

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Review Petition No. 44/RP/2018  
in  
Petition No. 235/MP/2015**

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

**Date of Order: 8<sup>th</sup> January, 2020**

**In the matter of:**

Petition under Section 94 (1) (f) of the Electricity Act, 2003 read with Regulation 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 for review of the order dated 17.9.2018 in Petition No. 235/MP/2015.

**And**

**In the matter of**

Gujarat Urja Vikas Nigam Limited  
Sardar Patel Vidyut Bhawan,  
Race Course Circle,  
Vadodara-390 007

.....**Review Petitioner**

**Vs**

1. Adani Power (Mundra) Limited  
Adani House, Near Mithakhali Six Roads,  
Navarangpura, Ahmedabad-380 009.
2. Uttar Haryana Bijli Vitran Nigam Limited  
Shakti Bhawan, Sector-6,  
Panchkula-134 109, Haryana
3. Dakshin Haryana Bijli Vitran Nigam Limited  
Vidyut Sadan, Vidyut Nagar,  
Hisar-125 005, Haryana

..... **Respondents**

**The following were present:**

Ms. Swapna Seshadri, Advocate, GUVNL  
Shri Anand K. Ganeshan, Advocate, GUVNL  
Shri Saunak Rajguru, Advocate, APMuL  
Shri Kumar Gaurav, APMuL

**ORDER**

The Review Petitioner, Gujarat Urja Vikas Nigam Limited (hereinafter referred to as "GUVNL") has filed the present Review Petition under Section 94 (1) (f) of the Electricity Act, 2003 (hereinafter referred to as "the Act") read with Regulations 103 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations,

1999 seeking review of the order dated 17.9.2018 in Petition No. 235/MP/2015 (hereinafter referred to as 'Impugned order') alongwith the following prayers:

(a) Review the order dated 17.9.2018 in Petition No. 235/MP/2017 to the extent challenged in the present review Petition; and

(b) Hold and clarify that the quantum of coal to be considered for change in law should be based subject to the ceiling of the parameters of SHR of 2150.28 kcal/kWh, Auxiliary Consumption of 6.5% and GCV of 5200 kcal/kg under PPA dated 2.2.2007 and SHR of 2223.86 kcal/kWh, Auxiliary Consumption of 9% and GCV of 5500 kcal/kg under PPA dated 6.2.2007.

### **Background of the case**

2. The Respondent No.1, Adani Power (Mundra) Limited (or "APMuL" in short), had filed Petition No. 235/MP/2015 seeking certain Change in Law reliefs during the operating period as per Article 13 of the PPAs dated 2.2.2007 (Bid-02) and 6.2.2007 (Bid-01) executed with Gujarat Urja Vikas Nigam Limited (GUVNL) and PPAs dated 7.8.2008 executed with Haryana Utilities on account of withdrawal of exemption of all the duties under the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944 and/or the Central Excise Tariff Act, 1985 w.e.f. 1.4.2015 pursuant to Notification dated 6.4.2015 and withdrawal of exemption of service tax pursuant to the Notification dated 16.2.2016, issued by Ministry of Commerce and Industry (MoC&I), Government of India. The Commission in its order dated 4.5.2017 in the aforesaid Petition held that the Notifications dated 6.4.2015 and 16.2.2016 issued by MoC&I did not amount to Change in Law in terms of the provisions of the PPAs. However, it was held by the Commission that change in rates of custom duty, excise duty, withholding tax and service tax on taxable services which have been imposed pursuant to the statutes passed by the Parliament shall be covered under Change in Law.

3. The Respondent, APMuL challenged the above order dated 4.5.2017 of the Commission in Appeal No. 210 of 2017 before the Appellate Tribunal for Electricity

(hereinafter referred to as "APTEL"). The APTEL in its judgment dated 13.4.2018 upheld the decision of the Commission with regard to matters relating to denial of impact of duties for import/procurement of any other goods/spares and service tax on the taxable service in respect of Bid-01 PPA of GUVNL and the Gross Station Heat Rate. However, the APTEL allowed the appeal with regard to reimbursement of impact of levy and duties under the Custom Act, 1962, Custom Tariff Act, 1975, Central Excise Act, 1944 and Central Excise Tariff Act, 1955 in respect of all the PPAs. In the appeal, APTEL also allowed relief regarding carrying cost in respect of Bid-02 PPA of GUVNL and Haryana PPAs. Accordingly, the APTEL partially set aside the order of the Commission and remanded the matter back to the Commission to pass consequential order in terms of its observation at Paragraphs 12(b) and 12(d) of the judgment dated 13.4.2018 in Appeal No. 210 of 2017.

