

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 8/MP/2014**  
**&**  
**Petition No.284/MP/2018**

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

**Date of Order: 16<sup>th</sup> May, 2019**

**Petition No. 8/MP/2014**

**In the matter of**

Petition for evolving a mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law during Construction and Operating period

**And**

**In the matter of**

**Petition No. 284/MP/2018**

Petition under Section 79 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding and Article 10 of the Power Supply Agreement dated 17.3.2010 and 21.3.2013 executed between GMR Warora Energy Limited and Distribution Companies of the States of Maharashtra and Dadra & Nagar Haveli for compensation due to change in law.

**And**

**In the matter of**

Judgment of the Appellate Tribunal for Electricity dated 14.8.2018 in Appeal No. 111 of 2017

**And**

**In the matter of**

GMR Warora Energy Limited  
701/704, 7<sup>th</sup> Floor, Naman centre, A-Wing  
Bandra Kurla Complex, bandra  
Mumbai- 400051

**.....Petitioner**

**Vs**

1. Maharashtra State Electricity Distribution Company Limited  
Firth Floor, Prakashgadh, Plot No. G-9,  
Anant Kanekar Marg, Bandra (East)  
Mumbai- 400051



2. Electricity Department  
Vidyut Bhavan, Opposite Secretariat,  
Silvassa, Dadra and Nagar Havel- 396230

....Respondents

3. M/s Prayas Energy Group  
Unit-III A & B, Devgiri, Joshi Railway Museum lane,  
Kothrud Industrial Area, Kothrud, Pune-411038

...Consumer Group

**Parties Present:**

Shri Vishrov Mukherjee, Advocate, GMRWEL  
Shri Yashaswi Kant, Advocate, GMRWEL  
Shri Anup Jain, Advocate, MSEDCL  
Shri Anand K. Ganesan, Advocate, DNH  
Ms. Poorva Saigal, Advocate, Prayas  
Ms. Anushree Bardhan, Advocate, Prayas  
Ms. Tanya Sareen, Advocate, Prayas

**ORDER**

GMR Warora Energy Limited, the Petitioner herein, is a generating company, incorporated under the Companies Act, 1956, which has developed a 600 MW coal based Thermal Power Project (hereinafter referred to as the “Project”) in the Warora Taluka, District Chandrapur in the State of Maharashtra. The Project comprises of two units of 300 MW each. Unit-I of the Project was commissioned on 19.3.2013 and Unit-II was commissioned on 1.9.2013.

2. The Petitioner has entered into the following long-term PPAs for supply of power from the Project:

(a) Supply and sale of 200 MW to Maharashtra State Electricity Distribution Company Ltd (MSEDCL) in terms of PPA dated 17.3.2010. The cut-off date for this PPA is 31.7.2009. Supply of power in terms of the PPA commenced from 17.3.2014.

(b) Supply and sale of 200 MW to Electricity Department, Union Territory of Dadra and Nagar Haveli (DNH Discom) in terms of PPA dated 21.3.2013. The cut-off date for this PPA is 1.6.2012. Supply of power in terms of the PPA commenced from 1.4.2013.

(c) Supply and sale of 150 MW to Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) through back to back arrangements between GMR Energy Trading Limited and the Petitioner.



3. The Respondent No. 1, MSEDCL issued Request for Proposal (RfP) on 15.5.2009 and initiated the competitive bidding process for procurement of power on long term basis. The Petitioner submitted its bid on 7.8.2009 and emerged as one of the successful bidders with levelled tariff of ₹2.879/kWh. On 20.11.2009, MSEDCL issued the Letter of Intent (LOI) for procurement of 200 MW of power to the Petitioner. On 17.3.2010, the MSEDCL-PPA was executed for procurement of 200 MW of power by MSEDCL on long term basis. MERC (Maharashtra Electricity Regulatory Commission), on 28.12.2010 approved the bidding process and adopted the tariff under competitive bidding process in terms of the PPA of MSEDCL. In March 2012, Respondent No. 2, DNH issued RFP document for procurement of power through competitive bidding, wherein the Petitioner was declared one of the successful bidders for supplying aggregated contracted capacity of 200 MW to DNH with a levelled tariff of ₹4.618 per unit. On 14.8.2012, DNH issued LOI to the Petitioner for procurement of 200 MW of power. JERC (Joint Electricity Regulatory Commission for the State of Goa and Union Territories) vide order dated 19.2.2013 in Petition No. 87/2012 (filed by DNH) granted approval for DNH PPA. On 21.3.2013, DNH-PPA was executed for procurement of 200 MW of power by DNH on long term basis. The scheduled delivery date under the MSEDCL-PPA was 17.3.2014 and bid deadline was 7.8.2009. Similarly, the bid deadline in terms of DNH-PPA was 8.6.2012. Accordingly, the cut-off date for MSEDCL PPA is 31.7.2009 and for DNH PPA is 1.6.2012.

4. Petition No. 8/MP/2014 was filed by the Petitioner seeking compensation for the change in law events in terms of MSEDCL-PPA & DNH-PPA occurring during the construction period and operating period. The Commission vide order dated 1.2.2017 allowed/ disallowed some of the claims of the Petitioner as under:



Sl No.	Parameters	MSEDCL PPA	DNH PPA
1	Excise Duty on Coal subject to the observation regarding Excisable value in Para 69	Allowed	Allowed
2	Change in Royalty	Allowed	Allowed
3	Clean Energy Cess	Allowed	Allowed
4	Busy Season Surcharge	Not Allowed	Not Allowed
5	Development Surcharge	Not Allowed	Not Applicable
6	Service tax on Coal Transportation	Allowed	Allowed
7	Swachh Bharat Cess	Allowed	Allowed
8	Sizing Charges	Not Allowed	Not Allowed
9	Surface Transportation Charges	Not Allowed	Not Allowed
10	NiryatKar Tax	Not allowed but liberty granted	Not allowed but liberty granted
11	Shortfall in Linkage Coal	Not allowed but liberty granted	Not allowed but liberty granted
12	Shift from UHV based pricing to GCV	Not Allowed	Not Applicable
13	Increase in working capital requirement	Not Allowed	Not Allowed
14	Change in MAT rate	Not Allowed	Not Allowed
15	MOEF notification on coal quality	Not Allowed	Not Allowed

*Note: In case of "Not applicable", the change in law event has occurred prior to the cut-off date*

5. Aggrieved by order dated 1.2.2017, the Petitioner filed Appeal No. 111 of 2017 before Appellate Tribunal for Electricity (hereinafter referred to as 'the Tribunal') on the change in law events which were disallowed by the Commission as above. Similarly, the respondent, DNH had filed Appeal No. 290 of 2017 before the Tribunal challenging the order dated 1.2.2017 in respect of the change in law events allowed and compensation granted to the Petitioner. The Tribunal by its common judgment dated 14.8.2018, while rejecting the appeal filed by the Respondent, DNH, partly allowed the appeal filed by the Petitioner mainly on the following issues:

- (a) Increase in Busy Season Surcharge & Development Surcharge on Coal transportation;
- (b) Shortfall in linkage coal due to changes in NCDP (New Coal Distribution Policy) issued by Ministry of Coal;
- (c) Change in quality of Coal pursuant to MOEFCC Notification dated 11.7.2012; and
- (d) Carrying Cost

6. Accordingly, the Tribunal remanded the matter to the Commission to pass consequential orders on the change in law events allowed in terms of the directions contained therein. The relevant portion of the said judgment dated 14.8.2018 is extracted hereunder:



*“The matter stands remanded back to the Central Commission to pass consequential orders so far as it relates to our observations/directions as indicated above on the issues related to Busy Season Surcharge, Development Surcharge, MOEF Notification on coal quality, change in NCDP and Carrying Cost.”*

7. Pursuant to the above, Petition No. 284/MP/2018 has been filed by the Petitioner with the following prayers:

*“(a) Grant compensation as set out in paragraphs above on the basis of actual parameters and also allow compensation for the claims set out in the petition including carrying cost and interest thereon in future;*

*(b) Restore the Petitioner to the same economic position in terms of Article 10 of the PPAs; and*

*(c) Pass any such other and further reliefs as this Hon’ble Commission deems just and proper in the nature and circumstances of the present case.”*

8. The Petition was admitted on 18.10.2018 and notice was issued to the respondents including M/s Prayas Energy Group (hereinafter referred to as ‘Prayas’). Meanwhile, the Petitioner filed IA No. 77/2018 seeking direction on the Respondents to pay the entire amount payable in respect of Busy Season Surcharge and Development Surcharge and 75% of the compensation amount claimed in respect of the other claims and the Commission by order dated 26.11.2018 disposed of the same with the following directions.

*“8.....Accordingly, we direct that pending issue of final order in Petition No. 284/MP2018, MSEDCL and Electricity Department, Union Territory of Dadra and Nagar Haveli shall pay the 75% of the compensation claimed by the Applicant, subject to the adjustment after issue of final order in the main petition. If the payment received in terms of the interim order exceeds the amount due after issue of final order, the Applicant shall refund the excess amount to MSEDCL and Electricity Department, Union Territory of Dadra and Nagar Haveli with 9%.”*

9. Thereafter, the matter was heard on 12.3.2019 and the Commission after permitting the Respondent, DNH to file its written submissions, reserved its order in the Petition. In compliance with the directions, the Respondent, DNH has filed its written submissions. Though the Respondent, MSEDCL was granted time to file its written submissions vide letter dated 16.4.2019, it has not filed the same. Based on the submissions of the parties and the documents on record, we proceed to consider the change in law events in terms of the judgment of the Tribunal, as stated in the



subsequent paragraphs.

