IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 155 OF 2019
&
APPEAL NO. 116 OF 2019 & IA No. 505 of 2019

Dated: 28th September, 2020

Present: Hon'ble Mrs. Justice ManjulaChellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member

APPEAL NO. 155 OF 2019

In the matter of:

Adani Power Maharashtra Limited (APML)
Through its Managing Director
"Adani House", Near Mithakali, Six Road,
Navrangpura, Ahmedabad – 380009. ….**Appellant**

Versus

1. **Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre,
Centre No.1, 13th Floor, Cuffe Parade,
Mumbai – 400005.

2. **Maharashtra State Electricity Distribution Company Ltd.**
Through its Superintending Engineer,
5th Floor, Prakashgarh, Plot No. G-9,
AnantKanekar Marg, Bandra (East)
Mumbai – 700 051. **….Respondent(s)**

Counsel for the Appellant : Mr. ManpreetLamba
Mr. Ramanuj Kumar

Counsel for the Respondent(s) : Mr. Udit Gupta
Mr. Anup Jain
Ms. S. Rama for R-2

APPEAL NO. 116 OF 2019 & IA No. 505 of 2019

In the matter of:

Maharashtra State Electricity Distribution Company Ltd.
Through its Superintending Engineer,
5th Floor, Prakashgarh, Plot No. G-9,
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   Through its Secretary,
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   Through its Managing Director
   "Adani House", Near Mithakali, Six Road,
   Navrangpura, Ahmedabad – 380009. **….Respondent(s)**

Counsel for the Appellant : Mr. Udit Gupta
Mr. Anup Jain

Counsel for the Respondent(s) : Ms. Priyal Modi
Mr. ManpreetLamba
Mr. Ramanuj Kumar for R-2

J U D G M E N T

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. Both the Appeals being Appeal No. 155 of 2019 and Appeal No 116 of 2019 are directed against the Impugned Order dated 07.02.2019 passed by Maharashtra Electricity Regulatory Commission (hereinafter referred to as ***"MERC/Maharashtra Commission"***) in Case No. 290 of 2018.

1.1 Appeal No. 155 of 2019 is filed by Adani Power Maharashtra Limited and Appeal No. 116 of 2019 is filed by Maharashtra State Electricity Distribution Company Limited. The Appeals are cross Appeals challenging the order dated 07.02.2019 passed by MERC.

1.2 The Appellant in Appeal No. 155 of 2019 and Respondent No. 2 in Appeal No. 116 of 2019 - Adani Power Maharashtra Limited (hereinafter referred to as "***APML / Adani Maharashtra***"), is a Generating Company within the meaning of Section 2(28) of the 2003 Act and owns and operates a generating station of 3300 MW (660 MW X 5) at Tiroda in the State of Maharashtra.

1.3 The Respondent No. 2 in Appeal No. 155 of 2019 and the Appellant in Appeal No. 116 of 2019 - Maharashtra State Electricity Distribution Company Limited is the 'distribution licensee' authorized to undertake procurement, supply and distribution of electricity within the State of Maharashtra (hereinafter referred to as "***MSEDCL***").

1.4 Adani Maharashtra and MSEDCL had entered into long-term Power Purchase Agreements ("***PPAs***") dated (a) September 8, 2008 for 1320 MW (hereinafter referred to as the "**1320 MW PPA**"); (b) March 31, 2010 for 1200 MW (hereinafter referred to as the "**1200 MW PPA**"); (c) August 9, 2010 for 125 MW (hereinafter referred to as the "**125 MW PPA**"); and (d) February 16, 2013 for 440 MW (hereinafter referred to as the "**440 MW PPA**") (hereinafter collectively referred to as the "***PPAs***"), pursuant to competitive bidding processes conducted by the MSEDCL.

2. BRIEF FACTS OF THE CASE(S)

The facts as brought before us by the Appellants in both the Appeals are summarized as under:

- On 17.11.2006, MSEDCL initiated the bidding process for procurement of 2000 MW power, under Case-I, Stage 1 with two stage bidding process.

- On 10.01.2007, APML made an application to the Government of India for allotment of Lohara Coal Block.

- On 18.10.2007 the Government of India issued the NCDP, 2007 through the Ministry of Coal ("***MoC***") Office Memorandum No. 23011/4/2007-CPD.

