CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 21/MP/2013 and
Petition No. 390/MP/2018

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

Date of Order: 3rd of September, 2019

Petition No. 21/MP/2013

In the matter of:

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 13 and 17 of the Power Purchase Agreement dated 7.8.2007 executed between Sasan Power Limited and the Procurers for compensation due to "Change in Law" during the Construction Period.

Petition No. 390/MP/2018

In the matter of

Petition for computation of compensation pursuant to APTEL judgment dated 20.11.2018 in Appeal No. 121/2015.

And
In the matter of

Sasan Power Limited
C/o Reliance Power Limited
Reliance Energy Centre, Santa Cruz East Mumbai **…Petitioner**

Vs.

1. MP Power Management Company Limited
Shakti Bhawan Jabalpur-482008, Madhya Pradesh

2. Paschimanchal Vidyut Vitran Nigam Limited
Victoria Park Meerut-250001, Uttar Pradesh

3. Purvanchal Vidyut Vitran Nigam Limited
Hydel Colony, Bhikaripur Post-DLW, Varanasi-221004, Uttar Pradesh

4. Madhyanchal Vidyut Vitran Nigam Limited
4A-Gokhale Marg
Lucknow-226001, Uttar Pradesh

5. Dakshinanchal Vidyut Vitran Nigam Limited
220 kV Vidyut Sub- Station
Mathura Agra By- Pass Road Sikandara, Agra-282007, Uttar Pradesh

6. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House
Ajmer-305001, Rajasthan

7. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jaipur-302005, Rajasthan

8. Jodhpur Vidyut Vitran Nigam Limited
New Power House Industrial Area, Jodhpur-342003, Rajasthan

9. Tata Power Delhi Distribution Limited
Grid Sub- Station Building,
Hudson Lines, Kingsway Camp,
New Delhi-110009

10. BSES Rajdhani Power Limited
BSES Bhawan,
Nehru Place, New Delhi-110019

11. BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma, Delhi-110096

12. Punjab State Power Corporation Limited
The Mall Patiala-147001, Punjab

13. Haryana Power Purchase Centre
Room No.239, Shakti Bhawan, Sector 6, Panchkula-134109, Haryana

14. Uttarakhand Power Corporation Limited
Urja Bhawan Kanwali
Road Dehradun-248001, Uttarakhand

Parties Present:

Shri Sajan Poovayya, Senior Advocate, SPL
Shri Vishrov Mukherjee, Advocate, SPL
Shri M. Janmali, Advocate, SPL
Shri Pratibhanu, Advocate, SPL
Shri Yashaswi Kant, Advocate, SPL
Shri Abhimanyu Das, SPL
Shri G. Umapathy, Advocate, MPPMCL

Shri Aditya Singh, Advocate, MPPMCL
Shri Ravi Sharma, Advocate, MPPMCL
Shri Alok Shankar, Advocate, TPDDL
Shri Mahip Singh, Advocate, TPDDL
Ms. Anushree Bardhan, Advocate, Rajasthan & Haryana Discoms
Ms. Tanya Sareen, Advocate, Rajasthan & Haryana Discoms
Shri Anand. K. Ganesan, Advocate, PSPCL
Shri Nitin Kala, Advocate, TPDDL
Shri Sanjay Okhade, MPPMCL

ORDER

The Petitioner, Sasan Power Ltd. (SPL), has filed the present Petition in pursuance of the matter remanded by the Appellate Tribunal for Electricity (Appellate Tribunal) vide its judgment dated 20.11.2018 in Appeal No. 121 of 2015 for computation of compensation including change in law claims during the construction period.

Background of the case

2. The Petitioner had filed the Petition No. 21/MP/2013 under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 and Article 13 of the PPA read with Article 17 of the PPA read with Paragraph 5.17 of the Competitive Bidding Guidelines claiming compensation the following "Change in Law" events that occurred during the construction period of the project:

(a) Increase in declared price of land for the project which includes the land for the Power Station, the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(b) Increase in cost of implementation of Resettlement & Rehabilitation Plan (R&R Plan) for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(c) Increase in cost of Geological Reports for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(d) Increase in cost of compensatory afforestation for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks;

(e) Increase in cost of Water Intake system due to an incorrect assessment of conditions in the original report supplied to the bidders at the RFP stage;

(f) Levy of excise duty on cement and steel used in the Project; and

(g) Levy of Customs Duty on mining equipment imported for the Project.

3. The Commission, after hearing the parties, in its order dated 4.2.2015 in Petition No. 21/MP/2013 disallowed the following change in law events:

(a) Increase in cost of Geological Reports for the Moher, Moher-Amlohri Extension and Chhatrasal captive coal blocks

(b) Increase in cost of Water Intake system due to an incorrect assessment of conditions in the original report supplied to the bidders at the RFP stage

(c) Levy of excise duty on cement and steel used in the Project; and

(d) Levy of Customs Duty on mining equipment imported for the Project.

4. Aggrieved by the said decision of the Commission, the Petitioner filed Appeal No. 121 of 2015 before the Appellate Tribunal. The Appellate Tribunal vide its judgment dated 20.11.2018 set aside the Commission`s order dated 4.2.2015 on the following issues and remanded the matter to the Commission for reconsideration and computation of the claims:

(a) Increase in cost of water Intake System over and above the estimates provided by the Procurers;

(b) Increase in cost due to imposition of custom duty on mining equipment;

(c) Reworking of the Formula provided in Article 13.2 (a) of the PPA for computing the quantum of compensation payable to SPL for change in law events taking place during the construction period; and

(d) Diversion of coal from the Moher Coal Block and the Chattrasal Coal Block to other Projects.

5. Against the above background, the Petitioner has filed the present Petition along with the following prayers:

"(a) Devise an alternate mechanism for compensating SPL for change in law events impacting the project during the construction Period such that SPL is restored to the same economic position as if such change in law did not take place;

(b) Calculate the impact of the levy of Custom Duty on the mining equipment and permit SPL to recover the same from the Procurers through monthly tariff over the terms of the PPA;

(c) Allow the increase in cost of the water intake system to be recovered from the Procurers in terms of the Appellate Tribunal`s judgment dated 20.11.2018 as one time compensation; and

(d) Take on record the factual position that coal from the captive coal blocks allocated to SPL are being utilized for Sasan UMPLL only."

6. The Petitioner has submitted the quantum of compensation payable to SPL for water intake system and customs duty on mining equipment as under:

(Rs.in crore)

S.No.	Event	Initial estimate	Actual cost	Total impact
1.	Increase in cost of water intake system	92	337	245
2.	Levy of customs duty on mining equipment	0	438	438
	Total	**92**	**775**	**683**

7. The Petitioner has further submitted as under:

(a) Claim for water intake system has been allowed by the Appellate Tribunal in terms of law and equity and SPL ought to be compensated for

increase in cost over the initial estimate as complete pass through as one-time payment.

(b) As regards the claim for levy of custom duty on mining equipment, being a change in law event, SPL ought to be compensated for the increase through change in non-escalable capacity charge to be recovered over the terms of the PPA;

(c) The issue of the failure of the formula provided in Article 13.2(a) of the PPA to compensate SPL for change in law events during construction period, the Commission ought to devise a compensation mechanism to substitute Article 13.2(a) of the PPA so that SPL may be restored to the same economic position for change in law events impacting the project during the construction period, as if the change in law events had not occurred.

(d) As regards the diversion of coal from the Moher Coal Block and the Chattrasal Coal Block to other projects, the Petitioner has submitted that SPL has not diverted any coal to any projects. The coal from the Moher and Moher Amlohri Extension coal block is being used exclusively for the project.

8. Notice was issued to the Respondents to file their replies. Reply to the Petition has been filed by Uttar Pradesh Power Corporation Ltd. (UPPCL) on behalf of UP Discoms (Respondent Nos. 2-5), Haryana Power Purchase Centre (Respondent No. 13) and Rajasthan Discoms (Respondent No. 6-8).

