CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 260/MP/2019

Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member

Date of Order: 31st January, 2021

In the matter of

Petition under section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 for claiming compensation on account of events pertaining to change in law as per the terms of Power Purchase Agreement dated 25.3.2011 (PPA) executed between the Petitioner and the Respondent No. 2 and as per the terms of the Power Supply Agreement (PSA) dated 5.1.2011 executed between Respondent No.1 and Respondent No. 2.

And
In the matter of

Adhunik Power and Natural Resources Limited
9B, 9th Floor,
Hansalaya Building
15, Barakhamba Road, Connaught Place,
New Delhi- 110001 **.....Petitioner**

Vs

1. West Bengal State Electricity Distribution Company Limited
Vidyut Bhawan, Block DJ, Bidhannagar,
Kolkata 700091

2. PTC India Limited
2nd Floor, NBCC Tower
15 Bhikaji Cama Place,
New Delhi - 110066 **... Respondents**

Parties Present:

Shri Deepak Khurana, Advocate, APNRL
Shri Tejasv Anand, Advocate, APRNL
Shri Vishrov Mukerjee, Advocate, WBSEDCL
Shri Rohit Venkat, Advocate, WBSEDCL
Shri Ameya Vikram Mishra, Advocate, WBSEDCL
Shri S. Chattopodhyay, APNRL

ORDER

The Petitioner, Adhunik Power and Natural Resources Limited, has filed the present Petition under Section 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to be as "the Act") read with Article 10 of the Power Sale Agreement (PSA) dated 5.1.2011 executed between West Bengal State Electricity Distribution Company Limited (in short, 'WBSEDCL') and PTC India Limited (in short, 'PTC'), and the Power Purchase Agreement (PPA) dated 25.3.2011 executed between PTC and the Petitioner for reliefs under various events of Change in Law affecting the generation and supply of power from the generating station of the Petitioner to WBSEDCL.

Background

2. The Petitioner has developed a 540 MW (2x270 MW) thermal power project (hereinafter referred to as 'the Project') in the State of Jharkhand. The Petitioner approached WBSEDCL for sale of 100 MW RTC (round the clock) power from the Project. A meeting was arranged between the Petitioner and WBSEDCL on 27.11.2010 to discuss the "offer, tariff and finalisation of PPA for purchase of power" from the Project in which the Petitioner stressed upon sale of power through negotiated route through a trader. Subsequently, a meeting was held amongst the Petitioner, WBSEDCL and PTC on 3.1.2011 in which the parties agreed that the contracted power of 100 MW with scheduled delivery date as 1.4.2013 at a levelised tariff of Rs.3.13/kWh including trading margin would be supplied by the Petitioner to WBSEDCL through PTC. Thereafter, a Power Sale Agreement was signed between PTC and WBSEDCL on 5.1.2011. In terms of Recital C of the PSA, PTC entered into a PPA with the Petitioner on 25.3.2011 for purchase of 100 MW power

generated from the Project for onward supply to WBSEDCL. Supply of power to WBSEDCL started with effect from 26.7.2013.

3. The Petitioner along with Tata Steel Ltd. was jointly allotted the Ganeshpur coal block in Jharkhand by the Government of India. Pending operationalisation of the captive coal block, the Petitioner was allotted tapering linkage by Central Coalfield Limited on 9.7.2009 and 25.11.2010. Due to delay in getting various approvals, the captive coal block could not be developed/ operationalized. Hon`ble Supreme Court in its judgment dated 25.8.2014 in WP (Crl.) No.120/2012 and connected matters read with the order dated 24.9.2014, cancelled the allotment of coal blocks with the observation that the coal block allotments made through the Government dispensation route were arbitrary and illegal. Subsequent to the cancellation of coal block allocation by the Hon'ble Supreme Court, the Parliament enacted Coal Mines (Special Provisions) Act, 2015 under which allocation of coal blocks was to be made through auction. Though the Petitioner participated in auction of coal blocks, it was not successful.

4. The Petitioner was generating and supplying electricity to WBSEDCL by use of coal sourced through tapering linkage and meeting the shortfall through procuring coal from alternate sources. After expiry of the tapering linkage, the Petitioner has been generating and supplying electricity by procuring coal from open sources, though the Petitioner has not placed the details thereof on record in the present Petition.

5. The Petitioner filed Petition No.305/MP/2015 seeking a declaration that it is entitled to actual landed cost of coal as per the terms of the PPA/PSA and also to compensation on account of Change in Law due to cancellation of coal block. The

Commission in its order dated 29.1.2020 decided that '*in the light of the judgment of the Appellate Tribunal for Electricity (in short 'Appellate Tribunal') in GMR case, the Petitioner shall be entitled for compensation to the extent of shortfall in tapering linkage granted to it pending operationalisation of the captive coal block which are met through e-auction coal or imported coal, etc. for generation and supply of electricity to the Respondent WBSEDCL'*.

6. The Petitioner had also filed Petition No.255/MP/2017 seeking compensation for certain Change in Law events which was allowed by the Commission vide order dated 30.4.2019.

7. The Petitioner has filed the present Petition seeking reliefs for various events of Change in Law in terms of Article 10 of the PPA/PSA in respect of the following:

(a) Levy of Coal Terminal Surcharge and Terminal Charge;
(b) Introduction of Goods and Service Tax (GST) on transportation of coal;
(c) Introduction of Goods and Service Tax (GST) on coal;
(d) Levy of Evacuation Facility Charges;
(e) Levy of Management Fee;
(f) Increase/ change in Value Added Tax (VAT) on account of changes in individual components of tax; and
(g) Carrying cost.

8. The Petitioner has submitted that during the period commencing from aforesaid Change in Law events upto March 2019, it has already incurred additional expenditure of Rs. 31.75 crore in generation and supply of power to WBSEDCL on account of the above-mentioned Change in Law events. The Petitioner has submitted that in order to offset the impact on account of Change in Law events and to ensure continuous, uninterrupted and reliable supply of electricity to WBSEDCL as well as to restore the Petitioner to the same economic position as if the Change in

Law events had not occurred, the Commission may, in exercise of its regulatory power, grant additional tariff over and above the tariff decided under the PPA/PSA to compensate for the increased cost. Accordingly, the Petitioner has made the following prayers:

> *"(a) Hold and declare that the events enumerated in the Petition constitute Change in Law events as per the provisions of the PPAs and that the Petitioner is entitled to be restored to the same economic condition prior to occurrence of the said Change in Law events;*
>
> *(b) Direct the Respondents to make payment of Rs. 31.75 crore to the Petitioner towards the additional expenditure incurred by the Petitioner on account of Change in Law enumerated in the Petition in supplying power to the Respondents under the PPAs from up to 31.3.2019;*
>
> *(c) Grant carrying cost @1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same;*
>
> *(d) Direct the Respondents to continue to make payments accrued in favour of the Petitioner on account of Change in Law events enumerated in the Petitioner up to the effect of the said Change in Law events; and*
>
> *(e) In the interim pending final adjudication of the present Petition, direct the Respondents to make payment of Rs. 28.57 crore (without the carrying cost) i.e. 90% of the already incurred amount by the Petitioner up to 31.03.2019 towards supply of power to the Respondents."*

9. The matter was admitted on 7.2.2019 and notices were issued to the Respondents to file their replies to the Petition. Reply to the Petition has been filed by the Respondents, WBSEDCL and PTC. The Petition was heard at length on 20.8.2020.

Replies of the Respondents

10. Respondent No.1, WBSEDCL, in its reply has submitted as under:

a) The issue of source of coal has been raised in Petition No. 305/MP/2015. The present Petition needs to be adjudged after decision in that Petition since the Change in Law is to be determined with reference to a baseline in terms of fuel cost as well as applicable taxes and duties.

b) Since the present PPA/PSA is through negotiated route, Change in Law principle as per Section 63 of the Act will not be applicable in the present case.

c) The Petitioner has failed to show the financial/ economic implications on account of Change in Law which has to be adjudged against the cost of coal from captive sources.

d) Coal Terminal Charge does not fall under any of the provisions of Change in Law as per Article 10.1 of PPA/PSA. Moreover, the Commission has disallowed the Coal Terminal Charges in its orders in Petition No.101/MP/2017 and 1/MP/2017.

e) GST should not be levied for coal sourced from captive mines. The Petitioner has failed to place any material on record evidencing the actual impact on account of GST leading to increase in actual cost.

f) Levy of evacuation facility charges is not an event of Change in Law in terms of Article 10.1 of the PPA/PSA.

g) Levy of Management Fee notified under Jharkhand Mineral (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 is not relevant as it is applicable in case of coal supplies made through road whereas the Petitioner is admittedly taking coal supplies through rail. Hence, the Petitioner is not entitled for reimbursement of Management Fee.

h) Increase in VAT on account of changes in individual components of tax is not covered under Change in Law in terms of Article 10.1 of PPA/PSA.

i) The Petitioner is trying to make profit in the guise of restitution principle by claiming carrying cost at the rate of 1.25% per month.

11. The Petitioner has filed rejoinder by refuting the submissions and objections made by WBSEDCL.

12. Respondent No.2, PTC has submitted that the Petitioner had filed Petition bearing Petition No. 255/MP/2017 and the Commission vide its order dated 30.4.2019 had disposed of the said Petition by allowing certain Change in Law claims. Since the present Petition has been filed for Change in Law events which have occurred after passing of the order dated 30.4.2019, the Commission may examine the issues in the light of the applicable laws and pass appropriate order in the interest of justice.

13. After issue of the order dated 29.1.2020 in Petition No.305/MP/2015, the Respondent No.1 (WBSEDCL) has filed an additional affidavit dated 19.2.2020 and has submitted as under:

a) Since the Commission has recognised the captive coal block as source of coal under the PPA and tariff agreed in the PPA/PSA pertained to captive coal, any relief to the Petitioner on account of Change in Law events will only be to the extent of cost of coal from captive sources.

b) The Appellate Tribunal for Electricity (in short, 'the Appellate Tribunal') in its judgment dated 12.9.2014 in Appeal No.288/2013 (in short, 'Wardha Case') has held that if a generating company seeks to procure coal from any source other than the designated source under the PPA, it has to seek consent of the distribution company and approval of the relevant regulatory Commission and compensation for Change in Law cannot be granted where these requirements have not been complied with.

c) Since the source of coal is captive coal, the Petitioner is not required to pay any GST or evacuation facility charges and, therefore, the Petitioner is not entitled for compensation for the same. Further, since the tapering linkage was available at the time of execution of the PPA, the Petitioner was aware of the railway charges/ transportation charges and, hence, the Petitioner is not entitled for such charges.

