent Power Producers (IPPs)/Captive Power Plants (CPPs) and Fertilizer Sector
>
> 100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly."

20. The Standing Linkage Committee (Long Term) was the designated forum to consider and recommend the allocation of coal to the Independent Power Producers. In para 15 of the Minutes of the Meeting of SLC (LT) held on 12.8.2008, the following were recorded with regard to the assessment of coal requirement of power utilities

based on availability of coal from CIL sources and meeting the differential through import:

> "15. AS(LA) further informed that as agreed in the meeting of Secretary (Coal) and Secretary (Power) on 31st October, 2008, MOC, MoP and CEA are required to jointly workout the coal requirement on yearly/half yearly basis for power utilities based on availability from the CIL sources. The differential requirement will have to be met by import and therefore, project wise quantity of import will have to be worked out and presented to the SLC. Accordingly, he requested all concerned to furnish the information at the earliest for existing projects as well as projects likely to be commissioned during 11th plan so that import plans including its logistics could be worked out. Further, while undertaking this exercise the import component for each of the existing project as well as projects for which linkage/LOA have already been granted, should be worked out taking into account inter alia the location of the plant, the boiler design, other technical parameters, availability of logistic etc. specially since all new LoAs are now based on mandatory 10% import component (30%for coastal plants). The report may become the basis for working out the coal supply under FSA by CIL."

Further, in para 21 of the SLC (LT) meeting dated 12.11.2008, it was decided that in the absence of any clear definition of "Coastal Power Plant", the projects coming within 150 kms from port facility should be considered as coastal for the purpose of earmarking a definitive import content in their fuel mix and the CEA should recommend accordingly while making specific observations in each case. In Para 21 (b) of the Minutes of the meeting dated 12.11.2008, the following fuel mix was decided for costal projects:

> "(b). All the recommended projects considered as 'coastal projects' as defined in this minutes will have an import component of 30% for which developer has to tie up sources directly. LOA will be for 70% of the recommended capacity only."

21. Therefore, as per the decision of SLC (LT), the power plants which are coming within 150 km of port facility would be considered as "coastal power plants" and in their cases, LOA would be issued for the 70% of the recommended capacity by MoP/CEA and balance 30% would be met through import from sources to be tied up by the Developer directly. In so far as the Phase-III (Unit 7, 8 and 9) of Mundra Power Project of the Petitioner is concerned, SLC (LT) in para 21 of the Annexure-III of the Minutes recommended as under:-

21.	Adani Power Limited of M/s Adani Power Limited	Adani Power SEZ, Village Tunda and Biracha, Mundra, Kutch, Gujarat.	MCL	4x330 MW-Phase I 2x660 MW -Phase II 3x660 Phase III

Recommendations of the Committee: CEA informed that land and water for the project is available. It was noted that CEA has recommended LOA for Phase III only for a capacity of 1980 MW, as applicant intends to tie up different sources for meeting the coal requirement for Phase I and Phase II. Moreover, the project is considered as coastal project. Having regard to the recommendation of CEA/MoP, the Committee authorized issuance of LOA by CIL for capacity of 1366 MW (70% of 1980 MW) for Phase III in accordance with the provisions of New Coal Distribution Policy (NCDP). Remaining capacity was deferred and will be taken up by SLC (LT) in future for consideration of issuance of LOA, based on recommendation of MoP and other relevant factors."

22. As per the above SLC (LT) decision, Mundra Project of the Petitioner was considered as coastal project. Phase IV consisting of Units 7, 8 & 9 of the project as per the Petition had an envisaged capacity of 1980 MW (3 x 660 MW) (inadvertently referred as Phase III Units 1, 2 & 3 in the minutes of SLC (LT) and FSA) and being a coastal project, CEA had recommended for 70 % of 1980 MW for issuance of LOA. Accordingly, the Committee authorised for issue of LOA for 70% of 1980 MW i.e. for 1386 MW [inadvertently mentioned as 1366 MW in the SLC (LT) minutes]. LoA was issued on 25.6.2009. LOA provides for the quantum of linkage of coal as under:

"1.1 Quantity, Grade and Source of Coal
Subject to the assured fulfilling its obligations in accordance with Clause 2 to the satisfaction of the Assurer within the period of validity of this LOA and the signing of the Fuel Supply Agreement (FSA) within three (3) months thereafter, the Assurer shall endeavour to supply, as per the normative requirement of the Plant, 6.409 Million Tonnes per annum of Gr. F coal to the Assured, which shall be subject to

review and assessment by the Assurer of the actual coal requirement of the Assured as well as the incremental availability of coal from the mines of the Assurer and of imported coal. It is expressly clarified that in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and the balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis."

Subsequently, the Petitioner entered into FSA dated 9.6.2012 with Mahanadi Coalfield Limited (MCL). Relevant provisions of the FSA dated 9.6.2012 are extracted as under:

*"***4.1 <u>Annual Contracted Quantity (ACQ):</u>**

4.1.1 The Annual Contracted Quantity of Coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 64.05 lakh tonnes per Year from the seller's mines and/or through import as per Schedule I. For part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in the proportion of the percentage of generation covered under long term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity.

4.2 <u>End-use of Coal</u>

The total quantity of Coal supplied pursuant to this Agreement is meant for use at their Power Plant (Phase-III, Unit-1,2&3 1980 MW) located at Mundra, Kutch, Gujarat as listed in Schedule. The Purchaser shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchaser shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller.

4.3 <u>Sources of Supply</u>

4.3.1 The Seller shall endeavor to supply coal from own sources as mentioned in Schedule I. In case the seller is not in a position to supply the Scheduled Quantity (SQ) of coal from such sources as indicated in the Schedule I, the Seller shall have, at its sole discretion, the option to supply the balance quantity of coal through import to be delivered at unload port at cost plus pricing including service charges of CIL. In case of acceptance of imported coal by the Purchaser, the Purchaser shall execute a back to back agreement for supply with the seller for such imported coal. In the event the quantity offered for imported coal is not accepted by the Purchaser, no penalty shall be applicable for the shortfall.

4.6 <u>Compensation for short delivery/lifting</u>

4.6.1 If for a year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect to that Year, the defaulting Party shall be

liable to pay compensation to the other party for such shortfall in Level of Delivery or Level of Lifting, as the case may be ("**Failed Quantity**") in terms of the following:

S. No.	**Level of Delivery/Lifting of Coal in a Year**	**Rate of compensation for the Failed Quantity (at the rate of simple average of Base Prices of Grades as shown in Schedule III)**	**Formula for calculation of compensation**
1.	Less than 100% but up to 80%	NIL	
2.	Less than 80%	0.01%	0.0001xPx(80-LD or LL)/100xACQ
# to be operative after a period of three years from the date of signing of the FSA			

Schedule-I

Annual Contracted Quantity
(Refer Clause 3.1)
Annual Contracted Quantity

Name and location of the Power Plant owned by Purchaser	***Unit wise Installed Capacity of the Power Station (in MW)***	***Balance life++ of plant/ unit in Years***	***Name of Rake Fit Station***	***Original LOA Quantity***	***Annual Contracted Quantity***	***Mode of Transport***	***Source Coal field of the Seller****
Adani Power Ltd. Phase-III,Unit-1,2&3 At-Mundra, Kutch, Gujarat	*3x660 (1980) @*	*24.7 yrs as on 01.04.2012*	*ADB coal Handling Plant, Paradeep Port (PPAP)*	*64.09 for (Unit-1,2&3) 1980 MW*	64.05 ***	*Rail cum sea*	*Any Source/ Coal field of MCL*

Buyer to provide annual coal requirements for the initial years also
* Details of coal offered through imports at the sole discretion of the Seller shall be furnished by the Seller to the Purchaser from time to time as and when such Coal is offered at port
** LOA Quantity means the quantity mentioned in the Letter of Assurance (LOA) issued by the Seller to the Purchaser.
++ Balance life of the Plant/Unit shall be determined by appropriate authority of Govt. of India
***Quantity appearing in the list of CEA enclosed in the MOC letter dated 17.02.2012.
@Linked capacity is 70% of unit capacity."

