CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

PETITION NO. 242/MP/2023

Coram :
Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Date of Order: 20.01.2024

IN THE MATTER OF:

Petition under Section 79(1)(b), (f) & (k) of the Electricity Act, 2003, read with Rule 3(7) and Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 seeking declaration of Change in Law event in terms of Article 26.1 of the Agreement for Procurement of Power dated 18.05.2022 and compensation on account of increase in cost of power generation by MB Power (Madhya Pradesh) Limited due to non-allocation of linkage coal under the FSA corresponding to 150 MW.

And

In the matter of:

MB Power (Madhya Pradesh) Limited,
239, Okhla Industrial Estate, Phase-III,
New Delhi-110 020 **...Petitioner**

Versus

Haryana Power Purchase Centre,
2nd floor, Shakti Bhawan, Sector -6
Panchkula -134109

Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, IP No. 3 & 4,
Sector 14, Panchkula, Haryana

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

Parties Present:
Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Ms. Akanksha Tanvi, Advocate, MBPMPL
Shri Abhishek Gupta, MBPMPL
Shri Shubham Arya, Advocate, HPPC
Ms. Poorva Saigal, Advocate, HPPC
Ms. Reeha Singh, Advocate, HPPC
Ms. Anumeha Smiti, Advocate, HPPC

ORDER

MB Power (Madhya Pradesh) Limited (hereinafter to be referred to as the Petitioner) has filed the present Petition under Section 79(1)(b), (f) & (k) of the Electricity Act, 2003 read with Rule 3(7) and Rule 3(8) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 seeking a declaration of Change in Law event in terms of Article 26.1 of the Agreement for Procurement of Power dated 18.05.2022 and compensation on account of increase in the cost of power generation by MB Power (Madhya Pradesh) Limited due to non-allocation of linkage coal under the FSA corresponding to 150 MW.

2. The Petitioner has made the following prayers:

a) Hold and declare that the decision by SLC(LT) in its meeting dated 28.10.2022, as recorded in its minutes of meeting dated 22.11.2022, with respect to non-allocation of linkage coal under concluded SECL FSA to MB Power is a Change in Law event in terms of Article 26.1 of the Agreement for Procurement of Power dated 18.05.2022; and

b) Direct the Respondents to pay compensation to MB Power towards all the incremental cost of landed non-linkage coal procured from various sources as also the coal procured under Shakti B (iii) auction vis-à-vis the cost of landed linkage coal under the SECL FSA which has already been incurred and to be incurred by MB Power for supplying power to HPPC from 19.07.2022 (date of commencement of supply) for the entire tenure of the APP or till the time SECL FSA gets amended to enhance the ACQ in terms of its Article 4.1.1, whichever is earlier; and

c) Grant carrying cost with its computation on monthly compounding basis and late payment surcharge from the date of incurring of cost by MB Power till the date of disbursal of compensation so as to restore MB Power to same economic position as if such Change in Law event had not occurred; and

d) Pass such other orders that this Hon'ble Commission deems fit in the facts of this case.

Petitioner's Submissions:

3. The Ministry of Coal (**MoC**) vide notification dated 18.10.2007, issued a New Coal Distribution Policy (NCDP), which ensured 100% of the quantity of coal through fuel supply agreements by Coal India Limited (CIL) and its subsidiaries, at fixed prices to be declared/notified by MoC. As per NCDP, the units/power plants which were yet to be commissioned, but whose coal requirements had already been assessed and accepted by MoC and linkage/letter of assurance approved, as well as future commitments, would also be covered accordingly.

4. South Eastern Coalfield Limited (SECL), vide letter dated 06.06.2009 issued a Letter of Assurance (LoA) for the supply of coal for the Petitioner's 1000 (2 x 500) MW project, which was later revised, whereby the capacity of the Project was revised to 1200 (2 x 600) MW. SECL LoA set out certain milestones to be achieved in the form of Annexure 1. The milestones and conditions as set out in the SECL LoA, including the financial closure, were duly fulfilled/completed by the Petitioner, and consequently, Petitioner and SECL executed FSA dated 26.03.2013 ("**SECL FSA**"), and at that point of time, the Petitioner has already entered into a long-term PPA dated 5.1.20211 with M.P. Power Management Company Limited (**MPPMCL**) for 360 MW ("**MPPMCL PPA**").

5. The Petitioner submitted its MPPMCL PPA to SECL and on the basis of it, a quantity of 1.498 million tonnes per year was earmarked as Annual Contracted Quantity ("**ACQ**") in terms of Article 4.1.1 of the SECL FSA from the approved and assured total LoA quantity of 4.993 million tonnes per annum (LoA quantity), which has since been enhanced and presently stands at 5.548 million tonnes per annum. A Table providing details of the 12 (twelve) addendums of the SECL FSA, primarily for revision in the ACQ is as under:

Sr. No.	Particular	Date	Purpose
1.	Addendum 1	20.03.2014	For certain modifications in the provision of FSA and revision of ACQ on account of auxiliary consumption and transmission line losses. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 33%
2.	Addendum 2	20.03.2014	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 38%
3.	Addendum 3	12.02.2015	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 70.175%
4.	Addendum 4	18.06.2015	For change in rake fit station
5.	Addendum 5	13.07.2015	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 70.175%
6.	Addendum 6	27.04.2016	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of

			Unit 1 & 2 was revised to 70.175%
7.	Addendum 7	01.04.2019	For change in registered address
8.	Addendum 8	01.04.2019	For incorporating provisions related to SHAKTI Policy
9.	Addendum 9	01.04.2019	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 86.213% (including 16.038% for medium term PPAs)
10.	Addendum 10	13.08.2020	For increase in trigger level for FY 2020-21
11.	Addendum 11	09.10.2020	For change in percentage of PPA. Consequent to this addendum, PPA percentage for ACQ in respect of Unit 1 & 2 was revised to 70.175% to be effective from 01.04.2022
12.	Addendum 12	19.10.2021	For revising the trigger level for penalty under the FSA from 75% of ACQ to 80% of ACQ for FY 2021-22

6. In terms of the SECL FSA, the Petitioner had to satisfy two conditions precedent as specified under Clause 2.8.2.1 and 2.8.2.2 of the SECL FSA. These conditions included (i) obtaining necessary clearances, authorizations, approvals and permissions required for construction, commissioning, operation and maintenance of the Plant; and (ii) completion of construction of the power plant along with readiness of the power plant for lighting up, by an Independent Engineer within the condition precedent period. Further, Clause 4.1.1 of the SECL FSA provides that in the event there is a change in the percentage of PPA(s) (increase or decrease), a corresponding change in ACQ will be affected through a side agreement/addendum.

7. The term of SECL FSA is 20 years from the Effective Date, i.e., the last date on which the conditions precedent as set out in Clause 2.8.2.1 and 2.8.2.2 were fulfilled or the life of the power plant, whichever is earlier. Accordingly, as the conditions precedent qua Unit 2 were fulfilled and acknowledged by SECL on 27.04.2016, the SECL FSA is valid for 20 years from 27.04.2016, i.e., till 26.04.2036. Accordingly, in furtherance of Clause 4.1.1 of the SECL FSA, the Petitioner executed various side agreements/addendums to the SECL FSA to increase the ACQ in proportion to the change in the percentage of power purchase agreements.

8. Subsequently, on account of a prevalent shortage of coal in the country, on 21.06.2013, the Cabinet Committee on Economic Affairs (**CCEA**) approved a coal supply mechanism for power

producers stating that higher cost of imported coal to be considered for pass through as per modalities suggested by this Commission and MoC to issue suitable order supplementing the NCDP. Ministry of Power ("**MoP**") was to issue an appropriate advisory to Central/ State Commission(s), including modifications, if any, in the bidding guidelines to enable the Appropriate Commission to decide the pass through of higher cost of imported coal on a case-to-case basis.

9. In furtherance of the above, MoC vide Office Memorandum dated 26.07.2013 ("**NCDP 2013**") amended the NCDP and modified the ACQ for the last four years of the 12th Five Year Plan for power plants having normal coal linkage. Thus, NCDP 2013 reduced the assured coal supply from 100% to 65%, 65%, 67% and 75%, respectively, for the remaining four years of the 12th Five Year Plan, i.e., for FY 2013-14 to FY 2016-17.

10. Accordingly, on 31.07.2013, in consonance with NCDP 2013, MoP issued a letter to the Commission, informing that after considering all the aspects and the advice of the Commission, the Government has decided that CIL may import coal and supply the same to the willing thermal power plants on cost plus basis. Thermal power plants may also import coal themselves if they so opt for the higher cost of imported coal to be considered for pass through as per modalities suggested by this Commission.

11. The COD for Unit 1 (600 MW) was achieved on 20.05.2015, and all conditions precedent qua Unit 1 were achieved within the permissible timelines, and accordingly, the Petitioner gave notice of satisfaction of purchaser's conditions precedent as per Clause 2.8.3.2 of the SECL FSA vide its letter dated 25.03.2015 and acceptance of the same was expressly recorded and confirmed in Record Note dated 13.07.2015.

12. Meanwhile, on 28.01.2016, MoP issued the revised Tariff Policy, 2016 ("**Tariff Policy, 2016**"), whereby specific provisions were made regarding pass through of the cost of imported coal/market-based e-auction coal for meeting the shortfall between the assured quantity/quantity indicated as ACQ in the LOA/FSA and reduced quantity of coal supplied by CIL.

13. Thereafter, the COD for Unit 2 (600 MW) was achieved on 07.04.2016, and all conditions precedent qua Unit 2 were fulfilled by the Petitioner within the permissible timelines, and

accordingly, the Petitioner vide its letter dated 25.3.2016 issued notice of satisfaction of purchaser's conditions precedent as per Clause 2.8.3.2 of the SECL FSA and SECL accepted the same, which was recorded and confirmed in Record Note dated 27.04.2016.

14. There were various other LoA and FSA holders with SECL who, unlike the Petitioner, had not been able to satisfy the condition precedents prescribed under their fuel supply agreements, as a result of which their respective fuel supply agreements could not come into effect. Most distinctly, such fuel supply agreements of other thermal power generators contained an additional condition precedent in the form of clause 2.8.2.3, which does not find mention in the Petitioner's FSA with SECL., which stipulated that the Purchaser shall have to furnish the long term Power Purchase Agreement (PPA) either directly with Distribution Companies (DISCOMs) or through Power Trading Company (ies) (PTC) who has/have signed back to back PPA(s) (long term) with DISCOMs within the Condition Precedent (CP) period as per clause 2.8.3.1. It is the Petitioner's case that unlike its FSA, which is not only valid, binding and subsisting and has been consistently acted upon, due to the non-satisfaction of a condition precedent in Clause 2.8.2.3, the FSA of other LoA holders remained inchoate/ineffective.

15. MoC vide notification dated 22.5.2017 issued the New More Transparent Coal Allocation Policy for Power Sector, 2017, namely Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India, (**SHAKTI Policy**) for the purpose of providing linkage coal to the independent power producers having already concluded long term power purchase agreements with DISCOMs. The purpose of the SHAKTI Policy was to fade out the old regime of LoA-FSA and bring in new guidelines for coal allocation.

16. In furtherance of SHAKTI Policy, on 01.04.2019, Addendum No. 8 was executed between the Petitioner and SECL to incorporate applicable provisions of SHAKTI Policy with respect to the inclusion of supply of coal for medium-term PPAs also in the SECL FSA. In view of the revised terms of the SECL FSA (Addendum No.8) read with Clause 4.1.1 of the SECL FSA, the Petitioner requested that the ACQ be enhanced on account of change in percentage of the power purchase agreement commensurate with the new medium-term PPA dated 25.02.2019 signed by the Petitioner with PTC India Limited ("**PTC**") (back to back PPA with Haryana DISCOMs/HPPC)

submitted to SECL including 10% grossing up of supplies on account of transmission loss and auxiliary consumption. This was given effect by Addendum No. 9 executed to SECL FSA on 01.04.2019 between MB Power and SECL.

17. Thereafter, SLC(LT) held a meeting on 03.02.2022, the minutes of which were published on 21.03.2022. In this meeting, the SLC (LT), in Agenda Item No.2, considered the request of various power generators which held LoAs under SHAKTI Policy for an extension of timeline for the satisfaction of Clause 2.8.2.3 of their FSAs (a condition absent from the SECL FSA of the Petitioner) i.e. to enter into a power purchase agreement as a condition precedent for their FSAs to come into effect. The SLC (LT), by these minutes, gave a lifeline to these LoA/ FSA holders and consequently extended the timeline to sign and bring PPAs by 31.03.2022. Ex-facie, these minutes did not seek to cover FSAs like that of the Petitioner, which (i) did not contain Clause 2.8.2.3 and (ii) had already been acted upon and resulted in the execution of numerous addendums.

18. On 21.03.2022, HPPC on similar lines as the medium-term PPA dated 25.02.2019 signed by the Petitioner with PTC (back-to-back PPA with Haryana DISCOMs) ("APP"), issued a Request for Qualification ("**RFQ**") and Request for Proposal ("**RFP**") for supply of 150 MW power to Haryana DISCOMs on finance, own and operate ("**FOO**") basic. On 30.03.2022, the Petitioner submitted its bid for supply of 150 MW power to Haryana DISCOMs from its Project.

19. On 05.05.2022, HPPC vide letter dated 5.5.2022 issued Letter of Award ("**HPPC LoA**") to the Petitioner for the supply of 150 MW power to Haryana DISCOMs from the Project. On 18.05.2022, The Petitioner and Haryana DISCOMs executed an APP dated 18.5.2022, for supply of power for an aggregate capacity of 150 MW from the Project for a period of 3 (three) years. The Petitioner vide letter dated 24.05.2022, 29.6.2022, and 6.7.2022 requested SECL for execution of side agreement to the SECL FSA for enhancement of ACQ corresponding to 150 MW to enable the Petitioner to commence supply under an APP. HPPC, vide letter dated 11.07.2022 informed SECL that it has signed APP with the Petitioner for supply of 150 MW power. In addition, HPPC, by way of the said letter, also requested the Petitioner to expedite the SECL FSA amendment with SECL so that power supply to HPPC can commence from

19.07.2022.

20. In furtherance of the above, the Petitioner, once again, vide letter dated 12.07.2022, requested SECL to execute a side agreement/addendum to SECL FSA, given that the supply of power to HPPC was to commence from 19.07.2022. Furthermore, on 13.07.2022, the Petitioner whilst submitting the required documents, requested SECL for amendment in the SECL FSA for enhancing the ACQ corresponding to the quantum under APP.