14. The Petitioner has refuted the objections of Respondent No.1, WBSEDCL and submitted as under:

a) Change in Law events are to be determined with reference to the actual cost of coal and not with reference to base price/ baseline of coal and, therefore, the order of the Commission dated 29.1.2020 in Petition No.305/MP/2015 which deals with base price of coal has no relevance for adjudication of the present petition. This argument of WBSEDCL has been rejected by the Commission in order dated 30.4.2019 in Petition No.255/MP/2017.

b) As regards the averment of WBSEDCL that relief to the Petitioner on account of Change in Law events will only be to the extent of cost of coal from captive block, Change in Law provision under the PPA is independent of the clause pertaining to source of fuel.

c) The observation of the Appellate Tribunal in Wardha Case for approval for procurement of coal from sources other than designated sources, is not relevant to the facts of the present case. In Wardha Case, the Appellate Tribunal had disallowed the import duty on coal since the identified source was only domestic coal. In case of the Petitioner, the source was captive coal and after cancellation of coal block, the Petitioner has no other option but to procure coal from alternate sources for generation and supply of power.

d) The captive coal block was never operationalised. The Petitioner is paying GST on coal procured from alternate sources. Hence, the Petitioner is entitled to be compensated for the same. Further, the basis of the allegation of the Respondent No.1 is Article 2.5 of the PPA. The Commission in its order dated 29.1.2020 has held that the provisions of Article 2.5 of the PPA is applicable only if after operationalisation of captive mines, the Petitioner buys coal from outside. Therefore, in the absence of operationalisation of captive mine, the question of application of Article 2.5 does not arise.

15. Learned counsel for the Petitioner and the Respondent No.1, WBSEDCL argued at length and filed their respective written submissions on the same lines as per the submissions made above.

Analysis and Decision

16. The following issues arise for our consideration:

Issue No.1: Whether the Petitioner is entitled for relief under Change in Law that is to be limited to the cost of coal under captive sources as contended by WBSEDCL?

Issue No.2: Whether the Petitioner is entitled for compensation on account of Change in Law with reference to the baseline of coal allowed in order dated 29.1.2020 in Petition No.305/MP/2015?

Issue No.3: Whether relief under Change in Law can be disallowed on the basis of the observations of the Appellate Tribunal in Wardha Case that consent of the Distribution Company and approval of the appropriate Commission is required for procuring coal from alternate sources.

Issue No.4: Which of the claims of the Petitioner on account of Change in Law are admissible in terms of the PPA/PSA?

Issue No.5: Whether the Petitioner is entitled for carrying cost?

These issues have been examined and answered in the succeeding paragraphs.

Issue No.1: Whether the Petitioner is entitled for relief under Change in Law that is to be limited to the cost of coal under captive sources as contended by WBSEDCL?

17. The Respondent, WBSEDCL has submitted that since in the order dated 29.1.2020 in Petition No. 305/MP/2015, the Commission has recognized the captive coal block (Ganeshpur coal block) as the source of fuel under the PPA and that the tariff agreed in the PPA/PSA was based on captive coal block, any relief to the Petitioner including Change in Law events qua procurement of coal from alternate sources will be limited to the extent of cost of coal from captive coal block. WBSEDCL has further argued that the Commission in the order dated 29.1.2020, granted limited relief to the Petitioner for compensation to the extent of shortfall in

supply of coal under tapering linkage. Therefore, the Petitioner's entitlement for compensation is limited to the extent of costs incurred to procure coal from alternate sources to make up for shortfall of supply under tapering linkage.

18. *Per contra,* the Petitioner has submitted that Change in Law provision under the PPA is independent of the clause pertaining to source of coal under the PPA. The Petitioner has submitted that its claim is in line with the principle of restitution in the PPA that provides to restore the Petitioner to the same economic position as if Change in Law had not occurred. Therefore, the principle of restitution can be given effect to by compensating the Petitioner as per actuals and not otherwise.

19. We have considered the submissions of the Respondent No.1, WBSEDCL and the Petitioner. WBSEDCL has submitted that since the Commission has recognised the captive coal block as source of coal under the PPA and tariff agreed in the PPA/PSA was based on the captive coal, any relief to the Petitioner qua procurement of coal from alternate sources will be limited to cost of coal from the captive source. In this connection, WBSEDCL has relied on the observations of the Commission in paragraph 32 of the order dated 29.1.2020 in Petition No. 305/MP/2015. It is pertinent to note that in paragraph 32 of the order dated 29.1.2020, the Commission was dealing with the objection of WBSEDCL that contended that neither the PPA nor the PSA mentioned any specific captive coal block and hence, the Petitioner cannot seek any relief on account of cancellation of captive coal block. In that context, the Commission examined various provisions of the PPA/PSA, particularly, Article 2.5 of the PPA/PSA and correspondences between the parties and based on them, the Commission came to the conclusion that the tariff agreed in the PPA/PSA was based on the captive coal block.

Thereafter, the Commission proceeded to examine whether Article 2.5 of the PPA/PSA which provides that "in case of sourcing of coal from any other sources, it will be deemed to be sourced from the captive source only" prevents the Petitioner from buying coal from alternate sources. The Commission in paragraph 33 of the order dated 29.1.2020 in Petition No. 305/MP/2015 observed as under:

> *"33. The next objection of WBSEDCL is that if the relief is granted to the Petitioner, then it will render Article 2.5 redundant as the said Article provides that in case of sourcing of coal from any other sources, it will be deemed to be sourced from the captive source only. We have come to the conclusion in the preceding para that the source of fuel as the captive mines has already been taken into consideration by the parties during the negotiation of tariff. The Petitioner was expecting that the captive coal block would be operational by the time it started supplying power to WBSEDCL and other beneficiaries. Supply of power to WBSEDCL started on 26.7.2013. However, due to delay in getting various approvals, the captive coal block could not be developed and operationalized by that time. Till the captive coal mines are developed, the Project Developers are granted tapering linkage to meet its contractual obligations for supply of power with the distribution companies. WBSEDCL in its written submission has admitted that the Petitioner was granted tapering linkages on 9.7.2009 and 25.11.2010 prior to the date of signing of the PSA. Therefore, WBSEDCL was aware that the Petitioner was granted tapering linkage till the captive mines are developed and operationalized. Further, actual supply of coal under linkage is allowed only when the Project Developer enters into PPA(s) with the distribution companies. The Petitioner was supplying power to WBSEDCL by sourcing coal under tapering linkage and was meeting the shortfall in supply under tapering linkage by purchasing coal from other sources such as e-auction coal and imported coal, etc. It is pertinent to mention that Ministry of Coal vide its Office Memorandum dated 26.6.2013 notified the changes in the New Coal Distribution Policy which provided that cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. Further, Ministry of Power vide letter dated 31.7.2013 addressed to CERC/SERCs advised that as per the decision of the Government, the higher cost of imported/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERCs to the extent of shortfall in the quantity indicated in the LoA/FSA. Since the policy framework envisaged for supply of coal under tapering linkage to the project developers till the operationalisation of their allocated captive mines, it will defeat the purpose of tapering linkage if the project developers are to get the tariff at the rate fixed for the captive coal even while buying the coal under tapering linkage and meeting the shortfall in supply of coal under tapering linkage through e-auction coal and imported coal. Therefore, the provisions of Article 2.5 of the PPA/PSA have to be read harmoniously in the context of the overall policy framework governing the allocation of captive coal mines and the covering tapering linkage. In our view, the provisions of Article 2.5 of the PPA/PSA is applicable in those cases when the Petitioner even after operationalisation of the captive mines buys coal from outside and claims reimbursement of the actual cost which is not the case. Article 2.5 of the PPA/PSA cannot be used to deprive the project developer for reimbursement of the cost of coal procured under tapering linkage or to meet the shortfall in supply of coal under tapering linkage through import/e-auction coal, in terms of the NCDP, 2013. It is pertinent to mention that NCDP, 2013 has been held by the Hon'ble Supreme Court as Change in Law in Energy Watchdog Case. In our view, Article 2.5 of the PPA/PSA does not create any embargo for the Petitioner to procure coal under tapering linkage*

and to meet shortfall in the tapering linkage by sourcing coal from import/e-auction coal till the captive mines commence production and supply of coal."

20. Thus, the Commission came to the conclusion that even though the negotiated tariff under the PPA/PSA was based on captive coal block, Article 2.5 of the PPA/PSA does not create an embargo on the Petitioner to buy coal from alternate sources, particularly after considering the fact that the Petitioner was allotted tapering linkage pending operationalisation of the captive coal block and in terms of the provisions of New Coal Distribution Policy 2013 (NCDP 2013) and the judgment of the Hon'ble Supreme Court in Energy Watchdog Case, the Petitioner was entitled for reimbursement of cost of coal from alternate sources to meet the shortfall under tapering linkage. Accordingly, the Commission in the said order dated 29.1.2020 in Petition No. 305/MP/2015 decided about the claim of the Petitioner for reimbursement of the cost of coal as under:

"44. In the light of the judgment of the Appellate Tribunal in GMR case, the Petitioner shall be entitled for compensation to the extent of shortfall in tapering linkage granted to it pending operationalisation of the captive coal block which are met through e-auction coal or imported coal, etc. for generation and supply of electricity to the Respondent WBSEDCL……..."

21. From the above, it is clear that the relief under Change in Law cannot be limited to the cost of coal from captive coal block, but has to be based on the actual cost of coal sourced from the tapering linkage and meeting the shortfall through alternate sources.

Issue No. 2: Whether the Petitioner is entitled for compensation on account of Change in Law with reference to the baseline of coal allowed in order dated 29.1.2020 in Petition No.305/MP/2015?

