CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No: 179/MP/2016

Coram:

Shri P.K.Pujari, Chairperson
Shri A.K. Singhal, Member
Dr. M.K. Iyer, Member

Date of Order: 8th October, 2018

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

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 Maligai, 6th Floor, Eastern Wing
144, Anna Salai, Chennai-600 002 ....**Respondent**

Parties present:

Shri Anand K. Ganesan, Advocate, KSKMCL
Shri A. Sreekanth, KSKMCL
Ms. Ranjitha Ramachandran, Advocate, Prayas
Shri G. Umapathy, Advocate, TANGEDCO
Shri S. Vallinayagam, Advocate, TANGEDCO

ORDER

KSK Mahanadi Power Company Limited (KSKMPCL) (hereinafter referred to as "the Petitioner"), a generating company as defined in Section 2 (28) of the Electricity Act, 2003 is in the process of establishing a 3600 MW coal based Thermal Power Project in District Akaltara of the State of Chhattisgarh, comprising of six generating

units with an installed capacity of 600 MW each (hereinafter referred to as "the Project"). Two units of the Project are under operation and the balance units are at various stages of the construction and commissioning. The date of commercial operation of the first unit is 13.8.2013 and the second Unit is 25.8.2014.

2. The Petitioner has entered into PPAs for supply of power from the generating station as follows:

(a) PPA dated 31.7.2012 between the Petitioner and the distribution licensees of the State of Andhra Pradesh.

(b) PPA dated 31.7.2012 between the Petitioner and the distribution licensees of the State of Telengana.

(c) PPA dated 27.11.2013 between the Petitioner and Tamil Nadu Generation and Distribution Corporation (TANGEDCO) ('Procurer') in the State of Tamil Nadu for supply of 500 MW. The Petitioner had commenced supply of 281 MW to TANGEDCO with effect from 1.8.2015 and the balance 219 MW with effect from 5.10.2015.

(d) PPA dated 18.10.2013 with the Government of Chhattisgarh for supply of *5% I* 7.5% of the net power (gross power generated minus the auxiliary consumption) under the host State obligations

(e) PPA dated 26.2.2014 between the Petitioner and the distribution licensees in the State of Uttar Pradesh.

3. In the present Petition, the Petitioner has sought adjustment of tariff on account of the events in change in law 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 due 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, GOI Notification dated 31.7.2013 stipulating the generators to source coal from alternate sources.

4. The Petitioner has submitted that the bid deadline was 6.3.2013 and any Change in law event after 27.2.2013 (seven days prior to the bid deadline) resulting in additional recurring or non-recurring expenditure incurred by the Petitioner falls within the ambit of change in law. Accordingly, the financial impact of change in law event during the operating period tabulated by the Petitioner vide affidavit dated 21.6.2017 for the years 2015-16 and 2016-17 are as under:

(amount in Rs)

Month	**2015-16**	**2016-17**
April	-	38,12,98,612
May June	-	25,16,11,379
June	-	23,82,46,833
July	-	30,05,45,119
August	19,40,61,708	45,55,52,611
September	16,70,00,238	32,23,24,594
October	28,66,99,934	24,39,08,633
November	20,48.82,327	21,43,34,562
December	18,98,61,512	27,41,67,646
January	11,23,86,484	46,34,68,675
February	10,45,28,623	49,04,49,513
March	14,60,21,198	56,35,86,040
Total	140,54,42,113	419,94,94,215

5. The Petitioner has submitted that the Change in law events have significant financial impact on the costs and revenue of the Petitioner during the Operating period for which the Petitioner is entitled to be compensated in terms of Article 10 of the TANGEDCO PPA. Accordingly, the Petitioner has filed the present Petition with the following prayers:

"(a) Hold and declare that the non-availability of the domestic coal from the coal linkage granted to the Petitioner and requiring the Petitioner to procure coal from the open market is on account of Change in Law in terms of Article 10 of the PPA.

(b) Hold and declare that the Respondents are liable to pay the Petitioner, for the additional costs incurred for purchase of coal at market prices over and above the Coal India Limited published prices for coal supply under coal linkage granted (to the extent of shortfall of linkage quantity) for the term of the PPA and Respondents to carry out necessary tariff adjustment to give effect to such economic impact.

(c) Direct the Respondents to receive and acknowledge the entire Supplementary Bills from the petitioner for the arrears of amounts finally allowed by this Hon'ble Commission towards change in law from the date of change in law notification till the date of final disposal of the present petition and issue necessary directions to the Respondents to pay such adjusted tariff in terms of the PPA.

(d) Restore the Petitioners to the same economic condition prior to occurrence of the Changes in Law by permitting the Petition and the amounts as per the computations set out in hereinabove or through a suitable mechanism to compensate the Petitioners as and when the financial impact of the Changes in Law arose.

(e) Direct the Respondent to pay pendent lite and future interest at the rate of 15% per annum on the amount payable on account of change in law..."

6. The Petition was admitted and notice was issued to the Respondent, TANGEDCO and M/s Prayas with directions to file their replies in the matter. Pursuant to the hearing of the Petition on 20.12.2017, the Petitioner was directed vide ROP to submit additional information on the following:

a) Copy of all the Fuel supply agreement entered with SECL/CIL for its coal based thermal generating station having 3600 MW installed capacity.

b) Date of commercial operation of the units which are under commercial operation.

c) Pro-rata contracted capacity for all the beneficiaries from the units/ capacity under commercial operation and date of commencement of power supply to various beneficiaries.

d) Actual date of supply of power to TANGEDCO.

e) Certificate from SECL/any other domestic coal company regarding availability of quantum of coal for despatch to KSK Mahanadi and actual supply of coal during the affected period starting from actual commencement of the supply of power to the respondents.

f) Soft copy of detailed calculation including linkage for arriving at the compensation claimed during 2015-16 and 2016-17.

g) Details of the operational parameters i.e. :-

*(i) **Station Heat Rate**:- Submit the Design Guaranteed Turbine cycle Heat Rate and Guaranteed Boiler efficiency along with design Temperature (Superheat & Reheat) and Pressure.*

*(ii) **Aux. Consumption**:- Submit the design guaranteed Auxiliary energy consumption and type of cooling system along with type of Boiler Feed pump.*

*(iii) **PLF/ normative availability**: As per the petition, PLF is 80%. However, PLF has been mentioned as 85% in the PPA. Submit the reason for variation in PLF.*

7. In terms of the directions of the Commission, the Petitioner has filed the additional information vide affidavit dated 12.1.2018. Thereafter, in terms of the directions of the Commission vide ROP of the hearing dated 30.1.2018, the Petitioner vide affidavit dated 17.2.2018 has filed the additional information. Reply to the Petition has been filed by the Respondent, TANGEDCO vide affidavit dated 17.1.2018

and M/s Prayas vide its affidavit dated 9.9.2017. The Petitioner has filed its rejoinder to the above replies vide separate affidavits dated 20.3.2018. The Commission after hearing the matter on 26.4.2018 reserved its order in the Petition, after directing the parties to file written submissions. In response, M/s Prayas (Prayas) vide affidavit dated 18.5.2018 and the Petitioner vide affidavit dated 4.6.2018 have filed their written submissions in the matter.