23. From the FSA dated 9.6.2012, the following relevant factors are noted:

(a) The linked capacity for the purpose of supply of coal under the FSA is 70% of the installed capacity of 1980 MW which works out to 1386 MW. Further, source of supply of coal is any source/coalfield of MCL.

(b) The ACQ of coal agreed to be supplied by MCL and undertaken to be purchased by the Petitioner is 64.05 lakh tonne per year from the MCL mines and/or through import. Moreover, the ACQ shall be in the proportion of the percentage of generation covered under long term Power Purchase Agreement(s) executed by the Petitioner with the distribution companies. In case of any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement.

(c) As regards the end use of coal, the FSA provides that the total quantity of coal supplied pursuant to the FSA is meant for use at Phase IV (Units 7, 8 & 9), again referred to as Phase-III (Unit-1, 2 & 3), of the Mundra Power Project of the Petitioner and cannot be sold/diverted and/or transferred to any third party. Any violation of the end use condition would be treated as breach of agreement and would warrant suspension of supply of coal.

(d) In case of failure of MCL to supply the ACQ, MCL has the option to supply the shortfall through import for which the Petitioner would be required to sign a back to back agreement for acceptance of supply of such imported coal and in case of non-acceptance of imported coal, MCL would not be liable for any penalty.

(e) In case the Level of Delivery by MCL or the Level of Lifting by the Petitioner falls below ACQ with respect to a particular Year, the defaulting Party shall be liable to pay compensation to the other party for such shortfall in Level of Delivery or Level of Lifting (failed quantity). The compensation amount is Nil for shortfall between less than 100%

and upto 80% and @ 0.01% of the failed quantity at the rate of simple average of Base Prices of Grades as shown in Schedule III of the FSA. Further, the compensation clause would be operative after a period of three years from the date of signing of the FSA (i.e. after 8.6.2015).

24. On account of shortage of coal, the Government of India (Ministry of Coal) vide its O.M. dated 26.7.2013 (referred to as "NCDP 2013") modified the ACQ for last four years of the 12th Plan for power plants having normal coal linkage. Relevant provisions of O.M. dated 26.7.2013 (NCDP 2013) are extracted as under:

> "2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 1.4.2009 to 31.3.2015. Taking into account the overall domestic availability and the likely actual requirement of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th plan for the power plants having normal coal linkage."

Therefore, as per NCDP 2013, the normative coal quantity has been reduced from 100% to 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th plan i.e. for the years 2013-14 to 2016-17. Subsequently, GoI/MoP issued the letter dated 31.7.2013 and advised the Electricity Regulatory Commissions as under:

> "4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the12th Plan for the already concluded PPAs based on tariff based competitive bidding.
>
> 5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government."

Further, Tariff Policy 2016 made specific provisions regarding pass through of the cost of imported coal/market based e-auction coal for meeting the shortfall

between the ACQ in the LoA/FSA and reduced quantity of coal supplied by CIL. Relevant provisions of the Tariff Policy (Para 6.1) are extracted as under:

> "However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."

25. The MoP letter dated 31.7.2013 and the Revised Tariff Policy have been held by the Hon'ble Supreme Court as having the force of law and read in context with the Article 13 of the PPAs, constitute Change in Law. Accordingly, this Commission has been directed by the Hon'ble Supreme Court to consider the case of the Petitioner afresh and grant relief as admissible under the PPAs. Therefore, the shortfall in the supply of coal by CIL or its subsidiaries vis-a-vis the quantum indicated in the LOAs/FSAs to be made up through import and/or market based imported coal and the expenditure on that account shall be permitted to be recovered as compensation under the provisions of Change in Law in terms of the PPAs.

26. The Petitioner submitted its bid on 24.11.2007 for supply of contracted capacity of 1424 MW to Haryana Utilities at Haryana periphery and was selected as the successful bidder. The Petitioner entered into PPAs dated 7.8.2008 with Haryana Utilities for supply of 1424 MW power at Haryana periphery. After taking into account the transmission losses and auxiliary energy consumption, the Petitioner is required to generate and supply approximately 1566 MW gross at the bus bar of the generating station (based on March 2014 values of 6.38% towards auxiliary consumption and 2.85% towards transmission loss as considered in order dated 28.03.2018 in petition number 104/MP/2017. This figure may vary depending on the rates of transmission loss and quantum of auxiliary consumption). As per the LOA

dated 25.6.2009 and FSA dated 9.6.2012, the Petitioner was entitled to supply of coal by MCL for the ACQ of 64.05 lakh tonnes. Further, as per the FSA, MCL in case of failure to supply the ACQ has the option to make up the shortfall through import for which the Petitioner would be required to sign a back to back agreement for acceptance of supply of such imported coal. The Petitioner entered into a Memorandum of Understanding (MOU) dated 3.7.2012 with MCL with regard to shortfall in supply below the ACQ as under:

> "4. Whereas Seller has indicated the supply of coal under FSA from domestic sources is not likely to exceed to 80% of Annual Contract Quantity (ACQ) for the year 2012-13 which shall be subject to review by seller every year for any revision that may be necessary and balance quantity through imports.
>
> 5. Whereas the Purchaser has conveyed unconditional acceptance for supply of imported coal as per Schedule VII of the FSA."

27. Schedule VII of the FSA which deals with the option for acceptance/non-acceptance of imported coal provides as under:

> "We, hereby confirm that we have read and understood the above including the terms of FSA dated 9th June 2012 and accordingly exercise our unconditional acceptance for the Option A/B (strike out whichever is not acceptable) and request you to take necessary further action.
>
> In case of exercising option A, please specify the supply intended to be taken in term of the percentage of ACQ through import ***20% (Twenty per cent.)***
>
> ***For Adani Power Limited"***

28. Therefore, in terms of the FSA and the MoU dated 3.7.2012 read with Schedule VII of the FSA, MCL was committed to supply 100% of ACQ quantity through domestic production and import of coal. Position of MCL in the MoU that supply of coal under FSA from domestic sources is not likely to exceed 80% of Annual Contract Quantity (ACQ) for the year 2012-13 which shall be subject to review by MCL every year and the balance quantity would be met through imports should not be construed that MCL had the commitment to supply 80% of the ACQ of coal under the FSA. Since MCL carries the commitment to supply 100% of ACQ

through domestic supply and import and the Petitioner through the MoU has exercised its option to accept 20% supply through import, we are of the view that shortfall in supply of coal needs to be considered with reference to the entire quantum of coal committed as ACQ in the FSA dated 9.6.2012, and not with reference to 80% of the ACQ for giving effect to the change in law in terms of Article 13 of the PPAs.

29. Prayas in its affidavit dated 13.7.2017 has submitted that the Petitioner has wilfully and voluntarily assumed a proportion of 70% domestic coal and 30% imported coal for running the concerned units under the PPAs. Therefore, the claim of the Petitioner that PPA tariff assumed 100% domestic coal allocation based on NCDP 2007 is erroneous. The Petitioner could sign FSA with MCL on account of the PPAs with Haryana Utilities and therefore, all the coal supplied by MCL should be used for meeting generation obligations as per the PPAs. Further, the Petitioner is to generate and sell electricity to the Haryana Utilities qua the contracted capacity of 1424 MW and the target availability of 80% works out to 1139 MW. FSA with MCL provides for supply of domestic coal to the extent of 70% of unit capacity which works out to 1386 MW (70% of 1980 MW). The assured quantum is 80% of 70% which works out to 1109 MW (80% of 1386 MW). After excluding 30% of the generation of electricity based on imported coal, the targeted PLF for generation and supply to Haryana Utilities require domestic coal availability of 70% of 1109 MW which is equivalent to 797.3 MW. As against the requirement of coal for 797.3 MW, the Petitioner is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW. The Petitioner in its affidavit dated 8.5.2015 before the Appellate Tribunal has admitted that the Petitioner had the coal availability for the linked capacity of 1386 MW towards the Haryana PPAs and did not dispute or refute

the claims of the Respondents that the Petitioner had the coal availability upto 80.64%. Therefore, there has been no shortage of domestic coal availability to the Petitioner for fulfilment of its obligations under the PPAs dated 7.8.2008 with Haryana Utilities.