22. Respondent No.1, WBSEDCL has submitted that since the PPA/PSA in case of the Petitioner are based on negotiated tariff and is not discovered through competitive bidding process, Change in Law claims including claims for carrying cost

under Section 63 of the Act would not be applicable in case of the Petitioner. WBSEDCL has further submitted that vide order dated 29.1.2020 in Petition No. 305/MP/2015, the Petitioner was granted compensation to the extent of shortfall in supply of coal under tapering linkage and, therefore, the Petitioner's entitlement for compensation is limited to the extent of costs incurred to procure coal from alternate sources to make up for the shortfall of supply under the tapering linkage. WBSEDCL has further submitted that the Appellate Tribunal in its judgement dated 12.9.2014 in Appeal No.288 of 2013 in Wardha Case has held that if a generating company seeks to procure coal from any source other than the designated source under the PPA, it ought to take consent of the distribution licensee and approval of the Commission. WBSEDCL has submitted that since it has rejected the procurement of coal from alternate sources and claim for increase in cost thereof, any additional expenditure in relation thereto is solely to the account of the Petitioner and WBSEDCL cannot be made liable for the same.

23. *Per contra,* the Petitioner has submitted that the Commission while relying on the law laid down by the Appellate Tribunal in Wardha Case held that the issue of source of coal and base price of coal on account of cancellation of coal block allotted to the Petitioner by the Hon`ble Supreme Court being adjudicated under Petition No. 305/MP/2015 has no impact on the Change in Law Petition for increase in taxes and duties filed on behalf of the Petitioner. Further, the order dated 29.1.2020 in Petition No. 305/MP/2015 has no bearing on the adjudication and decision of the present Petition since the Change in Law events are to be determined with reference to actual cost of coal in terms of the judgment of the Appellate Tribunal in Wardha Case, and not in relation to base line cost in terms of the fuel cost as well as applicable taxes and duties.

24. We have considered the submissions of the Respondent No.1, WBSEDCL and the Petitioner. According to WBSEDCL, since the Petitioner vide order dated 29.1.2020 in Petition No.305/MP/2015 was granted compensation to the extent of shortfall in supply of coal under tapering linkage, the Petitioner's entitlement for compensation be limited to the extent of costs incurred to procure coal from other alternate sources to make up for shortfall of supply under the tapering linkage. The Petitioner has submitted that in terms of the judgment of the Appellate Tribunal in Wardha Case, its claims for additional expenditure on taxes/ duties/ cess/ surcharge on account of Change in Law is not limited to the base price of coal but the actual expenditure by the Petitioner. In order to appreciate the case in proper perspective, we need to examine the orders of the Commission in Petition No. 255/MP/2017 and Petition No. 305/MP/2015 in the light of the principles decided in those orders. The Petitioner was allotted a captive coal block and was granted tapering linkage till the captive coal block was operationalised. Subsequently, the allocation of coal block was cancelled by the Hon'ble Supreme Court. The Petitioner approached the Commission by way of filing Petition No.305/MP/2015 seeking compensation on account of procurement of coal from alternate sources due to cancellation of coal block. The Petitioner also filed Petition No. 255/MP/2017 claiming compensation on account of Change in Law due to introduction of new or change in the rates of taxes/ duties/ cess/ surcharge. The Commission examined the claims of the Petitioner in both the Petitions as per the provisions of Article 10.1 of the PPA/PSA (pertaining to Change in Law); the judgment of the Hon'ble Supreme Court in Energy Watchdog Case; the judgment of the Appellate Tribunal dated 21.12.2018 in Appeal No. 193/2017 in the case of GMR Kamalanga Energy Limited Vs. Central Electricity Regulatory Commission and others (in short, 'GMR Kamalanga Case'); and

judgment of the Appellate Tribunal in Wardha Case and granted reliefs to the extent allowed in the orders of the respective Petitions.

25. In Wardha Case, which was decided on 14.9.2014, the Appellate Tribunal was considering the issue whether the State Commission was correct to link the computation of compensation payable to the appellant therein under Change in Law provision of the PPA with the base used in the bid i.e. energy charges quoted in the bid by Wardha Power Company Ltd. The Appellate Tribunal after considering the Change in Law provisions of the concerned PPA came to the following findings:

> *"23. The provisions of the PPA regarding principles for computing Change in Law and consequential relief to the affected party in the operation stage of a power plant, as applicable in the present case, are summarized as under:*
>
> > *(i) The purpose of compensating the party affected by Change in Law is to restore the affected party to the same economic position as if such Change in Law has not occurred.*
> >
> > *(ii) The compensation is 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 for the relevant contract year.*
> >
> > *(iii) The documentary proof that is required to be provided by the seller to establish the impact of Change in Law is the proof for increase/decrease in its revenue/expenses.*
>
> *24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.*
>
> *25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.*
>
> *26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant's perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid*

may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.

27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA.

28. The State Commission has wrongly considered that the economic position of the bidder has to be restored as of 7 days prior to the bidding date. As per the provisions of the PPA, the affected party has to be restored by compensation to the same economic position as if such Change in Law has not occurred, at the time of occurrence of Change in Law and not seven days prior to bidding date. 7 days prior to bidding date is relevant only as the base date with respect to which the occurrence of Change in Law has to be recognized. We find that the State Commission has not interpreted the provisions of the PPA correctly and have added words to the provisions of the PPA while giving the interpretation which is not permissible.

29. We also find that the State Commission in the impugned order has allowed extra VAT on secondary fuel due to Change in Law and has held that the Respondent shall reimburse additional VAT incurred by the Appellant in secondary fuel. Thus, the State Commission itself has allowed compensation on increase in tax on secondary fuel on the basis of actuals. However, a different yardstick was used for computation of compensation for tax on coal.

30. According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.

31. In view of above, we set aside the findings of the State Commission regarding calculation of compensation on the same base as given in the bid and hold that the compensation has to be computed with respect to prevalent price of coal. Accordingly, this issue is decided in favour of the Appellant."

26. The Appellate Tribunal in the above quoted judgment came to the conclusion that since the seller in its bid had not quoted the price of coal, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/ excise duty on coal to the coal price computed from the quoted energy charges for the

purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and, therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the seller to the same level as if such Change in Law has not occurred. While holding that the seller is not entitled to increase in energy charges on account of any increase in base price of coal, the Appellate Tribunal held that impact on account of change in taxes/ duties/ cess due to Change in Law resulting in additional expenditure has to be allowed as per actuals.

27. Law with regard to impact of Change in Law has further evolved in the judgment of the Hon'ble Supreme Court in Energy Watchdog Case. In that case, the question arose as to whether shortfall in supply of assured quantum of coal by Coal India Limited and the additional expenditure incurred by the sellers (generating companies) to meet their contractual obligations under the PPA by procuring coal from alternate sources is admissible under Change in Law. Hon'ble Supreme Court after considering the provisions of New Coal Distribution Policy (NCDP), 2007 which assured 100% of coal requirement to thermal power generating stations; NCDP, 2013 which reduced the assured supply of coal by certain percentages on account of shortage of coal and permitted the sellers to meet such shortages through procurement from alternate sources; and the letter of Ministry of Power, Government of India dated 31.7.2013 advising the Regulatory Commissions to allow the additional expenditure as pass through, recorded the finding that such changes in the NCDP amounted to change in conditions for obtaining any consent or permit or clearances and hence was covered under Change in Law provisions in the PPA. The relevant portions of the Hon`ble Supreme Court judgment in Energy Watchdog Case are extracted as under**:**

"56. However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1. It is clear from a reading of the Resolution dated 21-6-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2007 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 31-7-2013, the following letter, which is set out in extenso states as follows:

FU-12/2011-IPC (Vol-III)
Government of India
Ministry of Power
Shram Shakti Bhawan, New Delhi
Dated: 31-7-2013

To,
The Secretary,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.

Ref. CERC's D.O. No. 10/5/2013-Statutory Advice/CERC dated 20-5-2013.

Sir,

In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any fuel supply agreement (FSA) after March 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the letter of assurance (LoAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MoC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.

2. After considering all aspects and the advice of CERC in this regard, Government has decided the following in June 2013:

(i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of

annual contracted quantity (ACQ) for the remaining four years of the 12th Plan.

(ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

(iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26-7-2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to the coal supply for the next four years of the 12th Plan (copy enclosed).

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.

This issues with the approval of MOS(P)I/C.

Encl: As above.

Yours faithfully,
sd/-
(V. Apparao)
Director

This is further reflected in the revised Tariff Policy dated 28-1-2016, which in Para 1.1 states as under:

1.1. In compliance with Section 3 of the Electricity Act, 2003, the Central Government notified the Tariff Policy on 6-1-2006. Further amendments to the Tariff Policy were notified on 31-3-2008, 20-1-2011 and 8-7-2011. In exercise of powers conferred under Section 3(3) of the Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6-1-2006 and amendments made thereunder, shall, insofar as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1. Procurement of power

As stipulated in Para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19-1-2005 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 OM No. FU-12/2011-IPC (Vol-III) dated 31-7-2013.

57. *Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."*

28. It may be observed that while the judgment of the Appellate Tribunal in Wardha Case did not allow change in base price of coal as a pass through under Change in Law, the judgment of Hon'ble Supreme Court in Energy Watchdog Case enlarged the scope of the provisions of Change in Law by allowing the change in base price of coal to the limited extent of meeting the shortfall from the assured quantity through alternate sources.

