CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 179/MP/2016

Coram:
Shri Jishnu Barua, Chairperson
Shri Ramesh Babu V., Member
Shri Harish Dudani, Member

Date of Order: 22nd March, 2025

In the matter of

Petition under Sections 79 (1) (b) and 79 (1) (f) of the Electricity Act, 2003 for adjudication of claims towards compensation arising out of 'change in law' and consequential reliefs as per provisions of the PPA dated 27.11.2013 between KSK Mahanadi Power Company Limited and TANGEDCO during the operating period.

And

In the matter of

APTEL judgment dated 11.10.2022 in Appeal No.77/2019.

And

In the matter of

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

Vs

Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maaligai, 144, Anna Salai,
Chennai – 600002. **..... Respondent**

Parties Present:

Shri Anand K. Ganesan, Advocate, KSKMPCL
Ms. Aishwarya Subramani, Advocate, KSKMPCL
Ms. Harsha V. Rao, Advocate, KSKMPCL
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

Background

Petition No.179/MP/2016 was filed by the Petitioner, KSK Mahanadi Power Company Limited (KSKMPCL), under Sections 79 (1)(b) and 79 (1)(f) of the Electricity Act 2003, for adjudication of claims towards compensation arising out of 'change in law' and consequential reliefs as per provisions of the PPA dated 27.11.2013 entered into by it with the Respondent TANGEDCO, and the Commission vide its order dated 8.10.2018 disposed of the same, holding as under:

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

2. Aggrieved by the said order, the Petitioner filed Appeal No. 77/2019 before the Appellate Tribunal for Electricity (in short 'APTEL') on various grounds, and the APTEL vide its judgment dated 11.10.2022, disposed of the said appeal, remanding the matter to the Commission, with the following observations:

> *"1. The appellant failed to satisfy the respondent, Central Electricity Regulatory Commission (hereinafter referred to variously as, CERC' or 'Central Commission') with regard to its claim for declaration of change in law on account of two events viz. cancellation of the coal blocks by Hon'ble Supreme Court by its Orders dated 25.08.2014 and 24.09.2014 in WP Crl. No. 120 of 2012 Manohar Lal Sharma v The Principal Secretary & ors. and National Coal Distribution Policy 2013 which had reduced the assured quantum of coal for supply to the appellant under the tapering linkage granted to it. The Order dated 08.10.2018 of the Central Commission passed in Petition no. 179/MP/2016 is assailed, inter alia, on the basis of subsequent decision of this tribunal rendered on 21.12.2018 in Appeal no.193 of 2017 in GMR Kamalanga Energy Limited v Central Electricity Regulatory Commission & ors and judgment dated 31.08.2020 of Hon'ble Supreme Court in Jaipur Vidyut Vitran Nigam Limited v Adani Power Rajasthan Limited in Civil Appeal no. 8625-8626 of 2019 as indeed the ruling reported as Energy Watchdog v Central Electricity Regulatory & ors (2017) 14 SCC 80.*

2. The learned counsel for the first respondent, Tamil Nadu Generation & Distribution Corporation Ltd. (TANGEDCO) fairly submitted that the request of the appellant for remit to the Central Commission for revisit to the matter may be granted, though she has some submissions to make on the distinguishing features. She also submitted that the rights of the first respondent (TANGEDCO) to raise such contentions and objections as may be available in law may be reserved.

3. In above view, the appeal is allowed. The impugned order is set aside. The matter is remitted to the Central Commission for reconsideration in light of the above-mentioned subsequent decisions of Hon'ble Supreme Court and this tribunal. The contentions of both sides are kept open. For removal of doubts, if any, we clarify that nothing in this order shall be construed as an expression of opinion by this tribunal at this stage.

4. The appeal is disposed of in above terms."

Hearing

3. Pursuant to the remit as above, the matter was listed on 10.1.2023 and 7.3.2023, and the Commission, based on the request of the parties, permitted the filing of written submissions in the matter. Thereafter, the matter was heard at length on 15.5.2023, and the Commission, after hearing the parties, permitted the filing of short written arguments. Subsequently, the Commission, after hearing the parties and directing them to file their consolidated written submissions along with the judgment relied upon, reserved its order on the Petition on 19.7.2023. However, since the order in the Petition could not be issued prior to Members of the Commission demitting office, the matter was re-listed on 18.3.2024 and 17.9.2024 respectively, and the Commission, based on the consent of the parties that pleadings and arguments have been completed, reserved its order in the Petition.

4. Accordingly, in terms of the observations of APTEL vide judgment dated 11.10.2022 *supra*, we proceed to examine the claims of the Petitioner based on the submissions of the parties, as stated in the subsequent paragraphs.

Submissions of the Respondent TANGEDCO

5. The Respondent, TANGEDCO, vide its submissions dated 14.4.2023, has submitted the following:

Notice not issued within a reasonable period of time

(a) In terms of Article 10.4 of the PPA, the Petitioner was required to inform the Respondent about the change in law event 'as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the change in law' if it wanted to claim relief with respect to the said event. Petitioner issued notice on 12.7.2016 urging a change in law on the basis of shortfall in coal due to New Coal Distribution Policy(NCDP), 2013 issued on 26.7.2013.

(b) Commission, vide its order dated 8.10.2018, recorded that the Petitioner failed to provide the details of claims under a change in law as per Article 10.4.3 of the PPA qua the Respondent as claimed in the alleged letter dated 12.7.2016 and also beyond the period of three years. On this ground alone, the present Petition deserves to be dismissed, as the Petitioner failed to comply with the condition that notice was to be issued as soon as reasonably practicable.

Petitioner cannot claim compensation on the basis of change in law by virtue of promulgation of NCDP, 2013

(c) NCDP, 2013 represented a change in policy in terms of reduction in the assured quantum of allocation of coal vis-a-vis the position under the NCDP 2007. Therefore, a bidder that had participated in competitive bidding on the basis of coal linkage but had subsequently been granted linkage for a reduced quantum of coal would be entitled to compensation on the basis that a change in law event had occurred. In order to be entitled to claim compensation on this basis, the following conditions would have to be fulfilled.

(i) The bid ought to have been based on assurance of linkage under the NCDP 2007 as the source of coal;

(ii) Linkage ought to have been granted to the bidder after the cut-off date, pursuant to NCDP, 2013

(iii) By virtue of the promulgation of NCDP 2013, the quantum of coal pursuant to linkage so granted, stood reduced.

(d) The change in policy was specific to regular linkage. NCDP 2013 specifically notes that "*cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy*". Therefore, in so far as the tapering linkage is concerned, the NCDP 2013 cannot be said to constitute a change in law event.

(e) In any event, tapering linkage was in the nature of a stop-gap arrangement for power plants having captive coal block allocations in order to meet the requirements of the power plant until the commencement of production from such coal blocks. The policy, which was notified on 26.2.2010, clearly provides that tapering linkage was to cater to the requirement from the date of allocation of coal block up to the scheduled date of commencement of production. Thereafter, for a maximum period of three years, the quantum under tapering linkage would taper down.

