CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 269/MP/2018

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

Date of Order: 8th of July, 2019

In the matter of

Petition under Section 142 of the Electricity Act, 2003 for non-compliance of direction dated 28.9.2017 in Petition No. 97/MP/2017.

And
In the matter of

Adani Power (Mundra) Limited
"Adani House", Near Mithakhali Six Roads,
Navarangpura, Ahmadabad
Gujarat-380009 **…Petitioner**

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited,
Shakti Bhawan, Sector 6, Panchkula,
Haryana– 134 109

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Vidyut Nagar Hisar,
Haryana-125005 **…Respondents**

The following were present:

Shri Amit Kapur, Advocate, APMUL
Ms. Ponam Verma, Advocate, APMUL
Ms. Abiha Zaidi, Advocate, APMUL
Ms. Tanesha Sultan Singh, Advocate, APMUL
Shri Jignesh Langalia, APMUL
Shri Shashank Kumar, APMUL
Shri M.G. Ramachandran, Senior Advocate, Haryana Utilities
Ms. Poorva Saigal, Advocate, Haryana Utilities
Shri Shubham Arya, Advocate, Haryana Utilities
Shri Vikrant Saini, Haryana Utilities

ORDER

The Petitioner, Adani Power (Mundra) Limited, has filed the present Petition under Section 142 of the Electricity Act, 2003 (hereinafter referred to as the 'Act') for non-compliance of the Commission's direction dated 28.9.2017 in Petition No. 97/MP/2017 and for seeking directions to the Respondents to release the amount of Rs. 895.41 crore, which has allegedly been unilaterally and wrongly deducted by the Respondents from the monthly/ supplementary bills raised by the Petitioner.

Background of the case

2. The Petitioner has set up a generating station of capacity 4620 MW (Phase I & II- 4x330 MW, Phase III- 2x660 MW and Phase IV- 3x660 MW) (hereinafter referred to as the "Mundra Power Plant/ generating station") at Mundra in the State of Gujarat. The Petitioner has entered into PPAs dated 7.8.2008 with Uttar Haryana Bijli Vidyut Nigam Ltd and Dakshin Haryana Bijli Vidyut Nigam Ltd (hereinafter referred to as "Haryana Utilities/ Respondents") for supply of 1424 MW power from Phase IV of the generating station.

3. The Commission allowed compensation towards certain change in law events claimed by the Petitioner by order dated 6.2.2017 in Petition No. 156/MP/2014. The Petitioner has submitted that Haryana Utilities were making payments in terms of the supplementary invoices raised by the Petitioner. Further, the Petitioner filed Petition No. 97/MP/2017 on 1.5.2017 pursuant to directions of the Hon'ble Supreme Court in its judgment dated 11.4.2017 reported as (2018) 14 SCC 80 ("Energy Watchdog Judgment") seeking Change in Law relief on account of domestic coal shortage

resulting from, inter-alia, change in New Coal Distribution Policy, 2007 (NCDP). Along with the petition, the Petitioner filed I.A. No. 57 of 2017 for interim payments on 29.8.2017 in view of severe financial stress owing to non-payment of relief/ compensation for domestic coal shortfall. The Commission in its order dated 28.9.2017 in IA No. 57 of 2017 directed Haryana Utilities to provisionally make payment of 75% of the compensation claimed by the Petitioner towards Change in Law events as an interim measure.

4. In compliance of the aforesaid order dated 28.9.2017 of the Commission, Haryana Utilities paid Rs 639.69 crore as per the invoice raised by the Petitioner towards 75% of the claimed compensation as an interim relief. However, Haryana Utilities thereafter filed I.A. No. 21 of 2018 in Petition No. 97/MP/2017 seeking withdrawal of directions in the interim order dated 28.09.2017 with retrospective effect alleging 'Inter Plant Transfer (IPT) of coal' as illegal diversion of coal received for Mundra Power Plant to Adani Power Maharashtra Ltd. and Adani Power Rajasthan Limited. Accordingly, it was contended by Haryana Utilities that the shortage being claimed by Adani was incorrect.

Submission of the Petitioner

5. The Petitioner mainly has submitted as under:

(a) In light of the alleged illegality of Inter Plant Transfer of the coal, Haryana Utilities unilaterally revised the compensation amount of Rs. 639.68 crore to Rs. 311.19 crore as payable towards domestic coal shortfall and deducted the purported excess amount of Rs. 328.29 crore from the monthly bills (January to March 2018) and supplementary bills raised for Change in Law towards FGD, along with interest. The Petitioner, after the final order dated 31.5.2018 in Petition

No. 97/MP/2017, is entitled to receive Rs. 860.48 crore. Accordingly, the Petitioner vide its letter dated 12.6.2018 sought payment of Rs. 566.83 crore from Haryana Utilities.

(b) Haryana Utilities has also unilaterally adjusted Rs. 328.58 crore on the ground of IPT from the monthly bills (January to March 2018) and the supplementary bills raised for Change in Law towards FGD, along with interest. This amount of Rs. 328.58 crore was the compensation paid by Haryana Utilities towards change in law events of taxes and duties approved by the Commission in order dated 6.2.2017 in Petition No. 156/MP/2014. The Petitioner vide a separate letter dated 12.6.2018 to Haryana Utilities sought refund of Rs. 328.58 crore along with interest. However, Haryana Utilities did not make payment of aforesaid amount.

(c) Despite allegations of Haryana Utilities relating to IPT, being dismissed by the Commission in para 61 of its order dated 31.5.2018 in Petition No. 97/MP/2017, the issue of Inter Plant Transfer was raised by the Haryana Utilities to curtail or stop payments to the Petitioner in contravention of the order of the Commission. The above findings of the Commission in para 61 regarding inter-plant transfer are applicable to the change in law compensation pertaining to taxes and duties approved under Petition No. 156/MP/2014 as well. Therefore, the conduct of Haryana Utilities is in violation of the Article 11.3.2 of the PPAs which abstains the procurer from unilaterally deducting/ setting off any disputed amount. Further, as per Article 11.6.1 of the PPAs, if a party does not dispute a bill within 30 days of its receipt, it is taken to be conclusive.

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

"(a) Clarify and declare that the findings of this Ld. Commission at paragraph 61 of the Order of the Commission dated 31.05.2018 in Petition No. 97/MP/2017 and IA No. 21 of 2018, are applicable to the Change in Law compensation pertaining to taxes and duties approved under Order dated 06.02.2017 in Petition

No. 156/MP/2014 as well; and

(b) Direct the Respondents to pay Rs. 895.41 Crores (Rs. 566.83 Crores related to Domestic Coal Shortfall + Rs. 328.58 Crores related to taxes and duties) unilaterally deducted from the monthly bills/supplementary invoices along with the applicable Late Payment Surcharge."

7. The matter was heard and admitted on 6.9.2018. During the hearing held on 20.12.2018, Haryana Utilities pointed out that the Petitioner has only raised provisional bill. Further, it was also indicated that the Commission in Para 47 of the order dated 31.5.2018 in Petition No. 97/MP/2017 had directed the Petitioner to obtain and provide to the Haryana Utilities certificate from Mahanadi Coalfield Ltd (MCL) 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. However, the same has not been submitted by the Petitioner so far. Consequently, the Commission directed the Petitioner to raise the final bill as per the directions of the Commission in Petition No. 97/MP/2017 along with the relevant information and documents within seven days. During the hearing held on 17.1.2019 and 7.2.2019, learned counsel for the Petitioner submitted that as per the Commission`s direction dated 20.12.2018, the Petitioner has raised the final bill along with relevant documents. Haryana Utilities preliminarily raised objections on maintainability of the Petition under Section 142 of the Act and submitted that the certificate furnished by the Petitioner from MCL and SECL are only in regard to the quantum of supply of domestic coal by the above two companies in the respective years and not the quantum of coal made available by MCL and SECL during the respective financial years under the relevant FSA. Based on the objections raised by Haryana Utilities, the Commission directed the

Petitioner to submit (1) MCL certificates on coal availability, if any, and (2) Compensation, if any, paid by coal companies for shortage of coal supply.