29. In GMR Kamalanga Case, the Appellate Tribunal has held that add on premium prices paid by a seller under tapering linkage on account of delay in

operationalisation of captive coal block and subsequent cancellation of the captive coal block by the order of the Hon'ble Supreme Court are covered under Change in Law and the affected party needs to be compensated for the extra expenditure incurred on account of such add on premium price. The relevant portions of the judgment of the Appellate Tribunal in GMR Kamalanga Case are extracted as under:

> *"**65. Add on premium price on the notified price of coal supplied to tapering linkage holders***
>
> *Central Commission opined that the add on premium price over and above the notified price of coal under tapering linkage is not change in law in terms of Bihar PPA. The Commission opined as under in the impugned order:*
>
> > *"52. We have considered the submissions of the Petitioners and Prayas. The Petitioners have not placed on record any document with regard to add on procurers price on the notified price of coal for supplies under tapering linkage holders nor have explained as to how the said event can be considered under Change in Law in terms of Article 10.1.1 of the Bihar PPA. In any case, it appears that the premium charged by the coal company for the add-on price on the notified price of coal is the result of contractual arrangement between the Petitioners and MCL and therefore cannot be recovered under Change in Law."*
>
> *66. According to Appellants, this opinion of Commission is wrong since FSA pertaining to tapering linkage signed between the parties on 28-8-2013 for capacity of 2.384 MTPA as several Clauses envisages with reference to add on price under what circumstances such add on price should be levied. Clause 9 of the FSA refers to price of coal as under:*
>
> > *"9.1(a) Add-on Price: For coal supplies after the Normative Date of Production, additional 40% of the Base Price shall be payable by the Purchasers as 'Add-on price' for coals of GCV of 5800 kCal/Kg and below. … …"*
>
> *Even in the FSA entered into between ECL and the Appellant on 29-5-2014 after transferring certain quantum of coal supply from MCL to ECL (tapering linkage), such clauses pertaining to price of coal and add on price were noted which defines price of coal similar to the above mentioned meaning but additional percentage of the price is reduced from 40% to 20%. Except this, all other contents of Clauses 9, 9.1(a) are exactly the same.*
>
> *67. Tapering linkage was granted till operationalization of captive coal blocks. Captive coal block had to be developed on or before 17-10-2013. As already stated above, for the reasons beyond the control of GKEL, delay in operationizing the coal block had occurred on account of Go-No-Go policy of MOEF. Therefore, it had to rely on the tapering coal linkage. This fact is not denied.*
>
> *68. Meanwhile, on 25-8-2014 by virtue of judgment of the Hon'ble Apex Court in the case of Manohar Lal Sharma vs. The Principal Secretary & Ors, entire allocation of coal block made by Screening Committee from 14-7-1993 onwards in 36 meetings and allocations made through the Govt. dispensation route were held to be illegal. As a consequence, de-allocation order came to be passed on 24-9-2014 which cancelled*

allocation of 204 coal blocks including Rampia etc. with immediate effect. Therefore, Captive Coal Block came to be cancelled. Prior to this, the delay between October 2013 till date of judgment, it was on account of Go-No-Go policy of MOEF which was beyond the control of Appellant. Additional 40% or 20% of the base price was payable by the purchasers as "add on price" for coals after the normative date of production. On account of reasons mentioned above between the scheduled date of coal block and the judgment in Manohar Lal Sharma, it was a case of force majeure and from the date of judgment, it was on account of change in law (due to NCDP of 2013).

69. According to the Appellants, if Captive Coal Block had not been cancelled and if development of coal block was not delayed because of Go-No-Go policy, GKEL would not have to pay add on premium. For the reasons stated above, since the delay in development of Captive Coal Block and subsequent cancellation of the Block by virtue of judgment of Hon'ble Apex Court, the consequential financial impact on account thereof in respect of add on premium is also covered as change in law.

70. Apparently, add on premium was not part of LOA and tapering linkage policy. Therefore, we are of the opinion, Appellant GKEL is entitled for compensation for increase in cost due to continued use of tapering linkage coal on account of delay in development of coal block as well as eventual cancellation of blocks by judgment."

30. The principles laid down in the above noted three judgments can be summarised as under:

a) Since the price of coal is not quoted in the bid and only energy charge is quoted, the seller is not entitled for any relief on account of increase or decrease in base price of coal.

b) Change in Law on account of increase or decrease in the rate of taxes/ duties/ cess/ surcharge are paid on the actual landed cost of coal. Therefore, their impact has to be calculated and admissible under Change in Law not with reference to the base price of coal quoted in the financial bid but with reference to actual landed price of coal. Otherwise the affected party will not be restored to the same economic position as if the Change in Law has not occurred.

c) In case of shortfall in assured quantity of coal where the seller is required under NCDP, 2013 to arrange coal from alternate sources by paying higher price, the seller needs to be compensated for such additional cost under Change in Law.

d) Where the seller is required to pay add-on price under tapering linkage on account of delay in operationalisation of captive coal block or subsequent cancellation of allotment of such coal block, the seller is entitled to be

compensated for the additional expenditure incurred on add-on price under Change in Law.

31. Respondent No.1, WBSEDCL has raised an objection that since the PPA/PSA in case of the Petitioner are based on negotiated tariff and not on competitive bidding, Change in Law claims including claims for carrying cost under Section 63 of the Act would not be applicable in case of the Petitioner. It is pertinent to note that the Commission while dealing with the Change in Law claims in Petition No. 305/MP/2015 and Petition No. 255/MP/2017 examined the provisions of Article 10.1 of the PPA/PSA and found that the provisions are similar to those of the PPAs under Section 63 of the Act including restitution principles. Therefore, the case of the Petitioner deserved similar treatment as in case of the Section 63 PPA since the parties to the PPA/PSA have agreed to deal with the eventualities arising out of Change in Law in similar manner as in case of PPA under Section 63 of the Act.

32. In Petition No. 255/MP/2017, the Petitioner had claimed compensation on account of increase in certain taxes and duties. The Commission after considering the principle laid down in Wardha case allowed the claims as under:

"18. We have considered the submissions of the parties. It is observed that Petition No. 305/MP/2015 relates to issue of source of coal and base price of coal on account of cancellation of coal blocks allotted to the Petitioner by the Hon`ble Supreme Court. The Petitioner in the present Petition has sought compensation with respect to the increase/decrease of revenue/expenses on account of Change in Law events. It is pertinent to mention that the Appellate Tribunal in its judgment dated 12.9.2014 in Appeal No.288 of 2013 (Wardha Power Company Limited versus Reliance Infrastructure Limited & Others) had held that the compensation under change in law qua taxes and duties is always on the actual cost of coal. The relevant portion of the judgment dated 12.9.2014 in Appeal No.288 of 2013 is extracted as under:

> *24. We find that as per the provisions of the PPA, there is no co-relation of the base price of electricity quoted by the Seller and computation of compensation as a consequence of Change in Law. The compensation is only with respect to the increase/decrease of revenue/expenses of the Seller following the Change in Law. The minimum financial impact to qualify for claim of compensation is also linked to the increase in expenses/decrease in revenue of the seller.*

25. For example, if the tax on cost of coal has been increased from 5% to 8%, then for computing the impact of Change in Law, only the increase in the actual expenditure of Seller due to increase in tax from 5% to 8% has to be considered. This is because if the tax had not increased, the Seller would have paid tax of 5% on the actual cost of coal. With the Change in Law, the Seller has now to pay 8% on the actual cost of coal. Therefore, to restore the Seller to the same economic position as if such Change in Law has not occurred, the Seller has to be compensated for additional tax of 3% on the actual cost of coal. However, the Seller will have to submit proof regarding payment of tax on coal.

26. The price bid given by the Seller for fixed and variable charges both escalable and non-escalable is based on the Appellant"s perception of risks and estimates of expenditure at the time of submitting the bid. The energy charge as quoted in the bid may not match with the actual energy charge corresponding to the actual landed price of fuel. The seller in its bid has also not quoted the price of coal. Therefore, it is not correct to co-relate the compensation on account of Change in Law due to change in cess/excise duty on coal, to the coal price computed from the quoted energy charges in the Financial bid and the heat rate and Gross Calorific value of Coal given in the bidding documents by the bidder for the purpose of establishing the coal requirement. The coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred.

xxxxxxxxx

30. According to the bidding documents, the Appellant is not entitled to any increase in energy charges on account of increase in base price of fuel. However, the impact on account of change in the expenditure due to Change in Law has to be allowed as per the actuals subject to verification of proof submitted by the Appellant.

19. Thus, compensation on account of increase in the expenditure due to Change in Law events has to be allowed as per actual cost of coal subject to verification of documents submitted by the Petitioner…"

33. In Petition No.305/MP/2015, the Petitioner sought compensation for arranging coal from alternate sources on account of non-operationalisation of captive coal block and cancellation of coal block. The Commission in the light of the judgment of the Appellate Tribunal in GMR Kamalanga Case which referred to NCDP, 2013 (decided as Change in Law in Energy Watchdog Case) allowed the additional expenditure incurred by the Petitioner for procuring coal from alternate sources under the tapering linkage in the following terms:

"43……..It is observed from the judgement of the Appellate Tribunal as quoted above that the issue was considered in the context of the add on premium price on the

notified price of coal supplied to tapering linkage holders. The Appellate Tribunal has taken note of the fact that tapering linkage was granted to GMR Kamalanga till operationalisation of captive coal blocks. Though the captive coal block was to be developed on or before 17.10.2013, delay in operationalising the coal block had occurred on account of Go-No-Go policy of MoEF. Consequently, GMR Kamalanga had to rely on tapering coal linkage. The Hon'ble Supreme Court passed the judgment on 24.9.2014 cancelling the allocation of coal blocks. The Appellate Tribunal has held that it was a case of force majeure between the schedule date of operationalisation of coal block and the judgment in Manohar Lal Sharma and from the date of judgment, it was on account of change in law due to NCDP, 2013. The Appellate Tribunal has held that the consequential financial impact on account of the delay in development of the captive coal block and consequent cancellation by virtue of the judgment of the Hon'ble Supreme Court in respect of the add on premium is covered under Change in Law. The Appellate Tribunal has opined that GMR was entitled for compensation for increase in cost due to continued use of tapering linkage on account of delay in development of coal block as well as cancellation of blocks by the judgement of the Hon'ble Supreme Court.

44. In the light of the judgment of the Appellate Tribunal in GMR case, the Petitioner shall be entitled for compensation to the extent of shortfall in tapering linkage granted to it pending operationalisation of the captive coal block which are met through e-auction coal or imported coal, etc. for generation and supply of electricity to the Respondent WBSEDCL. Accordingly, we direct the Petitioner to approach the Commission through a fresh petition giving a details of the tapering linkage granted to it, the reasons for the delay in development and operationalisation of captive coal block, the coal requirement met through e-auction/imported coal to meet the shortfall in supply under tapering linkage."