4. Pursuant to remand, APMuL filed an affidavit on 30.5.2018 in Petition No. 235/MP/2015 placing all documents in support of its claim. After giving an opportunity of hearing to the parties, the Commission on 17.9.2018 issued consequential order in the Petition. In the said order, while allowing the claims of APMuL in respect of levies of basic customs duty and countervailing duty on imported coal, the Commission observed that APMuL shall be entitled to recover such levies on imported coal in Bid-01 and Bid-02 PPAs of GUVNL in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the applicable Tariff Regulations of the Commission whichever is lower, corresponding to the scheduled generation for supply of electricity to GUVNL. Being aggrieved by the aforesaid methodology for calculating the relief under Change in Law event which was at variance with the earlier order of the Commission dated 4.5.2017, the Review Petitioner has preferred the present Review Petition.

### **Submission of the Review Petitioner**

5. The Review Petitioner has submitted that the Commission in its order dated 4.5.2017 while granting relief of Change in Law adopted the same operating parameters including the SHR as approved by the Gujarat Electricity Regulatory Commission (GERC) and for the purpose of allowing the Change in Law claims of APMuL. Further, it has been submitted that the APTEL vide its judgment dated 13.4.2018 in Appeal No. 210 of 2017 has also held that the SHR as per the previous decision of the GERC (and as also accepted by APMuL) would apply and accordingly, rejected the claim of APMuL regarding grant of actual SHR.

6. The Review Petitioner has submitted that the Commission in the remand proceedings, i.e. in its order dated 17.9.2018 has changed the methodology and the operating parameters to be applied for calculating the impact on account of Change in Law, which is an error apparent on the face of record. The Review Petitioner has submitted that the same principle was adopted by the Commission in other cases where the operating parameters were not decided earlier. The Review Petitioner has further submitted that the calculations are to be made based on the actual subject to ceiling of quantum of coal as per the parameters of the Station Heat Rate, Auxiliary Consumption and GCV as already adopted by the Commission in its earlier order dated 4.5.2017.

7. The Review Petitioner has submitted that APMuL, in the bid submitted before GUVNL, had assumed the GCV of coal at 5500 kcal/kg under Bid 01 PPA dated 6.2.2007 and 5200 kcal/kg under Bid 02 the PPA dated 2.2.2007 at the time of submission of bid and the same has been upheld by GERC in its orders dated 21.10.2011 and 7.1.2013 in Petition No. 1080/2011 and 1210/2012 respectively and has also been accepted by APMuL. The Review Petitioner has submitted that since

the procurement of coal is the responsibility of APMuL, variation in GCV is to the account of APMuL. The quantum of coal to be considered is on basis of the GCV as taken into account at the bid stage, being the conscious decision of APMuL which has approved by GERC while allowing the Petition for Change in Law.

8. The Review Petitioner has submitted that the Commission in its order dated 4.5.2017 has already adopted the parameters of SHR based on the parameter adopted by GERC and the same was accepted by the parties. The same has also been upheld by the APTEL wherein the claim of APMuL to consider the GCV on actual basis was rejected. Similarly, the auxiliary consumption was also adopted by GERC in the previous orders which should be the ceiling parameter in the present case.

9. Reply to the Review Petition has been filed by the Respondent, APMuL and the Petitioner has filed rejoinder thereof.

### **Reply by the Respondent**

10. The Respondent, APMuL in its reply dated 24.5.2019 has raised objection on the maintainability of the Review Petition and has submitted as under:

(a) The Review Petitioner has failed to give any cogent or substantial reason as to why the decision of the Commission is an error apparent and warranting rectification. Accordingly, Review Petition ought to be dismissed for not satisfying the test laid down in Section 94(1) (f) of the Act read with Order XLVII Rule 1 of the Code of Civil Procedure, 1908.

(b) During the course of the remand proceedings, both the parties were directed by the Commission on 29.5.2018 to file their respective written submissions. However, the Review Petitioner in its written submission dated 13.6.2018 did not make any submission on account of Change in Law claims of APMuL. Instead, submissions of Review Petitioner were focused only on the issue of 'carrying cost'.

