

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 176/MP/2016

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

Date of order: 28th of October, 2019

In the matter of:

Petition under Section 79(1)(f) of the Electricity Act, 2003 for adjudication of disputes arising under the Power Purchase Agreement dated 31.7.2012 between KSK Mahanadi Power Company Limited and the distribution licensees of erstwhile State of Andhra Pradesh.

And

In the matter of:

KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A, Road No. 22
Jubilee Hills, Hyderabad – 500 033
Andhra Pradesh, India

.....Petitioner

Vs

1. Eastern Power Distribution Company of Andhra Pradesh Limited
P & T Colony, Seethammadhara
Visakhapatnam – 530 013
2. Southern Power Distribution Company of Andhra Pradesh Limited
D. No.19-13-65/A, Srinivasapuram
Tiruchanoor Road, Tirupati – 517 503
3. Southern Power Distribution Company of Telangana Limited
Formerly Central Power Distribution Company of Andhra Pradesh Limited
6-1-50, Corporate Office, Mint Compound
Hyderabad – 500 063
4. Northern Power Distribution Company of Telangana Limited
Formerly Northern Power Distribution Company of Andhra Pradesh Limited
H. No. 2-5-31/2, Corporate Office, Nakkalagutta
Hanamkonda, Warangal – 506 004

.....Respondents



Parties Present:-

For Petitioner : Ms. Swapna Seshadri, Advocate, KSK Mahanadi
Shri Amal Nair, Advocate, KSK Mahanadi

For Respondents : Shri S. Vallinayagam, Advocate, AP Discoms
Ms. S. Amali, Advocate, AP Discoms
Shri Nishant, Advocate, Telangana Discoms
Shri Rakesh K. Sharma, Telangana Discoms
Ms. Anushree Bardhan, Advocate, Prayas
Ms. Tanya Sareen, Advocate, Prayas

ORDER

The Petitioner, KSK Mahanadi Power Company Limited, is a generating company as defined in Section 2(28) of the Electricity Act, 2003 and is in process of establishing 3600 MW (6x600 MW) coal-based Thermal Power Project ("Project") at District Akaltara in the State of Chhattisgarh. Units 1 and 2 of the Project have achieved commercial operation on 13.8.2013 and 25.8.2014 respectively and the balance units are at various stages of commissioning.

2. The Respondents 1 to 4 are the distribution licensees in the undivided State of Andhra Pradesh. Upon bifurcation of the erstwhile State of Andhra Pradesh, new State of Telangana was formed and two of the distribution licensees, Respondents 3 and 4 were renamed as Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited.

3. The Petitioner has entered into PPAs for supply of power from the Project as under:

(a) PPA dated 31.7.2012 between the Petitioner and the distribution licensees of erstwhile undivided State of Andhra Pradesh for supply of 400 MW power from



16.6.2013 to 15.6.2016. However, pursuant to bifurcation of the State of Andhra Pradesh, the aforesaid capacity was allocated as under:

(i) 215.56 MW capacity to distribution licensees of the State of Telangana, Respondents 3 and 4 (hereinafter referred to as the “Telangana Discoms”); and

(ii) 184.44 MW capacity to distribution licensees of the new State of Andhra Pradesh, Respondents 1 and 2 (hereinafter referred to as the “AP Discoms”).

(b) PPA dated 18.10.2013 between the Petitioner and the Government of Chhattisgarh for supply of 5%/ 7.5% of the net power (gross power minus the auxiliary consumption) under the host State obligations.

(c) PPA dated 27.11.2013 between the Petitioner and Tamil Nadu Generation and Distribution Corporation (TANGEDCO).

(d) PPA dated 26.2.2014 between the Petitioner and the distribution licensees of Uttar Pradesh (UP Discoms).

4. In the present Petition, the Petitioner has sought adjustment of tariff on account of Change in Law events affecting the Project during the Operation Period in terms of PPA dated 31.7.2012. The Petitioner has sought compensation under Change in Law during the Operation Period on account of partial or no supply of coal under linkage on account of the Presidential Directive dated 17.7.2013 read with the Ministry of Power Notification to this Commission and various State Commissions dated 31.7.2013 stipulating generators to source coal from alternate sources.

5. The Petitioner has submitted that the bid deadline was 4.6.2012 and any Change in Law event after 28.5.2012 (seven days prior to the bid deadline) resulting in



additional recurring or non-recurring expenditure incurred by the Petitioner falls within the ambit of Change in Law. The Petitioner has, vide affidavit dated 21.6.2017, submitted the impact of Change in Law events affecting the economic position during the operation period for financial years 2013-14, 2014-15, 2015-16 and 2016-17 as under:

	(In Rs.)		
	2013-14	2014-15	2015-16
April		42,39,78,406	24,35,91,061
May		42,48,31,728	20,84,09,326
June		11,91,18,799	18,52,68,642
July		33,73,93,748	
August	12,90,39,961	13,14,10,697	
September	16,09,14,754	26,02,08,229	
October	20,93,44,229	23,00,81,052	
November	37,20,65,145	30,60,22,109	
December	40,41,05,011	38,26,68,278	
January	45,16,34,036	18,27,59,854	
February	32,76,44,722	32,41,43,182	
March	43,98,86,781	28,14,10,157	
Total	249,46,34,639	340,40,26,309	63,72,69,028

Under MoU Supply by SECL:

	(In Rs.)	
	2015-16	2016-17
April		22,30,67,998
May		11,35,52,105
June		4,90,37,312
July	24,53,02,900	
August	16,76,37,162	
September	20,63,55,370	
October	31,66,31,026	
November	23,04,87,999	
December	21,42,78,011	
January	10,66,74,966	
February	8,21,00,151	
March	11,08,28,902	
Total	168,02,96,487	38,56,57,415



6. The Petitioner has submitted that Change in Law events have significant financial impact on the costs and revenue of the Petitioner during the Operation Period for which the Petitioner is entitled to be compensated in terms of Article 10 of PPA. Accordingly, the Petitioner has filed the present Petition with the following prayers:

“(a) Hold and declare that the non-availability of the domestic coal from the coal linkage granted to the Petitioner and requiring the Petitioner to procure coal from the open market if on account of Change in Law in terms of Article 10 of the PPA;

(b) Hold and declare that the Respondents are liable to pay the Petitioner, for the additional costs incurred for purchase of coal at market prices over and above the Coal India Limited published prices for coal supply under coal linkage granted (to the extent of shortfall of linkage quantity) for the terms of the PPA and Respondents to carry out necessary tariff adjustment to give effect to such economic impact;

(c) Direct the Respondents to receive and acknowledge the entire Supplementary Bills from the Petitioner for the arrears of amounts finally allowed by this Commission towards Change in law from the date of change in law notification till the date of final disposal of the present petition and issue necessary directions to the Respondents to pay such adjusted tariff in terms of PPA,

(d) Restore the Petitioner to the same economic condition prior to the occurrence of the Changes in Law by permitting the Petitioner and the amounts as per the computations set out in hereinabove or through a suitable mechanism to compensate the Petitioners as and when the financial impact of the Changes in Law arose; and

(e) Direct the Respondents to pay pendent lite and future interest at the rate of 15% per annum on the amounts payable on account of Change in Law; and

(f) Grant costs in favour of the Petitioner and against the Respondents for the present petition.”