(f) In the present case, the Petitioner cannot claim to have been affected by the change in law that occurred by virtue of the promulgation of NCDP 2013 for the following reasons:

(i) The details of the coal arrangement as submitted by the Petitioner during the bidding process, which was incorporated in Schedule 5 of the PPA, specifies the coal supply agreements with GMDC and GIDC as the source of coal. Therefore, the Petitioner's bid was not based on linkage under the NCDP 2007.

(ii) In fact, no regular linkage was granted to the Petitioner at any stage after the cut-off date. Therefore, the contention of the Petitioner that it was affected by the NCDP 2013 is unsustainable.

(iii) The FSAs executed by SECL and ECL on 19.3.2014 and 12.8.2014 were expressly for tapering linkage. It is evident from a perusal of the said FSAs that the Petitioner's plant was approved for grant of tapering linkage on the basis of the Morga-II coal block allotment made to GMDC.

(g) The terms of the tapering linkage that was granted to the Petitioner were in accordance with the policy prevailing at the time of the cut-off date. It is not even the case of the Petitioner that there was any variation from such policy by virtue of the NCDP, 2013. Therefore, the claim for a change in law on account of the NCDP 2013 is without basis or merit.

(h) It is pertinent that the notice issued by the Petitioner under Article 10.4 of the PPA relied upon the change in quantum assurance for regular linkage by virtue of the NCDP 2013 and was hence, entirely misconceived. The grounds urged in the Petition for seeking compensation are also entirely premised upon a change in policy under the NCDP, 2013 being an event of change in law. As submitted above, since the promulgation of NCDP 2013 had no bearing upon the Petitioner's arrangements for sourcing coal, no compensation can be claimed by the Petitioner on this basis.

Petitioner cannot claim compensation on the basis of the cancellation of coal blocks

(i) The Petitioner had neither issued notice of change in law on the basis of the cancellation of coal blocks in terms of the judgment of the Hon'ble Supreme Court in Writ Petition (Crl.) No. 120/2012 & other connected matters (Manohar Lal Sharma vs. Principal Secretary & Ors.) dated 25.8.2014, nor had it sought the relief before this Commission, on this basis. As such, no relief of change in law ought to be granted on this ground alone.

(j) The Petitioner has placed reliance upon the APTEL's judgment dated 21.12.2018 in Appeal No. 193/2017 (GMRKEL v CERC & ors) to contend that the cancellation of coal blocks by the judgment of the Hon'ble Supreme Court in Manohar Lal case, constituted a change in law. Firstly, the present case is not one involving a captive coal block allocation. The Petitioner had entered into arrangements with the GMDC and GIDC, who were the allottees of coal blocks, unlike in the case of GMRKEL, wherein the power-generating company had a captive coal block.

(k) Regardless of the above, in any event, in the facts of the present case, the ratio of the GMRKEL case, would not apply. In this context, it is pertinent that the Petitioner had filed a similar petition before this Commission (Petition No. 176/MP/2016), claiming identical relief against the Telangana and Andhra Pradesh distribution licensees, with the PPAs premised upon the same Coal Supply Agreements (CSA)

entered into with GIDC and GMDC. This Commission disallowed the said Petition on 28.10.2019 and held that since the coal blocks of GMDC and GIDC, based on which tapering linkage was granted, were not developed, therefore, the Petitioner was not entitled to any relief in respect of the Presidential Directives dated 17.7.2013. It was also observed that the ratio in the GMRKEL case had no bearing on the present facts and circumstances. It is pertinent that the aforesaid order of this Hon'ble Commission has been challenged by the Petitioner before Hon'ble APTEL in Appeal No. (DFR No. 100/2021) and Order dated 28.10.2019 has not been stayed till date.

(l) The CSAs with GMDC and GIDC and the tapering linkage dated 11.6.2009 were terminated by SECL in July 2015 on the premise that the coal blocks do not exist. Since the allocation of coal blocks, based on recommendations of the Screening Committee of GOI and through the Government dispensation route, was declared illegal and arbitrary by the Hon'ble Supreme Court and had accordingly been cancelled, the termination of the Petitioner's CSA with GMDC and GIDC and the Coal India Limited tapering linkage dated 11.6.2009, consequent upon the said judgment, cannot fall within the scope of change in law, as claimed by the Petitioner.

(m) Based on the order of the Hon'ble Supreme Court, the Ld. CERC has rightly held that the termination of the Petitioner's CSAs with GMDC and GIDC and the CIL tapering linkage dated 11.6.2009, consequent upon the said judgment, cannot fall within the scope of change in law as contended by the Petitioner.

(n) It is also pertinent that coal arrangements entered into with GIDC and GMDC were not for the plant of the Petitioner as a whole but for the purpose of supply of power to the State of Gujarat and Goa. In fact, the FSAs were not for the entire Plant capacity of 3600 MW but for 1800 MW, and hence, none of the grounds claimed for change in law could even be said to have affected the ability of the Petitioner to supply under a PPA with the Respondent.

(o) In terms of this Commission order dated 8.10.2018, the claims based on the MOU signed between the Petitioner and Coal India Limited and its subsidiaries cannot be considered as a change in law event. The Petitioner entered into an MOU with SECL on 13.7.2015 for the supply of coal to the Power Plant and contended that post termination of tapering linkage FSA, coal supplies was made under an MOU till 30.6.2016 with a condition that coal will be supplied up to the percentages mentioned in the Presidential directive dated 17.7.2013 on "best effort basis."

(p) In any event, the grant of tapering linkage to the Petitioner itself took place after the cut-off date upon execution of the FSAs on 19.3.2014. Therefore, the replacement of such tapering linkage through the MOU route would not constitute a change in law since the bid of the Petitioner was not based on the subsistence of the tapering linkage.

(q) The judgements relied upon by the Petitioner have no application in the present case due to its distinguishing features.

6. Accordingly, the Respondent has prayed that the Petition is without merit and may be dismissed.

Consolidated written submissions of the Petitioner

7. The Petitioner, vide its written submissions dated 27.4.2023, has mainly submitted the following:

(i) The Commission, vide its order dated 8.1.2018, rejected the claims of the Petitioner, holding that (i) the cancellation of the coal blocks by the Hon'ble Supreme Court cannot be considered as a change in law as it was an illegal action quashed by the Hon'ble Court and (ii) NCDP, 2013 also cannot be treated as a change in law, as NCDP, 2007 and the LOA had itself envisaged the procurement of imported coal. This view was also taken by the Commission in other cases, including the GMRKEL case.

(ii) APTEL (in Appeal No. 193/2017) reversed the findings of the Commission in the GMRKEL case and held that the cancellation of coal blocks and the consequent cancellation /termination of tapering linkage is a change in law. Further, the reduction of the coal quantum by virtue of the NCDP, 2013 was held to be a change in law vis-a-vis NCDP, 2007 which assured 100% coal supply.