30. We have considered the submissions of Prayas made in its affidavit dated 13.7.2017. According to Prayas, the Petitioner requires coal for generation of 797.3 MW to meet the contractual obligations under the PPAs whereas it is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW and therefore, there is no shortage in supply of domestic coal. In our view, this is not the correct position. The Petitioner has entered into PPAs for supply of 1424 MW power at Haryana periphery and as mentioned in para 26 above, the Petitioner in order to fulfil its contractual obligations requires coal to generate 1566 MW gross at the bus bar of the generating station based on March 2014 values of auxiliary consumption and transmission loss which may vary from month to month. Further, the requirement of coal cannot be capped at 80% availability as the Haryana Utilities have the first right of refusal for generation and supply beyond 80%. It is pertinent to mention that the Petitioner entered into PPAs dated 7.8.2008 with Haryana Utilities whereas the decision to allocate domestic coal to the extent 70% of the recommended capacity by CEA/MoP in case of coastal plant was taken subsequently in the SLC (CT) meeting dated 12.11.2008. CEA/MoP recommended 70% of the installed capacity of 1980 MW and accordingly, the Petitioner was sanctioned the coal linkage corresponding to 1386 MW being 70% of the installed capacity. Therefore, the Petitioner could not have factored in its bid that it would supply 70% of the contacted capacity by using domestic coal and 30% by using imported coal. Accordingly, the Petitioner has been granted coal to generate 70% of

1980 MW installed capacity i.e. 1386 MW. Since the Petitioner has entered into PPAs for 1424 MW (1566 MW gross approximately) which is more than the linked capacity of coal, the Petitioner is entitled to get supply of full ACQ under the FSA i.e. 64.05 lakh tonnes per annum. In fact, as per the data available on the website of MCL, the ACQ quantity and the effective ACQ quantity of coal granted to the Petitioner are the same i.e. 64.05 lakh tonnes which means that the Petitioner is entitled for the said quantity and ACQ is not required to be prorated again at 70% with reference to 1424 MW contracted capacity. Therefore, the contention of Prayas that the Petitioner is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW is not correct as the Petitioner is entitled under the FSA for assured quantity of coal to generate 1386 MW of electricity.

31. Further, Prayas has referred to the Petitioner's affidavit dated 8.5.2015 filed before the Appellate Tribunal. The relevant paras of the said affidavit are extracted as under:

"4. I say that on 25.06.2009, coal linkage was granted to Adani Power for 70% of the installed capacity of 1980 MWs of Units 7, 8 and 9 of Mundra Power Project. Adani Power's bid dated 25.11.2007 was premised on 30% imported and 70% Domestic Coal linkage. Accordingly, the allocation of coal for the long term PPA capacities is demonstrated herein below:

Particular		
Gross Capacity of Phase IV	MW	1980
Contracted Capacity of Haryana PPA/% of gross capacity	MW	1424 (71.91% of 1980 MW)
Balance Capacity (presently 400 MW tied up in Medium Term PPA)	MW	556 (28.09% of 1980 MW)
Total Capacity for which linkage is granted @ 70%	MW	1386 (70% of 1980)
Linkage Capacity corresponding to Haryana PPA on prorate	MW	997 (71.91% of 1386 MW)
Linkage Capacity corresponding to Balance Capacity on prorate	MW	389 (28.09% of 1386)

5. I say that Currently Adani Power is supplying power under long term PPAs to Appellant Discoms only from Units 7-9. Adani Power is in the process of entering into long term PPAs for the balance capacity of 556 MW. I say that the entire actual

domestic coal received from MCL will be allocated towards the power supplied under Haryana PPAs for the purpose of computation of compensatory tariff in accordance with Government of India (GoI) guidelines. Adani Power will accordingly raise the invoice for Compensatory Tariff and will revise the invoices raised till date.

6. I say that as and when new long term PPAs are executed for the balance capacity as stated above or GoI permits use of linkage coal for short term or medium term PPA or any change in government policy, the entitlement of domestic coal towards existing Haryana PPAs shall be accordingly dealt with on prorate basis."

As per the above affidavit, the Petitioner has admitted that it has been granted domestic linkage coal for 1386 MW which can be prorated corresponding to Haryana PPA which works out to 997 MW as and when long term PPA for the balance capacity of 556 MW is entered into. The Petitioner has admitted that it does not have the long term PPAs for the balance capacity and therefore, the entire actual coal received from MCL will be allocated towards the power supplied under the Haryana PPAs. Since actual supply of coal is linked to the existence of PPA and the Petitioner is having PPAs for 1424 MW only with Haryana Utilities which is more than the linkage coal for 1386 MW, MCL has made the entire ACQ quantity of coal of 64.05 lakh tonnes as the effective ACQ quantity and the entire coal received from MCL as against the linkage capacity of 1386 MW is being utilised for supply of power to the Haryana Utilities.

32. Next we consider the quantum of shortage of domestic coal under change in law in order to implement the directions of the Hon'ble Supreme Court. The envisaged normative shortfall in supply of coal for the last four years of the 12th Plan i.e. 2013-14 to 2016-17 works out as under:

S. No.		2013-14	2014-15	2015-16	2016-17
1.	Contracted coal quantity as per FSA (in million tonne)	64.05	64.05	64.05	64.05
2.	Coal quantity as per NCDP 2007 (in percentage)	100	100	100	100
3.	Coal quantity as per NCDP 2013 (in percentage)	65	65	67	75

4.	Coal shortage due to change in law (in percentages)	35	35	33	25
5.	Coal shortage due to change in law (in tonnage) (in lakh tonne)	22.4175	22.4175	21.1365	16.0125

33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. In this connection, Article 13.2 of the PPAs dated 7.8.2008 provides for the following principles of computing change in law:

> "13.2 Application and Principles for computing impact of Change in Law
>
> While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred."

Further, the relevant observations of the Hon’ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:

> "53…………………This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred."

The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.

34. Hon’ble Supreme Court has in this particular matter declared that the Tariff Policy being issued under Section 3 of the Act has the force of law. Para 6.1 of the Tariff Policy reads as under:

> “Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January,2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.
>
> Clause 6.1 states:
>
> 6.1 Procurement of Power
>
> As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.
>
> However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity

> indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."

As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes.

35. The Petitioner has furnished the year-wise quantity of coal actually supplied and the shortfall in quantity vis-a-vis the ACQ under the FSA as under:

Year	ACQ	Coal Quantity (MT)	Shortfall Quantity (MT)	% Shortfall w.r.t. ACQ
2013-14	6.405	2.720	3.69	57.53%
2014-15	6.405	4.077	2.33	36.35%
2015-16	6.405	4.990	1.42	22.10%
2016-17	6.405	4.476	1.93	30.11%

The above shortfall in supply of coal during the last four years of 12th Plan has been considered for the purpose of change in law for implementing the directions of Hon'ble Supreme Court in Energy Watchdog case. Prayas has submitted that the relief under change in law should be admissible to the Petitioner from 1.8.2013 since as per the observation of the Hon'ble Supreme Court in para 54 of the judgement. "the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources." We have gone through the judgement. Hon'ble Supreme Court has held that the MoP letter dated 31.7.2013 and the Tariff Policy, 2016 are statutory documents and have the force of law. Further, para 4 of the MoP letter dated 31.3.2017 provides as under:

4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the12th Plan for the already concluded PPAs based on tariff based competitive bidding.