Replies of the Respondents

9. UPPCL in its reply dated 4.2.2019 has submitted that aggrieved by the judgment of the Appellate Tribunal dated 20.11.2018, lead procurers including UPPCL have filed appeals and stay applications before Hon'ble Supreme Court. They have further submitted that the hon'ble Supreme Court has admitted the Civil Appeals filed by Procurers, namely PSPCL, MPPMCL, Rajasthan Discoms and UPPCL and has issued notice on the application for stay. UPPCL has requested to

permit it to submit its reply on merits after the decision of the Hon`ble Supreme Court on stay application. As regards devising a mechanism for compensation under change in law, the Commission may postpone taking a decision till the Hon`ble Supreme Court decides the stay applications against the judgment of the Appellate Tribunal.

10. The Respondents, Haryana Power Purchase Centre and Rajasthan Distribution Companies in their respective replies dated 4.2.2019 have submitted as under:

(a) The Commission in its order dated 4.2.2015 in Petition No. 21/MP/2013 had allowed certain claims of the Petitioner under change in law and had directed the Petitioner to furnish complete information for computation of the relief. However, the Petitioner merely provided a certificate of Chartered Accountant regarding expenditure which is not sufficient for prudence check. Section 61 of the Electricity Act, 2003 provides for only reasonable costs to be allowed. Therefore, unreasonable or imprudent costs cannot be passed on to the consumers merely because such costs have actually been incurred by the Petitioner. In support of its contention, the Respondents have relied upon the judgments of Appellate Tribunal dated 20.11.2011(Dodson-Lindblom Hydro Power Private Limited Vs. MERC and anr.), 13.1.2011 (Kerala State Electricity Board Vs. Kerala State Electricity Regulatory Commission) and 3.1.2014 (Lanco Amarkantak Power Ltd. Vs. Haryana Electricity Regulatory Commission) in Appeal Nos. 152 of 2010, 177 of 2009 and 65 of 2013 respectively.

(b) The Appellate Tribunal vide its judgment dated 1.7.2014 in Appeal Nos. 213 and 214 of 2013 (Jindal Steel and Power Limited Vs. Chhattisgarh State Electricity Regulatory Commission) while dealing with the issue of nature of accounts rejected the accounts filed by the distribution company holding that accounts were mere extractions of the audited accounts of the parent company and were based on management assumption and that the account did not

reflect the actual expenditure with respect to the business. In the instant case, the Petitioner has claimed to have executed the work/ procured the equipment through its own parent/ group company, i.e. R.Infra/ Reliance Infrastructure. In such cases of related party transaction, it is necessary for the Commission to consider the prudency and reasonableness of the expenditure and there cannot be any grant of costs merely on the basis of accounts.

(c) The Appellate Tribunal has directed the Commission to reconsider issue of increase of cost of water intake system afresh on the basis that there may be error in the report of the consultant. However, the Petitioner has not provided any justification for the increase in cost and the reason for re-consideration. The Commission has to consider the issue afresh. Therefore, it is up to the Petitioner to provide justification for claiming the increase.

(d) The Appellate Tribunal has directed for consideration of the issue in terms of the judgment of Hon'ble Supreme Court in the case of Energy Watchdog Vs CERC and others in which the Hon'ble Supreme Court has held that there cannot be any exercise of regulatory powers to provide relief contrary to the Guidelines which include the Standard Bid Documents. Therefore, as the per the Guidelines and the Standard Bid Documents including the PPA, the Petitioner cannot claim any increase in cost of water intake system.

(e) Even assuming but not admitting that there has to be any consideration of the costs, the same is limited to the additional expenditure related to the erroneous (grossly) report. The increase in costs due to other reasons such as escalation in price, etc. cannot be considered. The increase in cost of materials, etc. is anticipated and cannot be allowed. In this regard, the Appellate Tribunal in its judgment dated 23.4.2014 in Appeal No. 207 of 2012 (Nabha Power Limited vs. Punjab State Power Corporation Limited) has held that there is no change in law and what is being considered is in view of principles of equity arising out of erroneous report. Therefore, it is essential for the Petitioner to point out the exact error in the Report and the resultant increase in the costs. The Petitioner cannot claim the entire increase for compensation. The Appellate Tribunal has recognized that the Petitioner also had the obligation for

due diligence and therefore, to that extent, the additional costs, if any, cannot be allowed.

(f) In the Appeal, the Petitioner has alleged that there was a change in location and, therefore, the costs have increased. Before the Commission, the Petitioner had claimed increase of Rs. 152 crore but now the Petitioner is claiming an increase of Rs. 245 crore which is not acceptable. Even as per the revised WAPCOS Repot, the total costs were Rs. 244.32 crore. The increase in cost beyond Rs. 244.32 crore cannot be considered.

(g) The Petitioner is claiming the increase as capital cost and there cannot be any one time payment. The compensation has to be considered on similar terms as any other increase in capital cost due to change in law. Since the Petitioner is claiming an increase in capital cost, the same has to be considered as increase in non-escalable capacity charges. There cannot be any upfront payment of full capital cost. Since the costs have been claimed to have been incurred for supply of power, the costs should be recovered only if the Petitioner makes available the power. If the Petitioner does not supply the requisite power, the Petitioner should not be entitled to recover the cost.

(h) The Petitioner has not provided any details with regard to the equipment which was imported. Neither has it provided the break-up of the cost or the rate of custom duty or the computation of the customs duty along with the invoices, etc. The Petitioner has also not provided the details of date of import of the equipment. The certificate claims payment up to 30.9.2018 which does not seem rational as the project was commissioned in 2013 itself. The Petitioner is required to justify the need and prudency for import of the equipment and the need for importing as opposed to domestic procurement.

(i) The Petitioner has procured the equipment from its parent company, namely Reliance Infrastructure Limited and has not directly imported the equipment. If the import is by Reliance Infrastructure Limited, the issue would also arise as to whether Reliance Infrastructure Limited could have claimed the exemption of custom duty based on the Ultra Mega Power Plant when it was

not the project developer. Since, the Petitioner has not provided any details in this regard, the same cannot be considered at this stage.

(j) The formula provided in the PPA is part of the competitive bid guidelines and standard bid documents issued by the Government of India under Section 63 of the Act. Therefore, there cannot be any consideration of compensation *de hors* the provisions of the PPA. The Hon`ble Supreme Court in the case of Energy Watchdog Vs. Central Electricity Regulatory Commission [2017 (14) SCC 80] has specifically held that the regulatory powers have to exercised consistent with the Guidelines. Therefore, there cannot be relief under regulatory powers contrary to the specific methodology provided under Article 13.2(a) of the PPA.

(k) Admittedly, the increase in tariff on account of increase in capital cost has to be considered by way of increase in non-escalable capacity charges for which the PPA provides a specific formula. Further, the Petitioner itself has bid on a quoted tariff and cannot now claim re-determination of tariff as if it is a Section 62 tariff. The claim of the Petitioner for specific elements of tariff as if it is cost plus regime is erroneous. If the Petitioner is allowed all costs irrespective of its quoted capacity charges, then this would render the competitive bid as redundant. In this regard, the Respondents have relied upon the judgment of the Appellate Tribunal dated 14.8.2018 in Appeal No. 14.8.2018.

(l) The Petitioner has sought to claim the increased capital cost through debt and equity and has sought the return on equity in relation to the same. There cannot be any return to any profit or reasonable return in relation to the expenditure for change in law. The compensation is only for expenditure incurred and not to make any profit on the same. If the change in law had not incurred, the Petitioner would not have had a return on equity on any such increased amount. The Petitioner has failed to consider that this is not a determination of tariff under Section 62.

(m) The Petitioner`s claim for interest on working capital is also erroneous. In this regard, Appellate Tribunal in the GMR Warora case (supra) upheld the

order of the Commission and rejected the contention for increased working capital costs in relation to change in law. Therefore, the Petitioner cannot seek any interest on working capital. There can be no separate consideration of interest on loan and depreciation, etc. as if this was a determination of tariff under Section 62 of the Act. If at all the issue has to be considered, the same has to be considered from the perspective of the quoted tariff.