Maintainability

8. The Petitioner has submitted that it has a "composite scheme" for generation and sale of power to more than one State and hence the Commission has the jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as the 2003 Act) in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for Electricity (Tribunal) in Appeal No. 100 of 2013 (UHBVNL & anr V CERC & ors). In response to the directions of the Commission vide ROP of the hearing dated 20.12.2017 to furnish the status of the cases pending before the Hon'ble High Court of Judicature at Hyderabad, the Petitioner vide affidavit dated 12.1.2018 has submitted that it has not filed any writ petition or any other proceedings before the Hon'ble High Court or any other judicial forum on the issue of jurisdiction of the State Commission *vis-a-vis* the Central Commission. The Petitioner has further submitted that the issue of jurisdiction primarily arose in case of generators who are located in the erstwhile undivided State of Andhra Pradesh and supplying power to the distribution licensees in the said State. The Petitioner has submitted that its generating station is located in the State of Chhattisgarh and the PPA dated 31.7.2012 for supply of electricity to the distribution licensees of the undivided State of Andhra Pradesh, which pursuant to the bifurcation of the State had been divided to the distribution licensees to the States of Andhra

Pradesh and Telangana. The Petitioner has also stated that the PPA dated 31.7.2012 which the Petitioner had with the distribution licensees of the undivided State of Andhra Pradesh (which got bifurcated to new States of Telengana and Andhra Pradesh) had expired on 15.6.2016 and is no longer in existence. However, the Petitioner is presently supplying the entire power to the discoms of the new State of Andhra Pradesh pursuant to the extension of the PPA and no supply is made to the State of Telengana. The Petitioner has also clarified that it has not filed any Writ Petition or any other proceedings before the Hon'ble High Court for the States of Telangana and Andhra Pradesh in Hyderabad on the issue of jurisdiction of the State Commissions vis a vis the Central Commission and the matter before the Hon'ble High Court is on the issue of jurisdiction qua the generators who were within the then undivided State of Andhra Pradesh and their status under the provisions of the Andhra Pradesh Reorganization Act, 2014 for the State of Andhra Pradesh. Referring to the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog V CERC & ors the Petitioner has submitted that the supply of power by the Petitioner from the State of Chhattisgarh to the State of Andhra Pradesh and other States would involve inter-state supply and is within the exclusive jurisdiction of the Central Commission to adjudicate the dispute in the present Petition.

9. The Respondent, TANGEDCO in its reply affidavit dated 17.1.2018 has referred to the judgment of the Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Ltd V Tarini Infrastructure Ltd & ors (2016) 8 SCC 743 and has submitted that the tariff was adopted by the State Commission under Section 63 of the 2003 Act and hence the provisions of Section 79(1)(b) are not applicable to tariff adopted by the Commission under Section 86(1)(b) of the 2003 Act. Accordingly, the Respondent has submitted that the Petition filed by the Petitioner is not maintainable and the Petitioner is not

entitled to any of the reliefs prayed for in the Petition. In response, the Petitioner vide its rejoinder affidavit dated 20.3.2018 has submitted that the reliance on the said judgment of the Hon'ble Supreme Court by the Respondent is completely misplaced as it has been held that the tariff fixation in PPA is a statutory function performed by the State Electricity Regulatory Commission. The Petitioner has also submitted that the reliefs sought for in the present petition are not in conflict with the above decision in any way whatsoever. The Petitioner has further submitted that the reliefs sought for by the Petitioner are strictly in terms of the PPA and the power of the Commission to reopen the PPA is not in question at all. The Petitioner has reiterated that the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog V CERC & ors is squarely applicable to the present case.

10. The submissions have been examined. It is observed that Respondent, TANGEDCO had raised the issue of maintainability on similar grounds in Petition No. 170/MP/2016 (KSKMPCL v TANGEDCO) pertaining to compensation claim due to change in law events during the operating period in respect of TANGEDCO PPA and the Commission vide its order dated 31.5.2018 rejected the submissions of the respondent as under:

"11. The Hon'ble Supreme Court while interpreting the term „composite scheme" under Section 79(1)(b) of the 2003 Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one state, whose tariff has been adopted under Section 63 of the 2003 Act. In our considered view, the judgment of the Hon'ble Supreme Court in Tarini Infrastructure case" as referred to by the Respondent, TANGEDCO, is not applicable to the present case. In the said case, the Hon'ble Supreme Court had affirmed the judgment of the Tribunal holding that the State Commission has the power to re-determine of tariff of the distribution licensee incorporated in the PPA under Section 86(1)(b) of the 2003 Act. The Hon"ble Supreme Court had not discussed the jurisdiction of the State Commission vis-à-vis the Central Commission in the said case. In the light of the decision of the Hon'ble Supreme Court in Energy Watchdog case dealing with the jurisdiction of the Central Commission in case of composite scheme for supply of electricity to more than one State, we are of the view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79 (1) (b) of the 2003 Act and adjudicate the disputes raised in the present Petition. Merely because the State Commission had adopted the tariff under Section 63 of the 2003 Act or approved the PPA between the Petitioner and TANGEDCO does

not mean that jurisdiction shall be with the State Commission, since the Petitioner besides TANGEDCO, is supplying power to two other states and therefore satisfy the condition of composite scheme in terms of the Section 79 (1) (b) of the Act. The Petition is therefore maintainable."

Accordingly, in line with the above decision, we hold that the Petition is maintainable.

11. One more submission of the Respondent, TANGEDCO is that the claim of the Petitioner under Change in law requires the Petitioner to prove that the Change in law in fact affected the price per unit and that the unit price exceeds the price of electricity per unit quoted in the bid plus yearly escalation provided in the PPA plus the escalation indices of the Commission. It has also stated that when the generator establishes that it incurred loss even after the escalation provided in the escalation indices published by the Commission every six months, the generator is entitled to compensation for the Change in law situation. The Respondent has stated that the generator cannot as a matter of right claim new taxes, duties and levies under the category of 'compensation for Change in law'. The Respondent has submitted that in terms of the RfP, the tariff is an all-inclusive one and taxes or duties or levies or cess are covered under the RfP. Clause 2.4.1 (B) xi of the RfP provides as under:

"xi. The quoted Tariff, as in format 4.10, shall be an inclusive Tariff up to the Interconnection Point and no exclusions shall be allowed. The Bidder shall take into account all cost including capital and operating costs, statutory taxes, levies duties while quoting such Tariff. It shall also include any applicable transmission costs and transmission losses from the generation source up to the Interconnection Point. Availability of the inputs necessary for supply of power shall be ensured by the Seller and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the plant location must be reflected in the Quoted Tariff. Appropriate transmission charges from the Injection Point to the Delivery Point as per Format 5.10 shall be added for Bid evaluation process."

