

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 105/MP/2017  
alongwith  
I.A. No. 42/2017**

**Coram:  
Shri A.K. Singhal, Member  
Shri A.S. Bakshi, Member  
Shri M.K. Iyer, Member**

**Date of Order: 20<sup>th</sup> March, 2018**

**In the matter of**

Petition under Section 79 (1) (b) and (f) of the Electricity Act, 2003 read with Articles 11.6 and 17 of the Power Purchase Agreement dated 7.8.2008 for recovery of unpaid dues towards fuel cost.

**And**

**In the matter of**

GMR-Kamalanga Energy Limited  
Skip House,  
25/1 Museum Road,  
Bangalore – 5600025

**Petitioner**

**Vs**

1. Haryana Power Purchase Centre  
Sector 6, Shakti Bhawan,  
Panchkula, Haryana-134109
2. Dakshin Haryana Bijli Vitran Nigam Ltd  
Vidyut Nagar,  
Hissar (Haryana)
3. Uttar Haryana Bijli Vitran Nigam Ltd  
Vidyut Sadan, Plot No C/16,  
Sector 6, Panchkula (Haryana)
4. Haryana Power Generation Corporation Ltd  
Urja Bhawan, Sector 6,  
Panchkula (Haryana)

5. PTC India Ltd  
2<sup>nd</sup> Floor, NBCC Tower,  
15, Bhikaji Cama Place,  
New Delhi

.....**Respondents**

**Parties Present:**

Shri Amit Kapur, Advocate, GKEL  
Shri Vishrov Mukherjee, Advocate GKEL  
Shri Yashawi Kant, Advocate GKEL  
Ms. Raveena Dhamija, Advocate GKEL  
Ms. Khyati Gupta, GKEL  
Shri G. Umamathy, Advocate UHBVN and DHBVN  
Shri Aditya Singhla, Advocate UHBVN and DHBVN  
Shri Varun Pathak, Advocate, PTC  
Shri Ravi Kishore, PTC India

**ORDER**

The Petitioner, GMR Kamalanga Energy Limited (GKEL) has filed the present petition under Section 79 (1)(b) and (f) of the Electricity Act, 2003 read with Articles 11.6 and 17 of the Power Purchase Agreements dated 7.8.2008 for recovery of the outstanding amount from the Haryana Discoms raised vide supplementary bills towards coal cost incurred by the Petitioner on account of shortfall in domestic firm linkage coal in violation of the Commission's order dated 3.2.2016 in Petition No. 79/MP/2013.

**Background of the case:**

2. GMR Kamalanga Energy Limited has developed a coal fired 1050 MW (Stage I) power project (hereinafter referred to the 'project') at village Kamalanga, District Dhenkanal in Odisha. The Project comprises of two stages i.e. Stage I has three units of 350 MW each and Stage II has one unit of 350 MW. The Project has been accorded Mega Power Project status by the Ministry of Power, Government of India vide its letter dated 1.2.2012.

3. The Petitioner entered into the following long term PPAs for supply of power from the power project:

(a) Supply of 350 MW gross power (Stage 1: 262.5 MW and Stage 2: 87.5 MW) to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006, amended on 4.1.2011 (GRIDCO PPA). Supply of power in terms of the GRIDCO PPA commenced on 30.4.2013.

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

(i) Agreement between GEL (parent company of GKEL) and PTC dated 31.10.2007 which was substituted by PPA dated 12.3.2009; and

(ii) PPAs between PTC and Haryana Distribution Companies dated 7.8.2008 with delivery point as Haryana STU bus-bar (collectively "Haryana PPAs").

(c) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU Bus-bar interconnection point. Supply of power commenced on 3.2.2016.

4. On 23.4.2013, the Petitioner filed Petition No. 79/MP/2013 seeking compensation for change in law events in relation to the Haryana PPAs including increase in cost of

fuel due to shortfall of linkage coal on account of deviation from the New Coal Distribution Policy (NCDP) and changes in the Fuel Supply Agreements (FSAs). The Petitioner has submitted that GKEL had the following fuel procurement arrangements:

- (a) On 25.7.2008, Letter of Assurance (LOA) for firm linkage of 2.14 MTPA coal for 500 MW capacity was issued in favour of GEL;
- (b) On 8.7.2009, LOA for tapering linkage of 2.384 MTPA for 550 MW capacity was issued in favour of GEL till the captive coal block then allocated to GEL was operationalized;
- (c) GKEL entered into FSAs dated 26.3.2013 and 28.8.2013 with MCL;
- (d) Coal India Limited vide its letter dated 26.2.2014 transferred 1.517 MTPA which was part of tapering linkage from MCL to ECL;
- (e) On 29.5.2014, ECL signed an FSA with GKEL for 1.071 MTPA which was amended on 24.5.2014 to 0.626535 MTPA.

5. The Commission vide order dated 3.2.2016 in Petition No. 79/MP/2013 allowed the Petitioner to recover the additional cost incurred on use of coal from alternate sources due to shortage in linkage coal and devised a formula in para 56 of the order for computing the Energy Charge Rate (ECR). The Petitioner has submitted that in terms of the Commission's directions dated 3.2.2016 and based on the formula devised by the Commission therein, the Petitioner raised supplementary bills towards compensation against various change in law events approved by the Commission which

included *inter alia* amounts towards procurement of coal from alternate sources on account of shortage of firm linkage coal. Accordingly, the Haryana Discoms had been paying the supplementary bills including payments towards coal cost incurred on account of shortfall of firm linkage coal and procurement in coal in terms of Step 2 of the formula devised by the Commission in its order dated 3.2.2016. However, HPPC has only made a payment of Rs. 139.97 crore towards supplementary bills for the period till June, 2016. Subsequently, HPPC in its letter dated 22.9.2016 wrote to PTC that the Commission's order dated 3.2.2016 envisaged only coal cost pass through in respect of shortfall in domestic coal of linkage fuel only, and the shortfall in domestic coal and the source of coal used in lieu of shortage in linkage fuel has not been clarified. HPPC also requested the Petitioner for copy of the FSA in respect of Haryana PPA and the quantum of generation the Petitioner can achieve by the assumed quantum of coal under the FSA and other details. HPPC stated that if the replies to the aforesaid queries are not found to be satisfactory, the bill would be construed as a disputed bill as per Haryana PPA. On 26.9.2016, PTC forwarded the letter dated 22.9.2016 by HPPC to the Petitioner.

