CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 356/MP/2022
along with IA No.64/2023

Coram:
Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Date of Order: 31st December, 2023

In the matter of

Petition under Section 79 of the Electricity Act, 2003 seeking declaration/ approval of Change in Law events and compensation on account of increase in cost of power generation by MB Power (Madhya Pradesh) Limited due to mandatory blending of domestic coal with imported coal in compliance of the directives issued by Ministry of Power, Government of India, which constitute as Change in Law event in terms of Article 21 of the Agreement for Procurement of Power dated 18.5.2022.

And
In the matter of
Petition under Section 11 of the Electricity Act 2003 and Regulations 111-113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 inter-alia seeking directions for payments on account of increase in cost of power generation by MB Power (Madhya Pradesh) Limited due to mandatory blending of domestic coal with imported coal in compliance of the directives issued by Ministry of Power, Government of India, under Section 11 of the Electricity Act, 2003.

And
In the matter of

MB Power (Madhya Pradesh) Limited,
Laharpur, Jaithari,
Anuppur- 484330, Madhya Pradesh ...**Petitioner**

Versus

1. **Haryana Power Purchase Centre,**
2nd floor, Shakti Bhawan, Sector -6,
Panchkula-134109, Haryana

2. **Uttar Haryana Bijli Vitran Nigam Limited,**
Industrial Area, Phase-2,
Panchkula-134112, Haryana

3. **Dakshin Haryana Bijli Vitran Nigam Limited,**
Vidyut Sadan, Vidyut Nagar,
Hisar -125005, Haryana ...**Respondents**

Parties present:

Shri Amit Kapur, Advocate, MBPMPL
Shri Akshat Jain, Advocate, MBPMPL
Ms. Shefali Tripathi, Advocate, MBPMPL
Shri Abhishek Gupta, MBPMPL
Shri Shubham Arya, Advocate, HPPC
Ms. Poorva Saigal, Advocate, HPPC

ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited (“MB Power”), a generating company incorporated under the Companies Act, 1956, has developed a 1200 MW coal based thermal power project in the District Anuppur in the State of Madhya Pradesh (“the Project”). The Project comprises two units of 600 MW each. Unit-I and II of the Project achieved COD on 20.5.2015 and 7.4.2016, respectively.

2. The Petitioner and Uttar Haryana Bijli Vitran Nigam Limited & Dakshin Haryana Bijli Vitran Nigam Limited (“Haryana Discoms”) through Haryana Power Purchase Centre (“HPPC”) executed an Agreement for the Procurement of Power on 18.5.2022 ("APP”) for supply of power for an aggregate capacity of 150 MW of the Project for a period of 3 years

3. After hearing the Petitioner and the Respondent, the Commission, vide Record of Proceedings for the hearing dated 29.5.2023, reserved the order in the Petition. Subsequently the Petitioner, on 3.8.2023, mentioned the matter before the Commission and submitted that the Petitioner has filed the Petition under Section 79(1)(f) of the Electricity Act, 2003 (in short ‘the Act’) for declaration of Change in Law events and compensation on account of an increase in the cost of power

generation due to the mandatory blending of domestic coal with imported coal in compliance with the directives issued by the Ministry of Power, Government of India (in short 'MoP'). However, keeping in view that the directives for the mandatory blending have been issued by the MoP under Section 11(1) of the Act, the Petitioner may be permitted to suitably amend the Petition to include reference to Section 11 of the Act therein in order to avoid any procedural infirmity in the matter. The learned counsel for the Respondent, HPPC, submitted that since the matter has already been reserved for the order, the Petitioner may be directed to file a proper application seeking an amendment to the Petition. After hearing both the Parties, the Commission permitted the Petitioner to file an appropriate application for incorporating amendments to the present Petition and directed both the Parties to file their respective Reply and Rejoinder to the Petition in a time-bound manner.

4. Thereafter, on 16.8.2023, the Petitioner filed an application ("IA") (IA No 64/2023) under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure seeking an amendment of the Petition ("CPC") in order to include reference to Section 11 of the Act therein to avoid any procedural infirmity in the present Petition. Along with the IA, the Petitioner also filed the Amended Petition seeking compensation in terms of Section 11(2) of the Act and prayed to take on record this Amended Petition. Respondent HPPC and the Petitioner filed the respective Reply and Rejoinder to the IA on 6.9.2023 and 7.9.2023, respectively. The matter, along with IA, was heard on 15.9.2023, wherein the Commission reserved its Order both on the Petition and IA.

5. Before preceding the matter on merit, first we shall deal with the IA filed by the Petitioner seeking amendment of the earlier Petition to include reference to direction Section 11 of the Act.

6. The Petitioner, in its IA, has mainly submitted as under:

(a) Order VI Rule 17 of the Code of Civil Procedure (CPC) dealing with amendment of the Petition provides that "The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

(b) Order VI Rule 17 of the CPC and legal position settled by the Hon'ble Supreme Court, permit an amendment of pleadings at any stage of the proceedings if, in view of this Commission, the amendments are necessary for the purpose of determining the real questions in controversy between the parties. The above proviso specifies that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that, despite due diligence, the party could not have raised the matter before the commencement of the trial. The amendment being sought by it is of utmost importance in the present proceedings before the Commission since it is inextricably connected to the real controversy/dispute between the Petitioner and the Respondents. The real controversy between the parties is whether the Petitioner is entitled to be compensated for the additional costs incurred by it on account of the mandatory blending of domestic coal with imported coal as per the directions of MoP issued under Section 11(1) of the Act and accordingly, the Petitioner has sought amendment of its Petition to the extent of seeking compensation to the above effect under Section 11(2) of the Act.

(c) The legal position in respect of an amendment of pleadings is no more *res integra* and has been laid down by the Hon'ble Supreme Court in a catena of decisions. In this regard, the Petitioner has placed reliance on the Hon'ble Supreme Court's Judgement in the case of *A.K. Gupta and Sons Ltd. vs. Damodar Valley Corpn., [(1966) 1 SCR 796,]* wherein the Hon'ble Supreme Court has delved into the intent of Order VI Rule 17 of the CPC and has held that if the amendment being sought is necessary to decide the real controversy between the parties, it ought to be allowed.

(d) It is a settled position of law that the power of the Court, so far as amendment is concerned, is wider in view of the expression *"at any stage of proceedings"* and not *"hearing"*. Therefore, as the petition commences by filing of the same and it stands disposed of by the Court on the pronouncement of judgment, the conclusion can be drawn, that delivery of judgment by the Court is a stage in the proceedings, and, therefore, because of the expression "*at any stage of the proceedings"* employed in Order 6, Rule 17 of CPC, the Court is competent to deal with the application for amendment, as it keeps seisin over the case till judgment is pronounced, and does not become functus officio. Therefore, in the present case, even when the present Petition had been reserved for Order, the question of an amendment of the pleadings can arise, and this Commission may be entertained in light of the settled legal proposition that an amendment application can be entertained even when the case is reserved for the order and before the order is pronounced. In support of this argument, the Petitioner has placed reliance on the judgments passed by the Hon'ble Madhya Pradesh High Court in the matter of *Badri Prasad Soni v. S. Kripal Singh, [AIR 1981 MP 228]* and also *Narendra Singh Sengar v. Maltidevi, [AIR 1993 MP 248].*

7. The Respondent, HPPC, in its reply filed dated 6.9.2023, has submitted that the IA filed by Petitioner is liable to be dismissed on the following grounds:

(a) The Petitioner has substantially altered the scope of the Petition by including reference to Section 11 of the Act and specifically, seeking compensation under Section 11(2) of the Act.

(b) The present IA has been filed by the Petitioner after a period of more than 2 (two) months from when the Order was reserved in the present Petition by this Commission. This IA is liable to be dismissed as it is contrary to the well-settled principle that no such application can be entertained by this Commission when the hearing has been completed and the judgment has been reserved. It is a settled principle of law that there is no hiatus between the stages of reserving orders for judgment and pronouncing the judgment, and such time is only for the convenience of this Commission to pass the judgment. In the interregnum period, no such IA can be entertained by this Commission. In support of its argument, the Respondent HPPC has placed reliance on the Hon'ble Supreme Court's Judgement in the case of *Andhra Pradesh Southern Power Distribution Power Company Limited and Ors. v. Hinduja National Power Corporation Limited and Ors. [(2022) 5 SCC 484].*

(c) The IA filed by the Petitioner does not meet the parameters laid down in Order VI Rule 17 of the CPC. Since the trial of the present matter has commenced and completed prior to the filing of the IA, the amendment cannot be allowed at this stage. It cannot be said that, in spite of the exercise of due diligence, the Petitioner could not have raised the present issue pertaining to Section 11 of the Act prior to the commencement of the final hearing. [Reference: Hon'ble Supreme Court's Judgement in the cases of *Revajeetu Builders And Developers -v- Narayanaswamy And Sons And Others [(2009) 10 SCC 84]; J. Samuel And Others -v- Gattu Mahesh [(2012) 2 SCC 300] and Chander Kanta Bansal -v-. Rajinder Singh Anand, [AIR 2008 SC 2234].*

(d) It is also well settled that an amendment cannot be allowed if the proposed amendment constitutionally or fundamentally changes the nature and character of the case. [Reference: *State of Madhya Pradesh -v- Union of India And Another - (2011) 12 SCC 268 and Revajeetu Builders and Developers -v- Narayanaswamy and Sons And Others (2009) 10 SCC 84].*

(e) If the applicant has been negligent in pursuing its right and the omission stated to have been made is without any substantial cause, the application is to be rejected. [Reference: *Vasudev –v- Rupkumar@ Banaraso Devi ILR*

(2007) I Delhi 785]. Amendment of the Petition sought should not be used to cover/fill up the lacuna in a case which is due to omissions of the Petitioner.

(f) The IA filed by the Petitioner does not give any justification or cause as to why such submissions and prayers were not raised by the Petitioner at the time of filing the Petition.

(g) The primary claim of the Petitioner in the Amendment Petition is that the steps to import coal were undertaken in pursuance to the Section 11 directions dated 26.5.2022, and therefore, the compensation should be awarded in terms of Section 11(2) of the Act. This is contrary to the earlier stand taken by the Petitioner in its rejoinder stating that the order for importing coal placed on 27.5.2022 was in pursuance to the MoP directions dated 28.4.2022. Further, the Notice Inviting Tender was issued to the bidders/suppliers on 20.5.2023. The above is clear evidence of the fact that the Petitioner is attempting to set up a fresh and contradictory stand to what has already been taken in the Petition and rejoinder. It is not open for the Petitioner to approbate and re-approbate.

8. The Petitioner, in its rejoinder dated 7.9.2023 to reply to HPPC in the IA, has countered the submissions of HPPC as under:

(a) Selective interpretation of Order VI Rule 17 of the CPC made by HPPC on the basis of the judgments relied upon it is illogical and irrational and is an attempt to obfuscate the Petitioner's legal claims by adopting a pedantic or super technical approach. The judgments relied on by HPPC are neither applicable to the facts of the petition nor germane to the present issue. It is a trite law that the power to grant amendment of pleadings is intended to serve the ends of justice and is not fettered by any narrow and technical limitations.