21. SECL vide letter dated 19.7.2022 sought clarification from CIL on whether the medium-term power purchase agreements submitted by the Petitioner after 31.03.2022 are to be accepted or not in light of SLC(LT) meeting dated 03.02.2022, wherein SLC(LT) had prescribed the cut-off date of 31.03.2022 for submission of any power purchase agreement for supply of linkage coal.

22. Thereafter, the Petitioner approached CEA and apprised them that the Petitioner has executed APP with HPPC for the supply of 150 MW power, however, SECL, despite repeated requests, is not executing a side agreement/addendum for enhancement of ACQ of SECL FSA corresponding to 150 MW and accordingly, requested CEA to recommend CIL to issue an amendment to the SECL FSA for such enhancement. Pursuant to Petitioner's letter dated 20.08.2022, CEA vide its letter dated 26.08.2022, apprised SECL that the relevant condition precedent clause, being clause 2.8.2.3 is not present in the Petitioner's FSA with SECL, therefore, decision of SLC(LT) in its meeting dated 03.02.2022, wherein SLC(LT) recommended for extension of timeline for obtaining power purchase agreement as per the condition precedent clause 2.8.2.3 till 31.03.2022, is not applicable upon the Petitioner. Accordingly, as per Para A(v) of SHAKTI Policy, the APP qualifies for coal drawl under the existing LoA-FSA route, and in that view, CEA recommended SECL to consider the Petitioner's request for amendment of SECL FSA for enhancement of ACQ for supply of 150 MW power to Haryana DISCOMs under the APP.

23. In light of CEA's letter dated 26.08.2022, SECL vide letter dated 27.8.2022 once again sought clarification from CIL on whether the power purchase agreements (long/medium term) submitted by FSA holders, whose plant/unit have been commissioned and fuel supply agreements are effective after fulfilment of conditions precedent, are to be accepted or not beyond 31.03.2022. The Petitioner, vide letter dated 07.10.2022, requested Joint Secretary

(Thermal), MoP, requesting for its support and intervention for amendment to SECL FSA and to advise MoC/CIL to consider MB Power's request for amending the SECL FSA for additional coal supply in order to fulfil its obligations under the APP. In furtherance of the same, the Petitioner also requested HPPC for its support in expediting the amendment to FSA for enhancement of ACQ by writing to the Ministry of Power ("**MoP**").

24. Thereafter, CEA in its letter dated 13.10.2022 noted that the Petitioner's FSA does not contain clause 2.8.2.3 and the applicability of such clause and the timelines as specified by SLC(LT) in its MoM dated 21.03.2022 does not apply to MB Power. HPPC vide its letter dated 15.10.2022, requested SECL to amend the SECL FSA and facilitate early supply of linkage coal to the Petitioner by enhancement of ACQ corresponding to the quantum of power under the APP. In consideration of Petitioner's letter dated 07.10.2022 to MoP, MoP informed MoC that the matter has been examined by CEA, which has recommended for amendment in SECL FSA and in that view, requested MoC to consider the Petitioner's request for amendment in the SECL FSA corresponding to APP favourably.

25. SLC(LT) held a meeting on 28.10.2022 wherein one of the agenda items for consideration was a discussion on the Petitioner's request for execution of side agreement/addendum to SECL FSA corresponding to the quantum under the APP and the Petitioner's representatives were invited to make a representation. However, despite a detailed representation, the request made by the Petitioner was not considered, and consequently, SECL did not sign the side agreement/addendum to SECL FSA. In addition to the same, MoP vide its Office Memorandum dated 28.10.2022 requested MoC that power plants which have fulfilled the condition precedent clause 2.8.2.3 even by submitting partial power purchase agreements and the power plants which do not have clause 2.8.2.3 in their fuel supply agreements may be entitled to draw coal as and when they submit the power purchase agreement under Section 63 of Electricity Act, till the validity of their fuel supply agreement with CIL/its subsidiaries.

26. However, despite repeated requests by the Petitioner, and recommendations from CEA, MoP and HPPC, SECL did not execute a side agreement to the SECL FSA for enhancement of ACQ, and accordingly, on 01.11.2022, the Petitioner once again wrote to SECL stating that in

absence of clause 2.8.2.3 in the Petitioner's FSA and in light of the fact that the Petitioner has already fulfilled all its condition precedent under the SECL FSA, the Petitioner is entitled to submit power purchase agreements beyond the cut off date of 31.03.2022. In this view, the Petitioner requested SECL to consider its request for the supply of coal under the SECL FSA and execute a side agreement/addendum to the same at the earliest.

27. In light of the above circumstances and repeated refusal/failure on the part of SECL to execute a side agreement to the SECL FSA for enhancement of ACQ corresponding to 150 MW of power and to wriggle out of its mandatory and binding obligation as per Clause 4.1.1 of the SECL FSA, on the basis of reading a non-existent clause into MB Power's FSA, being clause 2.8.2.3, the Petitioner filed a writ petition before High Court of Chhattisgarh, Bilaspur ("**Hon'ble HC**") on 09.11.2022, being Writ Petition (C) No. 4795 of 2022, with the following prayers:

"*Issue writ of mandamus restraining SECL from arbitrarily and unreasonably reading into MB Power's FSA a non-existent clause 2.8.2.3, which forms part of FSAs of some other companies;*

a) Consequently, issue writ of mandamus restraining SECL from arbitrarily and unreasonably applying extensions and/or cut-off dates, including the cut off date of 31.03.2022 pertaining to clause 2.8.2.3 to MB Power's FSA particularly when MB Power's FSA does not contain the said clause 2.8.2.3; and

b) Issue writ of mandamus to SECL to supply coal in accordance with the existing terms of MB Power's FSA for the entire duration of FSA, including all of the quantity required for generation of power agreed to be supplied under the APP and in respect of any and all other long term/medium term PPAs that may be executed by MB Power for the remaining contract period (i.e., until 26.04.2036)."

28. The Petitioner had also filed an interim application before the Hon'ble HC seeking *inter alia* the following prayers:

a) Direct SECL to immediately commence supply of additional coal quantity of 61809 tonnes per month for the months of November 2022 to December 2022, 69226 tonnes per months for the months of January to March 2023 and further quantities thereafter to MB Power from the date of the order passed by this Hon'ble Court in accordance with Clause 4.1.1 of the SECL FSA to enable MB Power to meet with the requirement of PPA executed with HPPC dated 18.05.2022 until final decision in the present writ petition.

29. Thereafter, the Petitioner had also filed an interim application on 5.10.2022 before the Hon'ble HC for certain reliefs:

a) Subject to Final Outcome and without prejudice, pass an order directing the SECL to commence supply to MB Power for its Haryana PPA on ad hoc/provisional basis within a period of 1 week from the date of the order, at the provisional price of the last auctioned price dated 27th and 28th September 2022.

b) Subject to Final Outcome and without prejudice, pass an order directing the SECL to do all acts necessary to implement the relief as prayed for in clause (a) above so that supply of coal is commenced within a period of 1 week from the date of the order.

30. Pursuant to the filing of the Writ Petition, SLC(LT) on 22.11.2022, published the minutes of its meeting held on 28.10.2022 ["**SLC(LT) MoM**"], wherein MB Power made a detailed presentation and submitted the following:

(a) That clause 2.8.2.3 is not present in its FSA and all the conditions precedent have been fulfilled as long back as in 2016 to the satisfaction of SECL.

(b) That there exists an ACQ clause in its FSA (being Clause 4.1.1 of FSA), as per which change in ACQ shall be affected through a side agreement whenever there is any change in the percentage of PPA(s), and there is no sunset clause for furnishing power purchase agreement in the FSA.

(c) That SHAKTI Policy and the SECL FSA are coherent and the SECL FSA is in consonance with Para A(v) of SHAKTI Policy, according to which medium-term PPAs to be concluded in future are eligible for coal supplies.

(d) Even after the SHAKTI Policy, the Petitioner's FSA acted upon it.

(e) Even after Addendum 8, the Petitioner's FSA acted upon qua the previous 175 MW Haryana medium-term PPA.

(f) Therefore, the alleged deadline of 31.03.2022 ex-facie in applicable to the Petitioner's FSA as it related to satisfaction of Clause 2.8.2.3 which is absent from the Petitioner's FSA.

(g) CEA, MoP, MoC and SECL [all being members of the SLC (LT)] have all understood (even after the execution of the APP), that due to the non-existence of Clause 2.8.2.3 in the Petitioner's FSA, the deadline of 31.03.2022 was inapplicable against the Petitioner.

31. Despite the aforesaid, for the first time since the SHAKTI Policy, the SLC (LT) meeting of 03.02.2022, and the execution of the APP, SLC (LT) noted and overruled the aforesaid position by way of its minutes published on 22.11.2022 and concluded that in view of the provisions of SHAKTI Policy which mandates fading away of the old LoA-FSA regime, only those power purchase agreements which have been entered up to 31.03.2022, will be accepted for supply of linkage coal by the coal companies. This, the Petitioner submits, amounts to amending/modifying the terms of the SHAKTI Policy, including in particular Para A (iii), (iv) and (v).

32. SECL referred to the SLC(LT) MoM dated 22.11.2022 in its reply filed to the Writ Petition and took principal objections based on the same stating that the SLC(LT) recommended that

irrespective of the conditions precedent clause of furnishing a PPA in the fuel supply agreements of the power plants signed under erstwhile nomination basis regime, only those eligible PPAs entered up to 31.03.2022 may be accepted for supply of linkage coal by the coal companies.

33. On 19.12.2022, SECL filed its reply to the Petitioner's interim application and stated that coal is not denied to power plants such as that of Petitioner as Shakti Scheme B(iii), B (iv) and B (v) are open for such power plants. SECL further stated that it would be unfair and arbitrary to other similarly placed power plants if the coal is supplied to MB Power, who had not participated in the Shakti B(iii) auction held on 27/28.09.2022, at the price discovered therein.

34. Meanwhile, CIL vide notice dated 28.12.2022 announced the fourth round of auction of coal linkages under Para B(iii) of SHAKTI Policy. Para B(iii) of the SHAKTI Policy provides that CIL/SCCL may grant future coal linkages on an auction basis for power producers without power purchase agreements that are either commissioned or to be commissioned. In furtherance of the same, CIL in February 2023, issued a Scheme Document for the auction of coal linkages to power producers/IPPs without PPAs ("Scheme Document"), basis on which the Petitioner participated in the Shakti B(iii) auction held on 14.02.2023 and 15.02.2023, wherein a total of 8.29 lacs MT coal has been booked from various subsidiaries for different grades. The Petitioner, therefore, made the best efforts to minimise and mitigate the losses in the consumer's best interests.

35. SECL vide letter dated 27.02.2023 issued a Letter of Award to the Petitioner for the award of 2,76,900 tonnes of coal per annum. In addition, Mahanadi Coalfields Limited ("MCL") issued 2 (two) Letter of Award(s), both dated 28.02.2023, to the Petitioner for award of 49,000 tonnes and 2,21,000 tonnes of coal per annum ("MCL SHAKTI LoAs"). Further, Central Coalfields Limited ("CCL") also issued Letter of Award to MB Power on 28.02.2023 for the award of 80,000 tonnes of coal per annum ("CCL SHAKTI LoA"), and Northern Coalfields Limited ("NCL") issued Letter of Award to MB Power on 07.03.2023, for award of 2,02,200 tonnes of coal per annum ("NCL SHAKTI LoA").

36. In furtherance of the SECL SHAKTI LoA, the Petitioner and SECL executed a fuel supply agreement dated 20.03.2023 ("**SECL SHAKTI FSA**"), which specified that ACQ would be

decided after submission of valid power purchase agreement. Thereafter, an addendum/side agreement to SECL SHAKTI FSA was executed on 21.03.2023, after submission of APP, and the ACQ stood revised to 2,76,900 tonnes per annum ("**SECL Addendum 1**"). Similarly, in furtherance of MCL SHAKTI LoAs, 2 (two) fuel supply agreements, both dated 25.03.2023, were executed between MB Power and MCL ("**MCL SHAKTI FSAs**"). In furtherance of CCL SHAKTI LoA, a fuel supply agreement was executed between the Petitioner and CCL on 24.03.2023 ("**CCL SHAKTI FSA**") for the supply of 75,136 tonnes of coal per annum. Thereafter, pursuant to the submission of APP, vide CCL's letter dated 30.06.2023, the ACQ stood revised to 74,236 tonnes per annum. Similarly, in furtherance of NCL SHAKTI LoA, a fuel supply agreement was executed between MB Power and NCL on 22.03.2023 ("**NCL SHAKTI FSA**") for the supply of 2,02,200 tonnes of coal per annum to MB Power. Thereafter, an addendum/side agreement to NCL SHAKTI FSA was executed on 05.04.2023, and after submission of APP, the ACQ stood revised to 1,56,888 tonnes per annum ("**NCL Addendum 1**").

Change in Law Rules issued by MoP and Notices issued by MB Power

37. Ministry of Power vide notification dated 22.10.2021 notified the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021("**CIL Rules**"). As per Rule 3(2) of the CIL Rules, the affected party, intending to recover the cost due to change in law, is required to give a three weeks' prior notice to the other party about the proposed impact of the proposed change in law event on the tariff or charges.

38. The Petitioner submitted that in view of such decision of SLC(LT) in its MoM dated 22.11.2022 (meeting held on 28.10.2022), whereby Para A (iii), (iv) and (v) of SHAKTI Policy stood amended/modified/altered/substituted for the first time since the SHAKTI Policy, the SLC (LT) meeting of 03.02.2022, and the execution of the APP, after the bid due date (i.e., 30.03.2022), the SLC(LT) being a Government Instrumentality, constitutes a Change in Law event as per the APP and CIL Rules. Accordingly, the Petitioner vide letter dated 28.02.2023 issued a Change in Law notice to HPPC under Rule 2(1)(c) read with Rule 3(2) of CIL Rules seeking an adjustment in tariff on account of increase in cost of procurement of coal and supply of power with effect from 19.07.2022, i.e., the date of commencement of supply in the following

manner:

Period	Change in Law Claims
From 19.07.2022 till commencement of supply of coal under Shakti B(iii) auction	Increase in cost of procurement of coal, i.e., non-linkage coal
From the date of supply of coal under Shakti B(iii) auction	Increase in cost of procurement of coal pursuant to fuel supply agreements under Shakti B(iii) auction.

