

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 305/MP/2015
With I.A. No. 24/2019**

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

Date of Order: 29th of January, 2020

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with the provisions of the Power Supply Agreement dated 5.1.2011 and Power Purchase Agreement dated 25.3.2011 for directions to make Energy Charges as pass through based on the actual fuel cost incurred by the Petitioner.

And

In the matter of:

Adhunik Power and Natural Resources Limited (APNRL)
9B, 9th Floor,
Hansalaya Building,
15, Barakhamba Road,
Connaught Place,
New Delhi- 110001

....Petitioner

Versus

1. West Bengal State Electricity Distribution Company Limited (WBSEDCL)
Vidyut Bhavan, 7th Floor, DJ- Block, Sector-11
Salt Lake, Kolkata- 700091,
West Bengal
2. PTC India Limited,
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi- 110066
3. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai- 600002
Tamil Nadu, India
4. Jharkhand State Electricity Board
Presently known as Jharkhand Bijli Vitran Nigam Limited
HEC Building, Dhurwa
Ranchi- 834004

The following were present:

- (a) Shri Gopal Jain, Senior Advocate, APNRL
- (b) Shri Deepak Khurana, Advocate, APNRL
- (c) Shri Vishrov Mukharjee, Advocate, WBSEDCL
- (d) Ms. Raveena Dhamija, Advocate, WBSEDCL
- (e) Shri Amit Griwan, APNRL
- (f) Shri Smarajit Sahoo, APNRL
- (g) Shri Aashish Anand Bernard, Advocate, PTC

ORDER

The present Petition has been filed by the Petitioner, Adhunik Power and Natural Resources Limited (APNRL), under Section 79 of the Electricity Act, 2003 (hereinafter referred to as the "Act") read with the provisions of Article 10 of the Power Sale Agreement(PSA) dated 5.1.2011 between the Respondent No. 2 and the Respondent No. 1 and Power Purchase Agreement(PPA) dated 25.3.2011 between the Respondent No. 2 and the Petitioner seeking directions to the Respondents to make energy charges as pass through based on the actual fuel cost incurred by the Petitioner.

2. The Petitioner has mainly submitted as under:

- (a) The Petitioner has set up a 540 MW (2x 270 MW) thermal power project in District Saraikela-Kharsawan in the State of Jharkhand. Units I and II of the generating station were declared under commercial on 21.1.2013 and 19.5.2013 respectively. The Petitioner has the arrangement to supply (i) 122.85 MW to the State of Jharkhand under the PPA dated 28.9.2012, (ii) 100 MW to Respondent No. 1, West Bengal State Electricity Distribution Company Limited (WBSEDCL) under PPA dated 25.3.2011 with PTC and back to back PSA between PTC and the Petitioner dated 5.1.2011, and (iii) 100 MW to Respondent No. 3, Tamil Nadu Generation and Distribution Corporation Limited(TANGEDCO) under PPA dated 18.12.2013. Subsequently, certain

amendments were made to the PPA vide Amendment Agreement No. 1 dated 26.4.2011 and Amendment Agreement No. 2 dated 1.12.2011.

(b) The Petitioner was allocated Ganeshpur coal block in the State of Jharkhand jointly with Tata Steel. The PPA and PSA were executed considering that the Petitioner would source coal for supply of power to WBSEDCL from its captive coal block. This has been reflected in the minutes of the meeting dated 3.1.2011 held between the parties.

(c) On 14.9.2012, the Hon'ble Supreme Court issued notice in Writ Petition (Criminal) No.120/2012 in a Public Interest Litigation challenging the coal block allocation process. Pursuant to the filing of the said Writ Petition, all Government permissions and clearances to be given for development of any coal blocks were stalled and, therefore, the development of Petitioner's captive coal block was also indefinitely delayed.

(d) The Petitioner vide its letters dated 9.2.2013, 13.3.2013 and 22.3.2013 requested Respondent No. 2, PTC India Ltd. (hereinafter referred to as "PTC") to approach Respondent No. 1, WBSEDCL to make coal cost as pass-through till fully operationalisation of coal blocks. In response, PTC vide its letter dated 17.5.2013 informed the Petitioner that its proposal with regard to coal cost pass through is not acceptable to WBSEDCL.

(e) Meanwhile, in response to the Ministry of Power's letter dated 9.5.2013 wherein the Ministry had sought the advice from the Commission regarding the impact on tariff of the concluded PPAs due to domestic coal unavailability, the Commission on 20.5.2013 issued statutory advice to Ministry of Power discussing the possibility of allowing the additional cost of imported coal under

the 'Change in Law' provisions of the PPA. The Commission in paragraphs 5 and 6 of the statutory advice suggested that suitable modifications were required to be made to the Competitive Bidding Guidelines enacted under Section 63 of the Act, National Electricity Policy and National Tariff Policy to enlarge the scope of regulatory intervention to enable the Commission to take care of such situations.

(f) Cabinet Committee on Economic Affairs (CCEA) on 21.6.2013, taking into account the overall domestic availability and the likely actual requirements, approved a revised arrangement for supply of coal to the identified thermal power stations and directed to consider the higher cost of imported coal to be made pass through. Subsequently, Ministry of Coal vide Office Memorandum dated 26.7.2013 also notified the changes in the New Coal Distribution Policy (NCDP) in line with the decision of CCEA.

(g) Ministry of Power, Government of India vide letter dated 31.7.2013 also approved fuel pass through for short supply of quantum of coal by Coal India Limited and directed Electricity Regulatory Commissions to take necessary action to implement the decision with regard to impact on tariff in the concluded PPA due to shortage of domestic coal availability. The Petitioner vide its letter dated 27.12.2013 requested PTC and WBSEDCL to make cost of fuel as pass through based on the directions of Ministry of Power's letter dated 31.7.2013.

(h) PTC vide its letter dated 15.1.2014 rejected the claims made by the Petitioner's letter dated 27.12.2013, for recovery of fuel cost on the basis of Ministry of Power's letter dated 31.7.2013, on the ground that Article 2.5 of the

PPA entered into between PTC and the Petitioner provided that the Petitioner shall not ask for any separate escalable rate for energy charges on the ground of sourcing coal from any other source and it will consider that such coal has been deemed to be sourced from captive source only for purchasing of power by PTC from the Petitioner under the PPA.

(i) The Petitioner has been raising supplementary bills for the power supplied to WBSEDCL based on actual energy charge vis-a-vis the PPA energy charge of Rs. 0.951/kWh with request to take up the cost escalation with WBSEDCL/WBSERC and to make fuel cost as pass through based on the directions of the Government of India. Subsequently, the Petitioner vide its letters dated 31.1.2014 raised supplementary bills to PTC for power supplied to WBSEDCL, which was denied by PTC vide its letter dated 3.3.2014. The Petitioner vide its letter dated 14.7.2014 requested WBSEDCL to make fuel cost as pass through to enable the Petitioner to recover only fuel charges in full till the Ganeshpur coal block achieved its peak rated productivity capacity, which was rejected by WBSEDCL on the ground that the claim of additional fuel cost is not in terms of the PPA dated 5.1.2011. Subsequently, PTC vide its letter dated 23.9.2014 informed the Petitioner that it should approach Appropriate Commission to resolve the issue.

(j) Subsequently, the Hon`ble Supreme Court vide its judgments dated 25.8.2014 and 24.9.2014 held that the allotment of coal blocks made by the Government of India were arbitrary and illegal. The allotment of such coal blocks including the Ganeshpur coal block allotted to the Petitioner stood cancelled. As a result of the said judgment, the clauses of the PPA and PSA relating to coal to be sourced from Ganeshpur coal block became otiose or

nugatory and the Petitioner has been forced to source coal through alternate sources i.e. tapering linkage, e-auction, direct purchases from traders and coal imports, etc.

(k) The Petitioner vide its letter dated 15.11.2014 requested PTC to make the fuel cost as pass through as the levelized tariff of Rs. 3.13/kWh inclusive of trading margin to PTC since the PPA was worked out based on the captive coal block allocated to the Petitioner and the coal block was expected to become operational during 2013. However, pursuant to the Hon'ble Supreme Court judgment dated 25.8.2014, the Petitioner did not have any confirmed fuel source except tapering linkage provided by the Ministry of Coal and the Petitioner is meeting the coal requirement from e-auction and coal import, etc. PTC vide its letter dated 11.12.2014 informed the Petitioner that WBSEDCL in its letter dated 10.12.2014 has stated that since the tariff payable to the Petitioner by WBSEDCL was mutually agreed, the question to deviate from agreed terms and conditions did not arise at all.

(l) Subsequent to coal block de-allocation, the Petitioner had also submitted its bid for the allocation of Ganeshpur coal block under the new framework. However, the Petitioner could not secure the bid.

(m) The levelised tariff determined under PPA and PSA was based on the *bona-fide* belief that the allotment of captive coal block by the Central Government was in accordance with law and when the said allocation was declared to be illegal by the Hon'ble Supreme Court, the levelised tariff is required to be revised.

(n) Hon'ble Supreme Court in its judgments dated 25.8.2014 and 24.9.2014 interpreted the law relating to allocation of coal blocks in a manner different from the interpretation of the Central Government which is change in interpretation of law and thus, is a Change in Law event under Article 10 of the PPA and PSA. Subsequent to the judgment of the Hon'ble Supreme Court, the Government of India issued two ordinances, namely, Coal Mine (Special Provisions) Ordinance, 2014 dated 21.10.2014 and Coal Mine (Special Provisions) Second Ordinance, 2014 dated 26.12.2014 and thereafter, enacted the Coal Mine (Special Provisions) Act, 2015 for allocation of coal mines so as to ensure continuity in coal mining operations and production of coal and also to regulate the allocation of coal block through competitive bidding. These Ordinances as well as Coal Mine (Special Provision) Act, 2015 are also Change in Law events in terms of Article 10 of the PPA and PSA.