- On 06.11.2007, MoC issued a Letter of Allotment to the Appellant conveying allocation of Lohara (West) and Lohara Extension (E) Coal Blocks to the Appellant as an allocated source of fuel.

- On 23.11.2007, APML made an application to the Standing Linkage Committee (Long Term) ("***SLC(LT)***") for grant of coal linkage for balance capacity of 1180 MW of Units 1, 2 & 3 of the Tiroda Project.

- On 16.02.2008, MSEDCL issued Final RFP based on the approval from MERC dated 24.01.2008 for Power Procurement of 2000 MW of Power under Case I, Stage 1.

- On 24.07.2008 Ministry of Power ("***MoP***") recommended to SLC(LT) about order of priority for issuance of LoA for 11th and 12th plan projects.

- On 12.11.2008 the SLC(LT) authorized issuance of Letter of Assurance (LoA) by Coal India Limited for 1180 MW from Unit 1 and Unit 2 of Appellant's Tiroda TPS after noting that Lohara Coal Block caters to the requirement for generation of 800 MW power.

- On 15.05.2009, MSEDCL initiated the process of Competitive Bidding for procurement of 2000 (-20/+20%) MW power on long term basis under Case 1 bidding process by floating Notice Inviting Tender ("NIT").

- On 18.05.2009, MSEDCL issued the Request for Proposal ("RfP") Documents.

- On 30.05.2009 and 09.06.2009, APML applied for coal linkages to the MoC and Government of India through a letter for the balance capacity of 1320 MW.

- On 01.06.2009 / 02.06.2009 and 06.06.2009, WCL and SECL issued two Letters of Assurance in favour of APML and assured supply of 2.185 MMTPA and 2.557 MMTPA respectively in respect of application dated 23.11.2007.
- On 21.10.2009 MoP issued coal linkage policy for 12th plan projects stipulating mechanism for grant of LoA and weightage for priority.
- On 14.02.2012 / 31.05.2013 SLC (LT) decided to freeze grant of new coal linkages nullifying the coal supply assurance contained in NCDP, 2007.
- On 28.12.2012, Fuel Supply Agreement (FSA) was executed between APML and SECL for domestic coal linkage of 1180MW capacity from Units 1 and 2.
- On 19.03.2013 the FSA dated 28.12.2012 was amended and the quantum of coal assured by WCL was transferred to SECL vide an addendum to the FSA dated 28.12.2012.
- On 21.06.2013, The Cabinet Committee for Economic Affairs (hereinafter referred to as "***CCEA***"), in view of the emergent domestic coal shortage situation, approved revised coal supply quantities under existing LoAs/FSAs and identified Units 4 and 5 of APML for domestic coal supply under a separate mechanism.
- On 17.07.2013, a Presidential Directive was issued in terms of the CCEA decision requiring Coal India to sign FSAs for plants expected to be commissioned during the 12th plan period.

- On 26.07.2013, pursuant to the CCEA decision, the MoC amended the NCDP, 2007.

- On 31.07.2013, the MoP issued a letter advising the Central and State Commissions to consider pass-through of shortfall in the domestic linkage coal as assured under NCDP, 2007.

- On 14.08.2013, APML's FSA dated 28.12.2012 was amended again and the ACQ was revised to 4.552 MMTPA.

- On 17.12.2013, APML filed a Petition (Case No. 189 of 2013) seeking compensation in Tariff on account of Change in law under the PPAs executed between AMPL and MSEDCL.

- On 07.03.2014, the FSA was further amended and the ACQ was revised to 4.91 MMTPA in view of the correction on account of change in grade from 'E' to 'F' in respect of the quantity transferred from WCL.

- On 15.07.2014, the MERC pronounced an order disposing the Petition filed by APML (Case No. 189 of 2013) by approving a general framework for seeking compensation in Tariff on account of Change in Law under the PPAs.

- On 23.07.2014, APML filed a Petition (Case No. 140 of 2014) for applying the framework for determination of compensatory fuel charge and to recognise the decision of CCEA as a Change in Law event as per the provisions of the PPAs.

- On 20.08.2014, MERC, in exercise of its regulatory powers, approved a mechanism for pass-through of the compensatory fuel charge that was allowed in Case No. 189 of 2013.