7. The Petition along with other similar matters filed by the Petitioner was heard on 15.11.2016 and notice was issued to the Respondents. The Respondents 3 and 4, vide



their reply dated 24.7.2017 have raised preliminary objections to the Petition and the Petitioner has filed its rejoinder vide affidavit dated 9.2.2018.

8. The matter was admitted by the Commission vide ROP dated 15.2.2019 and the Parties were directed to file their respective replies on merits. The Respondents 3 and 4, namely, Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited (hereinafter referred to as the “Telangana Discoms”) have jointly filed their reply on merits vide affidavit dated 8.3.2019. Prayas (Energy Group) has filed its reply on merits vide affidavit dated 25.3.2019. The Respondents 1 and 2, namely, Eastern Power Distribution Company of Andhra Pradesh Limited and Southern Power Distribution Company of Andhra Pradesh (hereinafter referred to as the “AP Discoms”) have jointly filed their reply on 1.4.2019. The Petitioner filed its rejoinder/ written submissions to the replies filed by the Respondents on 15.5.2019.

9. Since a preliminary objection has been raised by the Respondents regarding maintainability of the Petition, we have dealt with the same in the succeeding paragraphs of this order before going into the merits of the claims regarding change in law.

Maintainability

10. The Petitioner has submitted that it has a ‘composite scheme’ for generation and sale of power to more than one State and hence the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for



Electricity (APTEL) in Appeal No. 100 of 2013 in the matter of Uttar Haryana Bijli Vitran Nigam Limited v. Central Electricity Regulatory Commission & Ors.

11. *Per contra*, the Respondents, Telangana Discoms in their preliminary reply dated 24.7.2017 have submitted that the Petitioner has also filed a similar Petition claiming the amount under the Change in Law before the Telangana State Electricity Regulatory Commission (TSERC). The Respondents have further submitted that the issue of jurisdiction of the State Electricity Regulatory Commission is pending before the Hon'ble High Court of Judicature at Hyderabad in WP No. 19894 of 2015, WP No. 7965 of 2016, WP No. 14254 of 2016 and WP No. 22850 of 2016. The Respondents have stated that pursuant to the judgment of Hon'ble Supreme Court in Energy Watchdog Case, various developers had filed transfer petitions before the Hon'ble Supreme Court to transfer the above mentioned Writ Petitions, praying to pass similar orders as passed in Energy Watchdog matter. However, the Hon'ble Supreme Court vide its order dated 20.4.2017 declined the request of the developers/ generators and dismissed the transfer Petitions with direction to the Hon'ble High Court of Andhra Pradesh and Telangana to dispose of the said Writ Petition within a period of six months. The Respondents have submitted that the judgment of the Hon'ble Supreme Court in Energy Watchdog case is not applicable to the present case as the principle set out by Hon'ble Supreme Court is with respect to Section 79 of the Act.

12. The Petitioner, in its rejoinder dated 9.2.2018 has submitted that the issue of jurisdiction primarily arose in the case of generators who are located in the erstwhile undivided State of Andhra Pradesh and supplying power to the distribution licensees in



that State as pursuant to bifurcation, the said generators are supplying power to two States (new State of Telangana and new State of Andhra Pradesh) and issue arose as to the jurisdiction of the appropriate Regulatory Commission. According to the Petitioner, the Petitioner's generating station is located in the State of Chhattisgarh and has the PPA dated 31.7.2012 for supply of electricity to the distribution licensees of undivided State of Andhra Pradesh, which pursuant to the bifurcations of the State had been supplying power to the distribution licensees of Andhra Pradesh and Telangana. The Petitioner has stated that the PPA dated 31.7.2012 entered into with the distribution licensees of the undivided State of Andhra Pradesh (which got bifurcated into new States of Telangana and Andhra Pradesh) had expired on 15.6.2016 and is no longer in existence. However, the Petitioner is presently supplying the entire power to the Discoms of the new State of Andhra Pradesh pursuant to the extension of the PPA and no supply is made to the State of Telangana. The Petitioner has submitted that it has not filed Writ Petition or any other proceedings before the Hon'ble High Court for the States of Telangana and Andhra Pradesh on the issue of jurisdiction of the State Commissions vis-a-vis the Central Commission and the matter before the Hon'ble High Court is on the issue of jurisdiction qua the generators who were within the then undivided State of Andhra Pradesh and their status under the provisions of the Andhra Pradesh Reorganization Act, 2014. The Petitioner has submitted that as per the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog v. CERC & Ors. case, the supply of power by the Petitioner from the State of Chhattisgarh to the State of Andhra Pradesh and other States would involve inter-State supply and is within



the exclusive jurisdiction of the Central Commission to adjudicate the dispute in the present Petition.

13. We have examined the matter. The Petitioner has entered into separate PPAs with the Discoms of three States, namely, distribution licensees of Tamil Nadu, Uttar Pradesh and erstwhile undivided Andhra Pradesh (which was subsequently bifurcated into Telangana and residuary Andhra Pradesh and the PPA entered into with the Discoms of erstwhile Andhra Pradesh was allocated to Discoms of Telangana and residuary Andhra Pradesh) for supply of power at different points in time and for different quantum. The tariff agreed to under the said PPAs have been adopted by respective State Electricity Regulatory Commissions (SERCs). Sub-section (b) of Section 79(1) of the Act provides that Central Electricity Regulatory Commission shall regulate the tariff of generating company, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Petitioner has submitted that its generating station located in the State of Chhattisgarh has a 'composite scheme' for generation and sale of power to more than one State and hence the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for Electricity (APTEL) in Appeal No. 100 of 2013 in the matter of Uttar Haryana Bijli Vitran Nigam Limited v. Central Electricity Regulatory Commission & Ors. In the appeal against the said judgment, Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v. CERC & Ors. [(2017 (4) SCALE 580)] has upheld the jurisdiction of this Commission under Section 79 (1) (b) of the Act in respect of the generating companies



which have composite scheme for generation and supply of power in more than one State. The relevant paras the order of the Hon`ble Supreme Court is extracted as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”

14. The Hon`ble Supreme Court while interpreting the term ‘composite scheme’ under Section 79(1)(b) of the Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff has been adopted under Section 63 of the Act. The Petitioner has submitted that it has a ‘composite scheme’ for generation and sale of power to more than one State. In the light of the decision of the Hon`ble Supreme Court in Energy Watchdog case as regards composite scheme for supply of electricity to more than one State, we are of the view that this Commission has the



jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79(1)(b) of the Act and adjudicate the disputes raised in the present Petition.