3. In the above background, the Petitioner has filed the present Petition along with the following prayers:

“(a) Declare that the Petitioner is entitled to actual landed cost of coal with respect to the PSA dated 5.1.2011 and PPA dated 25.3.2011;

(b) Direct that the Respondent No. 2 / WBSEDCL to make a payment of Rs 257.09 crore to the Petitioner, which amount has accrued on account of the Change in Law events claimed in the present petition with respect to base price of coal, till March 2017; and

(c) Direct the Respondent No. 1/ WBSEDCL to continue to make payment accrued in favour of the Petitioner, post March- 2017 in terms stated in the present petition.”

4. The Petition was listed for hearing on maintainability on 19.4.2018. The Commission in its order dated 6.6.2018 held that the Commission has the jurisdiction under Section 79(1)(b) to regulate the tariff of the Petitioner including adjudication of

disputes relating to tariff and hence, the petition was maintainable before the Commission. Notices were issued to the Respondents, namely WBSEDCL, PTC, and TANGEDCO for filing their replies on merit. Replies to the Petition have been filed by WBSEDCL, TANGEDCO and PTC. The Petitioner has filed its rejoinders to the reply of WBSEDCL and TANGEDCO. The Petitioner and the Respondents have also filed written submissions.

5. WBSEDCL vide its reply dated 22.2.2018 has submitted as under:

(a) As per the PSA, the Petitioner has assumed the entire risk of generation and supply of power. Therefore, fuel risk is solely attributable to the Petitioner and the claim for fuel pass-through is not maintainable.

(b) The cancellation of Ganeshpur coal block does not fall under provisions of Change in Law under Article 10.1.1 of the PSA. Further, the Hon'ble Supreme Court judgment dated 25.8.2014 did not result in change in interpretation of any law. The said judgment cancelled arbitrary allocation of coal blocks. However, it did not lead to any change in interpretation of applicable laws. Similarly, neither the promulgation of Ordinances nor the enactment of Coal Mines (Special Provisions) Act, 2015 amounted to Change in Law as they did not have any impact on the economic position of the Petitioner. The said legislations only dealt with future allocation of coal blocks.

(c) The Petitioner's reliance on NCDP is misplaced as NCDP applies only to the grant of coal linkage, whereas the Petitioner intended to supply coal from a captive coal mine. Therefore, change in NCDP has no impact in the present case.

(d) The Petitioner is seeking increase in the base price of coal which is not permissible under the PPA. PPA allows only statutory levies and impositions.

(e) There has been no change in Coal Mines (Special Provisions) Act, 2015. However, the said Act actually leads to a reduction in fuel cost as the auction was premised on a ceiling price. Since WBSEDCL has consistently rejected the Petitioner's claim for compensation on account of procurement of coal through e-auction, spot market and imported fuel, etc., the Petitioner's contention that WBSEDCL was aware of and accepted the power generated using coal from the aforesaid sources is of no consequence and the liability is limited to the payment of tariff as set out in the PSA.

(f) The Petitioner's reliance on the negotiations that took place prior to the execution of the PSA is of no avail in the light of Article 14.6 of the PSA in terms of which the PSA superseded all prior agreements, negotiations, understandings and representations.

6. The Petitioner in its rejoinder to the reply of WBSEDCL has submitted as under:

(a) With regard to WBSEDCL's contention that fuel risk is entirely attributable to the Petitioner, the Petitioner has submitted that the tariff schedule of both the agreements i.e. PSA and PPA clearly states that the Petitioner shall be entitled to escalable energy charge as per the escalation index issued by the Commission for captive fuel sources. The tariff schedule to both the agreements verifies the fact that agreed fuel source was the captive coal mines allocated to the Petitioner. WBSEDCL and PTC were always aware of the fact that the source of

fuel is the captive coal mine allocated to the Petitioner. The letter dated 26.2.2014 issued by WBSEDCL also clearly mentioned about the captive coal block of the Petitioner, through which the Petitioner was required to source coal for generation of power.

(b) Article 10 of the PSA and PPA provides that the Petitioner is entitled to additional cost incurred by it due to occurrence of Change in Law events. The cancellation of the captive coal mine allocated to the Petitioner by the Hon'ble Supreme Court is a Change in Law event and falls under Article 10 of the PPA. The change in interpretation of law under which the coal block was allocated to the Petitioner is an event covered under Article 10 of the PPA.

(c) With regard to WBSEDCL's contention that the Hon'ble Supreme Court judgment dated 24.8.2018 and the subsequent orders are not change in law events as the same did not lead to any change in interpretation of applicable laws, the Petitioner has submitted that the judgment passed by the Hon'ble Supreme Court changed the interpretation of the laws relating to allocation of coal blocks to private entities from the interpretation under which the Central Government allocated coal blocks to the private entities including the Petitioner. The said change in interpretation was made applicable from the date of coal blocks were allocated by the Central Government to the private entities and the very basis under which the coal blocks were allocated was declared as arbitrary and illegal. Therefore, change in interpretation of laws relating to allocation of coal blocks and the subsequent enactment of

Ordinances and the Coal Mines (Special Provisions) Act, 2015 are change in law events under Article 10 of the PPA.

- (d) With regard to WBSEDCL's contention that NCDP is not applicable to the case of the Petitioner as the Petitioner intended to supply coal through captive coal mines, the Petitioner has submitted that on 21.6.2013, CCEA approved a revised arrangement for supply of coal to the identified thermal power stations, wherein it was decided that the cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. CCEA in its decision dated 21.6.2013 also directed to consider higher cost of imported coal to be made pass through as per modalities suggested by the Commission. Since the Petitioner was sourcing coal through tapering linkage till the cancellation of its captive coal block, change in NCDP is applicable in the present Petition. The Petitioner is not claiming any increase in base price of coal rather the Petitioner is claiming entire pass through of the excess fuel cost in the tariff on account of the occurrence of the Change in Law events.
- (e) With regard to WBSEDCL's contention that Coal Mines(Special Provisions) Act, 2015 actually leads to reduction in fuel cost in as much the auction was based on a ceiling price, the Petitioner has submitted that pursuant to the cancellation of coal blocks by the Hon'ble Supreme Court, the Petitioner had to procure coal from alternate sources like e-auction, forward auction and special forward auction as available under the various policies of the Government from time to time and at times, through imported coal. The Petitioner had also participated in the auction of coal blocks but could not succeed.

7. TANGEDCO in its reply dated 4.4.2018 has submitted as under:

(a) Pursuant to cancellation of coal blocks by the Hon'ble Supreme Court, TANGEDCO vide its letter dated 21.1.2014 had asked the Petitioner to clarify the fuel supply management and to provide a copy of the Fuel Supply Agreement. In response, the Petitioner had submitted that it had signed FSA with Coal India Limited and is ready to commence supply on the due date.

(b) The Petitioner commenced supply on 1.1.2016 and PTC claimed invoice, wherein energy tariff was arrived by applying linkage coal with the CERC escalation rate till 30.11.2015 and captive coal with CERC escalation rate from 1.12.2015 for the power supplied since January 2016 and the tariff was adopted by Tamil Nadu Electricity Regulatory Commission (TNERC) on 29.7.2016. Subsequently, the Petitioner issued notice dated 14.2.2017 claiming Rs. 72.05 crore for the period from 1.1.2016 to 30.11.2016 towards additional cost incurred on purchase of coal from alternate source i.e. linkage coal and on account of change in law provisions in the PPA. At the time of submission of the bid, the Petitioner despite knowing about initiation of action for cancellation of coal block by the Hon`ble Supreme Court had quoted bid with source of coal as linkage for the period upto 30.11.2015 and captive coal from 1.12.2015.

(c) Based on the bid of the Petitioner, the levelised tariff was arrived at Rs. 4.91 per kWh with linkage coal upto November 2015 and captive coal from December 2015 approved by TNERC. However, if the Petitioner had quoted its bid premised on the linkage coal for the entire contract period, the levelized tariff would have been Rs. 4.94 per kWh. The Petitioner knowingly

suppressed the fact of cancellation of captive coal block in the bid so as to become successful bidder at a lower tariff. The Petitioner cannot take advantage of a fact which it knew on the date of bidding.

(d) As per the guidelines issued by the Ministry of Power, for case 1 bidding, the quoted tariff is escalated with the Escalation Index notified by the Commission once in six months for each type of coal. Allowing energy charge as pass through is applicable only when PPA is executed under Design, Build, Finance, Own and Operate basis.

(e) The Ministry of Power's letter dated 31.7.2013 to allow additional coal cost as pass through in terms of decision taken by CCEA is only for the concluded PPA as on 31.7.2013 whereas the TANGEDCO executed PPA with the Petitioner only on 18.12.2013.

8. The Petitioner in its rejoinder dated 17.4.2018 to the reply filed by TANGEDCO has submitted that TANGEDCO has made submission with regard to the facts which are not at all an issue in the present Petition. The PPA dated 18.12.2013 executed between the Petitioner and TANGEDCO through PTC is not a fact in issue before the Commission in this Petition. The Petitioner in the present Petition is only seeking compensation from the Respondent No. 1 i.e. WBSEDCL and not from the Respondent No. 3 i.e. TANGEDCO. Further, TANGEDCO has been made a party to the present petition for the purpose of establishing the Composite Scheme as per the directions issued by this Commission vide its RoP dated 22.12.2017, wherein the Commission directed the Petitioner to implead the beneficiaries of the project as parties to the Petition. Accordingly, all the beneficiaries

of the project of the Petitioner have been impleaded as parties to the present Petition including the Respondent No. 3, TANGEDCO.