8. The matter was further heard on 19.3.2019. During the course of hearing, learned senior counsel for Haryana Utilities again objected to the certificates submitted by the Petitioner contending that the certificates submitted are different from the certificate received by Haryana Utilities from MCL in case of GMR Kamalanga. Therefore, the Commission directed the Haryana Utilities to obtain the desired certificate from the coal companies, on or before 27.3.2019 and process the case of the Petitioner to make payment of outstanding dues.

9. Haryana Utilities vide affidavit dated 27.3.2019 has submitted the information received from MCL and SECL in response to the availability certificates sought by Haryana Utilities vide letters dated 22.3.2019 and 25.3.2019. Haryana Utilities further indicated that MCL has clarified that the Petitioner was not entitled for any amount of compensation since the level of delivery of coal by MCL was not below the respective trigger levels from domestic sources as per the provisions of Fuel Supply Agreement. Thereafter, extensive arguments were made by both the Petitioner and the Respondents during the hearing held on 11.4.2019. As per the liberty granted by the Commission, Haryana Utilities have filed written submission vide affidavit dated 26.4.2019 and the Petitioner made its written submission vide affidavit dated 29.4.2019. In the above background, the contentions of the Respondents and the Petitioner are considered as below.

Submissions of the Respondents, Haryana Utilities

10. The Respondents have submitted as under:

Maintainability of Petition

(a) The Petition filed by the Petitioner under Section 142 of the Act is not maintainable and is liable to be rejected *in limine*. The provisions of Section 142 can be invoked only if Haryana Utilities ` *contravened any of the provisions of this Act or Rules or Regulations made there under or any directions issued by the Commission'* and not for enforcing an order passed by the Commission. This is a basic pre-requisite for maintaining a Petition under Section 142 of the Act. In this regard, reliance is placed on judgment of Hon'ble Supreme Court in R.N. Dey and Ors. vs Bhagyabati Pramanik and Ors. [(2000) 4 SCC 400], judgment dated 13.9.2007 of Appellate Tribunal in Appeal No. 115 of 2007 (B. M. Verma vs Uttarakhand Electricity Regulatory Commission) and judgment dated 15.5.2017 of Appellate Tribunal in Appeal No. 103 of 2017 and Batch (BSES Rajdhani Power Limited vs The Secretary, Delhi Electricity Regulatory Commission). The Petitioner has submitted that the provisions of Section 142 of the Act cannot be invoked for adjudication of the issues in regard to the monetary claims made by one party against the other or otherwise for execution of any recovery of the money. None of the prayers made by the Petitioner is in any manner covered under the provisions of Section 142 of the Act.

(b) Neither the order dated 31.5.2018 in Petition No. 97/MP/2017 and IA No. 21 of 2018 nor the order dated 6.2.2017 in Petition No. 156/MP/2014 decided on the determination of any amount as payable by the Haryana Utilities to the Petitioner. It is well settled that the Petition under Section 142 of the Act cannot be filed at this stage as there is no decision in regard to the claim of the Petitioner, much less a direction that a particular sum is payable by Haryana Utilities to the Petitioner. Thus, there cannot be a plea that the direction of the Commission has not been implemented by the Haryana Utilities. Further, when such claims of the Petitioner are disputed by Haryana Utilities, the same is required to be adjudicated

by the Commission. Till such time the above aspects are dealt with, there cannot be any computation of the amount that the Petitioner can claim.

Claim for Taxes and Duties

(c) The Commission in its order dated 6.2.2017 in Petition No. 156/MP/2014 or in any other proceedings has not adjudicated the issue regarding taxes and duties payable by Haryana Utilities to the Petitioner when the imported coal is used in place of domestic coal including on account of availing IPT of coal allowed since 2013.

(d) The Commission's order dated 6.2.2017 in Petition No. 156/MP/2014 only provides for the royalty on coal, clean energy cess and excise duty on coal, etc. to be computed based on the actual subject to the ceiling of coal consumed. It does not state that even if the imported coal is consumed by virtue of IPT being allowed, the taxes and duties payable shall continue to be those related to domestic coal and not the imported coal even though the same may be higher than the taxes and duties payable for imported coal. This issue has not been adjudicated by the Commission in order dated 6.2.2017 or in any other proceedings. Since IPT is a facility availed by the Petitioner for its commercial convenience, the Haryana Utilities will be liable to pay only the taxes and duties that is lower of such taxes and duties applicable to imported coal or to domestic coal. Haryana Utilities have duly accounted for and paid all the taxes and duties with regard to imported coal consumed based on taxes and duties applicable to the imported coal. If the Petitioner did not actually consume coal or does not make the actual payment towards change in law, it cannot claim such compensation from Haryana Utilities.

(e) The Petitioner is deliberately avoiding the specific findings of order dated 6.2.2017 which relates to change in law in respect of taxes and duties and relying on order dated 31.5.2018 which relates to shortfall in coal and even in the order dated 31.5.2018, it is relying on decision in the IA related to vacation of interim

orders on compensation for such shortfall. The order dated 6.2.2017 cannot be amended, modified or otherwise re-interpreted based on order dated 31.5.2018.

Claim for compensation for the alleged shortfall in domestic coal

(f) As regards the claim for compensation for shortfall in the domestic coal is concerned, the Petitioner is entitled to claim such compensation only to the extent it is required to use imported coal as an alternative coal for shortfall in domestic coal. The shortfall has to be considered qua the quantum of coal which MCL has failed to make available in terms of the Fuel Supply Agreement (FSA) dated 9.6.2012 entered into between the Petitioner and MCL. The compensation cannot be claimed with reference to the quantum of coal which MCL/ SECL was duly making available to the Petitioner but the Petitioner for its own reasons had chosen not to take such quantum of coal. In other words, the availability of coal from MCL/ SECL should be the consideration and not the actual quantum of coal taken delivery of by the Petitioner.

(g) The arguments of differentiating between the quantum of coal made available by MCL/ SECL to be not considered but the quantum of coal which the Petitioner chose to take delivery of from MCL/ SECL only to be considered has been made as an afterthought. The above claim has been made by the Petitioner at the hearing on 11.4.2019 after the Haryana Utilities had placed on record the certificates from MCL/ SECL to the effect that the actual quantum of coal which MCL had made available to the Petitioner is not below the trigger level of 65%, 65%, 67% and 75% for the financial years 2013-14, 2014-15, 2015-16 and 2016-17 respectively.

(h) The actual quantum of coal which MCL/ SECL made available for the four financial years was much larger and well above the trigger level of 65%, 65%, 67% and 75% for four financial years. The actual availability as per MCL/ SECL during the four financial years mentioned herein above are as under:

Actual Availability as per Coal Company

Year	MCL			SECL			Road (MCL+SECL) (C)	Total Coal available from MCL/SECL (A+B+C)	% of 6.405 MTPA
	Offer of rakes	Coal per rake	Offer of coal (A)	Offer of rakes*	Coal per rake	Offer of coal (B)			
2013-14	1377	3737	5145592					5145592	80.34
2014-15	1377	3806	4990045					4990045	77.91
2015-16	1142	3926	4483343	193	4310	831792	125541	5440676	84.94
2016-17	764	3976	3037298	388	3895	1511152	471816	5020266	78.38

* As per SECL Letter dated 4.4.2019.