(c) The Commission has not committed any error on the face of record in the remand proceedings. *Per contra*, the Commission has only reiterated its observation with respect to actual coal consumption as done for other Change in Law items in Paras 43 and 48 of the order dated 4.5.2017.

(d) GERC did not consider these parameters as ceiling and allowed compensation derived on notional basis irrespective of actuals which may be lower or higher than parameters as considered.

(e) APMuL has placed its reliance on the APTEL's judgment dated 12.9.2014 in Appeal No. 288 of 2013 (*Wardha Power Co. Ltd. vs. Reliance Infrastructure & Ors.*) to contend that Change in Law compensation based on bid assumptions, fails to restore the seller to the same economic position as if the Change in Law had not occurred. Therefore, considering the GCV of coal as mentioned in GERC orders or other operational parameters would not have restituted APMuL to the same economic position as if the Change in Law event had not occurred. Therefore, the Commission has taken a considered view and the claim of the Review Petitioner is bad in law and ought to be rejected.

(f) The decision of the Commission pertaining to operational parameters (actual GCV of coal) is a well considered view and is not an error apparent on the face of record. In terms of judgments in the cases of Kamlesh Verma vs. Mayawati [(2013) 8 SCC 320] and Thungabhadra Industries Ltd. vs. Govt. of Andhra Pradesh [AIR 1964 SC 1372], the general scope of power of a court to review is limited and any error which has to be detected by a detailed process of reasoning is not considered as an 'error apparent on the face of the record'.

(g) The Review Petitioner in the garb of establishing an 'error apparent' is seeking to re-argue the case on merits which is contrary to the law settled by the Hon'ble Supreme Court in the case of Parsion Devi & Ors. vs. Sumitri Devi [(1997) 8 SCC 715].

(h) The Impugned order dated 17.9.2018 examined the claims of APMuL, strictly within the contour and mandate set by the directions of the APTEL and is a well-reasoned order.

(i) Without prejudice to the aforesaid, the Commission was empowered to consider the matter afresh during the remand proceedings and decide on the basis of the peculiar circumstances brought on record. This power is akin to the power under Order XLI Rule 23A of the Code of Civil Procedure, 1908. In this regard, Hon'ble Supreme Court in the case of Remco Industrial Workers House Building Coop. Society vs. Lakshmeesha M. [(2003) 11 SCC 666] has observed that Rule 23-A Order 41 introduced by CPC Amendment Act 104 of 1976 w.e.f. 1.2.1977 confers powers on the appellate court to remand the whole suit for retrial. Therefore, even if the APTEL did not specify any particular mechanism to grant the basic customs duty, the mechanism adopted by the Commission cannot be challenged on the purported ground of being violative of the mandate set by the remand directions more so since the Commission took a considered view in line with the mechanism specified by it in other cases and the principle enshrined in APTEL's judgment.

(j) The findings of the APTEL on the issue of SHR and Auxiliary Energy Consumption cannot be replicated and applied to the issue of GCV of coal. Article 13 of the PPA enshrines the principle of restitution which states that the relief for Change in Law shall be that the affected party is restituted to the same economic position as if the Change in Law had not occurred. The said restitution can only happen if the actual parameters are considered. Further, in order to discourage inefficiency, the Commission has provided a cap in terms of operational parameters as per Tariff Regulations.

(k) The Review Petitioner has incorrectly sought to confuse the issue of GCV of coal by stating that an appeal is preferred by APMuL on SHR and Auxiliary Energy Consumption. The findings on these parameters are independent and findings on GCV are clearly not bound by the findings of the APTEL on the issue of SHR and Auxiliary Energy Consumption.

### **Rejoinder by the Review Petitioner**

11. The Review Petitioner in its rejoinder dated 14.8.2019 has submitted as under:

(a) Despite APTEL upholding the principle that operating parameters applicable to APMuL would be in terms of operating parameters adopted by

GERC, which was also accepted by APMuL, the Commission has proceeded on a different principle in the remand proceedings.

(b) The order inadvertently adopted orders passed by the Commission in respect of other generators wherein the issue of operating norms previously determined by GERC and accepted by APMuL was not there. This is an error apparent on the face of the record inasmuch as the impugned order goes against the binding decision of APTEL in terms of operating parameters.

