

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**PetitionNo.251/MP/2018**

**Coram:**

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

**Date of Order: 13<sup>th</sup> June, 2019**

**In the matter of**

Petition under Sections 79(1)(f) of the Electricity Act, 2003 read with Article 13 of the PPAs dated 7.8.2008 for payment of compensation pursuant to the relief of Change in Law granted by Commission's order dated 31.5.2018.

**And**

**In the matter of**

Adani Power (Mundra) Limited  
(formerly Adani Power Limited)  
Shikhar, Near Mithakhali Circle, Navrangpura,  
Ahmedabad-390009

**.....Petitioner**

**Vs**

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

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

**.....Respondents**

**Parties present:**

Ms.Poonam Verma, Advocate, APL  
Ms. Abiha Zaidi, Advocate, APL  
Shri Tarul Sharma, Advocate, APL  
Shri Jignesh Langalia, APL  
Ms. Ranjitha Ramachandran, Advocate, UHBVNL  
Ms. Poorva Saigal, Advocate, UHBVNL

**ORDER**

The Petitioner, Adani Power (Mundra) Limited has set up Mundra Power Project (hereinafter referred to as the Project or the generating station) with a total capacity of 4620 MW in the Special Economic Zone at Mundra in the State of



Gujarat. The generating station consists of four Units of 330 MW (Units 1 to 4) in Phase I and II; two Units (Units 5 & 6) of 660 MW in Phase III and three Units of 660 MW in Phase IV (Units 7, 8 and 9). The Petitioner has entered into PPAs dated 7.8.2008 with the Respondents, UHBVNL and DHBVNL (Haryana Utilities) for supply of 1424 MW (712 MW each) power from Phase IV of the generating station.

### **Background**

2. Petition No. 155/MP/2012 was filed by the Petitioner seeking revision of tariff on account of frustration and/or of occurrence of force majeure and/or change in law events (Article 13) under the PPAs due to change in circumstances for allotment of domestic coal by Coal India Ltd. (CIL) and enactment of new coal pricing regulations by the Indonesian Government. The Commission vide order dated 21.2.2014 in the said Petition granted compensatory tariff to the Petitioner from SCOD till the hardship, on account of Indonesian Regulation persists. Aggrieved by the Commission's order dated 21.2.2014 in Petition No. 155/MP/2012, UHBVNL and DHBVNL filed Appeals Nos. 100 of 2013 and 98 of 2014; Energy Watchdog filed Appeal No. 125 of 2014; and Prayas Energy Group filed Appeal No. 134 of 2014 before the Appellate Tribunal for Electricity (hereinafter referred to as "Appellate Tribunal"). The Full Bench of the Appellate Tribunal vide its judgment dated 7.4.2016 allowed the appeals and remanded the matter to the Commission to assess the impact of Force Majeure Event on the Project of the Petitioner and to give such relief as may be admissible under the respective PPAs.

3. In terms of the said directions of the Appellate Tribunal, the Commission vide order dated 6.12.2016 in Petition No. 155/MP/2012 held as under:

*"(a) In the light of the judgment of the Appellate Tribunal, it is held that the petitioner had Coal Sales Agreements or arrangement for the entire quantum of coal required for supply of power to the Procurers and the Indonesian Regulations has*



*completely wiped out the premise on which the petitioner had quoted the tariff in the bid.*

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

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

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

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

4. The Commission, however, observed that the above order shall be subject to the outcome of the Civil Appeal No. 5399-5400/2016 (Energy Watchdog v CERC & ors) and related matters pending before the Hon'ble Supreme Court. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog case) set aside the Appellate Tribunal's judgment dated 7.4.2016 and the Commission's order dated 6.12.2016 following the Appellate Tribunal's said judgment and directed the Commission to go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA. Relevant portion of the said judgment dated 11.4.2017 is extracted as under:

*“53..... it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission...*

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

5. Pursuant to the Hon'ble Supreme Court Judgment dated 11.4.2017, the Petitioner had filed Petition No. 97/MP/2017 seeking relief with effect from



7.8.2012 under para 4.7 of the Competitive Bidding Guidelines and Article 13 of the PPA to restore the Petitioner to the same economic position as if the Change in Law event had not occurred. The Petitioner had *inter alia* prayed to direct the Haryana Utilities to provisionally pay compensation amount for the past period within one month subject to adjustment on final determination of relief by the Commission.

6. The Commission by its order dated 31.5.2018 held that the Petitioner was entitled for compensation for any shortfall in supply of coal by Coal India Limited. As regards computation, the Commission held that relief due to shortage of domestic coal would be worked out for the period from 1.4.2013 to 31.3.2017. The relevant portion of the Commission's order dated 31.5.2018 is extracted hereunder:

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

*35.....The above shortfall in supply of coal during the last four years of 12th Plan has been considered for the purpose of change in law for implementing the directions of Hon'ble Supreme Court in Energy Watchdog case..... We have gone through the judgement. Hon'ble Supreme Court has held that the MoP letter dated 31.7.2013 and the Tariff Policy, 2016 are statutory documents and have the force of law. Further, para 4 of the MoP letter dated 31.3.2017 provides as under:*

xxxxxxx

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

7. Aggrieved by the above Order, the Haryana Utilities filed Review Petition No. 24/RP/2017 seeking review of the Commission's order dated 31.5.2018. The Review Petition was rejected by the Commission vide its order dated 31.12.2018.