(n) As regards coal from captive coal block used for other projects, the issue has been considered in Petition No. 162/MP/2015.

11. The Respondent, MPPMCL vide its affidavit dated 8.2.2019, has submitted as under:

(a) The clauses of PPA are a complete code between the parties and, therefore, the restoration on account of change in law during the construction period has to be strictly in accordance with Article 13 of the PPA. The Petitioner, while signing the RFP and thereafter the PPA, had full knowledge about the provision enshrined in the documents and the principle of change in law under Article 13 of the PPA.

(b) The Petitioner failed to furnish adequate details as mandated by the Commission and only furnished a certificate by the Auditor for the costs incurred without providing the necessary documentary proof or documents supporting the same and the same nowhere certifies that it has been prepared on the basis of the audited accounts by the Petitioner. The Petitioner ought to have produced relevant supporting documents for its claim along with the present Petition pursuant to the matter remanded back by the Appellate Tribunal.

(c) The Petitioner is trying to pass on the costs to the procurers without substantiating its claim with material proofs and the Commission may conduct a prudence check on the clams of the Petitioner.

(d) The Petitioner has only filed a certificate along with the Petition which cannot be construed to be the audited accounts of the Petitioner establishing its

claims before this Commission. No claim of the Petitioner can be ascertained without doing a prudence check on the figures furnished by the Petitioner. No expenditure should be allowed beyond the provisions of the PPA.

(e) As regards Water Intake System, the Petitioner has to substantiate its claims with relevant documents but the Petitioner has not provided any justification for the increase in costs and the reason for such reconsideration. In terms of clause 5.4 of the Bidding Guidelines, it was for the Petitioner to undertake the risk and it cannot be just passed on to the Procurers. The increase in cost of Water Intake System is an expense incurred by the Petitioner, but clearly not covered in change in law as defined in Article 13.1.1 of the PPA.

(f) The quantum of Rs. 245 crore now raised by the Petitioner is wholly untenable since the original estimate was only Rs.92 crore. The Petitioner`s claim of Rs. 245 crore is not acceptable and ought not to be allowed by the Commission.

(g) As regards Custom Duty on Mining equipment, the Petitioner has not provided details in regard to the equipment which was imported and the breakup of the cost and rate of custom duty and the computation of the custom duty along with invoices, etc. and also the certificate to that extent does not reveal the exact details pertaining to the mining equipment and the expenditure incurred against it.

(h) With regard to methodology for compensation, there can be no relief under regulatory powers contrary to the specific methodology provided under Article 13.2(a) of the PPA and same should be restricted to the extent provided in the Article 13. Therefore, Article13.2 restricts relief to Article 13.2(a) of the PPA.

(i) The Petitioner cannot claim tariff higher than its quoted bid even if the expenditure is higher. Any increase in tariff for change in law has to be based on actual or related to quoted tariff, whichever is lower. The formula or methodology suggested by the Petitioner cannot convert the present Petition

into a project under Section 62 of the Act dealing with determination of tariff on cost-plus basis.

(j) There can be no separate consideration of interest on loan and depreciation, etc. as if this was a determination of tariff under Section 62 of the Act. If at all, the issue has to be considered, the same has to be considered from the perspective of the quoted tariff. Any increase or decrease in non-escalable capacity charges has to be allowed as per the provisions of Article 13 of the PPA only.

(k) The Commission may examine the claims by applying due prudence check and pass appropriate orders keeping in view the terms of the PPA and other relevant consideration in accordance with law as per directives of the Hon`ble Supreme Court in CA No. 12190/2018 and other clubbed matters.

Rejoinder of the Petitioner

12. The Petitioner has filed rejoinders dated 26.2.2019 to the replies of Rajasthan Distribution companies, HPPC and MPPMCL which have been summarized as under:

(a) The Petitioner has filed all necessary information and documents for computing the compensation in Petition No. 162/MP/2015 before this Commission pursuant to the order dated 4.2.2015 in Petition No. 21/MP/2013. The Commission in its order dated 2.6.2016 in Petition No. 162/MP/2015 had considered the claims of SPL on the basis of Auditor Certificate, which was based on the books of account maintained by the management of the company. SPL was directed to furnish duly audited statement of expenditure on the claims allowed by this Commission while raising bills in respect of such expenditure. The order dated 2.6.2016 in Petition No. 162/MP/2015 has been challenged by way of Appeal No. 240 of 2014 before the Appellate Tribunal, which is pending as on date.

(b) In the present case, change in law events are detailed in Article 13 of the PPA. If an event amounts to change in law, SPL is to be compensated for

the same such that it is restored to the same economic position as mandated under Article 13.2 of the PPA. Without prejudice, the Commission may look into the issue of pendency and SPL undertakes to provide all requisite information. The main reason for increase in capital cost is cost of land as the project is an UMPP.

(c) The Appellate Tribunal vide its judgment dated 3.1.2014 in Appeal No. 65 of 2013 had observed that the prudence check was to be applied in determining the capital cost as well as time and cost over-runs. In the present case, the issue *inter alia* relates to the compensation to be granted for change in law events. Therefore, the observations of the Appellate Tribunal have no bearing in the present case.

(d) As regards the Water Intake System, the increase in cost of the water intake system is a direct consequence of the error in the WAPCOS report provided at the time of bidding to the potential bidders. In terms of Clause 1.4(v) of the RfP for the Project, the Procurers were required to provide a water intake study. WAPCOS was engaged by the Procurers to conduct the study and prepare the report. The Report identified the water intake pump house location at 12.5 km from the Power Station. As per the WAPCOS Report, the cost of construction of the water intake system was Rs. 92 crore. This report was made available to all the bidders before bid submission so that the bidders could factor in the cost of water intake system in preparation of their financial bids i.e. the tariff at which power would be supplied to the Procurers.

(e) The claim of SPL is to be considered in terms of judgment dated 20.11.2018 whereby SPL is to be compensated for the total increase in cost incurred on account of error in the WAPCOS Report. In terms of clause 1.4(v) of the RfP, the Procurers were obligated to provide the WAPCOS Report to the potential bidders. Accordingly, SPL is required to be compensated for the increase such that it is restored the same economic position as if such event had not occurred.

(f) As regards custom duty on Mining Equipment, SPL was constrained to import the mining equipment from the USA on account of the non-availability of

large size technologically advanced coal mining equipment in India. Accordingly, SPL procured mining equipment from the USA and other countries. The Appellate Tribunal vide its judgment dated 20.11.2018 has held that Article 13.2(a) of the PPA and the formula provided therein are unworkable in so far as it does not restore SPL to the same economic position as if such change in law had not taken place.

(g) The entitled compensation should be based on the guiding principle of restitution enshrined under Article 13.2(a) of the PPA. The Appellate Tribunal has noted the same in its judgment dated 2011.2018 and directed this Commission to devise an adequate formula/ methodology under its general regulatory powers to compensate SPL. Therefore, the compensation payable to SPL for change in law events ought not to be linked to the non-escalable capacity charges as provided for in Article 13.2(a) of the PPA.

(h) In the light of the findings returned by the Appellate Tribunal qua the unworkability of Article 13.2(a) of the PPA, the SPL has suggested a formulation for compensation for change in law events such that it is restored to the same economic position as if such change in law event did not take place. The same is in consonance with the underlying principle of Article 13.2 of the PPA as well. The objective of compensation is such that SPL is to be restored to the same economic position as if change in law did not take place. In order to do so, SPL has relied on prevailing norms in the sector to devise a formulation for compensation. Accordingly, SPL has included the return on equity in formulation for compensation.

(i) SPL has filed an Auditor Certificate in Petition No.162/MP/2015 stating that coal produced from mines located at Moher, Moher-Amroli are used for generation of power by the Project. No coal has been sold to any other projects since the commencement of mining operation. No documents have been placed by the Procurers before this Commission evidencing the same in the present Petition as well. Accordingly, this Commission may revise finding that the compensation for change in law events for coal would be considered on the basis of coal that has been supplied to other projects.