(c) There is no question of applying any other principle such as Wardha Power as sought by APMuL, when there is a specific direction of the APTEL that the parameters as previously decided by GERC is binding on the parties. The decision of APTEL in other cases cannot be applied without following the decision of the APTEL in this very matter.

(d) While submitting that the Impugned order is within the mandate given by the APTEL, Respondent, APMuL has conveniently ignored the specific finding of APTEL on the issue of operating parameters.

(e) The Commission is not entitled to determine the matter afresh on the basis of peculiar circumstances brought on record, contrary to the very principle upheld by APTEL and appeal against which, filed by Respondent, APMuL, is pending before the Hon'ble Supreme Court.

### **Analysis and Decision**

12. Under Order 47 Rule 1 of Code of Civil Procedure, 1908, a person aggrieved by the order of a Court can file review on the following grounds:

- (a) Discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
- (b) On account of some mistake or error apparent on the face of record.
- (c) For any other sufficient reason.

In light of the above provisions, we consider the following two grounds raised in the Review Petition for review of order dated 17.9.2018 in Petition No. 235/MP/2015.

- (a) Operating parameters to be considered for computation of Change in Law relief.
- (b) GCV to be considered for computation of Change in Law relief.

**A. Operating parameters to be considered for computation of change in law relief.**

13. The Review Petitioner has submitted that the Commission in the Impugned order dated 17.9.2018, while considering the claims of APMuL on the issue of Customs Duty on imported coal, has held that the duty shall be considered on actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the Tariff Regulations, whichever is lower. As per the Review Petitioner, the aforesaid observation of the Commission, deviates from the earlier decision of the Commission dated 4.5.2017 in Petition No. 235/MP/2015 wherein the Commission had adopted the operating parameters including SHR as approved by the GERC in Petition No. 1080 of 2011 (under Bid 01 PPA dated 6.2.2007) and in Petition No. 1210 of 2012 (under Bid 02 PPA dated 2.2.2007) for the purpose of allowing the Change in Law claims of APMuL. Accordingly, the Review Petitioner has contended that the decision of the Commission to adopt different methodology for computation of Change in Law is an error apparent on the face of record.

14. *Per contra*, the Respondent, APMuL has contended that consideration of the actual GCV of the imported coal and the operating parameters for calculating the actual coal consumed is in accordance with the principles adopted by the APTEL in its judgment dated 12.9.2014 in Appeal No. 288 of 2013 in the case of Wardha Power Limited v. Reliance Infrastructure & Ors. It has been further contended that in

the remand proceedings, the Commission is empowered to consider the matter afresh and decide on the basis of the peculiar circumstances brought on record. In support of its contention, the Respondent, APMuL has relied on the Order XLI Rule 23 A of the Code of Civil Procedure, 1908 and judgment of Hon'ble Supreme Court in the case of Remco Industrial Workers House Building Coop, Society v. Lakshmeesha M. [(2003) 11 SCC 666].

15. We have considered the submissions of the Review Petitioner and the Respondent, APMuL. As regards, operating parameters for calculation of relief under Change in Law, the Commission in its order dated 4.5.2017 had decided as under:

**“Operating parameters for calculation of relief under Change in Law**

54. GUVNL vide its affidavit dated 13.5.2016 has submitted that the Petitioner is bound by the norms and parameters submitted by the Petitioner and adopted for the purpose of granting relief in terms of the Change in Law by the GERC in its orders dated 21.10.2011 and 7.1.2013 in Petition Nos. 1080 of 2011 and 1210 of 2012 respectively. Per contra, the Petitioner has submitted that Station Heat Rate and Auxiliary Consumption be considered as per the CERC norms. We have considered the submissions of the Petitioner and GUVNL. We have gone through the said order and noticed that the Petitioner had claimed Clean Energy Cess by considering Gross Station Heat Rate of 2150.28 kCal/kg and net Gross Station Heat Rate of 2324.62 kCal/kWh after accounting for the Auxiliary Power Consumption of 7.5%. GERC after considering the submission of GUVNL has allowed the Clean Energy Cess @`0.0221/kWh on the basis of the Station Heat Rate of 2150.27 kCal/kWh and auxiliary consumption of 6.5%. This order has not been challenged and the Petitioner has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. The Commission considers it appropriate to take the Gross Station Heat Rate of 2150.27 kCal/kWh for the purpose of calculating the relief in case of Gujarat PPA as well for the imported coal component under Haryana PPA. However, for the domestic coal component, Gross Station Heat Rate of 2230 kCal/kWh has been considered as per the bid assumption submitted by the Petitioner in its affidavits dated 1.2.2013 and 4.8.2016. In case of Haryana PPAs, SHR has been taken as 2206 kCal/kWh considering the blending of domestic and imported coal in the ratio of 70:30. In view of the above, in case of Gujarat PPA, the petitioner is entitled to take the GSHR of 2150 kCal/kWh and in case of Haryana PPAs, GSHR of 2206 kCal/kWh is allowed for the purpose of calculating the relief.”