9. PTC vide its reply dated 8.9.2018 has submitted that PTC had entered into back-to-back agreements for purchase and sale of power. The entire transaction is on back-to-back basis. The Commission may examine the issues as raised by the Petitioner in the light of the applicable laws and Regulations.

10. WBSEDCL vide its written submission dated 31.10.2018 has submitted that the Petition filed by the Petitioner is devoid of any merit as the PPA between the Petitioner and PTC is entered into under a negotiated route upon the insistence of the Petitioner. WBSEDCL has further submitted that the contention of the Petitioner that the energy charge under the PPA and PSA was based on supply of coal from its captive coal block (Ganeshpur coal mine) and the cancellation of coal block by the Hon`ble Supreme Court vide judgments dated 25.8.2014 amounts to a Change in Law event is erroneous and does not fall under any of the provisions of Change in Law under Article 10.1.i., 10.1.i (a), (b), (c) and (d) of the PSA/PPA. Neither the PPA nor the PSA mentions any specific captive coal block. Typically, in cases where there is allocation of captive coal block and the same forms the basis of the PPA, such captive coal source is mentioned in the PPA. The Petitioner has not placed on record the documents pertaining to allocation of captive coal block or the approved mining plan. WBSEDCL has submitted that in terms of Article 2.2 of the PSA, WBSEDCL is liable to pay only the capacity charges, non-escalable energy charges and escalable energy charges set out in Table A of Schedule A of the PSA. Moreover, in terms of Clause 2.5 of the PSA, in case of supply of coal from a source other than a captive source, such supply will be treated as supply from a captive source and the Petitioner will not be entitled to any compensation on account of

procurement of coal from alternate sources. As per the PPA, fuel risk is solely of the Petitioner and the claim for fuel cost pass through is not maintainable in the facts of the present case.

11. The Petitioner, in its written submission dated 6.11.2018, has submitted as under:

(a) The source of coal from where the power is to be generated and supplied under the PPA/PSA is captive fuel source. The Petitioner along with Tata Steel Ltd. had been jointly allotted the Ganeshpur coal block in Jharkhand by the Government of India. Hon`ble Supreme Court in its judgment dated 25.8.2014 read with the order dated 24.9.2014, cancelled the allotted coal block with the observation that the coal block allotment made through the Government dispensation route were arbitrary and illegal. The cancellation of coal block by the Hon`ble Supreme Court amounts to Change in Law under the PPA/PSA. On account of the aforesaid Change in Law event, the captive fuel source i.e. the Ganeshpur coal block, based on which the tariff under the PPA/PSA was agreed between the parties, was no longer available to the Petitioner. It is an admitted position that on account of non-availability of coal from the Ganeshpur coal block, the Petitioner has been procuring coal from other sources, namely e-auction and open market sources. Accordingly, the Petitioner vide its letter dated 15.11.2014 sent Change in Law notice under the PPA to PTC which was forwarded by PTC to WBSEDCL.

(b) Understanding amongst all parties was that coal would be sourced from the Petitioner's captive coal block. The provisions in the PPA and PSA

itself provide that coal is to be sourced from the Petitioner's captive coal block. A combined reading of Article 2.1 and Schedule A (Tariff) of the PPA shows that the source of coal for generation and supply of power to WBSEDCL is captive fuel source. Schedule A (Tariff) to the PPA also shows that captive fuel source is fundamental to the PPA/PSA in as much as the energy charges are to be escalated based on index for captive fuel source. In addition to the above, Article 2.5 of the PPA is also conclusive of the factual position that the source of coal identified under the PPA was captive fuel source. Mere fact that 'Ganeshpur coal block' is not specifically mentioned in the PPA/PSA is of no relevance or consequence whatsoever. The PPA and PSA were admittedly entered into between the parties on the basis of captive fuel source, which was fundamental to the said agreements. In as much as the PPA and the PSA clearly provide that the source of coal is captive source and the admitted factual position is that the Petitioner had been jointly allotted the Ganeshpur coal block and the coal was to be sourced from the said coal block, power was to be generated and supplied on the said premise.

(c) WBSEDCL has failed to offer any explanation as to why the expression 'captive fuel sources' is mentioned in the PPA/PSA, if the said agreements were not based on captive fuel source. Since WBSEDCL has not raised any objection with regard to allocation of captive coal block or the approved mining plan, any such contention would not only be beyond pleadings but also contrary to the pleadings.

(d) In the present case, the laws governing allocation/allotment of coal blocks i.e. Coal Mines Nationalisation Act, 1957 and Mines and Minerals Development and Regulation Act, 1957 were interpreted by the Hon'ble

Supreme Court in its judgment dated 25.8.2014 in WP (Cri.) No. 120/2012 and connected matters in a manner different from the interpretation of the Government. Therefore, the judgment of the Hon`ble Supreme Court resulted in change in interpretation of law which clearly qualifies as Change in Law under Article 10.1.i (b) of the PPA/PSA.

(e) After the Hon`ble Supreme Court judgment and the change in policy for allocation of coal block vide cancellation Ordinance and Coal Mine (Special Provisions) Act, 2015, the Petitioner was required to comply with new conditions and apply afresh for coal block allocations. Thus, there is also a Change in Law in terms of Article 10.1.1 (c) and (d) of the PPA/PSA. Cancellation of coal block by the Hon`ble Supreme Court and subsequent promulgation of Ordinances by the Governments and enactment of the Coal Mine (Special Provisions) Act, 2015 also qualify as Change in Law under the Article 10.1.1(f) of the PPA/PSA as well which provides for any changes in law related to mining laws affecting the Petitioner's input cost of fuel as Change in Law.

(f) The Petitioner also participated in the process of auction but could not obtain coal block. Therefore, the Petitioner is required to purchase coal from other sources, namely as e-auction and open market at higher cost. There has been change in the Mining Laws, which has affected/increased the input cost of raw-material i.e. coal.

(g) Change in NCDP leading to reduction of coal supplied under the tapering linkage allotted to the Petitioner is also Change in Law under the PPA/PSA and the Petitioner is entitled to be compensated for the same.

(h) Reliance placed by WBSEDCL on the Commission`s order dated 8.10.2018 in Petition No. 179/MP/2016 (KSK Mahanadi Power Company Limited) is not applicable to the facts of the present case as in the said case, Coal Supply Agreement and the tapering linkage of the Petitioner therein were terminated by SECL for the reason that the coal block itself did not exist once it was cancelled by the Hon`ble Supreme Court.

(i) Purpose of compensation on account of Change in Law is to restore the affected party to the same economic position. There is no dispute that the Petitioner had a captive coal block. It is also not disputed that the said coal block has been cancelled and therefore, is no longer available. There is also no dispute that the coal block has been auctioned in terms of provisions of the Coal Mine (Special Provisions) Act, 2015. Factually, there is a change in the economic position of the Petitioner on account of non-availability of coal from the coal block, as the Petitioner now has to procure coal from other more expensive sources i.e. e-auction and spot market.

(j) There is no inconsistency between Article 2.5 and Article 10 of the PPA/PSA. Both the provisions operate in different spheres. While Article 2.5 prohibits increase in escalation rates, Article 10.1.1 is compensation for Change in Law.

I.A. No. 24/2019

12. Order was reserved in the matter vide Record of Proceedings for the hearing dated 18.10.2018. Subsequent to that date, the Petitioner has filed IA No. 24/2019 seeking to place on record the judgment of APTEL dated 21.12.2018 in Appeal No. 193/2017 (GMR Kamalanga Energy Limited Vs. Central Electricity Regulatory

Commission and others) and direction to the Respondents to make payment of 75% of the amount due to the Petitioner towards change in law claim made in the present Petition along with carrying cost subject to adjustment after issue of final order. The Petitioner has submitted that the Commission in its order dated 7.4.2017 in Petition No. 112/MP/2015 had held that cancellation of the allocation of captive coal mines pursuant to the order of the Hon`ble Supreme Court is not a change in law event. The said decision of the Commission was challenged by GMR Kamalanga Energy Limited (GKEL) before the APTEL vide Appeal No. 193 of 2017. APTEL vide judgment dated 21.12.2018 in Appeal No. 193 of 2017 set aside the above findings of the Commission holding that cancellation of coal block by judgment of the Hon`ble Supreme Court amounts to Change in Law. The Petitioner has submitted that APTEL judgment dated 21.12.2018 is squarely applicable in the facts of the present case and the Petitioner is accordingly, entitled to the reliefs claimed in the present Petition.

13. The Respondent, WBSEDCL has submitted that facts in APTEL judgment are completely different from the facts of the present case. The PPA (Schedule 5) in case of GKEL mentioned the captive coal blocks (Rampia and Dip Side Rampia) as the fuel source. APTEL judgment was premised on the fact that the fuel requirement for the GKEL Project was secured through the captive coal block which was subsequently cancelled. Ministry of Coal letter allocating the said coal blocks to a consortium of five allottees (including GKEL) made it clear that GKEL`s share in the captive coal corresponded to the entire capacity of the project. However, in the present case, neither the PPA nor the PSA mention a specific captive coal block. GKEL PPA is a case 1 PPA under Section 63 of the Act where there is fixed bid tariff on the basis of which the PPA was awarded. However, in the present case, the

Petitioner has not placed on record any evidence relating to the cost of coal from Ganeshpur coal block. In the absence of any data as to cost of coal from Ganeshpur coal block, grant of relief under change in law will be contrary to the express terms of PPA and judgment of the Hon`ble Supreme Court, APTEL and the Commission. WBSEDCL has also submitted that GKEL PPA does not have a clause similar to clause 2.5 of the PSA (between WBSEDCL and PTC) which provides that in case of supply of coal from a source other than a captive source, such supply will be treated as supply from a captive source and the Petitioner shall not be entitled to any compensation on account of procurement of coal from alternate sources. Therefore, the Petitioner cannot ask for any separate escalation rate for escalable energy on the ground of sourcing of coal from any other source and it would be considered that such coal has been deemed to be sourced from the captive source only. The Petitioner has failed to produce any documents regarding estimated cost of coal from Ganeshpur coal block and how procurement from alternate sources has adversely impacted it.