(b) Order VI Rule 17 of the CPC permits the parties to amend the pleadings "at any stage of the proceedings" without imposing any kind of limitation or any condition in order to avoid multiplicity of the proceedings and for determination of the real question in controversy. Therefore, in the light of the enabling provisions of Order VI Rule 17 of the CPC and also the settled

legal proposition, the Commission, may, at any stage of the proceedings, including when the Order has been already reserved, like the present matter, allow either party to alter or amend its pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

(c) HPPC's contentions that vide the Amended Petition, the Petitioner has sought claim under Section 11(2) of the Act on account of Section 11 directions of MoP dated 26.5.2022, which is contrary to its earlier stand are based on an irrational understanding of the facts at hand. The Petitioner's claim was based on various directions issued by MoP from time to time, starting from 28.4.2022 till 11.8.2022, regarding the mandatory blending of the domestic coal with imported coal, which also included Section 11 directions issued by MoP on 26.5.2022. This is evident from the fact that while the readiness to place the purchase order for procurement of the imported coal was ensured by the Petitioner, the same got placed only on 27.5.2022 i.e., only after the issuance of MoP's Section 11 directions dated 28.4.2022 and accordingly, compensation is being sought in terms of 11(2) of the Act on account of Section 11 directions dated 26.5.2022. Hence, the supply of power by the Petitioner to HPPC under APP from 19.7.2022 till 31.3.2023 in terms of Section 11 directions issued by MoP will qualify for relief under Section 11(2) of the Act to offset the adverse financial impact suffered by the Petitioned for complying with such Section 11 directions. Therefore, the stand taken by the Petitioner in its IA and in the Amended Petition is not in contradiction with its earlier stand but is in compliance with the Section 11 directions of MoP dated 26.5.2022 and 11.8.2022 and also with the provisions under Section 11 of the Act. Therefore, the Amended Petition filed by the Petitioner may be allowed for the purpose of determining the real questions in controversy between the parties and proper adjudication of the issues raised by the parties in the present Petition.

9. We have considered the submissions of the Petitioner and the Respondent HPPC made in the IA. We observe that the Petitioner has sought compensation towards the financial impact suffered by it towards the supply of power to HPPC under APP for the period from 19.7.2022 till 31.3.2023 on account of the mandatory blending of costlier imported coal with the domestic coal in compliance with the MoP directions issued from time to time from 28.4.2022 till 11.8.2022 including the directions issued under Section 11 of the Act on 25.5.2022 and 11.8.2022. While in the earlier Petition, this claim was sought under Section 79 of the Act in terms of Change in Law provisions under APP and Change in Law Rules issued by MoP, however, vide the Amended Petition, the Petitioner has prayed for grant of these claims under enabling provisions contained under Section 11(2) of the Act and also Section 79 of the Act.

10. We note both in the original and amended Petition, the Petitioner has sought computation of the compensation in terms of the methodology prescribed by MoP under Annexure V of its Section 11 directions dated 26.5.2022. Further, Petitioner, vide its rejoinder dated 23.5.2023, had provided the basis and details of the compensation being claimed by it from HPPC, which have also remained unaltered in the Amended Petition filed by it. Thus, there has been no change in either the methodology and/or in the basis & details of the compensation and hence the claimed compensation amount in the Amended Petition vis-à-vis the original Petition remains unaltered. We have considered that the Petitioner has simply adding a prayer on the same set of facts and thus, any prejudice may not be caused to the Respondents.

11. The amendment in the Petition as sought under the present IA is broadly with respect to including reference to Section 11 of the Act. The Petitioner has claimed the compensation under Section 11(2) of the Act to avoid any procedural infirmity in the present Petition since the directions towards mandatory blending of domestic coal with imported coal has been issued by MoP under Section 11(1) of the Act. We note that even in the original Petition, the compensation has been claimed by the Petitioner towards compliance with the directions dated 26.5.2022 and 11.8.2022 issued by MoP under Section 11(1) of the Act. Further, we examine Section 11 of the Act, which is as under:

> *"11. Directions to generating companies.- (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.*
>
> *Explanation- For the purposes of this section, the expression "extraordinary circumstances" means the circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in public interest.*
>
> *(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."*

12. As evident from the above, MoP is duly empowered to issue the said directions dated 26.5.2022 under Section 11(a) of the Act, the financial impact of which (of the generating company, in the present case, the Petitioner) is to be offset by the Appropriate Commission (in the present case, this Commission) in a manner as deemed fit. Thus, we are of the opinion that the compensation claimed by the Petitioner towards the supply of power to the Respondent HPPC under APP on account of the compliance with the MoP directions dated 26.5.2022 and 11.8.2022 issued under Section 11(1) of the Act is to be adjudicated by this Commission under

Section 11(2) of the Act to avoid any procedural infirmity and to avoid multiplicity of proceedings.

13. From the above, we observe that the Amendment in the Petition, albeit being sought belatedly, is essentially of a procedural nature without altering underlying facts, basis and details as also the compensation methodology and the amount. The same has been done to avoid any procedural infirmity. We further, note that such an amendment has neither substantially altered the scope of the Petition nor caused any grave injury to the Respondents and in fact, the same has been done to eliminate any inconsistencies and render the Petition harmonious to the provisions of the Act in order to enable this Commission to adjudicate upon the present matter.

14. Accordingly, in the interest of the law and to avoid multiplicity of the proceedings and minimise the scope of any avoidable disputes towards procedural compliance, we deem it appropriate to decide IA No. 64/2023 in favour of the Petitioner and, accordingly, we take on record the Amended Petition filed by the Petitioner for the purpose of adjudicating the present matter.

15. The Petitioner has filed the present Petition with the following prayers:

" (a) Hold and declare that MB Power is entitled to be compensated under Section 11(2) of the Electricity Act, 2003 based on the actual costs incurred by MB Power for supply of power to HPPC from 19.07.2022 (i.e., date of commencement of power supply to HPPC/Haryana Discoms under the APP) till 31.03.2023 (i.e., the end date mandated by MoP Order dated 26.05.2022) in compliance with MoP Order dated 26.05.2022 issued under Section 11(1) of the Electricity Act, 2003;

(b) Direct that calculation of the compensation is to be done in terms of the methodology for calculation of compensation due to blending of domestic coal with imported coal under Section-63 PPAs as prescribed under Annexure V of MoP Order dated 26.05.2022 issued under Section 11 of the Electricity Act, 2003 for offsetting the adverse financial impact caused to MB Power as a consequence of the Section 11 directions;

(c) Hold and declare that the aforesaid directives issued by MoP with respect to mandatory blending of domestic coal with imported coal are Change in Law events in terms of Article 21 of the Agreement for Procurement of Power dated 18.05.2022 read with Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 notified on 22.10.2021 by MoP;

(d) Direct the Respondents to pay compensation to MB Power towards the additional costs incurred by MB Power on account of mandatory blending of domestic coal with imported coal in compliance with the aforesaid directives issued by MoP till the time the entire coal imported/ sourced by MB Power in compliance with the aforesaid directives of MoP gets consumed/exhausted;

(e) Grant carrying cost with its computation on monthly compounding basis and the applicable Late Payment Surcharge from the date of incurring of such expenses by MB Power till the date of disbursal of entire compensation by the Respondent(s) so as to restore MB Power to same economic position as if no Change in Law events had occurred; and

(f) Pass any such further orders as this Commission may deem necessary in the facts of this case."

Petitioner's Submissions:

16. The Petitioner, in its Petition (subsequently amended), has broadly submitted as under:

(a) On 30.3.2022, the Petitioner submitted its bid for the supply of 150 MW power from its Project to Haryana Discoms. On 5.5.2022, HPPC issued a Letter of Award ("LoA") to the Petitioner for the supply of 150 MW power to Haryana Discoms from the Petitioner's Project. On 18.5.2022, the Petitioner and Haryana Discoms executed an Agreement for Procurement of Power for the supply of power for an aggregate capacity of 150 MW of the Project for a period of 3 years ("APP"). Power supply under this APP from the Petitioner's Project to HPPC/Haryana Discoms commenced on 19.7.2022

(b) After the Bid Date of 30.3.2022, Ministry of Power, Government of India ("MoP") issued various directions/orders starting from 28.4.2022 till 11.8.2022 (i.e. letters dated 28.4.2022, 13.5.2022, 18.5.2022, 26.5.2022, 28.5.2022, 1.6.2022, 1.8.2022, 2.8.2022, 11.8.2022) regarding blending of domestic coal with imported coal to overcome the situation of shortage of coal in the country ("MoP Directives") which included MoP directions dated 26.5.2022 and 11.8.2022 issued under Section 11 of the Act ("Section 11 directions") to the generating companies having coal-based power projects supplying electricity under Section 63 of the Act. These directions were initially applicable till

31.3.2023 but were subsequently withdrawn w.e.f. 11.8.2022. However, the imported coal procured by the generating companies under these directions was allowed to be utilized for the period after 11.8.2022.

(c) In compliance with the above Section 11 directions dated 26.5.2022, the Petitioner placed purchase orders on coal suppliers for the import of coal on 27.5.2022. Consequently, compliance with the Section 11 directions had a substantial impact on the operational costs of the Petitioner, resulting in additional expenditure by the Petitioner during the operating period i.e., the tenure of the APP in terms of the additional costs towards the procurement of imported coal for the purpose of supplying power to Haryana Discoms.

(d) Pursuant thereto, on 9.9.2022 and 29.9.2022, the Petitioner issued Change in Law notices under Article 21 of the APP read with Rule 3(2) of the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 notified on 22.10.2021 by MoP ("CIL Rules") to HPPC qua the aforesaid MoP Directives which resulted in increase in the cost of power generation.

(e) In response to the notices, HPPC, vide its letters dated 16.9.2022 and 7.10.2022, had submitted that MoP by letter dated 11.8.2022 has withdrawn the Section 11 directions issued under its previous letter dated 26.5.2022 and the coal stock position in respect of the Petitioner as on 14.9.2022 was sufficient, which is more than 50% of normative coal stock norms of the Ministry of Coal. HPPC further submitted that the Petitioner has not notified any "Change in Law" event in terms of the conditions of APP, and the same is at the belated stage, which is in clear breach of the terms of the APP and an afterthought. Therefore, the Petitioner's request for consideration of blending of domestic coal with imported coal as a Change in Law event cannot be considered in light of Articles 17.4 and 17.5.2 of the APP.

(f) MoP Directives issued from time to time with respect to the mandatory blending of domestic coal with imported coal by TPPs qualify as a Change in Law event for the Petitioner under Article 21 read with Article 26 of the APP and also CIL Rules in terms of the following:

(i) As per Article 1.2.1(b) of the APP, references to laws of the State, laws of India or Indian law or regulation having the force of law shall include the laws, acts, ordinances, rules, regulations, bye-laws or

notifications which have the force of law in the territory of India and as from time to time may be amended, modified, supplemented, extended or re-enacted. Hence, MoP Directives, being in the nature of orders/directions issued by MoP to thermal generating stations for mandatory blending of coal, qualify as an 'Indian Law' and, hence, squarely covered under the definition of Change in Law as provided under the APP.

(ii) MoP Directives have been issued by MoP in the exercise of powers conferred under Sections 107 and 11 of the Act, which comes within the ambit of "Indian Law" under the APP. MoP being a "Government Instrumentality", MoP Directives have the force of law in terms of the Judgement passed by the Hon'ble Supreme Court *in the case of Energy Watchdog & Ors. v. CERC & Ors., [(2017) 14 SCC 80].*

(iii) MoP Directives are an enactment of a Law and amendment of an existing law under Article 21 of the APP.