16. The above order dated 4.5.2017 was challenged by APMuL before the APTEL in Appeal No. 210 of 2017 on the specific ground that the Commission has erroneously adopted the SHR as was previously applied by GERC, which has been

rejected by the APTEL vide its judgment dated 13.4.2018. The APTEL vide its judgment dated 13.4.2018 remanded the matter to the Commission to pass consequential orders. Relevant portion of the APTEL judgment dated 13.4.2018 is extracted as under:

*“12 (e) iii. We observe that the bid of the Appellant for supply of power to the Respondent Nos. 2 to 4 was based on Case-1 of the competitive bidding guidelines issued by Gol. In Case-1 bidding, the Appellant is required to quote only the tariff (and not SHR) and it is solely responsible for seeking/incorporating all the inputs in the bids for supply of power to the Respondent Nos. 2 to 4. In the present case the Appellant was not required to disclose the SHR based on which it has quoted the tariff. The issue of disclosing the SHR came for the first time before the Gujarat Commission while making claims under Change in Law Events by the Appellant. Based on the figures of SHR produced before the Gujarat Commission, the Gujarat Commission allowed giving effect to Change in Law claims based on the said SHR. The Appellant continued to claim the benefits under Change in Law based on the approved SHR by the State Commission. **It is the Appellant who is only aware about the formulation of its bid including SHR for submission to the Respondent Nos. 2 to 4. The Appellant has also not challenged the said orders of the Gujarat Commission and these orders have achieved finality.***

*iv. In view of above the contention of the Appellant to consider margin over the design SHR as per the Central Commission’s Tariff Regulations, 2009 or to consider actual SHR whichever is lower does not arise. Further, the reliance of the Appellant on 4th amendment to IEGC is misplaced as it may already be taking the benefit of the same if the scheduling of its power station is in the range as envisaged in the amendment which is over and above the approved SHR by the Gujarat/Central Commission. The Respondent Nos. 2 to 4 have submitted that the decision of the Central Commission in case of GMR Kamlanga cannot be applied to the present case. The case of GMR Kamalanga was dealt by the Central Commission based on the submissions made by GMR regarding SHR. Further, the reliance on Committee Report in Petition No. 155/MP/2012 is not correct as the order passed in the said petition has been set aside.*

*v. Further, the Appellant has submitted that the Gujarat Commission has allowed SHR for Phase III of the power station and whereas power is supplied to the Haryana Utilities from Phase IV of the power station and that to at the periphery of the Haryana State. We observe that the Phase III & Phase IV consist of all 660 MW units having similar type of design parameters. Further, the Appellant was supposed to take care of the losses in the system for supplying power at the Haryana periphery while placing its tariff bid.*

*vi. In view of our discussion as above the reliance placed by the Appellant on the judgment of the Hon’ble Supreme Court in case of All India Power Engineer Federation & Ors. Vs. Sasan Power Limited & Ors. reported as (2017) 1 SCC 487 is also not applicable to facts and circumstances of the case in hand.*

*vii. Accordingly, this issue is also decided against the Appellant.”*

17. Further, the Commission in the remand proceedings vide the Impugned order dated 17.9.2018 has decided as under:

“16..... In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner is entitled for reimbursement of customs duty on the imported coal from non-AFTA countries from 1.4.2015 onwards. As on 1.4.2015, the rate of Basic Custom Duty on imported coal was 2.5% of assessable value. **The Petitioner shall be entitled to recover Basic Custom duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) or as per the operating parameters in accordance with the applicable Tariff Regulations of the Commission or actual whichever is lower, corresponding to the scheduled generation for supply of electricity to GUVNL.** If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Custom duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually”