**(a) Increase in Busy Season Surcharge & Development Surcharge on Coal transportation**

10. The Commission in its order dated 1.2.2017 had rejected the claim of the Petitioner for compensation under change in law on account of Busy Season Surcharge & Development Surcharge as under:

*“86.....The freight charges are a cost involved for procuring coal which is an input for generating power for supply to MSEDCL and DNH under their respective PPAs and therefore, the Petitioner was expected to take into account the possible revisions in these charges while quoting the bid. Therefore, the change in the rates of busy season surcharge and development surcharge are not admissible under Change in Law. The Commission is of the view that non-admissibility of busy season surcharge and development surcharge under change in law has been correctly decided in GMR case and in the light of the said decision and the reasons recorded above, the Petitioner cannot be granted relief under Change in Law on account of revision in the busy season surcharge and development surcharge by Railway Board.”*

11. However, the Tribunal in its judgment dated 14.8.2018 has set aside the findings of the Commission and has held as under:

*“xii. In view of the decision of this Tribunal as above which is squarely applicable to the present case, we are of the considered opinion that GWEL is entitled for compensation arising out of change in Busy Season Surcharge and Development Surcharge by the Railways under Change in Law. The Development Surcharge is not applicable in DNH-PPA.*

*Accordingly, these issues are decided in favour of GWEL.”*

12. The Petitioner has submitted that in terms of the above findings of the Tribunal, levy of Busy Season Surcharge & Development Surcharge qualifies as change in law events and the Petitioner ought to be compensated for the same. The summary of the compensation claimed by the Petitioner towards Busy Season Surcharge & Development Surcharge in respect of the MSEDCL and DNH PPAs are as under:

**MSEDCL PPA**

Particulars	(₹ in crore)						
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total
Busy Season Surcharge	0.62	8.03	8.56	7.80	4.83	-	29.85
Development surcharge	0.23	3.55	4.16	3.95	2.53	-	14.42
Total	0.85	11.58	12.72	11.75	7.36	0	44.26



Particulars	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	Total
Busy Season Surcharge	2.60	3.12	3.29	1.51	2.29	-	12.81
<b>Total</b>	<b>2.60</b>	<b>3.12</b>	<b>3.29</b>	<b>1.51</b>	<b>2.29</b>	<b>-</b>	<b>12.81</b>

### Analysis and Decision

13. In terms of the judgment of the Tribunal, the Petitioner is entitled to recover Busy Season Surcharge and Development Surcharge imposed by Railways under Change in Law. Therefore, the Petitioner shall be entitled to claim these from the Respondents, MSEDCL and DNH as change in law. It is pertinent to mention that Busy Season Surcharge and Development Surcharge were being separately levied by Railways over and above basic freight. However, the Ministry of Railways, GOI vide its Notification No. TCR/1078/2015/07 dated 9.1.2018 has subsumed the Busy Season Surcharge and Development Surcharge under the basic freight with effective date of 15.1.2018. Accordingly, these surcharges would be allowable as change in law events only till 14.1.2018. With effect from 15.1.2018, these charges having been subsumed in the basic freight by Railways, are accounted for through the Escalation Indices published by the Commission, and the Petitioner is claiming it in terms of the escalable component of tariff quoted by it while bidding. Therefore, these charges can no longer be claimed under change in law w.e.f. 15.1.2018.

### (b) Shortfall in linkage coal due to changes in NCDP

14. As regards the submissions of the Petitioner that shortage of linkage coal and additional cost incurred on account of procurement of coal from alternate sources to overcome such shortfall ought to be allowed as change in law, the Commission in its order dated 1.2.2017 held as under:

*“There is a clear-cut finding that the increase in price of coal on account of change in National Coal Distribution Policy linked to reduced availability of domestic coal does not constitute an event of Change in Law. Therefore, relief on account of higher purchase cost of coal due to reduced availability of domestic coal cannot be granted to the Petitioner under Change in Law.”*



*“107..... Therefore, in the light of the judgement of the Appellate Tribunal, the Petitioner has got the opportunity to pursue the remedy of force majeure for the additional expenditure incurred by it on account of procurement of coal from alternative sources due to shortage in supply of domestic coal upto normative availability of 85% by SECL.*

*108. Since, force majeure has not been argued by the Petitioner as well as the Respondents and Prayas, it is considered appropriate to grant liberty to the Petitioner to file an appropriate application on the issue of shortage of domestic coal with all relevant details in terms of the provisions of force majeure under MSEDCL and DNH PPA.”*

15. Since the Petitioner was granted liberty by the Commission to file application on this issue, in terms of the force majeure clause of MSEDCL/DNH PPA, the Tribunal disposed of the said appeal vide its judgment dated 14.8.2018 observing as under:

*xvii. It has been argued by GWEL that the Full Bench Judgment of this Tribunal has been set aside by Hon'ble Supreme Court in Energy Watchdog Judgment and hence change in NCDP has to be considered as a Change in Law event and the Impugned Order on this issue is required to be remanded to the Central Commission. The Discom/ Prayas Energy Group has also not objected to consider the Change in NCDP as Change in Law event in view of the Energy Watchdog Judgment. But they have contended that the same is to be seen in circumstances of the case and has tried to make a case that there is little difference in coal allocation/FSA coal quantities to GWEL pre and post change in NCDP. We observe that the parties are in agreement that change in coal quantities due to change in NCDP is a Change in Law event. We are of the view that this issue needs to be re-examined by the Central Commission thoroughly for the quantity of coal on which compensation can be allowed to GWEL in accordance with Law.*

*xviii. In view of the above development, this issue is remanded to the Central Commission for further examination as directed above and allowing compensation to GWEL in terms of the Energy Watchdog Judgment by considering change in NCDP as a Change in Law event.*

16. The Petitioner has submitted that it had been granted coal linkage from SECL (South Eastern Coalfields Ltd) in terms (a) Letter of Assurance (LoA) dated 19.10.2006 for 1.327 MTPA of Grade F coal from Korba/Raigarh coalfield of SECL and (b) Letter of Assurance dated 3.6.2010 for 1.3 MTPA of Grade F coal from Korba/Raigarh coalfield of SECL. The Petitioner has also submitted that it had premised its bid on the aforesaid linkages. As per Schedule 5 of the PPA, the primary source of coal was domestic coal and the fuel source indicated was CIL linkage. On 18.10.2007, the Govt. of India issued NCDP in terms of which an enforceable LOA would be issued, followed by Fuel Supply Agreements (FSA) and the existing linkage holders were assured supply coal at 100% of their normative requirement. The Petitioner has submitted that as on



the bid deadline date, there was assurance of supply of coal upto 100% of the normative requirement.

17. The Petitioner has pointed out that the Commission in its order dated 16.3.2018 in Petition No. 1/MP/2017 (GMRWEL v MSEDCL & ors) has held shortfall in coal on account of deviation in NCDP to be a change in law event and granted compensation for the same *vis a vis* the TANGEDCO PPA. Accordingly, the Petitioner has prayed that similar dispensation would have to be given in the case of MSEDCL & DNH PPAs as well. The Petitioner has also submitted that in the light of the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog case and the Commission's order in Petition No. 97/MP/2017 dated 31.5.2018 in Adani Power case, the shortfall in coal linkage is to be computed on the basis of the ACQ mentioned in the FSA.

18. In addition to the above, the Petitioner has submitted that on 22.5.2017, the Central Government has notified the Scheme for Harnessing and Allocation Koyala Transparently in India (SHAKTI Scheme). According to the Petitioner, this Scheme is a continuation of the coal allocation policy of the Government as it deals with existing linkage holders as well. It has also submitted that Shakti Scheme simply recognizes and acknowledges the fact that shortfall in supply of coal linkage (against NCDP assured quantity) will continue after 31.3.2017. The Petitioner has stated that Shakti Scheme issued by Ministry of Coal, GOI clearly stipulates that the existing LOA holders would be supplied only 75% of the ACQ (as against assured ACQ of 100% of coal requirement of a generating station corresponding to 85% PLF). Moreover, the Revised Tariff Policy dated 28.1.2016 had considered the shortage/non-availability of domestic coal and has decided that higher cost of coal 'shall be considered for being made a pass through'. The Petitioner has submitted that SECL has continued supplying linkage coal as per revised NCDP and has tabulated the actual coal supplied at plant level as against the FSA quantity.



In million tons	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)
FSA quantity	1.06	2.43	2.60	2.60	2.60	0.65
Actual receipt*	0.75	1.73	2.06	1.75	1.71	0.47
Receipt (%)	70.5	71.3	79.1	67.3	65.8	72.5

\*Including linkage coal, As-is-where-is basis and Washery coal

19. The Petitioner has submitted that it has been facing shortfall in linkage coal supply every year. It has further submitted that the original claim under NCDP as change in law was not limited to coal supply till 31.3.2017. Moreover, on account of notification of the Shakti Scheme and the Revised Tariff Policy, shortfall in linkage coal beyond 31.3.2017 is also a change in law event for which the Petitioner is entitled to be compensated. The Petitioner has stated that this Commission had allowed compensation for shortfall of coal linkage to the Petitioner beyond 31.3.2017 in terms of the Commission's Order dated 16.3.2018 in Petition No. 1/MP/2017 (GMRWEL V MSEDCL & ors). The financial impact of the shortfall in linkage coal on account shortfall in coal supply in respect of MSEDCL and DNH PPAs, as furnished by the Petitioner is as under:

#### MSEDCL PPA

(₹ in crore)						
2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
-	9.21	34.13	11.51	19.93	13.52	88.29

#### DNH PPA

(₹ in crore)						
2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
19.77	7.05	22.03	3.22	14.05	10.20	76.32

#### Submissions of Respondent, MSEDCL

20. The Respondent, MSEDCL vide its reply affidavit filed on 3.1.2019 has submitted the following:

- (a) The compensation under NCDP, 2013 for change in law is only to be considered to the extent of change affected by the said policy. The computation of impact of NCDP, 2013 should be on the coal offered by SECL under FSA dated 22.2.2013 to the Petitioner and it should not be on the coal lifted by the Petitioner. As per RFP clause 2.6, the Petitioner has the sole responsibility to consider availability of the



inputs necessary for supply of power such as all costs including capital and operating costs, etc., for quoting of tariff in bidding.

(b) The computation of the impact of NCDP, 2013 would in case of domestic coal non-availability is restricted to the quantum, which the coal company, after having issued a valid LOI/LOA and or entered into FSA, does not supply by reason of the policy decisions taken by the Govt. of India. Thus, clearly it does not apply to contractual issues or commercial disputes and/or non-fulfillment of the obligation by the Coal companies in making available the requisite quantum of coal when the same is not by reason of any policy decision of Govt. of India.