Reply of Tata Power Delhi Distribution Limited

13. Tata Power Delhi Distribution Limited (TPDDL) has filed its reply during the course of hearing on 12.3.2019 and has submitted as under:

(a) The Petitioner has not filed any substantial evidence in support of the relief claimed in the present Petition and has merely provided 'Auditor Certificate' for justifying the costs towards Water Intake System and Levy of custom duty on mining equipment. There are no documentary evidences and statement of accounts, etc. in support of the Petitioner`s claim.

(b) The Commission in its earlier orders *inter alia* observed that expenditure to be allowed under the change in law should be the actual expenditure on different items, which can be certified by the auditors after the examination of books of accounts and other verifications. Merely, furnishing the Auditor`s Certificate does not dispense the requirement for furnishing the duly audited statements of expenditures, etc.

(c) In any event, the Auditor Certificate submitted by the Petitioner cannot be any justification for the cost incurred since (i) it appears that the material/ services for 'Water Intake System' have been procured by the Petitioner from its group company, namely, RInfra, (ii) Similarly, the Mining Equipment also appears to have been purchased through RInfra. Since in both cases it is a related party transaction, the burden of justifying the cost, even on account of reasonableness, is much higher.

(d) Assuming without admitting that the Petitioner has incurred costs, for which it is claiming restitution in the present Petition, even then under the extant regulatory regime, only reasonable costs have to be allowed. Imprudent costs are not allowed (even though such cost may have been incurred) to protect the interest of the consumers, who would have to bear the ultimate impact of hike in tariff.

(e) With regard to Water Intake System, the Petitioner has not provided any justification for increased cost. For the purposes of re-examination, the Petitioner was required to bring on record evidence justifying the increased cost. Then re-examination, if at all, is to extent of additional expenditure solely

attributable to erroneous report. Therefore, increase in cost on account of other reasons cannot be considered. The Petitioner is required to indicate exact error in the report and the impact of error on the cost. In the present Petition, the Petitioner has neither disclosed the error(s) in the report, nor has provided any material to show how the increased cost is attributable to error(s) in report. While re-examining the issue of increased cost regarding water intake system, the Commission is mandated to look into the reasonableness of the cost incurred.

(f) With regard to Custom Duty on Mining Equipment, the Petitioner has not provided any details with respect to the imported equipment and the corresponding custom duty paid on such equipment. No invoices and/or any other documents to show what equipment was imported and how much custom duty has been paid to the concerned authorities have been provided by the Petitioner. For the purposes of re-examination, the Petitioner is required to establish (i) the equipment was for mining purposes to be used in the captive coal mine for Sasan UMPP, (ii) the equipment was imported, (iii) Custom duty was paid by the Petitioner on such equipment. None of these have been answered by the Petitioner in the present Petition. The Petitioner appears to proceed on the basis as if its claim stands allowed by the Appellate Tribunal and that it is not required to discharge any burden of proving its claim.

(g) With regard to appropriate formula/ methodology for compensation, the Hon`ble Supreme Court in Energy Watchdog case *inter alia* has held that the regulatory power under Section 79(1)(b) of the Act can be resorted to only in the absence of Guidelines or the PPA. Where there are Guidelines, as is the present case, power under Section 79(1)(b) of the Act can be exercised only in accordance with the Guidelines. In exercise of power under Section 79(1)(b), there cannot be re-determination of tariff. The Petitioner having quoted tariff under Section 63, it is not entitled to have a re-determination akin to Section 62 of the Act. Differential tariff on account of change in law does not mean that there can be a re-determination of tariff. Any increase in tariff on account of change in law has to be for admissible claim based on actuals.

(h) With regard to coal from the captive coal block to other projects, the Petitioner has not placed on record relevant document to demonstrate that the coal from the captive coal mines is not diverted to other projects. The Auditor Certificate cannot be treated as a conclusive proof against the allegation of diversion of coal to other projects.

14. During the hearing on 12.3.2019, the learned senior counsel for the Petitioner and the learned counsels for the Respondents reiterated their submissions made in the Petition and the Replies thereof.

Analysis and Decision

15. We have considered the submissions of the Petitioner and the Respondents and perused documents on record. MPPMCL, PSPCL, UPPCL and HPPC have submitted that they have challenged the judgment of the Appellate Tribunal dated 20.11.2018 before the Hon`ble Supreme Court and have also filed IA for stay of the judgment. Therefore, the appeal against the impugned judgment of the Appellate Tribunal is pending and the matter is *sub judice*. UPPCL has contended that the Commission ought not to proceed with the present Petition in the light of the appeal filed before the Hon`ble Supreme Court against impugned judgment of the Appellate Tribunal. We have considered the submissions of the Respondents. The Hon`ble Supreme Court in its judgment in the case of Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd. [2005(1)SCC 705] has held that mere filing of an appeal does not operate as stay on the order passed by the court below. Since there is no stay in the judgment, we proceed to deal with the issues raised in the present Petition as directed by the Appellate Tribunal and any decision in this order shall be subject to the final appeal pending before the Supreme Court.

16. Based on the submissions of the parties, the issue for our consideration is whether the Petitioner is entitled for the reliefs sought for in the Petition. We discuss the issues one by one.

A. <u>Increase in cost of Water Intake System</u>

17. The Petitioner has submitted that since the Appellate Tribunal vide its judgment dated 20.11.2018 has allowed the claim for water intake system in terms of law and equity, it should be compensated for increase in cost over the initial estimate as complete pass-through as one-time payment.

18. The Respondents have submitted that the Appellate Tribunal has only directed re-consideration of the increase in cost of water intake system afresh due to error in the report of the consultants. However, the Petitioner has not provided any justification for increase in cost and reasons for re-consideration. The Respondents have submitted that the Appellate Tribunal has further directed for consideration of the issue as per the Hon`ble Supreme Court judgment in the Energy Watchdog case [(2017) 14 SCC 80] in which it has been held that there cannot be any exercise of regulatory powers to provide relief contrary to the Guidelines which would include the standard bidding documents issued by the Central Government under Section 63 of the Act. The Respondents have submitted that as per the Guidelines and the Standard Bid Documents, including PPA, the Petitioner cannot claim increase in cost of water intake system on account of error in report of the consultant (WAPCOS). In support of their contention, the Respondents have relied upon the judgment of Appellate Tribunal dated 23.4.2017 in Appeal No. 207 of 2012 in the case of Nabha Power Limited Vs. Punjab State Power Corporation Limited.

19. The Petitioner has submitted that increase in cost of the water intake system is a direct consequence of the error in the WAPCOS Report provided at the time of bidding to the potential bidders. The Petitioner has submitted that claim in this regard is to be considered in terms of the judgment of Appellate Tribunal dated 20.11.2018 whereby SPL is to be compensated for the total increase in cost incurred on account of error in the Report. Accordingly, SPL is required to be compensated for the increase of cost, so that it is restored to the same economic position as if such error had not occurred.

20. We have considered the submissions of the Petitioner and the Respondents. The Commission in its order dated 4.2.2015 in Petition No. 21/MP/2013 held that the claim is not covered under any of the provisions of Article 13.1.1 of the PPA. Relevant portion of the said order dated 4.2.2015 is extracted as under:

> *"33. In our view, the claim is not covered under any of the provisions of Article 13.1.1 of the PPA. The petitioner being aware that the cost of water intake system being indicative in nature and being not covered under the "Change in Law" under Article 13 should have informed itself fully with the actual site conditions before preparing the bid and accordingly factored the possible estimates of water intake system while quoting the bid instead of relying on the indicative cost. In this connection, para 2.7.2.1 of the RfP document provides as under:*
>
> > *"2.7.2.1 The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. In assessing the Bid, it is deemed that the Bidder has inspected and examined the site conditions of roads, bridges, ports etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect supply of power."*
>
> *Further para 4 of the RfP document provides that the pricing and other details given in the bidding documents are by way of information only and it was for the bidders to conduct independent enquiry and verify the details and information. Para 4 are extracted as under:*
>
> > *"4. While the RFP has been prepared in good faith, neither the Procurers, Authorised Representative and Power Finance Corporation (PFC) nor their directors or employees or advisors/consultants make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omission herein, or the accuracy, completeness*

or reliability of information contained herein, and shall incur no liability under any law, statute, rules or regulations as to the accuracy, reliability or completeness of this RFP, even if any loss or damage is caused to the Bidder by any act or omission on their part."

