

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 112/MP/2015

Coram:

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

Date of order: 16th September, 2019

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13.2 (b) of the Power Purchase Agreement dated 7.8.2007 executed between GMR Kamalanga Energy Limited and Bihar State Power (Holding) Company Limited for compensation due to change in law impacting revenues and costs during the operating period.

And

In the matter of

1. GMR-Kamalanga Energy Limited
2. GMR Energy Ltd
New Shakti Bhawan,
Building No. 302- New Udaan Bhawan,
Opposite Terminal- 3,
Indira Gandhi International Airport,
New Delhi- 110037

.....Petitioners

Vs

1. Bihar State Power (Holding) Company Limited
1st Floor, Vidyut Bhawan, Bailey Road,
Patna - 800001
2. Prayas Energy Limited
Unit III A & B, Devgiri,
Joshi Railway Museum lane,
Kothrud Industrial area, Kothrud,
Pune - 411038

.....Respondents

Parties present:

Shri Vishrov Mukerjee, Advocate, GKEL
Ms. Raveena Dhamija, Advocate, GKEL
Shri Vikrant Nagpal, Advocate, GKEL
Ms. Ranjitha Ramachandran, Advocate, BSPHCL & Prayas
Shri Shubham Arya, Advocate, BSPHCL & Prayas



ORDER

GMR Kamalanga Energy Limited (Petitioner No.1, GKEL) was incorporated as a public limited company under the Companies Act, 1956 as a subsidiary of GMR Energy Limited (Petitioner No. 2) (collectively referred to as the 'Petitioner') to set up a 1400 MW Thermal Power Project (hereinafter referred to as the "Project") at village Kamalanga, District Dhenkanal in the State of Odisha. The Power Project comprises of two stages - the first stage having three units of 350 MW each and the second stage having one unit of 350 MW. Stage 1 of the Power Project has been accorded Mega Power Project status by the Ministry of Power, Government of India on 1.2.2012. GKEL had entered into the following long-term PPAs for supply of power from the Power Project:

(a) Supply of 350 MW gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006 (as amended on 4.1.2011 with delivery point as Odisha STU interconnection point).

(b) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point.

(c) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back to back arrangements:

(i) The PPAs dated 7.8.2008 entered into between PTC India Limited and Haryana Discoms with delivery point as Haryana STU bus bar;

(ii) Back to back PPA dated 12.3.2009 between GMR Energy Limited (holding company of GKEL) and PTC India Limited.

2. Petition No. 112/MP/2015 was filed by the Petitioner seeking adjustment of tariff on account of the events of Change in Law affecting the Project during the Operating Period in order to restore the Petitioner to the same economic position as if the events have not occurred in terms of the PPA dated 9.11.2011. The Commission vide its order dated 7.4.2017 allowed and disallowed some of the claims of the Petitioner as under:



Sl. No.	Change in law events	Decision
a	Change in Rate of Royalty on Coal	Allowed
b	Clean Energy Cess	Allowed
c	Change in Excise Duty on Coal and Inclusion of Royalty and SED on Excise Duty	Allowed to the extent mentioned in para 36 of the said order
d	Changes in the Fuel Supply Agreement and deviation from New Coal Distribution Policy on the project i. Change in Source of Coal from MCL to ECL ii. Deviation from NDCP	Not Allowed
e	Change in coal transportation from Rail mode to Road mode by MCL	Not allowed
f	Add-on premium on the MoC notified price of coal supplies under tapering linkage	Not Allowed
g	Railway freight on account of Development Surcharge by Ministry of Railway and Busy Season Surcharge	Not Allowed
h	Increase in Service Tax on transport of goods by Indian Railways	Allowed
i	Increase in VAT Rate	Allowed
j	Increase in Minimum Alternate Tax Rate	Not allowed
k	Contribution to National Mineral Exploration Trust and District Mineral Foundation	Allowed
l	Electricity Duty on Auxiliary Consumption	Allowed
m	Swachh Bharat Cess	Allowed

3. Aggrieved by the above said order, the Petitioner filed Appeal No. 193 of 2017 before the Appellate Tribunal for Electricity (hereinafter referred to as “the Tribunal”) on the following change in law events disallowed by the Commission:

(i) Shortfall of domestic linkage coal due to deviation from National Coal Distribution Policy (NCDP) and changes in Fuel Supply Agreements.

(ii) Increase in cost of railway freight on account of development surcharge and busy season surcharge.

(iii) Carrying cost.

(iv) Change in source of coal allocated at the time of bid submission [from Mahanadi Coal Fields Limited (MCL) to Eastern Coal Fields Limited (ECL)] resulting increase in cost of fuel.

(v) Cancellation of the Captive Coal Blocks pursuant to judgment passed by the Hon’ble Supreme Court of India.

(vi) Change in mode of coal transportation from rail to road by MCL.

(vii) Add on premium price on the notified price of coal supplied to tapering linkage holders.

(viii) Increase in the rate of Minimum Alternate Tax (MAT) rate.



(ix) Impact on interest on working capital and return on equity on incremental working capital and margin money for such working capital resulting from the aforesaid change in law events.

4. The Tribunal vide its judgment dated 21.12.2018 in Appeal No. 193 of 2017 allowed the Change in law events as follows:

- (a) Increase in cost of railway freight on account of Development Surcharge and Busy Season Surcharge;
- (b) Add on premium price on the notified price of coal supplied to tapering linkage holders;
- (c) Shortfall of domestic linkage coal due to deviation from National Coal Distribution Policy (NCDP) and change in fuel supply agreements;
Cancellation of the captive coal blocks pursuant to judgment passed by the Hon'ble Supreme Court of India; and
- (d) Carrying cost

5. By the said judgment, the Tribunal remanded the matter to the Commission to pass consequential orders in terms of the directions contained therein. The relevant portion of the said judgment is extracted hereunder:

“83. In view of the discussion, reasoning mentioned above, the Appeal is partly allowed. The Impugned Order dated 7-4-2017 is set aside. The matter stands remanded back to the Central Commission to pass consequential orders in the light of our observations as mentioned above on the issues relating to compensation on account of change in NCDP (cancellation of Captive Block vis-a-vis tapering linkage), busy season surcharge and developmental surcharge, carrying cost and add on premium price.

84. We further observe that the said consequential orders are to be passed within two months from the date of receipt of copy of this order by the Commission. All the parties are directed to appear before the Commission concerned on 7-1-2019. Since the matter is pending for long time, all endeavours must be extended for completion of assessment within the time schedule.”

6. Pursuant to the above directions of Tribunal, Petition No. 112/MP/2015 was heard on 8.1.2019 and the Petitioner vide its affidavit dated 8.1.2019 prayed that the Commission may pass consequential orders in terms of the directions contained in the judgment of the Tribunal. However, the Commission vide ROP directed the Respondents and M/s Prayas Energy Group (Prayas) to file their submissions with respect to the quantum of compensation to be granted to the Petitioner. The



Petitioner, after withdrawal / cancellation of affidavits dated 17.1.2019 (ack no. 194/2019) and 14.2.2019 (ack no. 489/2019) has filed Interlocutory Application (IA No.31/2019) and has placed on record the affidavit dated 8.2.2019 (filed on 14.2.2019 with ack no. 501/2019) containing the computation of compensation for change in law events allowed and the same has been taken on record. The Respondents, Bihar State Power (Holding) Company Limited (BSPHCL) and Prayas have filed their replies vide affidavits dated 11.2.2019 and the Petitioner vide affidavit dated 22.3.2019 has filed its rejoinder to the said replies.

7. Subsequently, the matter was heard on 4.4.2019 and the Commission directed the respondents to file written submissions. Based on the submissions of the parties and the documents on record, we proceed for computation of compensation in respect of change in law events allowed in terms of the judgment of the Tribunal, as stated in the subsequent paragraphs.

(A) Increase in cost of Railway freight on account of Busy Season Surcharge and Development Surcharge

8. The Commission in its order dated 7.4.2017 in Petition No. 112/MP/2015 had rejected the claim of the Petitioner for compensation on account of increase in Busy Season Surcharge and Development Surcharge as under:

“56. We have considered the submissions of the Petitioners and Prayas. The Commission in the order dated 1.2.2016 in Petition No. 8/MP/2014 has examined whether changes in the rates of busy season surcharge and development surcharge levied by Railway Board qualify as Change in Law. Relevant portions of the said order are extracted as under:

“60. We have considered the submission of the Petitioners. In our view, increase in the railway freight charges on account of development surcharge and busy season surcharge are in the nature of change in rates of freight charges levied by the Railway Board in exercise of its power under sections 30 to 32 of the Railways Act, 1989. The Petitioners were expected to take into account the possible revision in these charges while quoting the bid. As already stated, the Petitioners/PTC were expected in terms of para 2.7.2.4 of the RfP to include in quoted tariff all costs involved in procuring the inputs. Since freight charges are a cost involved for procuring coal which is an input for generating power for supply to Haryana Discoms under the Haryana PPA, the



Petitioners cannot claim any relief under change in law on account of revision in freight charges. Accordingly, the claim of the Petitioner on this account is disallowed.