(c) To restore the Petitioner to the same economic position, in terms of the PPAs, it is only the quantity of coal consumed over and above the prescribed level of 65%, 65%, 67% and 75% of supply of coal that would be taken into consideration. The shortfall in coal below 65%, 67% and 75% of ACQ as the case may be is not due to change in law. The change in law as held by the Hon'ble Supreme Court is on the basis of letter dated 31.7.2013 which provides for execution of FSA at the above percentages.

(d) The impact of change in law due to NCDP is subject to prudence check of the operational parameters like SHR, GCV of domestic coal supply by CIL and GCV of alternative coal etc.

### **Submissions of Respondent, DNH**

21. The Respondent, DNH vide its reply affidavit dated 13.2.2019 has submitted the following:

(a) The Respondent has filed Civil Appeal No. 11910 of 2018 before the Hon'ble Supreme Court against the judgment dated 14.8.2018 and the same has been admitted on 20.1.2019 and is pending adjudication.

(b) The Petitioner has sought to make certain claims which travel beyond the scope of remand by the Tribunal. It is settled position of law that the Court below to which the matter is remanded by the superior court is bound to act within the scope of remand and it is not open to the Petitioner to claim any relief which travels beyond the scope of remand (Judgment of Tribunal dated 10.5.2010 in Appeal No. 146 of 2009 was referred to).

(c) The supply to DNH commenced from 1.4.2013 and the scheduled date of delivery to MSEDCL was 17.3.2014. It is therefore clear that DNH could not have been supplied power from Unit-II as the FSA for Unit-II was itself had only been signed on 7.8.2013. Unit-II had achieved COD on 1.9.2013. Hence, the details furnished by the Petitioner are incorrect and cannot be the basis for any computation whatsoever.



(d) Though it is not disputed that in terms of the Energy watchdog judgment, the MOP letter dated 31.7.2013 and the revised Tariff Policy are change in law events, having force of law, whether there is any impact on the supply by the Petitioner under each of the PPAs to the Procurers and if so, the extent of the compensation under Article 10 is to be determined by the Commission in the facts of the case.

(e) The NCDP in its express terms is applicable only till 31.3.2017. Hence, there can be no question of any claim by the Petitioner for the period post 31.3.2017 citing NCDP as a change in law. In fact, even before the Tribunal, the Petitioner had sought for remand on this issue only, based on Energy Watchdog judgment. Accordingly, the Tribunal had remanded the matter to the Commission to consider whether there is any impact of NCDP in each of the PPAs, and if so, to what extent.

(f) The issue of Shakti scheme being a change in law event was never raised now could have been raised before the Tribunal, and therefore the judgment of the Tribunal is based on Energy watchdog judgment which itself does not render any finding on whether Shakti scheme forms part of NCDP or is change in law. The Petitioner cannot try and enlarge the scope of remand to include the Shakti scheme also.

(g) There is no impact of NCDP as the fuel supply arrangements by the Petitioner at the time of the bid were on the same lines as is prescribed in the NCDP. The premise and the basis of the bid submitted by the Petitioner was only based on the availability of coal at 65% and above and not to the full extent. Therefore, there is no impact on account of NCDP for compensation claim.

(h) The LOA issued by SECL in June 2010 to the Petitioner for the quantum of 1300300 tonnes /annum which translated to FSA for supply to DNH, had a specific clause that parameter of imported coal shall be specified by CIL/assurer (SECL). Therefore, it was well within the knowledge of the Petitioner that the entire quantum assured was not from the assured source but from imported sources at higher cost. This was the basis of the bid submitted by the Petitioner.

(i) The above is in contradistinction of the LOA issued by SECL in November, 2006 which translated for the other PPA for the Petitioner, wherein no such clause was provided for in the LOA. Therefore, the position as on seven days prior to the bid deadline as well as the basis of the bid submitted by the Petitioner for supply to DNH was that there would be shortfall of coal from domestic sources.

(j) In the presentation made by the Petitioner in July, 2012 to DNH, it was stated that the commitment of coal supply is only 65% of 85% of the contracted power. It was further stated by the petitioner that the anticipated percentage materialization for new power plants on the basis of production target of coal was only 66% in 2012-13, 54% in 2013-14, 63% in 2014-15, 72% in 2015-16 and 80% in 2016-17. It was further stated that shortfall in the coal supply has to be met by the developers through either e-auction coal or imported coal to avoid penalty on



low availability as per PPA. The risk on account of coal shortage (quantified by Petitioner) was already factored in the bid submitted.

(k) Even prior to the NCDP, 2013 the position with regard to the Petitioner was that there was shortfall of coal and the supply was to be only to the extent of 65%. In fact, the Petitioner expected the actual supply to be only to the extent of 54% in 2013-14 and 63% in 2014-15. This being the position, there was no impact whatsoever by NCDP, 2013 on the Petitioner and in fact the supply was only probably higher than as the Petitioner was entitled to.

(l) The FSAs dated 22.2.2013 and 7.8.2013 with SECL provide for the percentage of ACQ of domestic coal that the coal supplier will endeavor to supply from its sources and the possibility of importing the remaining quantity, if necessary. These FSAs were prior to the impact of NCDP being incorporated in the PPA. Further, Article 4.6 of the FSA provides for the minimum quantity of coal to be supplied by SECL each year, above which there is no compensation payable for short supply.

(m) The FSAs executed by the petitioner prior to the NCDP itself provided that the obligation of SECL would be fulfilled without any penalty for supply at 65% of the ACQ. Therefore, in any case, the minimum quantity of coal supply under the FSAs are to be seen with respect to this clause and only further shortfall in coal supply (if any) on account of change in NCDP is to be considered. It is therefore denied that shortfall ought to be seen with respect to the ACQ under the FSA.

(n) The difference between the liability under the FSAs entered into by Petitioner and the amended coal distribution policy is as follows:-

Financial year	Minimum Domestic coal quality to be supplied in a year as per:		
	Letter of Assurance	FSA (in terms of Article 4.6) dated 22.2.2013 and 7.8.2013	FSAs to be signed as per amended NCDP
2012-13	No quantum specified but envisaged domestic coal and also for shortage of Domestic coal to be met through imported coal	65% of ACQ*	65% of ACQ*
2013-14		65% of ACQ*	65% of ACQ*
2014-15		65% of ACQ*	67% of ACQ*
2015-16		70% of ACQ*	75% of ACQ*
2016-17 onwards		75% of ACQ*	No specific assurance

\*ACQ stands for Annual Contracted Quantity and is defined in the clause 4.1 of the FSA

It is evident from above that there is hardly any change in the minimum quantity to be supplied under the FSA that the Petitioner has signed and the modifications to the FSAs proposed as per the amendment to NCDP dated 26.7.2013 are minor in nature. In fact the FSA signed by the Petitioner provides a



better clarity in terms of the percentage of the ACQ that will be met through domestic coal supply, post 2016-17.

(o) The claim of the Petitioner for compensation can be tested on the basis of what would be the consequences if NCDP, 2013 had not occurred. Even Article 10.2 of the PPA provides that the principle of compensation for change in law is on the basis that would be position if the change in law had not occurred. In the present case, applying the said principle, the Petitioner had no right to claim coal supply over and above Article 4.6 of the FSA, which is only 65% for the first year and thereafter increasing.

(p) The Petitioner was required to arrange the balance quantum irrespective of whether amended NCDP 2013 had been implemented or not. If NCDP 2013 also recognizes the same amount of coal availability as provided in the FSA or near about the same there is no impact of change in law.

(q) The shortfall in coal beyond 65%, 67% and 75% of ACQ as the case may be, is not due to change in law. The change in law as held by the Hon'ble Supreme Court is on the basis of letter dated 31.7.2013 which provides for execution of FSA at the above percentages. If already reduced quantum is only recognized for FSA before NCDP 2013 to that extent there is no effect of any change in law.

(r) NCDP does not in any manner affect the supply of power by the Petitioner to DNH and the changes brought about by the said policy has little or no implication for the PPA with DNH.”

### **Submissions of Prayas**

22. Prayas vide its reply affidavit dated 8.11.2018 has submitted that the Petitioner is only entitled to the compensation to the extent it can be said to have been affected by the NCDP or MOP letter dated 31.7.2013 as recognized by the Hon'ble Supreme Court. In the present case, if the coal availability prior to 31.7.2013 is the same or near about the same, there is virtually no impact or increase in expenditure or as such there cannot be any claim for change in law. The submissions of Prayas are similar to the submissions made by the Respondent, DNH above.

### **Rejoinder of Petitioner**

23. The Petitioner in its rejoinder affidavit to the above replies has submitted the following:



- (a) The shortfall in linkage coal and compensation for the same is to be computed vis-à-vis the LoA quantity which is allocated prior to the cut-off date. Relief ought to be granted for actual shortfall vis-à-vis the quantum assured in the LoA. This has been affirmed by the Tribunal in its judgment dated 21.12.2018 in Appeal No. 193 of 2017 (GMRKEL Vs CERC &Ors).
- (b) Since as on the cut-off date, the Petitioner was assured domestic coal corresponding to 100% normative requirement therefore shortfall would be calculated for the amount of coal assured as on the cut-off date to the Petitioner and the actual coal supply to Petitioner.
- (c) In terms of the Wardha judgment of the Tribunal, the figures provided during the bid cannot be considered for computing relief for change in law. The adoption of normative operational parameter for change in law compensation will not result in any alteration of quoted tariff. Hence, the question of any benefit in quoted tariff does not arise. Moreover, the SHR considered is lower of norm and actuals and hence no inefficiency is passed on to the respondent.
- (d) The issue of shortfall in quantum of coal stands settled in terms of the Energy Watchdog judgment of the Hon'ble Supreme Court and judgment dated 14.8.2018 in Appeal No. 111 of 2017 and judgment dated 21.12.2018 in Appeal No. 193 of 2017 of the Tribunal. Further, the issue regarding quality of coal has been addressed by the Commission in its order dated 15.11.2018 in Petition No. 88/MP/2018.
- (e) The Tribunal vide its judgment dated 21.12.2018 in Appeal No. 193/2017 (GMRKEL V CERC & ors) had held that (a) for projects covered under paragraph 2.2 of the NCDP, 2007 there was assurance of 100% LOA quantum and (b) shortfall will have to be reckoned against the LOA quantum. The Petitioner is squarely covered by the said judgment
- (f) The Shakti scheme by the Central Government is a continuation of the coal allocation policy of the government under NCDP 2007 and NCDP 2013 beyond 31.3.2017. Therefore, the Petitioner is entitled to be compensated for any shortfall in assured quantum of coal. As evident from the judgment of the Tribunal in Appeal No. 193 of 2017, the change in law in relation to NCDP is not limited to 31.3.2017 and hence the claim for compensation for shortfall in linkage coal beyond 31.3.2017 is within the ambit of remand and does not amount to expanding the scope of remand. Moreover, the Tribunal had directed the Commission to thoroughly re-examine the issue of shortfall in linkage coal and deviation in NCDP.
- (g) Since reliance on the Shakti scheme is only limited to continuation of the change in law event beyond 31.3.2017, there was no requirement to issue a fresh change in law notice in respect of the same. The continued shortfall in linkage coal on account of the said scheme is a change in law event and not a contractual dispute.