15. It is noted that the Writ Petitions filed before the Hon'ble High Court Judicature at Hyderabad, as referred to by the Respondents, challenging the exercise of jurisdiction by this Commission vide orders dated 27.4.2015 and 15.6.2016 in Petition Nos. 463/MP/2014 and 183/MP/2015 respectively have been disposed of by the Hon'ble High Court vide common order dated 31.12.2018 upholding the exercising of jurisdiction by the Commission under Section 79 of the Act. The relevant extract of the said common order dated 31.12.2018 is as under:

"71. The view taken by the Central Electricity Regulatory Commission on the basis of Section 79(1) (f) alone reflects the correct position in law. Therefore in our considered view, the orders passed by the CERC with regard to jurisdiction are liable to be upheld and the orders passed both by the APERC and by the TSERC are liable to be set aside.

...

76. Therefore, in fine, the writ petitions are disposed of to the following effect: (i) W.P.Nos.19894 and 15848 of 2015 challenging the orders of CERC, dated 27.04.2015 are dismissed and the CERC is held entitled to decide the disputes covered by the said order, on merits after giving opportunities to all the parties.

(ii) W.P.No.22850 of 2016 challenging the order of the Central Electricity Regulatory Commission dated 15.06.2016 is also dismissed and the CERC is allowed to proceed further with the hearing of the case on merits."

16. Appeals (SLP (C) Nos. 8016-8018 of 2019) have been filed by AP Discoms before the Hon'ble Supreme Court against the judgment of the Hon'ble High Court of AP and Telangana dated 31.12.2018 upholding this Commission's jurisdiction. Hon'ble Supreme Court vide its order dated 8.4.2019 had directed the parties to maintain status quo as on 8.4.2019. It is noted that the aforesaid appeal before the Hon'ble Supreme Court challenges the exercise of jurisdiction by the Commission in respect of the



generators which were situated in erstwhile State of Andhra Pradesh and after the bifurcation of the erstwhile Andhra Pradesh into the States of Telangana and residuary Andhra Pradesh supplied the power to more than one States i.e. the Discoms of AP and Telangana and not with respect to the Petitioner. Since the project of the Petitioner is not located in the erstwhile undivided Andhra Pradesh, pendency of the appeal filed by AP Discoms before the Hon`ble Supreme Court against the judgment of the Hon`ble High Court of Andhra Pradesh shall not come on the way of exercise of jurisdiction by the Commission in respect of the Petitioner's generating station.

Issues on merit

17. After consideration of the submissions of the Petitioner and the Respondents, the claim of the Petitioner has been dealt with as under:

Issue No. 1: Whether the provisions of the PPA dated 31.7.2012 with regard to notice have been complied with?

Issue No. 2: What is the scope of Change in Law in the PPA dated 31.7.2012?

Issue No. 3: Whether the compensation claims are admissible under Change in Law in the PPA dated 31.7.2012? and

Issue No. 4: Mechanism for processing and reimbursing of admitted claimed under Change in Law.

Now we deal with the above issues one by one.

Issue No. 1: Whether the provisions of the PPA dated 31.7.2012 with regard to notice have been complied with?

18. The claims of the Petitioner in the Petition pertain to Change in Law events during the Operation Period. Article 10.4 of the PPA is extracted as under:

"10.4 Notification of Change in Law



10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurer(s) of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonable have known of the Change in Law.

10.4.2. Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurer(s) under this Article 10.4.2, even 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 Procurer(s) contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer(s) shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

- (a) the Change in Law; and*
- (b) the effect on the Seller.”*

19. The Petitioner has submitted that it has issued Notice to the Respondents on 28.3.2014 in accordance with the aforesaid Article informing about Change in Law events and their effects. The Respondents have submitted that in terms of the PPA, the Petitioner, at first, is required to give notice intimating the Change in Law and to lay its claim under Article 10.3.3 of the PPA with requisite documentary evidence for increase/decrease in revenue. However, the Petitioner has directly submitted the supplementary bills on 28.3.2014 claiming under the Change in Law.

20. As per Article 10.4.2 of the PPA, the Petitioner is required to give notice about occurrence of Change in Law events as soon as practicable after being aware of such events. The Petitioner has given notice on 28.3.2014 regarding the event of Change in Law, namely, Presidential Directive dated 17.7.2013, appraising the Respondents about the occurrence of Change in Law event and the impact of such event. However, no reply was received from the Respondents in this regard.



21. Thus, in our view, the requirements of Article 10.4.2 of the PPA have been complied with by the Petitioner.

Issue No.2: What is the scope of Change in Law in the PPA dated 31.7.2012?

22. The Petitioner has approached the Commission under Article 10 of the PPA read with Section 79 of the Act for adjustment/ compensation to offset the financial/ commercial impact of Change in Law during the Operating Period.

23. Article 10 of the PPA dated 31.7.2012 deals with the events of Change in Law and the same is extracted as under:

“10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/ non-recurring expenditure by the Seller or any income to the Seller:

- 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;*
- 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;*
- the imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier;*
- 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;*
- any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*

but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

10.2 Application and Principles for computing impact of Change in Law



10.2.1 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.

10.3 Relief for Change in Law

10.3.2 **During Operating Period:**

10.3.2.1 The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law

24. The term "Law" defined in the said PPA is extracted as under:

"Law shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;

25. The term "Indian Governmental Instrumentality" has been defined in the PPA as under:

"Indian Governmental Instrumentality" shall mean the Government of India, Governments of State(s) of Andhra Pradesh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state Government(s) or both, any political subdivision of any of them including any court or Appropriate Commission(s) or tribunal or judicial or quasi-judicial body in India, but excluding the Seller and the Procurer."



26. A combined reading of the above provisions in the PPA would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondents with regard to 'Change in Law' events which occur after the date which is seven days prior to the bid deadline. The events broadly covered under 'Change in Law' are as under:

- (a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or
- (b) Any change in interpretation or application of any Law by an 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 except due any default of the seller.
- (e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner as per terms of the Agreement. Such Changes result in additional recurring and non-recurring expenditure by the seller or any income to the seller.
- (f) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such "Change in Law" has not occurred.
- (g) The Petitioner shall provide to the Procurer and the Appropriate



Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law;

(h) The decision of the Commission with regard to the determination of Compensation and the date from which such Compensation shall become effective shall be final and binding on both the parties, subject to right of approval provided under Electricity Act, 2003.

(i) The compensation shall be payable for any decrease in revenue or increase in expenses to the seller (Petitioner) if the same is in excess of an amount equivalent to 1% of the value of the Standby Letter of Credit in the aggregate for the relevant Contract Year.

Issue No.3: Whether compensation claims are admissible under Change in Law in the PPA dated 31.7.2012?