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

Section 30 of the Railways Act is extracted as under:

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

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

The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board

57. In light of the above decision, the claim of the Petitioners for relief under Change in Law on account of revision in the Busy Season Surcharge and Development Surcharge by Railway Board is not admissible and is accordingly disallowed.”

9. However, the aforesaid findings were set aside by the Tribunal vide its judgment dated 21.12.2018 as under:

“36. Reading of the above paragraphs, it is clear that escalation price pertains to increase in base price and it does not cover increase in taxes and duties. This fact was reaffirmed by Tribunal in Adani judgment so also GMR Warora (mentioned above) wherein they have held as under:

“From the above discussions it is clear that the CERC escalation index for transportation covers only the basic freight charges. The Bidder was required to suitably incorporate the other taxes, duties, levies etc. existing at the time of bidding. The Bidder cannot envisage any changes happening regarding taxes, levies, duties etc. in future date. As such, any increase in surcharges or imposition of new surcharge after the cut-off date i.e. 30.7.2009 in the present case cannot be said to be covered under CERC Escalation Rates for Transportation Charges, which is indexed for basic freight rate only. Accordingly, any such change by Indian Governmental Instrumentality herein Indian Railways has to be necessarily considered under Change in Law event and need to be passed on to APRL. In terms of the PPA, such changes in the surcharges and levy of new Port Congestion Surcharge which do not exist at the



time of cut-off date falls under 1st bullet of Article 10.1.1 of the PPA read with the definitions of the ‘Law’ and ‘Indian Government Instrumentality’ under the PPA.”

37.....In the light of above discussion, we are of the opinion, Appellant GKEL is entitled for increase in the freight on account of levying of development surcharge and busy season surcharge which were not part of basic price of coal.”

Submissions of Petitioner

10. The Petitioner has submitted that in terms of the judgment of the Tribunal, it is entitled for compensation on account of increase in Busy Season Surcharge (BSS) & Development Surcharge (DS) as change in law events and that the compensation due to the Petitioner on account of BSS & DS in Bihar PPA is as under:

	(₹ in crore)					
	2014-15	2015-16	2016-17	2017-18	2018-19	Total
Busy Season Surcharge	1.02	2.18	1.74	1.01	-	5.96
Development Surcharge	0.46	1.05	0.83	0.54	-	2.88
Total	1.48	3.24	2.57	1.55	-	8.84

Submissions of Respondents BSPHCL & Prayas

11. The Respondents have submitted that the Petitioner had not given any details of computation though it had given the methodology for shortfall in coal due to NCDP. They have further submitted that since the tariff quoted by Petitioner was inclusive of BSS & DS as on cut-off date, any escalation of quoted tariff would include the escalation of BSS & DS component also. Moreover, any increase in actual BSS & DS beyond such escalation is only to be provided. The Respondents have also submitted that the quantum of coal has to be considered as per the coal required for generation (actual or scheduled whichever is lower) on the basis of the normative parameters under Tariff Regulations or actual whichever is lower and based on GCV as per the Coal Company.

Rejoinder of Petitioner

12. The Petitioner in its rejoinder has contended that the Respondents cannot be permitted to reopen the issues which are already been settled by the Tribunal in its



judgment dated 14.8.2018 in Appeal Nos. 119 of 2016 & 111 of 2017 (APL vs RERC). The Petitioner has clarified that the escalation index is only applicable to the base freight charges and does not cover BSS & DS. Referring to the judgment dated 12.9.2014 of the Tribunal in Appeal No. 288 of 2013 (Wardha Power Company Ltd. vs Reliance Infra Ltd), the Petitioner has stated that escalable index/ indexing of cost is not applicable in case of change in law wherein the impact of change in law is to be determined on actual basis.

Analysis and decision

13. In terms of the judgment of the Tribunal, Busy Season Surcharge and Development Surcharge are covered under change in law and, therefore, the Petitioners are entitled to claim these from the Respondent as change in law. It is pertinent to mention that Busy Season Surcharge and Development Surcharge were being separately levied by Railways over and above basic freight. However, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the basic freight with effective date of 15.1.2018. Accordingly, these surcharges would be allowable as change in law events only till 14.1.2018. With effect from 15.1.2018, these charges having been subsumed in the basic freight by Railways and being accounted for through the Escalation Indices published by the Commission, and the Petitioner is claiming the same in terms of the escalable component of tariff quoted by it while bidding. Therefore, these charges can no longer be claimed under change in law w.e.f. 15.1.2018. The compensation on this count needs to be computed in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to BSPHCL. If



actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law.

(B) Add-on premium price on the notified price of coal supplied to tapering linkage holders

14. The Commission vide its order dated 7.4.2017 had earlier rejected the claim of the Petitioner for add on premium price on notified price on coal for supplies under tapering linkage holders as under:

“52. We have considered the submissions of the Petitioners and Prayas. The Petitioners have not placed on record any document with regard to add on procurers price on the notified price of coal for supplies under tampering linkage holders nor have explained as to how the said event can be considered under change in law in terms of Article 10.1.1 of the Bihar PPA. In any case, it appears that premium charged by the coal company for the add-on price on the notified price of coal is the result of contractual arrangement between the Petitioners and the MCL and therefore cannot be recovered under Change in Law.”

15. The Tribunal in its judgment dated 21.12.2018 had allowed the claim of the Petitioner as under:

“69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon’ble Apex Court the consequential financial impact on account thereof in respect of add on premium is also covered as change in law.

70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment.”

Submissions of Petitioner

16. The Petitioner has submitted that the Tribunal in its judgment dated 21.12.2018 had held that Add on premium was not part of the LOA/ tapering linkage policy and qualifies as a change in law event under the Bihar PPA. It has further submitted that the Petitioner is to be compensated for add on premium paid on the coal received under tapering linkage from MCL & ECL and therefore be entitled to



the extra expenditure incurred (i.e for payment of add on premium) over and above the base price of the tapering linkage coal supplied to the Petitioner. The estimated compensation claimed by the Petitioner for Add-on premium is as under:

<i>(₹ in crore)</i>					
2014-15	2015-16	2016-17	2017-18	2018-19	Total
2.00	4.00	2.00	-	-	8.00

The Petitioner has submitted that the amount claimed as above is inclusive of the compensation claimed towards cancellation of captive coal blocks.

Submissions of Respondents BSPHCL & Prayas

17. The Respondents have submitted as under:

(a) The Tribunal has allowed change in law in respect of levy of add-on premium price on account of delay in operationalization and cancellation of coal blocks. Therefore, the use of tapering linkage coal due to delay and cancellation of coal block only has to be considered for any relief.

(b) The policy of tapering linkage is that the coal tapered off over a period of three years once the coal block is operational. Thus, the Petitioner would have continued to receive coal from the tapering linkage after the normative date of production even if the coal block is operationalized. To that extent, the Petitioner would have anyway procured coal under tapering linkage and paid the Add on premium price irrespective of whether the coal block was delayed or not.

(c) To the extent of the quantum wherein the add on premium price provided in the FSA would have been payable even if the coal block had been operationalized, the payment is not due to any change in law etc., related to Go-No-Go Policy or judgment of the Hon'ble Supreme Court in Manohar Lal Sharma vs Principal Secretary & ors dated 25.8.2014. Thus, the quantum of coal in respect of which compensation is to be considered is the quantum excluding the above quantum.

(d) As regards the amount claimed, there is no computation or supporting documentation.



18. The Petitioner has clarified that Add-on premium is a part of the financial impact incurred by them on account of delay in development of coal blocks and subsequent cancellation by the Hon'ble Supreme Court. The Petitioner has submitted that it was constrained to procure coal from tapering linkage post the scheduled operationalization of the captive coal blocks on account of the Go-No-Go Policy of GOI which was beyond the control of the Petitioner and this aspect has been recorded by the Tribunal in the said judgment. It has further clarified that no Add-on premium price would have been payable by the Petitioner, had the captive coal blocks operationalized as per the schedule. Accordingly, the Petitioner has prayed that it is entitled for relief for increase in cost due to payment of add-on premium price paid on the notified price of coal supplied to the tapering linkage holders.