- (h) There is no requirement for a fresh directive to be issued by the government. If the present directive covers a situation, the directive will apply. The government cannot be expected to issue distinct direction to cover similar scenario. The mere possibility of increase in assured quantum of supply does not change the nature of the event as being in change in law event.
- (i) The Respondent DNH's relies on presentations made by the Petitioner is misplaced since the same was made in July, 2012 which is after the cut-off date under the DNH PPA. Further, the presentation does not state that the Petitioner has factored in shortfall in coal supply and submitted its bid accordingly. The presentation merely refers to the overall scenario of the power sector. The DNH bid was submitted based on the coal assurance given under the LOA as on the cut-off date, otherwise the Petitioner could not have been emerged as L-1 bidder. Moreover, the Petitioner had not given up its claim for shortfall in coal linkage. Thus, the position as on the cut-off date ought to be considered by this Commission.
- (j) The extent of coal shortfall and its estimated continuity for an unforeseen period of 2013-17 was established only after changes to the NCDP, 2013. No generating station would consider a prohibitive /imported coal cost in its bid based on general assessment of coal demand and supply. Such critical assumptions can only be based on firm commitment as per LOA issued by MOC, GOI.
- (k) The Petitioner has provided details of FSA quantity for in the Petition and the actual supply receipt against the same in each financial year. All relevant details regarding shortfall of coal has been submitted.

### Written Submissions of Respondent, DNH

24. The Respondent DNH in its written submissions has mainly reiterated the submissions made in its reply.

### Analysis and Decision

#### (i) Shortfall in linkage coal

25. On 18.10.2007, the Government of India issued the New Coal Distribution Policy (NCDP 2007). In terms of Para 2.2 of the NCDP 2007, the existing linkage holders were assured supply of 100% of normative requirement. Paragraph 2.2 is as under: -

*"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 commitments would also be covered accordingly.” (emphasis supplied).

26. On account of shortage of coal, the Ministry of Coal, Government of India vide its O.M. dated 26.7.2013 (referred to as “NCDP 2013”) modified the ACQ for last four years of the 12<sup>th</sup> Plan for power plants having normal coal linkage. Relevant provisions of O.M. dated 26.7.2013 (NCDP 2013) are extracted as under:

*“2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPPs) of 78,000 MW capacity commissioned or likely to be commissioned during the period from 1.4.2009 to 31.3.2015. Taking into account the overall domestic availability and the likely actual requirement of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of the ACQ for the remaining four years of the 12th plan for the power plants having normal coal linkage.”*

Thus, the above OM modified the trigger level for penalty for domestic coal supply by reducing the ACQ from 100% to 65%, 65%, 67% and 75%.

27. Therefore, as per NCDP 2013, the minimum domestic coal supply quantity has been reduced from the assured 100% to 65%, 65%, 67% and 75% of ACQ respectively for the remaining four years of the 12th plan i.e. for the years 2013-14 to 2016-17. Accordingly, Ministry of Power, Government of India (MoP) issued letter dated 31.7.2013 and had advised the Electricity Regulatory Commissions as under:

*“4. As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.*

*5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government.”*

28. Further, the Revised Tariff Policy, 2016 made specific provisions regarding pass through of the cost of imported coal/market-based e-auction coal for meeting the shortfall between the assured quantity/quantity indicated as ACQ in the LOA/FSA and



reduced quantity of coal supplied by CIL. Relevant provisions of the Tariff Policy (Para 6.1) are extracted as under:

*“However, some of the competitively bid projects as per the guidelines dated 19<sup>th</sup> January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OMNO.FU-12/2011-IPC(Vol-III) dated 31.7.2013.”*

29. The MoP letter dated 31.7.2013 and the Revised Tariff Policy, 2016 have been held by the Hon’ble Supreme Court in the Energy Watchdog case as having the force of law and read in context with Article 10 of the PPAs, constitute Change in Law. The relevant portion of the judgment is extracted hereunder:

*“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 license available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the 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 has 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....”*

30. While remanding the matter to this Commission, the Tribunal had vide its judgment dated 14.8.2018 observed as under:

*“xvii. It has been argued by GWEL that the Full Bench Judgement of this Tribunal has been set aside by Hon’ble Supreme Court in Energy Watchdog Judgement and hence change in NCDP has to be considered as a Change in Law event and the Impugned Order*



on this issue is required to be remanded to the Central Commission. The Discom/ Prayas Energy Group has also not objected to consider the Change in NCDP as Change in Law event in view of the Energy Watchdog Judgement. But they have contended that the same is to be seen in circumstances of the case and has tried to make a case that there is little difference in coal allocation/FSA coal quantities to GWEL pre and post change in NCDP. We observe that the parties are in agreement that change in coal quantities due to change in NCDP is a Change in Law event. We are of the view that this issue needs to be re-examined by the Central Commission thoroughly for the quantity of coal on which compensation can be allowed to GWEL in accordance with Law.

xviii. In view of the above development, this issue is remanded to the Central Commission for further examination as directed above and allowing compensation to GWEL in terms of the Energy Watchdog Judgement by considering change in NCDP as a Change in Law event.”

31. In view of the above, we proceed to examine the quantum of coal on which compensation can be allowed to the Petitioner in terms of the Energy Watchdog Judgment of the Hon’ble Supreme Court by considering the change in NCDP as a Change in Law event.

32. The Petitioner, in furtherance of the LOAs, had entered into the following FSAs:

**FSA for Unit-I**

Particulars	Date	Coal Quantity (MTPA)	Capacity	PPA
FSA Unit-I	22.2.2013	0.8658	200	MSEDCL-66.67%
FSA Unit-II (addendum III)	16.9.2013	0.95238	220	MSEDCL-73.26%
FSA Unit-I (addendum-VI)	10.6.2014	1.3	300	MSEDCL-73.26% TANGEDCO 27.27%

**FSA for Unit-II**

Particulars	Date	Coal Quantity (MTPA)	Capacity	PPA
FSA Unit-II	7.8.2013	0.65015	150	DNH-50%
FSA Unit-II (addendum-I)	30.11.2013	0.715165	165	DNH-55%
FSA Unit-II (addendum-II)	30.11.2013	0.952958*	220	DNH-73.26%
FSA Unit-II (addendum-IV)	10.6.2014	1.3	300	DNH-73.26% TANGEDCO 27.27%

\*corrected through Addendum III dated 10.6.2014

33. The Petitioner has submitted that as on the cut-off date for MSEDCL PPA and DNH PPA which are 31.7.2009 and 1.6.2012 respectively, there was an assurance of supply of coal upto 100% of the normative requirement in terms of the NCDP 2007. The



Petitioner had premised its bid in terms of the linkage granted by SECL based on LOA dated 19.10.2006 for 1.327 MTPA of Grade-F coal from the Korba/Raigarh coal field of SECL and LOA dated 3.6.2010 for 1.3 MTPA of Grade-F coal from the Korba/Raigarh coal field of SECL. As per Schedule 5 of the MSEDCL and DNH PPAs, the primary source of coal was domestic coal and the fuel source indicated was CIL linkage.

34. We observe that the ACQ in terms of the FSAs corresponds to LOA quantity and thus, the Petitioner was assured of 100% of the normative requirement in terms of the PPAs. The Petitioner has submitted that the Respondents, DNH and Prayas have wrongly argued that the FSA signed by the Petitioner at the time of bid was on the same lines as is prescribed in the NCDP and hence there is no impact of NCDP. We notice that the Respondents have relied upon the penalty provision in the FSA, according to which, the shortfall in the level of delivery of the coal by CIL up to 65% of the Annual Contracted Quantity (ACQ) as applicable for domestic coal shall not be liable for penalty till 2014-15 which will get changed to 67% of ACQ in 2015-16 and 75% of ACQ in 2016-17. This is different from the assured quantum of coal under the FSAs/ LOAs. In our view, the impact of change in law for shortage in coal supply has to be computed *vis-a-vis* the quantum assured in the LOAs/FSAs (which was allocated prior to the cut-off dates).

35. We now proceed to consider the quantum of shortage of domestic coal under change in law in terms of the directions of the Tribunal. The actual coal supplied at plant level as against the FSA quantity, for the years 2013-14 to 2016-17 as submitted by the Petitioner is as under:

In million tonnes	2013-14	2014-15	2015-16	2016-17
FSA quantity	1.06	2.43	2.60	2.60
Actual receipt*	0.75	1.73	2.06	1.75
Receipt (%)	70.5	71.3	79.1	67.3

\*Including linkage coal, as-is-where-is basis and Washery coal



36. Article 10.2.1 of the DNH and MSEDCL PPAs provide for the following principles of computing change in law:

*“10.2.1 While determining the consequence of Change in Law under this Article 10, the 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, 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.”*

37. Further, the relevant observations of the Hon’ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case are extracted as under:

*“53.....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.”*

*54. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that.....”*

38. In the light of the provisions of Article 10.2.1 of the PPAs and the observations of the Hon’ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered. The Hon’ble Supreme Court has held that *“Both the letter dated 31<sup>st</sup> July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law.”* As per para 6.1 of the Tariff Policy, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantities indicated in the FSAs. Therefore, in line with the judgment of the Hon’ble Supreme Court in Energy Watchdog case, the Petitioner is entitled to be compensated for change in law due to reduction of supply of linkage coal which has occurred after the cut-off dates of the respective PPAs.