- On 09.09.2014, APML filed a Review Petition before the MERC in Case No. 159 of 2014 against the aforesaid Orders of the MERC which were disposed of by MERC on 30.10.2015 as being devoid of merits except on the issue of date of commencement of the compensatory fuel charge.

- On 28.01.2016, the MoP issued the revised Tariff Policy. As per the Clause 6.1 of the revised Tariff Policy, the Appropriate Commission is required to consider the cost of imported/market based e-auction coal procured for making up the shortfall in the domestic coal for pass-through.

- On 09.03.2016, APML filed Appeals before this Tribunal vide Appeal Nos. 129 of 2016 and 130 of 2016 against MERC Orders in Case No. 189 of 2013 and 140 of 2014 disposing the Review Petition filed by APML.

- On 28.05.2016, APML received the cross Appeals filed by MSEDCL vide Appeal Nos. 187 and 188 of 2016.

- On 11.04.2017, the Hon'ble Supreme Court of India pronounced its order in Case No. 5399-5400 of 2016 in the matter of *Energy Watchdog vs. CERC &Ors.* ("***Energy Watchdog Judgment***") on various aspects of compensatory tariff including the interpretation of change in law provisions in the PPA and the scope of regulatory power.

- On 04.05.2017, this Tribunal pronounced an order remanding the cross-appeals by APML and MSEDCL for fresh consideration by the MERC in the light of the ***Energy Watchdog Judgment***.

- On 22.05.2017, the Ministry of Coal notified the Scheme of Harnessing and Allocating Koyala (Coal) Transparently in India (SHAKTI) in supersession and substitution of NCDP 2007, as amended by NCDP 2013.

- On 07.03.2018, MERC pronounced Order in Case No. 189 of 2013 and 140 of 2014. Vide the said judgement, the Commission allowed the claims of APML on account of change in the New Coal Distribution Policy, 2007 (NCDP, 2007) under Article 13 of the 1320 MW PPA and Article 10 of the remaining PPAs.

- Aggrieved by certain aspects of the Orders in Case No. 189 of 2013 and 140 of 2014, APML preferred a Review Petition (Case No. 167 of 2018) which was dismissed by MERC vide its order dated 01.10.2018. While issuing the Order dated 01.10.2018 in Case No. 167 of 2018, the MERC granted liberty to APML to file a fresh petition in respect of seeking extension of Change in Law relief for domestic coal shortfall beyond March 2017 on account of changes introduced by the SHAKTI Policy.

- In terms of the liberty granted by MERC, APML filed a Petition being Case No. 290 of 2018 before MERC seeking relief in respect of Change in Law under respective PPAs for non-availability / short supply of domestic coal under SHAKTI Policy after March 31, 2017.

- On 07.02.2019, MERC passed the Impugned Order on 07.02.2019 granting relief for the Change in Law due to the promulgation of SHAKTI Policy. However, the Commission directed to compute the relief based on the same methodology and parameters as approved in the Order dated March 7, 2018 in Case No. 189 of 2013.

2.1 While granting relief under change in law to APML, MERC has linked the computation of shortfall to net SHR submitted by APML in its bid and middle value of GCV range of assured coal grade for domestic coal. MERC has further restricted the relief to the extend of percentage specified in NCDP 2013 and directed APML to intimate MSEDCL in advance for estimated impact on energy charge for alternate source of coal separately. Aggrieved by these aspects of the methodology and parameters considered by MERC in its order dated 07.02.2019, APML has preferred Appeal No 155 of 2019 before us praying for the following relief.

"(a) Hold and declare that the impact of Change in Law shall not be linked to the net SHR as submitted in the Bid and instead the impact of Change in Law would be considered on the basis of SHR as per MERC MYT Regulations, 2011, (or actual)*, whichever is lower, and modify paragraphs 23 and 24 of the Impugned Order accordingly;*

(b) Hold and declare that the impact of Change in Law for domestic coal supply should not be computed considering the middle value of GCV range of assured coal grade and instead the impact of Change in Law would be considered on the basis of as received/ actual GCV of coal, and modify paragraphs 23 and 24 of the Impugned Order accordingly;

(c) Hold and declare that the Appellant shall be entitled to Change in Law compensation for actual shortfall in supply of domestic coal by CIL and its subsidiaries in accordance with the revised Tariff Policy, 2016 vis-à-vis the quantity of coal assured under the NDCDP 2007; and

(d) Hold and declare that the existing methodology of MOD stack of providing energy charge details should be made applicable for the Appellant's

generating station irrespective of various fuel source used within the same generating station and modify paragraph 26 accordingly; and

(e)Pass such further orders or directions as this Hon'ble Tribunal may deem just and proper in the circumstances of the case.