8. In the above background, the Petitioner has filed this Petition and has pointed out that the Commission in the order dated 31.5.2018 has restricted the entitlement of the Petitioner to the last four years of the 12<sup>th</sup> five year plan. Accordingly, the Petitioner has sought the implementation of the judgment of the Hon'ble Supreme Court stating that the affected party shall be restored to the same economic position as if change in law has not occurred and has made the following prayers:

*“(a) Admit the present Petition;*

*(b) Direct that the entitlement of the Petitioner for compensation for domestic coal shortfall as determined by this Hon'ble Commission's order dated 31.5.2018 in Petition No. 97/MP/2017 shall continue after 31.3.2017, until the change in law event continues/ supply of the coal is restored to 100% as assured in the NCDP 2007;*

*(c) Grant carrying cost from the effective date of change in law events that have affected the Petitioner till the date of the order, at the rate as prayed for in the present Petition; and*

*(d) Pass such further orders or direction as this Hon'ble Commission may deem just and proper in the circumstances of the case.”*

### **Submissions by the Petitioner**

9. The Petitioner in this Petition has mainly submitted as under:

(i) The PPAs provide for extensive provisions for qualifying any event as change in law and mandates restitution from the impact of such change in law.

(ii) The Supreme Court in Energy Watchdog case held that any policy or letter issued by any Government instrumentality has force of law and qualifies as change in law and the affected party would be compensated to restore it to the same economic position as if the change in law event had not occurred.

(iii) As per the principle of restitution, the affected party is required to be restored to the same economic position as if change in law event had not occurred. In order to render complete justice, the relief for change in law is required to be continued beyond March 2017 as the adverse impact of Change in law event has continued beyond the said period. Therefore, having determined that the Petitioner is entitled to relief under change in law provision in terms of the PPAs for the shortfall of domestic coal, the Commission is mandated to implement the compensation for a period till the impact of change in law continues.



(iv) The Commission in its order dated 31.5.2018 limited the relief till 31.3.2017 on the basis of Ministry of Coal (MoC) letter dated 31.7.2013 that CERC/ SERCs would allow the higher cost of coal as a pass through to the extent of shortfall in the quantity indicated in LOA/ FSA for remaining four years of the 12<sup>th</sup> plan.

(v) To achieve this objective, the MoC, GOI on 22.5.2017, notified SHAKTI scheme which is a successor to the NCDP 2007 and NCDP 2013 and states that even after the end of 12<sup>th</sup> plan period, the availability of domestic linkage coal under the extant policy of the GOI continues to be restricted even beyond 31.3.2017. In terms of Energy Watchdog case, the introduction of SHAKTI scheme would qualify as change in law event vis-à-vis NCDP 2007 which was in place when the Petitioner had submitted its bid.

(vi) In terms of the Energy Watchdog case, the relief for change in law impact is not limited for a particular period or an end date. The principle established by the Hon'ble Supreme Court in the said judgment is that shortfall in domestic coal on account of change in government Policy is change in law event and the Petitioner is entitled to compensation in terms of the PPA.

(vii) Payment of the compensation is imperative to meet the principle of restitution stipulated in the PPA. Relief granted ought not to be subject to time period but to be granted till the impact of change in law continues in order to fulfill the mandate of restitution.

(viii) The carrying cost is an integral part of compensation so as to achieve restoration of the same economic position of the affected party. Accordingly, the Petitioner is entitled to relief/ compensation for impact of change in law along with the carrying cost even beyond 31.3.2017 and till the time impact of change in law continued.

(ix) In the remand proceedings related to Petition No. 235/MP/2015, the Petitioner had prayed for approval of carrying cost at the rate of 10.89% being the actual rate incurred. On the same lines, the Commission may consider the interest rate of 10.89% for computing carrying cost in this case also.

Accordingly, the Petitioner has prayed for grant of reliefs as prayed for in the above para 8 of this Order.

10. The Petition was admitted on 17.9.2018 and the Commission issued notice to the Respondents with direction to complete pleadings in the matter. Reply has been filed by the Respondent, Haryana Utilities (UHBVNL & DHBVNL) and the



Petitioner vide its affidavit dated 15.10.2018 has filed its rejoinder to the said reply.

### **Reply of Respondents**

11. The Respondents, Haryana Utilities vide reply affidavit dated 3.10.2018 have mainly submitted as under:

(a) PPAs dated 7.8.2008 were entered into with Adani Power limited and not with Adani Power (Mundra) Limited. The Respondents have not recognized the acquisition of the Units- 7, 8 & 9 of the Mundra Power Project by Adani Power (Mundra) Limited. There is no supplementary agreement between Adani Power Limited, Adani Power (Mundra) Limited and the Respondents recognizing the transfer under the scheme of amalgamation, de-merger or any such reconstruction.

(b) The change in law under Article 13 of the PPA, in terms of Energy Watchdog judgment is restricted to the reduction in coal availability till 31.3.2017 only. There is no change in law or direction from MOP, GOI or any other authority under the term 'law' under the PPA for reduction of coal availability from 1.4.2017.