**(ii) Shortfall in linkage coal beyond 31.3.2017**

39. The Petitioner has submitted that the Shakti Scheme issued by the Ministry of Coal clearly stipulates that the existing LOA holders would be supplied only 75% of the ACQ (as against assured ACQ of 100% of coal requirement in NCDP 2007 corresponding to 85% PLF). It has submitted that the Revised Tariff Policy dated 28.1.2016 has provided that due to shortage/non-availability of domestic coal, higher cost of coal from alternative sources 'shall be considered for being made a pass through'. The Petitioner has further submitted that its original claim was not limited to coal supply till 31.3.2017. On account of notification of the Shakti scheme and the Revised Tariff Policy, the Petitioner has submitted that shortfall in linkage coal beyond 31.3.2017 is also a change in law event for which the Petitioner is entitled to be compensated. The actual coal supplied at plant level as against the FSA quantity from 1.4.2017 till June, 2018 as submitted by the Petitioner is as follows:

In million tons	2017-18	2018-19 (till June, 2018)
FSA quantity	2.60	0.65
Actual receipt*	1.71	0.47
Receipt (%)	65.8	72.5

*\*Including linkage coal, as-is-where-is basis and Washery coal*

40. Per contra, the Respondents, DNH, MSEDCL and Prayas have objected to the contention of the Petitioner as regards compensation claim on account of coal shortage beyond 31.3.2017. They have submitted that the revised tariff policy and the scope of Article 10 of the PPA as considered by the Hon'ble Supreme Court in Energy Watchdog Case is restricted to consideration of change in law on account of NCDP 2013 only till 31.3.2017. These Respondents have further stated that the issue was never raised before the Tribunal and hence the Petitioner cannot enlarge the scope of remand to include the Shakti Scheme. The Respondent, DNH has referred to the judgment of the Tribunal dated 10.5.2010 in Appeal No. 146/2009 and has submitted that the Commission ought to consider only those issues which are covered by the



scope of remand and not *de hors* the same. In response, the Petitioner has submitted that Shakti Scheme was introduced by way of notification issued by the Govt. of India and falls under the definition of law under the PPAs. It has submitted that the notification has been issued by Ministry of Coal which is an Indian Government Instrumentality under the respective PPAs and such notifications have been held to be law in plethora of judgments including the Energy Watchdog case, Judgment of Tribunal in Appeal No. 193/2017(GMRKEL V CERC & ors) and Judgment of Tribunal dated 14.8.2018 in Appeal No. 119/2016 (AP(R)L v RERC). The Petitioner has also pointed out that both Shakti Scheme and NCDP 2013 have been issued by the Ministry of Coal pursuant to the decision of the CCEA altering the assurance provided in the NCDP 2007. The Petitioner has stated that MERC vide its order dated 7.2.2019 in Case No.290/2018 has allowed shortfall in Shakti linkage coal as change in law in terms of the provision of the PPA and the Energy Watchdog judgment. Accordingly, the Petitioner has submitted that having been adversely affected by the curtailment in the supply of coal by CIL even after 31.3.2017, it is entitled for relief on account of change in law in terms of the PPAs.

41. The submissions have been considered. As quoted earlier, the Tribunal in its judgment dated 14.8.2018 had remanded the matter to the Commission and had observed the following:

*“xvii.....The Discom/ Prayas Energy Group has also not objected to consider the Change in NCDP as Change in Law event in view of the Energy Watchdog Judgment. But they have contended that the same is to be seen in circumstances of the case and has tried to make a case that there is little difference in coal allocation/FSA coal quantities to GWEL pre and post change in NCDP. We observe that the parties are in agreement that change in coal quantities due to change in NCDP is a Change in Law event. We are of the view that this issue needs to be re-examined by the Central Commission thoroughly for the quantity of coal on which compensation can be allowed to GWEL in accordance with Law.*

*xviii. In view of the above development, this issue is remanded to the Central Commission for further examination as directed above and allowing compensation to GWEL in terms of the Energy Watchdog Judgment by considering change in NCDP as a Change in Law event.”*



42. The Tribunal has '*remanded to the Central Commission for further examination (as directed above) and allowing compensation to GWEL in terms of the Energy Watchdog Judgment by considering change in NCDP as a Change in Law event*'. We have in this order arrived at a conclusion that by virtue of NCDP 2013, the Petitioner is entitled to be compensated for actual shortfall in coal supply till 31.3.2017. The issue for consideration is whether the claim of the Petitioner for compensation for shortfall in coal supply beyond 31.3.2017 is within the scope and ambit of remand by the Tribunal. The Petitioner has submitted that subsequent to the promulgation of Shakti Scheme and in the light of the judgment of the Hon'ble Supreme Court in Energy Watchdog Case, the Petitioner should be compensated for shortfall in coal beyond 31.3.2017. It has submitted that the Shakti Scheme is an extension of the earlier pronounced NCDP, 2013 and the same qualifies for change in law and, therefore, the Petitioner needs to be compensated on account of any shortfall in actual coal supply as assured in NCDP, 2007. On the other hand, the Respondents DNH, MSEDCL and Prayas have objected to it and have submitted that scope of the remand is limited to giving compensation for shortfall of coal on account of NCDP only till 31.3.2017. The Respondent, DNH has further submitted that since Shakti Scheme is a subsequent event, it cannot be considered while deciding the remand matter as has been held in the judgment of the Tribunal dated 10.5.2010 in Appeal No. 146/MP/2009.

43. The submissions of the Respondents and Prayas are misconceived. It is noticed that the Tribunal in its judgment dated 14.8.2018 has not expressed any opinion with regard to the period for grant of compensation due to shortfall in coal supply, but has instead directed this Commission to re-examine the issue with regard to the quantum of coal on which compensation can be allowed considering NCDP as a change in law event, in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. As per the judgment in Energy Watchdog case, any change in the assurance of



supply of coal by amendment to NCDP, 2007 is a change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Both NCDP, 2013 and the Shakti Scheme have been issued by the Ministry of Coal and both alter the assurances provided in the NCDP, 2007. The Shakti Scheme issued by Ministry of Coal on 22.5.2017 (which is after the cut-off dates) provides as under:-

“xxxx

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

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

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

*(iii) The capacities totaling about 68,000 MW as per the decision of CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017. The coal supply to these capacities may be increased in future based on coal availability.*

*(iv) About 19,000 MW capacities out of the 68,000 MW could not be commissioned by 31.3.2015, Coal supply to these capacities may be allowed at 75% of ACQ against FSA provided these plants are commissioned within 31.3.2022. The coal supply to these capacities may be increased in future based on coal availability.*

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

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

xxxx”

44. As stated, the NCDP 2013 as well as the Shakti Scheme have been notified by the Ministry of Coal, Government of India being an Indian Government Instrumentality in terms of the provisions of the respective PPAs. From the provisions of the Shakti Scheme, we observe that Paragraph (A) of the Scheme deals with cases of old regime of LoA-FSA covering about 68,000 MW. Paragraph (A)(iii) mentions about the decision



of CCEA dated 21.6.2013; that the LoA-FDA holders would continue to get coal at 75% of ACQ; that this 75% would be the limit even beyond 31.3.2017; and that the coal supply to these capacities may be increased in future based on coal availability.

45. NCDP 2013 was issued consequent upon approval of CCEA on 21.6.2013. As per NCDP 2013, the revised assured coal allocation was 65%, 65%, 67% and 75% of ACQ for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively. Paragraph (A)(iii) of the Shakti Scheme (quoted above) deals with capacities totaling about 68,000 MW as per the decision of CCEA dated 21.6.2013 which would continue to get coal at 75% of ACQ even beyond 31.3.2017. The capacity of the generating station of the Petitioner falls within the said 68000 MW capacity covered by the decision of CCEA. Moreover, through Shakti Scheme, coal is continued to be made available at 75% of ACQ for the period after 31.3.2017. This percentage (75%) of coal allocation after 31.3.2017 is in continuation of the percentage coal allocation assured in the year 2016-17 of NCDP 2013. In other words, the phrase “*the capacities totaling 68,000 MW as per decision of the CCEA dated 21.6.2013 would continue to get coal at 75% of ACQ even beyond 31.3.2017*” in Paragraph (A)(iii) of the Shakti Scheme would imply that the said scheme is in continuation of the decision in NCDP, 2013.

46. In addition, Paragraph (A)(iii) of the Shakti Scheme provides that “*The coal supply to these capacities may be increased in future based on coal availability.*” Thus, the said scheme, as in case of NCDP 2013, recognizes that availability of coal is not commensurate with the demand and that once coal availability increases, the supply to these capacities of power plants may be increased. A combined reading of the provisions of the Shakti Scheme as regards the old regime of LoA-FSA holders leaves no room for doubt that Paragraph (A) of the Shakti Scheme extends the provisions of NCDP 2013 beyond 31.3.2017.



47. In our considered view, the shortfall in supply of coal is a continuous cause of action and the Shakti Scheme acknowledges and recognizes such shortfall with reference to NCDP, 2013. In the above background, consideration of relief on account of shortfall in supply of coal beyond 31.3.2017 falls within the ambit and scope of remand by the Tribunal. Accordingly, we proceed to examine the relief sought for by Petitioner on account of change in law for shortfall in supply of coal for the period beyond 31.3.2017.

48. As mentioned in Paragraph A(iii) of the Shakti Scheme, the Petitioner will continue to get only 75% of ACQ for its FSA signed under old regime, till improvement happens in coal availability. Such shortage of coal linkage allocation needs to be seen with respect to assurance of 100% normative coal requirement for its power station under NCDP 2007 which was prevailing at the time of cut-off date. Accordingly, in our view, the Petitioner needs to be compensated for shortfall of coal on account of reduction in coal supply allocation under Shakti Policy beyond 31.3.2017, as against 100% normative requirement assured under NCDP 2007. There can be no difference in the treatment for the period before 31.3.2017 and after that.