Further, Clause 6.1 of the Tariff Policy, 2016 provides as under with regard to shortfall in domestic supply of coal:

> "However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."

As per the above provisions, the Petitioner is entitled to compensation for the remaining four years of the 12th Plan. If the date of 1.8.2013 is taken as the date of commencement of change in law, then the period of remaining four years will go beyond the end of 12th Plan which will be against the letter and spirit of MoP letter dated 31.7.2013 and the Tariff Policy, 2016. In our view, "the remaining four year period of the 12th Plan" shall cover the period 1.4.2013 to 31.3.2017 as per the MoP letter dated 31.7.2013 read with Tariff Policy, 2016.

Relief for Change in Law

36. The Petitioner has claimed year-wise relief from the date of commercial operation of Units 7, 8 & 9 of the project till 31.3.2017 as under:

Particulars	Rs in crore.
2012-13	114.88
2013-14	321.92
2014-15	146.11
2015-16	91.32
2016-17	178.66
Total	**852.89**

37. The Petitioner has furnished the following Statement indicating the compensation for the period from 2012-13 to 2016-17:

Statement of compensation

Particulars	Unit	2012-13	2013-14	2014-15	2015-16	2016-17	Total
Step 1							
Energy Charge Rate (ECR) quoted	Rs./kWh	1.190	2.145	2.161	2.181	2.198	
Energy from Domestic coal	Rs./kWh	1,238	3,106	4,583	5,583	5,274	
Step 2							
ECR - other coal excluding Transmission Charges	Rs./kWh	2.227	2.444	2.340	2.300	2.569	
Transmission Charges	Rs./kWh	0.48	0.43	0.44	0.33	0.41	
ECR - other coal(at Delivery Point) Including Transmission Charges	Rs./kWh	2.707	2.874	2.780	2.630	2.984	
Balance Generation from Imported Coal	MU	827	4,908	2,650	2,284	2,560	
Step 3							
Wt. Avg. ECR chargeable at Delivery Point	Rs./kWh	1.798	2.591	2.388	2.311	2.455	
Loss per Unit	**Rs./kWh**	**0.608**	**0.446**	**0.227**	**0.130**	**0.257**	
Scheduled Energy at Haryana Periphery	MU	1,890	7,214	6,445	7,010	6,956	
Change in Law Relief	**Rs. Crs.**	**114.88**	**321.92**	**146.11**	**91.32**	**178.66**	**853**

Particulars	Unit	2012-13	2013-14	2014-15	2015-16	2016-17	
Common Parameters							
70% of Scheduled Energy at Haryana Periphery	**MU**	1,890	7,214	6,445	7,010	6,956	
Transmission Loss	%	0.00%	1.71%	3.51%	3.48%	3.85%	
Normative Auxiliary Consumption	%	8.42%	8.42%	7.67%	7.67%	7.67%	
Gross Generation	MU	2,064	8,014	7,234	7,867	7,835	
Gross SHR	**Kcal/kwh**	2,354	2,355	2,309	2,309	2,309	
Domestic Coal							
Actual Domestic Coal Quantum corresponding to PPA	M Tons	8,87,228	21,78,866	32,65,047	39,96,480	35,85,319	
Domestic Coal GCV	Kcal/Kg	3,283	3,356	3,241	3,226	3,397	
Energy from Domestic coal	MU	1,238	3,106	4,583	5,583	5,274	
Imported / Alternate Coal							
Balance Energy from Imported Coal	MU	827	4,908	2,650	2,284	2,560	
GCV of Imported Coal	Kcal/Kg	4,871	5,272	4,791	4,522	4,490	
Wt. Avg. price of imported coal	Rs./MT	4,221	4,926	4,326	4,014	4,435	
ECR - other coal excluding Transmission Charges	Rs./kWh	2.23	2.44	2.34	2.30	2.57	

38. Since the MoP letter dated 31.7.2013 read with the Tariff Policy, 2016 has been held as having force of law by the Hon'ble Supreme Court, the relief shall be allowed only for the last four years of the 12th Plan, and accordingly, the claims of the Petitioner get limited to the period from 1.4.2013 to 31.3.2017.

39. The Petitioner has submitted that the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013 *(*GMR- Kamalanga Vs. Haryana Power Purchase Centre) approved the methodology for relief on account of shortfall in domestic coal due to change in law subsequent to the issue of NCDP, 2013. The said methodology provides for pass through of higher cost of imported/market based e-auction coal in accordance with the NCDP, 2013 and MoP letter dated 31.7.2013. Accordingly, the Petitioner has proposed a similar methodology in the present case.

40. The Petitioner has furnished the following indicative calculation for relief for the Financial Year 2016-17:

Particulars	Unit	Formula	2016-17	Remark
Step 1: Energy Charge quoted				
Energy Charge Rate (ECR) quoted	Rs./kWh	A	2.198	As per PPA
Energy from Domestic coal	MU	B = R	5,275	As shown in Table below.
Step 2: Energy Charge for Other Coal				
ECR - other coal excluding Transmission Charges	Rs./kWh	C = V	2.569	As shown in Table below.
Transmission Charges	Rs./kWh	D	0.41	PoC Charges applicable for the month towards the LTA for the PPA with Haryana Utilities.
ECR - other coal (at Delivery Point) Including Transmission Charges	Rs./kWh	E = C + D	2.984	
Balance Energy from Imported Coal	MU	F = S	2,560	As shown in Table below.
Step 3: Change in Law Relief				
Wt. Avg. ECR chargeable at Delivery Point	Rs./kWh	G = [(AxB) + (ExF)]/(B+F)	2.455	

Particulars	Unit	Formula	2016-17	Remark
Loss per Unit	**Rs./kWh**	**H = G-A**	**0.257**	
Scheduled Energy at Haryana Periphery	MU	I = K	6,956	At Haryana Periphery; Based on REA
Change in Law Relief	**Rs. Crs.**	**J = HxI/10**	**178.66**	

41. In the indicative calculation for the year 2016-17, the Petitioner has considered Gross Station Heat Rate (GSHR) as 2309 Kcal/kWh and Auxiliary Power Consumption as 7.67% (5.75% as per the CERC Norms under 2014 Tariff Regulations + 1.92% for FGD).

42. Prayas has submitted that, the formula in GMR case may not be applied in toto in the case of the Petitioner due to three reasons, such as, (a) the generating station of the Petitioner is based on a mix of domestic and imported coal; (b) the quantum of linkage coal is higher as compared to the contracted capacity; and (c) the Petitioner has the commitment to use the entire linkage coal qua contracted capacity under the Haryana PPA. Prayas has further contended that the operational parameters such as GSHR and Auxiliary Consumption should not exceed the bid assumed parameters and in the event, bid assumed parameters are not available, then the OEM specified parameters or parameters specified in the Tariff Regulations of the Commission whichever is lower should be considered.

43. We have considered the submissions of the Petitioner, the Respondents and Prayas. We have already come to the conclusion that the Petitioner had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA shall be considered for generation and supply of power to Haryana Utilities. Therefore, any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA dated 9.6.2012 shall be admissible in relief under change in law in terms of the judgement

of the Hon'ble Supreme Court. Accordingly, the formula given in GMR case has been modified to meet this requirement, and the same is given in para 46 of this Order.

44. The Appellate Tribunal for Electricity in judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited Vs Reliance Infrastructure Limited & Another) 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 calorific value of coal given in the bid documents for establishing the coal requirement. The relevant observations of the Appellate Tribunal 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."