6. The Petitioner has submitted that in response to HPPC's letter, it clarified to PTC vide its letter dated 6.10.2016, *inter alia* that the supplementary bill raised by it for the month of the July, 2016 was in accordance with the formula prescribed in the Commission's order dated 3.2.2016 supported by Auditor Certificates and all necessary information including the FSA in respect of firm linkage coal have been shared with PTC-HPPC. The Petitioner requested to release the payment as it has to pay interest amount over due to lenders. In response, HPPC stated that the Petitioner's response is

not satisfactory and requested for a meeting to clarify the issues in respect of quantification of linkage fuel/calculation with regard to shortfall in linkage fuel or in the alternative, HPPC's letter dated 22.9.2016 would be treated as a bill disputed under Haryana PPA. In this regard, a meeting was convened on 25.1.2017 but the issues remained unresolved. HPPC wrote to GKEL that since the issues regarding quantification of linkage coal/shortfall quantification could not be resolved at the meeting held on 25.1.2017, the supplementary bills raised by the Petitioner on account of change in law for the period July 2016 to November 2016 have been considered as disputed bills and the bills were returned to the Petitioner. Subsequently, the Petitioner vide its letter dated 6.4.2017 requested UHBVNL to release an *ad hoc* amount till the matter regarding the outstanding amounts on account of supplementary bills was resolved amicably. On 27.4.2017 and 3.5.2017, the Petitioner requested PTC/HPPC to release the undisputed change in law (taxes and duties) arrears towards coal consumed for supply of power to Haryana Discoms through PTC and pay the same regularly on monthly basis.

7. The Petitioner has submitted that as of March 2017, the total amount due to be paid by PTC/Haryana Discoms is Rs. 106,62,42,264/-. On account of non-payment of the outstanding amounts by HPPC, the Petitioner's cash flow and working capital requirement is severely constrained and the payment for procurement of coal and other consumable have been severely affected. The Petitioner has submitted that HPPC has not complied with the requirements under Article 11.6.2 of the Haryana PPA regarding bill disputes and has not issued a valid bill dispute notice qua the said invoices in terms of Article 11.6.1 of the Haryana PPA; therefore, the said supplementary bills for the

period July, 2016 to March, 2017 ought to be treated as conclusive and HPPC should be directed to release the said amounts.

8. The Petitioner has submitted that as per the Commission`s order dated 3.2.2016, the computation of ECR has two elements, namely (a) ECR based on coal supplied under the firm linkage; and (b) ECR based on coal procured through import, open market and tapering linkage. The Petitioner has submitted that the aggregate ECR is a sum of ECRs computed for both elements. The ECR for firm linkage coal is based on the ECR quoted in the bid and included in the Schedule 9 of the Haryana PPA and ECR for imported, open market and tapering linkage coal is determined with reference to the weighted average price of coal from three sources. The Petitioner has submitted that it has been apportioning the coal received under firm linkage to the procurers in the ratio corresponding to their respective capacities in accordance with their order dated 3.2.2016. The Petitioner has further submitted that the order dated 3.2.2016 contemplates that the Petitioner may procurer imported, open market or tapering linkage coal in order to make up the shortfall of coal supplied under firm linkage which shall be paid as per the formula set out in the said order. The Petitioner has submitted that notwithstanding the fact that the tapering linkage has expired, it is entitled to procure coal from the other two sources, namely imported and open market in order to make up the shortfall in linkage coal. Therefore, the contention of HPPC that the step 2 of the formula devised by the Commission in the said order cannot be applied in the absence of tapering linkage is not correct. The Petitioner has submitted that the Petitioner has supplied all relevant information/clarification sought by HPPC and has provided Audited Form 15 and Auditor`s Report in respect of the computation.

9. Against the above background, the Petitioner has made the following prayers:

“(a) Declare that the coal received under firm linkage corresponding to 500 MW is to be utilized on pro-rate basis against the existing long-term PPAs with GRIDCO, Haryana and Bihar respectively.

(b) Direct the Respondents to make the payments against the invoices raised by the Petitioner in accordance with order dated 3.2.2016.

(c) Pass such other order which this Commission may deem fit.”

10. The Petitioner has filed IA 30/2017 seeking directions to the respondents to pay the outstanding amount raised by the Petitioner towards supplementary bills for the period July 2016 to March 2017 pending adjudication of the petition.

11. The matter was heard on 20.6.2017 and notices were issued to the respondents to file their replies. While disposing of the IA No. 30/2017, vide ROP dated 20.6.2017, Haryana Discoms were directed to pay to the Petitioner, the outstanding dues raised in the supplementary bills other than for shortfall in coal linkages which have been disputed by the Respondents.

12. Haryana Power Purchase Centre (HPPC) vide its reply dated 4.8.2017 has submitted as under:

(a) In pursuance of the order dated 3.2.2016, the Respondent No. 1 released payment to the Petitioner from COD upto March, 2016 subject to the approval and verification. In June, 2016, supplementary bills raised by the Petitioner were examined and it was found that the Petitioner was pro-rata loading linkage fuel and seeking open market compensation in its lieu from HPPC which was overlooked by PTC, on whose verifications HPPC had relied upon to release the



payments towards the supplementary bills of the Petitioner. After noticing the incorrect calculation, HPPC withheld payments and same was communicated to the Petitioner. However, the Petitioner failed to provide any such clarifications on the same and continued raising invoices based on the incorrect computation of linkage fuel.

(b) The Petitioner has entered into PPAs with the States of Haryana, Odisha and Bihar. Bihar PPA was executed two years after the entering into Haryana and Odisha PPAs on the initial basis of tapering linkage and thereon afterwards, consumption of fuel was to be from the Petitioner's own mines. The PPA with HPPC was secured through valid linkage fuel under FSA of 500 MW and HPPC is only liable to pay the shortfall in domestic coal upto the extent of shortfall in the linkage fuel as per NCDP. Therefore, the shortage in tapering linkage component cannot be loaded upon HPPC as the Commission in Para 55 of the order dated 3.2.2016 has settled and limited the Respondent's obligation to be fulfilled from linkage fuel solitary.

(c) The formula devised by the Commission is to calculate the energy charge for coal procured from other areas to fulfill deficit of linkage fuel of 500 MW. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Energy Watchdog and Others Vs. Central Electricity Regulatory Commission upheld that shortfall in NCDP is allowed under change in law only which is in line with the Commission's order dated 3.2.2016. Therefore, the Petitioner cannot be allowed to raise bills of other fuel viz. tapering or open market except for shortage in domestic fuel.

(d) The Minutes of the Meeting of the Standing Linkage Committee Long-term for Power dated 14.2.2012 for the purpose of reviewing the status of existing coal linkage/LOA in Power Sector, unmistakably exhibits the Kamlanga Linkage of fuel at 2.384 MTPA which is subsequently sufficient for the obligation of the Haryana PPA.

(e) The Petitioner on its own accord changed its plant capacity at a later stage, reflected and observed in the Minutes of the Meeting dated 17.1.2013 and such additional capacity should be entirely construed to the generator-its costs and risks involved and not upon the rights of the already concluded PPAs. Therefore, HPPC is only liable to make the payments up to the extent of shortfall in domestic coal under linkage fuel only.