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would be covered within the definition of 'Change in Law'. 'Indian Government Instrumentality' as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of 'an Indian Government Instrumentality' under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon'ble Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the



PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be compensated, so as to restore it to the same economic position, as if such change in law had not occurred.

50. The impact of the shortfall in linkage coal on account of deviation in NCDP, as furnished by the Petitioner for the period 2013-14 till 2018-19 (till June 2018) is as under:

**MSEDCL PPA**

<i>(₹ in crore)</i>						
2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
0.00	9.21	34.13	11.51	19.93	13.52	88.29

**DNH PPA**

<i>(₹ in crore)</i>						
2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
19.77	7.05	22.03	3.22	14.05	10.20	76.32

51. The Petitioner has submitted that it is entitled to be compensated for shortfall in linkage coal beyond 31.3.2017 in terms of the Commission's order dated 16.3.2018 in Petition No. 1/MP/2017 (GWEL V MSEDCL & ors). The Respondent, MSEDCL placing reliance of MERC orders dated 3.4.2018 in Case No. 154/2013, Order dated 7.3.2018 in Case No. 189/2013 and Order dated 19.4.2018 in Petition No. 102/2016 has submitted that the Station Heat Rate (SHR) to be computed for relief ought to be the net SHR as submitted in the bid or the SHR and Auxiliary Consumption norms specified for new



thermal generating stations as per CERC Tariff Regulations, whichever is superior. It has further submitted that GCV to be considered ought to be middle value of the GCV range mentioned in the invoices supplied to the Petitioner.

52. It is pertinent to mention that similar submissions of the Respondent, MSEDCL were considered by the Commission in Petition No. 88/MP/2018 and it was observed by order dated 15.11.2018 that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take SHR specified in the tariff Regulations as a reference point instead of other parameters suggested by MSEDCL. It was also held that SHR as a bidding document cannot be considered for deciding the coal requirement for the purpose of calculating relief under change in law. The relevant portion of the order is extracted hereunder:

*“30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also relied on MERC order with regard to GCV. As regards SHR, it was also suggested by MERC that net SHR as submitted in the bid or SHR norms specified for new thermal stations as per MYT Regulations, whichever is superior, shall be applicable. In our view, the decision in the said order has been given in the facts of the case and does not have any binding effect in case of the projects regulated by this Commission. Moreover, the SHR given in the bid are under test conditions and may vary from actual SHR. The Commission after extensive stakeholders’ consultation has specified the SHR norms in the 2014 Tariff Regulations. Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.*

*31. In the present case, the Petitioner has considered SHR of 2355 kcal/Kwh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211 x 1.065) and 2310 kcal/kWh (2211 x 1.045) for the period 2009-14 and 2014-19 respectively. Accordingly, we direct that the SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually.*

*32. In case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on ‘as billed’ basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on ‘as billed’ basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on ‘as received’ basis. Therefore, it will be*



*appropriate if the GCV on 'as received' basis is considered for computation of compensation for Change in law."*

In view of the above, the contention of Respondent, MSEDCL is not accepted.

53. The Commission in its order dated 31.5.2018 in Petition No. 97/MP/2017 & I.A No. 21 of 2018 had held that the compensation on account of coal shortage is required to be worked out for the entire actual coal shortage and is not be restricted to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17 onwards respectively The relevant portion of the said order dated 31.5.2018 is extracted as under:

*"33. ...The compensation available under the FSA from MCL for the shortfall in supply below 80% of ACQ is not sufficient to put the Petitioner in the same economic position as if the Change in Law event has not occurred. In the light of the provisions of Article 13.2 of the PPAs dated 7.8.2008 and the observations of the Hon`ble Supreme Court in Energy Watchdog Case, the actual shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered.*

*34. ...As per the above provisions, the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes."*

54. The above decision of the Commission shall also be applicable in the present case. It is however made clear that any compensation paid by the Coal Company to the Petitioner for shortfall in supply of domestic coal shall be adjusted from the claim for compensation under change in law allowed in this order.

55. In the light of the above, we approve the following methodology for compensation duly incorporating subsequent decisions of the Commission on this issue. This would be applicable for both the period before (under NCDP 2013) and after 31.3.2017 (covered by Shakti Scheme):

Step - 1: ECR Linkage Coal <sub>(Delivery point)</sub> = ECR Quoted

Step - 2: ECR Other Coal <sub>(Delivery point)</sub> = {[GSHR / Weighted Average GCV of Other Coal (i.e. imported + e-auction + others<sup>#</sup>)] x [Weighted Average Price of Other Coal (i.e. imported + e-auction + others<sup>#</sup>)] x [1 / (1 - Aux Consumption)] x [1 / (1 - Applicable Transmission Losses)]}



Step - 3: ECR Chargeable (Delivery point) =  $\{(G \times \text{ECR at Step - 1}) + [\text{ECR computed at Step - 2} \times (1 - G)]\}$

Where,

**G** = % Generation achievable based on Actual Linkage Coal received;

**GSHR** = Normative Gross Station Heat Rate as worked out on the basis of applicable CERC Regulations or actual, whichever is lower;

**Aux Consumption** = Normative auxiliary consumption as per applicable CERC Regulations or actual, whichever is lower;

Weighted Average GCV of Other Coal (to be computed in line with applicable CERC Regulation) =  $\{(GCV_{\text{imported}} \times Qty_{\text{imported}}) + (GCV_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (GCV_{\text{others\#}} \times Qty_{\text{others\#}})\} / (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})$ ;

**And**

Weighted Average Price of Other Coal =  $\{(Price_{\text{imported}} \times Qty_{\text{imported}}) + (Price_{\text{e-auction}} \times Qty_{\text{e-auction}}) + (Price_{\text{others\#}} \times Qty_{\text{others\#}})\} / (Qty_{\text{imported}} + Qty_{\text{e-auction}} + Qty_{\text{others\#}})$

Step - 4: Compensation =  $\{(\text{ECR as computed at Step - 3} \text{ minus ECR Quoted}) \times \text{Scheduled Generation at Delivery Point}\}$ .

**Note:**

- 1) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point.
- 2) All facts, figures and computations in this regard should be duly certified by the auditor.
- 3) The coal consumed on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.
- 4) Total Generation Ex-bus and Scheduled generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.
- 5) Other# implies "Coal procured through open market only at present. As-is-where-is basis coal and washery coal is not being considered at present due to lack of relevant information.
- 6) The Petitioner is granted liberty to approach the Commission with complete and relevant details on as-is -where -is basis coal & washery coal claimed in impact of shortage of coal.

56. Accordingly, the compensation on account of coal shortage shall be worked out in accordance with the prescribed formula as above for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ. The Petitioner is



directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to the Respondent Discoms. The Petitioner and the Respondent discoms (MSEDCL & DNH) are directed to carry out reconciliation on account of these claims annually.

**(c) Change in quality of coal pursuant to MOEFCC Notification dated 11.7.2012**

57. The Petitioner, in Petition No.8/MP/2014 had submitted that at the time of submission of bid, there was no requirement in relation to coal based thermal power plants using raw or blended or beneficiated coal with an ash content. However, as per Notification No. G.S.R.552 (E) dated 11.7.2012 of Ministry of Environment, Forests and Climate Change (MoEFCC), all coal based thermal power plants are required to use raw or blended or beneficiated coal with an ash content not exceeding 34% and gross calorific value not less than 4000 Kcal/kg on daily average basis effective from 1<sup>st</sup> day of January, 2014. Accordingly, the Petitioner had requested the Commission to approve the same as Change in Law and allow recovery of any increase in fuel cost resulting from the above change on actual basis. The Commission in its order dated 1.2.2017 had rejected the prayer of the Petitioner and held as under:

*“99. We have considered the submissions of the Petitioner and the respondent. As per notification issued by MoEF dated 11.7.2012, all the thermal power plants are required to use coal with GCV not less than 4000 Kcal/kg and an ash content not exceeding 34%. The Fuel Supply Agreement for MSEDCL was signed with SECL on 22.2.2013 and addendum was issued on 16.9.2013. Fuel Supply Agreement for ED DNH was signed with SECL on 7.8.2013 and addendum was issued on 30.11.2013. Therefore, the Petitioner was aware of the situation of using coal of GCV more than 4000kCal/kg and ash content less than 34%. Accordingly, the Petitioner should have included the coal quality/ grade of coal with GCV more than 4000kCal/kg and ash content less than 34%. Therefore, this event cannot be said to be a Change in Law. Under the circumstances, the Petitioner should have complied with provisions of notification of MOEF for using coal of GCV of 4000 kCal/kg of more and ash content less than 34%. The Petitioner should have approached the coal companies/coal supplier for supply of coal with above parameters so that the same could have been taken up in the FSA. From the submission of the Petitioner, it appears that the Petitioner has not made any efforts to avail the coal of required quality as per the MOEF notification. In the light of these facts, we are not inclined to allow this event as a change in law.”*



58. In the Appeal filed by the Petitioner before the Tribunal (Appeal No. 111/2017), the Tribunal in its judgment dated 14.8.2018 set aside the Commission's order dated 1.2.2017 on this ground and held the following:

*“xxx. We hold that in terms of the PPA the Change in Law event is to be treated with respect to the cut-off date and the present issue is required to be dealt accordingly....*

*xxxi. We observe that that on face of it the notification issued by MOEF being IGI is a Change in Law event falling under second bullet of the Article 10.1.1 of the PPA. The Central Commission has also not denied as a Change in Law event. The Central Commission has erred in linking it with signing of the FSA after issuance of the MOEF notification instead of cut-off date. The issue is to be seen in light of the premise on which the bid was based and the changes made after the cut-off date by MOEF. This issue is required to be analysed in detail by the Central Commission based on the contentions of the parties to arrive at a justified compensation, if any to GWEL considering the MOEF notification as a Change in Law event.”*