(c) The matter relating to the quantum of coal to be made available by the coal company under LOA/ FSA to the Petitioner is contractual in nature and it is open to the Petitioner to enforce its contract with the coal company and secure the coal to the extent assured under FSA/ LOA.

(d) There is no basis for the Petitioner to claim the extension of order dated 31.5.2018 in Petition No 97/MP/2017 for any period after 31.3.2017. Moreover, the Petitioner has not furnished any legal ground for such extension.

(e) The Petitioner had not raised any issue on Shakti Policy during proceedings in Petition No. 97/MP/2017 though the same has been claimed to have been issued at such time. Therefore, the Petitioner in this Petition is not allowed to raise new issue in the present Petition under guise of implementation of order dated 31.5.2018. The Petitioner has not even issued notice for change in law in respect of the Shakti Policy.

(f) When the letter dated 31.7.2013 considered as 'law' by the Supreme Court mandates the shortfall to be considered only until 31.3.2017, there cannot be any extension of such period on the basis of principle of restitution or otherwise.

(g) The Petitioner is not entitled to any carrying cost prior to 1.4.2017. The issue of delayed payment surcharge would arise only in the event the



Respondents fail to pay the amount on the due date as per Article 11.8 read with article 11.3.4 of the PPA.

### **Rejoinder by the Petitioner**

12. The Petitioner in its rejoinder affidavit dated 15.10.2018 has submitted the following:

(a) The contention of the Respondents as regards the maintainability of the Petition is patently incorrect. The National Company Law Tribunal (Ahmedabad bench) ('NCLT') vide its order dated 3.11.2017 had approved the scheme of transfer of Mundra Thermal Power Station to Adani Power (Mundra) Ltd. from Adani Power Ltd in terms of section 232(4) of the Companies Act, 2013. In view thereof, Mundra power generating undertaking presently vests in Adani Power (Mundra) Ltd and accordingly all assets, liabilities, contracts and obligations of the Mundra undertaking including generation assets stand transferred from Adani Power Ltd. to Adani Power (Mundra) Ltd. *vis-à-vis* the PPA dated 7.8.2008 with the Respondents, Haryana Utilities.

(b) The order dated 3.11.2017 of the NCLT is a legal arrangement and binding on all the concerned parties including the Haryana Utilities. No cause arises for the concern of Haryana Utilities regarding fulfilment of obligations under the PPA.

(c) The Petitioner by various letters had duly informed the Respondents about the scheme of arrangement approved by NCLT. Vide letter dated 5.10.2018, the Respondents were requested to cooperate and execute the proposed tripartite agreement in order to ensure proper and effective implementation of the said Scheme sanctioned by the NCLT. However, the Respondents did not respond to the said letter and are now alleging the lack of a supplementary agreement to contest the maintainability of the Petition.

(d) The Commission in Petition Nos. 97/MP/2017 and 235/MP/2015 has taken cognizance of the scheme of arrangement approved by the NCLT and allowed the change of name from Adani Power Limited to Adani Power (Mundra) Ltd. and the Haryana Utilities were party to the said Petitions.

(e) The Petitioner had filed IAs in Appeal Nos. 158/2017 & 316/2017 before APTEL for substituting the name of Adani Power (Mundra) Limited and the APTEL vide order dated 25.1.2018 had permitted the amendment of memo of parties. Hence, the present Petition is maintainable.

(f) The Energy Watchdog judgment does not merely provide relief till 31.3.2017 but also states that any change/ reduction/ non-grant of supply of domestic coal is modification of NCDP and, therefore, the affected party is entitled to claim relief under change in law in the PPA. Additionally, the





Hon'ble Supreme Court had held that the affected party shall be compensated and restored to the same economic position as if such change in law has not occurred.

(g) The MOC, GOI has on 22.5.2017 notified the Shakti policy which is a successor to NCDP 2007 & NCDP 2013 and provides for (i) treatment to assurance of coal linkages under NCDP 2007 under Part (A) of the policy and (ii) allocation of coal linkages to power sector through auction process under part (B) of the policy as per the approval of the CCEA dated 17.5.2017 for introduction of a new more transparent coal allocation policy for power sector 2017.

(h) A perusal of Shakti scheme makes clear that even after the end of the 12<sup>th</sup> plan period i.e. 31.3.2017, the availability of domestic linkage coal/supply of domestic coal up to 100% of assured quantum under the extant policy of GOI continues to be restricted i.e. 75% of the ACQ. Further, the Shakti policy is in continuation of the NCDP as per para (A) of Shakti policy. In view of this, the Petitioner is entitled for grant of compensation on account of change in law event continuing beyond 31.3.2017.

(i) In view of the settled position of law as laid down by the Hon'ble Supreme court in Energy watchdog case, even the introduction of Shakti by a statutory document being MOC notification dated 22.5.2017 having force of law, would squarely qualify to be change in law event vis-à-vis its former analogies being NCDP 2007 which was in place when the Petitioner submitted its bid and amendment through NCDP 2013 was upheld as change in law event by the Hon'ble Supreme Court.

(j) As regards contention of the Respondent for restricting the relief till March 2017, the Petitioner is entitled to relief under change in law provision of the PPAs for shortfall of domestic coal under the Commission's order dated 31.5.2018 in Petition No. 97/MP/2017. The Commission is mandated to implement the compensation for the period till the impact of change in law continues.