39. Pursuant to the Change in Law notice dated 28.02.2023, the Petitioner in terms of Rule 3(3) of CIL Rules, vide its letter dated 22.03.2023, provided computation of tentative impact in tariff to be adjusted and recovered from HPPC on account of the occurrence of such Change in Law event. In response, HPPC, vide its letter dated 27.03.2023, stated that the APP was premised on the fact that the Petitioner has access to the assured supply of fuel as per Clause 2.2(d) of the RFQ. In addition, Article 5.1.5(k) and Article 7.1(n) of the APP clearly state that arrangement of fuel is the Petitioner's obligation. Accordingly, since it was Petitioner's responsibility to ensure the existence of an assured supply of fuel as on the date of submission of the bid, any financial implication due to non-amendment of FSA cannot be attributed to HPPC and the issue of signing of the amendment to the FSA with SECL, after signing of APP, cannot be claimed as a Change in Law event by the Petitioner.

40. In light of the abovementioned facts and circumstances, the Petitioner has filed the present Petition.

JURISDICTION

41. With regard to the jurisdiction, the Petitioner has stated that it (project in the State of Madhya Pradesh), has entered into APP with Haryana DISCOMs through HPPC for the supply of 150 MW power in the State of Haryana. Accordingly, since there is inter-state generation and supply of power, MB Power's Project qualifies as a composite scheme under Section 79(1)(b) of the Electricity Act. The Petitioner has further stated as under:

a) The Commission's power to regulate tariffs for generating companies having a composite scheme for the generation and supply of power emanates from Section 79(1)(b)

of the Electricity Act. Hon'ble Supreme Court of India, in its judgment dated 11.04.2017 in the matter of Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80, has explained the expression 'composite scheme' and the jurisdiction of this Commission in regulating/adopting the tariff of the projects meeting the requirements of 'composite scheme'. From the findings of the Hon'ble Supreme Court, it is clear that if under a scheme there is generation or sale of electricity in more than one State, then the same is covered under the expression 'composite scheme' and is consequently under the jurisdiction of this Commission.

b) The Commission in the Order dated 18.01.2019 and 3.6.2019 in Petition No. 224/MP/2018 and 156/MP/2019, filed by the Petitioner, has, inter-alia, held:

> *"…even though the tariff discovered under competitive bidding process was adopted by a State Commission under Section 63 of the 2003 Act, Section 64(5) has no application in the present case since the generating station is supplying power to more than one State and in terms of the judgment of the Hon`ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the generating station of the Petitioner vests with this Commission. In view of this, we find no merit in the submission of the Respondent, UP discoms and accordingly the same is rejected."*

c) The Commission, in the Order dated 3.6.2019 in Petition No. 156/MP/2019, filed by the Petitioner, has, inter-alia, held that the case of Energy watchdog is squarely applicable to the present case between the same parties regarding the supply of power by the Petitioner to the Respondent, UPPCL/ UP Discoms in terms of the same PPAs. Therefore, the Commission rejected the objections of the Respondents UP Discoms on the issue of jurisdiction.

NCDP 2013 and SHAKTI Policy have been recognized as a Change in Law event

42. In support of its contention of change in law event, the Petitioner has submitted as under:

a) At the time of issuance of SECL LoA to the Petitioner and execution of FSA with SECL, the law prevailing for allocation of coal for the Project was being governed by NCDP, under which the Petitioner was assured to receive coal corresponding to 100% of its normative requirement, through fuel supply agreements by CIL/its subsidiaries at fixed prices to be declared/notified by CIL, based on Para 2.2 of the NCDP. In addition, NCDP also provided that to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. In other words, it was CIL/its subsidiaries' responsibility to meet the full requirement of coal under fuel supply agreements even by resorting to imports, if necessary. The relevant extract of Para 2.2 of

the NCDP is reproduced hereinbelow for ease of reference:

b) In furtherance of NCDP and NCDP 2013, on 22.05.2017, MoC notified the SHAKTI Policy, as per which the existing LoA holders would continue to get 75% of the ACQ beyond 31.03.2017 as against the assured ACQ of 100% under the NCDP. The purpose of the SHAKTI Policy was to fade out the old regime of LoA-FSA and bring in new guidelines for coal allocation. For MB Power, which had already executed an FSA with SECL (after submission of a long term PPA) under the old LoA-FSA regime, Para A(v) of the SHAKTI Policy was relevant. It is submitted that in terms of Energy Watchdog Judgment, it is settled that NCDP 2013 is a Change in Law event and a continuation of the coal supply restrictions contained in NCDP 2013, though named differently, i.e., SHAKTI Policy, would have the same impact on the generating companies, if the coal supply is affected/reduced. Therefore, as held in the Energy Watchdog Judgment, such policy decisions are statutory in nature, binding and have the force of law.

c) Accordingly, such reduction in the assured quantity of coal, by way of SHAKTI Policy, also constitutes a Change in Law event. The same is further substantiated by this Hon'ble Commission's order dated 16.05.2019 in Petition No. 8/MP/2014 and Petition No. 284/MP/2018 in the matter of GMR Warora Energy Limited v. MSEDCL and DNH ("**GMR Warora Order**"), wherein it has been held that since NCDP 2013 and SHAKTI Policy have changed the assurance of supply of coal as provided in NCDP, the same amounts to Change in Law event, for which the affected party ought to be compensated and restituted to the same economic position as if such Change in Law event had not occurred.

d) The Commission vide its order dated 03.06.2019 in Petition No. 156/MP/2018 in the matter of MB Power (Madhya Pradesh) Limited v. UPPCL & Ors., whilst relying on GMR Warora Order, has held that NCDP 2013 and the SHAKTI Policy are a Change in Law event for MB Power. Accordingly, NCDP 2013 and SHAKTI Policy have both been recognized as Change in Law events, specifically for MB Power, by this Hon'ble Commission.

e) In view of the above, it is clear that the change in the assurance of 100% supply of coal by way of amendment to NCDP, by NCDP 2013 and SHAKTI Policy is a Change in Law event, for which relief can be claimed by the affected party.

SLC(LT) MoM dated 22.11.2022 (meeting dated 28.10.2022) is a Change in Law event under the APP

43. In support of its contention that SLC (LT) MOM dated 22.11.2022 constitutes a change in law even , the Petitioner has submitted as under :

a) As per Clause 4.1.1 of the SECL FSA, the ACQ shall be in proportion of the percentage of generation covered under long term power purchase agreements executed

by MB Power with the DISCOMs either directly or through PTC(s) who has/have signed back-to-back long-term power purchase agreements with DISCOMs. In addition, whenever there is any change in the percentage of power purchase agreements, corresponding change in ACQ shall be effected through a side agreement, and such changes shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter.

b) Accordingly, in furtherance of Clause 4.1.1 of the SECL FSA, the Petitioner executed various side agreements/addendum to the FSA with SECL to increase the ACQ in proportion to the change in percentage of power purchase agreements. Such side agreements in the form of addendums are to be read as a part of SECL FSA for the purpose of grossing up the coal supplies for meeting the requirement towards transmission losses and auxiliary consumption.

c) Under the old LoA-FSA regime, since the fuel supply agreements with various other LoA holders had not been executed (which is not the case of Petitioner), SHAKTI Policy provided such other LoA holders extension till 31.03.2022 to fulfil their respective condition precedents. However, since the Petitioner had already executed FSA with SECL and fulfilled the relevant condition precedents prescribed under the SECL FSA by 27.04.2016, Para A(i) of the SHAKTI Policy was not applicable to MB Power and only Para A(v) of the SHAKTI Policy was applicable, which entitled the various FSA holders to take supply of coal even for medium-term PPAs (as opposed to long term PPAs) to be concluded in future.

d) In view thereof, an Addendum dated 01.04.2019 to SECL FSA was executed between MB Power and SECL to incorporate applicable provisions of SHAKTI Policy with respect to inclusion of the supply of coal for medium-term PPAs also in the SECL FSA.

e) MB Power entered into an APP with Haryana DISCOMs for the supply of 150 MW power from its Project for a period of 3 years. However, despite repeated requests by MB Power, CEA, MoP and HPPC, SECL did not execute a side agreement/addendum to SECL FSA in terms of Clause 4.1.1 of SECL FSA to enhance the ACQ in order to enable MB Power to supply power to Haryana DISCOMs under the APP on the pretext that in terms of SHAKTI Policy and SLC(LT) minutes of meeting dated 21.03.2022, MB Power ought to have submitted such power purchase agreement before 31.03.2022.

f) SLC(LT) in its minutes of the meeting dated 21.03.2022, the meeting for which was held on 03.02.2022, had, after considering the request of various thermal power generators to extend the timeline for entering into power purchase agreement, held that as

per clause 2.8.2.3, power purchase agreements have to be submitted within the condition precedent period and in view of the mandate of SHAKTI Policy, timeline for fulfilling condition precedents, i.e., submission of power purchase agreement cannot be extended beyond 31.03.2022.

g) The abovementioned clause 2.8.2.3 (existing in fuel supply agreements of certain other thermal power generators) is applicable only to those purchasers who have signed a fuel supply agreement without entering into a long term power purchase agreement. However, since the Petitioner had already entered into a long term power purchase agreement with MPPMCL before signing the FSA with SECL, the same is not applicable to MB Power. In any case, the aforementioned clause does not exist in MB Power's FSA with SECL or any of its subsequent addendums.

h) SLC(LT), by way of its minutes of the meeting dated 22.11.2022, recommended that power purchase agreements entered into after 31.03.2022 will not be eligible for the supply of linkage coal by the coal companies under the old LOA-FSA regime, which has in effect altered/amended Para A(v) of SHAKTI Policy.

i) There is no express mandate and/or restriction under the SECL FSA which requires MB Power to submit concluded power purchase agreements before 31.03.2022 to avail the FSA quantity. This means that there exists no sunset clause in the SECL FSA which mandates submission of power purchase agreements only up to a certain date.

j) SLC(LT), by way of its minutes of the meeting dated 22.11.2022, has altered/modified Para A(v) of SHAKTI Policy, which permitted coal supplies to power plants, under the old regime of LoA-FSA (such as that of MB Power), to the extent of long term power purchase agreements and medium-term power purchase agreements to be concluded in future. However, by denying enhancement of ACQ corresponding to the quantum under the APP, on the ground that the same had to be submitted before the deadline of 31.03.2022, the assurance provided to MB Power under Para A(v) of SHAKTI Policy, has been modified, resulting in a Change in Law event under the APP.

Re: Change in Law event under the APP

44. In support of its claim under a change in law event, the Petitioner has submitted as under:

a) The scheme for linkage of coal started in 1973 in terms of the resolution dated 06.01.1973, whereby, inter alia, a Standing Linkage Committee consisting of the members specified therein, was set up, To review from time to time the coal requirements of the existing thermal power stations and for establishing rational linkages with collieries for raw coal supplies and with washeries for the supply of middling having regard to the capacity of

coal production, available as well as planned from the nearest source which would avoid or minimize the rail transport etc.

b) As per Press Release dated 19.03.2015 issued by Press Information Bureau, Government of India PIB Release/DL/673, SLC(LT) is an inter-ministerial body which has been monitoring the status of FSA materialization and problems pertaining to signing of FSAs/fructification of LOAs time to time came out with operating decisions/polices to resolve such issues. Accordingly, as is clear from above, SLC(LT) is a body set up by the MoC to decide upon the coal allocations to end-users, including IPPs and it, therefore, falls within the definition of 'Government Instrumentality' in terms of Article 26.1 of the APP.

c) In addition to the same, SLC(LT), being a Government Instrumentality, any decision by SLC(LT) which modifies an existing Indian law, i.e., SHAKTI Policy, after the bid date, i.e., 30.03.2022, will fall under clause (b) of the definition of Change in Law, provided under Article 26.1 of the APP, thereby leading to a Change in Law event.

d) Accordingly, since the SLC(LT), by way of its minutes of the meeting dated 22.11.2022, which is after the bid date of 30.03.2022, has decided to not grant linkage coal to MB Power corresponding to the quantum of power under APP, thereby amending Para A(v) of SHAKTI Policy, has resulted in a Change in Law event in terms of Article 26.1 of APP. Therefore, the Petitioner should be restituted to the same economic position as if such a Change in Law event had not occurred in terms of Article 21.1 of APP.

e) The same is further substantiated by the Appellate Tribunal for Electricity ("**APTEL**"/"**Tribunal**") Judgment dated 14.09.2019 in the matter of Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Rajasthan Electricity Regulatory Commission & Ors., Appeal Nos. 202 and 305 of 2018, wherein the Hon'ble Tribunal has held that If any project is affected by such change in law, it is entitled to be restored to the same economic position by allowing the higher cost of any alternate coal that is being procured as against the assurance of domestic coal supply assured from Coal India Limited and its subsidiaries." In addition to the same, the Hon'ble Tribunal, by way of its Judgment dated 03.11.2020 in the matter of Uttar Haryana Bijli Vitran Nigam Limited and Anr. v. Adani Power (Mundra) Limited and Ors., 2020 SCC OnLine APTEL 92, has held that the submission that SLC(LT) meeting minutes cannot be relied upon is neither logical nor justifiable since it is an important document which throws light on the reasons behind reduction of coal linkage allocation to only 70% of installed capacity while the rest was to be considered later. The SLC(LT) minutes are undoubtedly post the cut off date and cannot be ignored. It must also be seen that the SLC(LT) meeting minutes if a document of governmental instrumentality and are in public domain.

f) The decision of SLC(LT) to deny allocation of additional linkage coal to MB Power under the FSA corresponding to 150 MW of power, thereby amending Para A(v) of SHAKTI Policy,

has resulted in change in assured supply of coal to MB Power and in that view, in terms of Energy Watchdog Judgment, also qualifies as a Change in Law event and MB Power ought to be restituted to the same economic position as if such Change in Law event had not occurred, in terms of Article 21.1 of APP.

g) In addition to the same, the Hon'ble Tribunal in Judgment dated 14.08.2018 passed in Appeal No. 119 of 2016 titled **Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors** has held that while submitting the bid, the bidders are only required to factor the applicable charges/ cost existing at the time of bidding and cannot envisage any change in such charges/ cost in the future. Hence, MB Power submitted its bid on 30.03.2022, considering the factors existing at that time. However, the SLC(LT) decision in the meeting dated 28.10.2022 has changed the premise on which the bid was submitted by MB Power.

h) Owing to the decision of SLC(LT), MB Power has incurred additional costs towards procurement of non-linkage coal from various sources and will continue to incur additional costs towards procurement of coal under the Shakti B(iii) auction, albeit at a markup/premium price as compared to notified coal price under MB Power's FSA with SECL, for the purpose of supplying power to Haryana DISCOMs under APP, till the time any favourable directions are issued by the Hon'ble HC under the ongoing Writ Petition.