(i) The Petitioner has contended that in terms of the decision of the Hon'ble Supreme Court in Energy Watchdog case [(2017) 14 SCC 80)]; provisions of NCDP 2013; communications of the Government of India in regard to NCDP; and the orders of the Commission, the relevant aspect is only the actual quantum of supply of coal by MCL and SECL and not the quantum of coal offered by MCL/ SECL. The plea taken by the Petitioner is frivolous and is an attempt in the circumstances where MCL/ SECL had clarified that there was no shortage of coal availability from them at least up to the trigger level of 65%, 65%, 67% and 75% and no compensation was, therefore, payable by MCL/ SECL to the Petitioner. The Petitioner is selectively reading the words in the above documents to contend out of context that the availability of coal is not the consideration and rather supply of coal is the consideration. Reference to the expression `*the supply from Coal India and other Indian sources is cut down'* in Para 57 of the Energy Watchdog judgment can refer only to what is not made available by Coal India and other Indian Sources. It does not refer to the quantum of coal which MCL/ SECL are duly making available but was not taken by the Petitioner. Similarly, reliance is placed on the relevant provisions of NCDP 2013; communication dated 31.7.2013 from Ministry of Power to the Commission; and provisions of the Tariff Policy 2016 to contend that the reference to coal supply or reduced quantity of domestic coal supply by CIL vis-à-vis assured quantity or quantity indicated in the Letter of Assurance refers to availability of coal from MCL or coal companies and not quantum of coal which the Petitioner decides to take. Para 47 of the order dated

31.5.2018 specifically directs the Petitioner to provide a certificate from MCL about the actual availability and actual supply of domestic coal against the FSA quantum. It is not merely the actual supply. The directions contained in Para 47 of the order dated 31.5.2018 need to be implemented by the Petitioner with full effect.

(j) In view of the above, the stand taken by the Petitioner that the shortfall needs to be considered on the actual supply of coal to the Petitioner and not with reference to actual coal availability from MCL/ SECL is patently erroneous and devoid of any merit.

(k) The programme for procurement of coal is given by the Petitioner and against the programme, the offer is given by MCL/ SECL. The details of the quantum of coal which was the subject matter of the programme by the Petitioner and the offer of the MCL/ SECL indicates that except for few months, the entire quantum of coal programme by Adani Power was offered by MCL/ SECL. The requirement of Program and offer is also clear from Clause 7 (*'Method of Order Booking and Delivery of Coal'*) of the Fuel Supply Agreement dated 9.6.2012 with MCL. Further, the record of the number of railway rakes intended for the supply and number of railway rakes used for the actual supply shows that whatever was requisitioned was more or less supplied by MCL/ SECL.

(l) The Petitioner has filed the present Petition on the basis of a provisional invoice dated 12.6.2016 raised by the Petitioner without any documentation. Such provisional invoices cannot be a basis for claim of money. Haryana Utilities had sought for various information from the Petitioner in order to verify the invoices and otherwise consider the computation. However, the Petitioner has simply reiterated its provisional invoice and declined to provide any information by stating the same to be irrelevant for calculation of relief. Subsequent to Record of Proceedings dated 20.12.2018, the Petitioner purported to raise the claim in December 2018 by enclosing the final claim which was less than the provisional.

(m) There were discrepancies in the invoices and auditor certificate which have been detailed by Haryana Utilities in the submissions dated 3.1.2019 and 30.1.2019. When Haryana Utilities pointed out the discrepancies in submission dated 3.1.2019, the Petitioner produced certain other documents and admitted to certain corrections in submissions dated 12.1.2019. However, there are still discrepancies which have been pointed out in submissions dated 30.1.2019.

(n) The auditor certificate produced by the Petitioner does not comply with the requirements contained in order dated 31.5.2018. The auditor's certificate is with qualifications and disclaimers which clearly show that the purpose for which such certificate had been called upon in support of the data by the Commission to satisfy the veracity of the amounts claimed, cannot be said to be served. The certificate issued by SRBC & Co LLP was only for arithmetical accuracy of the computation of average landed cost of imported coal. Further, the Auditor was engaged only for a limited assurance which has been so stated in the Para 8 of the Certificate itself. Thus, the Auditor Certificate is not an authentication of factual details or a certificate of actual costs but merely a check of arithmetical accuracy. Even with regard to arithmetical accuracy, there are discrepancies which negate the veracity of the Auditor Certificate. The Auditor had failed to note the discrepancies, clerical and mathematical errors in the statement.

(o) The Commission in Para 45 of the order dated 31.5.2018 stated that the parameters should be considered based on the parameters specified in the applicable Tariff Regulations or the actual parameters, whichever is lower. These include parameters relating to Station Heat Rate and Auxiliary Consumption. Further, the quantum of electricity generated on actual basis or scheduled generation whichever is lower ought to be considered. The Petitioner has not given the actual parameters relating to Station Heat Rate, Auxiliary Consumption and also on the actual or scheduled generation on the above basis. In absence of these particulars, the Petitioner has not complied with the order dated 31.5.2018 and, therefore, the present proceedings are liable to be rejected.

Inter Plant Transfer Benefit to be passed on to Haryana Utilities

(p) In terms of clause 4.2 of the FSA dated 9.6.2012 executed by MCL in favour of the Petitioner, the use of coal in any other plant i.e. Inter Plant Transfer of coal was specifically prohibited. Therefore, the Petitioner was not entitled to use any part of the coal under the FSA dated 9.6.2012 for any other end-use than for generation and supply of electricity to the Haryana Utilities under the PPA dated 7.8.2008 and in generating units of Phase III of the project. Subsequently, in the year 2013, the Government of India's Policy changed and permitted the Inter Plant Transfer of coal. The Commission has recorded the submission of the Petitioner in the order dated 31.5.2018 and Record of Proceedings of hearing dated 19.4.2018 that the Inter Plant Transfer is a scheme evolved by the Central Government as a Policy to allow transfer of coal between the power plants wholly owned by the Purchaser or its wholly owned subsidiary.

(q) In view of the above, the Inter Plant Transfer constitute a Change in Law and the effect of any increase or decrease in the cost by reason of Inter Plant Transfer need to be adjusted in the tariff in terms of Article 13.2 of the PPA. In the present case on account of Inter Plant Transfer there has been substantial reduction in the cost of transportation of coal to the Petitioner resulting in the significant gain/ savings which needs to be factored towards reduction in the tariff. Since IPT has been allowed under Policy of the Government of India and the Coal Company and the Petitioner is treating the coal companies as the Indian Government Instrumentality within the scope of the definition of the term 'Law' and claiming change in law effect for the decision by the said Indian Government Instrumentality, the benefit accruing to the Petitioner by reason of such IPT should be passed on to the Haryana Utilities. The benefit accruing are the savings on the transportation of coal from MCL/ SECL Mines to Mundra in the State of Gujarat, savings on the transportation of the imported coal from Mundra Port to Tiroda and Kawai in Rajasthan compared with the transportation charges incurred for transporting coal from MCL/ SECL to Tiroda and Kawai. The above also being

covered under the Change in Law, benefit of the same should accrue to Haryana Utilities.

(r) The above aspect has been fully dealt with in the reply dated 21.2.2019 sent by Haryana Utilities to the Petitioner wherein, based on the computation of Haryana Utilities, it has been indicated that the saving which has accrued to the Petitioner in terms of coal supply from MCL and the Notification of Railway dated 31.10.2018 for the period from August 2015 to March 2017 works out to approximately Rs. 2560 per MT. Similarly, the IPT gain for the coal transferred from SECL to Tiroda for the period from November 2015 to March 2017 works out to Rs. 3774 per MT. As against the total possible claim of the Petitioner even if everything is held in favour of the Petitioner as regards its claim of Rs. 840.71 crore, even then the gain to be passed on to the Haryana Utilities is Rs. 2357 crore.

Other Submissions

(s) The formula specified in Para 46 of the order dated 31.5.2018 need to be applied in a contextual and pragmatic manner and not blindly to determine the compensation due to the Petitioner. The computation should be the difference between the landed cost of the imported coal minus the landed cost of domestic coal at the power project site of Mundra or the quoted energy charge whichever is higher. The formula which has been specified in Para 46 of the order dated 31.5.2018 has proceeded on the basis that the quoted energy charges is higher than the landed cost of domestic coal at the Power Plant of Adani Power. The formula has to be applied in a contextual manner and not in a pedantic and purposeless manner.

(t) The claim of the Petitioner for the difference between the quoted energy charges and the landed cost of imported coal is contrary to the basic principles laid down under Sections 73 and 74 of the Indian Contract Act, 1872.