(k) The principle of restitution stipulated in the PPA provides that the relief granted against change in law ought not to be subject to an end date or time period. Instead, it should be granted till the impact of such change in law continues to exist in order to fulfill the mandate of restitution.

(l) The entitlement of the Petitioner under the domestic coal linkage policy has been in existence from the time the Petitioner submitted its bid. Therefore, the Shakti policy will always be read co-jointly and not in isolation with NCDP with regard to change in law event as provided under the PPA executed between the Petitioner and Haryana Utilities. Moreover, the Petitioner has filed a new petition seeking continuation of relief in view of change in law in terms of Shakti policy.



(m) The Petitioner is entitled to relief under change in law provisions of the PPA as the Shakti policy restricts the coal supply to 75% of the ACQ, contrary to the coal supply assured under NCDP 2007 which was in existence at the time of submission of bid by the Petitioner.

13. The matter was heard on 24.10.2018 and the Commission after directing the parties to file their written submissions reserved its order in the Petition. In compliance with the direction of the Commission, Haryana Utilities vide affidavit dated 3.11.2018 has filed its written submissions.

#### **Written submissions of Haryana Utilities**

14. The Respondent, Haryana Utilities in its written submissions has mainly contended the following:

(a) The Commission in its order dated 31.5.2018 had held that the petitioner shall be entitled to relief on account of change in law being MOP letter dated 31.7.2013 and the Revised Tariff Policy. The said letter based on which the relief was given was itself limited to the last four years of 12<sup>th</sup> Five year plan, namely covering the period from July 2013 to 31.3.2017 (though the Commission has considered the period of 1.4.2013 to 31.3.2017).

(b) The Petitioner cannot, while seeking implementation of order dated 31.5.2018, claim relief beyond the period envisaged in the said order i.e. only for the period till 31.3.2017 and not from 1.4.2017 onwards.

(c) The Petitioner is seeking to rely on the decision of the Hon'ble Supreme court to claim relief for shortfall even beyond 31.3.2017. The relief claimed by the Petitioner has to be for change in law and any shortfall which is not a consequence of change in law cannot be considered for grant of compensation/ relief under Article 13.

(d) The decision of Hon'ble Supreme Court in Energy Watchdog Case does not cover the issue of the coal availability beyond the MOP letter dated 31.7.2013 which reduces the coal availability for a period of balance 4 years. When the MOP letter dated 31.7.2013 considered as law by the Hon'ble Supreme Court mandates pass through of cost for the shortfall to be considered only until 31.3.2017, there cannot be any extension of such period on the basis of principle of restitution or otherwise.

(e) There is no change in law or direction from MOP, GOI or any other Authority who are recognized under the definition of term 'Law' under the PPA read with article 13 dealing with change in law have come into



existence for reduction of the coal availability from 1.4.2017.

(f) The Petitioner had not raised any contention or ground or submitted that the Shakti scheme policy during the proceedings in Petition No. 97/MP/2017 and it is not open for the Petitioner to now claim relief on basis of Shakti scheme in regard to order dated 31.5.2018 in the said Petition.

(g) The Petitioner is not entitled to any relief beyond 31.3.2017 on account of any change in law. It is for the Petitioner to take appropriate measures with the coal companies under the FSA/ LOA for procuring the requisite coal.

(h) The Commission had in remand, based on the judgment of the Hon'ble Supreme court already held that the relief can be granted only up to 31.3.2017. The Petitioner cannot now rely on the Energy watchdog decision to seek any additional relief contrary to Commission's order dated 31.5.2018.

(i) The Petitioner has not issued any notice for change in law in respect of Shakti Policy/ letter dated 22.5.2017 in terms of Article 13.3 of the PPA. Hence, the issue of change in law cannot be considered when the Petitioner has not demonstrated the change in law.

(j) The Petitioner is not entitled to carrying cost. The issue of carrying cost needs to be considered in the light of the provisions of Article 13.2, 13.4 and 11.8 of the PPA. The PPA having provided for the manner in which the claim for change in law shall be addressed, it is not open to the Petitioner to claim any additional amount.

(k) The PPA provides for Late Payment Surcharge (LPSC) in case of delay in payment beyond the due date. There cannot be any payment prior to the due date. The provisions relating to restoration of the Petitioner to the same economic position cannot be read in isolation. The restoration of economic position is not in absolute form and is conditional to other expression used 'to the extent contemplated in Article 13, which necessarily requires (i) the formula under Article 13.2 to be applied (b) the effect to be given for Article 13.4 read with Article 11.8 regarding supplementary invoice to be raised, time period to be allowed and issue of carrying cost/LPSC/interest in case of no payment of amount within the due date.

(l) It is not open to the appellant to claim carrying cost/ interest/ LPSC when the same is not provided in the PPA and particularly when there is no delay in payment. The Procurers and respondents are not liable to make payment until the decision of the Commission and raising of supplementary invoices.

(m) The Petitioner is not entitled to carrying cost to the extent that the



Petitioner has caused delay in seeking compensation. The Commission should not discriminate the rate of interest in case of Petitioner requiring to pay with 9% and when Respondents are required to pay at a percentage of 10.89% as claimed by Petitioner. The principle applied in the Commission's order dated 31.5.2018 in Petition No. 97/MP/2017 should be applicable to any amount that Petitioner may claim against respondents towards carrying cost.