14. The matter was heard at length on 16.7.2019. The Petitioner and the Respondent WBSEDCL have filed their respective written submissions dated 31.7.2019 and 25.7.2019 respectively.

Analysis and Decision

15. We have heard the learned senior counsel for the Petitioner and the learned counsel for WBSEDCL and PTC and perused documents on record. With regard to the question of jurisdiction, the Commission vide order dated 6.6.2018 has already held that this Commission has the exclusive jurisdiction to regulate the tariff of the Petitioner including adjudication of disputes relating to tariff.

16. With regard to the dispute between the Petitioner and the Respondent WBSEDCL on merits, the following issues arise for our consideration:

(a) Issue No. 1: What is the scope of change in law in the PPA and PSA?

(b) Issue No. 2: Whether the provisions of the PPA and PSA with regard to notice for events of Change in Law have been complied with?

(c) Issue No. 3: Whether the Petitioner is entitled for relief under Change in Law in terms of the PSA dated 5.1.2011 and PPA dated 25.3.2011 for arranging the coal from alternative sources on account of non-commissioning of the captive coal block and cancellation of coal blocks by the Hon`ble Supreme Court?

17. These issues have been analysed and discussed ad seriatim in the succeeding paragraphs.

Issue No.1: What is the scope of change in law in the PPA/PSA?

18. The Petitioner has developed a 540 MW (2x270 MW) thermal power project in the State of Jharkhand. The Petitioner approached WBSEDCL (Respondent No.1) for sale of 100 MW power RTC from its project. A meeting was arranged between the Petitioner and WBSEDCL on 27.11.2010 to discuss the “offer, tariff and finalisation of PPA for purchase of power” from the Petitioner’s project. The Petitioner stressed for sale of power through negotiated route through a trader. Subsequently, a meeting was held amongst the Petitioner, WBSEDCL and PTC on 3.1.2011 for purchase of 100 MW power from the project of the Petitioner through PTC. The parties in the said meeting agreed among other things that the contracted power would be 100 MW with scheduled delivery date as 1.4.2013 at a levelised tariff of Rs.3.13/kWh including trading margin. Further, the draft PPA was discussed threadbare and finalised based on mutually agreed terms and conditions. Thereafter, a Power Sale Agreement was signed between PTC and WBSEDCL on 5.1.2011.

Recital C of the PSA provided that the Seller (PTC) shall enter into a Power Purchase Agreement with the Petitioner for purchase of 100 MW power generated from the project. Accordingly, PTC entered into a PPA with the Petitioner on 25.3.2011. Both PPA and PSA contain Change in Law provisions in Article 10 of the respective agreements. Article 10 of the PPA dated 25.3.2011 is extracted as under:

“In this Article 10, the following terms shall have the following meanings:

I. Change in law means occurrence of any of the following events:

- a) the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law;
- b) a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law;
- (c) the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;
- (d) change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;
- (e) any change in tax or introduction of any tax made applicable for supply of power by the Seller
- (f) any change in law relating to Mining laws and Environment Laws or tax cess or duty affecting input cost or raw material.

II. But change in law shall not include :

- (a) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or
- (b) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

III. Such change in Law could be but not restricted to any of the following cases where it,

- a) Results in any change in respect of tax.
- b) Affects Seller's or PTC's obligation under this Agreement.
- c) Materially affects the construction, Commissioning or operation of the Project.

10.2 Application and principles for computing impact of Change in Law

i While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

ii Additional Expenditure during Operating Period

For change in Law coming into force after the Pre-poned Delivery date or the Scheduled delivery Date, as the case may be, any revision in tariff on account of such increase shall only be carried out after prior approval of the CERC/Appropriate Commission.

iii In the events of Change in Law under Article 10.1 (i), the parties shall take all steps that may be reasonably required to comply with such Change in Law including without limitation, extension of time to compensate for any delay in the Commissioning of the Project due to such Change in Law

10.3 Notification of Change in Law

i The Party that is affected by a Change in Law in accordance with Article 10.2 and wishes to claim a Change in Law under this Article, it shall give notice to the other Party of such Change in Law as soon as reasonably practicable after becoming aware of the same or when it should reasonably have known of the Change in Law.

ii Notwithstanding Article 10.3(i), the Seller shall be obliged to serve a notice to the Buyer/PTC under this Article 10.3(ii), if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Buyer/PTC contained herein shall be material. Provided that in case the Seller has not provided such notice, the Buyer/PTC shall have the right to issue such notice to the Seller.

iii Any notice served pursuant to this Article 10.3.(ii) shall provide, amongst other things, precise details of:

(a) The Change in Law; and

(b) The effects on the Seller of the matters referred to in Article 10.2.

10.4 Tariff Adjustment Payment on account of Change in Law

(i) Subject to Article 10.2, the adjustment in Monthly Tariff Payment shall be effective from :

a) The date of adoption, promulgation, amendment, re-enactment or repeal of the Applicable Law or Change in Law; or

b) The date of order/judgment of the Competent Court or Indian Government Instrumentality, if the Change in law is not on account of a change in interpretation of applicable law.

(ii) All the payments due to Change in law shall be through Supplementary Bill, However, in case of any change in tariff by reason of Change in Law, in accordance with this Agreement, the Monthly Bill or Supplementary Bill to be raised by the Seller/Buyer after such change in tariff shall appropriately reflect the charged Tariff.”

19. The provisions of the PPA between PTC and WBSEDCL are broadly the same as the provisions of PSA between PTC and WBSEDCL except in respect of the following:

(a) 10(1)(i)(f): Any changes in law related to mining laws or environmental laws or tax or cess or duty affecting APRNL's input cost of coal.

(b) 10(1)(iii)(b): Affects Seller's or Buyer's obligations under this Agreement;

(c) In Article 10(3)(ii), in place of "Buyer/PTC" as in the PPA, only "Buyer" has been mentioned.

20. A reading of the provisions of PPA and PSA with regard to Change in Law reveals the following:

(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, or any law including rules and regulations framed pursuant to such law, or

(b) Any change in interpretation or application of any Law by Indian Governmental Instrumentality having the legal power to interpret or apply such law, or any competent court of law.

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits otherwise than the default of the seller.

(e) any change in tax or introduction of any tax made applicable for supply of power by the seller.

(f) any change in law relating to mining laws and environment laws or tax cess or duty affecting input cost of raw material/ APRNL's input cost of coal.

(g) for change in Law coming into force after the Pre-poned Delivery date or the Scheduled delivery Date, as the case may be, any revision in tariff on account of such increase shall only be carried out after prior approval of the Commission.

(h) Any party affected by Change in Law shall be required to give a notice to the other party which shall include the precise details of change in law and the effects on the Seller.

21. The term "Applicable Law(s)" has been defined in Article 1.1 of the PPA/PSA as under:

"Applicable Law (s)" in relation to this Agreement means and includes (i) all laws in force in India and any statute, ordinance, regulation, notification, code and /or rules and/or (ii) any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and/ or (iii) all applicable rules, regulations, orders, notifications by an Indian Government Instrumentality pursuant to the items in (i) hereof or under any of them and includes all rules, regulations, decisions and orders of the Appropriate Commission."

22. The terms "Indian Governmental Instrumentality" and "Competent Court" have been defined in Article 1.1 of the PPA/PSA as under:

"Indian Governmental Instrumentality" means the Government of India, Government of States where the Buyer, Seller and the Project are located and any Ministry or department of or board, agency, or other regulatory or quasi- judicial authority controlled by the Government of India or Government of States where the Buyer, Seller and Project are located and includes the Appropriate Commission."

"Competent Court" means the Supreme Court or High Court at Delhi/Calcutta, or any Electricity appellate tribunal or Appropriate Commission in India that has jurisdiction to adjudicate upon issues relating to this Agreement."

As per the above definition, law shall include (a) all laws force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by

Government of India, Government of States where the Buyer, Seller and Project are located or any Ministry, department, board, agency or other regulatory or quasi-judicial authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same can be considered as 'change in law' to the extent it is contemplated under Article 10 of the PPA. Further, the Competent Court includes the Supreme Court, High Court at Delhi/Calcutta, Electricity Appellate Tribunal or Commission that has jurisdiction to adjudicate upon issues relating to the agreement.

Issue No. 2: Whether the provisions of the PPA/PSA with regard to notice has been complied with?

23. Article 10.3 of the PPA and PSA provides that any party affected by Change in Law shall be required to give a notice to the other party which shall include the precise details of change in law and the effects on the Seller. Before we go into the question of notice for Change in Law in terms of the PPA/PSA, we have to first find out about the exact change in law event for which the Petitioner is seeking relief in this petition. The Petitioner has submitted that after execution of the PPA/PSA, the following events have occurred which led to the change in the source of coal for the Petitioner and the price at which the coal was procured:

(a) Ministry of Coal vide Office Memorandum dated 26.7.2013 notified the changes in New Coal Distribution Policy.

(b) Change in interpretation of the laws relating to allocation of coal blocks by the Hon'ble Supreme Court vide its judgement dated 25.8.2014 and order dated

24.9.2014 in Writ Petition (criminal) No.120/2012 declaring the said allocation as arbitrary and illegal holding that the screening committee process was not in accordance with law.

(c) Pursuant to the order and judgement of the Hon'ble Supreme Court, the Government of India issued an Ordinance dated 21.10.2014 for allocation of coal mines by way of competitive bidding and auction.