(u) The Commission may convert the present Petition into a Petition for determination of increase as well as decrease in the cost or revenue on account of Changes in Law and to consider the implications of (1) shortage of availability of coal from the domestic linkage as per the certificate issued by MCL/ SECL; (2) formula to be adopted for computation of the compensation for the domestic coal shortage; (3) the impact of the Inter Plant Transfer and the revenue gain/ cost reduction achieved by the Petitioner by reason of such IPT being allowed by the Commission under the scheme of the Central Government subsequent to the cut of date.

Rejoinder of the Petitioner

11. The Petitioner has submitted as under:

(a) The statutory and regulatory powers of the Commission under Section 61 read with Section 63 and 79(1)(b) of the Act enable it to pass directions as it deems necessary and fit to adjudicate the present dispute. However, the Commission may treat the instant Petition as a Miscellaneous Petition if the provisions of Section 142 are coming in the way of justice and adjudication of the proceeding. The nature and contents of the proceedings is important for the Commission to adjudicate upon a Petition. However, there is no concession by the Petitioner with respect to Section 142 Petition being not maintainable/or not being pursued. The submission made by the Petitioner during the hearing held on 11.4.2019 was that technicality of applicability of the Section 142 of the Act cannot come in the way and the Commission is empowered to exercise its statutory and regulatory power to allow the prayers of the Petitioner.

(b) As regards contention of the Haryana Utilities that taxes and duties leviable on coal should be those which are levied on imported coal or on domestic coal, whichever is lower, the Petitioner has submitted that the Commission had allowed the Change in Law claim of taxes and duties vide its order dated 6.2.2017 in Petition No. 156/MP/2014. Further, the issue of IPT has been conclusively

determined by the Commission in its order dated 31.5.2018 in I.A. No. 21 of 2018 in Petition No. 97/MP/2018. Haryana Utilities are now barred by the principle of res judicata, from raising the same contentions which have been conclusively determined by the Commission time and again.

(c) The Petitioner has been raising bills for taxes and duties under change in law in line with the stipulation under the IPT Policy which prescribes that for all commercial purposes under the FSA, the supply of coal shall remain unchanged and on account of the original Power Plant. In view thereof, the entitlement of the Petitioner for Change in Law compensation cannot be disturbed since expenditure pertaining to those taxes and duties has been incurred by the Petitioner. Therefore, contentions and proposals of Haryana Utilities ought to be rejected. On the date of filing of the present Petition, Rs. 328.58 crore was outstanding against the Haryana Utilities and said claim is increasing on a monthly basis. Till the end of November 2018, it has increased to Rs. 513 crore.

(d) As regards the contention of Haryana Utilities that there exists no direction in the order of the Commission regarding payment, the Petitioner has submitted that the order approved the Change in Law relief and the compensation to be paid to the Petitioner in view of the domestic coal shortfall. Despite the order of the Commission, Haryana Utilities are now deviating from their responsibility to make payments in contravention of the Commission's order.

(e) There is no difference between the certificates issued to the Petitioner and those issued to Haryana Utilities by coal companies (Mahanadi Coalfields Ltd. and South Eastern Coalfields Ltd.) as the certificates only go on to confirm that (i) coal quantity specified in the certificates is the actual quantity of coal supplied as per the actual availability of coal., and (ii) no compensation has been paid by the coal companies to the Petitioner in terms of the FSA.

(f) The compensation for Change in Law is premised on a restitutive principle, aimed at restoring the affected party to the same economic condition as if such Change in Law had not occurred. This has been upheld by the Hon'ble Supreme Court in Energy Watchdog & Ors. vs. CERC & Ors. [(2017) 14 SCC 80]. Such restoration by way of compensation would, therefore, take into consideration the assurance of 100% coal to the Petitioner under NCDP 2007 vis a vis the coal actually supplied to the Petitioner post Change in Law. Accordingly, the Commission in Para 34 of order dated 31.5.2018 has held that the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Therefore, the Petitioner is entitled to compensation for any shortfall of 64.05 lakh MT.

(g) The decision of the Cabinet Committee of Economic Affairs ("CCEA") dated 21.6.2013; the letter of the Ministry of Power ("MOP") dated 31.7.2013; the revised Tariff Policy issued in January 2016; the Energy Watchdog Judgment along with the decision of the Commission mandate that the shortfall in coal for Change in Law compensation, is to be computed as the difference between the quantity of coal assured under the concerned FSA/ LOA (64.05 lakh MT) and the actual coal supplied.

(h) The provision for compensation contemplated under the FSA for coal supply below the minimum threshold quantity (80%) is a separate and distinct concept, in the nature of a contractual safeguard. The same must not be erroneously mixed with the compensation for Change in Law upon the enactment of the NCDP, 2013 as laid down by the Hon'ble Supreme Court in the Energy Watchdog Judgment. The Commission`s order dated 31.5.2018 has also observed that '*the compensation payable under the FSA for supply of coal for capacity lower than 65%,65%, 67% and 75% for the years 2-13-14, 2014-15, 20-5-16 and 2016-17 respectively on the ACQ* ***is too meagre*** *to meet the expenditure for procurement of coal from alternate sources or through import'.* Hence, the compensation under the FSA for the shortfall 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.

(i) The Petitioner has correctly computed the shortage as the difference between the assured quantity (ACQ) under the FSA and the actual quantity supplied by MCL/SECL.

Shortfall in coal supply is demonstrated in the table below:

Year	Firm Annual Coal Requirement/ACQ at page 438) (in MTPA)	Supply by coal companies (**CERC Order at page 73**, MCL certificates at pages 394 to 399, SECL certificates at pages 400 to 403)			**Shortfall**
		MCL	**SECL**	**Total**	
	A	**B**	**C**	**D = B + C**	**E = A-D**
2013-14	6.405	2.72	-	2.72	3.69
2014-15	6.405	4.08	-	4.08	2.33
2015-16	6.405	4.11	0.86	4.98	1.43
2016-17	6.405	2.69	1.84	4.53	1.87

(j) The 'Program' and 'Offer' referred by the Haryana Utilities in the affidavit dated 27.3.2019 relate to supply of domestic linkage coal by rail as the details sought by HPPC vide letter dated 22.3.2019 at Point No.1 is specific to Linkage coal quantum and the certificate issued by MCL dated 25.3.2019 also clearly refers to linkage coal and by rail only. The contention of Haryana Utilities that since the quantity of coal under the 'program' and 'offer' are the same, there is no shortfall in supply of coal by MCL/ SECL, is illogical. If this contention of Haryana Utilities is upheld, then the CCEA decision read with MOP directions as upheld by the Hon`ble Supreme Court (stating that the higher cost of imported coal procured to meet the shortfall) will have to be given a go-by.

(k) 'Program' is to be submitted by the Petitioner to the Railways and CIL. Then 'Offer' is made by Coal Company to the Petitioner. Then the supply of coal is

controlled and managed between the railways and the coal company. Therefore, it is crucial to see the 'supply' of coal which is actually made by the coal company to the Petitioner. In case of shortfall, the compensation must be paid to the Petitioner by the Discoms in terms of the Energy Watchdog Judgment and the Commission`s order dated 31.5.2018. Therefore, it is clear that 'Program' and 'Offer' have no relevance for the purposes of computation of compensation for shortfall of coal supply as it involves only a part of ACQ to be supplied by way of rail.

(l) As regards the auditor's certificate, the Commission in para 48 of the order dated 30.5.2018 directed the Petitioner 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. The ambit of auditor's certificate, therefore, was to certify the actual cost of imported coal consumed to meet the shortfall of domestic coal. By its Certificate dated 24.11.2018, the auditor has clearly certified the computation of actual cost of imported coal based on audited books. Therefore, the contention of the Respondents that the Petitioner has not complied with the requirements contained in the Order dated 31.5.2018 with regard to the furnishing of the auditor's certificate in support of the quantum and amounts referred to in the final bill since the same essentially contains disclaimer for limited assurance is completely misplaced and without any basis.

(m) Haryana Utilities have contended that the Petitioner ought to consider the lower of parameters as specified in the Commissions' Tariff Regulations or actual for operational parameters. The submissions of Haryana Utilities in this respect are irrelevant as the Petitioner has considered only lower of actual and as specified in the said Regulations for Operational Parameter of Auxiliary Consumptions. Even for energy, the Petitioner has considered lower of the actual or scheduled generation only. For the same, the Petitioner has already provided Injection Certificates for Phase III of the Mundra Power Plant. Haryana Utilities can easily

derive the actual injection based on such data along with data available in public domain.