(iii) Hon'ble Supreme Court, in its judgment dated 20.4.2023 in GMRWEL v CERC (CA No. 11095/2018) has held that the change in NCDP would amount to a change in law. In addition, the issue of NCDP, 2013 is also covered by the decisions in the Energy Watch Dog case and also in the JVVNL v AP(R)L case. This has further been followed by the Hon'ble Supreme Court in the MSEDCL v AP(M)L case. Thus, as held by the Hon'ble Supreme Court and APTEL, any change in the allocation of coal linkage and after the cut-of date shall be an event of change in law.

(iv) In terms of the PPA, any consent that is amended by a decision of the competent court subsequent to a bid deadline would amount to a change in law. The coal block was allotted to GMDC and GIDC, the Indian Governmental instrumentalities, who were to develop the coal block. The Petitioner had entered into a coal supply agreement and was to procure the coal under the said agreement. The Petitioner was in no way responsible, neither for the development nor for the cancellation of the coal blocks.

(v) In the GMRKL case, the delay in development of the coal block prior to its cancellation was also held to be a force majeure event. In the present case, the issue does not arise, as the coal blocks were cancelled prior to the commencement of supply by the Petitioner to the Respondent, and also the revised delivery dates, as accepted by the parties. APTEL, in its judgment in Appeal No.354/2019 dated 5.10.2020, has noted that even if the coal, block has been developed the same would have been de-allocated consequent to the judgment of the Hon'ble Supreme Court.

(vi) The Commission, in its order dated 29.1.2020 in Petition No.309/MP/2015 (APNRL v WBSEDCL & ors), followed the decision in the GMRKEL case and held

that the cancellation of the coal block and the consequent tapering linkage by the judgment of the Hon'ble Supreme Court is a change in law event under the PPA between the parties. The issue being covered by the above decisions, the Commission may, in the case of the Petitioner, declare that the cancellation of coal blocks, consequent to cancellation/termination of CSA by GMDC/GIDC and the cancellation of tapering linkage amounts to consequential relief in terms of the PPA for the alternate coal procured for supply to the Respondent.

(vii) The submission of the Respondent seeking to distinguish the above decisions on the ground that in the case of GMRKEL, the coal block was allotted to the generator whereas, in the present case, the coal block was allotted to GMDC/GIDC, is misconceived. The issue of change in law is the cancellation of the coal block allotted by the Government of India by virtue of the decision of the Hon'ble Supreme Court. Tapering linkage was earlier granted to the Petitioner as against the coal block allotted and recognizing that the Petitioner was a beneficiary of the coal from the coal block. It is not comprehensible as to how the decision of GMRKEL, which holds that the decision of the Hon'ble Supreme Court in cancellation of coal blocks is not a change in law in this case, but only in other cases.

(viii) GMDC is an Indian Governmental Instrumentality in terms of the PPA. Thus, the cancellation/termination of the CSA by GMDC by itself a change in law event, which is, in fact, coupled with the cancellation of the CSA was, on account of the cancellation of the coal block by the Hon'ble Supreme Court. The bid of the Petitioner was based on linkage coal to be sourced from GMDC/GIDC and the Respondent evaluated the bid using the parameters applicable for the domestic linkage coal. It is not now open to the Respondent to contend that the cancellation of coal blocks is not a change in law. In fact, upon cancellation of the CSA and the tapering linkage, the Petitioner was allocated MOU coal at a premium, which was also on account of the change in law. In any event, the tapering linkage would have been affected by the NCDP, 2013 is also covered by the decision of APTEL in the GMRKEL case**.**

(ix) The Commission had previously proceeded on the basis that since the LOA had envisaged the import of coal, there was no change in law. The issue was the change in law in policy from NCDP, 2007, which had assured 100% coal supply against NCDP, 2013, which assured a reduced supply. This was the precise argument raised in the case of Energy Watchdog and rejected by the Hon'ble Supreme Court. The same principle squarely applies to the case of the Petitioner as well.

(x)This principle has also been settled in favour of the generators in the judgment of the Hon'ble Supreme Court dated 3.3.2023 in the case of MSEDCL v AP(M)L & ors, wherein, the shortfall of coal even below 65% has been held to be an account of change in law. Based on the above decision, where the entire coal shortage is considered as a change in law, on account of coal block cancellation or on account of NCDP would make no difference, as the impact of the change in law on the Petitioner would be the same, namely, the entire coal shortage considering the normative availability for supply to the Respondent.

(xi) The issue of notice was not raised by the Respondent, which is a counter party to the PPA. The Respondent has, however, sought to raise this issue in the written

submissions, though this was never an objection at any stage earlier. Though the Commission had made observations that change in law was not provided in a timely manner by the Petitioner, the Commission had proceeded to adjudicate the matter on merits. Even in the appellate proceedings, the Respondent has sought to submit on the distinguishing features from the above decisions.

(xii) The supply of the aggregated contracted capacity began in October 2015 as per the revised delivery date accepted by the parties. After evaluating the quantum of domestic coal available, the Petitioner gave the notice on 12.7.2016. The decision in the case of Energy Watchdog was in 2017, wherein the change in law on NCDP, 2013, was held for the first time. The National Tariff Policy was also notified in January 2016, which provided for the NCDP to be treated as a change in law for additional compensation. The Petition was filed in September 2016, which is also not barred by limitation.

(xiii) The Petitioner's notice dated 12.7.2016 was the notice in regard to the coal shortage and also on the implication of taxes and duties. The change in law on taxes and duties has already been allowed by this Commission in Petition No.170/MP/ 2016, which has also been accepted by the Respondent. It is now not open for the Respondent to contend that the same notice dated 12.7.2016 is not sufficient in relation to the coal shortage.

(xiv) Unlike a Force majeure, a change in law does not provide for a specific period within which notice is to be issued. Notice itself is procedural and cannot affect the vested rights of the parties. In any event, this is not an objection of the Respondent, which is a counter party to the PPA. Further, the PPA does not provide that if the notice is not given within a particular period, there can be no claim of change in law.

(xv) The issue with regard to the time period for issue of notice in the event of change in law has been decided by the Commission in its order dated 17.10.2022 in Petition No 700/MP/2020 & Petition No.121/MP/2022 (JPL v TANGEDCO). Therefore, the Petitioner is entitled to the declaration of the coal block cancellation and the consequent cancellation of CSA with GMDC/GIDC and the cancellation of the tapering linkage as well, as being a change in law under the PPA with the Respondent, with the consequential relief of the procurement and use of alternate coal being compensated with the carrying cost as per the PPA.