(d) The Government of India issued the Coal Mines (Special Provisions) Second Ordinance, 2014 on 26.12.2014 in pursuance of the introduction of the Coal Mines (Special Provisions) Bill, 2014.

(e) Enactment of Coal Mines (Special Provisions) Act, 2015 which was also a change in law event having bearing on the variable cost element of power being supplied to WBSEDCL.

24. The Petitioner has submitted the judgement of the Hon'ble Supreme Court cancelling coal block allocation has changed the interpretation of the laws relating to allocation of coal blocks to private entities including the Petitioner. The Petitioner has further submitted that the said change in interpretation was applicable from the date the coal blocks were allocated by the Central Government to the private parties as the very basis of allocation was declared to be arbitrary and illegal. The Petitioner has submitted that as on the date of the execution of the PPA/PSA, the Petitioner was under a bonafide belief that coal block allocated by the Central Government was as per law and after the judgement of the Hon'ble Supreme Court, any clauses of the PPA and PSA relating to coal to be sourced from Ganeshpur coal block has become redundant. As a result, the Petitioner is seeking in this petition the entire landed price

of coal required for generation of power, as per the PPA and PSA, as pass through in tariff.

25. WBSEDCL has submitted that the Petitioner has not issued any 'Change in Law' notice in terms of Article 10.3 of the PSA. WBSEDCL has submitted that the correspondences relied upon by the Petitioner do not refer to change in law or the impact and grounds for change in law claim. WBSEDCL has further submitted that the Petitioner proceeded on the basis that there was no Change in Law and the Petitioner was disentitled to claim relief on this account.

26. The Petitioner has submitted that it has complied with the provisions of clause 10.3 of the PPA/PSA and has issued notice of change in law event as soon as it was practicable. The Petitioner has submitted that it wrote a letter on 15.11.2014 to PTC which was forwarded by PTC to WBSEDCL wherein the Petitioner referred to the ordinance issued by Government of India, namely, Coal Mines (Special Provisions) Ordinance, 2014 and the Hon'ble Supreme Court's order dated 24.9.2014 regarding cancellation of coal block. The Petitioner has submitted that the said letter not only points out about the Change in Law events i.e. Order of the Supreme Court and Ordinance but also gives in detail the impact of such change in law on the Petitioner. The Petitioner has submitted that the said letter clearly shows that the substance and essence of the same is notification of change in law.

27. We have considered the submissions of the Petitioner and WBSEDCL. The Petitioner through its letter dated 9.2.2013 informed the PTC that though the coal block was expected to be operational before the supply of power to WBSEDCL, but the coal block could not be made operational due to reasons beyond the control of the Petitioner including the delay in grant of various clearances from different

governmental instrumentalities. Since the Petitioner was sourcing coal from Central Coalfield through tapering linkage, the Petitioner requested PTC to approach WBSEDCL to make coal cost as pass through till the Petitioner's coal block got fully operational. The Petitioner also wrote another letter dated 13.3.2013 to PTC to take up the matter with WBSEDCL to make the coal cost pass through. PTC in its letter dated 17.5.2013 responded by stating that the Petitioner's proposal for a coal cost pass through is not acceptable to WBSEDCL. The Petitioner wrote a letter dated 27.12.2013 to PTC informing that its project was awarded tapering linkage till the Ganeshpur Coal block was developed and further informed PTC that since CCL would not provide coal as per FSA quantities, the Petitioner would have to source coal from other sources such as e-auction, spot market and import, etc. as per the Government of India letter dated 27.7.2013. PTC vide its letter dated 15.1.2014 rejected the claim of the Petitioner in view of the clause 2.5 of the PPA. WBSEDCL vide its letter dated 26.2.2014 also rejected the claim of the Petitioner citing clause 2.5 of the PPA. PTC vide its letter dated 3.3.2014 informed the Petitioner that in view of clause 2.5 of the PPA, the Petitioner cannot ask for separate escalation on the ground of sourcing coal from any other sources and accordingly, the Petitioner's request for additional coal cost is not tenable. After the judgement of the Hon'ble Supreme Court dated 25.8.2014 read with order dated 24.9.2014, the Petitioner sent a letter dated 15.11.2014 to PTC referring to the PPA, PSA and the letters written by it earlier and apprising about the cancellation of captive coal block by the Hon'ble Supreme Court. The contents of the said letter are extracted as under:

"This is in reference to the PSA signed on 25th March, 2011 for Long Term Power supply to WBSEDCL through PTC for 100 MW of power from 2X270 MW Thermal Power Plant of M/s Adhunik Power and Natural Resources Limited (APNRL) based on the PPA signed between WBSEDCL and PTC on 5th January, 2011 for supply of 100 MW. The supply of 100 MW was based on the supply of coal from the

Ganeshpur Coal Block allocated to APNRL and Tata Steel Limited jointly with 50:50 partnership and accordingly the PPA was crafted.

The tariff streams were worked out based on the Ganeshpur captive coal block allocated to APNRL and the coal block becoming operational was expected during 2013, and accordingly, the levelized Tariff of Rs. 3.13/kWh inclusive of trading margin to PTC at Rs. 0.06/kWh was arrived at for the PPA. WBSEDCL sought various other documents along with an affidavit stating that Ganeshpur coal block was allocated at APNRL. Accordingly, escalation factors of captive coal block of CERC were used in arriving at the levelized tariff for the entire duration of the PPA.

You may kindly appreciate the fact that there have been delays in developing the captive Ganeshpur coal block allocated to APNRL and Tata Steel due to various Govt. Instrumentalities. APNRL was able to obtain almost all the clearances required for commencing the mining operation of Ganeshpur coal block jointly with Tata Steel. The same was intimated to PTC, due to delay in Ganeshpur coal block development, APNRL has been requesting for fuel cost pass-through by various letters referred above.

You would recognize the fact that the said Ganeshpur coal block was not in the identified list of involved in any irregularities found by CBI/Coal gate Scam during July, 2012, further, Ministry of Coal, Gol has given time for completing the remaining formalities to commence coal mining from Ganeshpur coal block till November, 2014. As you are aware, in July, 2012, a case was referred to the Hon'ble Supreme Court for irregularities in coal block allocations for which very recently the Hon'ble Supreme Court had given its judgment on 25th September, 2014. Copies of the order and judgment are enclosed at Annexure-I. The Hon'ble Supreme Court in its order has directed Govt. of India to cancel all the coal blocks granted to various developers (including State Govt./ IPP/ etc.) which are under operations/developments/etc. as the process of allocating the coal blocks was "illegal and arbitrary". Further, Gol has issued an "The Coal Mines (Special Provisions) Ordinance No. 5 of 2014" dated 21st October, 2014, giving the full list of de-allocated coal blocks with an intent to expedite in public interest for the Central Government to take immediate action to allocate coal mines to successful bidders and allottees keeping in view the energy security of the country and to minimise any impact on core sectors such as steel, cement and power utilities, which are vital for the development of the nation.

Therefore, at this juncture, APNRL doesn't have any confirmed fuel source for the project except for the Tapering linkage provided by Ministry of Coal, Gol with LoA Ref. No. 6654-57 and 7583-93, dated 9th July, 2009 and 25th November, 2010 respectively and that APNRL is meeting the coal requirement from E-Auction/ Imported/ etc. sources of coal.

We, therefore, humbly request you once again to kindly consider favourably in making the fuel cost as pass-through based on the facts mentioned above."

In response to the above letter, PTC responded vide its letter dated 11.12.2014 attaching the WBSEDCL's letter dated 10.12.2014, wherein WBSEDCL stated that since the tariff payable to the Petitioner by WBSEDCL was mutually agreed, the question to deviate from the laid down or agreed terms and conditions did not arise. It is a fact that the letter dated 15.11.2014 by the Petitioner does not refer

to Article 10.3 of the PPA/ PSA. However, the letter refers to all the earlier correspondences by the Petitioner with regard to coal pass-through on account of non-operationalisation of the coal block. The content of the letter as quoted above refers to the cancellation of the coal blocks and its impact on the ability of the Petitioner to supply power at the rates agreed in the PPA/ PSA. We are of the view that the Petitioner through letter dated 15.11.2014 has apprised PTC as well as WBSEDCL about the impact of shortfall of coal in the tapering linkage pending operationalisation of the captive coal block and the impact of cancellation of the captive coal block by the Hon'ble Supreme Court on its ability to discharge its obligations under the PPA/PSA during the operation period, the said letter dated 15.11.2014 meets the requirement of notice under Clause 10.3 of the PPA/ PSA.

Issue No. 3: Whether the Petitioner is entitled for relief under Change in Law in terms of the PSA dated 5.1.2011 and PPA dated 25.3.2011 for arranging the coal from alternative sources on account of non-commissioning of the captive coal block and cancellation of coal blocks by the Hon`ble Supreme Court?

28. The Petitioner has submitted that the PPA and the PSA were executed between the parties by considering that the Petitioner would source coal from its captive coal block, namely, Ganeshpur coal block. In this connection, the Petitioner has referred to Clause 2.1 and Schedule A of the PPA which refers to the source of coal for generation and supply of power to WBSEDCL as captive fuel source. Further, the Petitioner has referred to the Clause 2.5 of the PPA which states that for the purpose of sourcing of coal from any other sources, "it will be considered that such coal has been deemed to be sourced from the captive source only for purchasing of power by PTC from the seller under this Agreement". The Petitioner has further submitted that on 3.1.2011, a joint meeting was held between the Petitioner, WBSEDCL and PTC for negotiation of the rate and finalization of PPA for the purchase of power from the Petitioner by WBSEDCL through PTC and para 8 of

the said minutes specifically referred to the captive coal block of the Petitioner at Ganeshpur, Jharkhand. The Petitioner has further submitted that WBSEDCL vide its letter dated 30.4.2012 had also enquired about the status of work relating to the lifting of coal from the captive coal mine at Ganeshpur and the transportation of coal from the said mine.