(iv) Mandatory blending of domestic coal with imported coal was made effective after the Bid Date i.e., 30.3.2022. The APTEL in its Judgment dated 14.8.2018 passed in Appeal No*. 119 of 2016 titled Adani Power Rajasthan Ltd. v. Rajasthan Electricity Regulatory Commission & Ors,* has held that while submitting a bid, the bidders are only required to factor the applicable charges/ cost existing at the time of bidding and cannot envisage any change in such charges/ cost in the future. The Petitioner had submitted its bid on 30.3.2022, considering the factors existing at that time. The Petitioner could not have foreseen/ presumed/anticipated the occurrence of the aforesaid Change in Law event during the tendering/ bidding process, and the same was not accounted for or factored in while submitting the final bid (quoted tariff). However, MoP Directives issued have changed the premise on which the bid was submitted by the Petitioner. Therefore, any increase in the cost of the Project as a result of the occurrence of any external events being beyond the reasonable control of the Petitioner i.e. MoP Directives, will qualify as an event of Change in Law in terms of Article 21 of the APP

(v) MoP Directives admittedly applies *in rem* and has a statutory mandate. Further, MoP Directives bind the conduct of the parties,

including the Petitioner. Nonetheless, since MoP Directives have been issued in mandatory terms, the binding nature of the instrument itself is sufficient to add the element of “force of law”. [Ref: *Gulf Goans Hotels Co. Ltd v. Union of India (2014) 10 SCC 673; Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (1975) 1 SCC 421 and Bengal Nagpur Cotton Mill Ltd v. Board of Revenue (1964) 4 SCR 190].*

(vi) Compliance with the MoP Directions has a substantial impact on the Operational Costs of the Petitioner, resulting in additional expenditure during the operating period i.e., the tenure of the APP. Evidently, as a consequence of the issuance of MoP Directives, the Petitioner suffered an increase in costs, the aggregate financial effect of which exceeds the higher of Rs. 1 crore and 0.1% of the capacity charge (of Rs 194.27 crore) in the financial year 2022-23. Thus, the Change in Law claims and compensation being sought by the Petitioner is meeting the thresholds stipulated under Article 21 of the APP.

(vii) In view of the above, MoP Directives squarely fall within the ambit of “Change in Law” as envisaged in the APP, specifically Article 21 read with Article 26 and Article 1.2.1(b) of the APP. Accordingly, the Petitioner had issued Change in Law notices on 9.9.2022 and 29.9.2022 and thereafter filed the present Petition seeking compensation for such Change in Law events, including restitution as upheld by the Hon’ble Supreme Court in a catena of judgments.

(viii) Even the CIL Rules notified on 22.10.2021 by MoP, which are applicable to all the generating companies, including the Petitioner, confers the right to a generating company like the Petitioner to claim relief on account of Change in Law. CIL Rules provide for the manner of compensation of such Change in Law claims. In terms of Rule 3(1) of CIL Rules, upon the occurrence of a Change in Law event, the monthly tariff or charges shall be adjusted and be recovered in accordance with the said Rules to compensate the affected party (i.e., the Petitioner) so as to restore such affected party to the same economic position as if such Change in Law had not occurred.

(ix) Notwithstanding the above, any adverse financial impact on the Petitioner due to the supply of power to HPPC in terms of Section 11

directions issued by MoP ought to be offset in terms of Section 11(2) of the Act. Section 11(2) of the Act entrusts this Commission with the responsibility of offsetting the adverse financial impact caused to the generating company as a consequence of directions issued by MoP under Section 11(1) of the Act. The Change in Law claims, as raised in the present Petition, are based on the doctrine of restitution. Section 11(2) also pertains to offsetting the adverse financial impact on a generating company such as the Petitioner on account of compliance with Section 11 directions. Therefore, the Petitioner has the lawful right as provisioned under Section 11(2) of the Act, and it is within the undisputable powers of this Commission under Section 79, read with Section 11(2) of the Act, to adjudicate upon the claims raised by the Petitioner due to compliance with Section 11 directions basis the underlying principle as envisages under Section 11(2) of the Act. In compliance with Section 11 directions dated 26.5.2022 issued by MoP in the exercise of the power conferred under Section 11 of the Act, the Petitioner placed purchase orders for the import of coal on 27.5.2022. In compliance with Section 11 directions, the Petitioner has incurred additional costs towards the procurement of imported coal for the purpose of supplying power to Haryana Discoms/ HPPC. The various cost components for importing coal for the purposes of blending with domestic coal are as under:

- Cost of imported coal on a CIF basis.

- Custom duty along with Goods and Services Tax on cost of coal (CIF) and compensation cess as levied on the imported coal.

- Stevedoring and Handling Charges: These comprise charges towards discharging/unloading of coal from a ship to a quay/ wharf and various other services like customs clearance, arranging storage at the port, shifting of coal to the storage area, loading of coal to a rake, etc.

- Port Demurrage and Transit Area Demurrage Charges: Port Demurrage Charges are levied by the shipping line in cases where the unloading is not completed within the allowed free time period. Transit

Area Demurrage Charges are levied if the coal is dumped on the specified transit area of the port.

- Wharf Demurrage charges: These charges are levied against cargo remaining at the wharf area after the expiration of free time.

- Tarpaulin charges: Tarpaulin charges are levied towards covering of coal at port and on the rakes by Tarpaulin, which is a large sheet of flexible, water-resistant or waterproof material, made of plastics such as polyethylene or polypropylene. The primary usage of tarpaulin covering coal is to keep the coal dry from harsh weather like snow, rain, storms, and etc., and to avoid the spread of coal dust in the environment.

- Royalty charges: These charges are paid to port authorities.

- Escalation charges: Port levy Escalation Charges as a certain percentage of others like wharfage, pollution, and tarpaulin, etc.

- Weighment charges: Weighment charges are paid towards the weighing of coal at the port during coal shifting from the transit area/ storage area for rake loading.

- Coal Sampling and Analysis charges at Port: These charges are paid to ascertain if the imported coal meets the required parameters.

- Insurance charges: These charges are paid towards insurance of coal against potential threats like fire, flood, and burglary, etc.

- Railway Freight: This is paid to the Indian Railways for transporting coal from port to the Project.

- Interest on Working Capital: Since the landed cost of imported coal is significantly higher than the domestic coal, additional capital was deployed by the Petitioner towards the procurement of the imported coal vis-à-vis domestic coal. The requirement of such additional capital cost towards procurement of expensive imported coal is met by the Petitioner from its working capital limits drawn from its lenders, on which a substantial interest is payable by the Petitioner to its lenders. Therefore, the Petitioner is entitled to claim the Interest on Working Capital towards the incremental landed cost of imported coal vis-à-vis domestic coal. Such an interest on Working Capital may

also be allowed either on the actual basis or in terms of normative Interest on Working Capital as per the Tariff Regulations, 2019.

(g) It is a settled position of law that directions issued under Section 11 of the Act are binding, and all concerned entities are mandated to follow these statutory directions. In terms of Section 11 of the Act, the appropriate Government may, in extraordinary circumstances, issue directions to the generating company to operate and maintain its generating station in accordance with such directions and the appropriate Commission may offset the adverse financial impact of the directions issued by the Government, on the generating company in such manner as it considers appropriate.

(h) The Commission is entrusted under Section 11(2) of the Act to allow compensation to the Petitioner in accordance with the 'proposed methodology for calculation of compensation due to blending of domestic coal with imported coal under Section-63 PPAs' as prescribed under Annexure V of Section 11 directions dated 26.5.2022. In this regard, reliance has been placed on the Judgment dated 23.5.2014 passed by APTEL in Appeal Nos. 37 of 2013 and 303 of 2013 titled *"GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors."*, wherein the APTEL has held that only the Appropriate Commission has the power to offset the adverse financial impact of the direction issued under Section 11(2) of the Act. Therefore, as a result of the supply of power to HPPC in terms of Section 11 directions, the Petitioner ought to be compensated under Section 11(2) of the Act.

(i) The Petitioner has relied on the Hon'ble Supreme Court's Judgement in the case of *Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd. and Ors. [(2018) 11 SCC],* wherein the principles of the 'business efficacy' and 'officious bystander test' have been discussed in detail. Business efficacy means that the courts are required to make the contract efficacious and practicable, and the officious bystander test is applied by the courts to determine whether a term should be implied into a contract for it being so obvious, even though that term was not written into the contract expressly. Regulatory certainty is essential for a project developer (i.e., the Petitioner MB Power in the present case) for sanction/approval of funds by investors/lenders for the timely execution of the Project. In this regard, the Petitioner has relied upon Judgment dated 28.8.2020 passed by the Hon'ble APTEL in Appeal Nos. 21 of 2019 and 73 of 2019 titled

Talwandi Sabo Power Limited v. Punjab State Electricity Regulatory Commission & Anr., wherein the Hon'ble APTEL has categorically held that regulatory certainty is necessary for securing funds from the lenders/ investors and in absence of the same, the additional funds will not be sanctioned by lenders. Therefore, considering the inherent powers as vested on this Commission by the Act, and to maintain the regulatory certainty, appropriate directions should be passed by this Commission to grant adequate compensation to the Petitioner on account of the increase in the cost of power supply to the Respondents under the APP on account of the incremental cost of coal due to mandatory blending of domestic coal with the imported coal.

(j) The purpose of the APP is to supply electricity to the procurer at the tariff agreed upon in the APP read with the terms and conditions of the APP. However, if the cost of generation of electricity increases for reasons beyond the control of the Petitioner, such as an increase in the cost of fuel due to the import and blending of domestic coal with imported coal, then the developer cannot be held accountable to bear the risk as the same was not foreseeable at the time of submission of the bid. Since the Petitioner cannot be subjected to risks unknown/untaken, it is only essential that while interpreting the APP, a common sense and business efficacy test is applied. This broad principle is captured in the judgment of the Hon'ble Supreme Court passed in the case of Union *of India v. D N Revri & Co. and Ors (1976) 4 SCC 147],* which explains two concepts of the interpretation of contract i.e., business efficacy and adoption of common-sense approach. The Hon'ble Supreme Court observed that while interpreting the provisions of the contract, it is important to apply law and economics as the same are intertwined and are integral parts to apply in case of any contractual arrangement.

(k) An entity cannot be made to absorb risk which is beyond its control. This is the basic economic principle of project development. Any additional cost by way of imposition of levies, increase in the cost of fuel and other unforeseen events, including mandatory directives which are beyond the control of the developer, shall not be borne by the developer. Hence, the Petitioner is entitled to recover such additional cost/ compensated for such additional cost

(l) MoP vide its Order dated 11.8.2022 withdrew its earlier Section 11 directions dated 26.5.2022 to import any further coal while stating that imported coal purchased by generating companies up to 11.8.2022 shall be utilized in accordance with the methodology provided by MoP in its Section 11 directions

dated 26.5.2022. Therefore, Section 11 directions dated 26.5.2022 remain applicable and binding for the entire quantum of imported coal procured by the Petitioner before 11.8.2022, and the Petitioner is entitled to compensation corresponding to the entire quantum of imported coal procured by it before 11.8.2022.

(m) It is noteworthy that the Petitioner did not place any fresh/new orders for the procurement of imported coal after 11.8.2022, and only the imported coal for which procurement orders were placed prior to 11.8.2022 was utilized for the blending purpose, for which compensation is being sought by it in the present Petition corresponding to the period from 19.7.2022 (i.e. date of commencement of power supply to the Respondents under the APP) till 31.3.2023 (i.e. the end date mandated by MoP Section 11 directions dated 26.5.2022).

(n) The Petitioner has already suffered an adverse financial impact on account of import of coal for the purpose of mandatory blending of domestic coal with imported coal in compliance with the Section 11 directions issued by MoP, which is required to be compensated to the Petitioner in terms of Section 11(2) of the Act and methodology for calculation of compensation due to blending of domestic coal with imported coal under Section 63 PPAs as prescribed by MoP in its Section 11 directions dated 26.5.2022, along with applicable carrying cost and the Late Payment Surcharge (LPS).