8. Pursuant to the hearing dated 15.5.2023, and based on the liberty granted to the parties, the Respondent, on 15.6.2023, filed its short submissions, mainly reiterating the submissions made in its written submissions as above. In addition to this, the Respondent has submitted that the LOA was only stipulated to be valid for a period of 2 years, and it is not the case of the Petitioner that the validity of the LOA was extended or that such LOA was subsisting as on the cut-off date. The Respondent also submitted that the FSAs

dated 19.3.2014 and 12.8.2014 do not state that the LOA was valid or is in subsistence beyond the term mentioned therein at the time of execution of the FSAs. While pointing out that the FSAs merely record the fact of assurance having been issued as a historical fact, the Respondent stated that the LOA cannot be said to have been issued for the grant of tapering linkage, as the tapering linkage policy came into existence only on 26.2.2010. The Respondent added that the MOU dated 13.7.2015 was not issued pursuant to NCDP, 2013, and was not a substitute for the coal supply under the CSA, and therefore, even on this basis, it cannot be construed as a change in law. Per contra, the Petitioner, in its note of arguments dated 15.6.2023, has reiterated the submissions made in its consolidated written submissions as above.

9. Thereafter, the Commission, based on the request of the learned counsel for both parties during the hearing of the Petition on 19.7.2023, permitted them to file their consolidated written submissions along with the judgments relied upon by them. In response, the Petitioner and the Respondent have filed their respective written submissions dated 30.8.2023, reiterating their contentions made earlier.

10. We note that APTEL while setting aside the Commission's order dated 8.10.2018, has, vide its judgment dated 1.10.2022, remanded the matter to this Commission for reconsideration in the light of the subsequent decisions of the Hon'ble Supreme Court and APTEL (as mentioned in para 2 above), keeping it open, the contentions of both the parties. In terms of this, the parties have made detailed submissions on the merits of the case issued by the Petitioner. Accordingly, based on the submissions of the parties and the documents on record, the issues for consideration are as under:

(A) Whether the change in law notice dated 12.7.2016 issued by the Petitioner is in consonance with the provisions of Article 10.4 of the PPA?

(B) Whether the Petitioner is entitled to the change in law compensation for the shortage of coal supply in terms of New Coal Distribution Policy(NCDP), 2013 and the judgments of the Hon'ble Supreme Court and APTEL?

Analysis and decision

A. Whether the change in law notice dated 12.7.2016 issued by the Petitioner is in consonance with the provisions of Article 10.4 of the PPA?

11. The Respondent has submitted that in terms of Article 10.4 of the PPA, the Petitioner was required to inform the Respondent about the change in law event 'as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the change in law' if it seeks to claim the relief(s) with respect of the said event. Referring to the notice dated 12.7.2016 issued by the Petitioner urging the change in law event on account of the shortfall in coal due to NCDP 2013 (issued on 26.7.2013), the Respondent has argued that in terms of the Commission's order dated 8.10.2018 (holding that the Petitioner has failed to provide the details of the claims under change in law and that the notice was also beyond the period of three years), the Petition deserves to be dismissed. *Per contra*, the Petitioner has contended that unlike force majeure, change in law does not provide for a specific time period for the notice and that the notice is only procedural and cannot affect the vested right. Pointing out that the Respondent had not raised any objection earlier, the Petitioner has submitted that the Respondent has always been aware of the legal developments and that supply of full capacity began in October 2015, and after evaluating the implications, notice was given on 12.7.2016. The Petitioner has added that the notice dated 12.7.2016 was in regard to coal shortage and taxes and duties, and based on the same notice, a change in law on taxes and duties was allowed in Petition No.170/MP/2016, which was accepted by the Respondent.

12. We have examined the submissions. We note that the Respondent had not raised the issue of delay in the issuance of the change in law notice either before the Commission or APTEL. We also notice that the APTEL's remand order dated 1.10.2022 is only to the extent of reconsideration of the change in law claims of the Petitioner in the light of the subsequent decisions of the Hon'ble Supreme Court and APTEL. Be that as it may, since the Respondent has raised the issue of delay in a change in law notice, we deal with the same as under.

13. Article10.4 of the PPA provides as under:

> ***"10.4 Notification of Change in Law***
> *10.4.1 If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim a Change in Law under this Article 10, it shall give notice to the Procurer of such Change in Law* ***as soon as reasonably practicable after becoming aware of the same or should reasonably*** *have known of the Change in Law.*
>
> *10.4.2 Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to all the Procurer under this Article 10.4.2 if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material.*
>
> *Provided that in case the Seller has not provided such notice, the Procurers shall have the right to issue such notice to the Seller."*

14. The Commission, in its order dated 8.10.2018, while holding that the Petitioner had not complied with the requirement of Article 10.4.2 of the PPA, observed as follows:

> *"17. The matter has been considered. Under Article 10.4.2 of the said PPA, the Petitioner is required to give notice about the occurrence of the change in law events as soon as practicable after being aware of such event. The Petitioner has submitted that it has given notice to the Procurer, of the event of change in law, as soon as it came to the conclusion on the impact of such change in law event. Admittedly, in the present case, notice has been issued to TANGEDCO only on 12.7.2016 i.e three years after the occurrence of the change in law event. This cannot by any stretch of imagination be considered reasonable. Thus, in our view, the requirement of Article 10.4.2 of the said PPA has not been complied with by the Petitioner.*

15. Admittedly, Article 10.4.1 of the PPA does not prescribe any fixed time frame within which the change in law notice ought to be given. It merely stipulates that in case the seller (KSKMPCL) was affected by a change in law event and wishes to claim so, it shall give notice of such change in law event to the Procurer (TANGEDCO) as soon as

reasonably practicable, after gaining knowledge about the same. It is pertinent to note that the Commission in its order dated 8.10.2018, without examining as to whether the time period was 'reasonable', held that the change in law notice was issued after the period of three years. However, it is noted that the actual date of power supply by the Petitioner to the Respondent for 281 MW was from 1.8.2015, and the additional 219 MW was supplied to the Respondent from 5.10.2015 after the operationalisation of the LTA by PGCIL. Thus, the aggregated contracted capacity of the power supplied to the Respondent is from October 2015, as per the revised delivery date accepted by the parties. Further, after the notification of the National Tariff Policy in January 2016, which provided for the NCDP 2013 as a change in law event for additional compensation, the Petitioner, after evaluating the implications of the change in law, including the taxes and duties, served the change in law notice on the Respondent vide letter dated 12.7.2016 and had later filed the present Petition in September 2016. Thus, considering the facts and circumstances of the present case, it cannot be said that the change in law notice issued by the Respondent was beyond reasonable time reckoned from date of supply and date of notification of NTP, as contemplated under Article 10.4.1 of the PPA.