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. Since, the Petitioner has not quoted the GCV of coal or heat rate in the bid documents with reference to the PPAs dated 7.8.2008. Also, the bid assumptions regarding heat rate or GCV of coal submitted by the Petitioner subsequently through affidavits cannot be considered for determining the coal requirement in order to give relief to the Petitioner for Change in Law. The Commission is of the view that in the interest of consumers, normative heat rate as

per the Tariff Regulations for 2009-14 and 2014-19 respectively or actual whichever is lower shall be considered for working out the compensation.

45. In the proposed calculations for relief, the Petitioner has taken Auxiliary Losses as 8.42% during 2012-13 and 2013-14 and 7.67% during 2014-15 to 2016-17. Accordingly, normative AEC at the rate of 6.5% as per the Tariff Regulations, 2009 and at the rate of 5.75% as per the Tariff Regulations, 2014 shall be taken into consideration for working out the compensation. As regards the additional AEC for FGD, the Commission in order dated 28.3.2018 in Petition No. 104/MP/2017, has decided as under:

> "47. We have considered the submissions of the parties. The Petitioner has furnished the Auxiliary Energy Consumption of 1.92% on account of installation of FGD, based on the OEM parameters. The Petitioner, in paras 11 and 15 of Petition No. 156/MP/2014 had submitted 6.38% as the actual Auxiliary consumption for the month of March, 2014 which was after commissioning of the FGD. The Petitioner in the present Petition has submitted that the actual Auxiliary Energy Consumption is 7.06% in the month of March, 2017 which is much lower than the claimed Auxiliary Energy Consumption of 8.42%. Central Electricity Authority vide its letter dated 1.8.2016 addressed to the Commission has recommended operational norms in respect of coal based thermal power plants for implementation of the Environmental (Protection Amendment, Rules, 2015. In the said recommendations, CEA, referring to the operational norms proposed by it during the year 1997, has recommended 1% additional Auxiliary Energy Consumption for FGD using Sea water provision. We are of the view that the Petitioner shall be granted compensation @1.0% as additional Auxiliary Energy Consumption or actual Auxiliary Energy Consumption on account of operation of FGD for Phase III of the project, whichever is lower. If the norms are revised by CEA in future, then the revised norms or 1.92% or the actual consumption whichever is lower shall be admissible. Considering the fact that expenditure on account of additional Auxiliary Energy Consumption shall be on recurring basis during the operating period, the same shall be reimbursed to the Petitioner by Haryana Utilities in terms of Article 13.2(b) of the PPA."

Therefore, the AEC for FGD shall be 1% over and above the normative AEC as per the Tariff Regulations or actual consumption whichever is lower or the norms to be decided by CEA for the purpose of relief under this petition.

46. Based on the above considerations, computation of relief due to shortage of domestic coal, the year-wise relief for change in law for the period from 1.4.2013 to 31.3.2017 shall be worked out as per the formulation given below:

Step 1: Shortage of Domestic coal (MT) = Domestic Coal Required (MT) – Actual Domestic Coal supplied by MCL and SECL against the FSA dated 9.6.2012 which is accounted under inter-plant transfer policy against the supply of power from Units 7, 8 & 9 to Haryana Utilities.

1. Domestic Coal Required (MT) is lower of ACQ or Actual Domestic coal required corresponding to 1386 MW generation linked to FSA. If generation corresponding to scheduled generation is less than generation corresponding to 1386 MW, such generation will be considered. In case, actual generation is less than generation corresponding to scheduled generation, the actual generation shall be considered.

2. For the purpose of computing above coal requirement, following operational parameter shall be considered:

    a. SHR: As per applicable CERC norms or actual, whichever is lower.

    b. Auxiliary Consumption: As per applicable CERC norms plus Auxiliary Consumption for FGD as decided in order dated 28.3.2018 in Petition No.104/MP/2017 or actual, whichever is lower.

    c. GCV of Coal: Based on certificate issued by Third Party Sampling Agency.

    d. Transmission Losses: As per applicable PoC rate issued from time to time.

3. Actual Domestic Coal supplied by CIL (in MT) is aggregate of quantity specified in Coal invoices of CIL for coal supplies corresponding to 1386 MW under the FSA, irrespective of transit loss.

Step 2: Compensation for shortage of Domestic Coal = Actual cost of generation using alternate coal to mitigate domestic coal shortage – Energy Charge revenue under the PPAs corresponding to such generation

1. Actual cost of generation using alternate coal to mitigate domestic coal shortage = Quantity of Alternate coal X Landed price of Alternate coal.

    a. Permissible Quantity of Alternate Coal = Quantity of Domestic Coal Shortage X (GCV of Domestic coal/GCV of alternate coal)

    b. Landed Price of alternate coal shall be as certified by Statutory Auditor.

2. Energy Charges revenue under PPA corresponding to generation based on alternate coal = Quoted Energy Charges as per PPA less transmission charges based on PoC X Energy at delivery point corresponding to gross generation based on alternate coal

    a. Quoted Energy Charges as per PPAs applicable for the relevant contract year.

    b. Energy at delivery point corresponding to gross generation based on alternate coal is gross generation from alternate coal, adjusted for auxiliary consumption and transmission losses as per applicable PoC rates.

    c. Gross generation from alternate coal shall be computed from Quantity of alternate coal, GCV of alternate coal and SHR as per applicable CERC norms or actual, whichever is lower.

47. The Petitioner is directed to work out the relief based on the formulation given at para 46 above for the period from 1.4.2013 to 31.3.2017. Any compensation paid by MCL and SECL to the petitioner for shortfall in supply of coal below the minimum/ threshold quantity as per FSA shall be adjusted against the year-wise claims for compensation under change in law allowed in this petition. It is further directed that the Petitioner shall obtain and provide to the Haryana Utilities certificate from Mahanadi Coalfield Ltd about the actual availability and actual supply of domestic coal against the FSA dated 9.6.2012 during each of the contract years, namely, 2013-14, 2014-15, 2015-16 and 2016-17. It is clarified that the Petitioner is required to meet the generation above 1386 MW from other sources including imported coal.

48. Since the Hon'ble Supreme Court has clearly held that the Petitioner is entitled for relief due to shortage of domestic coal under Change in law and no relief should be given due to impact of Indonesian Regulations which is not a Change in law, we are not going into the details of FoB cost of imported coal and Exchange Rate Variation to be considered for determining the price of imported coal. If imported coal is used to make up shortfall of domestic coal, then the actual cost of imported coal should be passed on for restitution of the Petitioner to the same economic position

as if the change in law has not occurred. It is noticed that the Petitioner has claimed weighted average price of imported coal per tonne duly certified by the Auditor. The Petitioner is directed to share all relevant documents supported by Auditor Certificate to the Haryana Utilities with regard to the actual cost of imported coal consumed to meet the shortfall of domestic coal.

49. The Commission vide order dated 28.9.2017 in IA No. 57/2017 in Petition No.97/MP/2017 granted the following interim relief:

> "8. Considering the fact that the Applicant has been supplying power to the Haryana Utilities by arranging coal from alternative sources to the extent of shortfall in supply of domestic coal by MCL and keeping in view the financial difficulties faced by the Applicant to arrange for working capital, we are of the view that the balance of convenience is in favour of grant of interim relief to the Applicant. If on final determination, it is found that the Applicant has received the payment in excess of the amount due, it shall be required to refund the same with interest. This will balance the interest of both the Applicant and the Haryana Utilities. Accordingly, we direct that pending issue of final order in Petition No. 97/MP/2017, Haryana Utilities shall pay 75% of the compensation claimed by the Applicant, subject to the adjustment after issue of final order in the main petition. If the payment received in terms of the interim order exceeds the amount due after issue of final order, the Applicant shall refund the excess amount to Haryana Utilities with 9%."