Accordingly, the Respondents, Haryana Utilities have submitted that the prayer of the Petitioner may be rejected.

### **Analysis and Decision**

#### **(a) Preliminary objection**

15. Before proceeding to decide on the prayers of the Petitioner, we consider the preliminary objection raised by the Respondents, Haryana Utilities in its reply affidavit dated 3.10.2018. In the said affidavit, the respondents have contended that the PPA dated 7.8.2008 was entered into by the Respondents with Adani Power Ltd. and not Adani Power (Mundra) Ltd. They have submitted that there is no supplementary agreement between Adani Power Ltd., Adani Power (Mundra) Ltd. and Haryana Utilities recognising the transfer of Mundra Power project (Units 7, 8 and 9) to Adani Power (Mundra) Ltd. under the scheme of amalgamation or de-merger and hence the Petition filed by the Petitioner is liable to be rejected as not maintainable.

16. In response, the Petitioner has clarified that the Petitioner had, by various letters, informed the Haryana Utilities about the scheme of arrangement approved by NCLT. It has further submitted that the Commission in its order had taken cognisance of the scheme of arrangement and had approved the change of name in Petition Nos. 97/MP/2017 and Petition No. 235/MP/2015 wherein, the Haryana Utilities were party to the said Petitions. The Petitioner has added that in Appeal Nos. 158/2017 and 316/2017, the Appellate Tribunal by order dated



25.1.2018 had allowed the substitution of the name of 'Adani Power (Mundra) Ltd' from Adani Power Ltd. and the Haryana Utilities who were parties to the said proceedings, had neither objected to such substitution nor had challenged the said decision. Accordingly, the Petitioner has submitted that the Petition is maintainable and the objections of the Respondent may be rejected.

### **Analysis and Decision**

17. The matter has been examined. It is noticed that in Appeal No. 158/2017 (APL V CERC &ors) and Appeal No. 316/2017 (UHBVNL v CERC & ors), the Appellate Tribunal by order dated 25.1.2018 had allowed the substitution of the name of 'Adani Power (Mundra) Ltd' from Adani Power Ltd. The Haryana Utilities, who were parties to the said proceedings had neither objected to such substitution nor had challenged the said decision. The relevant portion of the Appellate Tribunal's order is extracted hereunder:

***Appeal No. 158/2017 (APL V CERC &ors)***

*"The Appellant is permitted to substitute the name of the Appellant as 'Adani Power (Mundra) Limited' in place of 'Adani Power Ltd'. The application is disposed of..."*

***Appeal No. 316/2017 (UHBVNL v CERC &ors)***

*The Respondent No.2's name is permitted to be substituted as 'Adani Power (Mundra) Limited' in place of 'Adani Power Ltd'. The application is disposed of..."*

18. It is further noticed that in Petition No. 97/MP/2017, the Commission by order dated 31.5.2018 had approved the change of name from Adani Power Limited to Adani Power (Mundra) Limited, on the record of the Commission, based on the submissions of the Petitioner that the National Company Law Tribunal, Ahmedabad had sanctioned the arrangement between Adani Power Limited (Transferor Company) and Adani Power (Mundra) Limited (Transferee Company) vide order dated 3.11.2017. The relevant portion of the order is extracted hereunder:



*“The Petitioner has requested that the newly formed Adani Power (Mundra) Limited may be taken on record in place of Adani Power Limited. On perusal of the common order dated 3.11.2017 in CP (CAA) No. 104/NCLT/AHM/2017 with CP (CAA) No. 105/NCLT/AHM/2017, we find that the scheme of arrangement between Adani Power Limited and Adani Power (Mundra) Limited has been sanctioned by the Learned National Company Law Tribunal, Ahmedabad. In para 25 of the order, it has been directed that “all concerned authorities to act on copy of this order along with the scheme duly authenticated by the Registrar of the Tribunal”. The Petitioner has placed on record copy of the duly authenticated order along with the scheme. Accordingly, the name of the Petitioner has been change from Adani Power Limited to Adani Power (Mundra) Limited on the record of the Commission.”*

19. The Respondents, Haryana utilities filed Review Petition No. 24/RP/2018 and sought review of the Commission’s order dated 31.5.2018 on various issues, including the issue of substitution of Adani Power Mundra Limited in place of Adani Power Limited. However, during the hearing of the review petition, the Haryana utilities had not pressed for this issue. The relevant portion of the Commission order is extracted hereunder:

*“Review Petitioners have sought review on the issue of substitution of Adani Power (Mundra) Limited in place of Adani Power Limited. However, the learned counsel for the Review Petitioners submitted during the hearing that he was not pressing the issue. We are, therefore, not dealing with this issue in this order as issue was not argued.*

20. Since the issue of substitution of ‘Adani Power (Mundra) Limited’ in place of ‘Adani Power Limited’ has attained finality, the objection of the Respondents, Haryana utilities cannot be entertained. The Petition is therefore maintainable. Accordingly, we proceed to decide the issues on merit.