16. The Respondent TANGEDCO has also contended that the Petitioner has not claimed any relief of change in law on the alleged de-allocation or cancellation of the coal blocks /CSA before this Commission through a notice dated 12.7.2016. Per contra, the Petitioner, while pointing out that this objection was not raised by the Respondent earlier, has submitted that, unlike force majeure, change in law does not provide for a specific time period for the notice. It has also argued that notice is only procedural and cannot affect the vested rights and that the Respondent was aware of the legal developments. We have examined the submissions. Notice is a legal concept describing a requirement

that a party is aware of the legal process affecting their rights, obligations or duties. Every law has an inherent notice and a fact judicially noticeable within the meaning of Section 57 of the `Indian Evidence Act, 1872. This has been observed by the Commission in its order dated 17.10.2022 in Petition Nos.700/MP/2020 & 121/MP/2022, while rejecting the contention of the Respondent in the said case. In the present case, the Respondent was fully aware of the Hon'ble Supreme Court's order cancelling the coal block allocations (including the coal blocks allocated to the Petitioner) made by the Government of India instrumentalities. This in our view, amounts to a constructive notice upon the Respondent. The Respondent cannot, therefore, now contend that no forewarning was given by the Petitioner. Even otherwise, we do not find such delay to be inordinate and inexcusable, which would otherwise defeat the Petitioner's change in law claims and the consequent reliefs prayed for. Hence, the submissions of the Respondent on this issue stand rejected. (A) is disposed of in terms of the above.

B. Whether the Petitioner is entitled to the change in law compensation for the shortage of coal supply in terms of NCDP, 2013/FSAs with SECL &ECL/MOU of MOC/MOU between KSKMPCL & SECL vis-a-vis assured coal supply in terms NCDP 2007/linked coal from coal blocks and the subsequent decisions of the Hon'ble Supreme Court and APTEL?

17. The Petitioner, in the present Petition, has sought the adjustment of tariff on account of the change in law events affecting the Project during the operating period, in terms of the TANGEDCO PPA dated 27.11.2013. The Petitioner has sought compensation under 'change in law' during the Operating period on account of the events which have impacted the cost and revenue of supply of power from the Power Project to the procurers. The aforesaid events relate to partial or no supplies of coal under linkage on account of the Presidential Directive dated 17.7.2013 read with the Ministry of Power (MOP), GOI Notification dated 31.7.2013, stipulating the generators to source coal from

alternative sources. The chronological dates and events in respect of the claim of the Petitioner are as under:

Sl. No.	Events	Date
1	CSA with GMDC for the supply of 4 MTPA coal from Morga-I coal	16.11.2006
2	NCDP, 2007 issued by MoC, GOI	18.10.2007
3	CSA with GIDC	10.2.2009
4	LOA by CIL/SECL (tapering linkage) for a total quantum of 7.491 MTPA	11.6.2009
5	The cut-off date for TANGEDCO bid	27.2.2013
6	The last date for submission of the TANGEDCO bid	6.3.2013
7	Presidential Directive	17.7.2013
8	Amendment in NCDP by MoC, GOI (NCDP, 2013)	26.7.2013
9	MOP, GOI Notification directing shortfall of coal and procurement of alternate coal to be considered as a pass-through	31.7.2013
10	PPA executed with TANGEDCO for the supply of 500 MW	27.11.2013
11	FSA with SECL (based on the LOA dated 11.6.2009)	19.3.2014
12	FSA with ECL (based on the LOA dated 11.6.2009)	12.8.2014
13	Cancellation of the allocated coal blocks vide Hon'ble Supreme Court orders	25.8.2014 and 24.9.2014
14	Memorandum of MOC, GOI (effective from 1.7.2015)	30.6.2015
15	MOU signed between KSKMPCL and SECL	13.7.2015
16	Actual date of supply of power to TANGEDCO	**2.8.2015** (281
		15.10.2015 (219 MW)

18. Article 10 of the PPA dated 27.11.2013 deals with the events of change in law as extracted below:

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

• The enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law.

• A change in the interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent Court of Law.

• The imposition of a requirement for obtaining any Consents, Clearances and Permits which was not required earlier.

• a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;

• Any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.

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

***10.3** Relief for Change in Law*
****
***10.3.2** During Operating Period*
The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

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

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

19. The terms "Law" and "Indian Governmental Instrumentality" have been defined in the PPA as under: -

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

"Indian Governmental Instrumentality shall mean the Government of India, Government of state(s) of Uttar Pradesh, New Delhi and Madhya Pradesh and any ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of Government of India or any of the above state government(s) or both, any political sub-division of any of them including any court or appropriate commission(s) or tribunal or judicial or quasi-judicial body in India but excluding the Seller and Procurers;"

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

"(a) Any enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law, or

(b) Any change in interpretation or application of any Law by an Indian Governmental Instrumentality having the legal power to interpret or apply such Law, or any Competent court of Law;

(c) Imposition of a requirement for obtaining any consents, clearances and permits which was not required earlier.

(d) Any change in the terms and conditions or inclusion of new terms and conditions prescribed for obtaining any consents, clearances and permits except due any default of the seller.

(e) Any change in the tax or introduction of any tax made applicable for supply of power by the Petitioner as per terms of the Agreement.

(f) Such Changes result in additional recurring and non-recurring expenditure by the seller or any income to the seller.

(g) The purpose of compensating the Party affected by such Change in Law is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such "Change in Law" has not occurred.

(h) The Petitioner shall provide to the Procurer and the Appropriate Commission documentary proof of such increase /decrease in cost of the Power Station or revenue/expense for establishing the impact of such Change in Law;

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

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

21. As per the above definition, law shall include (a) all laws, including electricity laws in force in India; (b) any statute, ordinance, regulation, notification, code, rule or their interpretation by Government of India, Government of AP, Tamil Nadu & Chhattisgarh or any Ministry, department, board, body corporate agency or other authority under such Governments; (c) all applicable rules, regulations, orders, notifications by a Government of India Instrumentality; and (d) all rules, regulations, decisions and orders of the Appropriate Commission. If any of these laws affect the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same can be considered as a 'change in law' to the extent it is contemplated under Article 10 of the PPA.

22. One of the conditions under Article 10.1.1 of the PPA is that the events should have occurred after the date, which is seven days prior to the bid deadline, resulting in any additional recurring/ non-recurring expenditure by the seller or any income to the seller. The bid deadline has been defined as "the last date and time for submission of the bid in response to the RfP." In terms of the TANGEDCO PPA, the bid deadline was 6.3.2013. Therefore, the cut-off date, for considering the claims of the Petitioner under a change in law is 27.2.2013, which is 7 days prior to the bid deadline.

23. In the instant case, we have to deal with two events, i.e., notification of NCDP,2013 and cancellation of coal blocks, which happened on dates subsequent to the bid cut-off date.

24. With respect to the notification of NCDP,2013, the Hon'ble Supreme Court, in its judgment dated 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016 (Energy Watchdog V CERC & ors) (in short,' the Energy Watchdog case') held that the modification of the New Coal Distribution Policy (NCDP) issued by the Ministry of Coal (MOC), GOI its letter dated 26.7.2013, amounts to a change in Indian law and would be covered by the 'change in law' clause in the PPA. The relevant portion of the said judgment dated 11.4.2017 is extracted below.