34. It may be observed that reliefs under Change in Law in Petition No. 255/MP/2017 and Petition No. 305/MP/2015 were different as the nature of claims of Change in Law in both cases were different. Therefore, the principle based on which Petition No. 305/MP/2015 was decided cannot be used to restrict the claims of the Petitioner in the present Petition. The parties have agreed to a negotiated tariff and factored the same in the PPA/PSA and the provisions of PPA/PSA are similarly worded as in case of PPA under competitively bid tariff under Section 63 of the Act. Further, the parties to the PPA/PSA in the present case have incorporated Change in Law provision on similar line as in case of PPA under Section 63 of the Act. In that sense, the claims are on similar line as that of Petition No. 255/MP/2017. Therefore, on account of introduction of or change in rates of taxes/ duties/ cess/ surcharge, the Petitioner is entitled for relief on the basis of actual landed cost of coal. However, the

Petitioner is not entitled for compensation on account of change in base price of coal except to the extent allowed in Petition No.305/MP/2015.

Issue No.3: Whether relief under Change in Law can be disallowed on the basis of the observations of the Appellate Tribunal in Wardha Case that consent of the Distribution Company and approval of the appropriate Commission is required for procuring coal from alternate sources.

35. Respondent No.1, WBSEDCL has submitted in Wardha Case, the Appellate Tribunal did not allow custom duty on imported coal on the ground that the appellant therein had not taken the consent of the distribution company and approval of the appropriate Regulatory Commission. WBSEDCL has further submitted that the Appellate Tribunal denied permission to the Petitioner to arrange coal from alternate sources. WBSEDCL has submitted that orders of the Commission in Petition No. 255/MP/2017 and Petition No. 305/MP/2015 have not taken into account the principle decided by the Appellate Tribunal in Wardha Case with regard to consent of distribution company and the approval of the appropriate Commission and to that extent the orders are *per incuriam*. WBSEDCL has relied upon the judgments of the Hon`ble Supreme Court in the cases of *Sundeep Kumar Bafna v. State of Maharashtra* [(2014) 16 SCC 623] and *A.R. Antulay v. R.S. Nayak* [(1988) 2 SCC 602] and has submitted that the Hon`ble Supreme Court in the said judgments has held that the principle of *per incuriam* can be applied if the *ratio* of the judgment cannot be reconciled with the ratio of the previous judgment of a larger or a higher bench.

36. The Petitioner has submitted that WBSEDCL has taken no such objection in the pleadings that orders in Petition No. 255/MP/2017 and Petition No. 305/MP/2015 are inconsistent with judgement in Wardha Case and are, therefore, *per incuriam.* Hence, such a submission during the arguments is an afterthought. The Petitioner

has submitted that since the Commission has granted relief in Petition No. 255/MP/2017 by relying on the judgment of the Appellate Tribunal in Wardha Case, the said order cannot be considered as *per incuriam*. The Petitioner has submitted that the judgments relied upon by WBSEDCL with reference to *per incuriam* are not applicable to the facts of the present case.

37. We have considered the submissions of WBSEDCL and the Petitioner. The relevant portion of the judgment of the Appellate Tribunal in Wardha Case is extracted as under:

> *"32. The second issue is relating to claim on customs duty on imported coal.*
>
> *33. We find that the PPA defines fuel as primary fuel used to generate electricity namely domestic coal. The Schedule 5 of the PPA furnished by the Appellant also clearly indicates the primary fuel as domestic coal. The source of coal has been indicated as Coal India Ltd. through coal linkage to be supplied from Western Coalfields Ltd.*
>
> *34. It is clear from the bid document that at the time of submission of the bid, the Appellant had not contemplated any import of coal and it had proposed generation of electricity based on the domestic coal. The decision to import coal has been taken by the Appellant subsequently on its own volition with a view to increase the efficiency of the plant as held by the State Commission. If the Appellant wanted to import coal due to some compelling circumstances, it should have taken the consent of the Respondent No. 1 and the approval of the State Commission before procuring imported coal. Therefore, we are not inclined to interfere with the findings of the State Commission disallowing the claim of the Appellant on account of increase of import duty on coal under Change in Law. The issue is, accordingly decided against the Appellant."*

38. The above findings of the Appellate Tribunal is based on the finding that though the bid was on the basis of domestic coal, the appellant therein had resorted to import of coal in order to increase the efficiency of the plant. In that context, the Appellate Tribunal denied the relief under Change in Law on account of customs duty since the Appellant had not taken the consent of the distribution company or approval of the State Commission concerned. The Petitioner was allocated a captive coal mine and till development of the captive coal mine, it was allocated tapering

linkage. Thus, the case of the Petitioner in the instant Petition stands on a different footing. Therefore, the Petitioner cannot be denied relief under Change in Law on account of imposition of any taxes/ duties/ cess/ surcharge or any change in the rate thereof for not having sought consent of the distribution company or approval of the concerned State Commission and judgment in Wardha Case on this issue cannot be applied in the instant Petition. This is also covered under first part of the judgment of the Appellate Tribunal as quoted in paragraph 25 above. Further, the relief in Petition No.305/MP/2015 was granted pursuant to the principles laid down by the Hon'ble Supreme court in Energy Watchdog Case and Appellate Tribunal in GMR Kamalanga Case. Since the orders of the Commission in Petition No.255/MP/2015 and Petition No. 305/MP/2015 have been decided in compliance with the principles laid down by Hon'ble Supreme Court and Appellate Tribunal, they cannot be said to be *per incuriam* of some findings of the judgment in Wardha Case which are not applicable in the facts of the case of the Petitioner.

Issue No.4: Which of the claims of the Petitioner on account of Change in Law are admissible in terms of the PPA/PSA?

(A) Levy of Coal Terminal Surcharge and Terminal Charge.

39. The Petitioner has submitted that as on cut-off date, i.e. 5.1.2011, there was no levy of Coal Terminal Surcharge for the distance beyond 100 km. Subsequently, the Railway Board, Ministry of Railways vide Circular No. TCR/1078/2017/07 dated 22.8.2016, imposed a Coal Terminal Surcharge w.e.f. 22.8.2016 at Rs. 55/MT at both loading and unloading of coal (totalling to Rs. 110/MT) for distance beyond 100 km. Subsequently, Railway Board vide its Circular dated 6.7.2017 abolished Coal Terminal Surcharge w.e.f. 10.7.2017. However, Railway Board vide its Circular dated 27.12.2018 has started levying Terminal Charge @Rs. 20/MT on both inward

and outward tariff (totalling to Rs. 40/MT) for all commodities, including coal, being handled at Railway goods sheds and private terminals both greenfield and brownfield. The Petitioner has submitted that levy of Coal Terminal Surcharge and Terminal Charge has led to increase in the cost of supply of power by the Petitioner to the Respondents.

40. The Respondent, WBSEDCL has submitted that the levy of Coal Terminal Surcharge and Terminal Charge pursuant to Corrigendum No. 14 to Rates Circular No. 8 of 2015 dated 22.8.2016 and Rates Circular No. 24 of 2018 dated 27.12.2018 respectively do not amount to Change in Law in terms of Article 10.1 of the PSA as the Commission has disallowed the claims with respect to Coal Terminal Surcharge in its order dated 19.12.2017 in Petition No. 101/MP/2017, which was followed in order dated 16.3.2018 in Petition No. 1/MP/2017. WBSEDCL has further submitted that Coal Terminal Surcharge is being incurred on account of procurement of coal. In terms of Article 2.5 of the PSA, in case of supply of coal from a source other than a captive source, such supply will be treated as supply from a captive source and the Petitioner will not be entitled to any compensation on account of procurement of coal from alternate sources. Levy of Coal Terminal Surcharge and Terminal Charge do not fall under any category of Change in Law events under Article 10 of the PSA. The Petitioner is not entitled to transportation charges of any nature as the energy charges have been capped in terms of Article 2 read with Schedule A of the PSA. WBSEDCL has submitted that since tapering linkage was available at the time of execution of the PPA, the Petitioner was aware of modalities and costs associated with transportation.

41. *Per contra*, the Petitioner has submitted that it is an admitted position that the Coal Terminal Surcharge and Terminal Charge have been levied only after the cut-off date and pursuant to their levy in terms of the Circular/Notification issued by the Ministry of Railways, the cost of supply of power by the Petitioner to the Respondents has accordingly increased. Therefore, the levy of Coal Terminal Surcharge and Terminal Charge are Change in Law events within the meaning of Article 10.1.1 of the PPA/PSA. Moreover, pursuant to the consideration of various Change in Law events by the Appellate Tribunal and principles enumerated therein, the Commission, in line of the same, has permitted Coal Terminal Surcharge and Terminal Charge to be a Change in Law event. The Petitioner has further submitted that the claim of the Petitioner is in terms of Article 10 of the PSA/PPA and not under Article 2 of the PPA/PSA. Article 2.5 of the PSA/PPA pertains to the escalation rate and escalation index indices. However, the present Petition pertains to the compensation towards Change in Law events in terms of Article 10 of the PSA/PPA.

42. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. The Appellate Tribunal in its judgment dated 14.8.2018 in Appeal No. 119 of 2016 & IA Nos. 668 & 674 of 2016 has held that the circulars issued by Ministry of Railways (MoR) have a force of law. The relevant portion of the said judgment dated 14.8.2018 is extracted as under:

> *"xiii. From the above it is crystal clear that the Circulars issued by MoR regarding Busy Season Surcharge, Development Surcharge and Port Congestion Charges which have bearing on costs of the Kawai Project of APRL have force of law."*

43. In pursuance to the above judgment of the Appellate Tribunal, the Commission in its order dated 2.4.2019 in Petition No. 72/MP/2018 has considered levy of Coal Terminal Surcharge by Indian Railways as Change in Law event. The relevant portion of the said order dated 2.4.2019 is extracted as under:

"32. Accordingly, the Petitioner is entitled to recover the Coal Terminal Surcharge from the Respondents as per applicable rates in proportion to the coal as per the parameters of the applicable Tariff Regulations of the Commission or actually consumed whichever is lower, for generation and supply of electricity to the discoms concerned. As on cut-off dates of the Bihar and Haryana PPAs, Coal Terminal Surcharge was nil. Thereafter, the applicable rates of Coal Terminal Surcharge shall be paid based on the relevant date/s. The Petitioner is directed to furnish along with its monthly regular and /or supplementary bill(s) and computations duly certified by the auditor to the discoms concerned. The Petitioner and the discoms concerned are directed to carry out reconciliation on account of these claims annually".