Thus, the Commission had allowed interim relief @ 75% of the compensation claimed by the Petitioner, subject to the adjustment after the issue of final order in the main petition. We have already clarified that in the absence of any other long term PPA for the balance capacity, the quantum of coal received from MCL and SECL is meant for meeting the contractual obligations under Haryana PPAs only. As such, the supply of coal under the FSA dated 9.6.2012 shall be accounted for against the generation and supply of electricity to Haryana Utilities. Therefore, after determination of the final compensation for change in law due to shortage of domestic coal in terms of this order, the Petitioner shall refund the excess amount recovered, if any, on the basis of interim order dated 28.9.2017 to Haryana Utilities alongwith 9% interest on the excess amount so recovered.

Carrying Cost

50. The Petitioner has submitted that it had approached the Commission in July, 2012 seeking relief due to shortage/non-availability of domestic coal. The Commission granted the relief vide orders dated 2.4.2013 and 21.2.2014 from the date of commencement of supply under the PPA. Subsequently, the Appellate Tribunal had also granted relief to the Petitioner vide judgment dated 7.4.2016 and finally, the adjudication process was concluded by the Hon'ble Supreme Court in its judgment dated 11.4.2017 allowing the Petitioner to claim relief due to shortage of domestic coal. The petitioner has submitted that all the forums have recognised that the Petitioner is entitled for relief for shortfall in supply of domestic coal. The additional fuel cost to procure imported/market coal was funded by additional borrowing which has resulted in additional interest burden on the Petitioner. The Petitioner has submitted that Article 13.2 of the PPA contemplates that the affected party is to be restored to the same economic position as if such change in law has not taken place. This aspect has also been recognised by the Hon’ble Supreme Court in judgment dated 11.4.2017 in Energy Watchdog Case. The Petitioner has argued that the Commission is not bound by its earlier decision in this regard in the light of subsequent decision by the Hon`ble Supreme Court in the judgment 11.4.2017 in Energy watchdog Case. Prayas has contended that the Petitioner is not entitled to claim any interest for the deferred payment.

51. We have considered the submissions of Petitioner and the Respondents. The Appellate Tribunal for Electricity in its judgement dated 13.4.2018 in Appeal No.210 of 2017 (Adani Power Limited Vs. Central Electricity Regulatory Commission & Others) has allowed carrying cost in case of claims covered under Change in Law. The Commission is not expressing any opinion on carrying cost in the present case

in the light of the judgement of the Appellate Tribunal at this stage. The Petitioner is at liberty to approach the Commission through a separate petition which will be dealt with in accordance with law and provisions of the PPAs.

52. The Petition No. 97/MP/2017 is disposed of in terms of the above.

I.A. No. 21 of 2018

53. After the order was reserved in the main petition, Haryana Utilities filed IA No.21/2018 seeking the following prayers:

> "(a) take on record the interim application and direct that the Order dated 28.9.2017 insofar it provides for the payment of 75% of the compensation claimed by Adani Power shall stand withdrawn with retrospective effective from 28.9.2017;
>
> (b) hold that the Haryana Utilities shall not be liable to pay any amount towards compensation claimed by Adani Power as per the Order dated 28.9.2017;
>
> (c) Direct that any amount paid by the Haryana Utilities shall stand adjusted with delayed payment surcharge at the rate of 19% per annum against any amount due from Haryana Utilities to Adani Power for generation and supply of electricity;
>
> (d) Pass an interim ex parte orders in terms of prayers (a), to (c) above."

54. Haryana Utilities have submitted in the IA that the Commission vide order dated 28.9.2017 granted the interim relief for payment of 75% of the compensation claimed by the Petitioner subject to the final decision in Petition No.97/MP/2017 and pursuant to the said order, the Haryana Utilities have paid to the Petitioner a sum of Rs 639 crore (plus rebate adjustment of Rs. 36 crore) by 31.10.2017. Haryana Utilities have submitted that the Petitioner's claims for compensation in Petition No. 97/MP/2017 were based on the representation that the Petitioner had not been receiving the full quantum of coal (6.405 Million tonne) from MCL in terms of FSA dated 9.6.2012. Subsequently, a part of allocation from MCL (about 2.315 million tonnes) had been transferred to SECL. Haryana Utilities have submitted that an

independent inquiry made by the Haryana Utilities has revealed that the Petitioner has been diverting the coal supplied from MCL and SECL under the FSA dated 9.6.2012 to Adani Power Maharashtra and Adani Power Rajasthan and thereafter, pleading shortage of availability of coal from MCL and SECL for generation and supply of electricity to the Haryana Utilities and entitling the Petitioner to claim compensation on the grounds of Change in Law. In this regard, the Haryana Utilities have placed on record the following documents in support of their contention:

(i) Letter dated 12.2.2018 from Chief Engineer, Haryana Power Purchase Centre to GM Marketing and Sales, Mahanadi Coalfields Ltd. seeking certain specific information on the supply of coal under the FSA dated 9.6.2012;

(ii) Letter dated 14.2.2018 written by MCL to Chief Engineer, HPPC in response to the letter dated 12.2.2018 together with enclosures.

(iii) Letter dated 14.2.2018 from Chief Engineer, HPPC to SECL seeking certain specific information on supply of coal from SECL in relation to the FSA dated 9.6.2012;

(iv) Reply dated 19.2.2018 from SECL to HPPC referring the diversion of total quantity of coal supplied from SECL to Adani Power Maharashtra Ltd., Tiroda under Inter Plant Transfer from the Petitioner;

(v) Letter dated 24.2.2018 from SECL to HPPC forwarding the enclosures of the details of the coal supply from July 2015 to March 2017 and reiterating the entire coal from SECL has been diverted under inter plant transfer scheme from Adani Power Ltd. to Adani power Maharashtra Ltd.

(vi) Letters dated 12.2.2018 and 14.2.2018 from Eastern Railways to HPPC containing the details of the sanction of coal rakes;

(vii) Letter dated 19.2.2018 from East Coast Railways to HPPC containing details of sanction of coal rakes;

(viii) Letter dated 17.2.2018 from Southern East Central Railways to HPPC stating that no program for such supply was received by the said railways and there was no rakes loaded from SECL and MCL through SEC Railways to Adani Power Ltd. for the plant situated at Mundra, Gujarat during the period August 2015 to March 2017;

(ix) Copy of the reconciliation of Change in Law claim compensation of Adani Power Ltd. signed on 1.3.2018 confirming that no domestic coal has been used in Adani Power Mundra Plant for Units 7, 8 and 9 during the financial years 2016-17 and 2017-18 (upto November 2017); and

(x) Letter dated 16.2.2018 from HPPC to Adani Power seeking information for which no response has been received.

55. Haryana Utilities have submitted that the Petitioner had concealed material details, data and documents from this Commission while alleging shortage in the supply of domestic coal and had deliberately not filed the certificates from MCL and SECL in regard to the total quantum of domestic coal which MCL and SECL were willing and in a position to supply to the Petitioner under the FSA dated 9.6.2012 in terms of the order dated 6.12.2016. Haryana Utilities have further placed on record a reconciliation statement at Annexure 'L', stating that the Petitioner has admitted to have over charged for the coal. Haryana Utilities have submitted that the Petitioner had proceeded to claim the amounts under the interim order dated 28.9.2017 wrongly and therefore, the Commission should withdraw the directions for payment contained in the interim order dated 28.9.2017 and dismiss the Petition No. 97/MP/2017.