12. In response, the Petitioner in its rejoinder has submitted that the escalation indices of the Commission do not take into account any Change in law, but takes into account only a pattern or trend in changes of prices, and not any actual Change in law events. It has further submitted that the escalation index published by the

Commission does not take care of Change in law events and therefore the Petitioner is not put in the same economic position as if Change in law had not occurred. The Petitioner has stated that the CERC escalation indices are not attributable to the shortfall of coal as per the Presidential Directive. Accordingly, it has submitted that the submissions of the Respondent, TANGEDCO may be rejected.

13. The matter has been examined. It is noticed that the Respondent TANGEDCO had raised the above issue in Petition No. 170/MP/2016 and the Commission by order dated 31.5.2018 held as under:

"15. We have examined the submissions of the Petitioner and Respondent, TANGEDCO. The contention of the Respondent is that any increase in duties and levies are covered in escalation index issued by the Commission and therefore it cannot be allowed as Change in law. We are unable to accept this contention as such an interpretation will render the provisions of Change in Law in the PPA redundant. Moreover, the escalation indices notified by this Commission consider only the changes in basic price of fuel and basic railway freight rates and do not include any change in the rates of taxes, duties and cess. The respondents have further argued that as per RFP, the bidder is expected to take into account all cost within statutory taxes, levies, duties while quoting the tariff and since the quoted tariff includes taxes, duties and cess assumed at the time of bid, the successful bidder gets escalation on the taxes, duties and cess also. In our view such an approach, if accepted, will lead to reopening of the bid which is not permissible in terms of the judgment of the Appellate Tribunal dated 10.4.2017 in Appeal No. 161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 which is extracted as under:

"44. It is true that according to the provisions of the RFP, the quoted tariff shall be inclusive one including statutory taxes, duties and levies. But the PPA gives express right to an affected party to claim Change in Law if the event qualifies thus in terms of Article 13. The RFP cannot override this right if an event qualifies as a Change in Law. The Competitive Bidding Guidelines (Article 4.7 thereof has already been reproduced hereinabove) and the PPA have to be read together. If an event qualifies as a Change in Law event then the compensation must follow because otherwise Article 13 of the PPA will become redundant. But, this will of course depend on facts and circumstances of each case. Facts of each case will have to be carefully studied before granting such a relief. It is rightly pointed out that in Wardha Power Company Limited, this Tribunal has rejected the obligation of any escalable index or indexing of cost of fuel in order to determine the compensation due on account of Change in Law. Sasan will have to be compensated keeping the law in mind."

In line with the above decision, the objection of TANGEDCO on this ground is also rejected.

Analysis of issues on merit

14. After consideration of the submissions of the Petitioner, the Respondent, TANGEDCO and Prayas, the claim of the Petitioner has been dealt with as under:

(a) Whether the provisions of PPA dated 27.11.2013 with regard to notice have been complied with?

(b) What is the scope of change in law in the PPA dated 27.11.2013?

(c) Whether the compensation claimed is admissible under Change in law in the PPA dated 27.11.2013?

(d) Mechanism for processing and reimbursement of admitted claims under Change in law.

Issue No. 1: Whether the provisions of the PPA with regard to notice has been complied with?

15. The claims of the Petitioner in the present Petition pertain to the Change in Law events during the Operating period. Article 10.4 of the PPA is extracted 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 relief for such 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 the Procurer under this Article 10.4.2, even 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 Procurer contained herein shall be material.

Provided that in case the Seller has not provided such notice, the Procurer shall have the right to issue such notice to the Seller.

10.4.3 Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:

(a) the Change in Law; and
(b) the effects on the Seller.

16. The Petitioner has submitted that the Respondent, TANGEDCO was duly informed that the change in the New Coal Distribution Policy (NCDP) by the Ministry of Coal with effect from 26.7.2013 falls within the definition of change in law vide Notice No. TANGEDCO, CHN/NRKN/2500101/613 dated 12.7.2016. TANGEDCO had not raised any objections nor furnished any reply with regard to such notice of Change in law. Prayas

has submitted that the notice in change in law referred only to the amendment to the NCDP dated 26.7.2013 and the supply of coal at 65%, 67% and 75%. It has further submitted that there was no mention of cancellation of coal blocks (not claimed in the Petition) or termination of tapering linkage or the Policy dated 30.6.2015 (as claimed in the Petition). Prayas has pointed out to the order of the Commission dated 27.6.2016 in Petition No.419/MP/2014 and the Judgment of the Tribunal dated 3.6.2016 in Appeal No.97/2016 (Talwandi Saboo Power Ltd v PSPCL & ors) and has submitted that there cannot be any relief of force majeure. Accordingly, it has submitted that there cannot be any relief for change in law without appropriate notice. In response, the Petitioner has clarified that it had issued notices for change in law vide letter dated 12.7.2016 in accordance with the provisions of the PPA as soon as it arrived at a conclusion on the impact the change in law would have on the Petitioner.

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.

Issue No. 2: Scope of change in law in the PPA

18. The Petitioner has approached this Commission under Article 10 of the PPA read with section 79 of the 2003 Act for adjustment / compensation to offset the financial

/ commercial impact of change in law during the Operating period. Article 10 of the PPA dated 27.11.2013 deals with the events of Change in law and the same is extracted as under:

"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*
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***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 PPAs would reveal that the Commission has the jurisdiction to adjudicate upon the disputes between the Petitioner and the Respondents with regard to "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 under:

"(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 Cometent 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. "Law" has been defined under Article 1.1 of the PPA dated 27.11.2013 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".*

22. The term "Indian Governmental Instrumentality" is also defined in Article 1.1 as under:

> *"Indian Governmental Instrumentality" means the Government of India (GOI), Government of state of Tamilnadu, Chhattisgarh, Andhra Pradesh and any Ministry, department, board, authority, agency, corporation, commission under the direct or indirect control of GOI or any of the above state Government or both, any political sub-division of any of them including any court or Appropriate Commission or tribunal or judicial or quasi-judicial body in India but excluding the Seller and the Procurer."*

23. As per the above definition, law shall in 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 affects the cost of generation or revenue from the business of selling electricity by the seller to the procurers, the same can be considered as 'change in law' to the extent it is contemplated under Article 10 of the PPA.

Issue No.3: Whether the compensation claim is admissible under Change in Law in the PPA dated 27.11.2013?

24. One of the conditions of 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. 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 Change in law is 27.2.2013. Keeping in view the above, we proceed to deal with the claim of the Petitioner under Change in law, in respect of the TANGEDCO PPA.