44. The above decision of the Commission is also applicable in the present case. As on cut-off date i.e. 5.1.2011, there was no Coal Terminal Surcharge on transportation of coal. Subsequently, Ministry of Railways vide its circular dated 22.8.2016, levied Coal Terminal Surcharge of Rs. 110/MT (Rs. 55/MT on loading as well as unloading point) on transportation of coal with effect from 22.8.2016 and the same was subsequently abolished with effect from 10.7.2017 vide Ministry of Railways circular dated 6.7.2017. Since circulars issued by Ministry of Railways have force of law, introduction of Coal Terminal Surcharge by Ministry of Railways vide its circulars constitutes "Change in Law" in terms of Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover such Coal Terminal Surcharge from WBSEDCL as per the applicable rate in proportion to the coal consumed corresponding to the schedule generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to WBSEDCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Change in Law. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are directed to carry out reconciliation on account of these claims annually through PTC.

45. As regards Terminal Charge, the Respondent, WBSECL has submitted that since terminal charge is in nature of transportation charges and energy charges have been capped in terms of Article 2 of the PSA, the Petitioner has not entitled to the same. the Petitioner has submitted that the same has been levied by Ministry of Railways vide its Circular No. 24 of 2018 dated 27.12.2018 @Rs. 20/MT on both inward and outwards traffic (totalling to Rs. 40/MT) for all commodities including coal, etc. being handled at Railway goods sheds and private terminals both greenfield and brownfield. The Circular dated 27.12.2018 issued by Railways is extracted as under:

> *"In supersession of all previous instructions the sanction of the Competent Authority is hereby accorded for levy of Terminal charge @ Rs. 20 per tonne on both inward and outward tariff for all commodities (excluding container traffic) being handled at Railways Goods sheds and Private Freight Terminals (PFTs) both greenfield and brownfield, to be collected by the Railways.*
>
> *In terms of Para 7.4 and Para 9.1 of the Rates Circular No. 14 of 2017 (LTTC Policy), terminal charge will not be liveable in respect of all commodities covered in LTTC agreement in current year (12 months period as defined in the agreement)*
>
> *The terminal charges, so levied for both inward and outward traffic at PFTs shall be reimbursed to the Terminal Management Company of the relevant PFT at the end of every month by the Zonal Railway. For this purpose, after certification of FOIS data a PFT-wise statement shall be prepared by Commercial Department to be forwarded to Traffic Account Office, which shall, upon verification, arrange payment of the same.*
>
> *In order to maintain consistency, ensure continuity in policy and incentivise investment in PFTs, it is also clarified that in case such terminal charges are subsumed in future in freight charges then this amount (i.e Rs. 20 per tonne) shall continue to be paid to PFTs by the Railways."*

46. According to the Petitioner, Terminal Charge is similar to Coal Terminal Surcharge which was also imposed by Ministry of Railways through Rate circular No. 8 of 2015 dated 22.8.2016. Therefore, the Terminal Charge is covered under Change in Law. It is noted that the Rate Circular No. 8 of 2015 imposing Coal Terminal Surcharge was pertaining to 'adjustment in base freight rates-

rationalization of coal tariff structure'. Since the Coal Terminal Surcharge, being part of coal tariff structure, was specific to transportation of coal which was universally applicable on movement of coal by Railways, it was covered under Change in Law However, as per circular dated 27.12.2018 quoted above, the Terminal Charge is levied on all the commodities including coal which are loaded from Railway goods sheds and private terminals. Consequently, the Petitioner is paying Terminal Charge only on coal being loaded from goods sheds and private terminal.

47. In the instance case, the Petitioner has not explained the requirement to transport the coal through Railways goods sheds and/or through private freight terminal. It is not clear as to whether it is voluntary decision of the Petitioner to transport the coal through Railways goods sheds and /or private freight terminal as it would have bearing in consideration of the Petitioner`s claim. Therefore, in absence of such information/ details, we are not inclined to consider the Petitioner`s claim towards Terminal Charge. However, the Petitioner is granted liberty to approach the Commission along with relevant information/ documents including the details as above.

(B) Introduction of Goods and Service Tax (GST) on transportation of coal

48. The Petitioner has submitted that the Commission in its order dated 30.4.2019 in Petition No. 255/MP/2017 has allowed the Service Tax on transportation of coal through Railways. However, subsequent to enactment of Central Goods and Service Tax Act, 2017, the Service Tax on transportation of coal has been subsumed under the Central Goods and Service Tax Act, 2017 and in its place, GST @5% has been imposed on the goods and services for transportation of goods by Rail. Railway Board, Ministry of Railways, Government of India vide its Circular No. 19 of 2017

dated 30.6.2017 has also notified GST @5% on goods and services for transportation of goods by rail under the Central Goods and Service Tax Act, 2017. The Petitioner has further submitted that the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 has already dealt with the same issue. The Petitioner has claimed Rs. 2.04 crore on account of levy of GST on transportation of coal upto 31.3.2019.

49. The Respondent, WBSEDCL has submitted that since the source of coal under the PPA/PSA was captive coal block, it is not liable to pay GST since the captive coal block and the Project are in the same State. WBSEDCL has also submitted that the Petitioner has failed to place on record any document or material evidencing the actual impact on account of imposition of GST leading to incurrence of additional cost.

50. *Per contra*, the Petitioner has submitted that WBSEDCL has not disputed the levy of GST being a Change in Law event within the meaning of Article 10 of the PPA/PSA. The Petitioner has further submitted that it is an admitted position that the coal block allotted to the Petitioner was cancelled pursuant to the judgment of Hon'ble Supreme Court and that the said coal block was never operationalised. Since the Petitioner is bearing the amount towards GST on transportation of coal, in terms of the law laid down by Appellate Tribunal in Wardha Case as well as by the Commission in its various orders, the compensation towards Change in Law events payable to the Petitioner has to be calculated on the basis of actual amount borne by the Petitioner towards such Change in Law event.

51. We have noted the submissions of the Petitioner and the Respondent, WBSEDCL. The Commission in its order dated 14.3.2018 in Petition No.

13/SM/2017 has, *inter-alia*, held that the introduction of GST w.e.f. 1.7.2017 and subsuming/ abolition of specific taxes and duties, etc. in GST is in the nature of Change in Law event. The Commission in the said order dated 14.3.2018 has further observed that the generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the discoms/ beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. Relevant extract from the order dated 14.3.2018 is as under:

> *"34. Hence, we are of the opinion that introduction of GST and subsuming/abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/ beneficiary States. Since, these are change in law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.*
>
> *35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc.in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission."*

52. The above decision of the Commission is applicable in the present case of the Petitioner. In terms of order dated 14.3.2018, the Petitioner shall be entitled to recover the GST on transportation of coal from WBSEDCL in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to WBSEDCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of GST. The Petitioner is directed to furnish

along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC.

(C) Introduction of Goods and Service Tax (GST) on coal

53**.** The Petitioner has submitted that as on cut-off date, i.e. 5.1.2011, there was no GST on coal. Subsequent to enactment of the Goods and Services Tax Act, 2016, Central GST @2.5% on coal is being levied with effect from 1.7.2017. Further, the Government of Jharkhand vide its Notification No. 1/2017-State Tax (Rate) dated 28.6.2017 is also levying Jharkhand GST @2.5% of the coal with effect from 1.7.2017. The Petitioner has submitted that with introduction of GST and subsuming/ abolition of certain taxes, duties and levies has resulted in Change in Law, within the event which has affected the economic position of the Petitioner. Moreover, the Commission in its order dated 14.3.2018 in Petition No. 13/SM/2017 has *inter-alia* held that the introduction of GST and subsuming/ abolition of specific taxes and duties, etc. in the GST is a Change in Law event. The Petitioner's claim on account of introduction of GST on coal upto 31.3.2019 is Rs. 5.91 crore.

54. The Respondent, WBSEDCL has submitted that since the source of coal under the PPA/PSA was captive coal block, it is not liable to pay GST since the captive coal block and the Project are in the same State. WBSEDCL has further submitted that the Petitioner has failed to place on record document or material evidencing the actual impact on account of imposition of GST leading to incurrence of additional cost.

55. *Per contra*, the Petitioner has submitted that WBSEDCL has not disputed the levy of GST being a Change in Law event within the meaning of Article 10 of the PPA/PSA. The Petitioner has further submitted that it is an admitted position that the allocation of coal block allotted to the Petitioner was cancelled pursuant to the judgment of Hon'ble Supreme Court and that the said coal block was never operationalised. Since the Petitioner is bearing the amount towards GST on purchase of coal, the compensation towards Change in Law events payable to the Petitioner has to be calculated on the basis of actual amount borne by the Petitioner towards such Change in Law in terms of the law laid down by Appellate Tribunal in Wardha Case as well as by the Commission in its various orders.

56. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. The Commission in order to facilitate the settlement of the dues arising on account of the introduction of GST and GST Compensation Cess, initiated a suo-motu Petition No. 13/SM/2017 to hear the generating companies and the Procurers and to decide the issues. The Commission in the above Petition in its order dated 14.3.2018 decided as under:

> *"32. At the same time GST and IGST were also introduced from 01.07.2017 and some of the taxes, duties and levies were abolished or subsumed therein. The Commission through the instant petition tried to ascertain the impact of the same on the generators and discoms/beneficiary States by seeking detailed submissions from all concerned.*
>
> *33. It has been observed that some of the generators and discoms have submitted the calculations of impact of change in law. These calculations show varying impact of such changes on different generators and discoms on various dates. The impact worked out by the discoms was different from that submitted by the generators. Further, the generators have also not submitted a clear declaration as called for that there are no other taxes, duties, cess etc., which have been reduced or abolished or subsumed. From the forgoing, the Commission feels that due to varied nature of such taxes, duties and cess etc. that have been subsumed/ reduced, it is not possible to quantify in a generic manner, the impact of change in law for all the generators.*
>
> *34. Hence, we are of the opinion that introduction of GST and subsuming/ abolition of such taxes, duties and levies has resulted in some savings for the generators having generation based on domestic coal and the same needs to be passed to the discoms/*

beneficiary States. Since, these are change in law events beneficial to the procurers, the same needs to be passed on to the procurers by the generators.