(n) As regards sharing of benefits of Inter Plant Transfer of Coal, the Petitioner has submitted that the issue in the present Petition relates to shortfall in domestic coal and not to the diversion of coal under IPT. For instance, the Petitioner was required to receive 100 MT of coal, out of which 60 MT was diverted under IPT, but 40 MT was not received at all. The issue in the present matter is limited to this shortfall of 40 MT only. The benefit, if any, arising out of IPT in terms of saving in transportation cost is not relevant for the present Petition.

(o) Haryana Utilities have at this belated stage endeavoured to propose a revision to the formula of compensation, despite the same already being approved by the Commission in its order dated 31.5.2018. This proposal is untimely and outside the scope of present proceeding. Further, Haryana Utilities have been gravely inconsistent with respect to their stand at all stages of the proceedings. Firstly, during the proceeding in Petition No. 97/MP/2017, Haryana Utilities did not challenge the method proposed by the Petitioner based on quoted Energy Charge. Thereafter, in the proceeding of Review Petition No. 24/RP/2018, Haryana Utilities sought to consider landed cost of coal from the coal companies in the Petition but during the hearing the Respondents decided not to press this point. Now, the Haryana Utilities are asking for hybrid concept to consider higher of the two. The Commission ought not to entertain such submissions of Haryana Utilities and ought to reject such claims summarily.

(p) The aforesaid contentions of Haryana Utilities (including the contention that shortfall for reasons other than NCDP is not to be considered by this Commission) deserves no consideration as the same was raised earlier by Haryana Utilities in its Review Petition (24/RP/2018 in Petition No. 97/MP/2017) and have been rejected by this Commission. The present Petition is limited to implementation of the order dated 31.5.2018.

Analysis and Decision:

12. The matter was heard at length on 6.9.2018, 15.11.2018, 20.12.2018, 17.1.2019, 7.2.2019, 5.3.2019, 19.3.2019 and 11.4.2019. We have considered the written submissions made by the Petitioner and Respondents along with the submissions made during the hearings. The following issues arise for our consideration:

Issue No. 1: Whether the Petition is maintainable under Section 142 of the Act?

Issue No. 2: Whether our finding in respect of IPT coal at Para 61 of the order dated 31.5.2018 in Petition No. 97/MP/2017 is applicable for the compensation payable for various taxes and duties approved as change in law in the order dated 6.2.2017 in Petition No. 156/MP/2014?

Issue No. 3: What should be the treatment of Inter Plant Transfer of Coal, if it is considered as change in law?

Issue No. 4: What should be the basis for calculating shortfall of domestic coal?

13. The above issues have been dealt with in succeeding paragraphs.

Issue No. 1: Whether the Petition is maintainable under Section 142 of the Act?

14. The Respondents have contended that the proceedings under Section 142 of the Act cannot be used for the purpose of directing recovery of money as sought for by the Petitioner. Such a methodology used by the Petitioner for using Section 142 proceedings to execute any order is not authorized under the Act. It has been further argued by the Respondents that the claims made by the Petitioner have not been adjudicated and payable amount has not been determined either in the order dated 6.2.2017 or in the order dated 31.5.2018 passed by the Commission. Therefore, the claim made by the Petitioner is unilateral and there is no order passed by the Commission or any other competent authority holding that the said amount is payable

nor there is any agreement between the Petitioner and the Haryana Utilities on the amount claimed as outstanding due and payable by the Haryana Utilities. Haryana Utilities have submitted that the provisions of Section 142 of the Act can be invoked only if the Haryana Utilities have deliberately *'contravened any of the provisions of this Act, Rules or Regulations made thereunder or any directions issued by the Commission'*. The Petition under Section 142 of the Act cannot be invoked for adjudication of the issues in regard to the monetary claims made by one party against the other or otherwise for execution of any recovery of money. The Respondents have submitted that none of the prayers of the Petitioner are in any manner covered under the provisions of Section 142 of the Act.

15. *Per contra*, the Petitioner has argued that by raising the objections regarding Section 142 of Act, Haryana Utilities cannot escape their obligations to pay legitimate dues to the Petitioner on procedural grounds, seeking to erroneously limit the mandate and the powers of the Commission under Section 61 read with Sections 63 and 79(1)(b) of the Act. The judgment of the Hon'ble Supreme Court in Energy Watchdog case clearly establishes that the Commission is empowered to exercise its regulatory powers when the need arises. The Petitioner has also cited APTEL's Judgment dated 19.1.2019, in Appeal No. 332 of 2016 wherein the APTEL has upheld the exercise of Regulatory Power by this Commission. The Petitioner has further argued that once the principles have been clearly set out by the Commission and the formula to compute compensation has been allowed by the Commission, there is no need for specific adjudication of the amount payable by the Respondents. Computation of the amount/

quantum of compensation for change in law can be derived by putting actual numbers in the formula.

16. The Respondents have through submissions dated 26.4.2019 also submitted that the learned counsel for the Petitioner during the course of hearing on 11.4.2019 had submitted that the present Petition may not be considered under Section 142 of the Act and rather it should be considered as a Petition for clarification of earlier orders. However, the Petitioner in its written submission dated 29.4.2019 has submitted that there was no such concession given with respect to prayers under Section 142 of the Act. The Petitioner has submitted that only submission made on behalf of the Petitioner was that technicality of the Section 142 cannot come in the way of granting relief to the Petitioner and that the Commission is empowered to exercise its statutory and regulatory power to allow the prayers of the Petitioner.

17. We have considered the submissions of the Petitioner and the Respondents. It is evident from the submissions during proceedings of Petition No. 97/MP/2017 (recorded in RoP dated 10.8.2017 and order dated 28.9.2017) that the Respondents have accepted the formula for calculation of relief to the Petitioner on account of change in law. In our view, the amounts payable should have been reconciled by the Petitioner and the Respondents and that there was no need to approach the Commission for the same. However, since the Respondents have objected to the computation, this Commission is required to deal with the issue of deciding the liability of payment arising out of our earlier order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 31.5.2018 in Petition No. 97/MP/2017. Also, both the Petitioner and the Respondents

during the hearing held on 11.4.2019 and in their written submissions subsequently have sought to convert the instant Petition for adjudication of the matter, if so required. It is also noted that despite Commission's advice to sort out the payment issues amongst themselves, the parties could not resolve the issues.

18. We note that even though the Petition was filed under Section 142 of the Act, the prayers pertain to seeking clarification with regard to the applicability of the directions in para 61 of order dated 31.5.2018 in Petition No. 97/MP/2017, in case of order dated 6.2.2017 in Petition No. 156/MP/2014 and payment of dues arising out of the implementation of these two orders. Keeping in view the prayers made in the Petition and the submission of the parties during the hearing, we are of the view that it is appropriate to adjudicate the dispute between the parties arising out of the directions in Petition No.156/MP/2014 and Petition No.97/MP/2017 instead of proceeding with Section 142 of the Act. Accordingly, we proceed to adjudicate the matter as a dispute with regard to the compensation payable by the Respondents in terms of order dated 6.2.2017 in Petition No. 156/MP/2014 and order dated 31.5.2018 in Petition No. 97/MP/2017. Therefore, there shall be no direction as regards Section 142 of the Act.

Issue No.2: Whether our finding in respect of IPT coal at Para 61 of order dated 31.5.2018 in Petition No. 97/MP/2017 is applicable for the compensation payable for various taxes and duties approved as change in law in order dated 6.2.2017 in Petition No. 156/MP/2014?