> *"57. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or license available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then Lie said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June 2013, which resulted in the letter of 31st July 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows:*
>
> *Xxx*

Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

25. With respect to the cancellation of coal blocks, APTEL vide its judgment dated 21.12.2018 in Appeal No.193 of 2017 & IA NO. 449 OF 2018 has held as under:

62.In terms of judgment of the Apex Court in Manohar Lal Sharma vs. The Principal Secretary &Ors, the Captive Coal Blocks came to be cancelled. Normative date of production of the coal block was 17-10-2013. This block was allowed to Appellant GKEL on 17-1- 2008. It is not in dispute that the delay in development of coal block was on account of Go-No-Go policy of the MoEF which was beyond the control of the developers. The same came to be recorded in the minutes of the meeting between Inter-Ministerial Group held on 7-7- 2015 to review issue of bank guarantee so also the letter dated 16- 1-2014 issued by the Ministry of Coal (Annexure A-24, page-620, Vol.III of the Appeal Paper Book). On account of the reasons beyond the control of GKEL operationalization of the Captive Coal Block was delayed.

63. In lieu of the Captive Coal Blocks tapering linkage was extended and subsequent cancellation of the coal block was intimated in terms of IA No. 449 of 2018 & Appeal No. 193 of 2017

Page 44 of 55 letter dated 16-1-2014 (Annexure A-13,

page 510 of Appeal Paper Book). MoU dated 2-7-2015 between MCL and GKEL (Annexure A-23, page 615, 616, 617 of Appeal Paper Book and Annexure-A27, Page 638 of Appeal Paper Book) indicate that tapering linkage was also extended. Since cancellation of coal block was on account of judgment of the Apex Court in 2014, event subsequent to cut-off date, this also amounts to change in law.

64. In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources.

26. In terms of above orders of Supreme Court and APTEL, both events i.e notification of NCDP,2013 and cancellation of coal blocks are also CIL events as both of them have occurred after the bid cut-off date i.e 27.2.2013, however, the Respondent has submitted that the reliance placed by the Petitioner on the judgments of the APTEL and the Hon'ble Supreme Court (as tabulated below) is not applicable to the facts in the present case, and therefore, the Petitioner cannot claim compensation on the basis of the cancellation of the coal blocks in terms of the judgment of the Hon'ble Supreme Court in Manohar Lal Sharma v Principal Secretary & ors (W. P. (Crl) No. 120/2012 & other batch cases.

Sr. No.	Judgment relied upon by Petitioner	Distinguishing features
1.	GMRKEL & anr v CERC & ors (Appeal No.193/017 dated 21.12.2018)	• GMR was a case of captive coal block allocation. Whereas no coal block has been allocated to the Petitioner. • GMR's bid was based on standing coal linkage committee allocation prior to the cut-off date as indicated in PPA. Whereas there was no linkage allocation to the Petitioner • It was found in GMR's case that the coal block was not developed on account of the Go-No-Go Policy of MoEF, and hence it was not the fault of GMR. No such reasons have been forthcoming in the present case.

2.	JVVNL vs AP(R)L (Civil Appeal No. 8625-8626 of 2019 dated 31.8.2020)	• This was a case of allocation of Captive Coal Block to Adani Power. • Bid was submitted based on the availability of captive coal block/long-term coal linkage. Here, the basis of the bid was the supply arrangements with GMDC and GIDC. • Linkage was applied for, prior to the bid deadline under NCDP 2007. No such application was made in the present case. • Linkage was granted in the year 2013 at the reduced quantity. Whereas only tapering linkage was granted to the Petitioner.
3.	APNRL vs WBSEDCL (Commission's order dated 5.10.2020 in Petition No. 305/MP/2015)	• Adhunik was allocated a captive coal block, and the basis of the bid was a captive coal block • Tapering linkage was allocated in favour of Adhunik at a reduced quantity in lieu of captive block, but the same was granted prior to the PPA date. • The claim of Adhunik pertains to seeking compensation to the extent of shortfall in tapering linkage granted to it pending operationalization of the captive coal block. Whereas the claim of the Petitioner is based on the shortfall of coal on account of MoU dated 13.7.2015.
4.	MSEDCL v AP (M) L & ors. (Civil Appeal No. 684/2021 dated 3.3.2023).	• The judgment of the Hon'ble Supreme Court pertains to the payment of compensation on account of the reduced quantum of allocation of coal under the NCDP 2013.
5	MSEDCL v MERC & ors (Appeal No. 354/2019 dated 5.10.2020	• Adani submitted its bid for the supply of 1320 MW power to MSEDCL, specifying Lohara coal blocks (captive coal mines) as the fuel source for part of the contracted capacity • Lohara coal block, coal linkage mines was allotted to Adani by CIL • The issue involved in this case was the determination of the change in law relief due to the cancellation of the said coal block
6	GMRWEL v CERC & ors (Civil Appeal No. 11095/2018 dated 20.4.2023	• The judgment of the Hon'ble Supreme Court pertains to compensation on account of the reduced quantum of coal allocation under the NCDP • This case pertains to the cancellation of captive coal blocks and inordinate delay on account of the GO-No-Go policy, which delayed the operationalization of coal mines of GMR.

27. Per contra, the Petitioner has clarified that the contention of the Respondent in seeking to distinguish the decisions of the APTEL and the Hon'ble Supreme Court is misconceived. Pointing out that GMDC/GIDC has been allotted the Morga-II coal blocks coal blocks by the Government of India, the Petitioner has stated that the

cancellation/termination of the CSAs by GMDC, coupled with the fact that the said cancellation was on account of the cancellation of coal blocks by the Hon'ble Supreme Court in *Manohar Lal Sharma case*, is itself a change in law event. It has also stated that upon the cancellation of the CSAs and the tapering linkage, the allocation of coal through MOU, at a premium, is on account of the said change in law. Accordingly, the Petitioner has submitted that it is entitled to consequential reliefs in terms of the PPA during the operation period for the alternate coal procured for the supply to the Respondent.

28. Before proceeding, we take note that the Hon'ble Supreme Court vide its judgment dated 25.8.2014 in W.P.(Crl) No.120/2012 & other connected matters (Manohar Lal Sharma V Principal Secretary & ors) held that the allotment of coal blocks made by Screening Committee of the Government of India, as also the allotments made through the Government dispensation route, are arbitrary and illegal. The relevant portion of the said judgment is extracted here under:

> *"154. To sum up, the entire allocation of coal block as per recommendations made by the Screening Committee from 14.07.1993 in 36 meetings and the allocation through the Government dispensation route suffers from the vice of arbitrariness and legal flaws... 155. The allocation of coal blocks through Government dispensation route, however laudable the object may be, also is illegal since it is impermissible as per the scheme of the CMN Act… 157. As we have already found that the allocations made, both under the Screening Committee route and the Government dispensation route, are arbitrary and illegal, what should be the consequences, is the issue which remains to be tackled. We are of the view that, to this limited extent, the matter requires further hearing…"*

29. Further, the Hon'ble Supreme Court vide its judgment dated 24.9.2014 in the above matter decided as under:

> *"39. In view of the submissions made, although we have quashed the allotment of 42 out of these 46 coal blocks, we make it clear that the cancellation will take effect only after six months from today, which is with effect from 31st March, 2015. This period of six months is being given since the learned Attorney General submitted that the Central Government and CIL would need some time to adjust to the changed situation and move forward. This period will also give adequate time to the coal block allottees to adjust and manage their affairs. That the CIL is inefficient and incapable of accepting the challenge, as submitted by learned counsel, is not an issue at all. The Central Government is confident, as submitted by the learned Attorney General, that the CIL can fill the void and take things forward..."*

30. The Commission, vide its order dated 8.12.2018 in Petition No. 179/MP/2016, held that the cancellation of coal blocks by the Hon'ble Supreme Court vide its judgment dated 25.8.2014, cannot be construed as a change in law, as it was an illegal and arbitrary action, quashed by the Hon'ble Supreme Court. The relevant portion of the order is extracted below"

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

31. On appeal, the APTEL vide its judgment dated 1.10.2022 in Appeal No.77/2019 remanded the matter to this Commission for fresh consideration, to examine the issue in the backdrop of the above decision of the Hon'ble Supreme Court and the decision of APTEL, as quoted at para 24 and para 25 above.