59. The Petitioner has further submitted that the Notification dated 11.7.2012 has been subsumed by the Environment (Protection) Amendment Rules, 1986, notified on 2.1.2014. It has further submitted that the Petitioner's plant is located in Warora Taluka, Dist. Chandrapur and is a standalone thermal power project having installed capacity of 600 MW. The supply of coal to the Petitioner is from SECL mines located at a distance exceeding 500 kms (it is nearly 650 kms) and since the aforesaid amendment is subsequent to the cut-off date, the same qualifies as a change in law event. The Petitioner has stated that the aforesaid ash content required to be maintained in terms of Notification of MoEFCC has been ensured through (i) supply of high GCV coal with lower ash content by SECL, to maintain a lower blend ash content and (ii) Washing of coal by the Petitioner. The Petitioner has requested that this expenditure may be allowed and that the expenditure incurred on this count may be allocated to the discoms in the proportion of the scheduled energy. The impact due to change in coal quality as furnished by the Petitioner is as under:

Particulars	(₹ in crore)		
	Impact of washed coal	Impact of high GCV coal supply	Total
2016-17 (from June 2016 onwards)	0.00	25.89	25.89
2017-18	4.25	4.25	8.50
2018-19 (till September, 2018)	4.51	0	4.51
<b>Total</b>	<b>8.76</b>	<b>30.14</b>	<b>38.90</b>



## **Submission of Respondents**

60. The Respondent, MSEDCL has submitted that as per the notification, any thermal power plant using Circulating Fluidized Bed Combustion or Atmosphere Fluidized Bed Combustion or Integrated Gasification Cycle Technology or any other clean technology are also exempted from such coal specific requirement. MSEDCL has submitted that an option was also available with the Petitioner to install clean energy technologies to avail exemption from such coal quality requirement. It has added that a plain reading of the rules as modified by MOEFCC notification makes it clear that the primary legal obligation is of the supplier to supply coal as per the required specification. Accordingly, the Respondent has submitted that the Petitioner was fully aware of the requirement of procuring coal with higher GCV and less ash content.

61. The Respondent, DNH has submitted that the Tribunal having held that the notification by MOEF being Indian Government Instrumentality is a change in law, the Commission is required to consider the extent to which the said notification is applicable to the Petitioner. The Respondent has stated that since the petitioner has not furnished any computation, the question of granting relief does not exist.

62. Prayas has submitted that in case of standalone plant of installed capacity of 100 MW or above located between 500-749 km from pit head which is the likely category in which the plant of the Petitioner falls, the notification would only be effective from June, 2016. It has further submitted that this Commission has consistently held that the coal quantum is to be considered as per normative parameters under the Tariff Regulations of the Commission or actual, whichever is lower.

## **Analysis and Decision**

63. We have considered the matter. Before amendment, Rule 3(8) of the Environment (Protection) Rules, 1986 provided that a Thermal Power Plant located



beyond 1000 kms from the pit-head, or in an urban area or a sensitive or critically polluted area irrespective of its distance from the pithead, except for a pit-head Plant, shall use raw or blended or beneficiated coal with an ash content not exceeding 34% on an annual average basis. On 2.1.2014, MoEFCC amended Rule 3(8) by way of the Environment (Protection) Amendment Rules, 2014 which reads as follows:

*“(8) With effect from the date specified hereunder, the following coal based thermal power plants shall be supplied with, and shall use, raw or blended or beneficiated coal with ash content not exceeding thirty-four per cent, on quarterly average basis, namely :-*

*(a) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located beyond 1000 kilometres from the pit-head or, in an urban area or an ecologically sensitive area or a critically polluted industrial area, irrespective of its distance from the pit-head, except a pit-head power plant, with immediate effect;*

*(b) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 750 - 1000 kilometres from the pit-head, with effect from the 1st day of January, 2015;*

*(c) a stand-alone thermal power plant (of any capacity), or a captive thermal power plant of installed capacity of 100 MW or above, located between 500-749 kilometres from the pit-head, with effect from the 5th day of June, 2016:...”*

64. The Petitioner has contended that its plant is located at a distance exceeding 500 kms (i.e. 650 Kms) from the pit-head and is, therefore, covered by Rule 3(8) (c) of the amended Rules (i.e., Power Plant between 500-749 kms from the pit-head). Hence, it is required to use raw or blended or beneficiated coal with ash content not exceeding 34% on quarterly average basis with effect from 5.6.2016. However, MSEDCL has submitted that an option was available with the Petitioner to install Circulating Fluidized Bed Combustion or Atmosphere Fluidized Bed Combustion or Integrated Gasification Cycle Technology or any other clean technology to avail exemption from such coal quality requirement. This submission of MSEDCL is not acceptable since the plant of the Petitioner was at an advance stage of construction at the time the draft rules were notified and the Petitioner having made a choice of design of its plant, was not in a position to change the technology. Also, by the time the amended rules were notified, both the units had achieved COD.



65. The cut-off date with regard to MSEDCL PPA is 31.7.2009 and that for DNH PPA is 1.6.2012. The amendment to the Environment (Protection) Rules, 1986 was effected after the cut-off date by an Indian Governmental Instrumentality under the provisions of the Environment (Protection) Act. Hence, the MoEFCC notification is a change in law event and the Petitioner is entitled for relief on this count. The Tribunal in its judgment has directed that “the issue is to be seen in light of the premise on which the bid was based and the changes made after the cut-off date by MOEF”. The Tribunal has also directed that this issue is required to be analyzed in detail by the Commission based on the contentions of the parties to arrive at a justified compensation, if any to GWEL considering the MOEF notification as a Change in Law event.

66. The Petitioner has stated that its generating station is located at a distance of 650 kms from the pit-head and, is, therefore, covered by the provisions of Rule 3(8)(c) of the Environment (Protection) Amendment Rules 2014. In this background, we hold that the Petitioner is entitled for compensation under change in law in terms of Article 10.1.1 of the PPA with effect from 5.6.2016. As regards the impact of high GCV coal supply and washery coal claimed by the Petitioner, we notice that the said claim has not been supported with relevant details. In the absence of details, we are not inclined to consider the claim of the Petitioner towards expenditure incurred in compliance with the aforesaid notification. The Petitioner is however granted liberty to approach the Commission with all relevant particulars and the same will be considered in accordance with law.

**(d) Carrying Cost**

67. The Petitioner has submitted that in terms of the judgment of the Tribunal dated 14.8.2018 it is entitled to carrying cost. The Tribunal in the said judgment has



observed as under:

*“xiii. Now we have reached to the final issue raised by GWEL related to carrying cost on the allowed Change in Law events. For the sake of brevity we are not discussing the claims of GWEL and counter claims of the Discom/Prayas Energy Group on this issue as the said issue has been decided by this Tribunal vide judgment dated 13.4.2018 in Appeal No. 210 of 2017 in case of Adani Power Ltd. v. CERC wherein this Tribunal after detailed analysis has allowed carrying cost on the allowable Change in Law events. We straight way come to the relevant portion of the said judgment which is reproduced below:*

*xxxx*

*xv. We consider that the PPA in the present case is having similar provisions as in case of the Adani Judgment of this Tribunal on carrying cost. Hence, GWEL is entitled for carrying cost for allowed Change in Law event (s).*

*xxxx*

*xvii. Thus we hold that GWEL has not raised this issue specifically before the Central Commission. There are also judgments on the issue of raising any issue for the first time before the superior court wherein such claims have been denied. The principle of allowing carrying cost in Section 63 PPAs have been decided by this Tribunal in favour of generators/Sellers in the Adani Judgment quoted above and shall be applicable to the PPAs having similar provision as covered in the said judgment. Having decided so merely GWEL not raising the contention in the petition before the Central Commission would deprive it of the carrying cost of allowed Change in Law events, on the ground of principles of natural justice we grant liberty to GWEL/Appellant to file petition before the Central Commission for redressal of their grievances in this regard keeping in view of our above observations on carrying cost.”*

68. The Petitioner has submitted that in Petition No. 8/MP/2014, it had prayed for restoration to the same economic position as if change in law event had not occurred, which ought to include the grant of carrying cost without which the Petitioner cannot be restored to the same economic position. Accordingly, the Petitioner has submitted that it is entitled to carrying cost for the change in law events allowed. The Petitioner has further submitted that the impact on account of carrying cost has been computed in the following manner:

- (a) Carrying costs has been computed for respective PPAs for allowed claims considering the period between payment made by the Petitioner and date of order allowing such change in law. For this purpose, the Petitioner has computed carrying cost impact from date of payment by the Petitioner till issuance of the order on 3.2.2017. Likewise, for the order in *Suo motu* order in Petition No.13/SM/2017 relating to GST claims, petitioner has computed carrying costs from 1.7.2017 till 13.03.2018.
- (b) Rate of interest for carrying costs is considered as actual Rate of Interest on loan taken by GWEL being:-
  - (i) Principal outstanding towards any Change in Law event till the end of Nth month ( $P_N$ )



(ii) Carrying Costs =  $\sum P_N \times r/12$  (N = 1 to the N - Month of issuance of Order)

69. Accordingly, the carrying costs for MSEDCL PPA and DNH PPA have been computed and tabulated by the Petitioner as under:

**MSEDCL PPA**

Particulars	(₹ in crore)						
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
Carrying cost (BSS & DSS)	0.01	0.83	2.34	3.73	5.13	1.36	13.40
Carrying cost (Tax duties allowed in 8MP)	0.01	1.35	4.88	7.91	-	-	14.15
Carrying cost (Tax duties allowed in 13/SM/2017)					1.33		1.33
Carrying cost (Coal Pass through)	-	0.16	3.65	6.09	7.95	2.58	20.43
<b>Total</b>	<b>0.02</b>	<b>2.34</b>	<b>10.87</b>	<b>17.73</b>	<b>14.41</b>	<b>3.94</b>	<b>49.31</b>

**DNH PPA**

Particulars	(₹ in crore)						
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19 (till June, 2018)	Total
Carrying cost (BSS)	0.11	0.50	0.92	1.19	1.47	0.39	4.58
Carrying cost (Tax duties allowed in 8/MP/2014)	0.23	1.03	3.08	4.74	-	-	9.07
Carrying cost (Tax duties allowed in 13/SM/2017)					1.67		1.67
Carrying cost (Coal Pass through)	1.65	2.55	5.00	6.18	7.22	2.24	24.85
<b>Total</b>	<b>1.99</b>	<b>4.08</b>	<b>9</b>	<b>12.11</b>	<b>10.36</b>	<b>2.63</b>	<b>40.17</b>

70. The Respondent, DNH has submitted that there can be no award of carrying cost till the issue of change in law on the principle claims has attained finality. It has further submitted that the amounts pertaining to GST have no relation whatsoever in the present Petition. The respondent has submitted that the Commission has to determine the appropriate mechanism for computing relief qua the carrying cost. The Respondent, MSEDCL has submitted that in terms of Clause 10.3.4 of the PPA, it is evident that unless and until such compensation is determined by the Commission, the Respondent cannot be compelled to make payments towards alleged demand of compensation. It has further submitted that carrying cost is recognized normally in



cases of monies being denied at the appropriate time and the amounts do not become legally due and payable until the decision of the Commission. Thus, the PPA specifically provides for late payment surcharge in case of delay in payment beyond the due date. Similar submissions have also been made by Prayas.