Analysis & decision

19. The matter has been examined. The Petitioner had quoted tariff considering the coal availability from linkage and its own captive coal blocks since as on date of the bid, the Petitioner had the coal linkage as well as allocated coal block. However, the Petitioner was constrained to procure coal from tapering linkage with add on premium price post the scheduled operationalization of captive coal blocks (17.10.2013) on account of the Go-No-Go Policy of the Government of India (in force up to 31.8.2012) and the same was beyond the control of the Petitioner. Subsequently, due to cancellation of coal blocks by the Hon'ble Supreme Court, including Rampia coal block (allotted to the Petitioner) vide judgment dated 25.8.2014/24.9.2014, there has been continued use of tapering linkage coal. The Tribunal in the said judgment (as quoted above) while observing that the Petitioner is entitled for compensation for the increase in cost due to continued use of



tapering linkage coal on account of the delay in development of captive coal blocks and the subsequent cancellation of coal blocks as per judgment of the Hon'ble Supreme Court, has held that add-on premium was not part of the LOA/ tapering linkage policy and qualifies as a change in law event. Accordingly, the Petitioner is entitled for the additional expenditure incurred for payment of add-on premium over and above the base price of the tapering linkage coal received from MCL and ECL. It shall be computed in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actuals, whichever is lower, for supply of electricity to BSPHCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of change in law.

(C) Shortfall of domestic linkage coal due to deviation from NCDP and change in fuel supply agreement

20. The Commission in its earlier order dated 7.4.2017 in this Petition (Petition No. 112/MP/2015 had held as under:

“46. We have considered the submissions of Petitioners and the Respondents. We do not accept the contention of the Petitioners that cancellation of the allocation of captive coal mines pursuant to the order of the Hon'ble Supreme Court amounts to Change in Law. The Commission vide order dated 1.2.2017 in Petition No. 8/MP/2014 has examined whether the Changes in the Fuel Supply Agreement and deviation from the NCDP Policy qualify as Change in law. Relevant portion of the said order is extracted as under:

“106. The Petitioner was selected to supply power to MSEDCL and DNH based on the competitive bidding carried out under Section 63 of the Act. The Appellate Tribunal for Electricity in its judgement dated 7.4.2016 in Appeal No.100 of 2013 and other related appeals have held as under:

“163. In the ultimate analysis, we hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted under the adjudicatory power. Accordingly, Issue No.5 is answered in the negative. We also hold that the Appropriate Commission, independent of Force Majeure and Change in Law provisions of PPAs, has no power to vary or modify the tariff or otherwise grant compensatory tariff to



the generating companies in pursuance of the powers under Sections 61, 63 and 79 of the said Act and/or Clause 4.7 and 5.17 of the said Guidelines issued by the Central Government and/or Article 17.3 of the PPA and/or under the adjudicatory powers as per Section 79(1)(f) of the said Act. The adjudicatory powers available to the Appropriate Commission under Section 79(1)(f) of the said Act and Article 17.3 of the PPA can be used by the Appropriate Commission to give to the generator relief available under the PPA if a case of Force Majeure or Change in Law is made out under the PPA.....”

In the light of the above decision, the Commission can grant relief to the Petitioner if a case under Change in Law or Force Majeure is made out. The Petitioner has claimed relief under change in law as well as in the light of the statutory advice of the Commission, the decision of the Cabinet Committee on Economic Affairs and clause 6.1 of the Revised Tariff Policy. In the light of the decision of the Appellate Tribunal in Full Bench judgment, no relief can be granted outside the provisions of force majeure and change in law in the PPA. Consequently, the Commission cannot grant relief to the Petitioner in terms of the statutory advice by the Commission and advisory of the Government in the light of the decision of CCPA unless such provision is duly included in the PPAs. As regards whether change in NCDP amounts to change in law, the Appellate Tribunal has held as under:

“188. It was also urged that change in policy would, under certain circumstances, be included in Change in Law. It is not possible to stretch the definition of the term “Change in Law” to include change in policy. We reject this submission.

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190. In view of the above, we hold that Change in Law provided under Article 13 of the PPA or under Clause 4.7 of the said Guidelines issued by the Central Government as per Section 63 of the said Act should not be construed to include laws other than Indian Laws such as the Indonesian Law/Regulations prescribing the benchmark price for export of coal. Accordingly, we answer Issue No.10 in the negative. We also hold that in the facts and circumstances of the present case, the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal and/or promulgation of Indonesian Regulation do not constitute an event of Change in Law attracting Clause 4.7 of the said Guidelines read with Article 13 of the PPA. Issue No.11 is accordingly answered in the negative.”

There is a clear-cut finding that the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal does not constitute an event of Change in Law. Therefore, relief on account of higher purchase cost of coal due to reduced availability of domestic coal cannot be granted to the Petitioner under Change in Law....

107. The Appellate Tribunal has held that increase in prices on account of short supply of domestic coal constitute a force majeure event in terms of the PPA in case of Adani Power. Relevant excerpts of the judgement is extracted as under:

“303. In view of the above discussions, we hold that increase in the price of coal on account of the intervention by the Indonesian Regulations as also the non-availability/ short supply of domestic coal in case of Adani Power constitute a Force Majeure Event in terms of the PPA

Therefore, in the light of the judgement of the Appellate Tribunal, the Petitioner has got the opportunity to pursue the remedy of force majeure for the additional expenditure incurred by it on account of procurement of coal from alternative sources due to shortage in supply of domestic coal upto normative availability of 85% by SECL.

108. Since, force majeure has not been argued by the Petitioner as well as the Respondents and Prayas, it is considered appropriate to grant liberty to the Petitioner to file an appropriate application on the issue of shortage of domestic coal with all relevant details in terms of the provisions of force majeure under MSEDCL and DNH PPA.”



In the light of the decision as quoted above, the claim of the Petitioners for Change in Source of Coal from MCL to ECL under Change in Law is not admissible and is accordingly disallowed. Petitioner is granted liberty to file an appropriate application on the issue of shortage of domestic coal in terms of the provision of the force majeure under Bihar PPA.”

21. The Tribunal vide its judgment dated 21.12.2018 held as under:

“61. Under these circumstances, when bid submitted by GKEL for Bihar PPA was premised on SLC-LT allocation and LOA when FSA had not been entered into between the parties as on the cut-off date what should be the consequence? If the bid was based on the SLC allocation and LOA prior to cut-off date indicated in PPA dated 9.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.

62. In terms of judgment of the Apex Court in Manohar Lal Sharma vs. The Principal Secretary & Ors, the Captive Coal Blocks came to be cancelled. Normative date of production of the coal block was 17-10-2013. This block was allowed to Appellant GKEL on 17-1-2008. It is not in dispute that the delay in development of coal block was on account of Go-No-Go policy of the MoEF which was beyond the control of the developers. The same came to be recorded in the minutes of the meeting between Inter-Ministerial Group held on 7-7-2015 to review issue of bank guarantee so also the letter dated 16-1-2014 issued by the Ministry of Coal (Annexure A-24, page-620, Vol.III of the Appeal Paper Book). On account of the reasons beyond the control of GKEL operationalization of the Captive Coal Block was delayed.

63. In lieu of the Captive Coal Blocks tapering linkage was extended and subsequent cancellation of the coal block was intimated in terms of letter dated 16-1-2014 (Annexure A-13, page 510 of Appeal Paper Book). MoU dated 2-7-2015 between MCL and GKEL (Annexure A-23, page 615, 616, 617 of Appeal Paper Book and Annexure-A-27, Page 638 of Appeal Paper Book) indicate that tapering linkage was also extended. Since cancellation of coal block was on account of judgment of the Apex Court in 2014, event subsequent to cut-off date, this also amounts to change in law.

64. In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources.”

Submissions of Petitioner

22. The Petitioner has submitted that in terms of the Tribunal judgment dated 21.12.2018, the shortfall in coal and deviation in NCDP is a change in law event under the Bihar PPA. It has further submitted that shortfall has to be computed against the quantum assured under the LOAs issued in favour of the Petitioner. In this regard, the Petitioner has submitted the following:

(i) Firm coal linkage for the project providing 2.14 MTPA for 500 MW was approved by Standing Linkage Committee-LT (SLC-LT) on 2.8.2007. Pursuant thereto, LOA dated 25.7.2008 providing firm linkage of 2.14 MTPA for 500 MW



was issued in favour of GMR Energy Ltd. (GEL), the holding company of GKEL (the Petitioner).

(ii) On 6.11.2007, the Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other allottees as confirmed by letter no. 38011/1/2007-CA-1 on 17.1.2008.

(iii) Tapering coal linkage for 2.384 MTPA for 550 MW was approved on 12.11.2008 by SLC-LT for the project. Pursuant thereto, LOA dated 8.7.2009 providing tapering coal linkage of 2.384 MTPA coal for 550 MW was issued in favour of GEL. The tapering linkage was made available till supply of coal from Rampia coal block started.

(iv) GKEL and MCL signed FSAs dated 26.3.2013 and 28.8.2013 for 1.819 MTPA and 0.6556 MTPA respectively.

(v) Coal India Limited by its letter dated 26.2.2014 transferred 1.517 MT of coal which was part of the tapering linkage from MCL to ECL. On 29.5.2014, ECL has signed FSA with GKEL for 1.071 MTPA. On 24.9.2014, FSA signed with ECL was amended to 0.626535 MTPA.