29. The Petitioner has submitted that pending operationalisation of the captive coal block, the Petitioner was allotted tapering linkage by Central Coalfield Limited. Change in the New Coal Distribution Policy in 2013 leading to reduction of coal supplied under the tapering linkage allocated to the Petitioner is a change in law under the PPA/PSA and therefore, the Petitioner is entitled to be suitably compensated for the same. The Petitioner has submitted that the Hon'ble Supreme Court vide its judgment dated 25.8.2014 in Writ Petition (Criminal) No. 120/2012 read with order dated 24.9.2014 held that the allotment of coal blocks made by the Standing Committee of the Government of India as also the allotments made through the Government dispensation route were arbitrary and illegal and accordingly, cancelled the allotment of coal blocks including the coal blocks allocated to the Petitioner. The Petitioner has further submitted that pursuant to the orders of the Hon'ble Supreme Court, GoI issued an ordinance dated 21.10.2014⁷ for allocation of coal mines to ensure continuity in coal mining operation and production of coal which was replaced by Coal Mines (Special Provisions) Act, 2015 (CMSP Act). The Petitioner has submitted that issuance of ordinance and enactment of the CMSP Act was continuation of the change in law events which originated in the cancellation of the coal block by the Hon'ble Supreme Court. The Petitioner has referred to Clause 10.1.1(b) of the PPA/PSA which provides that a change in interpretation of application of any law by any Indian Government Instrumentality or any Competent

Court of Law is change in law. The Petitioner has submitted that the law governing allocation/allotment of coal blocks i.e. Coal Mines Nationalization Act, 1957 (CMN Act) and Mines and Minerals Development and Regulation Act, 1957 (MMDR Act) were interpreted by the Hon'ble Supreme Court in its judgment dated 25.8.2014 in W.P.(Criminal) No. 120/2012 and connected matters in a manner different from the interpretation of the Government and accordingly, the judgment of the Hon'ble Supreme Court resulted in change in interpretation of law and qualifies as change in law under Clause 10.1.1(b) of the PPA/PSA. The Petitioner has further submitted that the judgment of the Hon'ble Supreme Court also qualifies as Change in Law under Clauses 10.1.1(c) and 10.1.1 (d) of the PPA/PSA since after the judgment, the terms and conditions for procurement of coal has changed by putting a new condition of participation in the auction process for coal block under the Coal Mines (Special Provisions) Act, 2015. The Petitioner has further submitted that cancellation of coal block by the Hon'ble Supreme Court and the subsequent enactment of the Coal Mines (Special Provisions) Act, 2015 are changes in mining laws affecting the input cost of raw material and is accordingly, covered under Clause 10.1.1 (f) of the PPA/PSA.

30. Respondent No. 1, WBSEDCL has contested the claim of the Petitioner for relief under Change in Law on the following counts:

(a) Neither the PPA nor the PSA mentioned any specific captive coal block.

Further, the Petitioner has not placed on record the documents pertaining to the allocation of the coal block or the approved mining plan or any document to say that the captive mine was slated to commence production in synchronization with the scheduled supply date under the PPA/PSA.

(b) In terms of Clause 2.2 of the PSA, WBSEDCL is liable to pay only the capacity charges, non-escalable energy charges and escalable energy charges set out in Table A of Schedule A of the PSA. Further, in terms of Clause 2.5 of the PSA, in case of supply of coal from the source other than the captive source, such supply will be treated as supplied from a captive source and the Petitioner will not be entitled to compensation on account of procurement of coal from alternative sources. In case relief is granted to the Petitioner for cancellation of Ganeshpur Coal Block, then the same would render Article 2.5 of the PPA/PSA as redundant.

(c) Cancellation of Ganeshpur Coal Block does not fall under any of the Change in Law events under Article 10.1.1. The judgment of the Hon'ble Supreme Court dated 25.8.2014 read with order dated 24.9.2014 did not result in interpretation of any law. Further, the issue of ordinances or enactment of Coal Mines (Special Provisions) Act, 2015 did not amount to change in law as they did not have any impact on the economic position of the Petitioner since these enactments dealt with future allocation of coal blocks only.

(d) The cancellation of Ganeshpur Coal Block pursuant to the judgment of the Hon'ble Supreme Court does not qualify as Change in Law under Article 10.1 (a),(b),(c) and (d) of the PPA/PSA since they do not deal with the input cost of coal. In terms of Article 10.1.(f) of the PSA, change in law in relation to input cost of fuel has been limited to increase in tax, duty or cess affecting input cost of fuel. Since the increase in input cost of fuel is not on account of any of these factors, the Petitioner is not entitled to any relief. The Appellate Tribunal for Electricity in its judgment dated 12.9.2014 in Appeal No. 288/2013 (M/s Wardha Power Company Limited Vs Reliance Infrastructure Limited and Ors.)

held that there cannot be any compensation on account of increase in input cost/ base price of coal and that compensation would be granted only in case of occurrence of change in law events such as increase in cess and taxes.

- (e) There has been no change in mining laws resulting in any impact on the Petitioner's input cost of fuel. Coal Mines (Special Provisions) Act, 2015 actually leads to reduction in fuel cost in as much as the auction of coal mines for the power sector is based on a ceiling price with bidders required to quote lower than the ceiling price.
- (f) The Petitioner is not entitled to compensation for the period prior to the Supreme Court judgment. The Petitioner was allocated tapering linkage on 9.7.2009 and 25.11.2010 which was prior to execution of the PSA. Moreover, under the PSA, the Petitioner had agreed to assume the risk of fuel procurement and undertaken that it would not be entitled to any compensation/increase on account of fuel from sources other than captive sources. Therefore, the Petitioner is not entitled to any compensation on account of procurement of coal from sources other than the captive sources even before cancellation of Ganeshpur Coal Block. Further, the Petitioner had submitted before JSERC that production from coal block might achieve rated annual capacity only by 2017 and the Petitioner had contemplated use of tapering linkage coal and coal from non-captive sources. Therefore, the Petitioner's submission that it had contemplated use of coal only from captive sources for the PSA with WBSEDCL is without merit. In terms of the letter dated 29.2.2016 issued by Ministry of Coal regarding invocation of bank guarantee in respect of Ganeshpur Coal Block, the delay in operationalisation of captive coal block was attributable to the Petitioner.

31. The Petitioner has refuted the objections of WBSEDCL as under:

- (a) The provisions of the PPA/PSA provide that coal is sourced from the Petitioner's captive coal block.
- (b) Article 2.5 pertains to escalation rate and provides that if coal is sourced from any source other than captive source, then the escalation rates for the energy charges would be those which are applicable to captive source. Article 2.5 does not pertain to the increase in cost of generation on account of costlier coal being procured from sources other than captive coal block on account of change in law.
- (c) The judgement of the Hon'ble Supreme Court qualifies as Change in Law under Article 10.1.1(c) and 10.1.1(d) of the PPA/PSA as enactment of Coal Mines (Special Provisions) Act, 2015 after the said judgement imposes a new condition of participation in the auction process for allocation of coal blocks.
- (d) The Government had previously allocated the coal blocks within the framework of Coal Mines Nationalisation Act, 1957 and Mines and Minerals (Development and Regulation) Act, 1957. The said coal blocks were cancelled by the Hon'ble Supreme Court. Upon enactment of the Coal Mines (Special Provisions) Act, 2015, the said coal blocks were now to be allotted/ allocated by different process altogether i.e. auction. Therefore, there is clearly change in mining laws.
- (e) WBSEDCL has not placed on record the orders of JSERC. As per the order of JSERC, the Petitioner has submitted that production from coal block was

expected to commence in January, 2014 and subject to the clearances and approval to be obtained, production from coal block at rated annual capacity would start in 2017. Further, after the Hon'ble Supreme Court passed an interim order dated 14.9.2012 issuing notice in Petition No. WP (CRL) No. 120/2012 relating to cancellation of coal blocks, the Government Departments stalled all governmental permissions and clearances to be given for development of any coal block and consequentially, development of the Petitioner's coal block was indefinitely delayed. The delay in operationalisation of captive coal block was not attributable to the Petitioner.

32. We have considered the submissions of the Petitioner and WBSEDCL. We intend to first deal with the objections of WBSEDCL before deciding whether cancellation of coal block by the order of the Hon'ble Supreme Court amounted to change in law in terms of Article 10 of the PPA/PSA. The first objection of WBSEDCL is that neither the PPA nor the PSA mentioned any specific captive coal block and hence, the Petitioner cannot seek any relief on account of cancellation of captive block. We have gone through the provisions of the PPA and the PSA and the minutes of the meeting dated 3.1.2011 held between the representatives of the Petitioner, WBSEDCL and PTC. The meeting dated 3.1.2011 was held for negotiation of rate and finalization of PPA for purchase of power from the Petitioner through PTC India Limited. Para 8 of the minutes specifically mentions that "APRNL has a captive coal block in Ganeshpur at Jharkhand and this coal block is a joint venture with TISCO". Article 2.2 of the PSA provides that for sale of power under the agreement, the buyer shall pay the capacity charge, non-escalable energy charge and escalable energy charge as per Table A of Schedule A. Schedule A of the PSA provides as under:-

“Year on Year Capacity Charges payable is indicated in table below for the term of the Agreement, Energy Charges from the delivery date, may that be the Pre-pone Delivery date, the Scheduled Delivery Date or from the Revised Scheduled Delivery Date, as the case may be, as indicated in table below is based on the estimated coal prices and shall be adjusted on the basis of the prevailing escalation factors for captive fuel sources as declared by CERC from time to time during the terms of this Agreement.”