27. The Bid deadline and the cut-off date in respect of the PPA dated 31.7.2012 against which Change in Law compensation has been claimed, are as under:

Bid Deadline Date	4.6.2012
Cut-off Date (Seven days prior to the Bid Deadline Date)	28.5.2012

28. The Petitioner has submitted that in the year 2011, the Respondents had initiated a process of competitive bidding for procurement of electricity on medium-term basis in terms of Section 63 of the Electricity Act, 2003. In the competitive bidding, the Petitioner was selected as the successful bidder for supply of 400 MW of electricity from its generating station in the State of Chhattisgarh. Accordingly, Letter of Intent was issued to the Petitioner on 31.7.2012 and the PPA was executed between the Petitioner and the Respondents on 31.7.2012. The Petitioner has mainly submitted as follows:



(a) At the time of submission of bid, the Petitioner enjoyed Coal Supply Agreement with Goa Industrial Development Corporation (GIDC) and Gujarat Mineral Development Corporation Limited (GMDC) for sourcing coal from the coal blocks Gare Palma II and Morga II respectively. However, in view of the timing uncertainties in the coal block development, the Government of India, through South Eastern Coalfields Limited (SECL) had granted the Petitioner Letter of Assurance (LOA) for tapering coal linkage for total quantum of 7.49 MTPA which was sufficient to cater to the total capacity of 1800 MW at 80% PLF. Accordingly, LOA dated 11.6.2009 was issued by SECL to the Petitioner.

(b) In terms of Article 2.1.2.2 of the RfP, the fuel was required to be specified as domestic or imported coal. In case of domestic coal, the bidder was required to make a firm arrangement for fuel for the project to the extent of normative availability. Accordingly, as per Clause 2.1.2.2 of RfP, the Petitioner had indicated the fuel source as domestic coal linkage (F Grade).

(c) Grant of coal blocks to GIDC/ GMDC as well as the grant of tapering coal linkage to the Petitioner is by the Indian Governmental Instrumentalities. These were the agreed fuel supply sources for the Petitioner to generate electricity for the Respondents. The Petitioner vide communication dated 2.4.2013 informed the Respondents that the tapering linkage was the basis for power generation and supply under the PPA.

(d) The New Coal Distribution Policy dated 18.10.2007 (NCDP 2007) of the Government of India provided that the power plants would be supplied coal to fulfill their requirements.

(e) Subsequently, after execution of the PPA, Government of India by Presidential Directive dated 17.7.2013 amended the Policy for supply of coal by the Coal India Limited/ Subsidiaries including in the cases where the tapering coal linkages had been granted. However, the Presidential Directive dated 17.7.2013 specified that the actual coal supplies would be available when the required long-term PPAs are tied up. As per the Coal Policy as existing prior to 17.7.2013, there



was no restriction or provision in regard to the nature of the PPAs to be entered into by persons to whom tapering linkages were granted. By virtue of the above, the Petitioner who had a medium-term PPA with the Respondents has been denied the supply of coal under the coal linkage granted, which was the basis on which the bids were submitted by the Petitioner and the PPA was entered into with the Respondents.

(f) Apart from the condition of long-term PPA which is required for signing the FSA, the Presidential Directive further provides that coal to the extent of only 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th Plan would be provided under the coal linkage and the balance would be required to be procured by way of import of coal. This was also a new condition imposed as against the earlier assurance and position that the coal to the extent of the normative availability would be provided which would be the ACQ at the administered price of CIL. By virtue of imposition of this condition, a substantial portion of coal linkage given would not be available at the regulated price, but would be by way of imported coal at market prices.

(g) From 1.7.2015, pursuant to Government of India directive dated 30.6.2015, the supplies under Tapering Linkage FSA were discontinued and coal supplies were based on MoU. The Petitioner continued to pass on the benefit of MoU Coal supplies to the Respondents and only coal pricing with respect to the shortfall quantity has been claimed.

(h) The entire basis of the submission of bid, namely, domestic coal under the Policy of Gol at the domestic regulated coal price has changed by virtue of Presidential Directive dated 17.7.2013. As per Article 10.5 of the PPA, the impact of such change should be computed from the date it affects the seller.

(i) The difference between the market price and coal linkage price is the adverse impact on the Petitioner on account of Change in Law, which is required to be compensated in terms of Article 10.2.1 of the PPA. The additional cost which had to be necessarily incurred by the Petitioner pursuant to the Government



directives is liable to be reimbursed to the Petitioner, being Change in Law under Article 10 of the PPA.

(j) The Petitioner is entitled to carrying cost/ interest on all additional amounts incurred/ paid till date on account of Change in Law in terms of the judgment of APTEL in the case of M/s Wardha Power Company Limited vs. Reliance and anr.

Reply of AP and Telangana Discoms

29. Telangana Discoms vide their affidavit dated 19.3.2019 and AP Discoms vide their affidavit dated 1.4.2019 have raised identical issues and have submitted as under:

(a) At the time of bidding, the Petitioner had indicated the primary fuel as 'Domestic Coal' in the format 4.13 of RfP which has also been incorporated in Schedule 5 of the PPA. Since the Respondents/ Procurers calculated the quoted tariff considering the primary fuel as 'Domestic Coal' only, they are not responsible to pay any additional charges with regard to fuel in terms of the RfP as well the PPA.

(b) Respondents have entered into Medium-term PPA with the Petitioner as per the Standard Bidding Guidelines issued by MoP on Case-1 bidding process, wherein the fuel pass through mechanism is not allowed. Moreover, the PPA entered into was for Medium-term PPA i.e. for only 3 years and the Petitioner must have quoted the price of the bid having anticipated the dynamics of coal market.

(c) The Petitioner has admitted that the Government of India had granted to it tapering linkage which was enough to cater to the total capacity of 1800 MW at 80% PLF. Thus, the Petitioner, during the submission of bid, was aware of the fact that it had been allotted tapering coal linkage and had participated in the bidding process by showcasing the same to the Respondents/ Procurers.

(d) In the LOA dated 11.6.2009, it is clearly provided that the Assurer/ SECL shall provide the balance quantity of coal requirement through imported coal and



the Assured/ Petitioner shall be charged at the landed cost plus service charges including the applicable taxes and statutory levies. Thus, as on the bid deadline i.e. 4.6.2012, the Petitioner was aware of the fact that the balance quantity of the coal would be met through imported coal. Therefore, the claim of the Petitioner cannot be dealt with under Change in Law.

(e) In the Presidential Directive dated 17.7.2013, it has been clearly mentioned that the projects for which tapering linkage is granted would be supplied coal as per the tapering linkage policy. Thus, Presidential Directive, which did not affect coal to be supplied under tapering linkage and, therefore, does not constitute a Change in Law event.

(f) The Petitioner had to supply power to the Respondents from 16.6.2013. However, the supply was started w.e.f. 14.8.2013 i.e. with delay of 59 days. If the Petitioner had started the supply on time, the same would have been prior to the Presidential Directive.

(g) The Petitioner was well aware of the Presidential Directive dated 17.7.2013 before the commencement of supply in August 2013 and this has not been informed to the Respondents. The change in pattern of procurement of coal should have been intimated to Respondents/ Discoms as required under Article 10.4.1 and 10.4.2 of the PPA and the compensation claim should have been submitted as per Article 10.3.3 duly enclosing the requisite documentary proofs for such increase/ decrease in revenue. On the contrary, the Petitioner directly submitted the supplementary bill of Rs. 205.47 crore under Article 10.4 of the PPA on 28.3.2014 i.e. after 8 months.