2.2 APML has also challenged the Order dated March 07, 2018 in Appeal No. 182 of 2019 before us and therefore, to that extent, certain issues are common in the present Appeal filed by APML i.e. Appeal No 155 of 2019 and the Appeal No. 182 of 2019.

2.3 MSEDCL has preferred Appeal No 116 of 2019 challenging the Impugned Order mainly on two issues: (i) SHAKTI Policy, being different from NCDP 2007 and NCDP 2013, does not constitute a Change in Law and (ii) no Carrying Cost is admissible on any Change in Law relief de hors the PPAs. MSEDCL has preferred the cross appeal praying for the following relief.

"(a) Allow the present appeal and set aside the impugned order dated 07.02.2019 in Case No. 290 of 2018 passed by Ld. Maharashtra Electricity Regulatory Commission; and/or

(b) Award cost of this Appeal against Respondent No. 2 and in favour of the Appellant herein; and/or

(c) Pass such other Order(s) as this Hon'ble Tribunal may deem just and proper."

3. **The issues involved in both the cross appeals are common in nature, therefore, we decide to adjudicate both appeals by this common judgment.**

4. We have heard arguments of counsel for the Appellants and the Respondents in both the Appeals in detail over several hearings.

Appeal No 155 of 2019

5. Mr. SajanPoovayya, learned Senior Counsel appearing for the Appellants in Appeal No. 155 of 2019 has made the following oral submissions as also in the written submissions for our consideration:-

5.1 The MERC's decision to consider the superior of net SHR submitted in the Bid or SHR and Auxiliary Consumption norms as specified for new generating stations in MYT Regulations, 2011 as basis for computing the Change in Law compensation is flawed and without any basis in law. The MERC has not considered the fact that all the PPAs between APML and the MSEDCL were entered into through Case-1 competitive bidding process wherein SHR is not a bid parameter. In Case-1 bidding, unlike Case-2 bid projects, there is no requirement to quote the SHR in the RfP issued by the Discoms and APML did not submit its bid on the basis of net SHR. In fact, in a Case – 1 bidding process the bidder is required to quote only fixed charges and variable charges and hence, mandating the Change in Law compensation to be computed on the basis of the SHR submitted in the bid is erroneous and contrary to the provisions of the PPAs. It appears that the MERC has inadvertently omitted to take note of its own order in Case No. 123 of 2017 dated 07.03.2018 wherein it has categorically and correctly held that Auxiliary Consumption - an operating parameter - shall be applicable as per the norms laid down by the MERC. Accordingly, once the MERC has decided to adopt its own norms for one of the operating parameters, the same principle ought to be followed for the SHR which is also an operating parameter and has been specified as such by the MERC.

5.2 The issue of actual vs bid parameters for change in law compensation has been settled by the Tribunal and is no longer *res integra*. The Tribunal in its judgment dated 12.09.2014 in the matter of *Wardha Power Industries Ltd*. v. *Reliance Infrastructure Ltd*. in Appeal No. 288 of 2013 ("***Wardha Power Judgment***") held that consideration of bid parameters may not lead to the correct compensation under Change in Law. Further, in the matter of *Sasan Power Limited* v. *CERC &Ors*, order dated 13.11.2019 (Appeal No. 77 of 2016), this Tribunal held that compensation of various levies cannot be linked to the dispatched quantity of coal and that the compensation should not be restricted to bid SHR. Accordingly, the Tribunal held that for determination of coal consumption for scheduled generation, SHR should be based on the actual instead of bid SHR capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009.Sasan Power is a Case 2 project wherein net quoted heat rate is a bid parameter and despite that, this Tribunal rejected the plea to apply bid SHR as the basis for computing Change in Law relief.