i) SLC(LT), by way of its minutes of the meeting dated 22.11.2022 (meeting dated 28.10.2022), denied supply of linkage coal to MB Power under the SECL FSA on the ground that in view of the provisions of SHAKTI Policy, which mandates fading away of LoA-FSA regime, only those power purchase agreements which have been entered up to 31.03.2022, will be accepted by coal companies for supply of linkage coal. In this regard, although the Change in Law event occurred in the month of October/November 2022, the impact of the same was being faced by MB Power from 19.07.2022 itself, i.e., when MB Power commenced supply of power under the APP to HPPC in order to fulfil its obligations under the APP and as per Prudent Utility Practices.

j) The Petitioner was under the bonafide impression that as per past practice, i.e., whenever there is a change in the percentage of power purchase agreements (increase or decrease), a corresponding change in ACQ has been effected to the SECL FSA by way of executing side agreements/addendums, in terms of Article 4.1.1 of the SECL FSA. The same is substantiated by the fact that out of the 12 (twelve) side agreements/addendums to SECL FSA, 7 (seven) side agreements/addendums have been executed for making corresponding changes in ACQ due to change in the percentage of power purchase agreements, the details of such side agreements/addendums to SECL FSA has already been captured.

k) Accordingly, since the Petitioner had no other option but to procure non-linkage coal

from various sources for meeting its power supply obligation to HPPC under APP wherein the power supply commenced from 19.07.2022, hence, MB Power ought to be compensated/restituted in terms of Article 21.1 of APP, from 19.07.2022 to the same economic position as if the Change in Law event had not occurred, for the increase in the cost of procurement of non-linkage coal from various sources and/or Shakti B (iii) auction vis-à-vis the cost of procurement of linkage coal under the SECL FSA.

l) In addition to the same, as mentioned hereinabove, the Petitioner having participated in the fourth round of auction of linkage coal as per Para B(iii) of SHAKTI Policy, has duly executed fuel supply agreements with SECL, CCL, NCL and MCL and the commencement of supply of coal under such fuel supply agreements has commenced from 01.04.2023. Accordingly, MB Power also ought to be compensated for the increase in the cost of procurement of coal pursuant to such fuel supply agreements executed in furtherance of Para B(iii) of SHAKTI Policy vis-à-vis the cost of procurement of linkage coal under the SECL FSA.

m) The Petitioner has preferred a petition before this Commission, Petition No. 356/MP/2022, wherein in light of various MoP directives/orders qua blending of domestic coal with imported coal to overcome the situation of shortage of domestic coal in the country, the Petitioner has sought compensation towards the additional costs incurred on account of mandatory blending of domestic coal with imported coal and the order on the same has been reserved by this Commission on 29.05.2023. The Petitioner has submitted **that any relief granted to MB Power under Petition No. 356/MP/2022 shall be duly excluded/adjusted against the relief sought in the present petition.**

n) The Petitioner is entitled to Change in Law compensation with effect from 19.07.2022 so as to restore it to the same economic position because had the Change in Law event not occurred, the Petitioner would have been entitled to the supply of linkage coal as assured under the SECL FSA. It is noteworthy that the claim of compensation is not on the basis of a rise in the price of coal or on the ground of force majeure but on the basis of a Change in Law claim, which is a settled position of law as held by the Hon'ble Supreme Court in a catena of judgments.

o) As a result of the SLC(LT) decision, as recorded in its minutes of the meeting dated 22.11.2022, which has in effect amended/modified Para A(v) of SHAKTI Policy, qualifies as a Change in Law event and accordingly, MB Power ought to be compensated in terms of Article 21 of the APP to the same financial position as if such Change in Law event had not occurred. In this regard, it is noteworthy that the principle of 'business efficacy' and 'officious bystander test' has been discussed in detail by the Hon'ble Supreme Court in **Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Ors. (2018) 11 SCC 508.** Business efficacy means that the courts are required to make the contract efficacious and practicable

and the Officious bystander test is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even though that term was not written into the contract expressly.

p) Regulatory certainty is essential for a project developer (i.e., MB Power in the present case) for sanction/approval of funds by investors/lenders for timely execution of the Project. In this regard, MB Power is placing reliance on the Judgment dated 28.08.2020 passed by the Hon'ble Tribunal in Appeal Nos. 21 of 2019 and 73 of 2019 titled **Talwandi Sabo Power Limited v. Punjab State Electricity Regulatory Commission & Anr**., wherein the Hon'ble Tribunal has categorically held that regulatory certainty is necessary for securing funds from the lenders/ investors and in absence of the same, the additional funds will not be sanctioned by lenders.

q) Further, it is pertinent to mention here that the Hon'ble Tribunal, in its Judgment dated 12.10.2021 in Appeal No. 251 of 2021 titled **Green Infra Renewable Energy Limited v. RERC & Ors.,** has held that deferment of legitimate claims with respect to change in law compensation for a later date creates a whole lot of confusion which is of utmost concern to the project developers resulting in regulatory uncertainty and consequent difficulties. It further held that if the event referred to actually constitutes a change in law within the four corners of its definition under the power purchase agreements, there is no reason why it cannot be duly recognized as a change in law at the stage of tariff adoption. Notably, the Hon'ble Tribunal acknowledged that the events that occurred after the date of bid submission will qualify as Change in Law events in the Green Infra Case.

r) The purpose of the APP is to develop the project and supply electricity to the procurer at the tariff agreed upon in the APP read with the terms and conditions of the APP. However, if the cost of generation of electricity increases for reasons beyond the control of the developer, such as an increase in the cost of fuel due to non-execution of side agreement for enhancement of ACQ corresponding to the power to be supplied under APP, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of bid submission. Accordingly, MB Power cannot be subjected to risks unknown/ untaken, and hence, it is only essential that while interpreting the APP, a common sense and business efficacy test is applied. This broad principle is captured in the judgment of the Hon'ble Supreme Court passed in **Union of India v. D N Revri & Co. and Ors., (1976) 4 SCC 147** which explains two concepts of the interpretation of the contract, i.e., business efficacy and adoption of common-sense approach. The Hon'ble Supreme Court observed that while interpreting the provisions of the contract, it is important to apply law and economics as the same are intertwined and are integral parts to apply in case of any contractual arrangement.

s) An entity cannot be made to absorb risk which is beyond its control. This is the basic

economic principle of project development. Any additional cost by way of an increase in the cost of fuel and other unforeseen events which are beyond the control of the developer shall not be borne by the developer. Hence, MB Power is entitled to recover such additional cost/compensated for such additional cost.

t) Hon'ble Supreme Court in **Shivashakti Sugars Ltd. v. Shree Renuka Sugar Ltd. cited as, (2017) 7 SCC 729,** sets out the need for business efficacy and the importance of applying both law and economics while examining various contractual facets. Applying principles of the said decision to the present case, it is pertinent to point out that the financial impact on the Petitioner will be huge if the compensation towards the additional cost incurred on account of the Change in Law event is denied.

CARRYING COST

45. In support of its contention of carrying cost, the Petitioner has submitted as under:

a) Carrying cost is a legitimate expense, and t the principles governing "Carrying Cost" are well settled.

b) The Petitioner has put its reliance on the following earlier judicial pronouncements:

i. Judgement dated 15.02.2011 in Appeal No. 173 of 2009 titled **Tata Power Co. v. MERC**

ii. Judgment dated 20.12.2012 in **SLS Power Limited v. APERC, 2012 SCC OnLine APTEL 209**

iii. Judgment dated 28.11.2013 in Appeal Nos. 190 of 2011 and 162-63 of 2012 titled as **Torrent Power Limited v. GERC:** "83.

iv. Judgment dated 4.10.2019 in Appeal No. 246-47/2017 titled as **Torrent Power Limited vs GERC** & Ors.:

v. Judgment dated 14.09.2019 passed in Appeal Nos. 202 & 305 of 2018 titled as **Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors**

c) Since the burden of carrying cost is a consequence directly flowing from the Change in Law event, the relief in such regard cannot be complete unless this part of the additional expenditure is also allowed as pass-through. Once the event has been acknowledged and declared as a Change in Law event, the consequential relief of carrying cost would also flow from the main relief of compensation, the purpose of an award of carrying cost being to compensate "for time value of the money".

d) The present case pertains to compensation for Change in Law claims, which is based on restitutionary principle envisaged in the Procurer's PPA. Such a restitutionary

principle has been upheld by the Hon'ble Supreme Court in the case of **Energy Watchdog v. CERC [(2017) 14 SCC 80]** (Para 57), **Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors [(2019) 5 SCC 325**] (Para 10) and **Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power (Mundra) Limited [(2023) 2 SCC 624]** (Para 20, 23 & 24)

46. During the hearing dated 21.8.2023, the Commission admitted the Petition and directed the parties to complete the Pleadings. Haryana Power Purchase Centre vide affidavit dated 12.9.2023 has filed its reply. Subsequently, during the hearing dated 15.9.2023, the Commission reserved the order and directed the parties to file their respective written submissions.

Reply of HPPC

47. Haryana Power Purchase Centre vide affidavit dated 12.9.2023 and written submissions dated 9.10.2023 has mainly submitted as under:

a) The SLC Meeting dated 28.10.2022 is not a Change in Law event and is a mere reiteration of the view taken by the SLC in its earlier Meeting dated 03.02.2022, and despite the deliberations in respect of the same in the subsequent SLC Meetings, there has been no change in this view or its interpretation. The said Meeting dated 03.02.2022 was prior to the Bid Deadline date of 30.03.2022. In any event, the procurement of coal and any cost incurred (incremental or otherwise) fall within the obligations of the Petitioner.

b) The deliberations in the SLC Meeting dated 28.10.2022 only expand on the reasoning for the decision already taken in the SLC Meeting dated 03.02.2022, and there is no change in the timelines nor the interpretation of the decision made in the earlier Meeting dated 03.02.2022.

c) The Petitioner is under obligation to ensure access to an assured supply of Fuel in terms of Clause 2.2.1 (d) of the Request for Qualifications (**'RfQ'**) as well as Articles 5.1.5 (k) and 7.1 (n) of the APP dated 18.05.2022.

d) The SLC Meeting clarified that the terms of the FSA are subservient to the Government Policies. Therefore, even if the FSA dated 26.03.2013 included an ACQ Clause which provided for execution of side agreements/addendums in case of change in ACQ percentage, with the notification of the SHAKTI Policy 2017 and the amendment thereto, the outer limit for submission of Medium-term PPAs for getting a fuel linkage under Para A(v) of the SHAKTI Policy would remain 31.03.2022. Since the APP between MB Power and HPPC was executed on 18.05.2022, the Petitioner was aware that it would be ineligible for FSA linkage under Para A (v) of the SHAKTI Policy.

e) The Petitioner is only entitled to the relief as contemplated under Article 12.4 of the APP to the extent of shortage of fuel, if applicable. Article 12.4 of the APP stipulates that no tariff shall be payable to the Petitioner for the shortfall in availability on account of shortage of fuel. Considering that the Petitioner had, in fact, commenced supply and there has been no shortfall in the production of electricity, no relief is admissible to the Petitioner.

f) The claim raised by MB Power is delayed and not in terms of the Change in Rules 2021 as notified by the Ministry of Power. In any event and without prejudice to the fact that the SLC meeting dated 28.10.2022 is not a Change in Law event, the Petitioner is not entitled to any Carrying Cost and/or Late Payment Surcharge.

g) In any event, any implications on the cost of procurement of non-linkage coal on account of delay in amendment in the FSA by SECL is a matter of consideration between the Petitioner and SECL, Accordingly, the remedy, if any, for the delay in amendment of the FSA, lies vis a vis SECL and the Haryana Utilities cannot be saddled with the implications of the same;

h) Without prejudice to the above, the supply by the Petitioner w.e.f. 19.07.2022, from sources other than the linkage coal, would constitute an alternate supply within the meaning of Article 10.3 of the APP. The Haryana Utilities are not required to pay any additional cost for the power supplied from alternate sources.

i) HPPC notified the clarifications in response to the queries received from the Bidders wherein it was specified that the implications of shortfall of fuel would be borne by the Bidder. In view of the pre-bid response and the clarification provided by the Petitioner, on 18.05.2022, HPPC executed an APP with the Petitioner, which provides that the obligation of fuel supply shall be with the Petitioner.

j) Further, in terms of the APP dated 18.05.2022, the Petitioner was required to maintain the supply of coal and/or ensure that the side agreements/addendums to the FSA were executed timely. By no stretch can the shortfall in fuel be attributed to Haryana Utilities, nor can Haryana Utilities (and consequently its consumers) be saddled with the cost for the same.

k) The Petitioner is not entitled to any carrying cost as the SLC Meeting dated 28.10.2022 does not amount to a Change in Law in terms of the APP dated 18.05.2022. In any event, the Petitioner has issued the Change in Law Notice belatedly, i.e., on 28.02.2023, when the purported Change in Law event occurred on 28.10.2022 and the Minutes of the same were released on 22.11.2022, and the supply of power commenced from 19.07.2022.

l) It is a settled principle of law that a party cannot claim benefits of its own wrong, and the Petitioner cannot claim Carrying Cost where there has been delay and laches on the part of the Petitioner to raise the issue of Change in Law.

m) In terms of the CIL Rules, the generator, i.e., the Petitioner, is required to give 3 weeks prior notice to the other party, i.e., the Haryana Utilities, of the proposed impact in the tariff or charges (positive or negative). The period of 3 weeks is to be computed backwards from the date on which there will be an impact of Change in Law. The impact of Change in Law is different from the law coming into force. The impact of Change in Law is triggered from the date from which the Petitioner becomes entitled to adjustment and recovery of the impact in Change in Law.

n) The Petitioner is required to provide the computation of the impact in tariff or charges to be adjusted and recovered within 30 days of the occurrence of the Change in Law or on the expiry of the 3 weeks' notice period mentioned above, whichever is later. If the generator delays in giving the above notice and the computation of tariff impact (as in the present case), it shall not be entitled to recover the impact for the period of the delay.

o) In terms of Rule 3 (7), the generating company is also required to place the relevant document and details of the calculation to this Commission within 30 days of the coming into the effect of the recovery of the impact. In view of the above, the Notice issued by the Petitioner on 28.02.2023 cannot be considered as a Notice in terms of the CIL Rules. Further, in the present case, no such information or documents for establishing the impact and computation have been furnished by the Petitioner either to HPPC or this Commission. There are unexplained and unjustified latches in issuing the notice, and the present Petition has only been filed as an afterthought.