**(b) Shortfall in domestic linkage coal beyond 31.3.2017**

21. The Petitioner has submitted that the Commission, having determined that the Petitioner is entitled to relief under change in law provision of the PPA for shortfall of domestic coal, is mandated to implement the compensation for a period till the impact of change in law continues. It has submitted that as per the principle of restitution, the affected party is required to be restored to the same economic position, as if change in law has not occurred and hence, in order to



render complete justice, the relief of change in law has to continue beyond March 2017 as the adverse impact of change in law has continued beyond March 2017. The Petitioner has further submitted that Shakti Policy notified by the MOC, GOI on 22.5.2017 is a successor to the NCDP 2007 and NCDP 2013 and the policy makes it clear that even after the end of the 12<sup>th</sup> plan period, the availability of domestic linkage coal under the extant policy of the Govt. of India continues to be restricted even beyond 31.3.2017. The Petitioner has stated that as per the law laid down by the Hon'ble Supreme Court in Energy Watchdog case, the introduction of Shakti policy would also qualify as change in law event *vis-a-vis* NCDP 2007 which was in place when the Petitioner submitted its bid. The Petitioner while pointing out that the relief of change in law cannot be limited to 31.3.2017 only, has submitted that the principle of granting relief/ compensation under change in law is not limited for a particular period or any end date. It has submitted that the principle established by the Hon'ble Supreme Court makes it clear that (i) shortfall in domestic coal on account of change in government policy is a change in law event and (ii) the Petitioner is entitled to compensation in terms of the PPA. Accordingly, the Petitioner has submitted that it is entitled to compensation for impact of change in law event as approved by the Commission, even beyond 31.3.2017 along with carrying cost till such time impact of change in law continues/ supply of domestic coal up to 100% of assured quantum is restored.

22. *Per contra*, the Respondents, Haryana Utilities have submitted that the NCDP 2013 based on which relief was given to the Petitioner was limited to the last four years of the 12<sup>th</sup> five year plan covering the period from 1.4.2013 to 31.3.2017. The respondents have submitted that the change in law within the scope of Article 13 of the PPA as considered by the Hon'ble Supreme Court in Energy



Watchdog case is restricted to the reduction in coal availability till 31.3.2017 only. They have submitted that the Shakti Policy initiated by the GOI does not extend the NCDP beyond 31.3.2017 and is only an avenue by which Power company can procure coal. These respondents have pointed out that the Commission had already considered the above judgment in its order dated 31.5.2018 while holding that the change in law is to be considered only until 31.3.2017 and hence the Petitioner cannot under the guise of implementation of the Commission's order dated 31.5.2018 or the judgment of Hon'ble Supreme Court dated 11.4.2017 seek to raise new issues or contentions. The Respondents have also contended that the Petitioner had not raised any contention or even submitted the Shakti Policy during the proceedings in Petition No. 97/MP/2017 and hence there cannot be any extension of such period on the basis of restitution or otherwise.

### **Analysis and Decision**

23. The submissions have been considered. Petition No. 97/MP/2017 was filed by the Petitioner seeking implementation of the directions contained in the Energy Watchdog judgment dated 11.4.2017 for grant of relief under change in law and the Commission by its order dated 31.5.2018 had granted the said relief for the period from 1.4.2013 to 31.3.2017. The relevant portion of the order is extracted hereunder:

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

*xxx*

*47. The Petitioner is directed to work out the relief based on the formulation given at para 46 above for the period from 1.4.2013 to 31.3.2017. Any compensation paid by MCL and SECL to the petitioner for shortfall in supply of coal below the minimum/threshold quantity as per FSA shall be adjusted against the year-wise claims for compensation under change in law allowed in this petition..."*





24. The Respondents, Haryana Utilities have submitted that the Petitioner cannot rely on the Energy Watchdog judgment of the Hon'ble Supreme Court and seek additional relief since the Commission in remand had already granted relief up to 31.3.2017 based on the said judgment. They have further submitted that the Petitioner had not raised any issue on Shakti Policy nor made any submissions in this regard during the proceedings in Petition No. 97/MP/2017, though the said policy was issued at that time and therefore, the Petitioner is not permitted to raise the new issue under the guise of implementation of the Commission's order dated 31.5.2018 and seek relief from 1.4.2017 onwards.

25. In our view, the submissions of the Respondents are misconceived. Petition No. 97/MP/2017 was filed by the Petitioner for determination of compensation due to change in law pursuant to the directions of the Hon'ble Supreme Court in its judgment dated 11.4.2017 and the Commission had granted the relief up to 31.3.2017. Even though the said Petition was filed on 1.5.2017 i.e. prior to the notification of the Shakti Policy by the GOI, the Petitioner had not made any submissions in this regard during the course of the proceedings in the said Petition. This, however, does not preclude the Petitioner from filing a separate Petition and seek continuation of relief under change in law beyond 31.3.2017 in terms of the Shakti policy, based on the judgment of the Hon'ble Supreme Court. As per the principle laid down by the Hon'ble Supreme Court in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP 2007 is change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Accordingly, we proceed to examine whether the Petitioner is entitled for compensation for domestic linkage coal shortfall beyond 31.3.2017.