35. Accordingly, we direct the beneficiaries/ procurers to pay the GST compensation cess @ Rs 400/ MT to the generating companies w.e.f 01.07.2017 on the basis of the auditors certificate regarding the actual coal consumed for supply of power to the beneficiaries on basis of Para 28 and 31. In order to balance the interests of the generators as well as discoms/beneficiary States, the introduction of GST and subsuming/abolition of specific taxes, duties, cess etc. in the GST is in the nature of change in law events. We direct that the details thereof should be worked out between generators and discoms/beneficiary States. The generators should furnish the requisite details backed by auditor certificate and relevant documents to the discoms/ beneficiary States in this regard and refund the amount which is payable to the Discoms/ Beneficiaries as a result of subsuming of various indirect taxes in the Central and State GST. In case of any dispute on any of the taxes, duties and cess, the respondents have liberty to approach this Commission."

57. The above decision of the Commission is applicable in the present case of the Petitioner. In terms of the above order, the Petitioner shall be entitled to recover the GST in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to WBSEDCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of GST. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC.

(D) Levy of Evacuation Facility Charges

58. The Petitioner has submitted that subsequent to cut-off date i.e. 5.1.2011, Coal India Ltd. vide its price Notification dated 19.12.2017 imposed Evacuation Facility Charges at the rate of Rs. 50/MT on all despatches with effect from 20.12.2017. The Petitioner has submitted that levy of the said Evacuation Facility Charges is covered within the meaning of Change in Law as per Article 10.1.1 of the PPA being a levy

by Coal India Limited. Also, the said levy has increased the cost of generation of electricity and the Petitioner needs to be compensated for it as per Article 10 of the PPA. The Petitioner's claim on account of levy of Evacuation Facility Charges for the period up to 31.3.2019 is Rs. 2.35 crore.

59. The Respondent, WBSEDCL has submitted that the levy of Evacuation Facility Charges imposed by Coal India Limited vide Notification dated 19.12.2017 is not a Change in Law event in terms of Article 10.1 of the PSA since it is not a result of (i) an enactment of any law; (ii) change in interpretation of any law; or (iii) change in consents or taxes or mining related law. Further, in terms of Article 10.1(i)(b) of the PSA, only a change in interpretation or application of any law by an Indian Government Instrumentality can be a Change in Law event. WBSEDCL has further submitted that Evacuation Facility Charges is the result of contractual arrangement between the generating company and Coal India Limited and the same cannot be considered as Change in Law event. This principle has been observed by the Appellate Tribunal in its judgment dated 14.8.2018 in the case of GMR Warora Energy Ltd. v. CERC & Ors., wherein Appellate Tribunal has disallowed a revision in crushing and sizing charges as well as coal surface transportation charges on the ground that the same is the result of contractual agreement (i.e. FSA) executed between generating company and Coal India Limited. WBSEDCL has further contended that since in terms of Article 2.5 of the PSA, cost of fuel from alternate sources is capped at captive coal price, any compensation on account of the Petitioner`s claims in this regard will be limited to the benchmarked costs of the captive coal block. It has also been submitted that since the issue of levy of Evacuation Facility Charges as a Change in Law event is presently pending

adjudication before the Appellate Tribunal, the same ought not to be allowed by the Commission.

60. *Per contra*, the Petitioner has submitted that the issue of Evacuation Facility Charges being a Change in Law event is no more *res integra* and the Commission in its various orders has already considered the levy of Evacuation Facility Charges as Change in Law event including in the case of the Petitioner in order dated 19.8.2019 in Petition No. 17/MP/2019 (Adhunik Power and Natural Resources Limited v. TANGEDCO and Ors.). The reliance placed by WBSEDCL on the judgment of Appellate Tribunal has no relevance. The issue before the Appellate Tribunal was pertaining to disallowance of crushing and sizing charges as a Change in Law event, which has no correlation with adjudication of Evacuation Facility Charges as Change in Law event. Moreover, the levy of Evacuation Facility Charges is not a result of any contractual arrangement or in terms of the provision of the FSA and is a Change in Law event arising out of the notification issued by Coal India Limited. Therefore, levy of Evacuation Facility Charges can by no stretch of imagination be construed as contractual in nature. The pendency of issue of levy of Evacuation Facility Charges as a Change in Law event before Appellate Tribunal is irrelevant for the purpose of adjudication of the present Petition, particularly where there is no interim direction by Appellate Tribunal in the said proceedings.

61. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. According to WBSEDCL, since the issue of levy of Evacuation Facility Charges is pending before the Appellate Tribunal, the same ought not to be allowed. In response, the Petitioner has contended that since there is no stay on this issue, the contention of WBSEDCL is not sustainable. The issue as to whether levy of

Evacuation Facility Charges by Coal India Limited qualifies as Change in Law event has been examined by the Commission in its order dated 2.4.2019 in Petition No. 71/MP/2018 (GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited &Ors.). The relevant extract of the said order is reproduced as under:

> *"30. We notice that as on the cut-off date of the respective PPAs there was no Evacuation Facility Charges levied by CIL and subsequently Coal India Ltd. vide its price notification no. CIL:S&M:GM(F)/Pricing/2017/1005 dated 19.12.2017 notified the levy of "evacuation facility charges" at the rate of Rs. 50/MT on coal. The Tribunal vide its judgement dated 21.12.2018 had concluded that "departments, corporations/ companies like Coal India Limited or Indian Railways formed under different Statutes are Indian Government Instrumentality". In view of the submissions of the Petitioner and in view of the said judgment, we note that the Evacuation Facilities Charges are levied pursuant to notification issued by CIL which is an Indian Governmental Instrumentality in terms of the PPAs. The Evacuation Facility Charges were not possible to be envisaged at the time of bid submission by the Petitioner and its subsequent introduction has an adverse financial impact on the Petitioner which is one of the requirements of claiming relief for change in law event. We further note that the Tribunal in the case of Sasan Power Ltd. V. CERC [2017 ELR(APPELLATE TRIBUNAL) 508] has held that as long as the conditions of Change in law are satisfied, the affected party will be entitled to relief. In the present case, the introduction of Evacuation Facility Charges satisfies the criteria of change in law events as contained in the respective PPAs. Further, Evacuation Facilities Charges is not part of the escalation index for coal notified by this Commission. Hence, we are of the view that introduction of Evacuation Facility Charges beyond cut-off date of the respective PPAs is admissible to the Petitioner as a change in law event."*

62. The above decision of the Commission is also applicable in the present case. Coal India Limited being an Indian Government Instrumentality, its Notification dated 19.12.2017 with respect to levy of Evacuation Facility Charges on coal price constitutes Change in Law event in terms of Article 10 of the PPAs. Further, the Evacuation Facility Charges is not a part of the escalation index notified by this Commission periodically.

63. Accordingly, the Petitioner is entitled to recover Evacuation Facility Charges from WBSEDCL as per applicable rates in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the

applicable Tariff Regulations of the Commission or at actual, whichever is lower, for generation and supply of power to WBSEDCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Evacuation Facility Charges. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are directed to carry out reconciliation on account of these claims annually through PTC.

(E) Levy of Management Fee

64. The Petitioner has submitted that as on cut-off date i.e. 5.1.2011, there was no levy of Management Fee on coal. Subsequently, Government of Jharkhand vide Gazette Notification No. 80 dated 1.2.2018 imposed a new levy titled as Management Fee @Rs. 1/MT on coal w.e.f. 27.1.2018 under Rule 6 of the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017. The Petitioner has submitted that said levy of Management Fee is covered within the meaning of Change in Law as defined in Article 10.1.1 of the PPAs and the Petitioner needs to be compensated for it as per Article 10 of the PPAs. The said Change in Law event was notified by Coal Coalfields Limited vide notice dated 3.3.2018. The Petitioner has claimed Rs. 0.04 crore on account of levy of Management Fee up to 31.3.2019.

65. The Respondent, WBSEDCL has submitted that as per Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017, levy of Management Fee is applicable only in case the coal supplies are made via road. Since transportation of coal in the present case is via rail and not road, issuance of

Management Fee notification ought not to be allowed as Change in Law event. WBSEDCL has submitted that levy of Management Fee being a transportation charge is contractual in nature and the same ought to be included in the cost of coal.

66. *Per contra*, the Petitioner has submitted that since transportation of coal in the present case has been both by rail as well as by road, it has born the Management Fee for the said transportation. Also, the Commission in its various orders has already allowed the levy of Management Fee on coal as Change in Law event.

67. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. The issue as to whether the levy of Management Fee qualifies as Change in Law event has been examined by the Commission in its order dated 19.8.2019 in Petition No. 17/MP/2019 (Adhunik Power and Natural Resources Limited v. TANGEDCO and Anr.). The relevant extract of the said order is reproduced below:

> *"72. We have considered the submissions of the Petitioner. Mines and Mineral (Development and Regulation) Act, 1957 as amended in 2015 provides as under:*
>
> > ***"23C. Power of State Government to make rules for preventing illegal mining, transportation and storage of minerals**.—(1) The State Government may, by notification in the Official Gazette, make rules for preventing illegal mining, transportation and storage of minerals and for the purposes connected therewith.*
> >
> > *(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—*
> >
> > > *(a) establishment of check-posts for checking of minerals under transit;*
> > > *(b) establishment of weigh-bridges to measure the quantity of mineral being transported;*
> > > *(c) regulation of mineral being transported from the area granted under a prospecting licence or a mining lease or a quarrying licence or a permit, in whatever name the permission to excavate minerals, has been given;*
> > > *(d) inspection, checking and search of minerals at the place of excavation or storage or during transit;*
> > > *(e) maintenance of registers and forms for the purposes of these rules'*
> > > *(f) the period within which and the authority to which applications for revision of any order passed by any authority be preferred under any rule*

made under this section and the fees to be paid thereof and powers of such authority for disposing of such applications; and
(g) any other matter which is required to be, or may be, prescribed for the purpose of prevention of illegal mining, transportation and storage of minerals.