Analysis and Decision

48. After going through the submission of the parties and relevant documents placed on record, the following issue arises for our consideration:

1) **Whether the decision taken by SLC(LT) in its meeting dated 28.10.2022 would constitute a Change in Law event in terms of the APP and CIL Rules?**

2) **Whether the Petitioner is entitled to compensation for the shortfall of coal and/or an increase in the price of coal on account of the Change in Law?**

3) **Whether Petitioner has served the notice for CIL in terms of CIL rules?**

4) **What mechanism needs to be adopted for processing and reimbursement of admitted claims under a Change in Law?**

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

Issue No. 1: Whether the decision taken by SLC(LT) in its meeting dated 28.10.2022 would constitute a Change in Law event in terms of the APP and CIL Rules?

49. The Petitioner has primarily submitted that under the old LoA-FSA regime, since the FSAs with various other LoA holders had not been executed, the SHAKTI Policy provided such LoA holders with an extension till 31.03.2022 to commission their power plants. Taking an analogy from this, the SLC (LT), in its meeting dated 03.02.2022, the minutes of which were published on 21.03.2022 in Agenda Item No.2, considered the request of various power generators which held LoAs under SHAKTI Policy for extension of timeline for the satisfaction of Clause 2.8.2.3 of their FSAs (a condition absent from the Petitioner's FSA) i.e. to enter into a power purchase agreement as a condition precedent for their FSAs to come into effect. The SLC (LT), by these minutes, gave a lifeline to these LoA/ FSA holders and consequently extended the timeline to sign and furnish PPAs by 31.03.2023. *Ex-facie,* these minutes did not seek to cover FSAs like that of the Petitioner, which (i) did not contain Clause 2.8.2.3 and (ii) had already been acted upon and resulted in the execution of numerous addendums. Accordingly, Paras A(i) of the SHAKTI Policy was not applicable to the Petitioner, and only Paras A(iii), (iv) and (v) of the SHAKTI Policy were applicable, which clauses of the SHAKTI Policy reaffirmed the entitlement of valid FSAs like the Petitioner's of coal supplies at 75% of ACQ against FSA "*even beyond 31.03.2017*" and further to take supply of coal even in respect of medium term PPAs to be concluded in the future. The relevant extracts of the SHAKTI Policy read as under:

> *"iii. The capacities totalling about 68,000 MW as per the decision of CCEA dated 21.06.2013 would continue to get coal at 75% of ACQ even beyond 31.03.2017. The coal supply to these capacities may be increased in future based on coal availability.*
>
> *…*
>
> *v. Actual coal supply to power plants shall be to the extent of long-term PPAs with DISCOM/State Designated Agencies (SDAs) and medium term PPAs to be concluded in future against bids to be invited by DISCOMs as per bidding guidelines issued by Ministry of Power."*

Accordingly, post-signing of the FSA, the same was duly amended on 01.04.2019 to incorporate the applicable provisions of the SHAKTI Policy with respect to the inclusion of the supply of coal for medium-term PPAs in the SECL FSA.

50. The Petitioner has submitted that in response to its RFQ, HPPC vide letter dated 05.05.2022 issued a Letter of Award ("**HPPC LoA**") to the Petitioner for the supply of 150 MW power to Haryana DISCOMs from the Project. Subsequently, the Petitioner and Haryana DISCOMs executed an APP dated 18.5.2022 for the supply of power for an aggregate capacity of 150 MW from the Project for a period of 3 (three) years.

51. The Petitioner is aggrieved mainly on the ground that SECL did not execute a side agreement/addendum to the SECL FSA in terms of Clause 4.1.1 of the SECL FSA to enhance the ACQ in order to enable the Petitioner to supply power to the Haryana Discoms under the APP on the premise that in terms of the SHAKTI Policy and SLC (LT) minutes of meeting dated 21.3.2022, the Petitioner ought to have submitted such PPA before 31.3.2022. We also note that the Petitioner has contended that Clause 2.8.2.3 of the FSA, as indicated in the SLC (LT) minutes of the meeting dated 21.3.2022, applies only to those purchasers who have signed an FSA without entering into a long-term PPA. However, the Petitioner had already entered into a long-term PPA with MPPMCL before signing the FSA with SECL, and thus, it does not apply to the Petitioner. In any case, such a clause does not exist in the Petitioner's FSA with SECL or any of its subsequent addendums.

52. The Petitioner has further contented that SLC(LT) vide its minutes of meeting dated 28.10.2022, issued on 22.11.2022, has, for the first time since the SHAKTI Policy, the SLC (LT) meeting of 03.02.2022, and the execution of the APP, amended/modified/altered/substituted Para A (iii), (iv) and (v) of SHAKTI Policy, which permitted coal supplies to power plants, under the old regime of LoA-FSA (such as that of Petitioner), to the extent of long term power purchase agreements and medium-term power purchase agreements to be concluded in future. However, by denying enhancement of ACQ corresponding to the quantum under the APP, on the ground that the same had to be submitted before the deadline of 31.03.2022, the assurance provided to the Petitioner under Para A(v) of SHAKTI Policy, has been amended/modified/altered/substituted, resulting in an indisputable Change in Law event.

53. On the Contrary, the Haryana Discoms have submitted that for an event to qualify as a Change in Law in terms of the APP dated 18.05.2022, the event has to occur *after the Bid Date*,

i.e., 30.03.2022. As per the Haryana Discoms, a bare perusal of the SLC Meeting dated 28.10.2022 would establish that there has been no change in interpretation as there is no shift or a change from the position existing prior to the cut-off date. On 03.02.2022, the SLC deliberated on the extension of timelines for entering into PPA as per the Condition Precedent requirement under the FSA. Subsequently, on 28.10.2022, the SLC held discussions over the "*acceptance of Long/ Medium term PPA beyond 31.03.2022 under FSA*". In the said meeting, the Petitioner presented its case including in respect of Clause 2.8.2.3- Conditions Precedent under the FSA, not being present in the FSA dated 26.03.2013 executed between the Petitioner and SECL. Further, the Petitioner contended that in so far as the FSA dated 26.03.2013 has an ACQ Clause, any change in the ACQ will be undertaken through a side agreement/addendum, and therefore, there is no deadline for furnishing a PPA under the FSA dated 26.03.2013. After hearing the Petitioner, the SLC reiterated its earlier view and held that no extension would be granted in respect of PPAs that were entered into post 31.03.2022. The deliberations in the SLC Meeting dated 28.10.2022 only expand on the reasoning for the decision already taken in the SLC Meeting dated 03.02.2022, and there is no change in the timelines, nor the interpretation of the decision made in the earlier Meeting dated 03.02.2022. The SLC Meeting clarified that the terms of the FSA are subservient to the Government Policies. Therefore, even if the FSA dated 26.03.2013 included an ACQ Clause which provided for execution of side agreements/addendums in case of change in ACQ percentage, with the notification of the SHAKTI Policy 2017 and the amendment thereto, the outer limit for submission of Medium-term PPAs for getting a fuel linkage under Para A(v) of the SHAKTI Policy would remain 31.03.2022. Since the APP between the Petitioner and HPPC was executed on 18.05.2022, the Petitioner was aware that it would be ineligible to FSA linkage under Para A (v) of the SHAKTI Policy. Further, as indicated in the SLC Meeting dated 28.10.2022, the Petitioner is anyway eligible to procure coal under the SHAKTI B (iii), B (iv) and B (v) routes.

54. We have considered the submission of the parties. In order to understand coal allocation to the Petitioner, it is necessary to go through the Fuel Supply Agreement executed between the Petitioner and SECL. We observe that SECL vide letter dated 06.06.2009 issued a letter of assurance ("LoA") for the supply of coal to the Petitioner. The preamble of said LoA reads as

under:

> ***Preamble***
>
> *In consideration of the request Anuppur TPP (Unit-1&2) of M/s MB Power (Mad Pradesh) Limited, 43B, Okhla Industrial Estate, Now Delhi-110020 (hereinafter referred to as the "Assured") for issuance of Letter of Assurance (hereinafter referred to as "LOA") requiring 41,62,000 tonnes per annum (tpa) of F Grade coal for its 1000 MW Power Plant located at Anuppur TPP (Unit-1&2) of M/s MB Power (Madhya Pradesh) Limited, Mouhari. Auppur Distt, Madhya Pradesh (hereinafter referred to as "the Plant"), from about (*) as requested by the Assured, SECL (hereinafter referred to as the "Assurer") hereby provisionally assures that it would endeavour to supply coal to the Assured subject to the following terms and conditions.*

55. A plain reading of above referred Preamble of LoA infers that the SECL had assured the supply of coal to the Petitioner's power plant subject to certain terms and conditions. Further, Petitioner and SECL also entered into a Fuel Supply Agreement dated 26.3.2013 wherein Clause 2.7 reads as under:

> *2.7 On completion of twenty (20) years from the Effective Date, or earlier in case of life of the Plant is less than twenty years this Agreement shall expire unless both the Parties mutually agree in writing to extend the Agreement, on the same or such terms as may be agreed upon by the Parties.*

As per the above clause, the term of the Agreement is twenty years from the Effective Date, i.e. occurrence date of last of the events specified under Clause 2.8.3.2 and 2.8.3.3, which reads as under:

> *2.8.3.2 The CPs set out in Clause 2.8.2 above shall be fulfilled to the satisfaction of the Seller or waived jointly by both the Parties in writing, as the case may be. Within fifteen (15) days of completion of achieving the CPs set out in Clause 2.8.2 the Purchaser shall issue a written notice of satisfaction and notify to Seller. The Seller within fifteen (15) days from receipt of such notification by Purchaser shall issue a letter accepting the same.*
>
> *2.8.3.3 Notwithstanding the provisions of clause 2.8.3.1 above, at the request of the Purchaser, CIL may at its sole discretion extend the Condition Precedent Period.*

56. The Conditions Precedents for the Petitioner were specified under Clause 2.8.2.1 and 2.8.2.2 of the Fuel Supply Agreement, as given below:

> *2.8.2* ***Purchaser's Condition Precedent***
>
> *2.8.2.1 the Purchaser shall have obtained from the lawful authority all necessary clearances, authorizations, approvals and permissions required for, construction,*

commissioning, operation and maintenance of the Plant.

2.8.2.2 The Purchaser shall have completed the construction, as per the implementation schedule specified in detailed project report/techno-economic feasibility report submitted during the validity of Letter of Assurance (LoA), and the completion of such construction along with readiness of the power plant for lighting up has been certified by an Independent Engineer within the Condition Precedent Period.

A plain reading of the above provisions indicates that in order to get the supply of domestic coal, the Petitioner was required to satisfy only two condition precedents which were (i) obtaining necessary clearances, authorizations, approvals and permissions required for construction, commissioning,, operation and maintenance of the Plant; and (ii) completion of construction of the power plant along with the readiness of the power plant for lighting up, by an Independent Engineer within the condition precedent period. These two condition precedents for the Petitioner were fulfilled and acknowledged by SECL on 13.07.2015 and 27.04.2016 for Unit 1 and Unit 2, respectively. There appears to be no dispute between the parties regarding the satisfaction of all the condition precedents under the FSA. We note that there exists no additional condition precedent and that Clause 2.8.2.3 is not present in the Petitioner's FSA.

57. Clause 4 of the FSA Agreement, read with Schedule 1, deals with the Annual Contracted Quantity assured to the Petitioner, which reads as under:

4.0 QUANTITY:

4.1 Annual Contracted Quantity (ACQ):

4.1.1 The Annual Contracted Quantity of Coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser, shall be 14,98,176 tonnes per Year from the Seller's mines and/or from import, as per Schedule I. For part of the Year, the ACQ shall be prorated accordingly. The ACQ shall be in the proportion of the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed back to back long term PPA(s) with DISCOMs. Whenever, there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a year and shall be made effective only from the beginning of the next quarter. However, in no case ACQ should exceed the LOA quantity as mentioned in Schedule I.

4.1.2 The Purchaser shall in advance under the Schedule I provide form annual coal requirement for the initial years required for phasing of the Power Plant after the completion of Build-Up Period, quantities subject to maximum of Annual Contract quantity mentioned under Clause 4.1.1. Such quantities shall be considered binding and deemed to be Annual Contract Quantities for the respective years and be used for provisions under this Agreement.

4.1.3. It is expressly clarified that the Annual Contracted Quantity (ACQ) shall be valid for

each Power Station separately, as mentioned in Schedule I, and all the provisions of this Agreement related to ACQ shall be applicable mutatis mutandis.

Schedule I of the FSA:

Annual Contracted Quantity
(Refer Clause 3.1)

Annual Contracted Quantity

Sl. No	Name & location of the Power Plant owned by Purchaser	Unit wise Installed Capacity of the Power Station (in MW)	Balance life** of plant/unit in Years (w.e.f. date of Installation)	Name of Rake Fit Station	Original LOA Quantity (Tonnes)	Annual Contracted Quantity (Tonnes) (##)	Mode of Transport	Source Coal field of the Seller*
1	MB Power (Madhya Pradesh) Limited, IPP 1200 (2x600) MW, Units-1 & 2, Anuppur Thermal Power Project, Mouhari, Anuppur Distt. (Madhya Pradesh)	600	25 Years	Jaithari Station (Code JTI)	49,93,920	14,98,176	Rail	Any Source/ Coalfield of SECL
		600	25 Years					

* Details of Imported Coal shall be furnished by the Seller to the Purchaser from time to time as and when such Coal is offered.

** Balance life of the Plant/Unit shall be as determined by appropriate authority of Govt. of India/as declared by way of "Self Declaration" by the authorized signatory of the Purchaser as per Prescribed Format of CIL

 # Buyer to provide annual coal requirements for the initial years also

***LOA Quantity means the quantity mentioned in the Letter of Assurance(LOA) issued by the Seller to the Purchaser.*

Based on Self Declaration/PPAs submitted @ 30% of total capacity.

A bare reading of Clause 4.1.1 and Schedule I of the FSA infers that the Annual Contracted Capacity (ACQ) shall be in proportion to the percentage of generation covered under long-term PPAs executed by the Petitioner with the Discoms either directly or through PTC on a back-to-back basis. In addition, whenever there is any change in the percentage of PPAs, a corresponding change in ACQ shall be effected through a side agreement, and such changes shall be allowed to be made only once in a year, effective from the beginning of the next quarter. It is also evident that the Petitioner has also entered into as many as 12 side Agreements.

58. We noted that the Ministry of Coal had notified Shakti Policy in 2017. The relevant extracts of the Shakti Policy are as under:

"Subject: Signing of Fuel Supply Agreement (FSA) with Letter of Assurance (LoA) holders of Thermal Power Plants- Fading Away of the existing LoA-FSA Regime and Introduction of a New More Transparent Coal Allocation Policy for Power Sector, 2017- SHAKTI (Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India).