(h) As per Article 4.2.1 (g) of the PPA, the Seller's obligation of providing on timely basis all the relevant information to the Respondents which may be required for receiving power at the delivery point is not fulfilled by the seller/ Petitioner as it has not been giving prior information about the procurement of costly coal from the outside sources. Bill submitted by the developer is not substantiated with the invoice from where it has procured the coal.



(i) Bill is submitted based on the circular or internal correspondence of Coal India Limited, SECL and GOs of Government of Jharkhand without any invoices substantiating the claim. The said correspondence and internal notes of coal companies are apparently not related to the seller/ Petitioner. The CA certificate certifying the coal rate also does not indicate the source and place of procurement.

(j) The Commission in its order dated 8.10.2018 in Petition No. 179/MP/2016 has already disallowed similar claims made by the Petitioner under Change in Law.

(k) The Petitioner had issued the Change in Law notice with respect to change in New Coal Distribution Policy (NCDP) by the Ministry of Coal w.e.f. 26.7.2013 to TANGEDCO only on 12.7.2016. It is evident that the Petitioner did not face any problems in the coal supply till that date i.e. 12.7.2016 by which time the PPA with Respondents had already expired.

Reply of Prayas

30. Prayas, vide its affidavit dated 25.3.2019, has mainly submitted as under:

(a) The LOA dated 11.6.2009 does not refer to any Coal Supply Agreement or the factum of being a tapering linkage.

(b) The linkage has been allocated to Wardha Power Company Limited even though the coal block was allocated to GMDC or GIDC. If the tapering linkage is linked specifically to coal blocks, then the linkage should have been in the name of coal block allottee.

(c) The fuel source indicated at the time of bid is coal linkage of F Grade but it does not refer to the same being tapering linkage. Even if the linkage was tapering linkage, the same was not made clear to the States of Andhra Pradesh and Telangana. Therefore, any adverse impact of the linkage being tapering



linkage is to the account of the Petitioner and cannot be passed on to the Procurers/ consumers.

(d) The Petitioner has not provided the CSAs (Coal Supply Agreements) with GIDC and GMDC. Neither the terms of the said Agreements are clear nor is the reason for termination. It is possible that the stoppage of coal supply was due to default on part of the Petitioner or due to non-fulfillment of any term of the Coal Supply Agreement.

(e) As per the bid submitted by the Petitioner, the total Power Station Capacity is 3600 MW and the coal linkage is only for 1800 MW. The existing PPA capacity even at the time of PPA was (a) GUVNL-1094 MW, (b) GIDC- 450 MW and (c) Chhattisgarh -1350 MW which was already much more than 1800 MW even without accounting for the capacity for AP Discoms and Telangana Discoms. Therefore, the Petitioner has tied up power supply arrangements for more than 1800 MW capacity even though the coal linkage was only for 1800 MW.

(f) The Petitioner has also executed PPAs with TANGEDCO for 500 MW and with Uttar Pradesh for 1000 MW. Even without the PPAs with GUVNL and GIDC and considering the share of Government of Chhattisgarh at 5% or 7.5%, the total existing PPA capacity is much more than 1800 MW. Therefore, it is clear that the coal arrangement was not sufficient for all PPA capacities.

(g) The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case has granted relief of Change in Law in respect of the change in Policy of the Government of India through NCDP in the availability of the domestic coal from the coal companies against the LOA or FSA. The Hon'ble Supreme Court had relied on the letter dated 31.7.2013 of the Ministry of Power, Govt. of India and the Tariff Policy 2016, which refers to reduced quantity or shortfall in quantity of domestic coal supplied by CIL vis-à-vis the assured quantity or quantity indicated in the LOA or FSA. Thus, if there is no LOA or FSA



in relation to the contracted capacity, there is no assured quantum. Therefore, there is no shortfall against any assured quantum.

(h) The Presidential Directive dated 17.7.2013 refers to the execution of the FSA with projects including tapering linkage, which are likely to be commissioned by 31.3.2015. The Scheduled delivery date as per the PPA was 16.6.2013 which is prior to 31.3.2015 and in fact, prior to the Presidential Directive dated 17.7.2013. The Petitioner should have executed the FSA at least prior to 16.6.2013 and if it had done so in a timely manner, it may not have been affected by the Presidential Directive. In any event, the actual delivery date as claimed is 14.8.2013. This also means that the FSA should have been signed prior to 17.7.2013.

(i) It is not clear as to whether there was a delay in completion of milestones as defined under LOA dated 11.6.2009 by the Petitioner and as to whether LOA was still valid. If the Petitioner was unable to execute the FSA with Coal Company due to delay in completion of milestones, then the consequences of non-execution of the FSA are attributable to the Petitioner and the Petitioner cannot claim any Change in Law in respect of shortage of linkage coal in such a case.

(j) The Petitioner has claimed shortage of coal without furnishing complete details in regard to actual supply of coal by SECL. The Petitioner is required to submit the following information:

- The actual availability of coal from SECL during the relevant period and a certificate from SECL of total quantum of coal, which SECL would have made available to the Petitioner. The most important aspect is the maximum quantum of coal, which the SECL was willing to supply during the period, not merely the actual quantum supplied.
- Whether the Petitioner refused supply of coal, when available;



- Efforts made by the Petitioner to procure the increased quantum of coal from SECL and action taken against SECL to get assured quantum of coal;
- Month-wise opening and closing stock of domestic coal;
- Whether the total quantum of coal made available was sufficient for generation of electricity for supply to the extent of normative availability as per the PPAs;
- Month-wise actual generation, actual domestic coal realization and actual coal import.

(k) The zone of consideration can only be the difference between 85% of 7.49 MTPA and the actual quantum offered by SECL or the applicable NCDP stipulated percentage, whichever is higher. If the quantum available from SECL is less than the applicable percentage, it is for the Petitioner to take up the matter with SECL. This has already been accepted by the Commission in regard to other generators.

(l) Even on 30.6.2016, it has been provided in the MoU executed that “the quantity and price would be as per the level prevailing as on 30.6.2015”. Therefore, even under the MoU route, there was no change in the price.

(m) The Petitioner has not provided any computation or any supporting documentation and has not placed on record any invoice for the prices claimed by it. There is a great fluctuation in the prices of the coal under open market/e-auction/ imported coal. Since the period of supply is already over, the Petitioner may give detailed computation with supporting documents.

(n) As per the calculations of the Petitioner and the LOA, 7.94 MTPA of coal is sufficient for 1800 MW power plant. Therefore, the quantum of coal required for 400 MW is 1.76 MTPA, which translates to 0.1467 MT or 1,46,666 MT per month. Accordingly, the shortage is to be seen vis-à-vis 85% PLF. Further, the quantum of coal has to be considered as per the parameters for GCV, SHR and



Auxiliary Consumption based on bid assumed parameters or CERC Regulations or the requirement as per the LOA calculations above, whichever is lower.