32. There is no dispute or difference between the parties on the fact that the APTEL and the Hon'ble Supreme Court, in its judgments in the matters (as referred to in the table under para 24 above), held that cancellation of coal blocks and NCDP 2013 is a change in law event vis-a-vis the NCDP, 2007and that the change in law compensation had been granted to the extent of shortage in the supply of domestic linkage coal. However, the Respondent has sought to differentiate/distinguish the said judgments on facts, to contend that these judgments are not applicable to the case of the Petitioner.

33. We have examined the rival contentions of the parties and examined the judgments referred to above. In the GMR case, we note that Petition No.112/MP/2015 was filed by it seeking the adjustment of tariff on account of the events of change in law, which include, amongst others, the shortfall of domestic linkage coal due to deviation from

NCDP 2007 & changes in the fuel supply agreements and the cancellation of coal block pursuant to the Supreme Court order being a change in law, during the operating period, the Commission vide its order dated 7.4.2017 disallowed the same. On an appeal (Appeal No.193/2017) filed by the Petitioner therein, the APTEL, vide its judgment dated 21.12.2018, allowed the aforesaid change in law events and remanded the matter to the Commission to pass consequential orders, which was later complied with.

34. The APTEL's judgment in the GMR case, holding that the cancellation of the coal block on account of the Hon'ble Supreme Court judgment dated 25.8.2014 being an event subsequent to the cut-off date, is a change in law, including the judgments in JVVNL, MSEDCL, and APNRL cases are squarely applicable to the present case of the Petitioner. Further, the reference made by the Respondent to the Commission's order dated 28.10.2019 in Petition No. 176/MP/2016 (KSKMPCL v AP discoms), rejecting the reliefs claimed by the Petitioner by distinguishing the facts in the GMR case, has not been considered, keeping in view that the present case is being considered in terms of the APTEL judgment in the GMR case.

35. We, therefore, in terms of the order of the Hon'ble Supreme Court quoted at para 24, hold that notification of NCDP, 2013 on 26.7.2013, i.e., after the bid cut-off date, which is 27.2.2013 replacing NCDP,2007, is an event of Change in Law for the Petitioner. However, the compensation to be allowed to the Petitioner for this CIL event is subject to consideration of the fact that whether the bid was finalized on the premises that the generating station was assured of 100% coal supply in terms of NCDP,2007 for the complete contract period of 30 years.

36. Further, in terms of the APTEL order quoted in para 25 above, We hold that the termination/cancellation of the Petitioners CSAs/tapering linkage FSAs, pursuant to the

judgment of the Hon'ble Supreme Court in the Manohar Lal case, is a change in law event for the instant case in hand also as coal block cancellation occurred on 25.8.2014 i.e. after the bid cut-off date which is 27.2.2013, and the Petitioner herein, is entitled to be compensated for meeting the additional expenditures involved between quoted ECR based on linkage coal, i.e., transfer price of coal from coal blocks envisaged at the time of bidding and the ECR based coal procured from alternate sources.

37. Having held that both notification of NCDP,2013 and cancellation of coal blocks are Change in Law events for the generating plant of the Petitioner, we proceed to finalize the compensation to restore the Petitioner to the same economic position which prevailed before these CILs.

Compensation for shortage of coal supply by virtue of NCDP, 2013/cancellation of coal block

38. In the year 2012-13, the Respondent, TANGEDCO, had initiated a process of competitive bidding for the procurement of electricity on a long-term basis, in terms of Section 63 of the Electricity Act, 2003. In the competitive bidding process, the Petitioner was selected as a successful bidder for the supply of 500 MW capacity of electricity from its generating station in the State of Chhattisgarh. Accordingly, a Letter of Intent was issued on 14.11.2013, and pursuant to this, the Petitioner and the Respondent executed a PPA on 27.11.2013. The main contention of the Respondent TANGEDCO is that in order to be entitled to claim the change in law compensation by virtue of the promulgation of NCDP 2013, the following conditions would have to be fulfilled by the Petitioner viz., (a) The bid ought to have been based on assurance of linkage under the NCDP, 2007 as the source of coal; (b) Linkage ought to have been granted to the bidder after the cut-of date, pursuant to the NCDP, 2013; and (c) By virtue of the promulgation of NCDP,

2013 the quantum of coal pursuant to the linkage so granted, stood reduced. Respondent has submitted that the Petitioner cannot claim to have been affected by a change in law by virtue of the promulgation of NCDP, 2013, for the following reasons:

(i) The details of the coal arrangement as submitted by the Petitioner during the bidding process, which was incorporated in Schedule 5 of the PPA, specifies the coal supply agreements with GMDC and GIDC as the source of coal, the Petitioner's bid was not based on any linkage under the NCDP, 2007;

(ii) No regular linkage was granted to the Petitioner at any stage after the cut-off date, and therefore, the contention of the Petitioner that it was affected by NCDP, 2013 is not sustainable.

(iii) The FSAs executed by SECL and ECL on 19.3.2014 and 12.8.2014 were expressly for the tapering linkage. It is evident from the FSAs that the Petitioner plant was approved for a grant of tapering linkage on the basis of the Morga-II coal block allotment made to GMDC.

(iv) GOI, in its Presidential directives, published the list of CIL-linked thermal power stations of the private sector targeted for commissioning between the period 2013-15, and this list does not refer to the Petitioner under the CIL linkage. Thus, it is evident that there was no linkage in favour of the Petitioner, as on the date of submission of the bid or issuance of the Presidential directives.

39. In addition, the Respondent, while pointing out that the terms of the tapering linkage that was granted to the Petitioner were in accordance with the policy prevailing at the time of the cut-off date, i.e., policy dated 26.2.2010, has submitted that it is not the case of the Petitioner that there was any variation from such policy, by virtue of the NCDP, 2013 and therefore, the claim for a change in law, on this count, is without merit.