## Analysis and Decision

71. We have considered the submissions of the parties. The Petitioner has submitted that it should be restored to the same economic position in terms of Article 10.2 as if the Change in Law had not occurred. The Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (APL v CERC & ors) had allowed carrying cost on the claims under change in law and held as under:

*“In the present case we observe that from the effective date of Change in Law the Appellant is subjected to incur additional expenses in the form of arranging for working capital to cater the requirement of impact of Change in Law event in addition to the expenses made due to Change in Law. As per the provisions of the PPA the Appellant is required to make application before the Central Commission for approval of the Change in Law and its consequences. There is always time lag between the happening of Change in Law event till its approval by the Central Commission and this time lag may be substantial. As pointed out by the Central Commission that the Appellant is only eligible for surcharge if the payment is not made in time by the Respondent Nos. 2 to 4 after raising of the supplementary bill arising out of approved Change in Law event and in PPA there is no compensation mechanism for payment of interest or carrying cost for the period from when Change in Law becomes operational till the date of its approval by the Central Commission. We also observe that this Tribunal in SLS case after considering time value of the money has held that in case of re-determination of tariff the interest by a way of compensation is payable for the period for which tariff is re-determined till the date of such re-determination of the tariff. In the present case after perusal of the PPAs we find that the impact of Change in Law event is to be passed on to the Respondent Nos. 2 to 4 by way of tariff adjustment payment as per Article 13.4 of the PPA...*

*From the above it can be seen that the impact of Change in Law is to be done in the form of adjustment to the tariff. To our mind such adjustment in the tariff is nothing less than re-determination of the existing tariff.*

*Further, the provisions of Article 13.2 i.e. restoring the Appellant to the same economic position as if Change in Law has not occurred is in consonance with the principle of ‘restitution’ i.e. restoration of some specific thing to its rightful status. Hence, in view of the provisions of the PPA, the principle of restitution and judgement of the Hon’ble Supreme Court in case of Indian Council for Enviro-Legal Action vs. Union of India &Ors., we are of the considered opinion that the Appellant is eligible for Carrying Cost arising out of approval of the Change in Law events from the effective date of Change in Law till the approval of the said event by appropriate authority...”*



72. The aforesaid judgment of the Tribunal was challenged before the Hon'ble Supreme Court wherein vide judgment dated 25.2.2019 in Civil Appeal No. 5865 of 2018 and Civil Appeal No. 6190 of 2018, the Hon'ble Supreme Court has upheld judgment of the Tribunal as regards the directions of payment of carrying cost to the generator on the principles of restitution and held as under:

*“10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn.*

*This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal...*

*16...There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.”*

73. In terms of Article 10.2.1 of the respective PPAs which provides the principle for restitution and in line with the above judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost (at the rate decided in subsequent paragraphs of this Order) arising out of approved Change in Law events from the effective date of Change in Law till the date of issue of this Order by the Commission. Any payment made by the Respondents in terms of our Order in IA No. 77/2018 dated 26.11.2018 shall be duly adjusted. Once a supplementary bill is raised by the Petitioner, the provisions of Late Payment Surcharge would kick in if payment is not made within due date.



74. The Commission in its order dated 17.9.2018 in Petition No. 235/MP/2015 [AP(M)L v UHBVNL & ors) had decided the issue of carrying cost as under:

*“24.After the bills are received by the Petitioner from the concerned authorities with regard to the imposition of new taxes, duties and cess, etc. or change in rates of existing taxes, duties and cess, etc., the Petitioner is required to make payment within a stipulated period. Therefore, the Petitioner has to arrange funds for such payments. The Petitioner has given the rates at which it arranged funds during the relevant period. The Petitioner has compared the same with the interest rates of IWC as per the Tariff Regulations of the Commission and late payment surcharge as per the PPA as under:-*

<i>Period</i>	<i>Actual interest rate paid by the Petitioner</i>	<i>Working capital interest rate as per CERC Regulations</i>	<i>LPS Rate as per the PPA</i>
<i>2015-16</i>	<i>10.68%</i>	<i>13.04%</i>	<i>16.29%</i>
<i>2016-17</i>	<i>10.95%</i>	<i>12.97%</i>	<i>16.04%</i>
<i>2017-18</i>	<i>10.97%</i>	<i>12.43%</i>	<i>15.68%</i>

*25.It is noted that the rates at which the Petitioner raised funds is lower than the interest rate of the working capital worked out as per the Regulations of the Commission during the relevant period and the LPS as per the PPA. Since, the actual interest rate paid by the Petitioner is lower, the same is accepted as the carrying cost for the payment of the claims under Change in Law.*

*26.The Petitioner shall workout the Change in Law claims and carrying cost in terms of this order. As regards the carrying cost, the same shall cover the period starting with the date when the actual payments were made to the authorities till the date of issue of this order. The Petitioner shall raise the bill in terms of the PPA supported by the calculation sheet and Auditor’s Certificate within a period of 15 days from the date of this order. In case, delay in payment is beyond 30 days from the date of raising of bills, the Petitioner shall be entitled for late payment surcharge on the outstanding amount.”*

75. In line with above Order of the Commission, in the instant case, the Petitioner shall be eligible for carrying cost at the actual interest rate paid by the Petitioner for arranging funds or the Rate of Interest on Working Capital rate as per the applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is lower.

76. We note that the Petitioner, as mentioned in para 69 above has claimed carrying cost in terms of Commission’s order in Petition No.13/SM/2017. In our view, this claim does not fall within the purview of the present Petition. The decision on carrying cost in this Petition is therefore limited to the change in law events which have been allowed in this Petition.



**Mechanism for compensation on account of Changes in Law during the operation period**

77. The Petitioner has submitted that as the bid deadline was 8.6.2012 for DNH PPA and was 7.8.2009 for MSEDCL PPA, any change in law event after the cut-off dates of 1.6.2012 and 31.7.2009 respectively (i.e. 7 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 as per the provisions of the PPA. The Indian Governmental Instrumentalities have introduced and/ or modified various taxes, duties and levies subsequent to the aforesaid cut-off dates as detailed in the present petition. As a result, the Petitioner has to pay and will be paying in future additional amounts pursuant to such change in law, which have to be compensated to the Petitioner under the PPA. Unless the tariff is adjusted accordingly, to compensate for the effect of such change in law, the Petitioner will be subject to an adverse position financially from what the Petitioner had contemplated at the time of bidding.

78. Articles 10.2, 10.3 and 10.5 of the PPA provide for the principles for computing the impact of change in law as under:

*“10.2 Application and Principles for computing impact of Change in Law*

*10.2.1 “While determining the consequence of Change in Law under this Article 10, the 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 Payment, 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.*

*10.3 Relief for Change in Law*

*...*

*10.3.2 During Operating Period*

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

*10.3.3 For any claims made under Article 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurers 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.”*

**10.5 Tariff Adjustment Payment on account of Change in Law**

**10.5.1 Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:**

*(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.”*

79. In our view, the Petitioner is entitled to charge the compensation on account of Change in Law during the Operating Period as per the mechanism provided in the PPA and no separate mechanism is required to be prescribed.

80. However, it is clarified that the Petitioners shall be entitled to claim the compensation only if the expenditures allowed under Change in Law during the operating period (including the reliefs already allowed, if any) exceeds 1% of the value of Letter of Credit in aggregate for the relevant contract year as per provisions of Article 10.3.2 of the PPA. To claim the compensation, the Petitioner shall furnish to the Respondents all the relevant documents duly supported by Auditor Certificate.

81. Article 10 the PPAs provide for the principle for computing the impact of change in law during the operating period. Moreover, the compensation shall be payable only if the increase/ decrease in revenues or cost to the seller is in excess of an amount equivalent to 1% of the letter of credit in aggregate for contract year. These provisions enjoin upon the Commission to decide the effective date from which the compensation for increase/decrease in revenues or of cost shall be admissible to the Petitioner. In our view, the effect of change in law as approved in this order shall come into force from the date of commencement of supply of electricity to the Procurers or from the date of occurrence of Change in Law event, whichever is later. We have specified a mechanism, in the following paragraphs, considering the fact that



compensation for change in law events allowed as per PPA shall be paid in subsequent years of the contract period:

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondent or from the date of Change in Law, whichever is later.

(b) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by procurers during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries.

(c) For Change in Law events related to the operating period, the year-wise compensation henceforth shall be payable only if such increase in revenue or cost to the Petitioner is in excess of an amount equivalent to 1% of LC in aggregate for a contract year as per provision of the PPA.

(d) Approaching the Commission every year for allowance of compensation for such Change in Law is a time-consuming process. Accordingly, the mechanism prescribed above may be adopted for payment of compensation due to change in Law events allowed as per PPA for the subsequent period as well.

(e) If the Petitioner is eligible to receive compensation for Change in Law as per provisions of the PPA the compensation amount allowed shall be shared by the procurers based on the scheduled energy.

82. Petition No. 8/MP/2014 & Petition No. 284/MP/2018 are disposed of in terms of above. With this, the directions of the Tribunal in its judgment dated 14.8.2018 in Appeal No. 111 of 2017 stands implemented.

*Sd/-*  
(I. S. Jha)  
Member

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

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