Shortfall in linkage coal due to changes in New Coal Distribution Policy of the Ministry of Coal

25. The Petitioner has submitted that in the year 2012-13, the Respondent, TANGEDCO had initiated a process of competitive bidding for procurement of electricity on long term basis in terms of section 63 of the 2003 Act. In the competitive bidding process, the Petitioner was selected as successful bidder for supply of 500 MW capacity of electricity from its generating station in the State of Chhattisgarh. Accordingly, 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 Petitioner has also submitted the following:

(a) At the time of submission of the bid, the Petitioner enjoyed Coal Supply Agreements (CSA) with M/s Goa Industrial Corporation Limited (GIDC) and M/s Gujarat Mineral Development Corporation Limited (GMDC) for sourcing coal from the identified coal blocks allotted. The coal from GIDC was from Gare Palma-II coal block and the coal from GMDC was from Morga-II coal block which was allotted by the GoI. In view of the uncertainties in the coal block development, the GoI through CIL granted tapering coal linkage to the Petitioner for a total quantum of 7.491 MTPA. The said allocation was sufficient to cater to the total capacity of 1800 MW at 80% PLF. Accordingly, Letter of Assurance (LOA) dated 11.6.2009 was issued by SECL in favour of the Petitioner.

(b) In terms of Article 2.1.2.2 of the RfP, fuel was required to be specified as domestic or imported coal. Further, in case of domestic coal, the bidder was required to have made firm arrangement for the fuel required for the project to the extent of which the power is proposed to be supplied upto the normative availability. Accordingly, as per clause 2.1.2.2 of the RFP, the Petitioner has indicated the fuel source as domestic coal linkages. The said details were also appropriately communicated and the Petitioner had indicated the fuel sources as coal linkage domestic (F Grade).

(c) The grant of coal blocks to GIDC/GMDC (resultant fuel supply agreement with the Petitioner) as well as the grant of tapering coal linkage to the Petitioner is by the Government of India Instrumentalities. These were the agreed fuel supply sources for the Petitioner to generate electricity to the Respondent.

(d) Ministry of Coal (MOC), GOI, vide its office memorandum dated 26.7.2013, decided that fuel supply agreements will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of annual coal quantity for the remaining four years of the 12th plan for the power plants having normal linkages on account of non-availability of domestic coal. Vide the said office memorandum/ notification/ order MoC, GOI also decided that to meet its obligations under the fuel supply agreement of making available the balance quantity of coal, the Coal India Limited/CIL may import coal and supply the same to the willing power plants on cost plus basis. Alternatively, MoC in the said notice decided that power plants may also directly import coal themselves; in which case, the fuel supply obligations on part of CIL/SECL to the extent of import component would be deemed to have been discharged.

(e) By Presidential Directive dated 17.7.2013, the GOI amended the policy for supply of coal by the Coal India Limited/ subsidiaries including the cases where the tapering coal linkages had been granted. As per the coal policy as existing prior to 17.7.2013, there was no restriction or provision in regard to the nature of the Power Purchase Agreements to be entered into by persons to whom tapering linkages were granted.

(f) By the Presidential Directive dated 17.7.2013, coal to the extent of only 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th plan were to

be provided under the coal linkage and the balance would be required to be procured by way of import of coal. This was also a new condition imposed as against the earlier assurance and position that the coal to the extent of normative availability would be provided which would be the ACQ at the regulated price of CIL. By virtue of the condition imposed, a substantial portion of the coal linkage given would not be available at the regulated price but would be by way of imported coal at market prices.

(h) The Presidential directive dated 17.7.2013 restricting the supply of coal to 65%, 65%, 67% and 75% of the ACQ is clearly a Change in law from the position that was existing at the time of bidding. By virtue of the directive, the Petitioner has not received coal supply from the tapering coal linkage granted and has been constrained to purchase coal from the open market at the market prices as against CIL regulated price and therefore the economic consequence under the said directive dated 17.7.2013 need to be redressed by this Commission.

(i) Starting 1st July 2015, pursuant to Government of India directive dated 30.6.2015, the supplies under Tapering Linkage FSA were discontinued and coal supplies were based on MOU. The Petitioner continued to pass on the benefit of MOU coal supplies to the Respondent and only coal pricing with respect to the shortfall quantity claimed.

(j) Even post 30.6.2015, termination of coal supplies under tapering linkage and supplies thereafter under MOU until 30.6.2016, the supplies of coal by SECL has been to the extent of 65 % to 75% of the ACQ as stated in the said directive, based on the respective years of supply and the Petitioner continue to undertake uninterrupted supplies of power.

(k) The entire basis of the bid submitted namely based on availability of domestic coal under the policy of GOI at the domestic regulated coal price has changed by virtue of Presidential directive dated 17.7.2013 of the GOI. As per Article 10.5 of the PPA, the impact of such change should be computed from the date it affects the seller.

(m) The difference between the market price and the coal linkage price is the adverse financial impact on the Petitioner on account of the Change in law, which

is required to be compensated in terms of Article 10.2.1 of the PPA. The additional cost as aforesaid which had to be necessarily incurred by the Petitioner pursuant to the Government directives are liable to be reimbursed to the Petitioner, being change in law under Article 10 of the PPA.

(n) The Petitioner will be entitled to Carrying cost/ interest on all additional amounts incurred / paid till date on account of Change in law in terms of the judgment of the Tribunal in the case of M/s Wardha Power Company Limited v/s RIL & anr.

Reply of TANGEDCO

26. The Respondent, TANGEDCO in its reply dated 17.1.2018 has mainly submitted that the claim for additional cost on account of amendment of policy by Govt. of India by Presidential directive dated 17.7.2013 for supply of coal by CIL/subsidiaries are an additional financial burden on the consumers of the respondent. It has submitted that every enactment coming into operation or change in interpretation cannot become change in law for the purpose of increasing the cost of electricity fixed under the PPA following the provisions of the 2003 Act. The Respondent has further submitted that the Petitioner should have factored all the inputs necessary for supply of power and all charges involved in procuring the inputs. The Respondent has pointed out that the claim of the Petitioner citing change in law requires the Petitioner to prove that the change in law in fact affected the price per unit and that the unit price exceeds the price of electricity per unit quoted in the bid plus yearly escalation provided in the PPA plus the escalation indices of this Commission. Accordingly, the Respondent has prayed that the claim of the Petitioner may be rejected.

Reply of Prayas

27. Prayas vide its reply affidavit dated 9.9.2017 has submitted the following:

(a) The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy watchdog Case has granted relief of Change in law in respect of the change in policy of GOI by

NCDP in the availability of the domestic coal from the coal companies against the LOA or FSA. The Hon'ble Court had relied on letter dated 31.7.2013 of the MOP, GOI and the Tariff Policy 2016, which refers to reduced quantity or shortfall in quantity of domestic coal supplied by CIL vis-a-vis the assured quantity or quantity indicated in LOA/ FSA. Thus, if there is no LOA or FSA, there can be no Change in law.

(b) Though the address of the Power station in the LOA dated 11.6.2009 and the PPA are similar, the name of the company is different i.e. while LOA is in the name of Wardha Power Company Limited, the PPA has been executed by the Petitioner, KSKMPCL. The Petitioner has not given any explanation for the same.