Sir,

The proposal of Coal linkages Allocation Policy for Power Sector has been under examination in this Ministry. With approval! of Cabinet Committee on Economic Affairs (CCEA), the following policy guidelines for allocation of Coal linkages to Power Sector have been decided.

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

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

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

iii. The capacities totaling about 68,000 MW as per the decision of CCEA dated 21.06.2013 would continue to get coal at 75% of ACQ even beyond 31.03.2017. The coal supply to these capacities may be increased in future based on coal availability.

iv. About 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.03.2015. Coal supply to these capacities may be allowed at 75% of ACQ against FSA provided these plants are commissioned within 31.03.2022. The coal supply to these capacities may be increased in future based on coal availability.

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

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

59. We note that the Shakti Policy, 2017 contemplated phasing out of the LoA-FSA regime. But at the time when the Shakti Policy was introduced, the Petitioner had already executed FSA with SECL, and the coal supply was being done as per the provisions of FSA. We also note that under Clause A(i), the SHAKTI Policy contemplates the execution of further FSAs with then existing LoA holders subject to those LoA holders commissioning their power plants by 31.03.2022. The SHAKTI Policy, therefore, does not seem to extinguish the existing FSAs but creates one last opportunity for execution of further LoAs subject to the satisfaction of the above condition qua commissioning.

60. In Clause A(iii), the SHAKTI Policy provides that capacity totalling 68000 MW would continue to get coal up to 75% of the ACQ even beyond 31.03.2017, and this ACQ of 75% may be increased based on the coal availability. Accepting the Petitioner's case that its power plant of 1200 MW is covered under the said 68000 MW capacity, which constitutes a reaffirmation in favour of the Petitioner that it would continue to get coal under its FSA even beyond 31.03.2022., we are of the view that the Shakti Policy did not seek to override the Petitioner's FSA which continued to remain in

effect.

61. We also find that even after the SHAKTI Policy, on 01.04.2019, Addendum No. 9 was signed between the parties, and ACQ was enhanced on account of change in percentage of the power purchase agreement, commensurate with new medium-term PPA dated 25.02.2019 signed by the Petitioner with PTC India Limited ("PTC") (back to back PPA with Haryana DISCOMs/HPPC). It is pertinent to note that this PPA, along with the Addendum, were executed/implemented in terms of the SHAKTI Policy, which, for the first time enables the inclusion of medium-term PPAs.

62. We now turn to see the effect of SLC(LT)'s meeting of 03.02.2022, the minutes of which were published on 21.03.2022. In the said meeting, SLC(LT) considered the request of various power generators, in light of SHAKTI Policy's mandate, for an extension of the timeline for entering into a power purchase agreement as per condition precedent requirement under their fuel supply agreements. The relevant extracts of above said Minutes of Meeting are as under:

> *"Agenda Item No. 2 - Extension of timeline for entering into PPA as per Condition Precedent requirement under FSA.*
>
> *The Condition Precedents (CPs) as per clause 2.8.2 of Fuel Supply Agreement (FSA) are as below:*
>
> *2.8.2.1 The Purchaser shall have obtained from the lawful authority all necessary clearances, authorizations, approvals and permissions required for construction, commissioning, operation and maintenance of the Plant.*
>
> *2.8.2.2 The purchaser shall have completed the construction and the completion of such construction along with readiness of the power plant for lighting up has been certified by an Independent Engineer within the Condition Precedent Period.*
>
> ***2.8.2.3 [Applicable to Purchaser who has signed FSA without entering into long term PPA] The Purchaser shall have to furnish the long term Power Purchase Agreements (PPA) either directly with Distribution Companies (DISCOMs) or through Power Trading Company (ies) (PTC) who has/have signed back to back PPA(s) (long term) with DISCOMs within the Condition Precedent (CP) period as per clause 2.8.3.1.***
>
> *Clause 2.8.3.1 of the FSA states "The Conditions Precedents shall be fulfilled achieved within a period of twenty four (24) months from the Signature Date or such further period (up to a maximum of 180 days) as may be extended on account of Force Majeure under Clause 17 of this Agreement ("Condition Precedent Period").*
>
> *Thus, as per the CP clause 2.8.2.3 of the FSA, the purchaser has to furnish PPA, entered directly with the Distribution Companies (DISCOMs) or through power trading companies who have back-to-back PPAs with DISCOMs within 24 months from the date of signing of FSA.*

Based on the recommendation of Ministry of Power (Mop), SLC (LT) in its meeting held on 29.06.2017 had recommended that the CP clause 2.8.2.3 of the FSA may be extended upto31.03.2020 for all TPPs having FSAs. The recommendation of MoP was on the fact that sufficient PPAs were not available in the market. Again, based on the recommendation of Mop I CEA, SLC (LT) in its meeting held on 28.05.2020 recommended for extension of timelines for entering into PPA as per CP clause under FSA till 31.12.2021. The premise of the decision was that SHAKTI Policy prescribes a timeline of 31.03.2022 for commissioning of the power plants under Para A (i), A (iv) & A (v) and Mop had recommended the date of 31.12.2021 for entering into PPA which is three months prior to the commissioning timeline.

Representations for further extension of timelines for signing of PPA as per CP clause 2.8.2.3 have been received from Association of Power Producers, FICCI as well as a number of IPPs. MoP vide O.M dated 22.12.2021 also requested to extend the timeline for signing of PPA by the power plants getting commissioned by 31.03.2022 by further 2 years to allow the power plants to have sufficient time to execute PPA against the existing LoAs / FSAs. MoP also stated that though the SHAKTI Policy provides for the outer time limit for commissioning of all the existing LoA holders till 31.03.2022, but, there is no clarity regarding the timelines within which the PPAs are required to be signed by already commissioned power plants. The request of Ministry of Power was taken up as Table Agenda Item No. I in the meeting of the SLC (LT) held on 22.12.2021.It was discussed that the matter needs to be examined by Coal India Limited and comments / views of the coal companies may also be required. Hence, in view of the deliberations, the matter was not considered by the SLC (LT) in its meeting held on 22.12.2021. Competent Authority in the Ministry of Coal has now decided that the matter be considered by the SLC (LT).

SLC (LT) to take a view in the matter.

Record of Discussions:

The Committee was apprised that MoP vide O.M dated 22.t2.2021 had requested to extend the timeline for signing of PPA by the power plants getting commissioned by 31.03.2022 by further 2 years to allow the power plants to have sufficient time to execute PPA against the existing LoAs / FSAs. MoP had stated that though the SHAKTI Policy provides for the outer time limit for commissioning of all the existing LoA holders till 31.03.2022, but, there is no clarity regarding the timelines within which the PPAs are required to be signed by already commissioned power plants. The request of Ministry of Power was taken up in the meeting of the SLC (LT) held on 22.12.2021 and it was decided that the matter needs to be examined by Coal India Limited and comments / views of the coal companies may also be required. The Committee was also apprised that Ministry of Coal has also received representations from Associations of Power Producers representations dated L7.t2.202L & 02.02.20221, FICCI [representation dated 20.12.202L] as well as a number of lPPs [Ideal Energy Projects Ltd. - representation dated O8.t2.2O21; CESC - representation dated 27.12.2021; D B Power Limited - representation dated 2t.t2.2021; Dhariwal infrastructure Limited - representations dated L6.L2.202t & 20.L2.2021;I etc for further extension of timelines for signing of PPA as per CP clause 2.8.2.3.

It was discussed that the requirement of a long term PPA came from the decision of the Cabinet Committee on Economic Affairs (CCEA) in 2013 that actual coal supplies would be available when the required long term PPAs are tied up. Thus, Long Term PPA had to be submitted for coal supplies. Coal companies provided a time period of 2 years for furnishing a PPA from the date of signing of Fuel Supply Agreement (FSA). Based on the

recommendation of MoP / CEA, SLC (LT) in its meeting held on 28.05.2020 recommended for extension of timelines for entering into PPA as per CP clause under FSA till 31.12.2021.

Representative from MoP requested to extend the timeline for signing of PPA by the power plants by further 2 years to allow the power plants to have sufficient time to execute PPA against the existing LoAs / FSAs. MoP informed that Power Plants of around 5820 MW capacity are having FSAs but no PPAs. Hence, these Power Plants are likely to be benefitted if the timeline for signing of PPA is extended

Representative of CEA stated that there were genuine reasons because of which the Power Plants could not procure PPAs and therefore, the request for extension of timelines for signing of PPAs may be considered by the SLC (LT).

Xxxxxxxx

Coal India Limited (CIL) stated that the guidelines for commissioning of the Power Plants under the SHAKTI Policy needs to be adhered to.

It was discussed that SHAKTI Policy, 2017 already prescribes an outer time limit of 31.03.2022 for commissioning of the plants which have been issued LoA by coal companies. SHAKTI Policy mandates fading away of the old regime of LoA-FSA after 31.03.2022. The Power Plants for which extension for signing of PPA is being sought were granted coal linkages on nomination basis and extension beyond 31.03.2022 for signing of PPAs would tantamount to holding on to the old regime. The need of the present day is to move to a transparent mode of coal allocation. The recommendation in the meeting of the SLC (LT) held on 28.05.2020 was on the premises that SHAKTI Policy prescribes a. timeline of 31 .03.2022 for commissioning of the power plants under Para A (i), A (iv) & A (v) and MoP had recommended the date of 31.12.2021 for entering into PPA which is three months prior to the commissioning tirneline. In the eventuality of non-signing of FSA, there are options available under the SHAKTI policy for such power plants to obtain linkages.

Xxxxxxxxx
It was discussed that SHAKTI Policy, 2017 already prescribes an outer time limit of 31.03.2022 for commissioning of the plants which have been issued LoA by coal companies. SHAKTI Policy mandates fading away of the old regime of LoA-FSA after 31.03.2022. The Power Plants for which extension for signing of PPA is being sought were granted coal linkages on nomination basis and extension beyond 31.03.2022 for signing of PPAs would tantamount to holding on to the old regime. The need of the present day is to move to a transparent mode of coal allocation. The recommendation in the meeting of the SLC (LT) held on 28.05.2020 was on the premises that SHAKTI Policy prescribes a timeline of 31 .03.2022 for commissioning of the power plants under Para A (i), A (iv) & A (v) and MoP had recommended the date of 31.12.2021 for entering into PPA which is three months prior to the commissioning timeline. In the eventuality of non-signing of FSA, there are options available under the SHAKTI policy for such power plants to obtain linkages.

Xxxxxxxxx
***Recommendations:** In view of the deliberations in the meeting, the Committee recommended that the request for extension of Condition Precedent (CP) Clause for 2 years from 31.12.2021 cannot be agreed to. However, in view of provisions of SHAKTI Policy where timelines have been prescribed and also the guideline on fading away of the old regime of the LoA-FSA, SLC (LT) recommended for extension of timeline for obtaining PPA as per the CP clause under FSA till 31.03.2022.*

63. We note that the entire discussion revolves around Clause 2.8.2.3 as several LoA, as well as FSA holders, were facing difficulties in executing PPAs, and the issue of the extension was being considered to enable such LoA and FSA holders, who had a timeline until 31.03.2022 to commission their power plants, to execute PPAs and get the benefit of a linkage under their FSAs. This is evident from the bare reading of Agenda Item No. 2 as quoted above and the final recommendations of the SLC (LT) by which the timeline of satisfaction of condition precedents clause was extended till 31.03.2022.

64. We note that subsequent to the SLC (LT) meeting dated 03.02.2022, the Petitioner approached SECL, vide its various letters and emails and requested to execute the amendment in FSA by enhancing ACQ on account of the PPA dated 04.05.2022 executed with HPPC. However, SECL did not entertain the request made by the Petitioner on the sole ground that PPA was executed after 31.3.2022.

65. We further note that on 19.07.2022, SECL sought clarification from CIL on whether the medium-term power purchase agreements submitted by the Petitioner after 31.03.2022 are to be accepted or not in light of SLC(LT) meeting dated 03.02.2022, wherein SLC(LT) had prescribed the cut-off date of 31.03.2022 for submission of any power purchase agreement for supply of linkage coal. It is clear from the letter that SECL, who is a party to the FSA, has taken a position in which it clearly distinguishes the Petitioner's FSA from other FSAs which have Clause 2.8.2.3. The relevant extract of the SECL's letter dated 19.07.2022 is as below:

> *"In the light of the above decisions of SLC (LT), it seems that the aforesaid decision is applicable for the FSA holders through LOA route who have not been fulfilled their Condition Precedent as per the provisions of the FSA by submitting any valid PPA (amongst one of the condition of Purchasers' CP as per provision of the FSA) within 31.03.2022."*

66. We also noted that the Petitioner, vide its letter dated 20.8.2022, requested CEA to recommend SECL to issue an amendment to FSA, based on which, CEA, vide its letter dated 26.08.2022 recommended SECL to consider the Petitioner's request. The relevant extracts of CEA's letter dated 26.08.2022 is as under:

> *3. Again, SLC (LT) in its meeting held on 28.05.2020 recommended for extension of timelines for entering into PPA as per CP clause under FSA till 31.12.2021. Further, in SLC*

(LT) meeting held on 21.03.2022 it was recommended that timeline for obtaining PPA as per CP clause cannot be extended beyond 31.03.2022.

4. However, it is relevant to mention that CP clause 2.8.2.3 is not present in the FSA signed by the MB Power with SECL. ***Therefore, decision of SLC (LT) with regard to CP Clause 2.8.2.3 is not applicable for the MB Power.***

5. MB Power has signed the Medium Term PPA through competitive bidding process in accordance with bidding guidelines of Ministry of Power. Therefore as per para Alv) of SHAKTI Policy 2017, this PPA qualifies for coal drawl under existing LOA route FSA.

6. In view of the above, ***SECL may consider the request of MB Power for amending the existing FSA for additional coal supply against the above-mentioned medium term PPA of 150 MW (net).***

This issues with the approval of Competent Authority.

It is pertinent to note that CEA, which is a statutory technical body under the aegis of the Ministry of Power, Government of India, observed in its recommendation that condition precedent Clause 2.8.2.3 is not present in the FSA executed between the Petitioner and SECL. The CEA had recommended SECL consider the request of the Petitioner to amend the existing FSA for additional coal supply against the medium-term APP with HPPC.