**(c) Compensation for domestic linkage coal shortfall beyond 31.3.2017**

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

27. Per contra, the Respondents, Haryana utilities have submitted that the Shakti Policy being an enabling provision, there is no mandate that the coal quantum available to the power company be reduced in order to constitute change in law and enable them to claim the effect of change in law. They have submitted that the change in law for which relief was granted has been that, by NCDP, the Central Government has reduced the coal availability under the Fuel Supply Agreement/ Letter of Intent/ Letter of Assurance to the power project from the quantum required for generation of electricity on normative target availability to a minimum of 65%, 65%, 67% and 75% respectively for the four years commencing from 2013-14 to 2016-17. According to the Respondents, since there is no letter or direction by the Ministry of Power in regard to the reduction in coal availability to the power project after 31.3.2017, the relief prayed for by the Petitioner cannot be considered.

**Analysis and Decision**

28. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the



cut-off dates) provides as under:-

“xxxx

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

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

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

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

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

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

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

xxxx”

29. The Commission has considered the issue of compensation under Shakti Scheme of Government of India vide Order dated 16.5.2019 in Petition No. 8/MP/2014 & Petition No. 284/MP/2018; and Order dated 3.6.2019 in Petition No. 156/MP/2018. Relevant extract from Order dated 16.5.2019 in Petition No. 8/MP/2014 & Petition No. 284/MP/2018 in the case of GMR Warora Energy Limited versus MSEDCL is as under:

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



“xxxx

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

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

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

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

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

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

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

xxxx”

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

45. NCDP 2013 was issued consequent upon approval of CCEA on 21.6.2013. As per NCDP 2013, the revised assured coal allocation was 65%, 65%, 67% and 75% of ACQ for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Paragraph (A)(iii) of the Shakti Scheme (quoted above) deals with capacities totalling about 68,000 MW as per the decision of CCEA dated 21.6.2013 which would continue to get coal at 75% of ACQ even beyond 31.3.2017. The capacity of the generating station of the Petitioner falls within the said 68000 MW capacity covered by the decision of CCEA. Moreover, through Shakti Scheme, coal is continued to be made available at 75% of ACQ for the period after 31.3.2017. This percentage (75%) of coal allocation after 31.3.2017 is in continuation of the percentage coal allocation assured in the year 2016-17 of NCDP 2013. In other words, the phrase “the capacities totalling 68,000 MW as per decision of the CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017” in Paragraph (A)(iii) of the Shakti Scheme would imply that the said scheme is in continuation of the



decision in NCDP, 2013.

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

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

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

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of “Indian Governmental Instrumentality” would be covered within the definition of “Change in Law”. “Indian Government Instrumentality” as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of “an Indian Government Instrumentality” under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon’ble Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be compensated, so as to restore it to the same economic position, as if such change in law had not occurred.”

30. Considering the fact that the Petitioner’s plant is also covered in the capacity totaling 68000 MW as per decision of CCEA dated 21.6.2013, the Commission’s



decision in its earlier order dated 16.5.2019 is applicable in the present case. Accordingly, the Petitioner is entitled for relief under change in law and is required to be restored to the same economic position in terms of Article 13.2 of the PPA till the shortfall continues including the period covered by NCDP 2013 and subsequently continued by SHAKTI Scheme beyond 31.3.2017.

31. The Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017 & I.A. No. 21 of 2018 had held that the compensation on account of coal shortage is required to be worked out for the entire actual coal shortage and is not to be restricted to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Accordingly, we have granted relief for the period up to March 2017 in the said order. The relevant portion of the said order dated 31.5.2018 is extracted as under:

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

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

xxxx

*44. The Appellate Tribunal for Electricity in judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited Vs Reliance Infrastructure Limited & Another) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the heat rate and gross calorific value of coal given in the bid documents for establishing the coal requirement. The relevant observations of the Appellate Tribunal are extracted as under:*

*“26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant’s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in*



cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.”

In the light of the above observations, the technical parameters such as heat rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement. Since, the Petitioner has not quoted the GCV of coal or heat rate in the bid documents with reference to the PPAs dated 7.8.2008. Also, the bid assumptions regarding heat rate or GCV of coal submitted by the Petitioner subsequently through affidavits cannot be considered for determining the coal requirement in order to give relief to the Petitioner for Change in Law. The Commission is of the view that in the interest of consumers, normative heat rate as per the Tariff Regulations for 2009-14 and 2014-19 respectively or actual whichever is lower shall be considered for working out the compensation.

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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





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

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

*48. Since the Hon'ble Supreme Court has clearly held that the Petitioner is entitled for relief due to shortage of domestic coal under Change in law and no relief should be given due to impact of Indonesian Regulations which is not a Change in law, we are not going into the details of FoB cost of imported coal and Exchange Rate Variation to be considered for determining the price of imported coal. If imported coal is used to make up shortfall of domestic coal, then the actual cost of imported coal should be passed on for restitution of the Petitioner to the same economic position as if the change in law has not occurred. It is noticed that the Petitioner has claimed weighted average price of imported coal per tonne duly certified by the Auditor. The Petitioner is directed to share all relevant documents supported by Auditor Certificate to the Haryana Utilities with regard to the actual cost of imported coal consumed to meet the shortfall of domestic coal.”*

32. The above decision of considering entire actual coal shortage without restricting it to percentage (%) of the ACQ/ methodology for computation of relief due to shortage of domestic coal approved earlier by the Commission for period up to 31.3.2017 shall be applicable in the present case as it relates to period beyond 1.4.2017 in relation to the same PPA. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to the Respondents. The Petitioner and the Respondents are directed to carry out reconciliation on account of these claims annually.