(vi) The Petitioner's original claim was not limited to coal supply till 31.3.2017 only. Moreover, on account of notification of Shakti scheme and the revised tariff policy, shortfall in linkage coal beyond 31.3.2017 is also a change in law event for which the Petitioner is entitled to be compensated.

Submissions of Respondent, BSPCL

23. In response, the Respondent has submitted the following:

(a) The claim is for the shortfall in the quantity of domestic coal assured in the Letter of Assurance for firm linkage which was issued prior to the cut-off date. The Letter of Assurance dated 25.7.2008 was issued after the SLC-LT Meeting and before the cut-off date and, therefore, even as per the Petitioner, the same is to be considered as the basis for relief.



(b) As per the above Letter of Assurance, there was no assurance of supply of 100% domestic coal by CIL or its subsidiaries. The Petitioner could not have proceeded on the basis of full quantum of 2.14 MTPA of domestic coal being supplied to it and that the Petitioner would have accounted for some portion of the same being imported.

(c) Similarly, for the tapering linkage, Letter of Assurance dated 8.7.2009 also provided for shortfall of quantity of coal to be met through import. Thus, the Petitioner could not have assumed availability of 2.384 MTPA of domestic coal. The coal was to be supplied from both mines as well as imported coal.

(d) Even if the Petitioner had been under Clause 2.2 of NCDP 2007, once the Letter of Assurance has been issued prior to the cut-off date, the Petitioner could not have relied on Clause 2.2 of the NCDP 2007 when the Letter of Assurance was issued specifically to the Petitioner, subsequent to the NCDP 2007 and incorporated the provision for import of coal. These are the letters on the basis of which the Petitioner had bid its tariff and which are claimed to be the basis of the consideration of quantum of coal assured.

(e) Therefore the Petitioner has to disclose in a transparent manner the quantum of domestic coal assured under the Letter of Assurance.

(f) Even otherwise, the Petitioner has signed the FSA only for 3.63 MTPA of coal. Therefore, the coal requirement has to be considered only against the proportionate quantum related to domestic coal.

(g) The compensation is to be considered only for the difference between quantum of domestic coal assured and the quantum of shortfall as per NCDP 2013. In terms of the NCDP 2013 and the Letter dated 31.7.2013, for 2013-14 (from 26/31.7.2013 to 31.3.2014) and 2014-15, the quantum assured is 65%; for the financial year 2015-16, the quantum assured is 67%; and for the financial year 2016-17, it is 75%.

(h) Any shortage of coal linkage below 65%, 65%, 67% and 75% respectively for 2013-14, 2014-15, 2015-16 and 2016-17 is a matter for the Petitioner to deal with the Coal Companies. The shortfall due to NCDP 2013 alone has to be



considered. This has been held by this Commission in various cases including in Order dated 3.2.2016 in Petition No. 79/MP/2013 filed by the Petitioner.

(i) The commencement of power supply for Bihar Utilities is from 1.9.2014 and, therefore, the availability of coal has to be considered from the said date and till 31.3.2017.

(j) Despite being aware that the present proceedings is for calculation of impact of change in law, if any, the Petitioner has failed to produce supporting documentation and evidence to prove its claim and has not even produced the calculation. Such a vague claim cannot be accepted. It is incumbent upon the Petitioner to place the relevant details with supporting documents and information.

(k) It appears that the Petitioner has proceeded on two basis i.e. (a) considering shortfall of coal only against firm linkage while considering the coal requirement as per entire generation and (b) considering the coal received from both firm and tapering linkage as well as Shakti scheme. However, this needs to be clarified and confirmed by the Petitioner.

(l) The Petitioner is required to submit certificate of availability and certificate of supply of coal from the coal company. In case coal was available from coal company but not supplied for any reason not attributable to the coal company, the same is not a shortfall due to NCDP 2013 and therefore no compensation is payable in that case. The Commission has passed similar direction in case of Adani Power in Petition No. 97/MP/2017.

(m) The Petitioner is required to submit the audited certificates in relation to the actual parameters as well as to submit the bid assumed parameters and details for computation of the parameters as per the Tariff Regulations.

(n) The quantum of coal required has to be considered as per actual generation/scheduled generation (whichever is lower) and normative availability of 85% and as per the bid assumed parameters or normative parameters in the CERC Tariff Regulations 2009 and 2014 or actuals whichever is lower. The Petitioner has claimed SHR of 2378 kcal/kwh and Auxiliary of 5.75% but has not provided any details of such conclusion.



(o) The shortfall cannot be considered on the basis of coal requirement if the said coal requirement is higher than the coal allocated. The Petitioner had signed FSA in respect of only 3.63 MTPA (for the entire power plant). If the coal requirement is higher than the said quantum, then the shortfall is not a shortfall in coal under NCDP 2013.

(p) As regards claim for shortfall beyond 31.3.2017, such claim is beyond the scope of remand as per Order dated 21.12.2018. The Petitioner had only claimed relief in respect of changes in NCDP, 2013 which is applicable only till 31.3.2017.

Rejoinder of Petitioner

24. The Petitioner in its rejoinder affidavit dated 22.3.2019 to the above replies has submitted the following:

(i) In terms of the judgment of the Tribunal dated 21.12.2018, the issues of shortfall of firm and tapering linkage stand remanded and the Commission is required to analyse the aggregate impact for shortfall of coal on the said events. BSPHCL has erroneously omitted to mention cancellation of coal blocks as an issue for remand.

(ii) As regards shortfall in linkage coal, the contention of the BSPHCL that there was no assurance of 100% domestic coal under the LOAs is misplaced. This contention has also been rejected by the Tribunal in its judgment dated 21.12.2018. In terms of the LOAs dated 25.7.2008 & 8.7.2009, the Petitioner was assured 2.14 MTPA and 2.384 MTPA of domestic coal. The imported coal comes into picture only when there is incremental demand and incremental supply available with CIL, is not sufficient. This does not alter the obligation to supply 100% of the Petitioner's normative requirement. The Respondent cannot agitate the issue already decided by the Tribunal.

(iii) BSPHCL contention that the coal requirement cannot be considered above 3.63 MTPA is erroneous. The Tribunal in its judgment dated 21.12.2018 has clarified that the shortfall is to be reckoned against the quantum assured in the LOAs. Thus, the Petitioner is entitled to claim compensation for shortfall for



shortfall in coal quantity which is to be reckoned against the quantum assured in the LOAs and not 3.63 MTPA.

(iv) Shakti scheme is a continuation of the coal allocation policy of GOI and the notifications having force of law have been held to be change in law event. Therefore, if an event qualifies as change in law under the PPA, the compensation ought to be given to the affected party so as to reconstitute it to the same economic position as if change in law has not occurred.

Analysis and Decision

25. On 18.10.2007, the Government of India issued the New Coal Distribution Policy (NCDP 2007). In terms of Para 2.2 of the NCDP 2007, the existing linkage holders were assured supply of 100% of normative requirement. Paragraph 2.2 is as under: -

"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 have 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."

26. The Respondent BSPHCL and Prayas have submitted that there was no assurance of domestic coal under the LOAs dated 25.7.2008 and 8.7.2009 and therefore the Petitioner could not have assumed availability of 2.14 MTPA and 2.384 MTPA respectively. They have also submitted that the Petitioner could not have relied on Clause 2.2 of the NCDP, 2007 when the LOAs were issued specifically to the Petitioner, subsequent to the NCDP, 2007 and incorporated the provision for import of coal. In response, the Petitioner has submitted that in terms of the LOA, imported coal comes into picture only when there is incremental demand and the incremental supply available with CIL is not sufficient and this does not alter the obligation to supply 100% of the petitioner's normative requirement, which the



Petitioner was always assured of. The Petitioner has further submitted that the Respondents cannot re-agitate the issues already decided by the Tribunal.

27. The submissions of the Respondent BSPHCL and Prayas that there was no assurance of 100% domestic coal under the LOAs dated 25.7.2008 and 8.7.2009 and that the Petitioner cannot rely on Clause 2.2 of the NCDP had already been considered and rejected by the Tribunal vide its judgment dated 21.12.2018 as under:

“50. According to Appellants, the coal requirement of projects which had been assessed prior to NCDP 2007 had the assurance of coal supply up to 100% of normative requirement. GKEL’s coal requirement was assessed on 2-8-2007; therefore, they are covered by virtue of Clause 2.2 in terms of which GKEL is entitled to supply of 100% of the quantity as per normative requirement without any stipulation as to supply of imported coal

51. As against this, argument of the Respondents is that Appellant did not have the LOA or FSA at that stage; therefore, Clause 5.2 of NCDP 2007 alone applies. Therefore, CIL may have to import coal as may be required from time to time. It is further contended that in terms of the above-said Clause, LOA came to be issued on 25-7- 2008 and subsequently FSA came to be entered into between the parties which provides for supply of coal to be supplied by MCL for domestic as well as imported coal. Since Appellant did not raise any objection at the time of LOA or signing of FSA, Appellant is entitled to financial benefit only with regard to domestic coal. The Respondents further contended that LOA was much prior to cut-off date 28-3-2011. Therefore, the commitment of coal to be supplied by CIL/MCL was through its mines as well as imported coal. Therefore, Appellant could not have assumed 100% domestic coal availability while submitting the bid for Bihar PPA.