67. The Ministry of Coal ("MoC") vide its letter dated 27.09.2022 wrote to Coal India Limited ("CIL") wherein it sought details of all the erstwhile FSA cases where the FSAs are effective on submission of the PPAs and also asked CIL ***"to inform as to why the matter which has been referred to vide the letter under reference has not been brought to the notice of the SLC (LT) earlier."*** CIL, vide its letter dated 14.10.2022 itself admits that the cases of the FSAs already effective on partial PPAs and submitting additional PPAs subsequent to 31.03.2022 **have only recently arisen for discussion.** The relevant extract of the letter is as below:

"ix. The cases of FSAs already effective on partial PPAs and submitting additional PPAs subsequent to 31.03.2022 have arisen only recently for consideration. In one such case, CEA vide their letter no. 268/Shakti Misc./TPP&D/CEA/2022/340-43 dated 26.08.2022 (further amendment letter dated 01.09.2022) on the issue of "Amendment in FSA of M/s MB Power and consequent supply of coal against medium term PPA signed with Haryana Discom" vide point no. 4, following has been mentioned.

> *However, it is relevant to mention that CP clause no. 2.8.2.3 is not present in the FSA signed by the M/s MB Power with SECL. Therefore, decision of SLC (LT) with regard to CP clause 2.8.2.3 is not applicable to MB Power."*

68. Further, the Petitioner, vide its letter dated 07.10.2022 approached the MoP requesting its indulgence in recommending SECL to issue an amended FSA. In response, MoP, vide its letter

dated 13.10.2022 recommended to SECL that the Petitioner's request to issue an amended FSA may be considered favourably. The relevant extracts of the MoP letter dated 13.10.2022 is as under:

> *3. With respect to the submissions in Para 6 & 7, wherein MB Power has submitted that it has approached SECL to enhance ACQ under FSA for a new medium term PPA signed with the Distribution Companies of Haryana and SECL has sought clarification from CIL in light of SLC (LT) No.1/22 MoM dated 21st March 2022. CEA examined the matter and concluded that*
>
> *-The timelines of 31st March 2022 as recommended in SLC(LT) MoM dated 21st March 2022 are applicable for those coal purchasers who have signed FSA without any long term PPA & comes under Clause No. 2.8.2.3.*
>
> *4. In the light of our examination, CEA concludes that*
>
> - *Firstly, CEA has already written to SECL vide its letter dated 26th Aug 2022 that the FSA (dated 26th March 2013) signed between MB Power & SECL was with long term PPA of Madhya Pradesh & has no provision of Clause No. 2.8.2.3 in this FSA. Henceforth, the applicability of Clause No.2.8.2.3 and the timelines as per SLC (LT) MoM dated 21st March 2022 on MB Power FA does not hold even in light of Addendum No. 8 dated 1st April 2019 to FSA.*
> - *Secondly, MB Power has signed medium term PPA with Haryana Distribution Utilities through competitive bidding under Sec 63 of the Electricity Act 2003 and henceforth this PPA qualifies for coal drawl under A(v) Clause of SHAKTI Policy 2017.*
> - ***Accordingly, MB Power's request for amendment in FSA with respect to medium term PPA (net 150 MW) with Haryana may be considered favorably**."*

69. On 15.10.2022, HPPC wrote to SECL requesting to amend the SECL and FSA and facilitate early supply of linkage coal to the Petitioner by enhancing the ACQ corresponding to the quantum of power under the APP. The relevant extract of the HPPC's letter is as below:

> *"…*
> *M/s MB Power Ltd has signed PPA on 18.05.2022 with Haryana Power Purchase Centre (HPPC) for supply of 150 MW (Net) power from Annupur Thermal Power Station of MB Power (Madhya Pradesh) Limited for three years to state of Haryana. Further, it is informed that MB Power has already commenced its power supply to state of Haryana since 19.07.2022. In light of the aforesaid PPA, M/s MB Power Ltd. are entitled for supply of additional quantum of Coal from SECL.*
>
> *It is again requested that SECL may amend the FSA and facilitate early supply of linkage coal for enhancement of ACQ to M/s MB Power Ltd. Corresponding to Haryana's PPA so that continuous power may be supplied to Haryana."*

70. Subsequently, MoP vide its Office Memorandum dated 29.10.2022 deliberated upon the issue in detail and recommended that the power plants that do not have condition precedent clause 2.8.2.3 in their FSA are entitled to draw coal as and when they submit the PPA under Section 63 of the Electricity Act until the validity of their FSA with the coal company. The relevant extract of the MoP OM is as below:

> *"…*

15. Therefore, the power plants which either does not have CP 2.8.2.3 in their FSAs or have met this condition are entitled to get coal under A (v) provided they have signed PPA under section 63 of the Electricity Act.

16. In view of the above following may be recommended:

Power plants which have fulfilled the CP clause 2.8.2.3 even by submitting partial PPA and the ***power plants which does not have CP 2.8.2.3 in their FSA are entitled to draw coal as and when they submit the PPA under section 63 of Electricity Act till the validity of their FSA with the coal company."***

71. The SLC (LT) minutes dated 22.11.2022 record that the NITI Aayog, the premier policy think tank of the Government of India, had also suggested the MoP study the matter of accommodating the power plants such as the Petitioner. The relevant extract of the SLC (LT) minutes is given below:

> *"NITI Aayog stated that Clause 2.8.2.3 is not present in the FSA of few power plants and the Condition Precedents as per the FSA were met. It is a possibility that more Medium Term PPAs will come up in future and there has to be a mechanism to accommodate such cases. NITI Aayog suggested that Ministry of Power may study the matter further for accommodating these power plants through some mechanism."*

These minutes further recorded the recommendation of CEA, which is as below:

> *"CEA also recommended that the Medium Term PPAs submitted after 31.O3.2022 may be allowed to draw coal till the expiry of the FSA as the Condition Precedents have already been met. CEA informed the Committee that there are l5 such power plants and the untied capacity of 15 power plants is 2825 MW and the Clause 2.8.2.3 is not present in the FSA of 3 power plants."*

72. SLC (LT) vide its letter dated 22.11.2022, issued its Minutes of Meeting dated 28.10.2022 to consider the requests for coal linkages to Central / State Sector power plants and to review the status of existing coal linkages / LoAs & other related matters. The relevant extract from the minutes is as below:

> *"Additional Agenda Item No. 2: Acceptance of Long / Medium Term PPA beyond 31.03.2022 under FSA:*
>
> *The Condition Precedents (CPs) as per Clause 2.8.2 of Fuel Supply Agreement (FSA) are as below:*
>
> *2.8.2.1The Purchaser shall have obtained from the lawful authority all necessary clearances, authorizations, approvals and permissions required for construction, commissioning, operation and maintenance of the Plant.*
>
> *2.8.2.2 The purchaser shall have completed the construction and the completion of such construction along with readiness of the power plant for lighting up has been certified by an Independent Engineer within the Condition Precedent Period.*
>
> *2.8.2.3 [Applicable to Purchaser who has signed FSA without entering into long term PPA] The Purchaser shall have to furnish the long term Power Purchase Agreements (PPA)*

either directly with Distribution Companies (DISCOMs) or through Power Trading Company (ies) (PTC) who has / have signed back to back PPA(s) (long term) with DISCOMs within the Condition Precedent (CP) period as per clause 2.8.3.1.

Clause 2.8.3.1 of the FSA states "The Conditions Precedents shall be fulfilled / achieved within a period of twenty four (24) months from the Signature Date or such further period (up to a maximum of 180 days) as may be extended on account of Force Majeure under Clause 17 of this Agreement ("Condition Precedent Period"). As per the CP Clause 2.8.2.3 of the FSA, the purchaser has to furnish PPA, entered directly with the Distribution Companies (DISCOMs) or through power trading companies who have back-to-back PPAs with DISCOMs within 24 months from the date of signing of FSA.

The earlier cases of extension of timelines for entering into PPA as per the CP requirement under the FSA have been considered in the meetings of the SLC (LT). Based on the recommendations of the SLC (LT), timelines for submission of PPA have been extended a number of times. The last extension was granted based on the recommendation of the SLC (LT) meeting held on 03.02.2022. SLC (LT) in its meeting held on 03.02.2022 had recommended that "the request for extension of Condition Precedent (CP) Clause for 2 years from 31.12.2021 cannot be agreed to. However, in view of provisions of SHAKTI Policy where timelines have been prescribed and also the guideline on fading away of the old regime of the LoA-FSA, SLC &D recommended for extension of timeline for obtaining PPA as per the CP clause under FSA till 31.03.2022." The recommendation of the SLC (LT) were approved by the Government.

Xxxxx

Project Proponent made a detailed presentation. During presentation, it stated that MB Power (Madhya Pradesh) Limited is a subsidiary of Hindustan Power. It was stated that the FSA was signed by MB Power (Madhya Pradesh) Limited with SECL in20l3 without the condition of furnishing a PPA within a stipulated timeline and at that point of time, it already had a long term PPA under Section 62 of Electricity Act for the part capacity. Project Proponent also informed that Ministry of Power came out with a Pilot Scheme in 2018, in which it had procured a Medium Term PPA with Haryana, which expired in 2022. Project Proponent informed that the power plant was commissioned before 2014 and despite their best efforts, only 67 % capacity could be tied up for PPA out of the entire capacity. Now it has been able to procure another Medium Term PPA with Haryana which was executed in May, 2022. Project Proponent also stated that Clause 2.8.2.3 was not present in the FSA of MB Power (Madhya Pradesh) Limited and the Condition Precedents available in the FSA were fulfilled by it. He stated to have signed an Addendum (dated 01.04.2019) to the FSA wherein it was mentioned in para 2 "satisfaction of PURCHASER's Conditions Precedent will be up to 31.03.2022, however the PURCHASER required to furnish PPA with DISCOMs / PTCs having back to back agreement with DISCOMs within 31.03.2020 as per recommendation of the Standing Linkage Committee (Long Term) in its meeting dated 29th June, 2017or as may be clarified by the Competent Authority time to time". However, he argued that it is not applicable to him. Further, there is an ACQ Clause in the FSA as per which change in ACQ shall be effected through a side agreement whenever there is any change in the percentage of PPA (s). Hence, there is no Sunset Clause for furnishing PPA in the FSA of MB Power (Madhya Pradesh) Limited. Project Proponent informed that presently, 80 o/o of the capacity of the power plant are tied up with PPA. It was also stated by the Project Proponent that SHAKTI Policy, 2017 and the FSA of MB Power (Madhya Pradesh) Limited are coherent and the FSA is in consonance with Para A (v) of SHAKTI Policy, 2017 according to which Medium Term PPAs to be concluded in future are eligible for coal supplies. Project Proponent also stated that the request is to supply coal against Medium Term PPA only which is also allowed under SHAKTI Policy. It was enquired from the Project Proponent whether it had tried to obtain coal linkage under SHAKTI B (iii). Project Proponent informed that it had applied for coal linkage under SHAKTI B (iii) and was declared ineligible by CEA.

Record of Discussions: xxxxxx

Recommendations: ***In view of the deliberations in the meeting and in view of the provisions of the SHAKTI Policy which mandates fading away of the old regime of LoA - FSA, SLC (LT) recommended that irrespective of the Condition Precedent Clause of furnishing a PPA in the FSAs of the power plants signed under erstwhile nomination basis regime, only those eligible PPAs entered up to 31.03.2022 may be accepted for supply of linkage coal by the coal companies.***

73. We noted that on the query by MoC on 27.09.2022' **why the matter under reference was never brought to the notice earlier'** CIL vide its letter dated 14.10.2022 itself admits that the cases of the FSAs already effective on partial PPAs and submitting additional PPAs subsequent to 31.03.2022 **have only recently arisen for discussion.**

74. We further note that despite all the views and recommendations provided by all the authorities and stakeholders, such as CIL/SECL, CEA, Niti Ayog and MoP, the SLC (LT) in its minutes of meeting dated 22.11.2022 (meeting held on 28.10.2022) recommended that irrespective of the Condition Precedent Clause of furnishing a PPA in the FSAs of the power plants signed under the erstwhile nomination basis regime, only those eligible PPAs entered up to 31.03.2022 may be accepted for supply of linkage coal by the coal companies.

75. We note that the SLC (LT) minutes dated 22.11.2022 prescribing the timeline of 31.03.2022 for executing and furnishing the PPAs for all the generators, including the generators like the Petitioner whose FSA did not contain Clause 2.8.2.3 was a fresh mandate, as these minutes nowhere stated that the Petitioner's case was covered under the previous SLC (LT) minutes dated 21.03.2022. We agree with the Petitioner's submissions that, had this been stated in the previous SLC (LT) minutes dated 21.3.2022 itself, the Petitioner would have proceeded with the RFQ issued by HPPC on a different footing. It is clear that the Petitioner, on the date of bidding, was under the assurance that it would get the coal in accordance with the provisions of its FSA dated 26.03.2013. Therefore, we do not agree with the contention of the Respondents that the deliberations in the SLC Meeting dated 28.10.2022 only expand on the reasoning for the decision already taken in the SLC Meeting dated 03.02.2022, and there is no change in the timelines or the interpretation of the decision made in the earlier Meeting dated 03.02.2022. Accordingly, the Petitioner was well aware in

March 2022 that it would not be entitled to get the coal under its existing FSA for its PPAs executed after the deadline of 31.3.2022.

76. SLC(LT) is a body set up by the MoC to decide upon the coal allocations to end-users, including IPPs, and it, therefore, falls within the definition of 'Government Instrumentality' in terms of Article 26.1 of the APP. In Energy *Watchdog vs. Central Electricity Regulatory Commission & ors., (2017) 14 SCC 80*, the Hon'ble Supreme Court held that the rules, orders, guidelines, or notifications issued by an Indian Governmental Instrumentality qualify as an event of Change in Law, and the affected party must be restituted to the same economic position as if the event had not occurred. The Hon'ble Appellate Tribunal for Electricity ("APTEL"/"Tribunal"), vide its judgment dated 14.09.2019, in the matter of *Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Rajasthan Electricity Regulatory Commission & Ors., Appeal Nos. 202 and 305 of 2018,* has held that the decision of SLC(LT) amounts to a 'Change in Law'. Therefore, the decision by SLC(LT) which modifies an existing Indian law, i.e., the SHAKTI Policy, after the bid date/cut-off date, will fall under the definition of a Change in Law. Thus, SLC (LT) minutes of the meeting dated 22.11.2022 changed the scenario of the arrangement of coal under FSA dated 26.3.2013 and, therefore, prima facie is a change in law event. In view of the above, since the SLC(LT) by way of its minutes of meeting dated 22.11.2022, which is after the bid date/cut-off date, i.e. 30.03.2022, having decided to not grant linkage coal to the Petitioner corresponding to the quantum of power under APP, thereby amending Para A(v) of the SHAKTI Policy, has resulted in a Change in Law event in terms of Article 26.1 of APP and Clause 2 (c) of the CIL Rules. Accordingly, Issue No. 1is decided in favour of the Petitioner.