13. PTC India Limited (PTC) vide its reply dated 21.8.2017 has submitted that while raising the bills for this additional amount, the generator verified these figures from the auditors and submitted the same to PTC for onward claiming from HPPC. On receipt of the bills from the Petitioner, PTC ensured that the bills were duly certified by the auditor as required by the order dated 3.2.2016. After satisfaction that the bills were duly certified by the auditors, PTC raised its bill for similar amount on HPPC. HPPC paid the bills upto the month of June, 2016 and raised certain doubts as regards interpretation especially with regard to the allocation of the linkage quantum of coal for 500 MW on pro-rata basis. PTC has submitted that in the meeting held on 24.4.2017 between the Petitioner, HPPC and PTC, a mutual agreement was reached between the parties for approaching the Commission for clarification of the order dated 3.2.2016.

15. Subsequently, the Petitioner filed IA No. 42/2017 seeking clarification that the Commission's directions dated 20.6.2017 with regard to payment of undisputed amounts pertain only to the supplementary bills raised for the month of July, 2016 onwards, and that no deductions can be made from the supplementary bills raised for the period prior to July, 2016 which have already been paid by Haryana Discoms.

16. HPPC, vide its reply to the IA dated 22.8.2017, has submitted that the Commission in its order dated 3.2.2016 in Petition No. 79/MP/2013 had observed that Haryana Power Purchase Agreement is under Fuel Supply Agreement only. This implies that Haryana 324 MW (EX- Bus generation) is from coal available under FSA of linkage fuel with Coal India Limited. It further implies that 60% of the coal is to be allocated to Haryana from 500 MW FSA and the rest is at the disposal of the Petitioner to adjust with other beneficiaries under PPA obligations. HPPC has further submitted that as per the Commission's order, only shortfall in coal under linkage fuel is to be pass through i.e. shortfall under 500 MW of FSA with Coal India Limited, whereas, the Petitioner is not complying with the directions given in the order and is misrepresenting by calculating the energy charge for balance capacity generation beyond FSA and loading the same on Haryana as shortfall in domestic fuel. HPPC has submitted that since, there is no shortfall in domestic coal under FSA, HPPC is not liable to pay compensation to the Petitioner under the shortfall in domestic coal. HPPC has further submitted that it has paid Rs. 35 crore towards CIL bills as advance with the understanding that the same shall be adjusted @ 12% interest after the adjudication of the present dispute made payments for the supplementary bills raised for the period

prior to July, 2016 based on certification from PTC. The Petitioner has wrongly claimed the shortfall in domestic coal to the tune of Rs. 105 crore till July, 2016 and the same needs to be reimbursed to Haryana with late payment surcharge.

17. The Petition along with IA was heard on 29.8.2017. The Petitioner, HPPC and PTC vide Record of Proceedings for the hearing dated 29.8.2017 were directed to convene a joint meeting to resolve the issue regarding recovery of unpaid dues towards fuel cost in terms of order dated 3.2.2016 and submit a report in this regard.

**Submissions of the Petitioner and HPPC pursuant to Commission`s direction dated 29.8.2017.**

18. The Petitioner vide its affidavit dated 7.10.2017 has submitted that in pursuance of the Commission`s directions dated 29.8.2017, a meeting was convened on 25.9.2017 to resolve the issue. The Petitioner has submitted that during the meeting, the representative of the Petitioner presented the computation of invoices for July, 2016 and August 2016, which was based on the methodology stipulated by the Commission`s order dated 3.2.2016. However, the representatives of HPPC were of the view that since, there was a divergence regarding the methodology stipulated by the Commission, there would necessarily be a difference in computation arrived at by the Petitioner and HPPC. The Petitioner has submitted that for computing ECR at delivery point, factor G has been computed as percentage of assured quantity under NCDP or available stock of linkage coal, whichever is maximum to the linkage coal required to meet the scheduled generation, as per the definition of factor G in the Commission`s

order. The Petitioner has submitted that monthly compensation has been worked out as per Paragraph 73 (b) of the Commission's order. The Petitioner has submitted that as per the Commission's order and FSA dated 26.2.2013, the Annual Contracted Quantity (ACQ) shall be in proportion of the percentage generation covered under long term PPAs with Discoms. ACQ of 2.0009 MTPA under FSA was supplied under NCDP till September, 2014 and the coal was allocated between the then operating PPAs: GRIDCO and PTC/Haryana. As the Bihar PPA became operational, the FSA quantum was revised to 2.14 MTPA from September 2014 and linkage coal supplied as per NCDP was allocated between the beneficiaries. The Petitioner has submitted that the computation of shortfall as submitted by HPPC on 23.8.2017 is incorrect since as per Commission's order dated 3.2.2016, the shortfall was to be calculated based on coal received in the month and percentage shortfall during a month. Percentage of shortfall during the month is to be derived based on coal received as a percentage of the linkage coal required towards scheduled generation of all the long term PPAs. The Petitioner has submitted that in response, the representative of HPPC has submitted that firm linkage of 2.14 MTPA was meant exclusively for the Haryana DISCOMs. HPPC, referring the para 48 of the Commission's order dated 3.2.2016 has stated that the Petitioner has a long term PPA with the Haryana DISCOMs and FSA clearly provides that ACQ of 1.819 million tonne is proportionate to the capacity tied up under long term PPA with Discoms/PTC. The representative of the HPPC further submitted that the methodology stipulated in para 56 and 73 (b) of the Commission's order dated 3.2.2016 is with reference to Haryana Discoms only. The shortfall and compensation are to be

calculated for Haryana Discoms and not at station level. The Petitioner has submitted that the parties were unable to arrive at any consensus.

19. HPPC vide its affidavit dated 11.10.2017 has reiterated the facts of the case and submitted that the Petitioner engaged with the Bihar PPA and Odisha PPA after signing the Haryana PPA and therefore, the terms of the Haryana PPA cannot be diluted for signing any amended PPA or entering into new contract which was executed two years after signing of Haryana and Odisha PPAs on the initial basis of tapering linkage and thereafter, consumption of fuel was to be from the Petitioner's own mines. It is evident from the admission of the Petitioner in Petition No. 112/MP/2015 that Bihar PPA is from tapering linkage till the mines are not operational. Therefore, the firm linkage fuel cannot be adjusted with Bihar in any manner. HPPC has further submitted as under:

(a) As per para 48 and para 49 of the Commission's order dated 3.2.2016, Haryana PPA is within the linkage fuel allocated to the Petitioner, i.e., 500 MW.