Article 2.5 of the PSA provides as under:

“2.5 On the ground of sourcing of coal from any other sources by APRNL, the Seller shall not ask for any separate escalation rate for escalable energy charges and it will be considered that such coal has been deemed to be sourced from the captive source only for the purchasing of by the Buyer from the Seller under this Agreement.”

Similar provisions have been made in the PPA between the Petitioner and PTC which has been entered into on a back to back basis between them to enable PTC to fulfil its obligations under the PSA and in furtherance of the requirement of the PSA. After the signing of the PSA and PPA, WBSEDCL in its letter dated 30.4.2012 sought the following information from the Petitioner:

“A PPA has been executed on 05.1.2011 by and between WBSEL and PTC India Ltd. As per undertaking of APNRL, it is understood that they have already obtained allocation of Ganeshpur Coal Block in the State of Jharkhand for captive mining of coal jointly with Tata Steel Limited on equal sharing, i.e. 50:50 basis.

In this context, I would request you to provide us the present status of the work related to lifting of coal from the coalmine and transportation of coal from captive mine, allocated to APNRL to the coal handling plant, within 10.5.2012.”

The above correspondence and provisions of the PPA and PSA show that the parties have recognised that the source of fuel for generation and supply of power by the Petitioner to WBSEDCL through PTC is the captive coal block allocated to the Petitioner at Ganeshpur in the State of Jharkhand. Moreover, Schedule A of the PSA states that energy charge is based on estimated coal prices and shall be adjusted on the basis of the prevailing escalation factors for captive fuel sources as notified by CERC. It is pertinent to mention that the tariff in the PPA/PSA has been determined through negotiation between the parties. The “estimated coal price” can only be in

respect of the captive coal block as the parties were aware that the Petitioner had been allocated a captive coal block for generation and supply of power from its generating station. Moreover, the parties have linked the escalation rates with the escalation factors for captive fuel sources which also supports the contention of the Petitioner that the negotiated tariff agreed in the PSA/PPA was based on the estimated price of coal from the captive mine of the Petitioner. Article 2.5 of the PPA/PSA is of special relevance. It begins with the words “on the ground of sourcing coal from any other sources by the Seller”, and proceeds on to conclude that “it will be considered that such coal has been deemed to be sourced from the captive source only”. Reference to “any other sources” means the sources other than the captive source and in such cases, it will be deemed to be sourced from captive source only. This deeming provision in the PSA/PPA clearly establishes that the tariff agreed in the PPA/PSA was based on captive coal.

33. The next objection of WBSEDCL is that if the relief is granted to the Petitioner, then it will render Article 2.5 redundant as the said Article provides that in case of sourcing of coal from any other sources, it will be deemed to be sourced from the captive source only. We have come to the conclusion in the preceding para that the source of fuel as the captive mines has already been taken into consideration by the parties during the negotiation of tariff. The Petitioner was expecting that the captive coal block would be operational by the time it started supplying power to WBSEDCL and other beneficiaries. Supply of power to WBSEDCL started on 26.7.2013. However, due to delay in getting various approvals, the captive coal block could not be developed and operationalized by that time. Till the captive coal mines are developed, the Project Developers are granted tapering linkage to meet its contractual obligations for supply of power with the distribution companies.

WBSEDCL in its written submission has admitted that the Petitioner was granted tapering linkages on 9.7.2009 and 25.11.2010 prior to the date of signing of the PSA. Therefore, WBSEDCL was aware that the Petitioner was granted tapering linkage till the captive mines are developed and operationalized. Further, actual supply of coal under linkage is allowed only when the Project Developer enters into PPA(s) with the distribution companies. The Petitioner was supplying power to WBSEDCL by sourcing coal under tapering linkage and was meeting the shortfall in supply under tapering linkage by purchasing coal from other sources such as e-auction coal and imported coal, etc. It is pertinent to mention that Ministry of Coal vide its Office Memorandum dated 26.6.2013 notified the changes in the New Coal Distribution Policy which provided that cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. Further, Ministry of Power vide letter dated 31.7.2013 addressed to CERC/SERCs advised that as per the decision of the Government, the higher cost of imported/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERCs to the extent of shortfall in the quantity indicated in the LoA/FSA. Since the policy framework envisaged for supply of coal under tapering linkage to the project developers till the operationalisation of their allocated captive mines, it will defeat the purpose of tapering linkage if the project developers are to get the tariff at the rate fixed for the captive coal even while buying the coal under tapering linkage and meeting the shortfall in supply of coal under tapering linkage through e-auction coal and imported coal. Therefore, the provisions of Article 2.5 of the PPA/PSA have to be read harmoniously in the context of the overall policy framework governing the allocation of captive coal mines and the covering tapering linkage. In our view, the provisions of Article 2.5 of the PPA/PSA is applicable in those cases when the Petitioner even after operationalisation of the captive mines buys coal from outside and claims

reimbursement of the actual cost which is not the case. Article 2.5 of the PPA/PSA cannot be used to deprive the project developer for reimbursement of the cost of coal procured under tapering linkage or to meet the shortfall in supply of coal under tapering linkage through import/e-auction coal, in terms of the NCDP, 2013. It is pertinent to mention that NCDP, 2013 has been held by the Hon'ble Supreme Court as Change in Law in Energy Watchdog Case. In our view, Article 2.5 of the PPA/PSA does not create any embargo for the Petitioner to procure coal under tapering linkage and to meet shortfall in the tapering linkage by sourcing coal from import/e-auction coal till the captive mines commence production and supply of coal.

34. Next we consider whether cancellation of coal block falls under any of the Change in Law events under Article 10.1.1. The Petitioner has submitted that its case falls under Article 10.1 (b) (c), (d) and (f) of the PPA/PSA.

35. The Petitioner has submitted that as per Article 10.1.1 (b) of the PPA/PSA, a change in interpretation or application of any law by any Indian Government Instrumentality or Competent Court of Law is Change in Law. The Petitioner has further submitted that since the laws governing allocation/allotment of coal blocks i.e. Coal Mines Nationalisation Act, 1957 (CMN Act) and Mines and Minerals Development and Regulation Act, 1957 (MMDR Act) were interpreted by Hon'ble Supreme Court in its judgement dated 25.8.2014 in WP (Crl.) No.120/2012 and connected matters in a manner different from the interpretation of the Government under which allocations of coal blocks were made, the interpretation of the Hon'ble Supreme Court has resulted in Change in Law and clearly qualifies as Change in Law under Article 10.1.1(b) of the PPA/PSA.

36. Article 10.1.1(b) of the PPA/PSA provides that “a change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any competent Court of law”. In the PPA/PSA, “Indian Government Instrumentality” and “Competent Court” have been defined as under:

“Indian Governmental Instrumentality” means the Government of India, Government of States where the Buyer, Seller and the Project are located and any Ministry or department of or board, agency, or other regulatory or quasi- judicial authority controlled by the Government of India or Government of States where the Buyer, Seller and Project are located and includes the Appropriate Commission.”

“Competent Court” means the Supreme Court or High Court at Delhi/Calcutta, or any Electricity appellate tribunal or Appropriate Commission in India that has jurisdiction to adjudicate upon issues relating to this Agreement.”

37. The Hon’ble Supreme Court is a competent court in terms of the PPA/PSA. Therefore, any change in interpretation or any change in application of any law by the Hon’ble Supreme Court is covered under Article 10.1.1(b) of the PPA/PSA. The Government of India had previously allocated the captive coal blocks to the Project Developers including the Petitioner within the framework of Coal Mines Nationalisation Act, 1957 and Mines and Minerals (Development and Regulations) Act, 1957. This interpretation is evident from the observations of the Hon’ble Supreme Court in its judgement dated 25.8.2014 in WP (Crl.) No.120/2012 which is extracted as under:

“41. The Central Government has highlighted that once Section 3(3) of the CMN Act [Coal Mines once Section 3(3) of the CMN Act [Coal Mines Nationalisation Act] was amended to permit private sector entry in coal mining operations for captive use, it became necessary to select the coal blocks that could be offered to private sector for captive use. The coal blocks to be offered for the captive mining were duly identified and a booklet containing particulars of 40 blocks was prepared which was revised from time to time.

42. Mr. Goolam E. Vahanvati, learned Attorney General with all persuasive skill and eloquence at his command has sought to justify the allocation of coal blocks by the Central Government. He submits that the Central Government is not only empowered but is duty bound to take the lead in allocation of coal blocks and that is what it did. He traces this power to Sections 1A and 3(3) of the CMN Act. It is argued

by the learned Attorney General that in addition to the declaration contained in Section 2 of the 1957 Act, Parliament has made a further declaration in terms of Entry 54 of List 1 (Union List) of the Seventh Schedule in Section 1A of the CMN Act which makes specific reference to Section 3 (3) of the CMN Act and both have to be read in conjunction with each other. By virtue of Parliament having placed the regulation and development of coal mines under the control of the Union, Section 1A of the CMN Act regulates coal mining operations under Sections 3(3) and 3(4). He argues that coal reserves are primarily concentrated in seven States, viz., Maharashtra, Madhya Pradesh, Chhattisgarh, Odisha, Jharkhand, Andhra Pradesh and West Bengal and all these seven States have accepted and acknowledged the source of power of Government of India with respect to allocation of coal blocks.”