56. I.A was heard after notice to the Petitioner on 19.4.2018. Leaned counsel for Haryana Utilities and the Petitioner advanced extensive arguments. During the hearing, learned counsel for Haryana Utilities submitted that the basis of the interim order dated 28.9.2017 was that the Petitioner had not been receiving the full quantum of coal from MCL with whom it has the FSA dated 9.6.2012 for 6.405 million tonnes. Learned counsel submitted that in the light of the documents placed on record, it clearly emerges that the Petitioner has concealed material details, data and documents from the Commission while alleging shortage in the supply of domestic coal. Learned counsel urged that the Commission should revisit the interim order dated 28.9.2017. Learned counsel for the Petitioner submitted that interim relief was granted after hearing the learned counsel for Haryana Utilities and if

Haryana Utilities had any difficulty with the interim order, they should have filed either a Review Petition before this Commission or an Appeal before the Appellate Tribunal for Electricity. Since no such application has been filed by Haryana Utilities, the interim order has attained finality. Learned counsel for the Petitioner submitted that the Inter-plant transfer scheme is legitimate mechanism carried out under the Scheme announced by Government of India which is available in public domain. Further, the Compensation claimed in change in law relief by the Petitioner and accepted by Haryana Utilities is only with respect to shortfall of coal in terms of FSA irrespective of the quantity of coal being utilized in the power plant at Mundra plant of the Petitioner. Both Haryana Utilities and the Petitioner were directed to file their written submissions on the IA.

57. The Petitioner in its reply filed under affidavit dated 24.4.2018 has submitted as under:

(a) Inter Plant Transfer (IPT) is a scheme wherein transfer of coal is allowed between the different power plants of the coal purchaser. However, the supply of coal for all practical purposes under the FSA remain unchanged and on account of original Power Plant. The scheme is in existence since June 2013 as approved by Coal India Limited vide letter dated 19.6.2013 which is available in public domain. The fact about inter plant transfer was known to the Haryana Utilities which is evident from the invoices raised by the Petitioner from time to time (invoice dated 10.4.2014 for the month of March 2014 placed on record), the recordings in the report of Deepak Parikh Committee, reference in the order dated 21.2.2014 in Petition

No.155/MP/2012 and the e-mail dated 21.2.2018 from Haryana Utilities referring to point (a) of the CIL letter dated 19.6.2013.

(b) Inter Plant Transfer Scheme is a legitimate and accepted arrangement as approved by CIL vide letter dated 19.6.2013 which allows transfer of coal between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. Further, such supply of coal for all commercial purpose under the FSA remain unchanged and on account of original Power Plant. Accordingly, the Petitioner has carried out inter plant transfer since August 2013 and even after diverting the coal to other plants, the supply of coal has been accounted against the original power plant only i.e. Units 7, 8 and 9.

(c) The allegation of Haryana Utilities that the Petitioner has been diverting coal to other power plants and claiming shortage is incorrect as the coal quantity mentioned by the Petitioner in the Petition actually matches with the MCL/SECL certificates annexed by Haryana Utilities in the IA. This is evident from the following table:

Year	ACQ	Coal Quantity in the Petition (MT)	Coal Quantity as certified by MCL (MT)*	Coal Quantity as certified by SECL (MT)**	Total Coal Quantity as certified by MCL+SECL (MT)
2012-13	4.334	2.237	2.237*		2.237
2013-14	6.405	2.720	2.720*		2.720
2014-15	6.405	4.077	4.077*		4.077
2015-16	6.405	4.990	4.114*	0.862#	4.976
2016-17	6.405	4.476^	2.691*	1.842#	4.533^

** As per MCL Certificates at page 34 of the IA filed by Haryana Utilities*

***As per MCL Certificates at page 37 of the IA filed by Haryana Utilities*

 # As per SECL Certificate at Page No. 66 of IA filed by Haryana Utilities

^ 4.533 MT is as per final reconciliation which was pending for FY 2016-17 at the time of filing the petition dated 1.5.2017.

If the statement of Haryana Utilities is correct, then the Petitioner would have shown 'Nil' coal supply from CIL for the period from November, 2015 onwards, since as per MCL/SECL certificates, the Petitioner has diverted entire coal to other power plants under the IPT scheme from November, 2015 onwards. On the contrary, the Petitioner has shown the entire coal supplied by MCL/SECL, including IPT quantity, as available for supply of power against Haryana PPAs. Therefore, the Petitioner has neither claimed shortage nor compensation for such diverted coal quantity. The coal diverted to other plants under IPT scheme out of Annual Contracted Quantity (ACQ) under FSA has been accounted for against the supply of power to Haryana Utilities to meet the contractual obligation under PPAs dated 7.8.2008. The claim of compensation is confined to the difference between total quantity of coal supplied by coal companies including such coal accounted under IPT and coal committed under the FSA i.e. ACQ.

(d) The Reconciliation Statement dated 1.3.2018 referred by Haryana Utilities pertains to change in law events (in the nature of taxes and duties) approved by the Commission in its orders dated 6.2.2018 and 8.5.2017 in Petition Nos. 156/MP/2014 and 235/MP/2015 respectively. The Petitioner has only verified the working proposed by HPPC and due to insistence of HPPC, has signed the same without prejudice to legal right to approach any court of law as well as communicate views/contentions separately. The working shown in the reconciliation statement is based on methodology proposed by HPPC considering actual coal consumption at Mundra (i.e. domestic coal procured by the Petitioner minus Coal transferred under IPT to other plants of Adani). The Petitioner has informed HPPC that IPT is legitimate in terms of CIL letter

dated 19.6.2013 and hence IPT quantity also needs to be considered for payment compensation related to taxes and duties. Further, the Petitioner's statement in its affidavit dated 8.5.2015 before the Appellate Tribunal for Electricity has always been that the entire actual domestic coal received from MCL will be allocated/accounted for towards the power supplied under the Haryana PPAs for the purpose of computation of compensatory tariff in accordance with Government of India Guidelines. Therefore, the issue of IPT raised by Haryana Utilities is completely unfounded in facts and should be rejected.

58. Haryana Utilities, vide their affidavit dated 1.5.2018 have submitted as under:

(a) Hon'ble Supreme Court in Energy Watchdog case has decided that the New Coal Distribution Policy (NCDP) is a change in law event entitling the relief under Article 13 of the PPAs dated 7.8.2008 between the Petitioner and the Haryana Utilities. The scope of the reliefs admissible is confined by the fact that by virtue of NCDP, the ACQ of domestic coal to Unit-7, 8 and 9 of the project which was to cover 70% of the installed capacity of 1980 MW stood reduced to 65%, 65%, 67% and 75% of the ACQ during the last four years of the 12th plan. Accordingly, the shortage of domestic coal availability need to be considered only with the pre-existing quantum of coal assured under the Fuel Supply Agreement (FSA) with Mahanadi Coalfield Limited (MCL) and South Eastern Coalfields Limited (SECL) and the specified percentages under the NCDP.

(b) The PPAs dated 7.8.2008 were premised on 70% of domestic coal linkage from MCL and balance 30% imported coal. Since, the Hon'ble Supreme

Court has rejected the claim of change in prices of imported coal to be considered as change in law, the quantum of coal required to meet the generation and sale of electricity to Haryana Utilities to the extent of 30% cannot be considered for change in law under Article 13 of the PPA. Further, the Petitioner vide its affidavit filed before the Appellate Tribunal in Appeal No. 100 of 2013 has admitted that the entire quantum of coal offered by MCL and SECL on available to the Petitioner should be considered as available for generation and supply of electricity to Haryana Utilities. In case the coal quantum is available from MCL/SECL but not requisitioned by the Petitioner, to the extent of such non-requisition of quantum the relief of law shall not be admissible under change in law. Further, the shortage of coal below the percentage specified under NCDP (65%, 65%, 67% and 75%) and the grade of GCV or quality slippage are matters to be dealt with by the Petitioner with MCL/SECL and cannot be passed on to Haryana Utilities. Accordingly, the methodology to be applied for determining whether the Petitioner is entitled to any compensation on account of shortage of domestic coal availability as per the provisions of the NCDP will necessarily involve consideration of the above aspects.