Therefore, it is the responsibility of the petitioner to verify the suitability of the location of water intake and ensure reliable water supply for the power plant and workout the relevant approximate cost of water intake system independently and factor in the estimates in the bid so that a realistic cost is reflected in the bid. The petitioner having failed to do so, the increase in cost on account of this head is not admissible."

21. The Appellate Tribunal vide its judgment in Appeal No. 121/2015 dated 20.11.2018 had observed as under:

"*12.4 After due consideration of the rival contentions of both the parties, what emerges is that after being declared as the successful bidder, the SPL with a view to affirm the technical suitability of the preliminary report of the WAPCOS on Water Intake System, re-engaged the same agency for finalization of the said report. It is not in dispute that the Consultant, WAPCOS reviewed its earlier report and came to a conclusion that the earlier location of Water Intake was not at proper place and would result in non-availability of water for the plant during lean period. It is relevant to note that based on the recommendations of WAPCOS, SPL decided to go ahead for selection of new location as recommended and got carried out the requisite design and engineering of the entire Water Intake System which resulted into longer piping system, increased submergence area along the route, additional construction period etc.. On account of these factors, the cost of Water Intake System went up by over Rs.176 crores. The learned counsel appearing for the Appellant pointed out that the judgment of this Tribunal in Nabha Power case is not applicable to the present case since no cost relating to seismic zone data was provided to Nabha whereas in the instant case, costs were provided to the bidders. The Appellant has further reiterated that para 2.7.2.1 and para 4 of RFP which were relied upon by the Respondent procurers cannot be taken as obsolute in nature so as to absolve procurers of their responsibility for providing grossly incorrect information leading to substantial increase in cost of Water Intake System.*

12.5 After thoughtful consideration of the submissions made by the learned counsel for the Appellant and the Respondents and the findings of the Central Commission, we find that while the responsibility of carrying out due diligence before bidding and verifying the correctness of information provided in the bid documents rested with the bidders, at the same time, Respondent procurers cannot justify providing grossly erroneous report on Water Intake System taking shelter under the disclaimer in the bid document. As a matter of fact, the water availability for a thermal power station of this magnitude on regular, reliable and uninterrupted basis is essential and is a vital input for successful operation of the plant. It is noticed that the report of WAPCOS supplied to bidders at the time of bidding was deficient in ensuring adequate water supplies throughout the year uninterrupted and if the same would have been taken for construction and implementation, the same could have resulted into huge loss to the Respondent procurers being deprived of power supply for some period of the year due to less/ non-availability of water during the lean period. It is not in dispute that Sasan UMPP is supplying power to the Respondent procurer at one of the most competitive tariff in the country. It is noted from the contentions of the Respondent procurers that such an issue has not been dealt with either in the PPA or in the

competitive bidding guidelines issued by Ministry of Power under Section 63 of the Act, however, in view of the criticality of such situation, we opine that the matter needs afresh re-look for suitable redressal. While the Central Commission has correctly concluded that it does not qualify as change in law under Articles 13.1.1 of the PPA, it, however, needs to be addressed on the basis of settled principles of law and equity also, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog vs. CERC dated 11.04.2017. Thus, we are of the considered view that this issue involving substantial additional expenditure basically arising out of erroneous report of the consultants needs to be re-examined afresh by the Central Commission. Hence, this issue is answered in favour of the Appellant."

22. The APTEL in its judgment further observed as under:

"Issue No. 2- Water Intake System: We have critically analyzed the proposition of the Appellant for grant of compensation due to increase in cost of water intake system arising on account of change in location/lay out, thereby resulting in substantial increase in cost. We are of considered opinion that this issue involving substantial additional expenditure primarily arising out of erroneous report of the consultants provided to the bidder needs to be examined afresh by the Central Commission in accordance with law so as to arrive at a just and right decision."

23. We observe that in terms of clause 1.4(v) of the RfP, the Procurers were required to provide a water intake study. The services of WAPCOS were availed for this study and the report was shared with the prospective bidders. As per the WAPCOS Report, intake pump house was to be located at a distance of 12.5 kms from the Power Station and the cost of construction of the water intake system was estimated at Rs. 92 crore. According to the Petitioner, after being declared as the successful bidder, the Petitioner again engaged WAPCOS to confirm the technical feasibility as part of detailed engineering exercise and in the process, it was discovered that the water intake system as finalized by WAPCOS before the bidding was not an appropriate location to ensure reliable supply of water to the power plant. Thereafter, WAPCOS conducted detailed studies and recommended a new location which was 23 kms from the power plant as against 12.5 km as per the original study. The Petitioner has submitted that this resulted in an additional impact of Rs. 245 crore on the Petitioner on account of:

(a) Route length increase to 23 km;

(b) Piping length increase from 25 km (2 pipe lines each of 12 km) to 59.5 km (2 pipe lines each of 8 km and 3 pipes each of 14.5 km);

(c) Deeper pump house;

(d) Additional dredging for creation of intake channel for the offshore pump house; and

(e) Increase of cost on HT transmission line.

24. Thus, we note that the Petitioner did incur substantial additional expenditure due to error in the original WAPCOS Report.

25. The Respondents have argued that as per the Competitive Bidding Guidelines, Standard Bid Documents and the PPA, the Petitioner is not entitled for such increase in cost of water intake system.

26. As already cited above, the Appellate Tribunal in its judgment has observed that though the responsibility of carrying out due diligence before participating in the bidding rested with the Petitioner, it was not correct on part of the Respondents to provide an erroneous report to the Petitioner as regards Water Intake System. Water being an essential requirement of a thermal power station, it was essential that there was regular, reliable and uninterrupted supply of water for successful operation of the plant. Any reliance by the Petitioner on original WAPCOS report could have led to huge losses even to the Respondents (since the Petitioner's plant was supplying very cheap power) due to less/non-availability of water during lean period.

27. The Appellate Tribunal has also observed that neither the PPA nor the Competitive Bidding Guidelines issued by Ministry of Power under Section 63 of the Act provide for dealing with the instant case of the Petitioner. The Appellate Tribunal

having agreed with the finding of the Commission as regards the event not qualifying as a change in law event under Articles 13.1.1 of the PPA, has opined that in view of the criticality of such situation and the fact that it involves substantial additional expenditure arising out of erroneous report of the consultants, the matter needs to be looked into afresh for suitable redressal. The Appellate Tribunal has directed that the issue needs to be addressed by the Commission on basis of settled principles of law and equity, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog vs. CERC dated 11.4.2017.

28. Para 19 of the Energy Watchdog judgment is extracted as under:

> "*19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."*

29. The Hon`ble Supreme Court, after analysing the scope of Section 63 and 79(1)(b) of the Act came to the conclusion that even in cases where tariff has been adopted under Section 63 of the Act, this Commission is not divested of its powers under Section 79(1)(b) of the Act to regulate the said tariff. The Commission can exercise its powers to regulate tariff under Section 79(1)(b) of the Act in a scenario where it is not covered by any of the provisions of the Guidelines or where no Guidelines are framed at all or Guidelines do not deal with a given situation.

30. We observe that it was the obligation of the Procurers in terms of clause 1.4(v) of the RfP to provide the water intake channel report and the report in this regard prepared through WAPCOS turned out to be erroneous entailing additional expenditure for the Petitioner. We also observe that it equally was the responsibility of the bidders to carry out due diligence before submitting its bid. However, the Appellate Tribunal has observed that the Petitioner deserves to be compensated for the additional cost due to erroneous Report furnished by the Procurers and has directed the Commission to address the matter on the settled principle of law and equity, in the light of the Hon'ble Supreme Court findings in its judgment at Para 19 in Energy Watchdog Vs. CERC dated 11.04.2017.