19. The Commission in order dated 31.5.2018 in Petition No. 97/MP/2017 has held as under:

> *"61. The Petitioner has submitted that it has been carrying out inter plant transfer of coal since August, 2013 pursuant to the CIL letter dated 19.6.2013. The Petitioner has*

compiled the quantum of diversion of coal from the certificates from MCL and SECL which have been placed on record by Haryana Utilities. The same is extracted as under:-

Year	*ACQ*	*Coal Quantity in the Petition (MT)*	*Coal Quantity as certified by MCL(MT)**	*Coal Quantity as certified by SECL(MT)***	*Total Coal Quantity as certified by MCL + SECL*
2012-13	*4.334*	*2.237*	*2.237**		*2.237*
2013-14	*6.405*	*2.720*	*2.720**		*2.720*
2014-15	*6.405*	*4.077*	*4.077**		*4.077*
2015-16	*6.405*	*4.990*	*4.114**	*0.862#*	*4.976*
2016-17	*6.405*	*4.476^*	*2.691**	*1.842#*	*4.533^*

**As per MCL Certificates at page 34 of the IA filed by Haryana Utilities.*

***As per MCL Certificates at page 37 of the IA filed by Haryana Utilities*
 # As per SECL Certificate at Page No. 66 of IA filed by Haryana Utilities

^ 4.533 MT is as per final reconciliation which was pending for FY 2016-17 at the time of filing the petition dated 1.5.2017

The Petitioner has also submitted the said information particularly information in first three columns have been given in Para 11 of the main petition. The inter plant transfer of coal has been allowed across the power sector through the CIL letter dated 19.6.2013. As per the IPT policy, transfer of coal is allowed between two power plants which are wholly owned by or wholly owned subsidiaries of the purchaser of coal. The policy further provides that the supply of coal shall for all commercial purpose under the FSA remain unchanged and on account of the original Power Plant. Since the Mundra Power Project is owned by Adani Power and the projects at Maharashtra and Rajasthan are wholly owned subsidiaries of Adani Power, inter plant transfer of coal has been allowed by CIL. Even though, the coal under the FSA dated 9.6.2012 is diverted to the plants at Maharashtra and Rajasthan, such supply shall be accounted for on account of the original power plant i.e. Units 7, 8 and 9 of Mundra. In our view, inter plant transfer of coal is permissible under the CIL policy and therefore, the coal supplied under the FSA dated 9.6.2012 to other plants has to be accounted for against the generation and supply of power to Haryana Utilities from Units 7, 8 and 9 of Mundra and all claims for change in law with respect to the PPA dated 7.8.2008 with respect to Haryana Utilities shall be considered after taking into account the coal diverted under inter plant transfer. Therefore, inter plant transfer of coal which is legally permissible cannot be the ground for withdrawal of compensation to the Petitioner in terms of the interim order dated 28.9.2017. The Petitioner shall raise its claims for compensation as per the above clarification and the Haryana Utilities are directed to verify the claims before payment."

20. The Respondents have submitted that the Commission in paragraph 106(b) of the order dated 6.2.2017 allowed payment of taxes and duties based on the actuals subject to ceiling of coal consumed. Accordingly, it has pleaded that if the coal

consumed is imported coal, the taxes and duties applicable to imported coal is payable and not the taxes and duties applicable to domestic coal. Further, it has been contended that if, on account of IPT, the Petitioner does not actually consume coal or does not make the actual payment towards change in law, it cannot claim such compensation from the Procurers. Accordingly, since the IPT is a facility availed by the Petitioner for its commercial convenience, the obligation of the Haryana Utilities will be only to pay taxes and duties as applicable to imported coal or domestic coal, whichever is lower.

21. The Respondents have also submitted that the IPT is a change in law event and the effect of any increase or decrease in the cost on account of IPT need to be adjusted in the tariff in terms of Article 13.2 of the PPA. The Respondents have submitted that on account of IPT, there has been substantial reduction in the cost of transportation of coal to the Petitioner resulting in significant gain/ saving to the Petitioner which needs to be factored towards reduction in the tariff for the Respondents.

22. On the other hand, the Petitioner has contended that the issue of IPT has been conclusively determined by the Commission in its order dated 31.5.2018 in I.A. No. 21 of 2018 in Petition No. 97/MP/2017. Further, as per the IPT Policy, for all commercial purposes under the FSA, the supply of coal shall remain unchanged and shall be on account of the original Power Plant.

23. We have considered the submissions of the Petitioner and the Respondents. In respect of the change in law relief towards taxes and duties approved in the order dated

6.2.2017 in Petition No. 156/MP/2014, we note that a dispute arose between the Petitioner and the Respondents with regard to IPT coal. This is evident from the Minutes of Meeting (MoM) dated 1.3.2018 filed by the Respondents in IA No. 21 of 2018 in Petition No. 97/MP/2017. The dispute related to IPT coal has been dealt with by us and our findings are recorded at Para 61 of the order dated 31.05.2018 (quoted at paragraph 19 above) in Petition No. 97/MP/2017 whereby the said IA was dismissed.

24. Paragraph 106 (b) of the order dated 6.2.2017 in Petition No. 156/MP/2014 is extracted as under:

> *"(b) The increase in royalty on coal, clean energy cess, excise duty on coal, National Mineral Exploration Trust, District Mineral Foundation and service tax (which also includes Swachh Bharat Cess) shall be computed based on actual subject to ceiling of coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. In case of reduction in royalty on coal, clean energy cess and excise duty on coal, the petitioner shall compensate the procurers on the basis of above principle."*

25. The term '*computed based on actual subject to ceiling of coal consumed'* in the paragraph 106(b) of our order dated 6.2.2017 in Petition No. 156/MP/2014 has been construed by the Respondents to mean that the IPT coal has to be excluded from the calculation of taxes and duties since it has not consumed such coal and that the same has been used by the Petitioner (or its parent company) to supply power to other distribution companies through its power plants located in other parts of the country. In our view, our order in Petition No. 97/MP/2017 (paragraph 61) leaves no room for doubt that treatment of IPT coal has to be as if the coal was consumed for supplying power to the Respondents. We would like to point out that IPT is a scheme evolved by the Coal

India Limited as a Policy to be allowed and a decision was taken to provide the end-use of the coal under the FSA as under:

> ***"End-use of Coal***
>
> *The total quantity of Coal supplied pursuant to this Agreement is meant for use at the …….. name & location of the Plant(s)] as listed in Schedule I. The Purchase shall not sell/divert and/or transfer the Coal to any third party for any purpose whatsoever and the same shall be treated as material breach of Agreement, for which the Purchase shall be fully responsible and such act shall warrant suspension of coal supplies by the Seller.*
>
> *However, interplant transfer of coal may be considered provided:*
>
> **a)** *Transfer of coal shall be allowed only between the power plants wholly owned by the Purchaser or its wholly owned subsidiary. No transfer of coal shall be allowed for a joint Venture (JV) company of the Purchaser.* ***The supply of coal, shall for the commercial purpose under the FSA remain unchanged and on account of the original Power Plant. "***

26. Thus, there is a clear provision in the IPT Policy contemplating that supply of coal under the FSA shall remain unchanged for the commercial purpose and shall be on account of the original Power Plant. In view of the above paragraph in Order dated 6.2.2017 in Petition No. 156/MP/2014, it is evident that coal supply under FSA dated 9.6.2012 to other plants shall be accounted for generation and supply of power to Haryana Utilities from Units 7,8 and 9 of Mundra TPP for all commercial purposes. Therefore, the contention of the Respondents that it is liable to pay taxes and duties only for the coal that it has actually consumed and not for IPT coal, is not sustainable and is, therefore, rejected.

Issue No. 3: What should be the treatment of Inter Plant Transfer of Coal if it is considered as change in law?

27. The Respondents have submitted that in order dated 31.5.2018, the Petitioner has been held to be entitled to undertake the IPT of domestic coal procured from MCL/

SECL as per Policy of Coal India Ltd. and that this Policy decision was made in the year 2013 which is after the cut-off date i.e. after 7 days prior to the Bid Deadline as the bidding was in the year 2007. It is, therefore, an event subsequent to the bid deadline and accordingly qualifies for Change in Law consideration. The Respondents have contended that on account of IPT, there has been substantial reduction in the cost of transportation of coal to the Petitioner resulting in the significant gain/ savings to the Petitioner. The benefit accruing are the savings on the transportation of coal from MCL/ SECL Mines to Mundra in the State of Gujarat, savings on the transportation of the imported coal from Mundra Port to Tiroda in Maharashtra and Kawai in Rajasthan compared with the transportation charges incurred for transporting coal from MCL/ SECL to Tiroda and Kawai. Accordingly, the Respondents have argued that the above also being covered under the Change in Law, benefit of the same should accrue to the Respondents.