18. The Commission in its earlier order dated 4.5.2017 had relied on GERC order for Gross Station Heat Rate (GSHR) of 2150.27 kCal/kWh and Auxiliary Consumption of 6.5% considering that the order of GERC had not been challenged by the parties and APMuL has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. For the domestic coal component, since the Commission considered GSHR of 2230 kCal/kWh as per the bid assumption submitted by APMuL in its affidavits dated 1.2.2013 and 4.8.2016, the decision of the Commission with regards to the operating parameters was specific to the Petition No. 235/MP/2015. Therefore, the judgment of APTEL in Appeal No. 288 of 2013 in the case of Wardha Power Limited v. Reliance Infrastructure & Ors. relied upon by APMuL is not applicable in the present case. Thus, there is an inadvertent error in the Impugned order, specifying in view of the observation of the APTEL in Para 12 (e) (iv) of the judgment dated 13.4.2018, rejecting the claim of AMuL to consider the actual or the Tariff Regulations which is lower to consider operating parameters of SHR and Auxiliary Consumption as per the Tariff Regulations in the remand order. This was presumably done on basis of

the principle that has been adopted by the Commission in other cases, where the operating parameters were not decided earlier.

19. The Respondent, APMuL in support of its contention has relied on the judgment of Hon'ble Supreme Court in the case of Remco Industrial Workers House Building Coop, Society v. Lakshmeesha M. [(2003) 11 SCC 666] and has submitted that the Commission is empowered to consider the matter afresh and decide on the basis of the peculiar circumstances brought on record. The relevant extract of the judgment of Hon'ble Supreme Court in the case of Remco Industrial Workers House Building Coop, Society v. Lakshmeesha M. is as under:

*“18. ...The powers of the appellate court are not inhibited by the acts or omissions of the parties. Rule 25 of Order 41 of the Code of Civil Procedure empowers the appellate court to frame an issue and remit it for trial which has been omitted to be framed and tried by the trial court and which appears to the appellate court essential to the right decision of the case. **Rule 23-A Order 41 introduced by CPC Amendment Act 104 of 1976 w.e.f. 1-2-1977 confers powers on the appellate court to remand the whole suit for retrial.** In our considered opinion, this is a fit case where this Court should exercise powers of remand under Order 41 Rule 25 read with Rule 23-A CPC.”*

20. We note that the above judgement is not applicable to the present case as it confers powers on the appellate court to remand whole suit for retrial. However, the APTEL in its judgement dated 13.4.2018 has not remanded the matter to be considered afresh. On the other hand, APTEL, while partly allowing the appeal, had remanded the matter only for consequential order in terms of its decisions in Para 12(b) and 12 (d) of the judgment. It is pertinent to note that APMuL had specifically raised issue that the Commission has erroneously adopted the SHR as was previously applied by GERC in the said appeal, which has been rejected by the APTEL.

21. In light of the above observations, Para 16 and Para 17 of the Impugned order dated 17.9.2018 are modified as under in the light of the operating parameters taken

in Para 54 of the earlier order dated 4.5.2017 and the APTEL judgment dated 13.4.2018:

“16. The Commission in its order dated 4.5.2017 had held that the Petitioner shall be entitled for relief of custom duty on the entire quantum of imported coal irrespective of the source of import. Further, the Commission observed that import of coal from AFTA countries (Indonesia included) is not subject to custom duty. Therefore, the Petitioner was allowed reimbursement of customs duty on coal imported from non AFTA countries on the differential in the rate of custom duty prevailing as on the bid deadline in each of the PPAs and the prevailing custom duty as on 1.4.2015 or thereafter. In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner is entitled for reimbursement of customs duty on the imported coal from non-AFTA countries from 1.4.2015 onwards. As on 1.4.2015, the rate of Basic Custom Duty on imported coal was 2.5% of assessable value. **The Petitioner shall be entitled to recover Basic Custom Duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) corresponding to the scheduled generation for supply of electricity to GUVNL subject to a ceiling parameters of SHR 2150.28 kcal/kWh and Auxiliary Consumption of 6.5% in case of PPA dated 2.2.2007 and 2223.86 Kcal/Kwh and Auxiliary Consumption of 9% as per PPA dated 6.2.2007.** If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Custom duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually.