31. Para 19 of the judgment dated 11.4.2018 of the Hon'ble Supreme Court in Energy Watchdog Vs. CERC lays down the principle that "it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79 (1) ('b) can then be used." Moreover, the Hon`ble Supreme Court in its recent judgment dated 2.7.2019 in the case of Adani Power (Mundra) Ltd. V. GERC, has

endorsed the concept of economic justice with a view that a party which has performed the contract should be permitted to recover costs incurred by it. After considering the facts of the case, the directions of the Appellate Tribunal and the decisions of the Hon'ble Supreme Court with regard to the scope of exercise of regulatory power, we are of the view that the Petitioner should be granted relief by way of exercise of our regulatory power under section 79(1)(b) of the Act in the absence of any provision in the PPA or Competitive Bidding Guidelines and it is ordered accordingly.

32. It is noted that the Petitioner has claimed Rs. 245 crore over and above of Rs. 92 crore (initial estimate) towards increase in cost of the water intake system. However, APTEL in its judgment has observed that there has been substantial increase in cost of the water intake system by over Rs. 176 crore. Since APTEL has observed that due to erroneous report of WAPCOS, the Petitioner has incurred Rs. 176 crore, we consider it appropriate to be recovered from the Procurers. Accordingly, the Petitioner is entitled to recover Rs. 176 crore from the Procurers on the basis of allocated contracted capacity as per Schedule 13 of PPA in one installment without any consideration of carrying cost within period of three month from the date of the order. In case the payment is not made by the Procurers within the prescribed time as above, the Petitioner shall be entitled for late payment surcharge in accordance with the provisions of the PPA.

B. <u>Levy of custom duty on mining equipment</u>

33. The Commission, in its order dated 4.2.2015 in Petition No. 21/MP/2013 had rejected the claim of the Petitioner regarding levy of custom duty on mining

equipment on the ground that as on cut-off date, there was no exemption on mining equipment but the Petitioner had taken into consideration such exemption while quoting the bids. No such document had been produced in the Petition which could indicate that any such impression (that custom duty was exempt) was given by the procurers or their representatives prior to the bidding. Relevant portion of said order dated 4.2.2015 is extracted as under:

> *"41. It is to be considered whether under the notification as stated above, mining equipments were exempted from customs duty. General Exemption No.122 under the Customs Notification No.21/2002 as amended from time to time contains the list of items which are exempted from customs duty. It is observed that Notification 21 of 2002-Customs clearly demarcates the power projects and mining projects separately. It is seen that at Ser No.399 of the list, coal mining projects are liable to pay customs duty. Ser No. 400 only exempts the mega power project from payment of customs duty and there is no mention that it includes captive power plants. Therefore, it cannot be said that as on the cut-off date, there was exemption on mining equipment and the petitioner had taken into consideration such exemption while quoting the bids. Nothing has been produced in the petition which could indicate that any such impression was given by the procurers or their representative prior to bidding. In view of the foregoing discussion, the submission of the petitioner that the decision of the Ministry of Power detailed in its office memorandum dated 17.06.2011 and refusal by Energy Department, Government of Madhya Pradesh to provide recommendation letter to import mining equipments for Sasan UMPP under nil custom duty amounts to a "Change in Law" under Article 13.1 of the PPA and the petitioner is entitled to be compensated for the same is not acceptable and hence no compensation would be available in this regard."*

34. However, the Appellate Tribunal, vide its judgment dated 20.11.2018, has observed as under:

> *"14.5 We have considered the submissions of the learned counsel for the Appellant and learned counsel for the Respondents along with the consideration of the Central Commission on this issue pertaining to the claims of the Appellant regarding compensation on account of additional payment towards custom duty on mining equipment. After careful consideration and critical evaluation of the same, the key question arises for consideration, whether the equipment required for captive coal mines allocated to UMPP should be considered at par with the equipment required for setting up the power plants as far as exemption from the custom duty is concerned. The contention of the Appellant that the captive coal mines allocated to Sasan UMPP are integral & essential part of the project as a whole and as such, the exemption of custom duty was applicable to all equipments being imported for the entire project i.e. captive coal mines as well as power plants. It is not in dispute that the captive coal mines were allotted for UMPP for its exclusive use for power generation and in no way, meant for commercial utilization elsewhere.*

14.6 In this regard, we also take the note of Hon'ble Supreme Court directions in judgment dated 24.08.2014 in Manohar Lal Sharma Vs. Principal Secy., in W.P.(CRL) 120 of 2012 (Para 158) that coal from captive coal mines is to be used for UMPP alone and no diversion of coal for commercial exploitation would be permitted. Keeping these facts in view, we notice the glowing difference between an independent coal mines up for exploitation and selling coal on commercial lines and a captive coal mine set up to meet requirement of UMPP only to generate power for the ultimate benefit of the Respondent procurers and in turn, consumers for obtaining electricity at cheaper rates. The actual positions purported the assumption made by the Appellant that the customs duty exemptions will be available for import of the equipment for the entire project including captive mines and power plants. We find force in the argument of the learned counsel for the Appellant that being the integral and inseparable part of the UMPP, the custom duty rates applicable for standalone coal mining projects would not be applicable in the present case and the exemption would need to be given effect to. We, thus opine that the Central Commission appears to have been mechanically guided by the mere description of the relevant entry (Sl.No.399 & 400) in the said custom duty notifications and has not appreciated that the captive coal mines being integral part of the UMPP cannot be equated to a stand alone coal mines, having commercial line of utilization. The Appellant was thus right in assuming that Custom Duty exemption will be available for the coal mining equipments. As such, this issue needs to be examined afresh in accordance with law and various provisions of the RFQ/RFP/PPA. Therefore, we answer this issue in favour of the Appellant."

35. The Respondents have submitted that the Petitioner has not provided any details in regard to the equipment which was imported. They have also submitted that the Petitioner has also not provided breakup of the cost or the rate of custom duty or the computation of the customs duty along with the invoices, etc. The Respondents have further submitted that the certificate claims payment up to 30.9.2018 which does not seem rational as the project was commissioned in 2013 itself. The Petitioner is first required to justify the requirement for import of the equipment and secondly, the need for importing as opposed to domestic procurement. The Respondents have submitted that the Petitioner has procured the equipment from its parent company i.e. Reliance Infrastructure Limited (R-Infra) and has not directly imported the equipment. The Respondents have further submitted that if the import is by R-Infra, the issue would also arise as to whether R-Infra could have claimed exemption of custom duty based on the UMPP when it was not the project developer. Since the Petitioner has not provided any details in this regard,

the Respondents have submitted that the same should not be considered at this stage. However, the Respondents have not disputed the levy of custom duty on mining equipment to be considered under change in law.

36. *Per contra*, the Petitioner has submitted that it was constrained to import the mining equipment from the USA on account of non-availability of large size technologically advanced coal mining equipment in India. The Petitioner has submitted the details of broad category of import of coal mining equipment as under:

S.No.	Particulars	Make	Capacity	Purpose
1.	Dragline (2 nos)	Caterpillar (Then Bucyrys)	61m^3 bucked capacity, 100 m boom length	Overburden removal
2.	Shovel (6 nos)	Caterpillar (Then Bucyrys)	42m^3 bucket capacity	Overburden removal
3.	Front End Loader (FEL) (2 nos)	Joy Blogal (Then Le Tourneau)	240 tonnes	Coal extraction
4.	Dumper (55 nos.)	Caterpiller (Then Bucyrys)	240 tonnes	Hauling of OB removed by Shovels to OB dump. Handing of coal extracted by FELs to coal receiving pits.
5.	Drills (12 nos)	Atlas Copco	160 mm, 250 mm, 311 mm	Drilling holes in OB and coal seam. Drilled holes are subsequently filled with explosives and blasted to enable OB removal and coal extraction
6.	Dozers and Graders (27 nos)	komatsu	240 HP, 280 HP, 450 HP, 560 HP, 850 HP	Face preparation at Shoel and Drill working areas and OB Dump area Haul road preparation
7.	Tyres for dumpers	M/s Colorado, M/s Michelin	Tyres for front and rear dumpers	

37. The Appellate Tribunal in its judgment has observed that this issue needs to be examined afresh in accordance with law and various provisions of the

RFQ/RFP/PPA. We have examined the RFQ, RFP and PPA. In terms of the RFP, the bidder was required to acquaint itself about the prevalent laws while quoting the bid. Para 2.7.2.2 of the RFP provides as under:

> "2.7.2.2 In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act, 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory Commissions and all other relate acts, laws, rules and regulation is prevalent in India. The Procurers shall not entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been full investigated and considered while submitting the Bid."