(o) The Petitioner is entitled to the carrying cost of the compensation sought in the present Petition. Carrying cost is a legitimate expense towards the time value of money based on the restitutionary principles and the principles governing “carrying cost” are well settled. In this regard, reliance has been placed on the judgments of the APTEL, namely, Judgement dated 15.2.2011 in Appeal No. 173 of 2009 titled *Tata Power Co. v. MERC (Para 43),* Judgment dated 20.12.2012 in *SLS Power Limited v. APERC, 2012 SCC OnLine APTEL 209 (Page 63),* Judgment dated 28.11.2013 in Appeal Nos. 190 of 2011 and 162-63 of 2012, titled *Torrent Power Limited v. GERC (Para 83),* Judgment dated 4.10.2019 in Appeal No. 246-47/2017 titled *Torrent Power Limited vs GERC & Ors.*

(p) The Petitioner is entitled to the carrying cost on a monthly compounding basis. In this regard, reliance has been placed on the judgment of the APTEL dated 14.9.2019 in Appeal Nos. 202 & 305 of 2018 in the case of Adani Power Rajasthan Limited v. Rajasthan Electricity Regulatory Commission & Ors, the Hon’ble Supreme Court Judgements in the case of Energy Watchdog v. CERC

[(2017) 14 SCC 80] (Para 57), and Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors [(2019) 5 SCC 325], Indian Council for Enviro-Legal Action v. Union of India, (2011) 8 SCC 161, T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd, (2014) 11 SCC 53, Judgment dated 24.8.2022 passed in Civil Appeal No. 7129 of 2021 titled Uttar Haryana Bijli Vitran Nigam Limited & Anr v. Adani Power Mundra Limited & Anr., 2022 SCC Online SC 1068, and the Commission's Order dated 23.10.2021 passed in Petition No. 104/MP/2017 titled Adani Power (Mundra) Limited vs. Uttar Haryana Bijli Vitran Nigam Limited & Ors

(q) In view of the above, the Petitioner is entitled to the additional costs incurred for mandatory blending of domestic coal with imported coal as per the directives issued by MoP from time to time, compensation to be calculated in accordance with the methodology for calculation of compensation due to blending of domestic coal with imported coal under Section-63 PPAs as prescribed under Annexure V of MoP Order dated 26.5.2022, under which "Price of imported coal" shall inter-alia include the various cost components as specified at paragraph 38 of the present Petition, landed GCV and the Price of imported coal (including the various cost components) as certified by the Auditor(s) of the Petitioner and the carrying cost computed on the monthly compounding basis and Late Payment Surcharge till the time the entire payments are made by the Respondents.

Hearing dated 9.2.2023

17. Notices were issued to the Respondents to file their replies. Respondent No. 1 (HPPC) has filed its reply, and the Petitioner has filed a rejoinder thereof.

Reply of HPPC

18. The Respondent, in its reply dated 10.4.2023, has broadly submitted as under:

(a) The Section 11 directions dated 26.5.2022 issued by the MoP do not necessarily constitute a 'Change in Law' in terms of the scope of the Change in Law provision (Article 21) in the APP as various directions towards the blending of domestic coal with imported coal were issued prior to the cut-off date of 30.3.2022

(b) On 12.10.2021, the Central Electricity Authority ("CEA") issued a direction to all the generating companies (State Gencos and IPPs) to import coal to meet their requirements by blending with imported coal to the extent of 10%. On 7.12.2021, MoP issued an advisory to all domestic coal-based power plants to import coal to meet their requirements by blending with imported coal.

(c) On 26.3.2022, MoP issued a Circular addressed to all the IPPs, including the Petitioner, wherein MoP reiterated the blending of domestic coal with imported coal and requested that necessary action may be taken to import coal in a transparent and competitive manner for blending purposes.

(d) On 28.4.2022, MoP issued the revised advisory reiterating the IPPs to blend 10% of the total requirement via imported coal by 31.10.2022. The IPPs and State Gencos were advised to place the awards for import of coal (for blending) by 31.5.2022 in order to ensure that 50% quantity is received by 30.6.2022, 40% of the quantity by 31.8.2022 and 10% of the quantity by 31.10.2022 before the onset of monsoon. Further, this letter itself refers to the earlier directions issued by MoP on 7.12.2021.

(e) It is a settled position that there has to be a change in the existing position after the cut-off date of 30.3.2022. For the purposes of considering relief under Change in Law, the law prevailing as on the cut-off date as well as the obligations already existing for the Petitioner, is to be considered. Therefore, the Petitioner's contentions that as on the cut-off date, i.e., 30.3.2022, there was no obligation on the Petitioner to import coal for the purposes of blending domestic coal with the imported coal is wrong and denied since the earlier directions of MoP issued prior to the cut-off date of 30.3.2022 i.e. on 12.10.2021, 7.12.2021 and 26.3.2022 did mandate the blending of domestic coal with imported coal.

(f)The Petitioner's Change in Law claim is not in accordance with the provisions of CIL Rules dated 22.10.2021 issued by MoP. In terms of the provisions of these CIL Rules, the generator (i.e. the Petitioner) is required to provide 3 weeks' prior notice to HPPC about the proposed impact in the tariff on account of such a Change in Law event. Further, the generator (i.e. the Petitioner) is also required to provide a computation of the impact in tariff on account of such Change in Law within 30 days of the occurrence of the

Change in Law or on the expiry of the 3 weeks' notice period mentioned above (whichever is later).

(g) If the generator delays in giving the above notice and the computation of tariff impact (as in the present case), it shall not be entitled to recover the impact for the period of the delay.

(h) As per the CIL Rules, the impact of the Change in Law is then required to be raised along with the monthly bills. The monthly bill needs to provide all the necessary details and supporting documents for the benefit of the procurer to scrutinize the claim. The generator (i.e. the Petitioner) is also required to place the relevant document and details of the calculation before the Commission within 30 days of the Change in Law event coming into effect of the recovery of the impact

(i) Since the Petitioner has not complied with the above requirement mandated under CIL Rules, the Notice issued by the Petitioner on 9.9.2022 cannot be considered a Notice in terms of the CIL Rules. Further, no such information or documents for establishing the impact and computation have been furnished by the Petitioner either to HPPC or this Commission. There are unexplained and unjustified laches in issuing the notice, and the present Petition has only been filed as a complete afterthought.

(j) HPPC, vide its letter dated 16.9.2022, has refuted the Change in Law claims of the Petitioner made vide its letter dated 9.9.2022

(k) It is not disputed that the notifications/orders issued by MoP, Government of India, mandating the blending of domestic coal with imported coal is a law. However, in terms of Article 21 of the APP, the Petitioner shall suffer an increase in costs or reduction in net after-tax return or other financial burden, the aggregate financial effect of which exceeds the higher of Rs. 1 crore (Rupee one crore) and 0.1% (zero point one per cent) of the capacity charge in any accounting year. The Petitioner has failed to establish how the MoP notification has led to an increase in the cost of Rs. 1 crore (Rupees one crore) and 0.1% (zero point one per cent) of the capacity charge in the financial year 2022-23. Accordingly, the claim of the Petitioner does not qualify as a Change in Law in terms of Article 21 of the APP.

(l) The Petitioner has not provided any documents that furnish a one-to-one correlation of the cost incurred by it towards procurement of imported coal for the purposes of blending imported coal with domestic coal. The Petitioner

has not placed on record the details relating to the payment of coal imported and, further, established the one-to-one correlation between the project, the import of coal and the invoices and other relevant documents for proof of the said payment. Further, the Petitioner has also not provided the exact date of placing the order of import, the actual date of importation, the date of receiving the coal and the exact correlation as to the period when the said coal was used by it to establish that it used the aforesaid imported coal during the period when it was supplying power to HPPC when the APP dated 18.5.2022 was subsisting and that the said power was supplied under the said APP to the State of Haryana. The Petitioner did not establish that no part of the cost of coal imported to sell power at the Power Exchange has been passed on to the distribution licensees. In the absence of these details, the claims of the Petitioner may be rejected.

(m) Assuming but not admitting the claim of the Petitioner, the relief (if any) to be considered by the Commission has to be determined considering the supply of power between the date commencement of supply of Power, i.e., 19.7.2022 and the date when the MoP directions were in force, i.e., 11.8.2022, quantum of power supplied to HPPC, i.e., 150MW as against the aggregate capacity of 1200 MW. In other words, the bills raised by the Petitioner for the coal imported had to be on a pro-rata basis; the direction of CEA/MoP in regard to the blending of coal was already in place prior to 28.4.2022 *[Directions dated 12.10.2021 issued by CEA and Directions dated 7.12.2021 issued by MoP]*; and the Petitioner proves that it shall suffer an increase in costs in net after-tax return or other financial burdens, the aggregate financial effect of which exceeds the higher of Rs. 1 crore and 0.1% (zero point one per cent) of the capacity charge in the financial year 2022-23.

(n) The Petitioner is not entitled to carrying cost as the Petitioner has issued the Change in Law notice belatedly, i.e., only on 9.9.2022, whereas the event sought to be claimed as 'Change in Law' by the Petitioner was for the period of 28.4.2022 till 11.8.2022. The Petitioner cannot claim for carrying cost where there has been delay and laches on the part of the Petitioner itself. It is a settled principle of law that a party cannot claim benefits for its own wrong. Due to the Petitioner's failure to issue a Change in Law notice and bills claiming relief based on the alleged Change in Law along with supporting documents, HPPC and consumers cannot now, at a belated stage, be made to suffer. The APTEL, in the matter of *Punjab State Power Corporation Limited*

v. Punjab State Electricity Regulatory Commission vide its Order dated 22.4.2015 in Appeal No. 174 of 2013, has considered the delay in providing complete documents as a reason for denying carrying costs.

(o) The claim of the Petitioner seeking carrying cost at the rate of late payment surcharge and that too on a compounding basis is wrong and baseless. The carrying cost being claimed under the restitutionary principle can only be limited in nature, i.e., up to the maximum for the reasonable time value of money and not for levying penalty or excess burden on the Respondents/consumers. The judgment in *Uttar Haryana Bijli Vitran Nigam Limited and Another (Supra)* only recognized the restitutionary principle in the PPA at Para 11 and 13. The restitutionary principle is completely different the penal rate of interest, which is a late payment surcharge.

(p) There is no provision in the APP and CIL Rules that allows the levy of a Late Payment Surcharge for restitution. When the payment does not become due at all, there can be no question of any liability of late payment surcharge for such period. HPPC cannot be made liable to pay a late payment surcharge when there has been no late payment.

Rejoinder to the reply of Respondent

19. The Petitioner, in its rejoinder dated 23.5.2023, has reiterated the submissions made in the Petition and has mainly submitted as under:

(a) The reliance placed by the Respondent, HPPC, on the CEA's letter dated 12.10.2021 and MoP's letter dated 7.12.2021 is misplaced as the Section 11 directions dated 26.5.2022 neither refer nor rely on the said CEA's letter dated 12.10.2021 and/ or said MoP's letter dated 7.12.2021. The Petitioner's claim is premised on the MoP Directives, being mandatory in nature, which were issued on 28.4.2022 onwards. In this context, MoP's Section 11 directions issued on 26.5.2022 reveal that directions to import at least 10% coal for the blending were already stipulated by MoP in its earlier letter dated 28.4.2022. MoP's letter dated 28.4.2022 only mentions that the same has been issued pursuant to a review of the status of coal stocks by MoP in a meeting with the generating companies and IPPs, which took place on 12.4.2022. The language of the letter makes it mandatory and directory in nature.

(b) A bare perusal of MoP's letter dated 7.12.2021 reflects that it refers to MoP's letter dated 22.10.2021 and states that "*MoP has issued an advisory dated 22.10.2021 to all coal-based stations to maintain their coal stocks as per their obligations and to ensure full availability of their plants*". It is clear from the same that MoP's letter dated 20.10.2021 is merely an advisory and not a mandate on generating companies, including the Petitioner. Further, MoP's letter dated 7.12.2021 itself is advisory in nature inasmuch as it states that "*It was also advised that if the domestic coal supplies falls short of the requirements, they may blend with imported coal up to 15%.*" Therefore, it is evident that MoP's letters dated 20.10.2021 and 7.12.2021 were merely advisory in nature and not binding on generating companies. Further, from the language of the CEA letter dated 12.10.2021, it is evident that it does not make any mandate as required by law.