(o) In the present case, as per the LOA allocation, the quantum of coal required per unit comes to approx. 0.51 kg/kWh and the claim of the Petitioner is 0.64 kg/kWh.

(p) With regard to the price to be considered for the shortfall in domestic coal, if any, it should be the difference in price of landed cost of alternate coal at the project site and landed cost of linkage coal or quoted energy charges, whichever is higher. It also has to be considered as to whether the alternate coal arrangements made by the Petitioner was prudent.

(q) Pendent lite interest starts only on the filing of the Petition. The Petitioner has filed the present Petition on 3.9.2016 when the entire period of power supply was over. Thus, the Petitioner has delayed the filing of the Petition. Moreover, for any delay in providing of information even after filing of the Petition is to the Petitioner's account and there can be no interest for the period of delay. The interest can be considered only from the date of filing of the complete information.

(r) The principle that delays in filing Petition/ information would result in denial of carrying cost has been settled by APTEL in (a) Judgment dated 19.9.2007 in Appeal No. 70 of 2007 in the matter of Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission, (b) Judgment dated 30.5.2014 in Appeal Nos. 147, 148 and 150 of 2013 in the matter of Torrent Power Limited v. Gujarat Electricity Regulatory Commission, (c) Judgment dated 4.12.2014 in Appeal No. 45 of 2014 in the matter of Paschim Gujarat Vij Company Limited and Ors. v. Gujarat Electricity Regulatory Commission, (d) Judgment dated 22.4.2015 in Appeal No. 174 of 2013 in the matter of Punjab State Power Corporation Limited v. Punjab State Electricity Regulatory Commission.

Rejoinder of Petitioner



31. The Petitioner, vide its written submission dated 15.5.2019, has submitted as under:

(a) The Commission vide order dated 8.10.2018 in Petition No. 179/MP/2016 has already taken a view against the Petitioner in respect of the same issue qua its PPA with TANGEDCO. The Petitioner has filed Appeal No. 77 of 2019 challenging the above order before APTEL, which is pending for disposal.

(b) The view taken by the Commission in order dated 8.10.2018 in Petition No. 179/MP/2016 has been subsequently modified by the APTEL in its judgment dated 21.12.2018 in Appeal No. 193 of 2017 in the matter of GMR Kamalanga Energy Limited v. CERC & Ors. Moreover, the observation of the Commission therein that the LoA and NCDP 2007 already stipulated that in the event of shortage of coal, the requirement shall be met through import which is also against the view taken by the Hon'ble Supreme Court in Energy Watchdog Case.

(c) Mentioning of the fuel source as domestic coal in the bid is irrelevant for the purpose of adjudicating on Change in law as merely because the bid premised on domestic coal would not mean that the Petitioner would not be entitled to claim the shortfall in the coal supply as Change in Law event.

(d) LOA of the Petitioner was for a quantum of 7.49 MTPA (sufficient for 1800 MW). Further, the list of 78,000 MW of power plants mentioned in the Presidential Directive included a capacity of 9,840 MW with tapering linkages. Therefore, be it a firm linkage or tapering linkage, short supply on account of the Presidential Directive was applicable on both, and consequently, the relief under Change in Law ought not depend on whether the linkage was firm or tapering. APTEL in its judgment dated 21.12.2018 in the case of GMR Kamalanga Energy Limited v. CERC & Ors. has clarified that it makes no difference whether the linkage is firm or tapering.

(e) Issue of delay in commencement of supply by the Petitioner under the PPA is completely unrelated. The claims of the Petitioner in any case are from August 2013. Therefore, even if the Petitioner had started supplying from 16.6.2013, the NCDP and subsequently the cancellation of coal block would have still affected the supply



of coal to the Petitioner and in turn would have led to the claim for compensation on account of Change in Law.

(f) The linkage provided to the Petitioner was in fact tapering linkage linked to the coal blocks being developed by GIDC and GMDC. Irrespective of that, in terms of judgment of APTEL in the case of GMR Kamalanga, the generators are entitled to get Change in Law benefit for shortfall in coal both qua firm linkage as well as tapering linkage.

(g) It is immaterial as to in whose name tapering linkage ought to have been given when the admitted position is that the Petitioner was given the tapering linkage.

(h) It is an admitted position that the PPA with AP Discoms and Telangana Discoms were entered into only on 31.7.2012 i.e. much after the coal linkage was granted to the Petitioner. While LOA was given for 1800 MW, there is no bar on using the coal for supply of power under any of the PPAs of the Petitioner with the distribution companies.

(i) Delay in signing of FSA is irrelevant as even if the Petitioner had signed the FSA prior to 16.6.2013 i.e. scheduled delivery date in terms of the PPA, the Presidential Directive would still have applied to the Petitioner. In any case, from August 2013 onwards, the Petitioner would have been subjected to the reduced quantum of coal supply. Therefore, the issue of delay in signing of the FSA, and commencement of supply are irrelevant for the purpose of adjudicating on Change in Law on account of NCDP, 2013 and subsequent cancellation of coal block.

Analysis and Decision

32. We have considered the submissions made by the Petitioner and the Respondents. The Petitioner has argued that due to Presidential Directive dated 17.7.2013 and subsequently cancellation of coal blocks by the Hon'ble Supreme Court vide its judgment dated 24.9.2014, the quantum of coal assured to the Petitioner was



not available/ reduced. Therefore, it was constrained to purchase coal at market prices as against the CIL administered price. The Petitioner has further contended that at the time of submission of bid, there was no requirement of having long-term Power Purchase Agreement for supply of coal under tapering linkage as introduced vide Presidential Directive dated 17.7.2013 and by virtue of which the Petitioner who had medium-term Power Purchase Agreement with Respondents was denied the supply of coal.