Further, the draft PPA provided alongwith the RFP defines project as under:

> "Project means the power station and Captive Coal Mine(s) undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller in accordance with the terms and conditions of this Agreement."

38. It is the case of the Petitioner that since the captive coal mine(s) is an integral part of the project, the Petitioner assumed that it would be entitled for exemption from customs duty on imported equipment for the mines and accordingly, quoted the bid. After being declared successful, the Petitioner approached the Government of Madhya Pradesh for recommendations for exemption from customs duty on mining equipment. However, Govt. of Madhya Pradesh refused to recommend the case of the Petitioner in the light of the O.M. dated 17.06.2011 issued by Ministry of Power, Govt. of India which provided that the exemption from custom duty for UMPP would be available only in respect of equipment for power plants.

39. The Commission in its order dated 4.2.2015 considered the claims of the Petitioner in the light of the provisions of Notification No. 21 of 2002 – Customs and noted that while entry at Sl.No.399 (Coal Mining Projects) did not qualify for

exemption, the entry at Serial No.400 (Mega Power Projects) was entitled for exemption. The Commission came to the conclusion that as on cut-off date, since the mining equipment did not qualify for exemption from custom duly, the Petitioner was not entitled for relief on account of denial of exemption from customs duty. However, while hearing appeal against order of the Commission, the Appellate Tribunal has observed that the captive coal mines being integral part of the power Project shall be covered under Entry Serial No. 400 of the Notification No. 21 of 2002 and accordingly, the custom duty rates applicable for stand-alone coal mining projects would not be applicable for such captive coal mine Project and the Petitioner was right in assuming that Custom Duty exemption would be available for the coal mining equipment. Since the Petitioner did not get exemption on account of non-recommendation of its case by Government of MP and the Petitioner had to incur expenditure on customs duty and as Article 13.1.1(ii) of the PPA provides that "a change in any interpretation of any Law by a Competent Court of Law, tribunal or Indian Government Instrumentality provided such court of law, tribunal or Indian Government Instrumentality is the final authority under law for such interpretation" shall qualify as change in law, the Petitioner needs to be compensated to put it in the same economic position as if the Change in Law had not occurred.

40. We observe that the Petitioner who was developing the UMPP and the captive coal mine did not import the coal mining equipments. These equipments were imported by the Petitioner's parent company, namely, R-Infra. Since the entity which imported the equipments was not the entity developing the UMPP and the coal mine, benefit of exemption from custom duty, if any, cannot be claimed by the R-Infra.

41. Further, we observe that the Petitioner has submitted the information with regard to expenditure incurred towards levy of custom duty on equipment supported by the Certificate of the Auditor M/s Pathak H.D & Associates, Chartered Accountant. The Auditor's Certificate states as under:

> *"The management of the company has provided us with the details of the accompanying "Statement of Customs Duty on mining equipment reimbursed by Sasan Power Limited (the 'Company') to Reliance Infrastructure Limited ('the contractor') till September, 2018 ('Statement') which is recoverable from the procurers as per Appellate Tribunal for Electricity ('APTEL') order in Appeal No. 121 of 2015 dated 20th November 2018. The same has been prepared for the purpose of submitting the same to Central Electricity Regulatory Commission ('CERC'). The management of the Company has requested us to verify the details of the said Statement from the books of account of the Company as on September 30, 2018.*
>
> *It is the responsibility of the Management (including directors) to prepare the accompanying 'Statement' from the books of accounts and documents/records. This responsibility includes designing, implementing and maintaining internal control relevant to the preparation and presentation of 'Statement' and applying an appropriate basis of preparation, and making estimates that are reasonable in the circumstances."*

42. On account of the above observations of the Auditor, we find strength in the objection raised by the Respondents about the authenticity of the expenditure. The expenditure to be allowed under change in law should be the actual expenditure on different items which can be certified by the auditor after examination of the books of accounts and other verifications in accordance with the Standard of Auditing and other authoritative pronouncement of ICAI. However, the Auditors in this case have given a certificate based on the Books of Accounts maintained by the Management. In the Certificate, the auditors have stated as under:

> *"8. This report is addressed to and provided to the Board of Directors of the company solely to assist you in meeting your responsibilities in relation to your submitting the statement to the Central Electricity Regulatory Commission (CERC) and should not be used by any other person or for any other purpose…"*

43. We also observe that the Petitioner has not furnished any information regarding the break up cost, rate of custom duty, computation of the customs duty

along with invoices and Auditor certificate pertaining to the mining equipment and the expenditure incurred against it.

44. Therefore, as the equipments have not been imported by the Petitioner but have been imported by the R-Infra and the Auditor certificate does not indicate any details of custom duty payment, the prayer of the Petitioner in this regard is rejected.

C. <u>Appropriate formula/ methodology for compensation</u>

45. The Commission in its order dated 4.2.2015 in Petition No. 21/MP/2013 had observed that there is a specific formula given in the PPA for grant of relief during the construction period and the Petitioner has admittedly stated that had it quoted higher non-escalable capacity charge, it would have recovered the full impact of additional capital cost on account of change in law as per the formula. Therefore, the Commission had held that the main reason for non-recovery of the capital cost fully is attributable to the low non-escalable capacity charges quoted by the Petitioner and was not on account of any flaw in the formula. Accordingly, the Commission had disallowed the suggested modification in the formula on the ground that the compensation is subject to the limitation provided under Article 13.2(a) of the PPA.

46. The Appellate Tribunal, in its judgment, has observed that the principle of restoration is required to be interpreted in the right perspective with the main governing principles not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. APTEL has further observed that in the present case, neither the guidelines nor the PPA envisages any provision to deal with a situation of an erroneous formula and directed the Commission to devise the adequate formula/

methodology under its general regulatory powers in the light of the Hon`ble Supreme Court judgment in Energy Watchdog case to allow the admissible claims of the Petitioner regarding compensation in accordance with law. Relevant portion of the judgment of the APTEL is extracted as under:

> "*15.7 In view of the above facts, the core issue that arises in the matter is that once change in law event occurs and various claims made by the Appellant are considered genuine and admissible then how to evolve a mechanism for restoring the affected party to the same economic position as if the change in law had not occurred. Admittedly, as acknowledged by the Central Electricity Authority and the Ministry of Power, Govt. of India, the said formula had several flaws and accordingly being not conducive for working out compensations for actual distress to the affected parties and accordingly the same has now been removed from the standard bidding guidelines for UMPP. As noticed from the facts presented before us, the formula does not provide a thorough reflection of the claims which are even genuine and admissible under logical & legal considerations. We also take note that the intended objective underlined the stated principle is restoration of the party to the same economic position and thus, the same needs to be interpreted in the right perspective with the main governing principles and not by a formula limiting to the said objective and yielding different reliefs to different generators as recorded by the CEA in its meeting held on 8.7.2013. In fact, the formula is essentially a vehicle to give effect to the guiding principle of economic restoration and the same needs to be read down to the extent it is inconsistent with the principle it seeks to serve. In the instant case, neither the guidelines nor the PPA envisage any provision to deal with a situation of an erroneous formula. In view of the well settled law laid down by the Apex Court in case of Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. etc. (2017) 14 SCC 80, the Central Commission is directed to devise the adequate formula/methodology under its general regulatory powers (*Section 79*(1)(b)) so as to allow the admissible claims of the Appellant regarding compensation in accordance with law."*

47. The APTEL in its findings further observed as under:

> *"This issue regarding flaws in the formula for computation of compensation is in fact a resultant issue requiring alignment to the primary objective of retrain the affected party of its original economic position as if the change in law has not occurred. In the instant case, neither the guidelines nor PPA envisage any provision to deal with such situation of an erroneous formula. We, therefore, opine that in such an exceptional circumstances, the Central Commission may devise an adequate methodology/formula under its general regulatory powers so as to allow the entitled/admissible compensation in accordance with law."*

48. The Petitioner has contended that the Commission ought to devise a compensation mechanism to substitute Article 13.2(a) of the PPA such that the Petitioner is restored to the same economic position for any change in law events impacting the project during the construction period, as if the change in law events

did not take place. The Petitioner has further argued that the Commission should take into account the increased capital cost, which is funded through a mix of debt and equity at normative level (70:30), in terms of interest on term loan, depreciation and pre-tax return on equity.