(c) Contrary to the claim of the Petitioner, the records clearly establish that there was no inter plant transfer of domestic coal prior to August, 2015 from Mundra Power Plant to power plants of the Adani Power Limited in Maharashtra and Rajasthan. In any case till April, 2017, when the matter was decided by the Hon'ble Supreme Court, the Petitioner was required to supply electricity at the quoted tariff without there being any implication on account of shortage of coal under NCDP. Perusal of the domestic coal availability since August, 2015

onwards show that the Petitioner had not requisitioned the entire quantum made available by MCL/SECL, thereby establishing that there was no implication of shortage of domestic coal for considering the effect of NCDP. The inter plant transfer of coal by the Petitioner cannot be on the basis of transfer of entitlement of Unit 7, 8 and 9 of Mundra Power Project in Maharashtra and Rajasthan without any right to Mundra to get equivalent quantum of coal. The inter plant transfer cannot lead to adverse financial implication in that the Petitioner claiming compensation from Haryana Utilities. The only inference which can be drawn from the fact that the Petitioner did choose on its own to transfer the coal meant for Units 7, 8 and 9 of Mundra Power Plant to Maharashtra and Rajasthan is that the Petitioner sourced coal from others which was cheaper than MCL/SECL and therefore, there is no question of compensating the Petitioner for the period from August, 2015 onwards.

(d) The ACQ mentioned by the Petitioner in Para 14 of the reply (quoted under para 5 (c) above) as coal availability from MCL/SECL is adequate to meet the requirements of generation and supply of power to the extent of 70% of the normative availability of the contracted capacity with the Haryana Utilities and the balance 30% was in any event to be supplied by the Petitioner by use of imported coal. The 65%, 65%, 67% and 75% of ACQ of 6.405 MT work out to 4.163 MTPA, 4.291 MTPA and 4.804 MTPA respectively and the above quantum of coal was to be supplied by MCL/SECL even in terms of NCDP. Failure if any, on part of MCL/SECL to supply coal even up to the said quantum was required to be dealt by the Petitioner with MCL/SECL and the burden of the same cannot be placed on the Haryana Utilities.

(e) The reconciliation statement given in the Annexure to the IA as well as the letter dated 6.3.2018 said by the Petitioner disputing the reconciliation statement itself establish beyond the doubt that there is a clear financial implication to the Haryana Utilities on the account of diversion of coal from the Mundra Power Project to the power projects of Maharashtra and Rajasthan.

59. We have considered the submissions of Haryana Utilities and the Petitioner. Haryana Utilities have filed the IA seeking withdrawal of the interim order dated 28.9.2017 with retrospective effect under which the Petitioner was allowed a provisional relief of 75% of the compensation amount claimed in Petition No. 97/MP/2017. The main ground for seeking withdrawal is that an independent enquiry made by the Haryana Utilities revealed that the Petitioner has been diverting the coal supply from MCL/SECL under the FSA dated 9.6.2012 to Adani Power Maharashtra and Adani Power Rajasthan and thereby the pleading shortage of availability of coal from MCL and SECL and claiming compensation on the grounds of change in law in terms of the Judgment of the Hon'ble Supreme Court. The Haryana Utilities have also submitted that the Petitioner has signed a reconciliation statement dated 1.3.2018 in which the Petitioner has confirmed that the Petitioner has not used any domestic coal in Units 7, 8 and 9 during the financial year 2016-17 and 2017-18 (upto November, 2017). According to Haryana Utilities, since the Petitioner has not used the coal supplied from MCL and SECL under FSA dated 9.6.2012, the directions issued vide interim order dated 28.9.2017 be withdrawn.

60. The Petitioner in its reply has admitted that it has been diverting coal tied up under the FSA dated 9.6.2012 to its plant in Maharashtra and Rajasthan in terms of the policy of Coal India Limited dated 19.6.2013. The inter plant transfer of coal under the CIL letter dated 19.6.2013 is extracted as under:-

"A proposal for allowing inter power plant transfer of coal from one Power Plant to another under the modified FSA applicable for New Power Plants (for both PSU/Govt. Pus and Private Pus) was placed before the 298th CIL Board in its meeting held on 27.5.2013.

The CIL Board while approving to the proposal allowed such dispensation subject to the following conditions which stand as below after legal vetting:

(a) Transfer of coal shall be allowed only between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. No transfer of coal shall be allowed for a JV company of the Purchaser. The supply of coal, shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant.

(b) Both the Power Plants should have executed FSA in the modified FSA Model applicable for new power plants and not having any supplies linked to coal blocks. In case of IPPs both the plants must have valid long term PPAs with DISCOMS.

(c) In no case the transferred quantity to a plant together with the quantity supplied under the applicable FSA shall exceed the ACQ of the Transferee Plant for a particular year which is proportional to the long term PPA with DISCOMS.

(d) Transfer of coal will not be allowed to those plants who are allotted coal blocks under the arrangement.

(e) In case of change in the ownership and no environmental clearance of the plant this facility shall stand withdrawn, and

(f) Penalty/ Incentive under this arrangement would be considered in terms of (a) above."

61. The Petitioner has submitted that it has been carrying out inter plant transfer of coal since August, 2013 pursuant to the CIL letter dated 19.6.2013. The Petitioner has compiled the quantum of diversion of coal from the certificates from MCL and SECL which have been placed on record by Haryana Utilities. The same is extracted as under:-

Year	ACQ	Coal Quantity in the Petition (MT)	Coal Quantity as certified by MCL (MT)*	Coal Quantity as certified by SECL (MT)**	Total Coal Quantity as certified by MCL+SECL (MT)
2012-13	4.334	2.237	2.237*		2.237
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2016-17	6.405	4.476^	2.691*	1.842#	4.533^

** As per MCL Certificates at page 34 of the IA filed by Haryana Utilities*

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 # As per SECL Certificate at Page No. 66 of IA filed by Haryana Utilities

^ 4.533 MT is as per final reconciliation which was pending for FY 2016-17 at the time of filing the petition dated 1.5.2017.

The Petitioner has also submitted the said information particularly information in first three columns have been given in Para 11 of the main petition. The inter plant transfer of coal has been allowed across the power sector through the CIL letter dated 19.6.2013. As per the IPT policy, transfer of coal is allowed between two power plants which are wholly owned by or wholly owned subsidiaries of the purchaser of coal. The policy further provides that the supply of coal shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant. Since the Mundra Power Project is owned by Adani Power and the projects at Maharashtra and Rajasthan are wholly owned subsidiaries of Adani Power, inter plant transfer of coal has been allowed by CIL. Even though, the coal under the FSA dated 9.6.2012 is diverted to the plants at Maharashtra and Rajasthan, such supply shall be accounted for on account of the original power plant i.e. Units 7, 8 and 9 of Mundra. In our view, inter plant transfer of coal is permissible under the CIL policy and therefore, the coal supplied under the FSA dated 9.6.2012 to other plants has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer. Therefore, inter plant transfer of coal which is legally permissible cannot be the ground for withdrawal of compensation to the Petitioner in terms of the interim order dated 28.9.2017. The Petitioner shall raise its claims for compensation as per the above clarification and the Haryana Utilities are directed to verify the claims before payment.

62. Haryana Utilities have raised several other points as mentioned in paras 54 and 58 above. All these points have been dealt with in the main part of the order.

63. In view of the above discussion, we do not find any merit in the IA filed by Haryana Utilities and accordingly, the IA No. 21 of 2018 is rejected.

sd/-	sd/ -	sd/-	sd/-
(Dr. M.K. Iyer)	**(A.S. Bakshi)**	**(A.K. Singhal)**	**(P.K. Pujari)**
Member	**Member**	**Member**	**Chairperson**