Issue No. 2: Whether the Petitioner is entitled to compensation for the shortfall of coal and/or an increase in the price of coal on account of the Change in Law?

77. On 28.02.2023, the Petitioner had issued a Change in Law notice to HPPC under Rule 2(1)(c) read with Rule 3(2) of the CIL Rules seeking an adjustment in tariff on account of the increase in the cost of procurement of coal and supply of power, with effect from 19.07.2022, i.e., the date of commencement of supply. Pursuant to the Change in Law notice dated 28.02.2023, the Petitioner, in terms of Rule 3(3) of the CIL Rules, by way of its letter dated 22.03.2023, provided a computation of the tentative impact in tariff to be adjusted and recovered from HPPC on account of the occurrence

of such a Change in Law event.

78. The Petitioner's case is that any shortfall in the price of coal and/or increase in the price of coal on account of any directive/ statute/ rule/ regulation/ notification issued by any government instrumentality subsequent to the cut-off date qualifies for a Change in Law event both under the provisions of the APP and the CIL Rules. The Petitioner contends that it is entitled to compensation for the shortfall of coal and/or increase in the price of coal on account of the Change in Law.

79. The position taken by the Haryana Discoms is that the APP entered into between MB Power and HPPC was premised on the fact that MB Power has access to an assured supply of fuel as per Clause 2.2.1 (d) of the RFQ. In addition, Article 5.1.5(k) and Article 7.1(n) of the APP clearly state that the arrangement of fuel is the Petitioner's obligation. Further, HPPC notified the bidders of the clarifications in response to the queries received from the Bidders, wherein it was specified that the implications of a fuel shortfall would be borne by the bidders. Further, in terms of the APP dated 18.5.2022, the Petitioner was required to maintain the supply of coal to ensure that the side agreements/addenda to the FSA were executed timely. By no stretch of the imagination can the shortfall in fuel be attributed to Haryana Utilities, nor can Haryana Utilities (and consequently its consumers) be saddled with the cost of the same. Accordingly, any financial implication due to the non-amendment of the FSA and the shortfall of coal thereto cannot be attributed to HPPC, and the issue of the non-signing of the amendment to the FSA with SECL after the signing of the APP cannot be claimed as a Change in Law event by the Petitioner.

80. In this regard, we note that arranging coal is the responsibility of the Generator i.e. the Petitioner. The Petitioner had won the HPPC bid on the premise that it had assured the quantity of coal under its FSA dated 26.3.2013, and that premise was also known to the Respondents. But despite having effective FSA, the fact is that Petitioner could not get an assured quantity of coal on account of the regulatory uncertainty surrounding the applicability of the SLC (LT) minutes of the meeting dated 03.02.2022. Article 2.2.1 of the RFQ issued by the Respondents reads as under:

> *"2.2.1 For determining the eligibility of Bidders for their pre-qualification hereunder, the following shall apply:*

(a) The Bidder should be a corporate entity;

(b) The Bidder should either be the owner and operator of the Power Station from where electricity shall be supplied or a Trading Licensee;

(c) In case of Bidder being a Trading Licensee, such Trading Licensee should have executed a power purchase agreement or an equivalent arrangement with the Developer for at least the Capacity for which the Application has been made;

(d) the Power Station has access to an assured supply of Fuel;

81. It is noteworthy that the CIL Rules were notified to allow the affected party to claim an adjustment of the monthly tariff in accordance with the CIL Rules upon the occurrence of a change in law event. Rule 3(1) of the CIL Rules provides as under:

"Adjustment in tariff on change in law. - (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred."

82. Rule 2(c) of the CIL Rules defines change in law as any enactment, amendment or repeal of any law made after the determination of tariff under Section 62 or Section 63 of the Electricity Act, which leads to a corresponding change in the tariff. The relevant portion is provided as under:

"2(c) change in law, in relation to tariff, unless otherwise defined in the agreement, means any enactment or amendment or repeal of any law, made after the determination of tariff under section 62 or section 63 of the Act, leading to corresponding changes in the cost requiring change in tariff, and includes—

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83. The term "Change in Law" is also defined in the APP, which under Article 26 reads as under:

"Change in Law" means the occurrence of any of the following after the Bid Date:

(a) the enactment of any new Indian law;

(b) the repeal, modification or re-enactment of any existing Indian law;

(c) the commencement of any Indian law which has not entered into effect until the Bid Date:

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84. It cannot be disputed that the contract between the parties has to conform to the regulations, rules, bye-laws, and any other statutory rules made by the Appropriate Government and Commission from time to time. It is a settled position in law that there cannot be a contract that runs contrary to any provisions of the law, and whenever there is a conflict, it is only the law which would prevail and not the contractual provisions as agreed to between the parties. It is pertinent to mention that the term "law" under Rule 2(d) of the CIL Rules includes any Act, Ordinance, order, bye-law, rule, regulation, or notification, for the time being in force, in the territory of India.

85. It is clear that the CIL Rules have a binding effect on all parties to a contract as they create a new mechanism for recovery of change in law compensation and grant rights of adjustment and recovery to the parties. We are of the opinion that the qualifying provisions under APP/RfQ, as referred to by HPPC cannot override the binding provisions of the CIL Rules.

86. In light of the above discussions, Issue No. 2 is decided in favour of the Petitioner, i.e. the Petitioner is entitled to compensation for the shortfall of coal and/or increase in the price of coal on account of the Change in Law.

Issue No. 3: What mechanism needs to be adopted for processing and reimbursement of admitted claims under a Change in Law?

87. We observe that Section 3 of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 deals with adjustments in tariffs, and it reads as under:

*"**3. Adjustment in tariff on change in law.—** (1) On the occurrence of a change in law, the monthly tariff or charges shall be adjusted and be recovered in accordance with these rules to compensate the affected party so as to restore such affected party to the same economic position as if such change in law had not occurred.*

*(2) For the purposes of sub-rule **(1), the generating company or transmission licensee, being the affected party, which intends to adjust and recover the costs due to change in law, shall give a three weeks prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party.***

(3) The affected party shall furnish to the other party, the computation of impact in tariff or charges to be adjusted and recovered, within thirty days of the occurrence of the change in law or on the expiry of three weeks from the date of the notice referred to in sub-rule (2), whichever is later, and the recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff.

(4) The impact of change in law to be adjusted and recovered may be computed as one time or monthly charges or per unit basis or a combination thereof and shall be recovered in the monthly bill as the part of tariff.

(5) The amount of the impact of change in law to be adjusted and recovered, shall be calculated—

(a) where the agreement lays down any formula, in accordance with such formula; or

(b) where the agreement does not lay down any formula, in accordance with the formula given in the Schedule to these rules;

(6) The recovery of the impacted amount, in case of the fixed amount shall be — (a) in case of generation project, within a period of one-hundred eighty months; or (b) in case of recurring impact, until the impact persists.

(7) The generating company or transmission licensee shall, within thirty days of the coming into effect of the recovery of impact of change in law, furnish all relevant documents along with the details of calculation to the Appropriate Commission for adjustment of the amount of the impact in the monthly tariff or charges.

(8) The Appropriate Commission shall verify the calculation and adjust the amount of the impact in the monthly tariff or charges within sixty days from the date of receipt of the relevant documents under sub-rule (7).

(9) After the adjustment of the amount of the impact in the monthly tariff or charges under sub-rule (8), the generating company or transmission licensee, as the case may be, shall adjust the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount."

88. As per Section 3 (2) of the Change in Law Rules, 2021, the Petitioner was required to furnish three weeks prior notice about the proposed impact of the change in tariff. The Petitioner, vide its letter dated 28.2.2023 furnished a change in law notice to the respondents and sought compensation on account of the increase in the cost of procurement of coal and supply of power with

effect from 19.7.2022. We are of the view that the Petitioner has complied with the change in law notice, though belatedly. However, the Petitioner even before the commencement of supply from 19.7.2022, kept the Respondent informed that SECL is not signing the side agreement for increasing its ACQ, which corresponds to its PPA of 150 MW under FSA dated 26.3.2013, according to clause 4.1.1 and Clause A(v) of the Shakti Scheme, which ensured coal supply for future long term and medium term PPAs. We note that Respondent HPCC also wrote to SECL to sign the side agreement for supplying coal at the notified price corresponding to its 150 MW medium-term PPA, as it also considered that the Petitioner was eligible for coal supply in terms of Clause A(v) of the Shakti Policy as its FSA did not have clause 2.8.2.3. However, the Petitioner arranged coal from other different sources and also under Shakti B(iii) to meet its commitment of supplying power to respondents right from 19.7.2022. Further, it is observed that neither the APP nor the Change in Law Rules 2021 talks about the deadline for furnishing a change in law notice. It merely says that the affected party is required to give a three-week prior notice to the other party about the proposed impact in the tariff or charges, positive or negative, to be recovered from such other party. As such, in consideration of the fact that the cost of electricity generation increased for the Petitioner right from 19.7.2022 due to a change in law event as deliberated above for which the Respondents were notified through notice dated 28.2.2023, we hold that the Petitioner needs to be compensated to the extent of the increase in cost of generation due to the procurement of coal by the Petitioner from other sources in place of coal receipt from SECL at the notified price.

89. It is observed from the notice dated 28.2.2023 that the Petitioner in the said notice did not include the impact of the change in law during the period when it was procuring coal from alternative sources, spanning from the commencement of electricity supply on 19.7.2022 until the initiation of coal receipt under Shakti-scheme-B (III) even though the petitioner had already incurred the additional expenditure during that period. The notice merely outlines the prospective impact, expressed in Rs./kWh terms, applicable from the commencement of coal receipt under Shakti-scheme-B (III). This estimation is contingent upon various factors, such as the cost of coal and transportation costs from various CIL subsidiaries, thereby resulting in a fluctuating monthly impact due to varying transportation costs. Consequently, the notice serves as a method to sensitize the

beneficiary to the occurrence of a Change in Law event. It indicates that the Respondents may bear the consequential impact of this change in Law, as per the provisions of the Change in Law Rule, 2021, which has increased the cost of generation. Pursuant to the CIL Rules,2021, we direct the affected parties, in the present case the Petitioner and the Respondent, to reconcile the Change in Law claims amongst themselves based on the actual invoices and approach the Commission again in terms of Rule 3(8) of the Change in Law Rules.

90. Further, it is noted from the notice dated 28.2.2023 that the Petitioner, while calculating the tentative impact, has considered 100% coal supply corresponding to 150 MW at notified price from SECL, whereas the Respondent has objected to the same submitting that at the relevant time (starting from 19.7.2022), the Petitioner was to get 75% coal supply at notified price in terms of amended NCDP 13 in place of 100% coal supply which was assured before amendment of NCDP. The submission of the Respondent has been found to be in order, and accordingly, the compensation due to the Petitioner shall be reconciled between the Petitioner and the Respondent based on the limitation that the Petitioner was to get only 75% coal supply at a notified price.

91. The Petitioner has also made a prayer for carrying costs. In this regard, the Petitioner has submitted that in the case of Indian Council of Enviro-Legal Action v. Union of India & Ors. (2011) 8 SCC 16), the Supreme Court ruled that compensation ought to be granted on a compound interest basis as it takes into account the time value of money and the inflationary trends, which is the true spirit of restitution for the affected party. The relevant extracts from the said decision are as under:

> *"161. The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders. ,,,*
>
> *178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of Time Value of Money, restitution and unjust enrichment noted above - or to simply levelise - a convenient approach is calculating interest. But here interest has to be calculated on compound basis - and not simple - for the latter leaves much uncalled for benefits in the hands of the wrongdoer.*
>
> *179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors, i.e., use of the money and the inflationary trends, as the market forces and predictions work out."*

92. Article 21 of the APP deals with the change in law clause, which reads as under:

> *"If as a result of Change in Law, the Supplier suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. I crore (Rupees one crore) and 0.1 '%, (zero point one per cent) of the Capacity Charge in any Accounting Year, the Supplier may so notify the Utility and propose amendments to this Agreement so as to place the Supplier in the same financial position as it would have enjoyed had there been no such Change in Law resulting in increased costs, reduction in return or other financial burden as aforesaid. Upon notice by the Supplier, the Parties shall meet as soon as reasonably practicable but no later than 30 (thirty) days from the date of notice and either agree on amendments to this Agreement or on any other mutually* ***agreed arrangement.***

93. With regard to the prayer of the Petitioner for carrying cost, we observe that the Hon'ble Supreme Court in Judgment dated 24.8.2022 in Civil Appeal No. 7129 of 2021 titled Uttar Haryana Bijli Vitran Nigam Limited v. Adani Power (Mundhra) Limited & Anr., has held that once a party is entitled to carrying cost under the relevant agreement, the same is to be granted from the date when such additional expenditure on account of the relevant "Change in Law" event has incurred till the time the affected party receives compensation. In the instant case also, we observe that the APP contains a provision in Article 21 for the restoration of the parties to the same economic position in case the cost of generation increases due to a certain Change in Law event. Therefore, as a relief for the occurrence of a "Change in Law" event, the Petitioner is entitled to claim carrying cost for the period from the date when such additional expenditure on account of the relevant "Change in Law" event is incurred until the time the affected party receives compensation, specifically in view of the principle of restitution inbuilt/envisaged in Article 21 of the APP and the general law applicable to the grant of carrying costs/interest.

94. We have already held that a Change in Law has occurred and the Petitioner is entitled to recover the additional expenditure incurred towards the increase in the cost of generation consequent to CIL and also the carrying cost. With regard to the rate at which carrying cost is to be recovered, the Commission, in line it with earlier orders, decides that the carrying cost shall be recovered at the actual rate of interest paid by the Petitioner for arranging the funds (supported by Auditor's Certificate) or the rate of interest on working capital as per applicable CERC Tariff Regulations or the late payment surcharge rate as per the APP, whichever is the lowest.

95. Accordingly, the Commission hereby directs the parties to carry out a reconciliation of additional expenditures and carrying costs based on actual invoices on account of change in law and audited accounts and approach the Commission again in terms of Rule 3(8) of the Change in Law Rules.

96. Petition No. 242/MP/2023 is disposed of in terms of the above.

Sd/-	Sd/-	Sd/-	Sd/-
(P. K. Singh)	**(Arun Goyal)**	**(I. S. Jha)**	**(Jishnu Barua)**
Member	**Member**	**Member**	**Chairperson**