**(d) Carrying Cost**

33. The Petitioner has submitted that it is entitled to relief/ compensation for impact of change in law event beyond 31.3.2017 along with carrying cost and till



the time the impact of change in law event continues/ supply of domestic coal up to 100% of assured quantum is restored. It has submitted that carrying cost is an integral part of compensation so as to achieve restoration of the same economic position of the affected party. Accordingly, the Petitioner has submitted that it is also required to be compensated for the carrying cost from the effective date of change in law events that have affected the petitioner till the date of order by the Commission. The Petitioner has pointed out that the interest rate of 10.89% for computing carrying cost may be considered in the present case on the same lines as considered in Petition No. 235/MP/2015 filed by it.

34. The Respondents, Haryana Utilities have submitted that the petitioner is not entitled to carrying cost on the amount claimed by the Petitioner for the period from 1.4.2017 onwards. They have submitted that the provisions relating to restoration of the Petitioner to the same economic position cannot be read in isolation. The tariff adjustments for change in law has to be claimed by the petitioner through the supplementary bill as mentioned in Article 11.8 and a time period of 30 days is available to the Respondents to pay such supplementary bills. The Respondents have submitted that the issue of delayed payment surcharge would arise only in the event the Haryana Utilities fails to pay the amount on the due date as per Article 11.8.3 of the PPA read with Article 11.3.4. It has also been submitted by the Respondents that the Petitioner should not be allowed the carrying cost at the rate exceeding 9% per annum. Also, the claim for interest at the rate of 10.89% besides being not admissible is patently arbitrary, discriminatory and treating the Petitioner favourably when it is required to recover the carrying cost/ interest as against 9%, when it is required to pay carrying cost. Accordingly, the Respondents have prayed that the prayer of the Petitioner on this count may be rejected.



35. The Petitioner has clarified that the Commission may consider the actual interest rate of 10.89% incurred for computing carrying cost in the present case along with a copy of auditor certificate in support of the same.

### **Analysis and decision**

36. We have considered the submissions made by the Petitioner and Respondents. In the present Petition, the Petitioner has sought change in law relief including carrying cost for shortfall in domestic coal supply from the period April 2017 onwards. We have already decided to allow carrying cost for the change in law relief for domestic coal shortfall up to March 2017 in our order dated 11.03.2019 in Petition No. 249/MP/2018. The relevant portion of the said order is reproduced herein below:

*“19. The Commission in para 38 of the order dated 28.9.2017 in Petition No. 97/MP/2017 has decided the claims of the Petitioner as under:*

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

*Therefore, the Commission has decided the effective date for implementation of the judgment of the Hon`ble Supreme Court from 1.4.2013 to 31.3.2017. Since, the Petitioner has paid for the supply of shortfall of coal from alternative sources for generation and supply of electricity on month to month basis, the Petitioner is also entitled for carrying cost from the effective date of Change in Law event that has affected the Petitioner till the date of the order in Petition No. 97/MP/2017.”*

37. In line with above, we allow carrying cost for the change in law relief towards domestic coal shortfall for the period of April 2017 onwards claimed in the present petition.

38. Next issue related to the carrying cost is the rate at which the carrying cost is to be computed. The Respondent has contended that the interest rate of 9% ought to be considered as against claim of actual interest rate incurred by the Petitioner. We have addressed the said issue in our order dated 11.03.2019 in



Petition No. 249/MP/2018 in relation to the same PPA for the issue concerning change in law relief for domestic coal shortfall. The relevant portion of the said order is reproduced herein below:

*“20. The Petitioner has sought carrying cost at the rate of 10.89% in line with the rate sought during the remand proceedings of Petition No. 235/MP/2015. The Petitioner has also submitted that the actual interest rate claimed is cheaper as compared to SBI Base Rate + 350 basis points being considered by the Commission as interest on working capital under Tariff Regulations as well as Late Payment Surcharge (LPS) of SBAR +2% under the PPAs. Per contra, the Respondents, Haryana Utilities have contended that the claim of the Petitioner should be limited to 9% interest rate in terms of the decision of the Commission in order dated 28.9.2017 in Petition No. 97/MP/2017 where interim relief was granted subject to refund of excess amount to Haryana Utilities. Haryana Utilities have also submitted that as per the provisions of CPC, interest should not be more than 6%.*

*21. The Commission in its order dated 28.9.2017 in IA No. 57/2017 in Petition No. 97/MP/2017 considered interest rate of 9% for adjustment of final relief as compared to payment allowed as interim relief. The said rate cannot be taken as the guiding principle for awarding the carrying cost. Since, the Appellate Tribunal has observed that carrying cost ought to be granted following the restitution principle in terms of provision of Article 13.2 of the PPA which provides that the party affected by change in law shall be restituted to the same economic position as if change in law has not occurred, we are of view that the interest rate of 9% does not meet the requirement of the principle of restitution.*

.....

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

39. The above decision is squarely applicable in the present case. Accordingly, we allow prayer of the Petitioner to claim carrying cost at the rate of actual interest rate for arranging funds (supported by Auditor’s Certificate). The Carrying cost shall be paid for the period starting with the date when the actual payments were made to the authorities till the date of issue of present order.

40. Petition No. 251/MP/2018 is disposed of in terms of the above.

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

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