49. The Respondents have submitted that since the formula provided in the PPA is part of the competitive bidding guidelines and standard bid documents issued by the Government of India under Section 63 of the Act, there cannot be any consideration of compensation *de hors* the provisions of the PPA. Hon`ble Supreme Court in Energy Watchdog case has specifically held that the regulatory powers have to be exercised consistent with the guidelines. The Hon`ble Supreme Court has also recognized that model PPA has been drafted by the Central Government and fleshes out the principles of the guidelines. Therefore, there cannot be any relief under regulatory powers contrary to the specific methodology provided under Article 13.2(a) of the PPA. The Respondents have submitted that increase in tariff on account of increase in capital cost has to be considered by way of increase in non-escalable capacity charges for which the PPA provides a specific formula. If the Petitioner is allowed all costs irrespective of its quoted capacity charges, then this would render the competitive bid redundant. In this regard, the Respondents have relied upon the judgment of the APTEL in Appeal No. 111 of 2017 (GMR Warora Energy Ltd. Vs. Central Electricity Regulatory Commission and others). The Respondents have submitted that any increase in tariff on account of change in law has to be based on actuals or related to quoted tariff, whichever is lower. The Petitioner cannot merely seek to convert the present Petition into a Petition for determination of tariff under Section 62 of the Act. The Respondents have submitted that the Petitioner is not entitled to any profit or reasonable return in relation to the

expenditure for change in law. The compensation is only for expenditure incurred and not to make any profit on the same. If the change in law had not occurred, the Petitioner would not have had a return on equity on any such increased amount. In support of their contentions, the Respondents have relied upon the judgment of the Appellate Tribunal dated 19.4.2017 in Appeal No. 161 of 2015. The Petitioner's claim for interest on working capital is erroneous as the APTEL, in the said judgment, has rejected the contention for increased working capital in relation in change in law. The Respondents have submitted that there can be no separate consideration of interest on loan and depreciation etc. as it is not a determination of tariff under Section 62 of the Act. However, if at all the issues have to be considered, the same has to be considered from the perspective of quoted tariff. Therefore, the methodology and illustrative computation given by the Petitioner is wrong and denied.

50. *Per contra*, the Petitioner has submitted that the entitled compensation should be based on the guiding principle of restitution enshrined under Article 13.2(a) of the PPA. With regard to contention of the Respondents that increase in tariff on account of increase in capital cost have to be considered by way of non-escalable capacity charges for which PPA provides a specific formula, the Petitioner has submitted that methodology for computing compensation in terms of Article 13.2(a) of the PPA does not satisfy the underlying principle of Article 13 i.e. restoration to the same economic position as if the change in law had not occurred. Accordingly, APTEL in its judgment has directed the Commission to devise an adequate formula/ methodology under its general regulatory powers to compensate the Petitioner. Therefore, the compensation payable to the Petitioner for change in law events ought not to be linked to the non-escalable capacity charges as provided for in Article 13.2(a) of the PPA. Accordingly, the Petitioner has suggested a formulation for compensation for

change in law events in line with the underlying principle of Article 13.2 of the PPA such that it is restored to the same economic position as if such change in law did not take place. The Petitioner has submitted that the methodology for compensation as suggested by the Respondents is liable to be rejected since it would not restore the Petitioner to the same economic position as if change in law did not take place. The formula suggested by the Respondents provides lesser compensation than would have been available under the impugned PPA formula which APTEL has held to be insufficient to restore the Petitioner to the same economic position.

51. We have considered the submissions of the Petitioner and the Respondents. The formula provided in the PPA is part of the competitive bid guidelines and standard bid documents issued by the Government of India under Section 63 of the Act. Moreover, the PPA was entered into between the Petitioner and the Respondents pursuant to a tariff based competitive bidding in terms of the standard bidding documents and guidelines issued by the Central Government. Article 13.2 of the PPA provides for a formula for grant of relief for change in law during the construction period and accordingly, the Petitioner is entitled for relief in terms of the said formula. The Commission observes that neither the Competitive Bidding Guidelines nor the PPA enables the Commission to revisit the formula in Article 13.2 of the PPA.

52. The Commission further notes that the assumptions and considerations behind the said formula have neither been disclosed to the Commission by the Bid Process Coordinator nor by the Petitioner nor by the Respondents. In the absence such details, it is not appropriate for the Commission to revisit the formula. The

Commission is of the view that the appropriate course of action could be for the Petitioner and the Respondents to work out a mutually agreed formula, which can be incorporated in the PPA through a Supplementary Agreement, after due approval by the Commission in terms of Article 18.1 of the PPA.

D. Coal from the captive coal block used to other projects

53. The Petitioner has submitted that it has not diverted any coal to any projects and the coal from the Moher & Moher extension coal block is being used exclusively for the Project. In this regard, the Petitioner in Petition No. 162/MP/2015 before the Commission has placed on record the Auditor certificate stating that "coal produced from mines located at Moher & Mohar Amlohri has been used for power generation by Sasan UMPP since starting of coal mining operations" and the same has been noted by the Commission in its order dated 2.6.2016.

54. The Respondents have submitted that the issue regarding coal from the captive coal block used in other projects has been considered in Petition No. 162/MP/2015. Therefore, the Petitioner may be directed to furnish the requisite information and the impact may be computed based on the submission to decide on whether any adjustment in the tariff to be given.

55. Per contra, the Petitioner has contended that the procurers have not submitted any documents to the effect that coal is being diverted to other Projects. Therefore, the Commission may revise its finding that the compensation for change in law events for coal would be considered on the basis of coal supplied to other Projects.

56. We have considered the submissions of the Petitioner and the Respondents. APTEL vide its judgment dated 20.11.2018 has observed as under:

> *"16.3 After careful consideration of the rival contentions of learned counsel for both the parties, we find that the Respondent procurers have apprehension that the Appellant is diverting coal from the captive coal mines to some other projects and the mining cost should accordingly be proportioned in the ratio of such use. We, however, do not find any relevant document in the material placed before us to arrive at a conclusion that coal is being diverted to some other projects. Accordingly, we hold that, the Central Commission should examine this issue afresh after obtaining legitimate and relevant documents showing that the coal is not being exclusively used for Sasan UMPP and is also utilized by some other projects. Hence, this issue is answered in favour of the Appellant."*

57. We observe that the Respondents have not submitted any documents regarding diversion of coal by the Petitioner to other projects. Therefore, considering the submissions of the Petitioner that the coal produced from the Moher and Moher-Amlohri coal block has never been sold to any other project and is being used exclusively for Sasan UMPP, the compensation for change in law events for coal would be considered on the basis of coal being supplied to Sasan UMPP alone.

58. Petition No. 21/MP/2013 and Petition No. 390/MP/2018 are disposed of in terms of above. With this, the directions of the APTEL in its judgment dated 20.11.2018 in Appeal No. 121 of 2015 stands implemented.

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