(c) It is a settled position of law that an advisory is not binding if such an advisory has a pre-condition attached to it. Hence, the Petitioner was not legally bound to follow the advisory issued by the CEA vide its letter dated 12.10.2021. Evidently, it was only on 28.4.2022, when MoP fixed a target and timelines for the import of coal, which had a binding force and mandated generating companies to import coal for the purpose of blending.

(d) The contention of HPPC that the Petitioner has failed to establish that the Change in Law event has led to an increase in the cost of Rs. 1 crore and 0.1% of the capacity charge in the financial year 2022-23 is erroneous and misconceived. Taking into account the thresholds stipulated under Article 21 of APP, the total capacity charges billed towards the supply of power to HPPC under the APP during the financial year 2022-23 was Rs 194.27 crore. Evidently, as a consequence of the issuance of Section 11 directions by MoP, the Petitioner has suffered an increase in costs, the aggregate financial effect of which exceeds the higher of Rs. 1 crore and 0.1% of the capacity charge in the financial year 2022-23. Thus, the claims and compensation being sought by the Petitioner are meeting the thresholds stipulated under Article 21 of the APP.

(e) The contention of HPPC that the Petitioner has not provided any documents that furnish a one-to-one correlation of cost incurred by it towards the procurement of imported coal for the purpose of blending imported coal with domestic coal is unsustainable, without any basis and ought to be rejected. To buttress its claim, the Petitioner has placed on record the following documents as certified by its statutory auditor:

- Details of the coal imported and consumed by the Petitioner during the financial year 2022-23 for the purpose of generation and supply of power to its various beneficiaries including HPPC, namely purchase orders to coal supplier for import of coal on 27.5.2022 i.e. after issuance of Section 11 directions by MoP, total quantity of imported coal received by the Petitioner is 2,35,170 tonnes (received in multiple tranches) with an overall GCV of at 3,661 kCal/kg (as received basis), and overall landed price of such imported coal is Rs.12,613/tonne.

- Quantity-wise break-up of the imported coal from the date of import to the date of receipt, which is as under:

S. No	Imported Coal Quantity (Tonnes).	Date of Import	Date of Receipt
1	60,500	12-Jul-2022	22-Jul-2022
2	60,500	31-Jul-2022	09-Aug-2022
3	59,170	05-Aug-2022	17-Aug-2022
4	55,000	14-Aug-2022	25-Aug-2022
TOTAL	**2,35,170**		

- Details of imported coal consumption *[from 19.7.2022 (i.e. commencement of power supply to HPPC under APP) till 31.3.2023]*, which are as under:

Beneficiaries	MPPMCL	UPPCL	HPPC	Others (incl. Power Exchange)	Total
Total Energy Scheduled (MUs)	1834	1599	**809**	490	4732
Energy Scheduled based on Imported Coal (MUs)	131	114	**58**	35	338

Beneficiaries	MPPMCL	UPPCL	HPPC	Others (incl. Power Exchange)	Total
Imported Coal Consumption (Tonnes)	91,121	79,477	**40,199**	24,373	2,35,170

- In addition to the above, the Petitioner has also placed on record the following documents:

(i) Notice inviting tenders issued by the Petitioner from the bidders/suppliers for procurement of imported coal from its 1200 MW Project, Sample invoices and bill of entries received by the Petitioner from the vendors/suppliers/customs departments regarding the cost components for importing coal for the purposes of blending with domestic coal, namely, cost of imported coal on cost, insurance, & freight basis, Custom duty along with Goods and Services Tax on cost of coal (CIF) and compensation cess as levied on the imported coal, Stevedoring and Handling Charges, Port Demurrage and Transit Area Demurrage Charges, Wharf Demurrage Charges, Tarpaulin Charges, Royalty Charges, Escalation Charges, Weighment Charges, Coal Sampling & Analysis Charges at Port, Insurance Charges, and Railway freight.

(ii) The contention of HPPC that the Petitioner is not entitled to carrying cost since the Petitioner had issued Change in Law notice belatedly is unmeritorious, fallacious and deserves to be rejected since the APP executed between the parties herein does not specifically lay down any timeline for issuance of Change in Law notice to the other party. In such a scenario, where an agreement does not specify a timeline for issuance of Change in Law Notice, it is established that the affected party has to give notice “as soon as reasonably practicable” or when it “should reasonably have known” regarding the Change in Law. Evidently, the Change in Law notice could only be issued when the Petitioner knew of the adverse effect that such a Change in Law event would cause on the cost of the Project.

(f) In the present case, the power supply to HPPC under the APP commenced on 19.7.2022. On 22.7.2022, the first tranche of imported coal was received. Accordingly, after the commencement of blending of domestic coal with the imported coal for the supply of power to HPPC, the Petitioner issued the first Change in Law Notices on 9.9.2022 and 29.9.2022 under Article 21 of the APP read with Rule 3(2) of the CIL Rules which is within the interpretation of reasonable timeline prescribed under the APP. However, HPPC, vide its letters dated 16.9.2022 and 7.10.2022 rejected the claims of the Petitioner, and thereafter, the present Petition was filed.

(g) Notwithstanding the above, a substantive relief cannot be negated/denied by a party in light of procedural bias/technical pleas as per the settled position of law that procedure cannot obstruct justice, and a party cannot be refused or denied its substantive relief on account of the procedure. Further, HPPC is taking hyper-technical pleas by stating the claims were issued belatedly to avoid its liability under the APP. The Hon'ble Supreme Court, in several cases, has settled the position of law that the courts ought to avoid a hyper-technical approach and that substantial rights of parties cannot be thwarted on the grounds of procedural technicalities, including delay, if any. Even this Commission vide its Order dated 17.10.2022 in *Petition No. 700/MP/2020 [Para 16],* has held that every law has an inherent notice and a fact judicially noticeable within the meaning of Section 57 of the Indian Evidence Act, 1872. The Section 11 directions were issued by "Government Instrumentality" and have the force of law, which qualifies as a construction notice to HPPC. Even otherwise, HPPC had the knowledge of the issuance of Section 11 directions and its impact on the generating stations, including the Petitioner. Therefore, HPPC, at this stage, cannot allege that the claims were issued belatedly by the Petitioner.

(h) The contention of the HPPC that there is no provision in the APP that allows the levy of Late Payment Surcharge for restitution is misleading and based on an erroneous interpretation of the provisions of the APP. As per Clause(s) 11.9,11.10,25.3,25.4 and the definition of "Bank Rate" in the AAP, payment due under the APP shall be made within 30 (thirty) days of receiving

a demand and in the event of delay beyond such period, the defaulting party shall pay interest for the period of delay calculated at a rate equal to 5% above the Bank Rate. Any interest payable under the APP shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests. Hence, HPPC is obliged to pay compensation to the Petitioner along with the carrying cost computed on a monthly compounding basis and Late Payment Surcharge/ Interest in terms of APP till the time the entire payment is made by the Respondents.

Hearing dated 29.5.2023

20. During the course of the hearing on 29.5.2023, learned counsels for the Petitioner and the Respondents argued the matter at length, and after hearing both the parties, the Commission reserved the order. Subsequently, both the parties filed their Written Submissions.

21. The Respondent, HPPC, in its written submissions, has reiterated the submissions made in the reply and has further submitted that as against the scheduled generation of HPPC (from 19.7.2022 till 31.3.2023) of 809 MUs as claimed by the Petitioner, the actual generation has been only to the extent of 779 MUs (approximately) and therefore, compensation, if any, should be restricted to 779 MUs (approximately).

22. The Petitioner, in its written submissions, has reiterated the submissions made in the pleadings and has additionally submitted as under:

(a) The reliance placed by HPPC in its written submissions upon the various letters/circulars issued by CEA and MoP dated 12.10.2021, 7.12.2021 and 26.3.2022, to argue that even prior to cut-off/ Bid Date i.e., 30.3.2022, there existed directions/mandates of MoP/CEA to import coal for blending purposes and therefore, there is no Change in Law, these letters/ circulars were only in nature of advisory and were not a mandate/directive/binding on the domestic

coal based Power Projects like that of the Petitioner as CEA vide letter dated 12.10.2021 merely requested the generators to make efforts to import coal and hence it not in form of mandate or directions. Further, even MoP, in Para 2 of its subsequent letter dated 7.12.2021 to the generators, has held that CEA has issued letters (dated 12.10.2021) to the generators for *"making efforts for importing coal for up to 10% blending purpose so that they are able to maintain adequate coal stocks during Jul-Oct every year as coal supplies from CIL gets affected adversely during these months".* The usage of the term "*making efforts"* clearly establishes that referred CEA letter was a generic advisory based on the coal shortfall witnessed by CIL during the months of July – October every year and was in no way a binding direction on the generators as alleged by HPPC. Thus, the CEA letter dated 12.10.2021 does not make any mandate as required by law. Hence, the Petitioner was not legally bound to follow the advisory issued by CEA vide its letter dated 12.10.2021.

(b) Further, the fact even the MoP's letter dated 7.12.2021 was a mere advisory is evident from the MoP's subsequent letter dated 26.3.2022 wherein MoP itself stated at Para 6 that "*Ministry of Power on 7.12.2021 had issued advisories to domestic coal based power plants to import coal to meet their requirements by blending with imported coal…".* Hence MoP's letter dated 7.12.2021 was merely an advisory and not mandatory in nature as recognized by MoP itself in its subsequent letter dated 26.3.2022.

(c) With respect to the MoP circular dated 26.3.2022, the language of Para 6 of this letter makes it evident that it was advisory in nature as it clearly states that MoP had issued an advisory to domestic coal-based power plants to import coal to meet their requirements by blending with imported coal and accordingly, MoP requested (and not directed) that necessary action may be taken to import coal for blending purpose based on demand assessment to deal with shortfall of coal availability. The Hon'ble Supreme Court, in the catena of judgments, has held that the word "may" is not a word of compulsion, and whenever the word "may" be employed in a contract or statute, it confers discretion to do something and is not a mandatory obligation. To buttress its arguments, the Petitioner had placed reliance on the Hon'ble Supreme Court's Judgments in the case of

Pradip Kumar Maity v. Chinmoy Kumar Bhunia, [*(2013)11 SCC 122]* and *Brahampal v. National Insurance Co*, [*(2021) 6 SCC 512]*

(d) Since actual generation to the extent of 779 MUs is the net-off transmission losses of ~ 30 MUs (i.e. ~ @3.5%). However, these transmission losses are on the account of HPPC in terms of the bid documents. In view of the same, the Petitioner is entitled to compensation for the total generation to the extent of 809 MUs.

Analysis and Decision

23. We have considered the rival contentions of the parties and examined the documents available on the record. The following issues arise for our consideration:

Issue No. 1: Whether the Respondent HPPC is liable to pay any compensation to the Petitioner on account of mandatory blending of domestic coal with imported coal in compliance with the directives issued by the Ministry of Power, Government of India, under Section 11 of the Electricity Act, 2003 in terms of Change in Law provision of the APP & CIL Rules and/ or Under Section 11(2) of the Electricity Act, 2003?

Issue No. 2: What mechanism needs to be adopted for granting compensation to the Petition?

Issue No. 3: Whether the Petitioner is entitled to any Carrying Cost on the compensation?

The above issues have been dealt with in detail in the succeeding paragraphs

Issue No. 1: Whether the Respondent HPPC is liable to pay any compensation to the Petitioner on account of mandatory blending of domestic coal with imported coal in compliance with the directives issued by the Ministry of Power, Government of India, under Section 11 of the Electricity Act, 2003 in terms of Change in Law provision of the APP & CIL Rules and/ or Under Section 11(2) of the Electricity Act, 2003?