40. Per contra, the Petitioner, while pointing out that it had entered into coal supply arrangements for the procurement of coal from GMDC and GIDC on 16.11.2006 and 10.2.2009, respectively, submitted that it also had a Letter of Assurance (LOA) dated 11.6.2009 for 7.491 MTPA of coal from SECL, based on the NCDP, 2007. It has also submitted that its RFQ and RFP are based on the coal linkage allocated to it by SECL in June 2009 (LOA) under NCDP 2007, including the CSA signed by it with GMDC / GIDC for the supply of coal from the coal blocks allocated to it. Stating that the bid was evaluated on the basis that fuel is to be sourced under domestic linkage (CSA /LOA), the

Petitioner has contended that based on the direction in NCDP 2013, the linkage (LOA) allocated to it under NCDP 2007, was converted to a tapering linkage, as the Petitioners plant was identified as the End-use plant for the above-said coal blocks. In fact, tapering linkage FSA clearly records that it is in lieu of the coal block from which coal is to be supplied to the Petitioner based on the above LOA. The Petitioner has added that though the tapering linkage policy provides for 100% of the normative coal requirement as per NCDP 2007, consequent to the Presidential directive and NCDP 2013, the MOC, GOI, through its directive dated 16.1.2014, directed the CIL and its subsidiaries to sign the FSAs for tapering linkage for the supply of domestic coal for the quantity, as indicated in the Presidential directive. Accordingly, the Petitioner has contended that it is entitled to the declaration of change in NCDP 2013 as a change in law event under the PPA, with consequential relief for compensation, with carrying cost as per the PPA.

41. We have examined the submissions. For arriving at any change in law compensation admissible to the affected party, firstly, we have to have the prevailing conditions, that existed at the time of the bid cut-off date based on which the bidder has finalized its bid. The Petitioner has contended that at the time of bid, it was armed with two CSAs with GMDC/GIDC coal blocks and one LOA dated 11.6.2009 issued by SECL for the supply of domestic coal to the tune of 7.49 MTPA of F grade coal per annum, as per the normative requirement of 1800 MW. It is noted that the said CSAs were valid for thirty years, and the said LOA was valid for two years and, as such, was not valid at the bid cut-off date, i.e., 27.2.2013. Further, scrutiny of Schedule-5 of the PPA dated 27.11.2013, where the fuel source envisaged for supply power to the Respondent has been registered, reveals that the Fuel indicated is domestic coal, which can mean domestic coal under CSAs and/or domestic coal under LOA. Further, it is indicated that

the duration of the fuel supply agreement shall be 30 years from the date of commencement of supply, which points out that it is referring to CSAs, which were for 30 years, and not to LOAs, which were not valid at the time of bid cut-off date. Further, scrutiny of Schedule 5 reveals that against the "Name of CIL subsidiary from which coal is proposed to be sourced," "Not applicable" has been mentioned, and against "Name and Location of the captive coal mine (as applicable)," the following has been indicated:

> "*However, coal supply agreements entered with M/s Goa Industrial Development Corporation and M/s Gujrat Mineral Development Corporation, State Government Undertaking/Companies who have been allocated coal blocks under the Government dispensation scheme by Ministry of Coal, Government of India"*

42. As such, the above entries registered in the PPA clearly bring out that the bid was prepared on the strength of CSAs with the coal blocks and not on the basis of the LOA, which, according to the Petitioner, was issued by SECL under NCDP, 2007 prevailing at the cut-off date. However, it is also a fact that on the cut-off date, i.e., NCDP 2007 was prevailing according to which the upcoming plants were assured of 100% coal towards normative requirement by signing of FSAs. Nevertheless, the non-mentioning of SECL as a source of coal in Schedule 5 of PPA makes it clear that the Petitioner has not quoted an energy charge rate in the bid, considering that it will get 100% coal at CIL notified price for the whole PPA period i.e.30 years. Accordingly, now the issues that arise are: "What was the transfer price of coal as per these CSAs based on which the energy charge rate was quoted by the Bidder? Was coal from these blocks to be transferred at CIL Notified price? To find answers to such questions, we have scrutinized the CSAs and find that Schedule-1 of the CSAs only specifies the methodology based on which final transfer price (in Rs./Ton) would evolve; as such, what was the assessment of the Petitioner of coal transfer price while quoting ECR in its bid based on Schedule-1 of CSA, is not clear. Sure enough, it cannot be the CIL notified price as the same has not been

mentioned in CSAs as the ceiling price. It is common knowledge that when any new mine developer engages in coal block development, the transfer price is always in excess of the CIL notified price. The observation that the Petitioner finalized its bid based on the transfer price of coal under Schedule-1 of CSAs, which was in excess of CIL notified price, is validated by scrutiny of the Financial Bid and Schedule 8 of PPA of the Petitioner with Respondent TANGEDCO according to which, the quoted non-escalable ECR is Rs.1.35 /Kwh, escalable ECR is Rs.0.495/kWH, and Rs.0.275/kWh is the escalable inland transportation charges for the year 2015-16 (totalling to Rs.2.12/kWh even without escalation of escalable ECR and escalable inland transportation charges) against ECR ranging from Rs.1.13/kWh to Rs.1.30/kWh based on Linkage price during the period from August 2015 to March 2016 (reference page annexure-I page 234 of consolidated petition). Further, it is observed from the calculation submitted by the Petitioner for the months of April 2015 to March 2016 that the ECR based on weighted price of coal received actually at the station from various sources, including coal from linked sources based on MoU @ of 67% of the normative requirement, imported coal and domestic open market, ranges from Rs.2.10/kWh to Rs.1.78/kWh as against the ECR of Rs.2.12/kWh (even without escalation of escalable ECR and escalable inland transportation charges) being received by the Petitioner during the year 2015-16, based on energy charges mentioned at Schedule-8 of PPA with TANGEDCO. As such, the Petitioner does not seem to be at a loss considering the fact that ECR based on the weighted average price of coal, including e-auction and imported coal actually received at the station, is less than the quoted ECR in the BID/PPA.

43. Accordingly, based on the above discussion, the claim of the Petitioner which denotes the {Units supplied to the Respondent x (ECR based on the weighted price of

coal received actually at the station from various sources including coal from linked sources based on MoU @ of 67% of the normative requirement, imported coal and domestic open market *minus* ECR based on Linkage coal price)}, is not admissible as the Petitioner has not quoted the ECR based on the price of linkage coal, i.e., transfer price of coal from coal blocks envisaged at the time of bidding.

44. In the absence of a coal transfer price from the linked coal blocks, as envisaged by the Petitioner, at the time of bidding, we are not inclined to allow the change in law claim impact as claimed by the Petitioner. (B) is disposed of in terms of the above.

45. Petition No. 179/MP/2016 is disposed of in terms of the above. With this, the directions of the APTEL in its judgment dated 11.10.22 in Appeal No. 77/2019 stand implemented.

Sd/	***Sd/***	***Sd/***
(Harish Dudani)	**(Ramesh Babu V)**	**(Jishnu Barua)**
Member	**Member**	**Chairperson**