(b) As per para 56 of the Commission's order dated 3.2.2016, step-wise formula has been devised. HPPC has submitted that following observations:

(i) Step-II: Only alternate coal (imported/tapering linkage/spot purchase/E-auction) used for Haryana's shortfall obligation needs to be considered for calculation of alternate fuel. Weighted GCV of the specific type alternate coal used for shortfall in FSA for Haryana's obligation is to be considered. However, the Petitioner is considering ECR of alternate coal for the plant as a whole for shortfall in linkage fuel and the balance plant capacity, i.e., 550 MW plus shortfall in linkage capacity on alternate fuel.

(ii) Step-III: GMR is pro-rata distributing the generation achievable through linkage fuel whereas HPPC is seeking the implementation of Paragraph 48 of the Commission's order in totality and adjust the linkage fuel allocated for the Haryana PPA obligation and claim shortfall, thereof, under the FSA.

(iii) The Petitioner is considering the component (1-G) for the plant as a whole to calculate the energy charge, whereas HPPC is seeking adjustment upto the extent of specific alternate fuel used against shortfall in supply on account of deficit in linkage fuel for HPPC's obligation only.

(c) Therefore, there is a disagreement and negotiations have failed in arriving at an agreeable solution.

(d) HPPC has prayed to direct the Petitioner to give undertaking that there is a shortfall in linkage fuel along with supporting certification from CIL or CIL may be asked to provide the certification of quantum in shortfall in linkage fuel, and any misrepresentation on part of the Petitioner should result in penalty in proportion to the capacity charges of the prevailing year.

### **Proceedings before the Commission**

20. During the course of hearing dated 20.12.2017, learned counsel for the Petitioner submitted that the Commission vide order dated 3.2.2016 in Petition No. 79/MP/2013 has allowed the Petitioner to recover the additional cost incurred on use of coal from alternate sources due to shortage in linkage coal. The said order has attained finality as far as the issue of compensation for shortfall of linkage coal is concerned. Learned counsel submitted that as per the formula given by the Commission in the said order dated 3.2.2016, the computation of ECR has two elements i.e. ECR based on coal supplied under the firm linkage and ECR based on coal procured through import, open

market and tapering linkage. The Petitioner is charging the respondent in accordance with the order dated 3.2.2016 which contemplates that the Petitioner shall apportion the firm linkage coal supply to it pro rata to all the beneficiaries i.e. Haryana Discoms, GRIDCO and Bihar Discoms. Further, the Petitioner may also procure imported, open market or tapering linkage coal in order to make up the shortfall in coal supplied under firm linkage and the cost of procurement of coal from alternate source will also be apportioned pro rata based on power supplied to the beneficiaries. Learned counsel for the Petitioner submitted that since, the linkage coal was granted with respect to all the beneficiaries, the linkage coal has to be apportioned to Haryana Discoms proportionate to the capacity being supplied to them. It is incorrect on the part of Haryana Discoms to assume that the linkage coal has to be appropriated for Haryana Discoms only.

21. Learned counsel for HPPC submitted that pursuant to the Commission's direction dated 29.8.2017, HPPC convened a meeting with PTC and the Petitioner on 25.9.2017 to resolve the issue. However, no amicable settlement could be reached in the meeting. During the meeting, PTC did not submit anything on the issue. However, the petitioner reiterated its earlier stand that it is equally distributing the linkage fuel to all the beneficiaries and the energy charge for alternate fuel against the shortfall in domestic coal is done for the plant as whole and passing it on the Haryana Discoms on pro rata basis. Learned counsel for HPPC submitted that the Commission in order dated 3.2.2016 in Para 55 has clearly adjudicated that the shortfall in linkage fuel is allowed and the respondent is ready to give the same for shortfall in NCDP if any, attributed upon the respondent. Learned counsel argued that the Petitioner is pro rata distributing



the generation achievable through linkage fuel whereas the respondent is seeking the implementation of para 48 of the order dated 3.2.2017 in totality and adjust the linkage fuel allocated for Haryana PPA obligation and to claim the shortfall thereof, if any under FSA.

**Analysis and Decision:**

22. The Petitioner has filed the present petition seeking a declaration that the coal received under firm linkage corresponding to 500 MW is to be utilized pro-rata basis against the existing long term PPAs with GRIDCO, Haryana Discoms and Bihar Discoms respectively and for a direction for recovery of outstanding amount of Rs. 130 crore raised through supplementary bills for the period from July, 2016 to June, 2017 towards cost of coal incurred by the Petitioner on account of procurement of open market coal due to shortfall of domestic firm linkage coal.

23. The Commission vide order dated 3.2.2016 in Petition No.79/MP/2013 allowed the Petitioner to recover the additional cost incurred on use of coal from alternate sources due to shortage in linkage coal and devised a formula for computing the Energy Charge Rate. Pursuant to the said order, the Petitioner issued supplementary bills on Haryana Discoms in accordance with the said formula and Haryana Discoms made payment for supplementary bills for the months of February, 2014 to June 2016 amounting to Rs. 140.06 crore. Subsequently, Haryana Discoms declined to make payments against the supplementary bills from July, 2016 to March 2017 on the ground that the supplementary bills were not as per the order dated 3.2.2016.

24. The main contention of HPPC is that the Haryana PPA was based on the firm coal linkage of 500 MW and therefore, HPPC is liable to pay only for the shortfall in domestic coal upto the extent of shortfall in the firm linkage fuel as per NCDP and the shortage in tapering linkage component cannot be loaded upon HPPC as the Commission in order dated 3.2.2016 itself has settled and limited the HPPC's obligation to be fulfilled solely from linkage fuel.

25. The Petitioner has submitted that as per the formula given by the Commission in order dated 3.2.2016 in Petition No. 79/MP/2013, the computation of ECR has two elements i.e. ECR based on coal supplied under the firm linkage and ECR based on coal procured through import, open market and tapering linkage. The aggregate ECR is a sum of ECRs computed for both elements. Therefore, the order dated 3.2.2016 contemplates that the Petitioner shall apportion the firm linkage coal as well as cost of coal from the alternate sources pro rata as per energy scheduled to Haryana.

26. We have considered the submissions of the Petitioner and the Respondents and perused the documents on record. The issue that arises for our consideration is whether supply of power to Haryana Discoms was/is to be met from the coal received by the Petitioner under the FSA dated 26.3.2013 in terms of the order dated 3.2.2016 of the Commission in Petition No.79/MP/2013.

27. The Petitioner entered into the long term PPAs for supply of power from the power project, namely (a) Supply of 350 MW gross power (Stage 1: 262.5 MW and

Stage 2: 87.5 MW) to GRIDCO in terms of PPA dated 28.9.2006 (as amended on 4.1.2011 with delivery point as Odisha STU inter-connection point); (b) Supply of 350 MW gross power (300 MW net of transmission losses and auxiliary consumption) to Haryana Discoms based on the competitive bidding through back to back arrangements with PTC; (c) Supply of 282 MW gross power (260 MW net of auxiliary consumption) to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point. Supply of power under GRIDCO PPA commenced on 30.4.2013, under Haryana PPA on 7.2.2014 and under Bihar PPA on 1.9.2014.