(3) Notwithstanding anything contained in section 30, the Central Government shall have no power to revise any order passed by a State Government or any of its authorised officers or any authority under the rules made under sub-sections (1) and (2)."

73. Government of Jharkhand, Department of Industries, Mines and Geology in exercise of power conferred under Section 23C (1) and (2) of the Mines and Minerals (Development and Regulation) Act, 1957 has notified the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 prescribing the Management Fee of Rs. 1/MT for prevention of illegal mining, transportation and storage of mineral as under:

"6. Management Fees:

(i) A management fee of Rupees one per ton of mineral despatched shall be paid by the mining lease holders which will be deposited online through JIMMS portal. However, Department of Industries, Mines and Geology, Government of Jharkhand may revise the management fee by a notification.

(ii) The amount collected towards management fee may be provided from time to time in the expenditure budget of the Department of Industries, Mines & Geology under appropriate head of account. This fund shall be utilized to maintain and strengthen the JIMMS and prevention of illegal mining, transportation and storage or for the purpose as may be notified by the Department of Industries, Mines and Geology, Government of Jharkhand."

74. The amount collected through Management Fee is to be used for prevention of illegal mining, transportation, storage etc. This Fee on coal has been imposed through promulgation of the Jharkhand Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2017 under Section 23C (1) and (2) of the Mines and Minerals (Development and Regulation) Act, 1957 and is payable by holders of mining lease. Government of Jharkhand is an "Indian Governmental Instrumentality" as defined in Article 1.1 of the PPA. This is covered under first bullet under clause 10.1.1 of the PPA that states, "the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any Law, including rules and regulations framed pursuant to such Law". In view of the above, levy of Management Fee by Government of Jharkhand through promulgating the aforesaid Rule is an event of change in law in terms of the PPA."

68. The above decision of the Commission is squarely applicable in the present case of the Petitioner. Accordingly, the Petitioner shall be entitled to recover Management Fee in proportion to the coal consumed corresponding to the

scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of power to WBSEDCL. If the actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Management Fee. The Petitioner is directed to furnish along with its monthly bill, the proof of payment and computations duly certified by the auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are further directed to carry out reconciliation on account of these claims annually through PTC.

(F) Increase/ Change in Value Added Tax (VAT) on account of changes in individual components of tax

69. The Petitioner has submitted that as on cut-off date i.e. 5.1.2011, VAT was levied at the rate of 5% under Jharkhand Value Added Tax Act, 2005 on the summation of base price of coal, Royalty, Stowing Excise Duty, Surface Transportation Charge, Sizing and Crushing Charge, Clean Energy Cess, Education Cess and Higher Education Cess. Though there is no change in the rate of Jharkhand VAT, however, due to occurrence of other Change in Law events, namely, contribution to the District Mineral Fund, contribution to the National Mineral Fund and increase in various other charges/ duties/ taxes/ levies (increase in surface transportation charges, sizing and crushing charges assessable value of coal at which excise duty is leviable etc.), there has been increase in the amount of Jharkhand VAT. Therefore, there has been an overall impact on the net tax outflow qua VAT over and above what the Petitioner was liable to pay as on cut-off date. As such, the same is Change in Law event under Article 10 of the PPAs that has resulted in the change in economic position of the Petitioner. The Petitioner has submitted that w.e.f. 1.7.2017 (with introduction of GST), Jharkhand VAT has been subsumed in the GST and

Central GST @2.5% is levied on coal as per the Jharkhand Goods and Service Tax. The Petitioner has submitted that the claim on account of levy of increase/ change in Jharkhand VAT upto 30.6.2017 is Rs. 9.43 crore.

70. The Respondent, WBSEDCL has submitted that there is no change in the rate of levy of VAT under the Jharkhand Value Added Tax Act, 2005. The Petitioner`s claim is based on the increase in the amount of VAT payable on account of increase in other charges which is payable due to extraneous factors. Accordingly, the same does not qualify as a Change in Law event in terms of Article 10.1 of the PSA.

71. *Per contra*, the Petitioner has submitted that the issue of increase/ change in VAT being a Change in Law event is no more *res-integra* and pursuant to the Appellate Tribunal's judgment, the Commission in its various orders has allowed increase/ change in VAT as a Change in Law event including in the case of the Petitioner vide its order dated 19.8.2019 in Petition No. 17/MP/2019 (Adhunik Power and Natural Resources Limited v. TANGEDCO and Ors.). Therefore, the objection of WBSEDCL in this regard is not tenable.

72. We have examined the matter. The Petitioner has submitted the bills dated 7.11.2013 and 11.6.2017 raised by Central Coalfields Limited showing the levy of CGCT/ VAT @5% of total invoice value of coal. Appellate Tribunal vide Judgment dated 19.4.2017 in Appeal No.161 of 2015 & IA No. 259 of 2015 and Appeal No. 205 of 2015 in the case of Sasan Power Limited vs. CERC &Ors. has allowed VAT under Change in Law. The observations of the Appellate Tribunal as specified in Paragraphs 46 of the judgment dated 19.4.2017 is extracted as under:

> *"46. Having regard to the nature of Excise Duty and Central Sales Tax and VAT which have an impact on the cost of or revenue from the business of generation and sale of electricity, in our opinion, the same should be allowed as Change in Law event."*

73. In light of the above decision, the claim of the Petitioner for relief on account of increase/ change in VAT is admissible as a Change in Law event under Article 10 of the PPA. The Petitioner shall be entitled to recover increase/ change in VAT in proportion to the coal consumed corresponding to the scheduled generation at normative parameters as per the applicable Tariff Regulations of the Commission or at actual, whichever is lower, for supply of electricity to WBSEDCL. If actual generation is less than the scheduled generation, the coal consumed for actual generation shall be considered for the purpose of computation of impact of Value Added Tax (VAT). The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations in this regard duly certified by the Auditor to WBSEDCL through PTC. The Petitioner and WBSEDCL are directed to carry out reconciliation on account of these claims annually through PTC.

Issue No.5: Whether the Petitioner is entitled for carrying cost?

74. The Petitioner has also prayed for carrying cost @1.25% per month from the date on which the said amount became due to the Petitioner till the actual realization of the same to restore the Petitioner to the same economic position as existed prior to the Change in Law events.

75. The Respondent, WBSEDCL has submitted that carrying cost is based on the principle of restitution. The purpose of granting carrying cost is to restore the party to the same economic position as it was in before the occurrence of the Change in Law event. However, a party cannot be permitted to make a profit on the pretext of claiming carrying cost. Since the Petitioner is seeking to make a profit in the guise of

restitution by claiming carrying cost at the rate of 1.25% per month, the same ought to be disallowed.

76. We have considered the submissions of the Petitioner and the Respondent, WBSEDCL. According to the Petitioner, 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 Appellate Tribunal in its judgment dated 13.4.2018 in Appeal No. 210/2017 (Adani Power Limited v. Central Electricity Regulatory Commission & Ors.) has allowed the carrying cost on the claim under Change in Law and held as under:

> "*ix. 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 then re-determination of the existing tariff.*
>
> *x. 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. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law has not occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA…"*

77. The aforesaid judgment of the Appellate Tribunal was challenged before the Hon'ble Supreme Court wherein the Hon'ble Supreme Court vide its judgment dated 25.2.2019 in Civil Appeal No.5865 of 2018 with Civil Appeal No.6190 of 2018 (Uttar Haryana Bijili Vitran Nigam Limited & Anr. Vs. Adani Power Ltd. & Ors.) has upheld 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 04.05.2017that 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."

Article 10.2.i of the PSA/PPA provides as under:

"10.2.i. 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 Article10, the affected party to the same economic position as if such Change in Law has not occurred."

78. In view of the provisions of the PSA/PPA, the principles of restitution and the aforesaid judgment of the Hon`ble Supreme Court, we are of the considered view that the Petitioner is eligible for carrying cost arising out of approved Change in Law

events from the effective date of Change in Law till the actual payment to the Petitioner.

79. 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:-*

Period	*Actual interest rate paid by the Petitioner*	*Working capital interest rate as per CERC Regulations*	*LPS Rate as per the PPA*
2015-16	*10.68%*	*13.04%*	*16.29%*
2016-17	*10.95%*	*12.79%*	*16.04%*
2017-18	*10.97%*	*12.43%*	*15.68%*

> *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 work out 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."*

80. 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 (supported by Auditor`s Certificate) or the Rate of Interest on Working Capital rate as per applicable CERC Tariff Regulations or the Late Payment Surcharge Rate as per the PPA, whichever is the lowest. The payment shall be

made to the Petitioner within due date as per PPA/PSA failing which provisions of Late Payment Surcharge of the PPA/PSA would kick in.

Summary of Decision:

81. Based on the above analysis and decisions, the summary of our decisions under the Change in Law during the operating period of the Project is as under:

Sr.	Change in Law events	Decision
1.	(a) Levy of Coal Terminal Surcharge	Allowed
	(b) Coal Terminal Charge	Liberty is granted to approach the Commission along with relevant documents
2.	Introduction of GST on transportation of coal	Allowed
3.	Introduction of GST on coal	Allowed
4.	Levy of Evacuation Facility Charges	Allowed
5.	Levy of Management Fee	Allowed
6.	Increase in VAT on account of changes in individual components of tax	Allowed
7.	Carrying cost	Allowed

82. The Petitioner is directed to ensure that it always has a composite scheme for generation and sale of electricity in more than one State in terms of Section 79(1)(b) of the Act for this order to remain valid. The Petitioner is directed to submit documentary proof of payments along with monthly bills while claiming the impact of above Change in Law events allowed by the Commission.

83. The Petition No. 260/MP/2019 is disposed of in terms of above.

Sd/
(Arun Goyal)
Member

Sd/
(I.S. Jha)
Member

Sd/
(P.K. Pujari)
Chairperson