17. The Commission in its order dated 4.5.2017 held that since Countervailing Duty is the additional duty on customs duty equivalent to Central Excise Duty levied on similar goods produced in India and no such levy was applicable as on the date of bid guidelines, the Petitioner shall be entitled for reimbursement of the same. In view of the decision of the Appellate Tribunal that all exemptions were available to the Petitioner as on cut-off date, the Petitioner shall be entitled for reimbursement of countervailing Duty on imported coal. Countervailing Duty was imposed @1% with effect from 1.2.2011 and @2% with effect from 1.2.2013. Therefore, the Petitioner shall be entitled for reimbursement of Countervailing Duty at @2% with effect from 1.4.2015. **The Petitioner shall be entitled to recover Countervailing Duty on imported coal used in Gujarat PPAs Bid-01 and Bid-02 in proportion to the actual coal consumed (calculated on the basis of actual GCV of imported coal) corresponding to the scheduled generation for supply of electricity to GUVNL subject to a ceiling parameters of SHR of 2150.28 kcal/kWh and Auxiliary Consumption of 6.5% in case of PPA dated 2.2.2007 and 2223.86 Kcal/Kwh and Auxiliary Consumption of 9% as per PPA dated 6.2.2007.** If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Countervailing Duty on coal. The Petitioner is directed to furnish along with its monthly bill, the proof of payment of duty and computations duly certified by the auditor to GUVNL. The Petitioner and GUVNL are directed to carry out reconciliation on account of these claims annually.”

## **B. GCV to be considered for computation of Change in Law relief.**

22. The Review Petitioner has submitted that APMuL had submitted before GERC that it had assumed GCV of coal at 5500 kcal/kg under PPA dated 6.2.2007 and 5200 kcal/kg under PPA dated 2.2.2007 at the time of submission of bid. It has been contended by the Review Petitioner that the same has been upheld by GERC in its orders dated 21.10.2011 and 7.1.2013 in Petition No. 1080/2011 and 1210/2012 respectively, the same has also been accepted by APMuL. The Review Petitioner has argued that since the procurement of coal is the responsibility of APMuL, variation in GCV is to the account of APMuL. *Per Contra*, the Respondent, APMuL has submitted that findings of the APTEL in the judgment dated 13.4.2018 on the issues of SHR and Auxiliary Energy Consumption cannot be replicated and applied to the issue of GCV of coal as, unlike the SHR and Auxiliary Energy Consumption, GCV is not an operational parameter.

23. The Commission in its order dated 4.5.2017, while considering operating parameters, has considered only the SHR and Auxiliary Energy Consumption in terms of the orders of GERC. At cost repetition, the relevant extract of the order is reproduced as under:

### **“Operating parameters for calculation of relief under Change in Law**

54..... We have gone through the said order and noticed that the Petitioner had claimed Clean Energy Cess by considering Gross Station Heat Rate of 2150.28 kCal/kg and net Gross Station Heat Rate of 2324.62 kCal/kWh after accounting for the Auxiliary Power Consumption of 7.5%. GERC after considering the submission of GUVNL has allowed the Clean Energy Cess @`0.0221/kWh on the basis of the Station Heat Rate of 2150.27 kCal/kWh and auxiliary consumption of 6.5%. This order has not been challenged and the Petitioner has been claiming the relief for Change in Law on account of Clean Energy Cess on the basis of the said order. The Commission considers it appropriate to take the Gross Station Heat Rate of 2150.27 kCal/kWh for the purpose of calculating the relief in case of Gujarat PPA as well for the imported coal component under Haryana PPA.”

24. Neither the Commission consider GCV in the above order dated 4.5.2017 nor APTEL has issued any direction with regard to GCV of coal in its judgment dated 13.4.2018 in Appeal No. 210 of 2017. The Review Petitioner is seeking a fresh decision in respect of GCV of coal by adducing additional facts based on the GERC orders dated 21.10.2011 and 7.1.2013 in Petition No. 1080/2011 and 1210/2012 respectively, which is not permissible in review. Therefore, review Petition on this ground is rejected.

25. The Review Petition No. 44/RP/2018 is disposed of in terms of the above.

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

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