28. We have considered the submissions of the Respondents for treating IPT Policy of Coal India Ltd. as change in law and its request for sharing of benefits accrued to the Petitioner on account of IPT. In Petition No. 97/MP/2017 and the instant Petition, we have given directions as to how IPT coal has to be considered for the purpose of calculation of coal shortfall as well for taxes and duties. Consideration of the IPT Policy of Coal India Ltd. as a change in law event has not been discussed by the Commission in its previous orders. We note that transfer of coal by the Petitioner under IPT Policy also affects other generating stations (that are consuming the IPT coal) and other distribution companies (who are supplied power by the generating stations that have

used IPT coal). Since, they are not parties to the present Petition, we do not find it appropriate to deal with the issue in the present Petition.

29. Further, the Respondents have again raised the issue of computation of change in law compensation as the difference between landed cost of domestic linkage coal and landed cost of alternate coal and not energy charge. The Respondents had raised this issue in the Review Petition No. 24/RP/2018 against the order dated 31.5.2018 in Petition No. 97/MP/2017. Considering that the Commission has already rejected this contention in the order dated 3.12.2018 in Review Petition No. 24/RP/2018, we do not find the need to consider this issue again.

Issue No. 4: What should be the basis for calculating shortfall of domestic coal?

30. The Respondents have submitted that for the purpose of computation of the shortfall in the domestic coal, the relevant aspect is the quantum of coal offered by MCL/ SECL and not the quantum of coal actually indented and taken delivery by the Petitioner. If the Petitioner sought for a certain quantum and if the same was supplied by Coal Company, there can be no shortfall. The shortfall has to be calculated as difference between coal actually requisitioned by the Petitioner and the coal actually offered by the MCL/ SECL and that shortfall cannot be compared with ACQ. The Respondents have further stated that in response to the direction of the Commission, the Petitioner submitted a certificate from MCL dated 13.2.2019 stating that `*the quantity certified in the letter……..is considered as actual quantity supplied by MCL as per the actual availability of the coal'*. Whereas, the MCL/ SECL certificates obtained

by Haryana Utilities clarified that there was no shortage of coal availability from their end at least up to the trigger level of 65%, 65%, 67% and 75% and no compensation was, therefore, payable by MCL/ SECL to the Petitioner. The Respondents have submitted that since the coal was available from MCL/ SECL, there can no shortfall in coal and there can be no compensation to the Petitioner.

31. On the other hand, the Petitioner has relied on judgment of the Hon`ble Supreme Court in the Energy Watchdog Case; direction of Ministry of Power dated 31.7.2013; amended Tariff Policy dated 28.1.2016; and the Commission's order dated 31.5.2018 in Petition No. 97/MP/2017 to contend that the entitlement of the Petitioner for compensation for shortfall of coal supply is no longer *res-integra*. Thus, the shortfall ought to be computed as 'ACQ minus Actual Supply'.

32. The Petitioner has submitted that the 'Program' and 'Offer' referred to by the Haryana Utilities relates to supply of domestic linkage coal by rail and the certificate issued by MCL dated 25.3.2019 also clearly refers to linkage coal by rail only. 'Program' is submitted by the Petitioner to the Railways and CIL and then 'Offer' is made by coal company to the Petitioner. Thereafter, the supply of coal is controlled and managed between the Railways and the coal company. MCL, in its certificate dated 13.2.2019 has categorically stated that the quantity certified vide its letters dated 18.9.2017, 2.5.2017 and 3.6.2017 as issued for the financial years 2013-14 to 2016-17 is considered as actual quantity supplied by MCL as per the actual availability of coal. MCL vide the above referred letters has certified the coal supplied to the Petitioner. The

Petitioner has submitted that it cannot be held accountable for the lower throughput of the coal companies.

33. We have considered the submissions made by the Petitioner and the Respondents. The Commission in order dated 31.5.2018 in Petition No. 97/MP/2017 has already allowed computation of shortfall based on 'actual coal supply' as per the decision of the Hon'ble Supreme Court in Energy Watchdog judgment and has decided as under:

> *"33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to pay compensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import. In this connection, Article 13.2 of the PPAs dated 7.8.2008 provides for the following principles of computing change in law:*
>
> *……*
>
> *Further, the relevant observations of the Hon`ble Supreme Court in the judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:*
>
> > *"53……This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred."*
>
> *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.*

43. We have considered the submissions of the Petitioner, the Respondents and Prayas. We have already come to the conclusion that the Petitioner had got the coal linkage to the extent of normative availability for linked capacity of 70% of the installed capacity of 1980 MW and the entire coal received under the FSA shall be considered for generation and supply of power to Haryana Utilities. Therefore, any shortfall in the supply of domestic coal vis-à-vis quantity indicated in the FSA dated 9.6.2012 shall be admissible in relief under change in law in terms of the judgment of the Hon'ble Supreme Court. Accordingly, the formula given in GMR case has been modified to meet this requirement, and the same is given in para 46 of this Order"

34. In terms of the above decision of the Commission, the shortfall has to be computed as 'ACQ minus Actual Supply'.

35. During proceeding of the present Petition, the learned senior counsel for the Respondents vociferously argued regarding non-submission of required documents/ certificates from coal companies. In fact, several hearings took place and series of documents were placed on record on this aspect by both the parties. On analysis of these documents, it is clear that the quantum of coal mentioned by the Petitioner in Petition No. 97/MP/2017 *vis-a vis* the coal quantity certified by MCL in its letter dated 31.5.2016 and SECL letter dated 24.2.2018 has remained the same.

36. On a direction from the Commission, the Petitioner had again procured a certificate from MCL on 13.2.2019 certifying that the quantity certified in letter No. MCL/KOL/169 dated 18.9.2017, MCL/KOL/170 dated 18.9.2017, MCL/KOL/37 dated 2.5.2017 and MCL/SBP/GM (S&M)/RS/2016/1160 dated 3.6.2016 as issued for the financial years 2013-14 to 2016-17 is considered as actual quantity of coal supplied by MCL as per actual availability of coal.

37. The Respondents submitted that the certificates were vague and wanted a certificate specifying the actual quantum of coal made available to the Petitioner by MCL. To this, the Commission, during the hearing dated 19.3.2019, had directed the Respondents to obtain a certificate from MCL themselves as per their format. The Respondents obtained MCL certificate dated 25.3.2019 and SECL certificate dated 27.3.2019 and placed it on record.

38. The relevant portion of the MCL certificate dated 25.3.2019 is extracted as under:

"Sub: Request to provide the certificate in line with CERC hearing dated 19.3.2019-reg.
Dear Sir,

This has reference to your letter no. CH-61/CE/HPPC/SE/C&4-I/LTP—II/APL-60 dated 22/25.03.2019 on the subject cited above, Point-wise information as sought vide the said letter is given below:

1. In relation to the month-wise quantum of linkage coal as mentioned under point no.1, you are requested to refer to letter no. MCL/SBP/GM(S&M)/2018/2488 along with enclosures addressed to the Chief Engineer, HPCC and certificate ref. no. MCL/SBP/GM (M&S)/Sectt./2019/5631 dated 13.-2.2019 issued by GM (M&S) along with enclosures (copy enclosed)

2. In respect to the information sought under point no. 2,3 & 4, it may kindly be noted that during the financial year 2013-14, 2014-15, 2015-16 and 2016-17, M/s Adani Power Limited was not entitled for any amount of compensation since the level of delivery of coal by MCL was not below the respective trigger levels from domestic sources i.e for 2013-14& 2014015-65% of ACQ for 2015-16-67% of ACQ and for 2016017-75% of ACQ as per the provisions of Fuel Supply Agreement.