52. According to Respondents, even in terms of Clause 2.2 of letter dated 18-10-2007, there was no commitment to supply 100% of coal.

53. Clause 2.2 at Office Memorandum pertaining to New Coal Distribution Policy dated 18-10-2007 (Annexure A-4 of the Appeal) reads as under:

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55. Reading of Clause 2.2 clearly indicates the power plant which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal would also be covered under Clause 2.2. Therefore, none of the other Clause would apply. In terms of LOA dated 25-7-2008 there was 21.40 lakh tons per annum (TPA) of E/F Grade coal for 500 MW power plant from about April 2010 was provisionally assured. By another Letter dated 8-7-2009 pertaining to tapering linkage, they assured 2.384 million tons per annum of F Grade coal for 550 MW project was assured. In the light of these two LOAs, one has to quantify shortfall in coal against the quantum assured in the LOAs in favour of Appellant GKEL. Clause 5.2 of NCDP 2007 pertains to new linkages and does not apply to Appellant”



28. On account of shortage of coal, the Ministry of Coal, Government of India 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.”

29. Thus, the above OM modified the trigger level for penalty for domestic coal supply by reducing the ACQ from erstwhile 100% committed under NCDP 2007 to 65%, 65%, 67% and 75% respectively for the remaining four years of the 12th plan i.e. for the years 2013-14 to 2016-17 under NCDP 2013. Accordingly, Ministry of Power, Government of India (MoP) issued letter dated 31.7.2013 and had 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 the 12th 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.”

30. The Respondent BSPHCL has further submitted that the Petitioner has signed the FSA only for 3.63 MTPA of coal though the total linkage was granted for 4.524 MTPA (2.14+2.384). According to the Respondent, the coal requirement can be considered at maximum of 3.63 MTPA and if the coal requirement of the Petitioner is higher than the coal assured, then the Petitioner is not entitled to any relief in respect of such additional coal requirement. The Respondent has further submitted



that in terms of NCDP 2013 and letter dated 31.7.2013, the quantum assured is 65% for 2013-14 (from 26.7.2013 to 31.3.2014) and 2014-15, and 67% for 2015-16 and 75% for 2016-17. Thus, the Respondent has contended that any shortage below 65%, 65%, 67% and 75% respectively is a matter for the Petitioner to deal with Coal companies and any such shortfall is not due to NCDP 2013 and is therefore not covered by change in law. Per contra, the Petitioner has stated that compensation is to be considered only for the difference between the quantum of domestic coal assured and the quantum of shortfall as per NCDP 2013 and the Respondent's plea that any shortage below 65%, 65%, 67% and 75% respectively is a matter for the Petitioner to deal with the coal companies had been rejected by the Commission in its judgment dated 21.12.2018 wherein it has been observed that the shortfall is to be reckoned against the quantum assured in the LOAs.

"55. Reading of Clause 2.2 clearly indicates the power plant which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal would also be covered under Clause 2.2. Therefore, none of the other Clause would apply. In terms of LOA dated 25-7-2008 there was 21.40 lakh tons per annum (TPA) of E/F Grade coal for 500 MW power plant from about April 2010 was provisionally assured. By another Letter dated 8-7-2009 pertaining to tapering linkage, they assured 2.384 million tons per annum of F Grade coal for 550 MW project was assured. In the light of these two LOAs, one has to quantify shortfall in coal against the quantum assured in the LOAs in favour of Appellant GKEL. Clause 5.2 of NCDP 2007 pertains to new linkages and does not apply to Appellant.

31. As regards shortfall in supply vis-à-vis quantum assured in NCDP, the matter was considered by the Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017. Relevant extract of the Order is as under:

"58. According to Appellants, on account of shortfall of domestic linkage coal due to deviation from the NCDP 2013 and changes in fuel supply agreements, they have sustained increase in expenditure. As against this learned counsel for Respondent No. 2 & 3 admit that in terms of Energy Watchdog, Adani Power, and GMR Warora cases, NCDP is a law within the definition of the term 'law' According to learned counsel, in the present case, unless conditions contained in Article 10 are satisfied, they are not entitled for such claim. They further contend that it has to be a change in expenditure as a consequence of law. According to them NCDP 2013 has not led any impact on the Appellant as fuel supply agreement entered into by the Appellant was prior to NCDP 2013 and the Ministry of Power itself restricts coal allocation to a specified percentage. Change in law according to them has to be considered with



reference to reduction in coal availability due to NCDP 2013. They refer to 4.3 of FSA dated 26-3-2013 which reads as under:

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61. Under these circumstances, when bid submitted by GKEL for Bihar PPA was premised on SLC-LT allocation and LOA when FSA had not been entered into between the parties as on the cut-off date what should be the consequence? If the bid was based on the SLC allocation and LOA prior to cut-off date indicated in PPA dated 9.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.”

32. The fuel requirement of the Project of the Petitioner was secured through firm linkage coal for 2.14 MTPA for 500 MW as approved by the Standing Linkage Committee-LT (SLC-LT) on 2.8.2007. Pursuant thereto, LOA dated 25.7.2008 providing firm linkage of 2.14 MTPA for 500 MW was issued in favour of GEL. The Ministry of Coal, GOI on 6.11.2007 intimated its decision to allocate Rampia and Dip Side Rampia Coal blocks in Odisha to a consortium comprising of the Petitioner No.2 GEL (the holding company of GKEL) and five other allottees. Thereafter, tapering coal linkage for 2.384 MTPA for 550 MW was approved by SLC-LT and LOA dated 8.7.2009 providing tapering coal linkage of 2.384 MTPA coal for 550 MW was issued in favour of the Petitioner, GEL. The tapering linkage was to be made available till the start of supply of coal from Rampia Coal block. The Petitioner signed FSAs with MCL on 26.3.2013 for 1.819 MTPA which was increased to 2.0009 MTPA on 13.11.2013 and further increased to 2.14 MTPA on 18.9.2014. Similarly, FSA was executed on 28.8.2013 in respect of tapering linkage for 0.6556 MTPA corresponding to the PPAs in operation and this quantity was increased to 0.8669 MTPA on 18.9.2014. In the meanwhile, by letter dated 26.2.2014, CIL had transferred 1.517 MT of coal which was part of MCL tapering linkage of 2.384 MTPA to ECL and consequently, ECL signed FSA with the Petitioner for 0.238 MTPA on 20.5.2014. This quantity was increased to 0.29425 on 29.5.2014 and further increased to 0.626535 MTPA on 24.9.2014. The Petitioner also signed FSA with ECL on 29.5.2014 for 1.071 MT.



33. From the above, it is observed that the LOAs which were issued to the Petitioner eventually got culminated to FSAs which assured the Petitioner, quantum of coal termed as ACQ. Accordingly, based on the FSAs, the Petitioner is required to be compensated for the shortfall in supply(ies) of coal.

(D) Cancellation of the captive coal block

34. The Tribunal in its judgment dated 21.12.2018 has held that cancellation of captive coal block following the judgment of the Hon'ble Supreme Court as under:

“62. In terms of judgment of the Apex Court in Manohar Lal Sharma vs. The Principal Secretary & Ors, the Captive Coal Blocks came to be cancelled. Normative date of production of the coal block was 17-10-2013. This block was allowed to Appellant GKEL on 17-1-2008. It is not in dispute that the delay in development of coal block was on account of Go-No-Go policy of the MoEF which was beyond the control of the developers. The same came to be recorded in the minutes of the meeting between Inter-Ministerial Group held on 7-7- 2015 to review issue of bank guarantee so also the letter dated 16- 1-2014 issued by the Ministry of Coal (Annexure A-24, page-620, Vol.III of the Appeal Paper Book). On account of the reasons beyond the control of GKEL operationalization of the Captive Coal Block was delayed.

63. In lieu of the Captive Coal Blocks tapering linkage was extended and subsequent cancellation of the coal block was intimated in terms of letter dated 16-1-2014 (Annexure A-13, page 510 of Appeal Paper Book). MoU dated 2-7-2015 between MCL and GKEL (Annexure A-23, page 615, 616, 617 of Appeal Paper Book and Annexure-A27, Page 638 of Appeal Paper Book) indicate that tapering linkage was also extended. Since cancellation of coal block was on account of judgment of the Apex Court in 2014, event subsequent to cut-off date, this also amounts to change in law.