28. The Petitioner filed Petition No. 79/MP/2013 for approval of compensation for Change in Law events qua the Haryana Discoms. In order dated 3.2.2016, the Commission allowed that shortfall of coal from the firm linkage granted to the Petitioner shall be met from the alternative sources including imported coal and the expenditure thereon shall be passed on as Change in Law. The Commission in order dated 3.2.2016 has held as under:

“41. The Petitioners have submitted that the power project was conceived on the basis of domestic coal to be sourced from linkages and share of coal from captive coal blocks. Thereafter, there have been substantial changes in the Coal Policy and availability which has affected the project economics. On 18.10.2007, Government of India introduced the New Coal Distribution Policy (NCDP) in terms of which Coal India Limited or its subsidiaries were responsible for supply of 100% of the fuel quantity to all the IPPs including the Petitioner. GMR Energy Limited (GEL) was issued LOAs by Mahanadi Coalfields Ltd on 25.7.2008 and 8.7.2009 providing firm linkage of 2.14 MTPA coal for 500 MW and tapering linkage of 2.384 MTPA for 550 MW respectively in terms of the NCDP which were subsequently transferred in the name of GKEL. The Petitioner have submitted that the assured supply of 100% of the coal requirement was the fundamental premise on which power could be supplied under the Competitive Bidding Regime. The Petitioner have submitted that subsequent to the submission of the Haryana bid on 23.11.2007, there were substantial deviations from the New Coal Distribution Policy (NCDP) and the stipulations in the model FSA due to decision of the Government of India. On 17.2.2007, Ministry of Coal advised CIL that for power utilities which have been commissioned after 31.3.2009, CIL should enter into FSAs with those utilities which have long term PPAs with the distribution companies. According to the Petitioner, a new model FSA was issued by CIL on 19.4.2012

which substantially altered the terms and conditions of the NCDP such as (i) no penalty was on CIL if the quantity of coal supplied is less than 100% but at least 65% of the annual contracted capacity; (ii) CIL had the option of supplying up to 15% of the coal by way of imported coal; and (iii) supply of coal was limited to the percentage of generation covered under long term PPAs with the distribution companies. CEA in its letter dated 19.4.2011 also noted the issue of imported coal to ensure that all future coal based thermal power stations should be designed to accommodate use of imported coal. Mahanadi Coalfield Ltd. has signed FSA with GEKL on 26.3.2013 which is based on the model FSA which has significant deviation from NCDP. The Petitioner have submitted that the reduction in the assured quantity of coal from 100% to 65% of annual contracted capacity and consequent effect on the Petitioner to tie up coal from other sources has significant effect on the cost or revenue of the project of the Petitioner. The Petitioner have submitted that the deviations from NCDP and the stipulations in the model FSA are a result of the decision of the Government of India particularly the Ministry of Coal and signifies change in policy of the Government of India and therefore, is covered under change in law.

42. The Petitioners have submitted that the delay in development and operationalizing the captive coal block has had a significant impact on the business of GKEL. It has been submitted that GKEL has tied up 892 MW of power through long term PPAs including supply to Haryana Discoms for which GKEL require approximately 4.5 MTPA per annum against which it has a firm linkage for 2.14 MTPA and tapering linkage for 2.38 MTPA for a limited period till the supply of coal from captive coal block which has been significantly delayed on account of non-receipt of Prospecting Licence from Government of Odisha. The Petitioner have submitted that the project should be restored to the same economic condition as it would have been had the fundamental changes affecting availability of coal through linkages or from captive coal mines had not occurred. The Petitioner have submitted that the Commission may devise a mechanism to compensate GKEL for the increase in the cost for purchasing coal from sources other than linkage coal and coal from captive coal blocks on account of change in law events by way of deviation from NCDP and changes in policies of the Indian Government Instrumentalities in terms of allocation of coal.

43. Haryana Discoms have submitted that Haryana invited Case 1 bids where the GEL/PTC were one of the successful bidders. The essence of Case 1 bidding is that the bidder has to quote tariff including all factors at the State periphery. GEL/PTC ought to have factored all the issues at the time of Case 1 bidding participation and should not seek revision on any of the grounds. Haryana Discoms have further submitted that it is the duty of project developer to take care of all the issues faced by them and the procurers are only required to pay the agreed tariff on account of power received by them. During the hearing, learned counsel for Haryana Discoms submitted that the project was conceived based on domestic coal and the imported coal was never the basis for the project and any increase in cost on account of imported coal cannot be fastened to the procurers.

44. Learned counsel for the Petitioner submitted during the hearing that as per the decision dated 21.6.2013 of Cabinet Committee on Economic Affairs, CEA issued directions to all generating companies to provide for imported coal blending facility due to shortage of domestic coal. The Petitioner have placed reliance on the Commission's statutory advice dated 20.5.2013 to the Central Government recommending for allowing the cost of imported coal being supplied by CIL and its subsidiaries as pass through under the Change in Law provisions of the PPA.

45. We have examined the submissions of the Petitioner and the Respondents. HPGCL invited bids for procurement of power. As per para 2.7.2.1 of the RfP document issued by HPGCL, the bidders were required to quote tariffs under Stream 1 and Stream 2 while preparing and submitting financial bid. Under Stream 1, the bidders were required to quote a fixed tariff for both Capacity Charge and Energy Charge during the term of the PPA. Under Stream 2, the bidders were required to quote firm Capacity Charge or a combination of escalable and non-escalable Capacity Charges, and firm Energy Charge or a combination of escalable and non-escalable Energy Charges. Under both streams, the Transmission Charge of the intervening CTU network upto the Delivery Point (CTU-Haryana inter-connection) would not be part of capacity or Energy Charge and needed to be quoted separately. As per RfP, the bidder was required to indicate the progress/proof of in support of fuel arrangement through submission of copies of anyone or more of (a) linkage from fuel supplier; (b) Fuel Supply Agreement between bidder and Fuel Supplier; (c) Coal Block Allocation letter/in principle approval for allocation of captive coal block from Ministry of Coal; (d) Other details submitted by the Bidder subject to the acceptance by the Procurer as sufficient proof of demonstration of ability. The RfP further provided that the Bidder in the event of being the successful bidder would be required to show a firm fuel supply agreement/linkage by the time of conditions subsequent as mentioned in the PPA. Thus the requirement under the bidding conditions was that the bidder should be able to demonstrate its ability to procure fuel for supply of power to Haryana Discoms in the event of being declared as a successful bidder.