3. *As per the provision of the Fuel Supply Agreement executed between M/s Adani Power Limited and MCL, Interplant transfer (IPT) of coal was allowed to M/s Adani Power Limited."*

39. The SECL letter dated 27.3.2019 is extracted as under:

"Sub: Certificate in line with CERC hearing dated 19.03.2019

Dear Sir,

In reference to your letter No: CH-60/CE/HPPC/SE/C&R-I/LTP-II/APL-60 dated 22.3.2019, the information related to the supply of coal for the period 2015-16 (Nov. onwards) till 2016-17 was already provided to your office vide our letter no:

SECL/BSP/S&M/Oprn/3423 dated 24.2.2018 and subsequently vide the certificate no: SECL/B/M&S/2019/3436 dated 12.2.2019.

As the Level of Lifting, in terms of the Fuel Supply Agreement executed during the concerned period was not less than the Trigger Level, hence no compensation was paid to M/s Adani Power Limited.

As per the provision contained in the Fuel Supply Agreement executed between SECL & Adani Power Limited, the quantity of coal delivered was allowed to be transferred under the Inter Plant Transfer Scheme."

40. As submitted by the learned counsel for the Petitioner, we note that the MCL and SECL certificates have been consistent and the quantity of actual supply mentioned in all the certificates, submitted both the Petitioner and the Respondents are the same. In view of above, it is evident that there is no infirmity in the quantity of coal actually supplied by MCL and SECL for claiming for domestic coal shortfall.

41. The only issue is whether the quantum of coal made available by the coal companies, which the Petitioner for its own reasons might have chosen not to take, instead of actual supply of coal at the plant as contended by the Respondents.

42. As per Schedule VII of the FSA and submission of the Petitioner, supply of coal from domestic sources has been restricted to 80% on account of shortage of domestic coal. Consequently, the supply of coal from domestic sources i.e. up to 80% of ACQ is being met through Rail mode. The balance coal supply of 20% is being met through imported coal. In the context of coal supply through Rail mode, it is imperative to refer to the clause 7 of the FSA dated 9.6.2012 as under:

"7.0 METHOD OF ORDER BOOKING AND DEVLIERY OF COAL

The Purchaser shall submit monthly programme(s) mode-wise for off-take of Coal against the monthly mode-wise Coal allocation made by the Seller. Notwithstanding,

Clause 7.1 and Clause 7.2 shall be applicable in case of Coal off-take by rail and road respectively.

7.1 Order Booking by Rail:

7.1.1 At least seven (7) working days prior to the commencement of the month concerned, the Purchaser shall submit a programme in writing to the Seller, as per the applicable Railway rules and the Seller's notified procedure. Thereafter, the Seller shall process for issuance of the consent of the programme. The sanction of the consented rail programme shall be obtained accordingly. The validity period of the monthly programme for movement by rail for seeking allotment shall be till the last day of the month concerned. The consent of the programme to be listed by the Seller shall not remain valid after the above period. Once the rake is allotted, it shall remain valid for supply as per the prevailing Railways rules.

7.1.2 Subject to fulfillment of payment obligation pursuant to Clause 12.1.2 by the Purchaser, the Seller shall thereupon submit specific indent/offer based on the valid rail programme(s) to the Railways as per the extant Railway rules for the allotment and placement of wagons during the concerned month in conveniently spaced intervals.

7.1.3 The wagons shall be booked on "freight to pay" or "freight per paid" basis, as applicable based on the arrangements made by the Purchaser with Railways in this regard.

7.1.4 In case of formation of rakes with wagons loaded from different Delivery Points, the Seller shall make best efforts to complete documentation formalities as per Railway rules so as to enable the Purchaser to avail a trainload freight rate.

7.1.5 In the event rail movement is declared / considered not feasible by Railways, review will be made jointly in the matter of mode of transport."

43. As per the above provision of the FSA, the Petitioner is required to submit 'Programme' to the Railways and CIL. Then 'Offer' is made by Coal Company to the Petitioner. Therefore, we find merit in the submission of the Petitioner that the supply of coal is controlled and managed between the railways and the coal company thereafter. This is evident from clause 7.1.2 of the FSA, wherein it has been categorically stated that subject to fulfillment of payment obligation pursuant to Clause 12.1.2 of the FSA by the Purchaser/ generator, it is the Seller's (coal companies) responsibility to submit specific indent/ offer based on the valid rail programme (s) to the Railways as per the

extant Railway rules for the allotment and placement of wagons during the concerned month in conveniently spaced intervals. In fact, perusal of Clause 12.1.2 reveals that the generator has to make advance payment each month for the coal quantities in three installments. Thus, the generator makes the payment in advance as per 'Programme'.

44. Further, the Respondents have contended that as MCL/ SECL have not paid any compensation, there was no shortfall of coal. In this regard, clause 4.7 of the FSA defines the 'Level of Delivery' as under.

> *"Level of Delivery with respect to a Year shall be calculated in the form of percentages as per the following formula:*
> *Level of Delivery (LD)= [(DQ+DDQ+FM+RF)×100]/ACQ*
>
> *Where:*
>
> *LD= Level of Delivery of Coal by the Seller during the Year.*
>
> *DQ= Delivered Quantity, namely, aggregate actual quantities of Coal delivered by the Seller during the year.*
> *DDQ= Deemed Delivered Quantity, reckoned in the manner stated in Clause 4.11*
> *FM- Proportionate quantity of Coal which could not be delivered by the Seller in a Year due to occurrence of Force Majeure event effecting the Seller and/or the Purchaser, calculated as under:*
> *……..*
>
> ***RF= Quantity of Coal that could not be supplied by the Seller during the Year owing to the Railways not allotting wagons or not placing wagons for loading, in spite of specific valid indent/offer submitted by the Seller to the Railways against valid program(s) submitted by the Purchaser for the purpose****."*

45. It is observed that the quantity that could not be supplied by the Seller/ coal companies on account of Railways not allotting wagons or not placing wagons for loading, in spite of demand raised by the Seller/ coal companies shall be considered as delivered. This also indicates that the Petitioner has no role as far as coal supply is concerned after the demand is raised through submission of 'Programme'. The Petitioner is totally dependent on the extent of loading by coal companies and supply of

rakes by Railways. Further, non-allotment/ non-placement of wagons by Railways is considered as deemed delivered as per the aforementioned formula for 'Level of Delivery'. In such a scenario, compensation for shortfall in delivery compared to ACQ is not payable to the Petitioner by the coal companies even in case of supply lower than the trigger level. In view of the above, we are of the considered opinion that calculation of shortfall in supply of coal for the purpose of change in law on basis of compensation payable by the coal companies is not a valid proposition. Therefore, this proposition of Respondents is rejected.

46. Relevant extract from letter of Ministry of Power dated 31.7.2013 that is quoted in the Energy Watchdog Judgment at paragraph 53 is as under:

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

47. In the same paragraph of the Energy Watchdog Judgment, the relevant extract from the Tariff Policy is as under:

> *"Clause 6.1 states:*
> *xxxx*
> *However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL).* ***In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA*** *the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013."*

48. We note from above letter of the Ministry of Power and the provision in Tariff Policy that the principle is clearly laid down and the same requires calculation of shortfall to be done as regards quantity indicated in the ACQ and the quantity actually supplied by the coal companies. The same has been recognized in the Judgment of the Hon'ble Supreme Court in Energy Watchdog Case. In our view, the interpretation of shortfall proposed by the Respondents is not in line with the decision of CCEA nor does it conform to the Energy Watchdog Judgment. We also observe that the Respondents have not submitted any documents substantiating that the Petitioner has not submitted "programme" up to its entitlement as per ACQ.

Summary of Decisions:

49. Based on the above discussions, summary of our decisions are as under:

(a) Payment of taxes and duties for IPT coal shall be on basis of deemed consumption of coal as given in paragraph 26 of this Order.

(b) The shortfall in domestic coal shall be calculated on basis of difference in ACQ and coal actually supplied by the coal companies.

50. The Petition No. 269/MP/2018 is disposed of in terms of the above.

sd/-	sd/-	sd/-
(I.S.Jha)	**(Dr. M.K. Iyer)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**