Submissions of Petitioner

35. The Petitioner has submitted that the Tribunal vide its judgment dated 21.12.2018 had held that the delay in operationalization of captive coal block due to Go-No-Go Policy of the Government of India qualifies as a Force Majeure event under the Bihar PPA. It has stated that the Tribunal, in the said judgment, had also held that the cancellation of the captive coal block following the judgment of the Hon'ble Supreme Court is a change in law event for which the Petitioner ought to be restored to the same economic position as if the change in law did not occur. In other words, the Petitioner has submitted that all additional cost over and above



the coal cost from the coal block needs to be compensated. The Petitioner has submitted that in the absence of actual cost of coal block, which would be substantially less than the linkage coal cost, keeping commercial principles in mind, any additional cost over and above linkage cost must be compensated.

36. The Petitioner has further stated that it had envisaged supply of coal from the captive coal block for the entire capacity of 1050 MW, but on account of the cancellation of the captive coal block, the Petitioner was constrained to procure coal from tapering linkage, e-auction, open market imported coal and with effect from March, 2018 under the Shakti Scheme. The Petitioner has submitted that in terms of the APTEL judgment dated 21.12.2018, it is entitled to be compensated for procurement of coal from the aforesaid sources to overcome shortfall on account for cancellation of captive coal block. The Petitioner has stated that even though coal under Shakti scheme qualifies as alternate coal and the Petitioner is entitled for compensation on account of use of Shakti coal which is more expensive than linkage coal, the Petitioner has considered Shakti coal as linkage coal and has not claimed any additional compensation on account of Shakti coal. Accordingly, the estimated compensation claimed by the Petitioner towards procurement of coal from alternate sources for the period from 2014-15 till 2018-19 (November, 2018) is ₹221.3 crore, in terms of the formula specified by the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013, subject to the decision in Appeal No.135/2018 filed by the Haryana discoms regarding allocation of linkage coal and pending before the Tribunal.

Submissions of Respondent BSPHCL & Prayas

37. The Respondent BSPHCL and Prayas have submitted that the claim of the Petitioner for cancellation of coal block is not considered in the final direction



contained in para 83 of the judgment dated 21.12.2018. They have stated that because the tapering linkage was granted in lieu of coal block, the Tribunal had remanded the matter on the issue of compensation on account for shortfall in linkage coal due to NCDP, 2013. The Respondents have stated that NCDP, 2013 is for tapering linkage and there is no compensation for cancellation of coal block under NCDP, 2013. BSPHCL and Prayas have stated that para 64 of the said judgment provides for shortfall of firm linkage and tapering linkage only and the Petitioner cannot claim relief in respect of shortfall of coal in tapering linkage and cancellation of coal block since both sources of coal were towards the same capacity.

Analysis & Decision

38. The Tribunal in its judgment has observed that the delay in development and operationalization of captive coal block was beyond the control of the Petitioner on account of GO-NO-GO policy of MOEF, GOI. The Tribunal has also observed that due to non-operationalization of captive coal block, tapering linkage was extended. The same was also further extended subsequent to the cancellation of coal block by the Hon'ble Supreme Court vide its judgment dated 25.9.2014. The Tribunal has observed as follows:

“64. In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources.”

Accordingly, the impact of shortfall in linkage coal as well as tapering linkage of coal is worked out in terms of the judgment of the Tribunal.

(a) Shortfall in linkage coal beyond 31.3.2017

39. The Petitioner has submitted that neither the Energy Watchdog judgment nor the judgment of the Tribunal dated 21.12.2018 limits or restricts compensation till



31.3.2017. The Petitioner has submitted that shortfall in linkage coal is a Change in law event and the affected party is entitled to compensation for such shortfall during the operating period. The Petitioner has further submitted that the Government of India has clarified that shortfall of linkage coal will continue beyond 31.3.2017 vide its Notification dated 22.5.2017 of Shakti Scheme which deals with supply of coal under existing linkage arrangements (linkage arrangements under NCDP, 2007) and future coal linkages for those projects which do not have 100% linkage. The Petitioner has further submitted that Shakti scheme is a continuation of the coal allocation policy of the Ministry of Coal, GOI, and these notifications have been held to have force of law and is, therefore, a change in law event. The Petitioner has stated that Shakti scheme acknowledges that short supply of coal (with reference to NCDP, 2007) will continue and this has led to continued procurement of coal from alternate sources which have led to increase in expenditure of the Petitioner. The Petitioner has also stated that both NCDP 2013 and Shakti scheme have been issued by the Ministry of Coal pursuant to the decision of the CCEA and both alter the assurance provided in NCDP, 2007. The Petitioner has stated that the revised tariff policy dated 28.1.2016 has considered the shortage/non-availability of domestic coal and has decided that higher cost of coal shall be considered for being made a pass through on a case to case basis as stipulated in MoP letter dated 31.7.2013 addressed to this Commission. Accordingly, the Petitioner has submitted that the change brought by Shakti Scheme to the coal supply assurance contained in NCDP, 2007 constitutes a change in law event and therefore, the Petitioner, having been adversely affected by the curtailment in the supply of coal by CIL and is entitled to relief on account of such change in law in terms of the PPA.



40. The Respondent BSPHCL and Prayas have submitted that the shortfall has to be considered only for the period upto 31.3.2017 since NCDP 2013 relates to “remaining 12th plan period” upto 31.3.2017. They have also submitted that the Petitioner has entered into Supplemental PPA with Bihar Discoms at discounted tariff w.e.f. March, 2018 with allocation of coal as per Shakti Scheme. Therefore, there cannot be any consideration for the compensation for the period thereafter and the shortfall, if any, in such coal allocated is beyond the scope of the present proceedings which is limited to NCDP 2013 only. In response, the Petitioner has clarified that the Supplemental PPA entered into by the Petitioner has no bearing on the fact that Shakti Scheme is a continuation of the Change in Law event of shortfall of coal. Moreover, the Supplemental PPA is limited to the discount to be passed on to the Bihar Discoms which is on the gross bill. The Petitioner has further clarified that the quantity of actual alternate coal consumed at station level has only been considered to arrive at the weighted average GCV and weighted average price of alternate coal.

41. The submissions have been considered. The Petitioner in this Petition has submitted that the Ministry of Coal, GOI has notified the Shakti Policy on 22.5.2017 which makes it very clear that even after the end of the 12th plan period (31.3.2017), the availability of domestic linkage coal under the extant policy continues to be restricted beyond 31.3.2017. It has submitted that as per law laid down by the Hon’ble Supreme Court in its judgment, even the introduction of Shakti Policy would qualify as change in law event *vis-a-vis* NCDP 2007 which was in place at the time of submission of bid. The Petitioner has submitted that Shakti Policy notified by the GOI is a change in law event and compensation ought to be granted to the affected party under the change in law provisions of the PPA until the shortfall continues.



42. This Commission vide its order dated 16.5.2019 in Petition No. 8/MP/2014 & Petition No. 284/MP/2018 in the case of GMR Warora Energy Limited vs MSEDCL and DNH has decided as under:

"43.As per the judgment in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP, 2007 is a change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Both NCDP, 2013 and the Shakti Scheme have been issued by the Ministry of Coal and both alter the assurances provided in the NCDP, 2007. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the cut-off dates) provides as under:-

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(A) Under the old regime of LoA-FSA:

(i) FSA may be signed with the pending LoA holders after ensuring that the plants are commissioned, respective milestones met, all specified conditions of the LoA fulfilled within specified timeframe and where nothing adverse is detected against the LoA holders. The outer time limit within which the power plant of LoA holders must be commissioned for consideration of FSA shall be 31.03.2022, failing which LoA would stand cancelled. Coal supply to these capacities may be at 75% of ACQ. The coal supply to these capacities may be increased in future based on coal availability.

(ii) The 583 pending applications for LoA need not be considered and may be closed.

(iii) The capacities totaling about 68,000 MW as per the decision of CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017. The coal supply to these capacities may be increased in future based on coal availability.

(iv) About 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.3.2015, Coal supply to these capacities may be allowed at 75% of ACQ against FSA provided these plants are commissioned within 31.3.2022. The coal supply to these capacities may be increased in future based on coal availability.

(v) Actual coal supply to power plants shall be to the extent of long-term PPAs with DISCOM/State Designated Agencies (SDAs) and medium term PPAs to be concluded in future against bids to be invited by DISCOMs as per bidding guidelines issued by Ministry of Power.

With these, the old regime of LoA-FSA would come to finality and fade away.

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44. As stated, the NCDP 2013 as well as the Shakti Scheme have been notified by the Ministry of Coal, Government of India being an Indian Government Instrumentality in terms of the provisions of the respective PPAs. From the provisions of the Shakti Scheme, we observe that Paragraph (A) of the Scheme deals with cases of old regime of LoA-FSA covering about 68,000 MW. Paragraph (A)(iii) mentions about the decision of CCEA dated 21.6.2013; that the LoA-FDA holders would continue to get coal at 75% of ACQ; that this 75% would be the limit even beyond 31.3.2017; and that the coal supply to these capacities may be increased in future based on coal availability.