24. The Respondent, HPPC, has contended that the cut-off date under the APP was 30.3.2022 and directions towards the mandatory blending of domestic coal with the imported coal were issued by CEA and MoP prior to the cut-off date vide letters dated 12.10.2021, 7.12.2021 and 26.3.2022. Therefore, the Petitioner was aware of

such blending directions before the cut-off date, and hence, neither the Section 11 directions issued by MoP on 26.5.2022 constitute a Change in Law event under APP, nor is the Petitioner entitled to any compensation on account of these Section 11 directions. *Per Contra*, the Petitioner has submitted that these letters were only in nature advisory and were not a mandate/directive/binding on the Domestic Coal based Power Projects like that of the Petitioner.

25. Before proceeding further, we examine the relevant extracts of the said letters dated 12.10.2021, 7.12.2021 and 26.3.2022 issued by CEA and MoP, which are extracted as under:

a) CEA letter dated 12.10.2021

"…..
3. All the State/Central Gencos and IPPs are requested to take necessary action immediately as above, under intimation to this office."

b) MoP Letter dated 7.12.2021

"*2. In the present scenario where demand is increasing and domestic coal is meeting the demand of power plants only partially, the need of import for blending purpose has arisen and Gencos need to import coal for blending. CEA has already issued letters to all gencos in this regard for making efforts for importing coal for upto 10% blending purpose so that they are able to maintain adequate coal stocks during July-Oct every year as coal supplies from CIL gets affected adversely during these months. MoP has also issued an advisory on 20.10.2021 to all the coal-based stations to maintain their coal stocks as per their obligations and to ensure full availability of their plants to meet the electricity demand as pet the requirements in the grid. It was also advised that if the domestic coal supplies fall short of the requirements, they may blend with imported coal upto 15 percent.*

c) MoP Circular dated 26.3.2022

"6. In view of the increasing demand for electricity and associated need of coal to ensure smooth functioning, as a short term measure, Ministry of Power on 07.12.2021 had issued advisories to domestic coal based power plants to import coal to meet their requirements by blending with imported coal to the extent of 4% by State Gencos & Independent Power Producers (IPPs). It is requested that necessary action may be taken to import coal in a transparent

and competitive manner for blending purpose *<u>based on demand assessment to deal with shortfall of coal availability</u>*."

From a conjoint reading of the above, we observe that MoP, in its circular dated 26.3.2022, has itself referred to its earlier letter dated 7.12.2021 as an advisory saying that *if the domestic coal supplies fall short of the requirements, they may blend with imported coal up to 15 percent*. Further, MoP, in its letter dated 7.12.2021, has held that CEA has earlier issued letters to the generators for making efforts to import coal. We are inclined to agree with the Petitioner's contentions that the usage of the term "*making efforts*", makes it evident that an earlier CEA letter dated 12.10.2021 was a generic advisory and was not a binding direction on the generators. With respect to the MoP circular dated 26.3.2022, we observe that it was in the nature of the request to the generators to import coal as it used the words like "advisories", "requested", "action may be taken" etc. in this letter.

26. The Petitioner has submitted as per Judgments of the Hon'ble Supreme Court to argue that the word "may" is not a word of compulsion, and whenever the word "may" is employed in a contract or statute it confers discretion to do something and is not a mandatory obligation. In this regard, the Petitioner has relied upon the following judgments of the Hon`ble Supreme Court:

(a) Pradip Kumar Maity v. Chinmoy Kumar Bhunia, [(2013)11 SCC 122]:

"6. So far as the government as well as aided educational institutions, also poverty alleviation schemes of appropriate government and local authorities are concerned, the statute mandates a three per cent reservation for the benefit of persons with disabilities; failure to implement these provisions can be remedied by issuance of a writ of mandamus. The two sections i.e. Sections 39 and 40 containing these stipulations are preceded by Section 38, which is germane to the conundrum at hand. It postulates that the appropriate government and local authority shall formulate schemes for ensuring employment of persons with disabilities and such schemes may provide for the relaxation of upper age limits. Owing to the use of the word "may" in the section, the question that immediately arises is whether even in the absence of an implemental scheme, can a superior court issue an inviolable order with regard to

the relaxation of upper age limits. Chinnamarkathian v. Ayyavoo [(1982) 1 SCC 159] holds that whenever the word "may" is employed in a statute it confers discretion to do something. It seems to us that in instances where the legislature uses the words "shall" and "may" in close proximity of each other, as in Section 38, there is virtually no room to construe the word "may" as mandatory. Indeed, the decisions in this context dwell predominantly on the scope of interpreting "shall" as merely obligatory, whereas the nodus in hand is the obverse. G.P. Singh in his treatise titled, Principles of Statutory Interpretation remains steadfast in the opinion that when both words are used in the same section, "shall" imposes an obligation or imperative whilst "may" connotes directive or discretionary power. The Disabilities Act should, therefore, explicitly postulate compulsory relaxation of age of candidates suffering from any of the statutorily recognised disabilities. The absence of this feature has become conspicuous by the dispute in hand."

(b) Brahampal v. National Insurance Co, [(2021) 6 SCC 512]:

"11. Ordinarily, the word "may" is not a word of compulsion. [Justice G.P. Singh in Principles of Statutory Interpretation, 14th Edn., p. 519.] It is an enabling word and it only confers capacity, power or authority and implies discretion. [Chinnamarkathian v. Ayyavoo, (1982) 1 SCC 159] "It is used in a statute to indicate that something may be done which prior to it could not be done". [Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd., 1962 Supp (3) SCR 973: AIR 1962 SC 1543]"

In view of the above, we opine that the said MoP circular dated 26.3.2022, left it to the discretion of the generators to import coal in case they are facing any shortfall in the domestic coal and hence this circular cannot be viewed as an absolute binding on the domestic coal-based generators to mandatorily blend the domestic coal with the imported coal even if they have adequate domestic coal.

27. In view of our above observations, we are in agreement with the submissions of the Petitioner that till the cut-off date i.e. 30.3.2022 under the APP, there were no absolute binding/ directions on the Petitioner to mandatorily blend the domestic coal with the expensive imported coal for the purpose of supply of power to the Respondents under the APP and hence there was no event for the Petitioner to have factored the cost/impact of the expensive imported coal in its bid submitted on 30.3.2022 with respect to the APP executed with the Respondents.

28. Having decided that till the cut-off date i.e. 30.3.2022, there were no express directions/ bindings on the Petitioner to blend the domestic coal with the imported

coal for supply of power to the Respondents under the APP, we now proceed to examine the directions issued under Section 11 of the Act by MoP to the generating companies having domestic coal-based power plants supplying electricity under Section 63 of the Act for mandatory blending of domestic coal with the imported coal issued by MoP through various letters, which are extracted as under:

Letter dated 28.4.2022:

> *"… Please refer to Ministry of Power's (MoP) letter dated 07.12.2021 regarding the import of coal for blending purpose during 2022-23 estimated @ 4% for Pithead and Non-Pithead stations.*
>
> *2. The status of materialization of domestic coal, status of imported coal for blending purpose as well as coal stocks at Thermal power plants was reviewed by Hon'ble Minister of Power, New & Renewable Energy on 12.4.2022, in a meeting with Gencos.*
>
> *3. In continuation to this Ministry's letter of even number dated 7.12.2021 and in view of the increasing demand and consumption of electricity, it has been decided that the thermal power plants owned by State Gencos and IPPs must import the coal for blending purpose to meet requirement at 10% of the total requirement, and ensure continuous power supply in the respective states.*
>
> *4. To ensure minimum required coal stocks in power plants before onset of monsoon, it is necessary that placement of awards for importing coal for blending purpose is completed by 31.5.2022. All Gencos shall ensure delivery of 50% of allocated quantity by 30.06.2022, 40% by 31.08.2022 and remaining 10% by 31.10.2022. The requirements for blending at 10% is placed at Annexure-I for each of the Gen cos.*
>
> *(i) State Gencos: 22.049 MT*
> *(ii.) IPPs : 15.936 MT*
>
> *5. States are also required to timely give clearance to IPPs, wherever required in PPA, for blending imported coal.*
>
> *6. Procurement of imported coal must be done in a transparent manner to obtain competitive rates.*
>
> *7. All the State Gencos and IPPs must also submit weekly Management Information System (MIS) report by every Friday to CEA and MoP about port wise indents placed, arrival and delivery of imported coal plant wise.*

8. This issues with the approval of Hon'ble Minister of Power & New and Renewable Energy"

Letter dated 26.5.2022:

"No. 23/13/2021-R&R (Pt-1)
Government of India
Ministry of Power
*****

To,
1. Generating companies
(As per list enclosed)
*****

Subject: Direction under Section 11 to the Generating Companies having Domestic Coal Based Plants Supplying Electricity under Section 63 of the Electricity Act, 2003- regarding

……

2. Looking into the emergent situation due to rise in demand and non-adequate supply of domestic coal, all States and Gencos based on domestic coal have been directed vide letter dated 28th April, 2022 (copy enclosed at Annexure-I) to import atleast 10 percent of their requirement of coal for blending

……

6. Domestic coal based power plants, whose tariff has been determined under Section 63 of the Act have raised concerns about the pass through of the increased cost in tariff if imported coal is used and have requested for a suitable methodology to determine the impact on tariff of mandatory blending of imported coal. Their request has been examined in detail and a methodology has been finalized in consultation with Central Electricity Authority (CEA), which was discussed in the meeting held on 20.05.2022 with the stakeholders. Based on the discussion, the methodology has been revised to make it in line with the existing methodology being adopted by the CERC. A copy of the methodology is enclosed at Annexure-V.

7. In the light of the present emergent circumstances, and in continuation of the directions to import coal for blending, using the powers under Section 11 of the Act, it is hereby directed that:

a) The methodology referred to in Para 6 above shall be used by the Generating companies supplying power under Section 63 of the Electricity Act, 2003 and State Governments/Discoms to calculate the compensation due to blending with imported coal.

b) The mechanism for billing and payment for these plants shall be as per PPA. However, to enable Gencos importing coal with adequate cash flow, the provisional billing shall be done by the Gencos on weekly basis. Payment of at least 15 % of the provisional bill shall be made by the procurers within a week from the date of receipt of bill. This provisional billing and payment shall

be subject to reconciliation during final billing and payment on monthly basis as per the PPA.

c) In case of default of payment of 15% of the weekly provisional bill, the generating company shall be free to sell 15 % power in the power exchange. The generating companies shall ensure blending with imported coal and maintain coal stock as per extant norms and the directions issued by the MoP from time to time.

d) This direction is for coal imported for blending by such domestic coal based power plant up to 31.03.2023.

………."

The above directions have been issued by MoP under Section 11(1) of the Act, which provides that the Appropriate Government may specify that a generating company shall, in extraordinary circumstances, operate and maintain any generating station in accordance with the directions of that Government. The Explanation under Section 11(1) of the Act explains the extraordinary circumstances as arising out of a threat to the security of the State, public order a natural calamity or such other circumstances in the public interest.

29. Further, as evident from above, MoP vide these Section 11 directions:

a) Imposed a direction on all the Generating Companies having domestic coal-based power plants supplying electricity under Section-63 of the Act for mandatory importing of coal and blending with the domestic coal to the extent of at-least 10% of the coal requirement.

b) Acknowledged that such mandatory blending would increase the cost of power generation and supply by the generating companies to their beneficiaries, however, the generating companies have concerns about lack of clarity on the compensation mechanism/ methodology towards such blending with imported coal and accordingly, notified a methodology for computing the compensation payable to the generating companies having domestic coal-based power plants supplying electricity under Section 63 of the

Act by the Discoms under such Section 63 PPAs towards the blending of domestic coal with the expensive imported coal, ("Compensation Methodology") which was enclosed as Annexure- 5 to the MoP letter dated 26.5.2022.

c) Stated that these Section 11 directions shall remain in force till 31.3.2023.