46. GEL was issued a Letter of Assurance by Ministry of Coal on 20.9.2007 on normative basis for 500 MW capacity. It was made clear in the LOA that CIL would issue Letter of Assurance in terms of the provisions of New Coal Distribution Policy (NCDP) which was under issue at that point of time. PTC while submitting the bid on behalf of GEL submitted the LOA dated 20.9.2007 issued in favour of GEL in support of proof of fuel arrangement. The New Coal Distribution Policy was notified by Government of India on 18.10.2007. Para 2.2 and 7.2 of the NCDP provided as under:

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

7.2 The FSAs would cover 100% of normative coal requirements of the Power Utilities, including Independent Power Producers (IPPs) and Captive Power Plants (CPPs), Fertilizer units and 75% of normative coal requirement of other consumers.”

NCDP further provided that in order to meet the shortfall in domestic requirement of coal, CIL might have to import coal as per the requirement from time to time, if feasible and would adjust the overall price of coal accordingly. Thus, under the NCDP, it became the responsibility of CIL or its subsidiaries to meet full requirement of coal under FSAs even by resorting to imports, if necessary to the extent of shortfall.

47. GEL was also allocated a captive coal blocks with 5 others vide letter dated 6.11.2007. Subsequently, GEL was approved by SLC-LT for issue of LOA for tapering

linkage for 500 MW in accordance with NCDP since development of coal block was taking time. LOA for coal linkage for 500 MW was issued on 25.7.2008 for 2.14 million tonnes of coal per annum as per normative requirement of the plant. Subsequently, LOA was issued for 2.384 million tonnes per annum of F grade coal for 550 MW capacity. The LOAs were valid for a period of 24 months and FSAs were to be signed within 3 months from the expiry of validity of LOAs. It has been clearly stipulated in the LOAs that “in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.” Thus the LOAs which were issued in pursuance to NCDP clearly provide that in the event of shortage of coal, the requirement shall be met through import of coal. GEKL and Mahanadi Coalfield entered into FSA on 26.3.2013. The FSA provides for supply of annual contracted capacity of 18.19 lakh (1.819 million) tonnes of coal from any source/coalfield of MCL proportionate to the 425 MW generation capacity covered under the long term PPA with DISCOM/PTC having long term back to back PPA with DISCOM. Para 4.3 of the FSA provides that in case the Seller is not in a position to supply the scheduled quantity of coal from the sources indicated, the seller shall have the balance quantity of coal through import which shall not exceed 15% of the ACQ in the year 2012-13, 2013-14 and 2014-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards.

48. NCDP is a policy statement of Government of India with regard to supply of coal. NCDP clearly provides that in case of shortage in supply of coal by CIL or its subsidiaries, the shortfall will be made up through import. The LOAs issued to GEL/GEKL also provided that shortfall would be made through import. Similarly, the FSA provided that shortfall in supply of coal by CIL or its subsidiaries would be made through import. Therefore, meeting part of the coal requirement through import has been provided in NCDP and has been reiterated through the LOAs and FSA in favour of GEKL. It is significant to note that the Petitioner has long term PPAs with Haryana Discoms and the FSA clearly provides that ACQ of 1.819 million tonne is proportionate to the capacity tied up under long term PPA with Discoms/PTC having long term back to back PPA with Discoms. Thus, coal for supply of power to Haryana Discoms is secured through the FSA. In so far as captive coal block is concerned, the Petitioner was granted tapering linkage of 550 MW on account of delay in development of captive coal block. The Petitioner has not disclosed in the petition whether the FSA for supply of coal covered under the LOA for tapering coal linkage has been signed or not.

49. It is significant to note that the Petitioner as an IPP has entered into PPAs with Haryana Discoms for supply of power from part of its capacity under Case 1 bidding. As per Para 2.7.2.4 of the RfP issued by HPGCL, the Petitioner was required to quote an all inclusive tariff. The said para provides for the following:

“2.7.2.4 The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Bidder and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) must be reflected in the Quoted Tariff.

Under Case 1 bidding, it is the responsibility of the project developer to arrange for coal and the project developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply power on sustained basis. The procurer does not take any responsibility in so far as fuel is concerned. Therefore, Haryana Discoms are responsible only to the extent of payment of charges in accordance with the PPAs for the power supplied to them.

50. On account of inability of the Coal India Limited to meet the requirement of coal of power sector in respect of the projects likely to be commissioned by 31.3.2015, it was decided by the Cabinet Committee on Economic Affairs (CCEA) after taking into account the statutory advice of this Commission to the Central Govt. under Section 79 (3) of the Act, that considering the domestic coal availability and actual requirements, FSAs would be signed for domestic coal quantity of 65%, 67% and 75% of the ACQ for the remaining 4 years of 12<sup>th</sup> Five Year Plan and the balance FSA obligations would be met by import of coal by CIL or the IPPs themselves as per the guidelines issued by MOC. Relevant provisions of the decision of CCEA as conveyed vide letter dated 21.6.2013 are extracted as under:

“(i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage which are likely to be commissioned by 31.3.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.

(ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 67 percentage and 75 percentage of Annual Contracted Quantity (ACQ) for the remaining four years of the 12<sup>th</sup> Five Year Plan.

(iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. IPPs may also import coal themselves, MoC to issue suitable instructions.

(iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.

(v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.3.2015, having long term PPAs and a high Bank exposure and without effecting the above decision.”

51. Based on the decision of CCEA, Ministry of Power, Government of India vide its letter dated 31.7.2013 communicated the decision of the Central Government as under:

“After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

(i) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12<sup>th</sup> plan.

(ii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

(iii) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

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

4. As per the decision of the Government, the higher cost of import/market based evacuation coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65% 67% and 75% of LoA for the remaining four years of the 12<sup>th</sup> plan for the already concluded PPAs based on tariff based competitive bidding.

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

52. As per above advisory of the Central Government, the higher cost of import/market based coal to the extent of shortfall in supply by CIL or its subsidiaries under the FSAs/LOAs in respect of the concluded PPAs on tariff based competitive bidding shall be considered in public interest as pass through on case to case basis by the Central Commission or the State Commissions as the case may be. It has been further stated in the said letter that the higher cost of imported coal shall be considered as pass through as per the modalities suggested by this Commission. It is pertinent to mention that the Commission in its statutory advice dated 20.5.2013 had advised that the Project Developers whose projects were commissioned or likely to be commissioned between 1.4.2009 and 31.3.2014 would have to approach the Appropriate Commission for claiming the impact of imported coal under change in law which would be decided on case to basis. The Petitioner has signed the FSA with MCL on 26.3.2013. Therefore, the FSA was signed before the statutory advice. As per the FSA, there is no penalty for shortfall in delivery upto 65% for the years 2012-13, 2013-14 and 2014-15. As per the advisory, higher cost of imported coal and evacuation coal shall be made a pass through



to the extent of shortfall in the quantity mentioned in the LOA/FSA and CIL supplied coal which would be 65%, 65% , 67% and 75% of the LOA during the last four years of 12<sup>th</sup> Plan for already concluded PPAs.