33. It is pertinent to mention that the Petitioner had filed Petition No.179/MP/2016, seeking similar prayers of compensation due to occurrence of Change in Law events viz. Presidential Directive dated 17.7.2013 and cancellation of coal blocks by Hon'ble Supreme Court in respect of the Power Purchase Agreement entered into with Tamil Nadu Generation and Distribution Company Limited. After considering the submissions of the parties and the documents available on record, the Commission in its order dated 8.10.2018 disallowed the said claims of the Petitioner. As regard the claim of the Petitioner for compensation due to short supply of coal by SECL on account of Presidential Directive dated 17.7.2013 read with Office Memorandum of Ministry of Coal, Government of India dated 26.7.2013 (NCDP, 2013), the Commission in its order dated 8.10.2018 in Petition No. 179/MP/2018 had observed as under:

“39. Pursuant to the allocation of coal blocks by the Government of India to Gujarat Mineral Development Corporation (GMDC) and Goa Industrial Development Corporation (GIDC), the Petitioner entered into (i) Coal Supply Agreements (CSA) with GMDC on 16.11.2006 (with amendments dated 21.4.2007, 31.8.2007 and 4.7.2009) for supply of adequate quantity of coal from Morga-II Coal block required to generate 1750 MW and (ii) CSA with GIDC on 10.2.2009 for supply of an aggregate quantity of 9 MTPA of coal for 1800 MW capacity. Both the CSAs were valid for a period of 30 months from the date of commencement of supply. As per CSA with GMDC, amended on 21.4.2007, the Petitioner is to make available to GMDC a total of 1010 MW of power out of the 1750 MW proposed



to be generated. At the option of GMDC, the entire power shall be made available to the discom GUVNL and thereafter meet the demand, if any, from the host state. Similarly, in terms of the CSA dated 10.2.2009, GIDC shall be entitled to off take 15% of the actual power generated or 240 MW which ever is higher after meeting the host state obligations. However, due to uncertainties in the development of the above coal blocks, the Petitioner had applied to the MOC, GOI seeking short-term tapering coal linkage from CIL. Thereafter, the Standing Linkage Committee (Long-term) (SLC-LT) under the MOC, GOI vide its meeting dated 12.11.2008 approved the issuance of LOA for tapering linkage to the Petitioner for a capacity of 1800 MW. Subsequently, SECL (a subsidiary of CIL) issued LOA for tapering coal linkage for 1800 MW capacity to the Petitioner on 11.6.2009 for 7.49 MTPA of F grade coal per annum as per normative requirement of the plant. The LOA was valid for a period of 24 months and FSA was to be signed within 3 months from the expiry of validity of LOA.

40. Some of the conditions in the LOA dated 11.6.2009 are extracted hereunder:

....

41. It is therefore evident that the LOA stipulates 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 LOA which were issued in pursuance to the NCDP, 2007 clearly provide that in the event of shortage of coal, the requirement shall be met through imported coal. Therefore, meeting part of the coal requirement through import has been provided in NCDP, 2007 and has been reiterated through the LOA issued in favour of the Petitioner.

42. 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. Pursuant to the LOA dated 11.6.2009, the Petitioner participated in the Case 1 bidding process of TANGEDCO and had premised its bid on the aforesaid linkages.

...

44. The Petitioner had entered into PPA with TANGEDCO on 27.11.2013. As per Schedule 5 of the TANGEDCO PPA the primary source of coal was domestic coal and the fuel source indicated was CIL linkage. In furtherance to the LOA dated 11.6.2009, as per the CCEA decision, the Petitioner entered into the Fuel Supply Agreements (FSA) with SECL on 19.3.2014 for 100% LOA quantity of 4.99 MTPA for 1200 MW capacity, upto the normative date of production. Subsequently, FSA was executed by the Petitioner with ECL on 12.8.2014 for an LOA quantity of 1.76 MTPA for 600 MW capacity.

45. The Petitioner has submitted that by the time the FSAs dated 19.3.2014 and 12.8.2014 were executed with the CIL/ subsidiaries in furtherance of the LOA dated 11.6.2009, NCDP, 2007 was amended resulting in NCDP, 2013, after the bid deadline, and the quantum of supply was greatly reduced. This according to the Petitioner constitutes a change in law event.



46. In terms of clause 4.1.1, the said FSAs provides for the Annual Contracted Quantity (ACQ) as under:

FSA dated 19.3.2014

“4.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser till the normative date of production or the actual date of production, whichever is earlier, shall be.....lakh tonnes (against the LOA quantity of 49,94,000 Tonnes) per year from the Seller’s mines and/or from import, as per Schedule I. After the Normative date of Production or the actual date of production, the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) i.e last year of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal/CCO as mentioned in Annexure-A and Schedule-I..

FSA dated 12.8.2014

“4.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser till the normative date of production or the actual date of production, whichever is earlier, shall be.....lakh tonnes (against the part LOA quantity transfer of 17.63 lakh Tonnes) per year from the Seller’s mines and/or from import, as per Schedule I. After the Normative date of Production or the actual date of production, the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) i.e last year of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal/CCO as mentioned in Annexure-A and Schedule-I..”

47. Para 4.3 of the FSAs 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. The tapering linkage sought by the Petitioner for Units I to III of the project was against the coal mines of GIDC and GMDC. While the coal linkage assured in LOA dated 11.6.2009 corresponding to 1800 MW was 7.491 MTPA, the coal linkage assured in FSA dated 19.3.2014 with SECL corresponding to 1200 MW was 4.994 MTPA and in FSA dated 12.8.2014 with ECL was 1.763 MTPA corresponding to 600 MW. As mentioned above, clause 4.1.1 of the FSAs dated 19.3.2014 and 12.8.2014 provided that the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal, after the Normative date of Production or the actual date of production. It is noticed that the captive mines of GMDC & GIDC had not been developed.

49. However, it is noticed that only two Units of the project corresponding to 1200 MW have been completed and the actual power supply to Respondent TANGEDCO has been effected only from 2.8.2015. Further, it is observed that the captive mines of GMDC & GIDC on which basis tapering linkage was sought and obtained have not been developed.



As the petitioner did not develop the mines and the power supply to the Respondent started only from 2.8.2015, the petitioner is not entitled for any compensation.”

34. Thus, in the above order, the Commission observed that LOA as well as the Fuel Supply Agreement provided for import of the coal. The Commission further observed that since the Petitioner was granted a tapering linkage in lieu of captive coal blocks, the assured quantity was available only till the normative date of production and thereafter, it was subject to taper to at pre-defined rate for subsequent three years. The Commission further observed that the captive coal blocks of GMDC and GIDC on basis of which tapering linkage was sought and obtained had not been developed and accordingly, disallowed the relief sought by the Petitioner therein.

35. The aforesaid decision of the Commission squarely applies to the present case. In the present case, the cut-off date was 28.5.2012 and the supply to the Respondents started w.e.f. 14.8.2013. The Petitioner's bid in the present case was also premised on the basis of LOA dated 11.6.2009 issued by SECL and the coal blocks of GMDC and GIDC similar to that in TANGEDCO's case and as examined by the Commission in the above order dated 8.10.2018. Though, in the present case, the FSA entered into with the SECL and ECL were subsequent to commencement of supply of power under the PPA to the Respondents, the Petitioner was aware at the time of bidding that the linkage granted to the Petitioner was a tapering linkage and in terms of Tapering Linkage Policy dated 26.2.2010 which was prior to the cut-off date, the tapering linkage holders were to be supplied coal under the tapering linkage for meeting 100% of normative requirement only up to scheduled date of commencement of production from the coal block and thereafter, the supply of coal was to taper to 75%, 50% and 25% of



the normative quantity during the subsequent three years from the scheduled date of commencement of coal production. Thus, in line with the observations of the Commission in the order dated 8.10.2018, in the present case also, we hold that since the coal blocks of GMDC and GIDC, based on which the tapering linkage was granted, were not developed, the Petitioner is not entitled to any relief in respect of Presidential Directive dated 17.7.2013.