30. There is no doubt about the fact that the Section 11 directions dated 26.5.2022 were binding on all the Domestic Coal Based Plants supplying electricity under Section 63 of the Act like that of the Petitioner, in compliance with which these generating companies were mandatorily required to procure the expensive import coal for blending purpose, thereby increasing the cost of the generating and supply of power to their beneficiaries under their PPAs. We are of the considered view that in terms of the principle of restitution enshrined by the Hon'ble Supreme Court in its various Judgments and also owing to the fact that the Sections 11 directions themself duly provide a compensation methodology to compute the compensation payable to the generating companies by their beneficiaries towards the mandatory blending of domestic coal with the expensive imported coal, the Petitioner is entitled to compensation payable by Respondents towards such blending with imported coal.

31. We note that the Petitioner had initially sought compensation/relief towards increase in the cost of power supply to the Respondents under APP on account of mandatory blending of domestic coal with the costlier imported coal in compliance with the Section 11 directions issued by MoP under the Change in Law provisions in terms of the applicable provisions of the APP, CIL Rules and Section 79 of the Act,

and subsequently amended its Petition to seek the said claim under Section 11(2) of the Act in order to avoid any procedural infirmity in the matter. Since we have already allowed the Amended Petition to be taken on record, hence we deem it fit to consider and review the Petitioner's said claim under Section 11(2) of the Act.

32. The Petitioner has submitted that owing to the issuance of Section 11 directions, the Petitioner has incurred additional costs towards the procurement of imported coal for the purpose of mandatorily blending with the domestic coal for the purpose of supplying power to the Respondents under APP with effect from 19.7.2022 onwards. The Petitioner has further submitted that in the interest of having regulatory certainty, compensation towards such additional costs incurred by it may be determined in terms of Section 11(2) of the Act, which entrusts this Commission with the responsibility to offset the adverse financial impact caused to the generating company as a consequence of the directions given by MoP on 26.5.2022 under Section 11(1) of the Act on the basis of the underlying principle of restitution and hence the Petitioner has the lawful right under Section 11(2) of the Act, and it is within the undisputable powers of this Commission to adjudicate and grant compensation as being sought by it in the present Petition corresponding to the period from 19.7.2022 (i.e. date of commencement of power supply to HPPC/Haryana Discoms under the APP) till 31.3.2023 (i.e. the end date mandated by MoP Section 11 directions dated 26.5.2022).

33. The Petitioner has relied on the APTEL's Judgment dated 23.5.2014 passed in Appeal Nos. 37 of 2013 and 303 of 2013 titled *"GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors."* wherein the APTEL has held that only the

Appropriate Commission has the power to offset the adverse financial impact of the direction issued under Section 11(2) of the Act.

34. The Petitioner has sought compensation under Section 11(2) of the Act on account of the directions issued by MoP under Section 11(1) of the Act. Section 11 of the Act is extracted as under:

> *"11. Directions to generating companies. (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.*
>
> *Explanation- For the purposes of this section, the expression "extraordinary circumstances" means the circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in public interest.*
>
> *(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."*

35. Indisputably, in terms of Section 11(2) of the Act, adequate powers have been vested with the Appropriate Commission, in this case the Central Electricity Regulatory Commission, to offset the adverse financial impact suffered by the Petitioner on account of increase in cost of power supply to the Respondents under the APP towards compliance to directions under Section 11(1) of the Act issued by MoP vide letter dated 26.5.2022 in a manner as this Commission may consider appropriate. Further, we have decided this issue in our Order dated 3.1.2023 in Petition No.128/MP/2022 along with IA No.64/2022, wherein we have held that this Commission is duly empowered under Section 11(2) of the Act to compensate the generating companies towards the adverse financial impact on account of the compliance with the directions issued by MoP under Section 11(1) of the Act.

36. In view of the above, the Issue No.1 is decided in the favour of the Petitioner, and we hold that in terms of Section 11(2) of the Act, the Respondent HPPC is liable to pay compensation to the Petitioner on account of mandatory blending of domestic coal with imported coal to the extent of 10% in compliance with the directives issued by the Ministry of Power, Government of India, under Section 11 of the Act.

Issue No. 2: What mechanism needs to be adopted for granting compensation to the Petition?

37. We have perused the various details submitted by the Petitioner in support of its claim, including the Statutory Auditor's Certificate dated 23.5.2023 placed on record by the Petitioner. We note that for the purpose of procurement of imported coal, the Petitioner issued Notice Inviting Tenders from the bidders/suppliers for the supply of imported coal and immediately after issuance of the above Section 11 directions dated 26.5.2022, the Petitioner had placed an order for procurement of imported coal on 27.5.2022. Further, the total quantity of imported coal received by the Petitioner is 2,35,170 tonnes (received in multiple tranches from 22.7.2022 till 25.8.2022) with an overall GCV of 3,661 kCal/kg (as received basis) at an average landed price of Rs. 12,613/tonne (including freight and other charges/ overheads and applicable taxes). The Petitioner has also placed on record the sample invoices and bill of entries received from the vendors/suppliers/customs departments in support of the coal cost. We further note that the Petitioner has allocated the entire imported coal quantity of 2,35,170 tonnes to all its beneficiaries for the supply of power from 19.7.2022 *(date of commencement of power supply under PPA)* till 31.3.2023 *(date till which the Section 11 directions were to remain in force as per MoP Letter dated 26.5.2022)* in the proportion of their respective scheduled generation during this period as under:

Beneficiaries	MPPMCL	UPPCL	HPPC	Others (incl. Power Exchange)	Total
Total Energy Scheduled (MUs)	1834	1599	**809**	490	4732
Energy Scheduled based on Imported Coal (MUs)	131	114	**58**	35	338
Imported Coal Consumption (Tonnes)	91,121	79,477	**40,199**	24,373	2,35,170

38. The above details reveal that for the supply of power from 19.7.2022 till 31.3.2023, against the total imported coal quantity of 2,35,170 tonnes, imported coal quantity allocated under APP with HPPC is 40,199 tonnes which is in the same proportion of the scheduled generation for HPPC under APP i.e. 809 MUs against the total scheduled generation of the Petitioner's Project i.e. 4732 MUs during this period. Further, we also note that the Petitioner has allocated the entire imported coal consumption uniformly across all its beneficiaries, namely, MP, UP, Haryana and Other(s), in proportion to their respective scheduled energy. i.e. the ratio of Imported coal consumption and total energy scheduled for each of the beneficiaries is the same. However, the Petitioner has not furnished the monthly break-up of the above details for the period from July 2022 to March 2023.

39. The Respondent, HPPC, has argued that vide subsequent letter dated 11.8.2022, MoP revoked its earlier Section 11 directions dated 26.5.2022, and hence, the Petitioner is not entitled to the compensation towards any imported coal utilised for blending with domestic coal beyond 11.8.2022. *Per Contra*, the Petitioner has submitted that in compliance with the earlier Section 11 directions dated 26.5.2022, the Petitioner had already taken necessary steps, such as placing the order for imported coal so as to ensure seamless availability of imported coal for blending and to plan and manage all the resources and keep the necessary supply

chain in place as the minimum business cycle is 2-3 months. Further, no fresh order for procurement of imported coal has been placed by the Petitioner after 11.8.2023, and only the imported coal for which the procurement order was placed prior to 11.8.2022 was utilized for the blending it with the domestic coal in compliance with Section 11 directions issued by MoP on 26.5.2022 and 11.8.2022.

40. We have examined the referred MoP letter dated 11.8.2022. The relevant extracts of the letter dated 11.8.2022 are as under:

"No. 23/13/2021-R&R (Pt-1)
Government of India
Ministry of Power
***

Shram Shakti Bhawan, Rafi Marg,
New Delhi, 11th August, 2022

To,
1. Generating companies
(As per list enclosed)

Subject: Direction under Section 11 to the Generating Companies having Domestic Coal Based Plants Supplying Electricity under Section 63 of the Electricity Act, 2003- regarding

……

2. The coal stock position in power plants has been reviewed periodically, with the stakeholders, including Ministry of Coal and Ministry of Railways. It has been decided to withdraw the aforesaid order dated 26th May, 2022, with immediate effect.

3. Imported coal purchased under the aforesaid directions, till the date of issuance of this letter, shall be utilised in accordance with the methodology given the subject order dated 26th May, 2022…"

41. We note that the order for procurement of the entire imported coal of 2,35,170 tonnes was placed by the Petitioner on 27.5.2022, the last tranche of which amounting to 55,000 tonnes was received by the Petitioner on 25.8.2022. Further, no fresh order for procurement of imported coal has been placed by the Petitioner after

11.8.2022, and only the imported coal for which the procurement order was placed prior to 11.8.2022 was utilized for the blending purpose. Further, the above quoted relevant extracts of the MoP letter dated 11.8.2022 make it abundantly clear that while earlier Section 11 directions dated 26.5.2022 issued by MoP were withdrawn with effect from 11.8.2022, however MoP also directed that the entire imported coal purchased before 11.8.2022 by the generators shall be utilised by the generators for blending with domestic coal and such generators shall be entitled to compensation as per the compensation methodology given in the earlier Section 11 directions dated 26.5.2022. Therefore, Section 11 directions dated 26.5.2022 with respect to the import of coal for blending with domestic coal and the compensation methodology thereof remains applicable and binding till the time the entire coal imported by the Petitioner (under the order(s) placed before 11.8.2022) is utilized/ exhausted for blending with domestic coal.

42. Hence, we are not inclined to agree with the contention of the Respondent, and we hold that the Petitioner has complied with Section 11 directions issued by MoP on 26.5.2022 and 11.8.2022 and has only utilised the imported coal purchased before 11.8.2022 for the blending with domestic coal and is entitled to be compensated for the entire imported coal for which it had placed the order before 11.8.2022.

43. In view of our above observations, we hold that the Petitioner has exercised due diligence and maintained a consistent approach in allocating the imported coal across all its beneficiaries. Accordingly, we find that this methodology adopted by the Petitioner to allocate the imported coal quantity of 2,35,170 tonnes across all its beneficiaries, is in order.

44. Further, we observe that in the Section 11 directions of the MoP dated 26.5.2022, a methodology for computing compensation towards the blending of domestic coal with the expensive imported coal as payable to the generating companies having domestic coal-based power plants by their respective beneficiaries under Section 63 PPAs ("Compensation Methodology") has been notified which was enclosed as Annexure-5 to these directions, which is reproduced as under:

"Methodology for calculating compensation due to use of imported coal

Step - 1: *ECR domestic Coal $_{(Delivery\ point)}$ = ECR Quoted*

Step - 2: *ECR imported Coal $_{(Delivery\ point)}$ = {[GSHR / GCV of imported Coal] X [Price of imported Coal] x [1 / (1 - Aux Consumption)] x [1 / (1 - Applicable Transmission Losses)]}*

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

Where,

G *=%Generation achieved based on Actual domestic Coal received;*

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

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

Step - 4: *Compensation = {(ECR as computed at Step - 3* ***minus*** *ECR Quoted) x Scheduled Generation at Delivery Point}.*

Note:

a) If the actual generation at delivery point is less than scheduled generation at delivery point, it will be restricted to actual generation at delivery point in step 4 above.

b) All facts, figures and computations in this regard should be duly certified by the auditor.

c) The coal consumed from all the sources on month to month shall be duly certified by the auditor and the same shall be reconciled annually with the Opening Stock, coal received during the year, coal consumed during the year and the closing stock.

d) Total Generation Ex-bus and Scheduled Generation Ex-bus on month to month basis as per the meters at the station switchyard bus shall be reconciled with the relevant/SCADA data of SLDC/RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month."