45. NCDP 2013 was issued consequent upon approval of CCEA on 21.6.2013. As per NCDP 2013, the revised assured coal allocation was 65%, 65%, 67% and 75% of ACQ for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Paragraph



(A)(iii) of the Shakti Scheme (quoted above) deals with capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013 which would continue to get coal at 75% of ACQ even beyond 31.3.2017. The capacity of the generating station of the Petitioner falls within the said 68000 MW capacity covered by the decision of CCEA. Moreover, through Shakti Scheme, coal is continued to be made available at 75% of ACQ for the period after 31.3.2017. This percentage (75%) of coal allocation after 31.3.2017 is in continuation of the percentage coal allocation assured in the year 2016-17 of NCDP 2013. In other words, the phrase “the capacities totalling 68,000 MW as per decision of the CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017” in Paragraph(A)(iii) of the Shakti Scheme would imply that the said scheme is in continuation of the decision in NCDP, 2013.

46. In addition, Paragraph (A)(iii) of the Shakti Scheme provides that “The coal supply to these capacities may be increased in future based on coal availability.” Thus, the said scheme, as in case of NCDP 2013, recognizes that availability of coal is not commensurate with the demand and that once coal availability increases, the supply to these capacities of power plants may be increased. A combined reading of the provisions of the Shakti Scheme as regards the old regime of LoA-FSA holders leaves no room for doubt that Paragraph (A) of the Shakti Scheme extends the provisions of NCDP 2013 beyond 31.3.2017.

47. In our considered view, the shortfall in supply of coal is a continuous cause of action and the Shakti Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013. In the above background, consideration of relief on account of shortfall in supply of coal beyond 31.3.2017 falls within the ambit and scope of remand by the Tribunal. Accordingly, we proceed to examine the relief sought for by Petitioner on account of change in law for shortfall in supply of coal for the period beyond 31.3.2017.

48. As mentioned in Paragraph A(iii) of the Shakti Scheme, the Petitioner will continue to get only 75% of ACQ for its FSA signed under old regime, till improvement happens in coal availability. Such shortage of coal linkage allocation needs to be seen with respect to assurance of 100% normative coal requirement for its power station under NCDP 2007 which was prevailing at the time of cut-off date. Accordingly, in our view, the Petitioner needs to be compensated for shortfall of coal on account of reduction in coal supply allocation under Shakti Policy beyond 31.3.2017, as against 100% normative requirement assured under NCDP 2007. There can be no difference in the treatment for the period before 31.3.2017 and after that.

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of ‘Indian Governmental Instrumentality’ would be covered within the definition of ‘Change in Law’. ‘Indian Government Instrumentality’ as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of ‘an Indian Government Instrumentality’ under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon’ble Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold



that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be compensated, so as to restore it to the same economic position, as if such change in law had not occurred."

43. Considering the fact that the Petitioner's plant is also covered in the capacity totalling 68000 MW as per decision of CCEA dated 21.6.2013, the Commission's decision in the above order dated 16.5.2019 in Petition No. 8/MP/2014 & 284/MP/2018 is applicable in the present case. Accordingly, the Petitioner is entitled for relief under change in law and is required to be restored to the same economic position in terms of Article 10 of the PPA till the shortfall continues including the period covered by NCDP 2013 and subsequently continued by Shakti Scheme beyond 31.3.2017.

(b) Impact of Coal Shortfall

44. The particulars of coal received from MCL under firm linkage and the alternate coal procured by the Petitioner is as under:

	Unit	2014-15	2015-16	2016-17	2017-18	2018-19
LOA/FSA quantity (Firm linkage) (A)	MT	2070450	2140000	2140000	2140000	2140000
Quantity received (B)	MT	1707150	1986729	1981907	2055431	1232183
Linkage coal required (C)	MT	2757117	3065066	3557349	3478732	2929334
Shortfall (C-B)	MT	1049966	1078337	1575441	1423302	1697151
Alternate coal consumed	MT	579242	1060549	1617808	1539766	1856498
Alternate coal consumed prorated to Bihar PPA	MT	156513	361671	502128	476549	588985

45. The shortfall in linkage coal and deviation in NCDP as furnished by the Petitioner is as under:

Coal Pass-through working for BIHAR PPA (As per Audited Form-15 for November, 2018)		
Tapering / E-Auction / Imported / Open Market Coal		
	Value	Remarks
1. Tapering Linkage-MCL		
Coal Quantity consumed	-	
Landed cost of coal	-	
Wtd. Average GCV	-	
2. Tapering Linkage - ECL		
Coal Quantity consumed	-	
Landed cost of coal	-	



Wtd. Average GCV	-	
3. Open Market		
Coal Quantity consumed	74730 MT	
Landed cost of coal	3133 ₹/MT	
Wtd. Average GCV	2262 Kcal/Kg	
4. E-Auction		
Coal Quantity consumed	46508 MT	
Landed cost of coal	2979 ₹/MT	
Wtd. Average GCV	2970 Kcal/Kg	
5. Imported		
Coal Quantity consumed	36277 MT	
Landed cost of coal	5268 ₹/MT	
Wtd. Average GCV	4174 Kcal/Kg	
Combined Wt. Avg.		
Total Quantity of other Coal consumed	157515 MT	
Weighted Average Cost of other coal	3579 ₹/MT	
Weighted Average GCV of other Coal	2911 Kcal/Kg	
SHAKTI Coal		
Coal Quantity Received	121559 MT	
Landed cost of coal	2071 ₹/MT	
Wtd. Average GCV	3516 Kcal/Kg	
Firm Linkage Coal		
Coal Received	126161 MT	
Landed cost of coal	2020 ₹/MT	
Wtd. Average GCV	3341 Kcal/KG	
Details of Scheduled Energy and other Parameters[#]		
Gross Station Heat Rate	2378 kcal/Kwh	
Auxiliary Consumption	5.75%	
Approved Transmission Losses	0.00%	
Scheduled Energy under Long Term PPAs		
Haryana	172.46 MU	
Bihar	167.01 MU	
Gridco	160.00 MU	
Total Scheduled Generation under PPAs_Exbus	499.47 MU	
Total Scheduled Generation under PPAs_Gross	529.94 MU	
ECR Quoted for the month	1.095 ₹/Kwh	
Computation of Compensation		
Step-1: ECR Firm Linkage coal @ Delivery point = ECR QUOTED		
ECR_Linkage Coal	1.095 ₹/Kwh	
Step-2: ECR Other Coal @ Delivery Point		
Opening Heat Available from Linkage & SHAKTI Coal at Station	-	
Heat Value of recd. Linkage Coal during the month	421504 MKcal	
Heat Value of recd. SHAKTI Coal during the month	427354 MKcal	
Total heat Available from Linkage & SHAKTI Coal for the month	848859 MKcal	
Heat required to Generate Scheduled energy under Long Term PPAs	1260199 MKcal	
Heat Shortfall	411341 MKcal	
Closing Heat Value of Linkage Coal	-	
Alternate Coal Required to meet the Heat Shortfall	141286 MT	



Alternate Coal Required to meet the Heat Shortfall Prorated to Bihar PPA	47241 MT	
Generation from Other/Alternate Coal allotted for Bihar PPA	58 MU	
ECR for Other Coal for BIHAR PPA at Delivery Point	3.10 ₹/KWh	
Step-3: ECR SHAKTI Coal @ Delivery Point		
Heat Contribution of available SHAKTI Coal	427354 MKCL	
Heat Contribution of SHAKTI Prorated to BIHAR PPA	142893 MKCL	
SHAKTI consumption in BIHAR PPA	40645 MT	
Energy Generated from SHAKTI allotted to BIHAR PPA	60.09 MU	
ECR for SHAKTI Coal for BIHAR PPA at Delivery Point	1.49 ₹/KWh	
Step-4: Compensation for alternate coal = {(ECR as computed at Step-2- ECR Quoted i.e. ECR Step-1) x (Generation from alternate coal)}		
ECR @ Step-2 Less ECR @ Step-1	2.01 ₹/KWh	
Generation from Alternate Coal	58 MU	
Compensation for alternate coal (A)	₹11.61 crore	
Step-5: Compensation for SHAKTI Coal = {(ECR as computed at Step-3- ECR Quoted i.e. ECR Step-1) x (Generation from SHAKTI coal)}		
ECR @ Step-3 Less ECR @ Step-1	₹0.39 /KWh	
Generation from SHAKTI Coal	60 MU	
Compensation (B)	₹2.35 crore	
Total Compensation (A+B)	₹13.95 crore	
<i>Less: Change in Law already recovered</i>	<i>₹3.41 crore</i>	
Net Payable	₹10.55 crore	

As per Commission's order dated 3.2.2016 in Petition No. 79/MP/2013

46. Since the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as 'nil'. Accordingly, the following formulation, is applicable for all period/s covering before (under NCDP 2013) and after 31.3.2017 (only to the extent as covered by Clause A (iii) of Shakti Scheme, notified by MOC, GOI on 22.5.2017:

Step 1: Shortage of Firm Linkage coal (MT) **** = Firm Linkage Coal Assured (MT) year/period wise against the FSA dated 26.3.2013 as amended for quantity on 13.11.2013/18.9.2014 minus (-) Actual Firm Linkage Coal supplied by MCL.