36. As regard the claim of the Petitioner for Change in Law event qua cancellation of coal blocks by the Hon'ble Supreme Court vide its judgment dated 25.8.2014, the Commission in its order dated 8.10.2018 had observed as under:

"50. The Petitioner has submitted that a further change in law had occurred pursuant to the orders of the Hon'ble Supreme Court. It has submitted that the CSAs with GMDC & GIDC and the tapering linkage dated 11.6.2009 were terminated by SECL in July, 2015 on the premise that coal blocks do not exist. The matter has been considered. The Hon'ble Supreme Court vide its judgment dated 25.8.2014 in W.P. (CrI) No. 120/2012 & other connected matters (Manohar Lal Sharma V Principal Secretary & ors) had held that the allotment of coal blocks made by Screening Committee of the Government of India as also the allotments made through the Government dispensation route are arbitrary and illegal. The relevant portion of the said judgment is extracted hereunder:

...

52. Since allocation of coal blocks based on recommendations of the Screening Committee of GOI and through Government dispensation route was declared illegal and arbitrary by the Hon'ble Supreme Court and had accordingly been cancelled, the termination of the Petitioner's CSAs with GMDC & GIDC and the CIL tapering linkage dated 11.6.2009, consequent upon the said judgment, cannot fall within the scope of change in law as contended by the Petitioner.

53. The Petitioner has further submitted that post termination of tapering linkage FSA, coal supplies were made under an MOU till 30.6.2016 with a condition that coal will be supplied upto the percentages mentioned in the Presidential directive dated 17.7.2013 on 'best effort basis'. The Petitioner has submitted that it conveyed its willingness to avail coal supplies for its plant till 31.3.2016 or until a policy was formulated by MOC, GOI, whichever is earlier and entered into an MOU with SECL on 13.7.2015 and the coal received under the MOU was utilized to start power supplies to TANGEDCO from 2.8.2015 onwards. Accordingly, the Petitioner has submitted that it is entitled to be compensated for shortage of coal supply for the period from the date of supply of power to



TANGEDCO (2.8.2015) till 30.6.2016 as change in law event in terms of Article 10 of the PPA dated 27.11.2013.

54. The terms and conditions under the said MOU dated 13.7.2015 are as under:

...

55. The MOC, GOI vide letter dated 13.4.2016 and CIL vide letter dated 18.4.2016, in order to ensure that there was no disruption in coal availability to the plants, including the project of the Petitioner whose MOU expired on 31.3.2016, inter-alia extended the validity of the said MOUs upto 30.6.2016, in order to facilitate the smooth transition to e-auction of CIL. These MOUs were accordingly extended upto 30.6.2016 with the following terms and conditions.

(i) The submission of application for availing the coal supplies shall be construed as mutual acceptance of extension of MOUs dated 13.7.2015 upto 30.6.2016 with the terms and conditions mentioned in the said MOUs along with additional clauses mentioned at point No.(ii), (ii) & (iv) of this notice

(ii) The quantity and price (Add-on) including any price revision as applicable would be at the level prevailing as on 31.3.2016. Sellers decision regarding computation of eligible quantity would be final and binding

(iii) The terms and conditions of the Affidavits/documents etc submitted by the Purchaser for signing of aforesaid MOU dated 13.7.2015 shall also be applicable mutatis-mutandis for availing the coal supplies upto 30.6.2016..."

(iv) xxxxxx

56. The matter has been considered. The directions of MOC, GOI vide its Office Memorandum dated 30.6.2015, is as under:

"2. To address immediate issue of supply of coal to the power plants already commissioned or to be commissioned in 2015-16 in a transparent manner and objective manner, the following decisions are taken:

(i) Pre-commissioned plants (capacity 65185 MW) and post-2009 plants as per CCEA approved dated 21.6.2013 TPPs capacity of 60000 MW (corrected to 59113 MW) and TPPs with 7000 MW (revised to 6796 MW) will continue to be governed by the CCEA decision dated 21.6.2013

(ii) Consequent to the cancellation of coal blocks by Hon'ble Supreme Court, the 24 power units of 9840 MW capacity (that is part of 78000 MW) approved by CCEA cease to be entitled to tapering linkage. In order to ensure that there is no disruption in the present power generation arrangements for these plants, coal may be supplied to such plants through a separate MOU route till 31.3.2016 or until a policy is formulated, whichever is earlier, as many plants are already commissioned or to be commissioned in 2015-16 and have long term PPAs. The quantity and the price would be as per the level prevailing as on 30.6.2015...



(iii) xxx..”

57. As stated, the CSA dated 19.3.2014 with SECL and the tapering linkage FSA of the Petitioner dated 19.3.2014 and 12.8.2014 for supply of coal for Units I & II were cancelled by the Hon'ble Supreme Court and thereby ceased to exist with effect from 1.7.2015. The Petitioner entered into an MOU with SECL on 13.7.2015 for supply of coal to the Project, which was subsequently extended till 30.6.2016. In our view, no reliance can be made by the Petitioner on the said MOU to claim impact of the change in law event, as the MOU cannot be a substitute to the CSA which had been cancelled by the Hon'ble Supreme Court. In this background, we are of the view that the Petitioner is not entitled for any compensation for shortage of coal supply for the period from the date of supply of power to TANGEDCO i.e. 2.8.2015 till 30.6.2016 as change in law event in terms of Article 10 of the PPA dated 27.11.2013. We direct accordingly.”

37. The Commission in the above order disallowed the claim for compensation on account of shortage of coal supply pursuant to the cancellation of coal blocks till the period the Petitioner was supplied coal under MoU i.e. 30.6.2016 in respect of TANGEDCO PPA. The aforesaid decision also squarely applies to the present case. In the present case, the supply of power under the Power Purchase Agreement dated 31.7.2012 was only from 14.8.2013 to 15.6.2016. Therefore, in line with the earlier decision of the Commission dated 8.10.2018, the claim of Petitioner on this count is not sustainable in respect of the PPA with AP Discoms and Telangana Discoms.

38. The Petitioner has submitted that the order of the Commission dated 8.10.2018 in Petition No. 179/MP/2016, has been challenged by the Petitioner before APTEL vide Appeal No. 77 of 2019, which is pending for adjudication. The Petitioner has submitted that the one of the aspects decided by the Commission in the said order is contrary to the view taken by the Hon'ble Supreme Court in Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. Moreover, the views taken by the Commission in the said order have been subsequently modified by the APTEL in its judgment dated 21.12.2018 in Appeal No. 193 of 2017 in the case of GMR Kamalanga



Energy Limited vs. Central Electricity Regulatory Commission and Ors. In our view, the facts of the present case is distinguishable from the facts in the GMR Kamalanga Case and therefore, no relief can be granted to the Petitioner with regard to the cancellation of coal block in the light of the judgment in GMR Case.

39. The Petition No. 176/MP/2016 is disposed of in terms of the above.

Sd/-
(I.S.Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