45. We observe that the above methodology adequately captures the financial impact suffered by a generating company towards the supply of power to its beneficiaries under Section 63 PPAs on account of the mandatory blending of domestic coal with imported coal (based on which the bid was premised) in compliance with Section 11 directions dated 26.5.2022. Accordingly, in terms of Section 11(2) of the Act, this Commission considers it appropriate to adopt the above methodology specified under Section 11 directions dated 26.5.2022 to compute the compensation payable by the Respondent HPPC to the Petitioner for the supply period from 19.7.2022 to 31.3.2023 to offset the adverse financial impact suffered by the Petitioner on account of the mandatory blending of domestic coal with imported coal in compliance with Section 11 directions of the MoP dated 26.5.2022. Such computation shall be done on month wise basis for the claim period from July 2022 to March 2023

46. However, we note that the Statutory Auditor's Certificate dated 23.5.2023 placed on record by the Petitioner does not contain the monthly break-up of the details of the beneficiary-wise scheduled generation, generation based on domestic coal, generation based on imported coal, and imported coal consumption for the claim period from July 2022 to March 2023. Thus, the Petitioner shall be required to provide the month-wise breakup of these details duly certified by the Statutory Auditor for the purpose of computation of compensation on the month-wise basis from July 2022 to March 2023.

47. For the purpose of computation of compensation in terms of the above methodology, the following shall be taken into consideration:

(a) GSHR and Aux Consumption shall be considered at their normative values as per the CERC Tariff Regulations 2019-24 or at actual values (whichever is lower).

(b) GCV, the price of the imported coal shall be considered as per the Auditor Certificate dated 23.5.2023 placed on record by the Petitioner.

(c) Statutory Auditor certified monthly break-up of the details of the beneficiary-wise scheduled generation, generation based on domestic coal, generation based on imported coal and imported coal consumption for the claim period from July 2022 to March 2023 to be furnished by the Petitioner along with its claim in terms of our above directions contained in Para 46 of this Order. The methodology for calculating compensation due to the use of imported coal shall be as under:

Step - 1: ECR domestic Coal $_{\text{(Delivery point)}}$ = ECR Quoted

Step - 2: ECR imported Coal $_{\text{(Delivery point)}}$ = {[GSHR / GCV of imported Coal] X [Price of imported Coal] x [1 / (1 - Aux Consumption)] x [1 / (1 - Applicable Transmission Losses)]}

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

Where,

G =%Generation achieved based on domestic coal as per the statutory auditor certified monthly details as per (c) above;

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

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

Step - 4: Compensation = {(ECR as computed at Step - 3 **minus** ECR Quoted) x Scheduled Generation at Delivery Point}.

(d) Applicable transmission losses shall be considered as per the APP dated 18.5.2022.

(e) If the actual generation at the delivery point is less than the scheduled generation at the delivery point, it will be restricted to the actual generation at the delivery point in Step-4 of the above methodology.

(f) Total generation ex-bus and scheduled generation ex-bus on month to month basis as per the meters at the station switchyard bus shall be

reconciled with the relevant/SCADA data of SLDC/RLDC and/or Regional Energy Accounting of RPC/ RLDC for the month.

(g) The Petitioner shall be required to get all facts, figures and computations in this regard audited by its Auditor and enclose the Auditor Certificate to this effect along with its compensation claim raised on the Respondent.

Issue No. 3: Whether the Petitioner is entitled to any Carrying Cost/Interest on the compensation?

48. The Petitioner has prayed for the carrying cost/interest on the compensation computed on a monthly compounding basis from the date of incurrence of additional expenditure till the date of disbursal of the entire compensation by the Respondent in order to restore the Petitioner to the same economic position. The Petitioner submitted that carrying cost is a legitimate expense to compensate "for time value of the money" and that the principles governing "carrying cost/interest" are well settled. In support of its submissions, the Petitioner has placed reliance on the following Judgments of the APTEL:

(a) Judgement dated 15.2.2011 in Appeal No. 173 of 2009 titled *Tata Power Co. v. MERC* (at Para 43):

> *"Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies.* ***The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost****. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. therefore, the Appellant is entitled to carrying cost".*

(b) Judgment dated 20.12.2012 in *SLS Power Limited v. APERC, 2012 SCC OnLine APTEL 209* (at page 63)*:*

> *"The principle of carrying cost has been well established in the various judgments of the Tribunal.* ***The carrying cost is the compensation for time value of money or the monies denied at the appropriate***

time and paid after a lapse of time. *Therefore, the developers are entitled to interest on the differential amount due to them as a consequence of re-determination of tariff by the State Commission on the principles laid down in this judgment. We do not accept the contention of the licensees that they should not be penalized with interest.* ***The carrying cost is not a penal charge if the interest rate is fixed according to commercial principles. It is only a compensation for the money denied at the appropriate time."***

(c) Judgment dated 28.11.2013 in Appeal Nos. 190 of 2011 and 162-63 of 2012 titled *Torrent Power Limited v. GERC:*

> *"83.* The relevant principles which have been laid down in these decisions are extracted below:
>
> *(a) … the* ***carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost.***
>
> *(b) The carrying cost* ***is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure*** *of the distribution company.*"

(d) Judgment dated 4.10.2019 in Appeal No. 246-47/2017 titled *Torrent Power Limited vs GERC* & Ors.:

> *"9.4 … Thus,* ***the value of money is settled financial principle*** *and the same has also been recognized by this Tribunal.* ***The utility gets compensated by way of carrying cost on this very principle i.e., when amount is due and recovery is deferred, the utility gets compensated by way of carrying cost****. Thus, when the Commission has arrived at the revenue gap after following due process of truing up exercise, the utility should be compensated for the delay in recovery of its revenue.*"

49. The Petitioner has further submitted that the present compensation is based on restitutionary principle upheld by the Hon'ble Supreme Court in the case of *Energy Watchdog v. CERC* [(2017) 14 SCC 80] (Para 57), and *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors* [(2019) 5 SCC 325]. The Petitioner has submitted that in order to effect restitution, carrying cost/interest ought to be granted along with the compensation. on a monthly compounding basis.

50. The Respondent, HPPC, has submitted that compensation has been claimed by the Petitioner belatedly. Hence, it is not entitled to any carrying cost and relied on the APTEL's Judgement dated 22.4.2015 in Appeal No. 174 of 2013 in the matter of *Punjab State Power Corporation Limited v. Punjab State Electricity Regulatory Commission* wherein the APTEL considered the delay in providing complete documents as a reason for denying carrying cost. The Respondent, HPPC, has further submitted that carrying cost at the rate of LPS on a compounding basis, as claimed by the Petitioner is not admissible as the same is not restitutionary but penal in nature. In this regard, reliance has been placed on the judgment of APTEL in the case of *Uttar Haryana Bijli Vitran Nigam Limited and Another (Supra)* only recognized the restitutionary principle in the PPA at Para 11 and 13. The said principle is provided under Article 21.3. The restitutionary principle is completely different from the penal rate of interest, which is LPS. The Respondent, HPPC, has submitted that there is no provision in the APP allowing the LPS for restitution. When the payment does not become due at all, there can be no question of any liability of the LPS for such a period. HPPC cannot be made liable to pay the LPS when there have been no provisions for LPS. In any event, the consideration of LPS on a monthly compounded basis without any justification or supporting documentation is erroneous, misconceived and cannot be allowed.

51. *Per contra*, the Petitioner has submitted that the power supply under the APP commenced on 19.7.2022. On 22.7.2022, the first tranche of imported coal was received. Accordingly, after the commencement of blending of domestic coal with imported coal for the supply of power to HPPC only, the Petitioner started evaluating the compensation towards the additional costs incurred by it towards mandatory

blending of domestic coal with imported coal in compliance with the MoP's Section 11 directions dated 26.5.2022 for the purpose of supplying power to Haryana Discoms under APP and thereafter, the Petitioner issued the compensation claim on HPPC vide its letters dated 9.9.2022 and 29.9.2022 which was within the reasonable timeline under the APP dated 18.5.2022. However, the Petitioner's compensation claims dated 9.9.2022 and 29.9.2022 were not admitted and rejected by HPPC by its letters dated 16.9.2022 and 7.10.2022, respectively, subsequent to which the Petitioner filed the present Petition before this Commission. The Petitioner has quoted the applicable clauses of the APP dated 18.5.2022 to claim that under the APP, all the payments shall be made by HPPC to the Petitioner within 30 (thirty) days of receiving a demand and in the event of delay beyond such period, the defaulting party shall pay interest for the period of delay calculated at a rate equal to 5% above the Bank Rate and any interest payable under the APP shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.

52. We have examined the submissions of both parties and observed that in compliance with the MoP's Section 11 directions dated 26.5.2022, subsequent to the commencement of power supply under APP on 19.7.2022 and receiving the first tranche of the imported coal on 22.7.2022, the Petitioner started blending it with its domestic coal for the purpose supplying power to all its beneficiaries including the Respondent HPPC. The compensation claim towards additional costs incurred by the Petitioner towards this mandatory blending was raised by the Petitioner on 9.9.2022 i.e. within a reasonable period of 50 days of receiving the imported coal, which cannot be held as a belated claim. This claim of the Petitioner was disputed and outrightly rejected by the Respondent HPPC by its letters dated 16.9.2022 and

7.10.2022. Further, no communications have been placed on record by Respondent HPPC to suggest that it was inclined to amicably discuss or admit/ pay any compensation to the Petitioner towards the additional expenditure suffered by the Petitioner towards the supply of power under APP on account of mandatory blending of domestic coal with imported coal. Accordingly, we hold that in terms of the principles of restitution and time value of money as upheld by the Hon'ble Supreme Court in its various Judgments, the Respondent HPPC is liable to pay an adequate carrying cost/interest on the compensation claim.

53. We observe that the APP dated 18.5.2022 contains the enabling provisions for payment of the disputed amounts and the interest (carrying cost) thereof. The relevant Articles are reproduced as under:

> *"11.10.2 If any amount is payable by either Party to the other Party upon determination of a dispute regarding any Disputed Amounts under the Dispute Resolution Procedure, such amount shall be payable on the date when it first became due under this Agreement and interest for the period of delay shall be due and payable at the rate specified in Clause 25.4.*
>
> ***25.3 Interest***
>
> *Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on the basis of quarterly rests.*
>
> ***25.4 Delayed payments***
>
> *The Parties hereto agree that payments due from one Party to the other Party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with the necessary particulars. Unless otherwise specified in this Agreement, in the event of delay beyond such period, the defaulting Party shall pay interest for the period of delay calculated at a rate equal to 5% above the Bank Rate and recovery thereof shall be without prejudice to the rights of the Parties under this Agreement Termination thereof.*
>
> *"**Bank Rate"** means the rate of interest specified by the Reserve Bank of India from time to time in pursuance of section 49 of the Reserve Bank or*

India Act. 1934 or any replacement or such Bank Rate for the time being in effect;"

54. We find that the above provisions of the APP suitably take into consideration the concept of the time value of money and the principle of restitution by allowing the award of interest on the delayed payments. Accordingly, the Respondent, HPPC, is directed to pay the month-wise compensation to the Petitioner for the claim period from July 2022 to March 2023 in terms of the above Para(s) 45 to 47 of this Order along with interest within 60 days of this Order. The month-wise compensation of a month corresponding to the claim period from July 2022 to March 2023 shall be deemed to have become payable by the Respondent HPPC on the same date when the energy bill of that month became payable by the Respondent HPPC in terms of APP dated 18.5.2022 ("Due Date"). Further, the interest on each monthly compensation amount payable by the Respondent, HPPC, to the Petitioner in terms of our above directions shall be computed for the period from its respective Due Date till the date of making the final payments by the Respondent HPPC in terms of the above-quoted provisions of the APP dated 18.5.2022.

55. Petition No. 356/MP/2022, along with IA No.64/2023, is disposed of in terms of the above.

Sd/-	sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S. Jha)**	**(Jishnu Barua)**
Member	**Member**	**Member**	**Chairperson**