(c) The LOA dated 11.6.2009 does not refer to any CSA or the factum of being a tapering linkage. Also, in the bid filed by the Petitioner, the reference to fuel is for 15.47 MTPA for the entire power station of 3600 MW which includes LOA of 7.491 MTPA as well as CSA with GIDC & GMDC. The Petitioner had also committed for sale of power of 450 MW to GIDC as per the CSA and 1094 MW (gross) supply to GUVNL. This indicates that the CSA was related to the above power supply and not for power supply to TANGEDCO.

(d) The total power station capacity is 3600 MW and the coal linkage is only for 1800 MW. The Petitioner is required to specify the PPAs for which concerned coal linkage / coal blocks were meant.

(e) The LOA dated 11.6.2009 was valid for a period of 24 months unless extended for 3 months and after which it shall stand annulled and the LOA provided for the execution of the FSA. The Petitioner has not indicated when the relevant milestones were executed. The Presidential Directive dated 17.7.2013 refers to execution of FSA with projects including tapering linkage, which are likely to be commissioned by 31.3.2015. The scheduled delivery date as per TANGEDCO PPA was 1.6.2014 and therefore the projected commissioning date was at least 1.6.2014. The Petitioner had commenced supply to TANGEDCO on 2.8.2015 and thus it is not clear if the delay in commencement of supply would mean the delay in completion of milestone as per LOA dated 11.6.2009 by the Petitioner or if the LOA was still valid. The consequence of non-execution of FSA is attributable to the Petitioner and the Petitioner cannot claim any Change in law in respect of shortage

of coal.

(f) The submission of the Petitioner that for non- availability of coal under the tapering linkage and from July, 2016, it had considered the total linkage coal received as 'zero' is contrary to the NCDP, 2013 and various letters, which provide for linkage coal at 65% to 75%. The Petitioner has not demonstrated any efforts made by it for continuation of the tapering linkage or applying for a firm linage or a coal block. The Petitioner has responsibility to arrange for fuel under the PPA.

(g) The Petitioner has not demonstrated the actual shortage of domestic coal, if any. Also, the policy discourse as well as trends in CIL production does not support the claim of shortage of coal. As per data published by CIL, 95% of the production target has been achieved in January, 2016 and the same has been 101% for SECL during April, 2015 to January, 2016.

(h) The following principles need to be applied for computing the impact, if any, of NCDP:

(i) The Presidential directive fixes the coal availability as 65%, 65%, 67% and 75% of ACQ as against supply of 7.491 MTPA at 85% assured quantum. Accordingly, the zone of consideration can only be the difference between 85% of the 7.491 MTPA and the actual quantum offered by SECL or the applicable NCDP stipulated percentage, whichever is higher.

(ii) If the quantum of coal required with reference to the GCV range stipulated in the LOA is higher than 85% of 7.491 MTPA, the Petitioner had the obligation to arrange at its cost and responsibility and the same cannot be considered for computing the effect of such directive under change in law.

(iii) If the quantum available is less than the applicable 65% to 75% of ACQ, it is for the petitioner to take up the matter with SECL as the same is on account of any directive or Change in law.

(iv) There is no prohibition in supplying coal more than the specified percentage if the coal is available with SECL. The question would be what did SECL offer or was it in position to supply above the percentage mentioned and upto 7.491 MTPA.

(i) For computation of the claim, first the quantum of coal, which is to be considered is to be calculated and thereafter the differential price to be considered is to be calculated.

(j) As per calculation of the Petitioner and LOA, 7.491 MTPA is sufficient for 1800 MW power plant. Therefore, the quantum of coal required for 500 MW is 2.08 MTPA which translates to 0.17 MT or 1733379 tonnes / month.

(k) The normative requirement of coal is based on 85% PLF of the plant and not 100% of the installed capacity. This was the situation even under the NCDP 2007 which was noted in 2013. Therefore, the shortage is to be seen vis-a-vis 85% PLF i.e. 1473372 tonnes/month.

(l) As regards computation of shortfall in quantum of coal, following is to be considered:

(i) If the quantum of coal requested is supplied, then there is no shortage and there can be no compensation. Even if the supply of coal is only 65% of the ACQ, if the request was for such quantum, the same cannot be considered as a shortage.

(ii) If the quantum of coal supplied is less than 65%, 67% or 75% of ACQ as the case may be, then the shortfall between the above percentage and the quantum supplied is a commercial bilateral issue between the generator and the coal company and not by virtue of the NCDP 2013 and therefore not on account of Change in law.

(iii) The quantum of coal required by the generator is to be considered based on actual generation subject to scheduled generation and on normative parameters of Auxiliary Consumption, Station Heat Rate and GCV. If the quantum of coal required by the generator was supplied, then there is no shortfall, even if the generator has sought for more quantum of coal.

(iv) Accordingly, the shortfall in quantum of coal is calculated as lower of (i), (ii) and (iii) above is only to be considered for compensation by the discoms. The quantum of coal cumulatively available (based on opening stock and coal received) with the generator is also to be considered.

(m) The formula for computation of shortfall quantum of coal is summarized as under:

Quantum of shortage at reference GCV =

{Minimum of (AQNPLF or QAPLF) - Maximum of (NCDP specified quantum or Actual offered quantum of coal)}

Where;

AQ_{NPLF}, refers to actual quantum of coal required for generation at normative PLF (80% or 85%) considered as assured quantum at reference GCV prior to NCDP or
QA_{PLF}, refers to quantum of coal required at the actual PLF achieved by the generator at reference GCV.

Rejoinder of Petitioner

28. The Petitioner in its rejoinder affidavit dated 20.3.2018 has clarified as under:

(a) In terms of the order dated 26.2.2010 of the Hon'ble Andhra Pradesh High Court, scheme of demerger was sanctioned, whereby KSKMPCL was demerged from Wardha Power Company Limited (presently Sai Wardha Power Generation limited) with effect from 31.3.2010. Therefore, the LOA is in the name of Wardha Power Company Limited and the PPA was executed with the Petitioner. KSKMPCL on 27.11.2013 i.e. after the demerger.

(b) The LOA dated 11.6.2009 was given on tapering basis based on the recommendations of Standing Linkage Committee (long term), Ministry of Coal. The Petitioner has enclosed all PPAs and FSAs entered into by the Petitioner and relies on the same.

(c) Even though the Petitioner was to supply 450 MW and 1094 MW to GIDC and GUVNL respectively, the coal blocks of GIDC and GUVNL had sufficient coal to generate 3600 MW from which supplies to TANGEDCO was envisaged. The tapering linkage provided was not particularly assigned against the coal block, but to meet the Petitioner's requirement for the interim period between the commercial date of operation and the commercial operation of coal block.

(d) The bid due date was 27.2.2013 which was prior to the Presidential directive dated 17.7.2013 and hence the Petitioner is covered under the Change in law claim for the same. Irrespective of the delay in commissioning of the power project, the Petitioner is entitled to Change in law since the same is in terms of the PPA.