Thus, as per the above observations of the Hon’ble Supreme Court, the Central Government in exercise of the powers under CMN Act and MMDR Act had allocated captive coal mines to certain project developers including the Petitioner. However, the Hon’ble Supreme Court held that the powers of the Central Government for allocation of mines can be traced neither to the CMN Act nor MMDR Act. The following observations of the Hon’ble Supreme Court are relevant in this connection:

“69. In view of the foregoing discussions, we hold, as it must be, that the exercise undertaken by the Central Government in allocating the coal blocks, or, in other words, the selection of beneficiaries, is not traceable either to the 1957 Act or the CMN Act. No such legislative policy (allocation of coal blocks by the Central Government) is discernible from these two enactments. Insofar as Article of the Constitution is concerned, there is no doubt that the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws and the executive instructions can fill up the gap not covered by statutory provisions but it is equally well settled that the executive instructions cannot be in derogation of the statutory provisions. The practice and procedure for allocation of coal blocks by the Central Government through administrative route is clearly inconsistent with the law already enacted or the rules framed.”

In the final decision, Hon’ble Supreme Court held that the allocation of the coal blocks on the recommendations of the Screening Committee is illegal and accordingly cancelled such allocations. The relevant part of the order is extracted as under:

163. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14.7.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of arbitrariness and legal flaws. The Screening Committee has never been consistent, it has not been transparent, there is no proper application of mind, it has acted on no material in many cases, relevant factors have seldom been its guiding factors, there was no transparency and guidelines have seldom guided it. On many occasions, guidelines

have been honoured more in their breach. There was no objective criteria, nay, no criteria for evaluation of comparative merits. The approach had been ad-hoc and casual. There was no fair and transparent procedure, all resulting in unfair distribution of the national wealth. Common good and public interest have, thus, suffered heavily. Hence, the allocation of coal blocks based on the recommendations made in all the 36 meetings of the Screening Committee is illegal.”

38. The Hon’ble Supreme Court held in the above judgement that the power of the Central Government to allocate coal block is neither traceable to CMN Act nor to MMDR Act. Hon’ble Supreme Court has come to the conclusion that the implementation of the provisions of CMN Act and MMDR Act by the Government for allocation of coal blocks through Screening Committees and Government Dispensation was arbitrary, non-transparent, and unfair and accordingly cancelled the allocation. Therefore, the judgment of the Supreme Court resulting in cancellation of the coal block allocated to the Petitioner cannot be considered as change in interpretation of the provisions of CMN Act and MMDR Act and hence it will not be covered under Article 10.1.1 (b) of the PPA/PSA.

39. The Petitioner has further argued that the judgment of the Hon’ble Supreme Court cancelling the coal block also qualifies as Change in Law under Article 10.1.1 (c) and Article 10.1.1 (d) of the PPA/PSA as a new condition of participation in the auction process for coal blocks under the Coal Block (Special Provisions) Act, 2015 has been prescribed. Clauses 10.1.1(c) and (d) of the PPA/PSA are extracted as under:

“(c) the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;

(d) change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;”

The judgement of the Hon’ble Supreme Court found that allocation of coal blocks through Screening Committees and Government Dispensation was arbitrary,

non-transparent, and unfair and accordingly cancelled the allocation. The judgment did not impose any new requirement nor changed the terms and conditions for obtaining consents, clearances and permits for allocation of coal block. Therefore, the case of the Petitioner cannot be covered under Article 10.1.(c) and (d) of the PPA/PSA.

40. The Petitioner has also submitted that its case is covered under Article 10.1.1 (f) of the PPA/PSA, i.e. any change in the law relating to Mining Laws or Environmental Laws or Tax or Cess or Duties affecting the input cost of raw material. We have considered the submission of the Petitioner. The Govt. of India previously allocated the coal blocks within the framework of Coal Mines Nationalization Act, 1957 and Mines and Minerals (Development and Regulation) Act, 1957. Subsequent to the cancellation of coal block allocation by the Supreme Court, Parliament enacted Coal Mines (Special Provisions) Act, 2015. Therefore, enactment of the Coal Mines (Special Provisions) Act, 2015 changing the process of allocation of coal block through auction from the earlier practice of Screening Committee Route and Government Dispensation Route is a change in mining law which affects the input cost of the Petitioner.

41. In view of the above, we hold that enactment of Coal Mines (Special Provisions) Act, 2015 prescribing the auction route for allocation of coal block amounts to change in law if it affects the input cost of the Petitioner. However, in the present case, though the Petitioner participated in the auction process, it did not become successful and therefore the Petitioner cannot take the benefit of Article 10.1.1 (f) of the PPA.

42. The Petitioner has filed IA No. 24/2019 to place on record the judgment of APTEL dated 21.12.2018 in Appeal No. 193 of 2017 (GMR Kamalanga Energy Limited (GKEL) vs. Central Electricity Regulatory Commission and Ors.). The Petitioner has submitted that APTEL in the said judgment has held the cancellation of coal blocks by the Hon'ble Supreme Court amounts as Change in Law event and the said judgment squarely applies to the Petitioner's case. The Petitioner in the IA has prayed for direction to the Respondents to make payment of 75% of outstanding dues towards change in law along with carrying cost. WBSEDCL has refuted the claims of the Petitioner.

43. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. The Appellate Tribunal in its judgement dated 21.12.2018 in Appeal No.193 of 2017 and IA No.449 of 2018 (GMR Kamalanga Energy Limited & another Vs. Central Electricity regulatory Commission & Others) dealt with the issue of cancellation of coal block by the Hon'ble Supreme Court as under:

“65. Add on premium price on the notified price of coal supplied to tapering linkage holders

Central Commission opined that the add on premium price over and above the notified price of coal under tapering linkage is not change in law in terms of Bihar PPA. The Commission opined as under in the impugned order:

“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 tapering 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 the 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 MCL and therefore cannot be recovered under Change in Law.”

66. According to Appellants, this opinion of Commission is wrong since FSA pertaining to tapering linkage signed between the parties on 28-8-2013 for capacity of 2.384 MTPA as several Clauses envisages with reference to add on price under what circumstances such add on price should be levied. Clause 9 of the FSA refers to price of coal as under:

“9.1(a) Add-on Price: For coal supplies after the Normative Date of Production, additional 40% of the Base Price shall be payable by the Purchasers as ‘Add-on price’ for coals of GCV of 5800 kCal/Kg and below.”

Even in the FSA entered into between ECL and the Appellant on 29-5-2014 after transferring certain quantum of coal supply from MCL to ECL (tapering linkage), such clauses pertaining to price of coal and add on price were noted which defines price of coal similar to the above mentioned meaning but additional percentage of the price is reduced from 40% to 20%. Except this, all other contents of Clauses 9, 9.1(a) are exactly the same.

67. Tapering linkage was granted till operationalization of captive coal blocks. Captive coal block had to be developed on or before 17-10-2013. As already stated above, for the reasons beyond the control of GKEL, delay in operationizing the coal block had occurred on account of Go-No-Go policy of MOEF. Therefore, it had to rely on the tapering coal linkage. This fact is not denied.

68. Meanwhile, on 25-8-2014 by virtue of judgment of the Hon’ble Apex Court in the case of Manohar Lal Sharma vs. The Principal Secretary & Ors, entire allocation of coal block made by Screening Committee from 14-7-1993 onwards in 36 meetings and allocations made through the Govt. dispensation route were held to be illegal. As a consequence, de-allocation order came to be passed on 24-9-2014 which cancelled allocation of 204 coal blocks including Rampia etc. with immediate effect. Therefore, Captive Coal Block came to be cancelled. Prior to this, the delay between October 2013 till date of judgment, it was on account of Go-No-Go policy of MOEF which was beyond the control of Appellant. Additional 40% or 20% of the base price was payable by the purchasers as “add on price” for coals after the normative date of production. On account of reasons mentioned above between the scheduled date of coal block and the judgment in Manohar Lal Sharma, it was a case of force majeure and from the date of judgment, it was on account of change in law (due to NCDP of 2013).

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.”

It is observed from the judgement of the Appellate Tribunal as quoted above that the issue was considered in the context of the add on premium price on the notified price of coal supplied to tapering linkage holders. The Appellate Tribunal has taken note of the fact that tapering linkage was granted to GMR Kamalanga till operationalisation of captive coal blocks. Though the captive coal block was to be

developed on or before 17.10.2013, delay in operationalising the coal block had occurred on account of Go-No-Go policy of MoEF. Consequently, GMR Kamalanga had to rely on tapering coal linkage. The Hon'ble Supreme Court passed the judgment on 24.9.2014 cancelling the allocation of coal blocks. The Appellate Tribunal has held that it was a case of force majeure between the schedule date of operationalisation of coal block and the judgment in Manohar Lal Sharma and from the date of judgment, it was on account of change in law due to NCDP, 2013. The Appellate Tribunal has held that the consequential financial impact on account of the delay in development of the captive coal block and consequent cancellation by virtue of the judgment of the Hon'ble Supreme Court in respect of the add on premium is covered under Change in Law. The Appellate Tribunal has opined that GMR was entitled for compensation for increase in cost due to continued use of tapering linkage on account of delay in development of coal block as well as cancellation of blocks by the judgement of the Hon'ble Supreme Court.

44. In the light of the judgment of the Appellate Tribunal in GMR case, the Petitioner shall be entitled for compensation to the extent of shortfall in tapering linkage granted to it pending operationalisation of the captive coal block which are met through e-auction coal or imported coal, etc. for generation and supply of electricity to the Respondent WBSEDCL. Accordingly, we direct the Petitioner to approach the Commission through a fresh petition giving a details of the tapering linkage granted to it, the reasons for the delay in development and operationalisation of captive coal block, the coal requirement met through e-auction/imported coal to meet the shortfall in supply under tapering linkage.

45. The Petition No. 305/MP/2015 along with IA No. 24/2019 is disposed of in terms of the above.

**sd/-
(I.S. Jha)
Member**

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

**sd/-
(P.K. Pujari)
Chairperson**