Step 2: Shortage of Tapering Linkage coal (MT) **** = Tapering Linkage Coal Assured (MT) year/period wise against the FSA dated 28.8.2013 as amended for quantity on various dates including part shifting to ECL from MCL minus (-) Actual Tapering Linkage Coal supplied by MCL/ECL.

Step 3: Compensation for shortage of Firm Linkage coal = Actual cost of generation using alternate coal to mitigate Firm Linkage coal shortage minus (-) Energy Charge revenue under the PPAs corresponding to such generation

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



a. Permissible Quantity of Alternate Coal = Quantity of Firm Linkage Coal Shortage X (GCV of Firm Linkage 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 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 if applicable

c. Gross generation from alternate coal shall be computed from Quantity of alternate coal, GCV of alternate coal and GSHR as stated in note.

Step 4: Compensation for shortage of Tapering Linkage coal = Actual cost of generation using alternate coal to mitigate Tapering Linkage coal shortage minus (-) Energy Charge revenue under the PPAs corresponding to such generation

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

a. Permissible Quantity of Alternate Coal = Quantity of Tapering Linkage Coal Shortage X (GCV of Tapering Linkage 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 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 if applicable

c. Gross generation from alternate coal shall be computed from Quantity of alternate coal, GCV of alternate coal and GSHR as stated in note.

Total Compensation = Compensation as computed at Step 3 + Compensation as computed at Step 4 + Add on Premium paid on Quantity of Actual Tapering Linkage Coal supplied by MCL/ECL.

Note:

- 1) ***** Based on the decision of this Commission in its order dated 20.3.2018 in petition number 105/MP/2017 along with I.A. No. 42/2017, the firm and tapering linkage coal assured/supplied to the petitioner has to be apportioned on pro rata basis to all beneficiaries of the project.
- 2) Accordingly the exact applicable quantity in case of Bihar on month to month basis need to be furnished by the Petitioner duly certified by auditor.
- 3) For the purpose of computing coal requirement, following operational parameter shall be considered:



GSHR= Normative Gross Station Heat Rate as worked out on the basis of applicable CERC Regulations or actual, whichever is lower;

Auxiliary Consumption= Normative auxiliary consumption as per applicable CERC Regulations or actual, whichever is lower;

4) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.

5) All facts, figures and computations in this regard should be duly certified by the auditor.

6) The coal consumed on month to month under different heads shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock of respective head.

7) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.

8) Alternate Coal implies coal other than Firm Linkage coal and tapering Linkage coal.

9) It is however made clear that any compensation paid by the Coal Company to the Petitioner for shortfall in supply of coal shall be adjusted.

47. Accordingly, the compensation on account of coal shortage shall be worked out in accordance with the prescribed formula as above for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to the Bihar Discoms. The Petitioner and the Bihar discoms are directed to carry out reconciliation on account of these claims annually.

(E) Carrying Cost

48. The Petitioner has submitted that the Tribunal in its judgment dated 21.12.2018 had held that the Petitioner is entitled to carrying cost. It has also submitted that the Petitioner in the original Petition had prayed for restoration to the economic position which ought to include grant of carrying cost without which the Petitioner cannot be restored to the same economic position. The Petitioner has further submitted that the impact on account of carrying cost for the change in law



events allowed has been computed from the date of payment by the Petitioner till the pronouncement of the judgment dated 21.12.2018 for the items allowed in the judgment and till issuance of order dated 7.4.2017 for items allowed in the original Petition. Further, the rate of interest for carrying cost has been considered as actual rate of interest on loan taken by the Petitioner being:

- i. Principal outstanding towards any Change in Law event till the end of Nth month (P_N).
- ii. Carrying Costs = $\sum P_N \times \text{Rate of Interest} / 12$ (N= 1 to the N- Month of issuance of respective orders)
- iii. Rate of interest charged by IDBI Bank (Lead Bank of Working Capital Consortium) during last 4 years is produced below:

Year	Base Rate	MCLR	Spread	Effective ROI
FY19		8.85%	3.70%	12.55%
FY18		8.80%	3.70%	12.50%
FY17	9.65%		3.00%	12.65%
FY16	10.00%		3.00%	13.00%

49. Accordingly, the carrying costs for the Bihar PPA has been computed and tabulated for different items by the Petitioner as under:

Particulars	2014-15	2015-16	2016-17	2017-18	2018-19	Total
Coal Pass through	1.36	6.06	12.16	17.76	16.76	54.10
Add on Premium	0.08	0.45	0.87	0.88	0.64	2.92
Busy Season & Development Surcharge	0.06	0.40	0.81	1.05	0.75	3.07
13/SM/2017 allowed items	-	-	-	1.64	-	1.64
Items allowed in Petition No. 112/MP/2015	0.30	2.80	8.49	0.969	-	12.57
Total	1.80	9.71	22.32	22.32	18.15	74.30

50. The Respondent, BSPHCL and Prayas have submitted that the Petitioner had never claimed carrying cost in the original Petition. They have also submitted that the prayer of the Petitioner for carrying cost may be rejected since restoration to the same economic position is limited to Article 10 of the PPA and there is no provision for the carrying cost in the said PPAs. It has also been submitted that the



compensation for the change in law events crystallizes upon determination of claims by this Commission and there can be no payment before such determination. These Respondents stated that carrying cost can be considered only from the date of filing of the complete information by the Petitioner and no relief can be claimed in respect of the period prior to the filing of the Petition. Per contra, the Petitioner has clarified that the Commission has the power to determine compensation for change in law keeping in view the principal of restitution to the same economic position. It has also submitted that the Tribunal had relied upon the judgment dated 13.4.2018 in Appeal No. 210/2017 (APL Vs CERC & Ors) and had granted carrying cost. This judgment has been upheld by the Hon'ble Supreme Court in its judgment dated 25.2.2019 in Civil Appeal No.5865/2018 wherein the Court had allowed carrying cost as a restitution element which is a part of restoration to the same economic position. The Petitioner has added that it has provided the requisite information regarding carrying cost and there has been no delay in providing the same to the Respondents. According to the Petitioner, carrying cost is payable from the effective date of change in law event till approval of the same by the Competent Authority.

Analysis and Decision

51. We have considered the submissions of the parties. The Petitioner has submitted that it should be restored to the same economic position in terms of Article 10.2 as if the Change in Law had not occurred. The Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (APL v CERC & ors) had allowed carrying cost on the claims under change in law and held as under:

“In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for



approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA...

From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff. Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of 'restitution' i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon'ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India & Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority..."

52. The aforesaid judgment of the Tribunal was challenged before the Hon'ble Supreme Court wherein vide judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 and Civil Appeal No. 6190 of 2018, the Hon'ble Supreme Court has upheld judgment of the Tribunal as regards the directions of payment of carrying cost to the generator on the principles of restitution and held as under:

"10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn.

This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle



of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...

16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”

53. In terms of Article 10.2.1 of the respective PPAs which provides the principle for restitution and in line with the above judgment of the Hon’ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost (at the rate decided in subsequent paragraphs of this Order) arising out of approved Change in Law events from the effective date of Change in Law till the date of issue of this Order by the Commission. Any payment made by the Respondents in terms of our Order shall be duly adjusted. Once a supplementary bill is raised by the Petitioner, the provisions of Late Payment Surcharge would kick in if payment is not made within due date.

54. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L v UHBVNL & ors) had decided the issue of carrying cost as under:

“24.After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-

Period	Actual interest rate paid by the Petitioner	Working capital interest rate as per CERC Regulations	LPS Rate as per the PPA
2015-16	10.68%	13.04%	16.29%
2016-17	10.95%	12.97%	16.04%
2017-18	10.97%	12.43%	15.68%

25. It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.



26. The Petitioner shall workout the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor's Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount."

55. In line with above Order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds duly certified by auditor or the Rate of Interest on Working Capital rate as per the applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is lower.

56. We note that the Petitioner has claimed carrying cost in terms of Commission's order in Petition No.13/SM/2017. In our view, this claim does not fall within the purview of the present Petition. The decision on carrying cost in this Petition is, therefore, limited to the change in law events which have been allowed in this Petition.

57. Petition No. 112/MP/2015 is disposed of in terms of above. With this, the directions of the Tribunal in its judgment dated 21.12.2018 in Appeal No. 193 of 2017 stands implemented.

sd/-
(I. S. Jha)
Member

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

sd/-
(P. K. Pujari)
Chairperson