53. The Petitioner have submitted that GKEL have incurred an additional cost of Rs.46.10 crore in generation of power to the Haryana Discoms during the months of February, May to July, 2014 due to imported Coal and usage of Open market coal to mitigate the shortfall in the linkage coal and also due to transfer of certain quantum of tapering linkage from MCL to ECL. The Petitioner vide affidavit dated 29.8.2014 have submitted the details of increase in the coal cost as under:

(Table not reproduced and may be referred in the original order)

54. Perusal of the above data reveals that the Petitioner has considered gross generation required in February, May, June and July, 2014 after considering actual Auxiliary Power Consumption of 9.28%, 9.38%, 8.34% and 9.28% respectively and the transmission losses of about 2.95% to delivery power at Haryana STU inter-connection point. The Petitioner in the months of February and May to July, 2014 has considered Gross Station Heat Rate as 2424 kCal/kWh and 2378kCal/ kWh as per 2009 Tariff Regulations and 2014 Tariff Regulations. It is noted that the Petitioner has considered Net Coal available from linkage (firm and taper) after excluding transit losses of 0.8%. Based on these considerations, the Petitioner has computed the actual generation from linkage coal and the balance generation for which coal from import and open market were used. Accordingly, the total fuel cost were arrived at in each month i.e. February, May, June and July, 2014 and the per unit fuel cost has been computed as Rs.1.24/ kWh, Rs.1.66 /kWh, Rs.1.51 /kWh and Rs.1.82 /kWh respectively by dividing the fuel cost by energy supplied to Haryana at delivery point. The difference between actual cost per unit and the cost quoted in the bid has been shown as loss incurred per unit.

55. We have considered the submissions of the petitioner on the additional cost incurred on imported coal and open market coal procured due to shortage in linkage coal for Haryana generation during the months of February, 2014 and May to July, 2014. The following mechanism as given in para 56 below is devised to compute actual additional cost incurred in a month to procure imported coal and coal from open market to make up the deficit portion of coal actually received from linkage.

56. The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering SHR of 2378 kCal/kWh and Aux Consumption of 5.75%. Since, the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as nil.

Step-1:

ECR Linkage coal<sub>(Delivery point)</sub> = [ECR Quoted]

Step-2:

ECR Other coal<sub>(Delivery point)</sub> = {[2378 / Weighted Average GCV of other coal (i.e. imported+openmarket+tapering linkage)] x [Weighted Average Price of other coal (i.e.

imported+openmarket+tapering linkage)] x [1/(1- Aux Consumption)] x [1/(1- Approved Transmission Losses)]]

Step-3:

ECR chargeable at delivery point = {(G x ECR at Step-1) + [ECR computed at Step-2 x (1-G)]}

Where,

G = Generation achievable based on higher of minimum percentage as assured in relevant year as per NCDP or actual percentage of linkage coal received

Weighted Average GCV of other coal =

$$\frac{\{(GCV_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (GCV_{\text{Tapering Linkage coal}} \times Qty_{\text{Tapering Linkage coal}}) + (GCV_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{Tapering Linkage coal}} + Qty_{\text{Open market coal}}\}}$$

Weighted Average Price of Other coal =

$$\frac{\{(Price_{\text{Imported coal}} \times Qty_{\text{Imported coal}}) + (Price_{\text{Tapering Linkage coal}} \times Qty_{\text{Tapering Linkage coal}}) + (Price_{\text{Open market coal}} \times Qty_{\text{Open market coal}})\}}{\{Qty_{\text{Imported coal}} + Qty_{\text{Tapering Linkage coal}} + Qty_{\text{Open market coal}}\}}$$

Compensation = {(ECR as computed at Step-3- ECR<sub>Quoted</sub>) x (Scheduled Generation at delivery point)}

Note: 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.

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

3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.

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

29. It is pertinent to mention that the Hon`ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeal Nos.5399-5400 of 2016 and others [Energy Watchdog Vs. Central Electricity Regulatory Commission and others] has held that shortfall of domestic linkage coal under NCDP is a change in law event. Relevant portion of the said judgment is extracted as under:

“53. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows:

\* \* \* \* \*

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

In view of the above judgment, the shortfall in linkage coal which is met through imported coal, e-auction and open market coal is allowable under change in Law.

30. HPPC has submitted that in terms of the directions in para 48 of the order dated 3.2.2016, coal received under the FSA dated 26.3.2013 should be considered for Haryana only and shortfall in supply thereof should be met through import/open market coal which would be payable by Haryana. The Petitioner has submitted that the allocation of coal was made from the entire plant of the Petitioner and therefore, coal shall be used proportionately for generation and supply of power to all beneficiaries namely, GRIDCO, Haryana and Bihar. The Petitioner has further submitted as under:

- (a) The Petitioner had quoted tariff for Haryana PPA considering coal availability for the station from linkage coal and its own Captive Coal blocks based on SLC-LT approval dated 2.8.2007 for 500 MW and Ministry of Coal's decision dated 6.11.2007 to allocate Rampia and Dip side Rampia coal blocks to GKEL. The Petitioner has further submitted that at the time of bid submission, GKEL had envisaged that from the 2<sup>nd</sup> tariff year, there would be supply of coal from its captive blocks.
- (b) Subsequently, two LOAs, namely, LOA dated 25.7.2008 (Firm 2.14 MTPA linkage for 500 MW) and LOA dated 8.7.2009 (Tapering 2.384 MTPA linkage for 550 MW) were issued by Ministry of Coal and as per the aforesaid LOAs, the end-use of coal specified is for use at the Plant.
- (c) The Petitioner had quoted the tariff for Bihar PPA considering the coal availability for the Project from LOAs received from MCL and allotted Coal Blocks which is also reflected in Schedule 5 (B) of Bihar PPA.
- (d) In the SLC minutes dated 14.2.2012, it has been minuted that the tapering linkage coal of 2.384 MTPA is to be utilized for all three PPAs of the Petitioner with GRIDCO, Haryana and Bihar Discoms.
- (e) In terms of Clause 4.1 and 4.2 of the FSA dated 26.3.2013, the ACQ shall be in proportion of the percentage generation covered under long term PPAs with Discoms.

(f) The Tapering Linkage FSA with MCL was signed on 20.5.2014 and Tapering linkage FSA with ECL was signed on 29.5.2014. Further, actual supply of Tapering Linkage started from MCL in the month of June, 2014 and from ECL in the month of July, 2014, when only GRIDCO and Haryana PPAs were operational. The tapering linkage supplies started well before the power supply to Bihar Discoms commenced with effect 1.9.2014 and therefore, the tapering linkage was meant for GRIDCO as well as PTC/Haryana Discoms.