(e) The coal linkage for power projects was given only to long term PPA. Tapering linkage has been cancelled post cancellation of coal block by the Supreme Court as the main reason is to bridge the gap between commercial operation and actual coal supplies from block. The Petitioner has in fact taken efforts for linkage of coal by

participating in the Shakti Scheme issued by the MOP, GOI. All details pertaining to the actual shortage of coal has been submitted to the Commission and the Respondent.

(f) Petitioner has claimed shortage of coal with the actual data and proper assessment and the relevant documents have been submitted to the Commission regarding the claim for shortfall. As regards compensation, this Commission had already decided the principles in its order pertaining to GMR and DB Power and the same may be applied.

(g) The PPA recognizes the fact that the changes in law subsequent to the cut-off date cannot be foreseen and has to be compensated for. The PPA also provides for certain circumstances under which the Petitioner would be entitled for an adjustment in tariff.

(h) Whether the Petitioner is incurring a loss or not is irrelevant for the purpose of deciding whether a particular event falls under change in law in terms of the PPA. The principle of restoration demands that the Petitioner be put back in the same economic posit as on the cut-of date. The Petitioner had already submitted relevant documents for the same. Therefore the change in law affecting the cost for supply of power has to be compensated for.

29. The learned counsels for the Petitioner and Prayas have reiterated their submissions made in the Petition and the reply filed by them. Also, the written submissions filed by these parties are mainly on the lines argued during the hearing. We now examine the claim of the Petitioner for change in law due to shortfall of coal as stated in the subsequent paragraphs.

Analysis & Decision

30. Before proceeding, we take note of the objection of Prayas as regards the difference in the name of the Petitioner Company in the LOA dated 11.6.2009 and the PPA dated 27.11.2013, though the address of the power station are similar. The Petitioner has clarified that though the LOA was entered into by Wardha Power

Company, pursuant to the sanction of the Scheme for Arrangement by the Hon'ble High Court of Andhra Pradesh on 26.2.2010, the Petitioner Company was demerged from Wardha Power Company Ltd with effect from 31.3.2010. Accordingly, the Petitioner has pointed out that the PPA entered into with TANGEDCO on 27.11.2013 was after the demerger.

31. The matter has been examined. It is noticed that the Board of Directors of Wardha Power Company Ltd (Transferor Company) and the Petitioner Company KSKMPCL (Transferee Company) in their respective meetings held on 16.9.2009 had approved a Scheme of Arrangement for demerger of the power project of the Transferor Company into the Transferee Company, subject to the approval of the shareholders and confirmation by the Court. After approval of the said scheme by the shareholders and based on Company petitions filed, the Hon'ble High Court of Andhra Pradesh vide its order dated 26.2.2010 had sanctioned the said Scheme of Arrangement. Thus, the difference in the name is only on account of the fact that while the LOA dated 11.6.2009 was entered into by Wardha Power Company Ltd with CIL prior to its demerger, the PPA dated 27.11.2013 was entered into by the Petitioner Company with TANGEDCO pursuant to the said demerger with effect from 31.3.2010. With this clarification, the objections of Prayas stands disposed of.

32. One more contention of Prayas is that the notice for change in law as per Article 10.4.2 of PPA issued by the Petitioner on 12.7.2016 referred only to the amendment to NCDP dated 26.7.2013 and the supply of coal being at 65%, 65%, 67% and 75% of ACQ during the last four years of the 12th plan period. Prayas has submitted that there was no mention of cancellation of coal block or termination of tapering linkage or the policy dated 30.6.2015. Prayas has pointed out that the Petitioner has not claimed any relief on the alleged de-allocation or cancellation of coal blocks / CSA in the Petition.

In response, the Petitioner has clarified that its claim under Change in law is with regard to domestic coal and coal linkage with GMDC & GIDC, which is a source of coal indicated by the Petitioner in the bid document.

33. The matter has been examined. The Petitioner has stated that the Presidential Directive dated 17.7.2013 restricting the supply of coal to 65%, 65%, 67% and 75% of ACQ during the last four years of the 12th plan period is change in law from the position that was existing at the time of bidding. The Petitioner was granted tapering linkage till the supply of coal from the linkage mine and the Petitioner entered into FSA with SECL and ECL on 19.3.2014 and 12.8.2014 respectively. After change in NCDP on 26.7.2013 and issue of MOP letter dated 31.7.2013, the Petitioner, after a period of three years, has given a notice for change in NCDP, which cannot be considered as a reasonable time in terms of the ~~said~~ Article 10.4.2 of the PPA. Therefore, the requirement of notice for claiming Change in law has not been satisfied in the present case.

34. As regards the claim of the Petitioner for compensation due to short supply of coal by CIL under Change in law in terms of the NCDP, 2013, the case of the Petitioner is that the linkage coal to the Petitioner was reduced by NCDP, 2013 and the Petitioner started receiving only part of the total required quantity from SECL for the purpose of supply of power to the Respondent, TANGEDCO under the PPA dated 27.11.2013. According to the Petitioner, due to the reduced supply of the quantum of linkage coal, it was constrained to purchase coal from open market at the market prices as against the CIL regulated price. The chronological dates and events in respect of claim of the Petitioner are as under:

Sl. No.	Events	Date
1	NCDP issued by MoC, GOI	18.10.2007
2	CSA with GMDC	16.11.2006
3	CSA with GIDC	10.2.2009
4	LOA by CIL/SECL (tapering linkage)	11.6.2009
5	Cut-off date for TANGEDCO bid	27.2.2013
6	Last date for TANGEDCO bid submission	6.3.2013
7	Presidential Directive	17.7.2013
8	Amendment in NCDP by MoC, GOI	26.7.2013
9	MOP, GOI Notification	31.7.2013
10	PPA executed with TANGEDCO	27.11.2013
11	FSA with SECL (based on LOA dated 11.6.2009)	19.3.2014
12	FSA with ECL (based on LOA dated 11.6.2009)	12.8.2014
13	Memorandum of MOC, GOI	30.6.2015
14	MOU signed between Petitioner and SECL	13.7.2015
15	Actual date of supply of power to TANGEDCO	**2.8.2015** (281 MW)
		15.10.2015 (219 MW)

35. 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) has held that the modification of the New Coal Distribution Policy (NCDP) issued by the Ministry of Coal, Government of India vide its letter dated 26.7.2013 amounts to 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 as under:

"53. 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 licence 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

Both the letter dated 31st July, 2013 and the revised tariff policy is 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."

36. In the light of above judgment, it needs to be considered whether the claim of the Petitioner is admissible under change in law and the extent to which the Petitioner was affected on account of non-availability /short supply of the linkage coal and the relief, if any, to be given for such shortfall determined as per Article 10.2 of the PPA.

37. The New Coal Distribution Policy was notified by Government of India on 18.10.2007. Para 2.2 and 7.2 of the NCDP, 2007 provided as under:

> "2.2 Power Utilities including Independent Power Producers (IPPs)/Captive Power Plants(CPPs) and Fertilizer Sector 100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future requirements would also be covered accordingly.
>
> 7.2 The FSAs would cover 100% of normative coal requirements of the Power Utilities, including Independent Power Producers (IPPs) and Captive Power Plants (CPPs), Fertilizer units and 75% of normative coal requirement of other consumers."