(g) After operationalization of the Bihar PPA in September, 2014, the FSAs for the project were amended to cater to the total requirement of 823 MW towards Long Term PPAs (905 MW with Auxiliary Power Consumption & losses) in the following manner:-

FSA	Till September 2014		From 1 <sup>st</sup> October, 2014	
	MTPA	MW	MTPA	MW
Firm MCL	2.0009	467	2.14	500
Tapering MCL	0.2384	55	0.8669	200
Tapering ECL	0.294525	96.25	0.62653	205
<b>Total For Station*</b>	<b>2.53</b>	<b>618</b>	<b>3.63</b>	<b>905</b>

\* Actual Coal Supplied was as per the terms of the NCDP

(h) The Petitioner has been apportioning linkage coal in accordance with the Order dated 3.2.2016 as also consistent with the SLC Minutes of Meeting dated 14.2.2012

31. On perusal of the documents on record, it emerges that the Petitioner was granted firm linkage of 500 MW and linkage from captive coal mine for 550 MW for its plant which was envisaged to have capacity of 1050 MW(3x350 MW). Subsequently, LOA dated 25.7.2008 was issued for firm linkage of 2.14 MTPA for 500 MW and LOA

dated 8.7.2009 was issued for tapering linkage of 2.384 MTPA for 550 MW by Ministry of Coal. Perusal of the Standing Linkage Committee (SLC) Minutes of Meeting dated 14.2.2012 reveals that the tapering linkage of 2.384 MTPA was allocated to the Petitioner for all three beneficiaries i.e. GRIDCO, Bihar Discoms and Haryana Discoms. The Committee noted that in some cases like GMR Kamalanga Energy Ltd., two separate LoAs were recommended by the SLC (LT) in different meetings, due to change in the configuration/capacity of the unit. The 2<sup>nd</sup>LoA was recommended by the SLC (LT) for the remaining capacity arising out of the changed configuration. On the recommendation of SLC (LT), the LoAs dated 25.7.2008 and 8.7.2009 were issued to the Petitioner for 500 MW and 550 MW respectively to meet the coal requirement for the entire capacity of 1050 MW.

32. FSA dated 26.3.2013 was entered into by the Petitioner with Mahanadi Coalfield Limited for 500 MW of firm linkage coal. The Tapering Linkage FSA with MCL was signed on 20.5.2014 and Tapering linkage FSA with ECL was signed on 29.5.2014.

Paras 4.1.1 and 4.2 of the FSA dated 26.3.2013 provide as under:

“4.1.1 The Annual Contracted Quantity of Coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 18.19 lakh Tes. Per Year from the Seller’s mines and/or from import, as per Schedule I. For part of Year, the ACQ shall be prorated accordingly. The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed the back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity as mentioned in Schedule I.

4.2. The total quantity of coal supplied pursuant to this Agreement is meant for use at Power Plant (3X350 MW), 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA). Located at Village-Kamalanga, Dt. Dhenkanal, Odhisha as listed in Schedule I. The Purchaser shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchaser, shall be fully responsible and each act shall warrant suspension of coal supplies by the Seller in terms of Clause 14.1 (b).”

It is evident from the above provisions of the FSA that the total quantum of coal supplied pursuant to the FSA is meant for use at the power plant (3x350 MW) of the Petitioner. Further, ACQ would be in proportion to the percentage of generation covered under long term PPAs either with the DISCOMs directly or through PTC which have been signed by the Petitioner. Therefore, the FSA cannot be for a particular PPA as contended by HPPC. As on the date of the FSA, only 425 MW were to be operationalised under long term PPAs with PTC/Haryana DISCOMs and GRIDCO and accordingly, only 425 MW covered under the long term PPAs was mentioned in the FSA. The FSA further provides that whenever there is any change in the percentage of PPAs, corresponding changes in the ACQ shall be effected through side agreements. The FSAs for the tapering linkage were signed with MCL on 20.5.2014 and with ECL on 29.5.2014. These FSAs were signed before the commencement of supply under Bihar PPA. The Petitioner was receiving 2.58 MTPA of coal from both firm and tapering linkage to meet the requirement for 618 MW and after operationalization of Bihar PPA, the Petitioner received 3.63 MTPA of coal to meet the requirement of 905 MW. Therefore, any shortfall in the firm linkage as well as tapering linkage met through import and open market coal shall be eligible for relief under the Change in law in the

light of the order dated 3.2.2016 and the Hon'ble Supreme Court's judgement in Energy Watchdog case.

33. In the light of the above discussion, it cannot be inferred from the language of para 48 of the order dated 3.2.2016 that the requirement of Haryana PPA shall be met from the firm linkage under the FSA dated 26.3.2013 and shortfall thereof shall be met through import and open market coal. Such an interpretation goes against the coal allocation by Ministry of Coal to power plant of the Petitioner as a whole and will put the GRIDCO PPA and Bihar PPA at a disadvantage vis a vis Haryana PPA. In fact, the Commission in para 73 (b) of the order dated 3.2.2016 in Petition No. 79/MP/2013 had observed as under:

“73.....

(b) The additional cost incurred in a month due to shortage of linkage coal shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given in para 56 above.”

Therefore, in light of the allocation of firm as well as tapering linkage for all three beneficiaries and our order dated 3.2.2016 in Petition No. 79/MP/2013, the firm and tapering linkage coal supplied to the Petitioner has to be apportioned on pro rata basis to all beneficiaries of the project and the cost of procurement of coal from alternate sources to meet the shortfall of firm and tapering linkage coal has also to be apportioned pro rata based on power supplied to these beneficiaries. Accordingly, the contention of Haryana Discoms to appropriate the coal supplied under firm linkage towards the capacity being supplied to them instead of pro-rata apportionment to all the beneficiaries is not correct. The order dated 3.2.2016 has to be read in its entirety and



HPPC is not correct to pick up an observation in para 48 of the said order to claim that its liability is limited to imported/open market coal for the shortage in firm linkage coal only. In our view, the Petitioner has correctly apportioned the linkage coal to Haryana Discoms proportionate to the capacity being supplied to them and has issued Supplementary Bills in accordance with the formula devised in order dated 3.2.2016 in Petition No. 79/MP/2013. Accordingly, we direct the respondents to pay the supplementary bills raised by the Petitioner for the period from July, 2016 to March, 2017 along with late payment surcharge as per the provisions of the PPA within one month from the date of issue of the order.

34. HPPC has filed an IA No. 12 of 2018 to bring certain documents on record which has been disposed of by the Commission vide order dated 19.3.2018.

35. The Petition and IA No. 42/2017 are disposed of in terms of the above.

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

**sd/-**  
**(A.S. Bakshi)**  
**Member**

**sd/-**  
**(A.K. Singhal)**  
**Member**