38. Thus, in terms of the above, CIL or its subsidiaries were responsible for supply of 100% of the fuel quantity to all the IPPs including the Petitioner. NCDP, 2007 further provided that in order to meet the shortfall in domestic requirement of coal, CIL might have to import coal as per the requirement from time to time, if feasible and would adjust the overall price of coal accordingly. Thus, under the NCDP, 2007 it became the responsibility of CIL or its subsidiaries to meet full requirement of coal under FSA even by resorting to imports, if necessary to the extent of shortfall.

39. Pursuant to the allocation of coal blocks by the Government of India to Gujarat Mineral Development Corporation (GMDC) and Goa Industrial Development

Corporation (GIDC), the Petitioner entered into (i) Coal Supply Agreements (CSA) with GMDC on 16.11.2006 (with amendments dated 21.4.2007, 31.8.2007 and 4.7.2009) for supply of adequate quantity of coal from Morga-II Coal block required to generate 1750 MW and (ii) CSA with GIDC on 10.2.2009 for supply of an aggregate quantity of 9 MTPA of coal for 1800 MW capacity. Both the CSAs were valid for a period of 30 months from the date of commencement of supply. As per CSA with GMDC, amended on 21.4.2007, the Petitioner is to make available to GMDC a total of 1010 MW of power out of the 1750 MW proposed to be generated. At the option of GMDC, the entire power shall be made available to the discom GUVNL and thereafter meet the demand, if any, from the host state. Similarly, in terms of the CSA dated 10.2.2009, GIDC shall be entitled to off take 15% of the actual power generated or 240 MW which ever is higher after meeting the host state obligations. However, due to uncertainties in the development of the above coal blocks, the Petitioner had applied to the MOC, GOI seeking short-term tapering coal linkage from CIL. Thereafter, the Standing Linkage Committee (Long-Term) (SLC-LT) under the MOC, GOI vide its meeting dated 12.11.2008 approved the issuance of LOA for tapering linkage to the Petitioner for a capacity of 1800 MW. Subsequently, SECL (a subsidiary of CIL) issued LOA for tapering coal linkage for 1800 MW capacity to the Petitioner on 11.6.2009 for 7.49 MTPA of F grade coal per annum as per normative requirement of the plant. The LOA was valid for a period of 24 months and FSA was to be signed within 3 months from the expiry of validity of LOA.

40. Some of the conditions in the LOA dated 11.6.2009 are extracted hereunder:

> "1. Scope of Assurance
> 1.1 **Quantity, Grade and Source of coal**
>
> Subject to the Assured fulfilling the obligations in accordance with clause 2 to the satisfaction of the Assurer within the validity period of this LOA and the signing of the Fuel Supply Agreement (FSA) within three months thereafter, the Assurer shall endeavor to supply, as per the normative requirement of the Plant **7491000 tonnes per annum**

(mtpa) **of F grade coal to the Assured** , which shall be subject to review and assessment by the Assurer of the actual coal requirement of the Assured as well as incremental availability of coal from the mines of the Assurer and of imported coal. It is expressly clarified that in the event that the incremental coal supplies available with Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro rata basis and the balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.

xxx

4. Validity of LOA

The LOA shall remain valid for a period of twenty-four (24) months from the date of issue of this LOA unless extended for three (3) months in accordance with Clause 3.5 hereof and shall stand annulled upon expiry of such period."

41. It is therefore evident that the LOA stipulates that "in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis." Thus, the LOA which were issued in pursuance to the NCDP, 2007 clearly provide that in the event of shortage of coal, the requirement shall be met through import of coal. Therefore, meeting part of the coal requirement through import has been provided in NCDP, 2007 and has been reiterated through the LOA issued in favour of the Petitioner.

42. Under Case 1 bidding, it is the responsibility of the project developer to arrange for coal and the project developer is merely required to indicate the coal linkage in its bid in support of it being a serious bidder to supply power on sustained basis. The procurer does not take any responsibility in so far as fuel is concerned. Pursuant to the LOA dated 11.6.2009, the Petitioner participated in the Case 1 bidding process of TANGEDCO and had premised its bid on the aforesaid linkages.

43. In the meantime, on account of inability of the CIL to meet the requirement of coal of power sector in respect of the projects likely to be commissioned by 31.3.2015, it was decided by the Cabinet Committee on Economic Affairs (CCEA) that FSAs would be signed for domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining 4 years of 12th Five Year Plan and the balance FSA obligations would be met by import of coal by CIL or the IPPs themselves as per the guidelines issued by MOC. Relevant provisions of the decision of CCEA as conveyed vide letter dated 21.6.2013 are extracted as under:

> " (i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW, including cases of tapering linkage, which are likely to be commissioned by31.3.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.
>
> (ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 67 percentage and 75 percentage of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan.
>
> (iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPP s) on cost plus basis. IPPs may also import coal themselves, MoC to issue suitable instructions.
>
> (iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.
>
> (v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.3.2015, having long term PPAs and a high Bank exposure and without effecting the above decision."

44. The Petitioner had entered into PPA with TANGEDCO on 27.11.2013. As per Schedule 5 of the TANGEDCO PPA the primary source of coal was domestic coal and the fuel source indicated was CIL linkage. In furtherance to the LOA dated 11.6.2009, as per the CCEA decision, the Petitioner entered into the Fuel Supply Agreements (FSA) with SECL on 19.3.2014 for 100% LOA quantity of 4.99 MTPA for 1200 MW capacity, upto the normative date of production. Subsequently, FSA was executed by

the Petitioner with ECL on 12.8.2014 for an LOA quantity of 1.76 MTPA for 600 MW capacity.

45. The Petitioner has submitted that by the time the FSAs dated 19.3.2014 and 12.8.2014 were executed with the CIL/ subsidiaries in furtherance of the LOA dated 11.6.2009, NCDP, 2007 was amended resulting in NCDP, 2013, after the bid deadline, and the quantum of supply was greatly reduced. This according to the Petitioner constitutes a change in law event.

46. In terms of clause 4.1.1, the said FSAs provides for the Annual Contracted Quantity (ACQ) as under:

> **FSA dated 19.3.2014**
>
> "4.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser till the normative date of production or the actual date of production, whichever is earlier, shall be…..lakh tonnes (against the LOA quantity of 49,94,000 Tonnes) per year from the Seller's mines and/or from import, as per Schedule I. After the Normative date of Production or the actual date of production, the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) i.e last year of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal/CCO as mentioned in Annexure-A and Schedule-I..
>
> **FSA dated 12.8.2014**
>
> "4.1.1 The Annual Contracted Quantity of coal agreed to be supplied by the Seller and undertaken to be purchased by the Purchaser till the normative date of production or the actual date of production, whichever is earlier, shall be…..lakh tonnes (against the part LOA quantity transfer of 17.63 lakh Tonnes) per year from the Seller's mines and/or from import, as per Schedule I. After the Normative date of Production or the actual date of production, the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) i.e last year of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal/CCO as mentioned in Annexure-A and Schedule-I.."

47. Para 4.3 of the FSAs provides that in case the Seller is not in a position to supply the scheduled quantity of coal from the sources indicated, the seller shall have the balance quantity of coal through import which shall not exceed 15% of the ACQ in the year 2012-13, 2013-14 and 2014-15, 10% of the ACQ in the year 2015-16 and 5% of the ACQ for the year 2016-17 and onwards.

48. The tapering linkage sought by the Petitioner for Units I to III of the project was against the coal mines of GIDC and GMDC. While the coal linkage assured in LOA dated 11.6.2009 corresponding to 1800 MW was 7.491 MTPA, the coal linkage assured in FSA dated 19.3.2014 with SECL corresponding to 1200 MW was 4.994 MTPA and in FSA dated 12.8.2014 with ECL was 1.763 MTPA corresponding to 600 MW. As mentioned above, clause 4.1.1 of the FSAs dated 19.3.2014 and 12.8.2014 provided that the ACQ shall taper to 75% of the ACQ in the first 12 months (1st year), then to 50% of the ACQ in the next 12 months (2nd year) and 25% of the ACQ in the next 12 months (3rd year) of the tapering linkage period subject to the ceiling of quantities approved by the Ministry of Coal, after the Normative date of Production or the actual date of production. It is noticed that the captive mines of GMDC & GIDC had not been developed.

49. However, it is noticed that only two Units of the project corresponding to 1200 MW have been completed and the actual power supply to Respondent TANGEDCO has been effected only from 2.8.2015. Further, it is observed that the captive mines of GMDC & GIDC on which basis tapering linkage was sought and obtained have not been developed. As the petitioner did not develop the mines and the power supply to the Respondent started only from 2.8.2015, the petitioner is not entitled for any compensation.

50. The Petitioner has submitted that a further change in law had occurred pursuant to the orders of the Hon'ble Supreme Court. It has submitted that the CSAs with GMDC & GIDC and the tapering linkage dated 11.6.2009 were terminated by SECL in July, 2015 on the premise that coal blocks do not exist. The matter has been considered. 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) had 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 hereunder:

> *"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…"*

51. 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..."*

52. Since allocation of coal blocks based on recommendations 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 Petitioner's CSAs with GMDC & 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.

53. The Petitioner has further submitted that post termination of tapering linkage FSA, coal supplies were made under an MOU till 30.6.2016 with a condition that coal

will be supplied upto the percentages mentioned in the Presidential directive dated 17.7.2013 on 'best effort basis'. The Petitioner has submitted that it conveyed its willingness to avail coal supplies for its plant till 31.3.2016 or until a policy was formulated by MOC, GOI, whichever is earlier and entered into an MOU with SECL on 13.7.2015 and the coal received under the MOU was utilized to start power supplies to TANGEDCO from 2.8.2015 onwards. Accordingly, the Petitioner has submitted that it is entitled to be compensated for shortage of coal supply for the period from the date of supply of power to TANGEDCO (2.8.2015) till 30.6.2016 as change in law event in terms of Article 10 of the PPA dated 27.11.2013.

54. The terms and conditions under the said MOU dated 13.7.2015 are as under:

> "8. Therefore it is hereby agreed for supplying/lifting of coal as per the following terms and conditions:
>
> (i) Only upto 67% of the LOA quantity would be supplied on 'best effort basis' as per the level prevailing as on 30.6.2015 and Sellers decision regarding computation of eligible quantity would be final and binding
>
> (ii) Period of booking/lifting of coal shall be from 1.7.2015 upto 31.3.2016 or until a policy is formulated by MOC, whichever is earlier
>
> (iii) The 67% of total LOA quantity is 3345980 TPA. Thus, the quantities are to be supplied on pro rata basis from 1.7.2015 to 31.3.2016 or until a policy is formulated by MOC, whichever is earlier, with the following terms and conditions

Pro rata quantity from 1.7.2015 to 31.3.2016 (Tonnes)	Mode	Grade	Size	Source coalfield
2514056	Rail	All grades including higher grades (G3/G4) as available	Steam/Slack /ROM/Sized ROM	Any source/ Coalfield of Seller

> (iv) Price would be charged on 'add-on' basis as per level prevailing as on 30.6.2015 and supplies will be against 100% Advance Payment only.
>
> (v) xxxx

55. The MOC, GOI vide letter dated 13.4.2016 and CIL vide letter dated 18.4.2016, in order to ensure that there was no disruption in coal availability to the plants,

including the project of the Petitioner whose MOU expired on 31.3.2016, inter-alia extended the validity of the said MOUs upto 30.6.2016, in order to facilitate the smooth transition to e-auction of CIL. These MOUs were accordingly extended upto 30.6.2016 with the following terms and conditions.

(i) The submission of application for availing the coal supplies shall be construed as mutual acceptance of extension of MOUs dated 13.7.2015 upto 30.6.2016 with the terms and conditions mentioned in the said MOUs along with additional clauses mentioned at point No.(ii), (ii) & (iv) of this notice

(ii) The quantity and price (Add-on) including any price revision as applicable would be at the level prevailing as on 31.3.2016. Sellers decision regarding computation of eligible quantity would be final and binding

(iii) The terms and conditions of the Affidavits/documents etc submitted by the Purchaser for signing of aforesaid MOU dated 13.7.2015 shall also be applicable mutatis-mutandis for availing the coal supplies upto 30.6.2016..."

(iv) xxxxxx

56. The matter has been considered. The directions of MOC, GOI vide its Office Memorandum dated 30.6.2015, is as under:

"2. To address immediate issue of supply of coal to the power plants already commissioned or to be commissioned in 2015-16 in a transparent manner and objective manner, the following decisions are taken:

(i) Pre-commissioned plants (capacity 65185 MW) and post-2009 plants as per CCEA approved dated 21.6.2013 TPPs capacity of 60000 MW (corrected to 59113 MW) and TPPs with 7000 MW (revised to 6796 MW) will continue to be governed by the CCEA decision dated 21.6.2013

(ii) Consequent to the cancellation of coal blocks by Hon'ble Supreme Court, the 24 power units of 9840 MW capacity (that is part of 78000 MW) approved by CCEA cease to be entitled to tapering linkage. In order to ensure that there is no disruption in the present power generation arrangements for these plants, coal may be supplied to such plants through a separate MOU route till 31.3.2016 or until a policy is formulated, whichever is earlier, as many plants are already commissioned or to be commissioned in 2015-16 and have long term PPAs. The quantity and the price would be as per the level prevailing as on 30.6.2015…

(iii) xxx.."

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.

58. Petition No.179/MP/2016 is disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***
(Dr. M.K. Iyer)	**(A.K.Singhal)**	**(P.K.Pujari)**
Member	**Member**	**Chairperson**