5.3 The SHR given in the bid is estimated prior to award of the EPC contract by the generator and may vary from actual SHR. Therefore, the operating parameters mentioned in the bid submitted by APML has little relevance to the determination of Change in Law compensation payable to APML and may defeat the restitution principle provided under the PPAs as the affected party will not be put back into the same economic position. Reliance is also placed on order dated 31.05.2018 of Central Electricity Regulatory Commission (**CERC**) in Petition No. 97/MP/2017 which is related to domestic coal shortfall and wherein the CERC has

considered SHR as per applicable CERC norms or actual, whichever is lower, for allowing Change in Law compensation. The ***Wardha Power Judgment*** was also relied upon by the CERC in Order dated 15.11.2018 in Petition No. 88/MP/2018 and the Commission has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Accordingly, the CERC held that the SHR as per the bidding document for deciding the coal requirement cannot be considered for the purpose of calculating the relief under Change in Law.

5.4 MSEDCL's reliance on the order of the Tribunal in *Adani Power Ltd. v. GUVNL (Appeal No. 210 of 2017)* is misplaced. MSEDCL has very conveniently omitted to draw attention to the part of the said order which states "*In Case-1 bidding, the Appellant is required to quote only the tariff (and not SHR)…".* Further, the relief to the Appellant in that case was denied solely on the ground that the State Commission's order had attained finality. The said judgment is clearly distinguishable on facts and has no bearing on the issues in the present case.

5.5 Further, Ministry of Power, on 08.03.2019 by way of an Office Memorandum, has also directed/clarified to consider Normative SHR for the purpose of deriving ACQ. Therefore, MSEDCL's contention that the FSA quantity, i.e., ACQ was determined on the basis of SHR mentioned in the bid documents is erroneous.

5.6 Accordingly, the compensation methodology for Change in Law, which restricts or precludes APML from recovering the actual cost incurred due to the said Change in Law event, is contrary to the PPAs and judgments of the Hon'ble Supreme Court as also of this

Tribunal and APML is entitled for change in law relief based on normative SHR as per MERC MYT Regulations, 2011/2015 or actual SHR, whichever is lower so that APML is restored to the same economic position.

5.7 The methodology approved by the MERC in the Order dated 07.03.2018 for computing impact of approved Change in Law events considered GCV as the Middle value of the GCV range of the assured coal grade in LoA/FSA/MoU instead of the actual as received GCV. The decision of MERC is contrary to the fundamental principle of Change in Law provision of the PPAs - Articles 13.2 and 10.2 of the 1320 MW and 1200/125/440 MW PPAs respectively which require the affected party (Appellant) to be restored to the same economic position as if the said change in law had not occurred.

5.8 The adoption of Middle value of the GCV assured in FSA/MoU, which is higher as compared to actual GCV of coal received from coal companies, will artificially show that the quantity of coal required is low as compared to the quantity of coal actually being consumed by APML to generate and supply electricity to MSEDCL. This in turn will result in artificially showing that the shortfall in coal availability is lower and would result in determination of lower compensation amount.

5.9 APML had submitted before the MERC that the actual GCV based on third party sampling certificate ought to be considered for relief under Change in Law in order to restore it to same economic condition in terms of the PPAs. Since the MERC in change in law orders passed in Case No. 2 of 2014 and Case No. 163 of 2014

had not stipulated any condition regarding consideration of 'Middle value of the GCV range' of the assured coal grade for the purpose of computing Change in Law compensation, stipulating a new condition for APML, which is contrary to its prior orders, is incorrect.

5.10 The MERC overlooked the fact that GCV specified by Coal India Ltd and its subsidiaries is on 'Air-Dried Basis' (ADB), whereas the GCV used for computation of Energy Charge is always on 'As Received basis', which is derived from an empirical formula. GCV on Air Dried Basis represents the GCV measured by heating the coal to bring it to certain specified laboratory conditions (5% moisture, 60% humidity and 40°C temperature), whereas GCV on “As Received Basis” (ARB) represents the GCV measured at normal conditions. GCV-ARB is always lower in value than the GCV (ADB) and if notional GCV on Air Dried Basis is considered instead of GCV on “As Received Basis” for computation of fuel cost, it will not restore APML to the same economic position as provided in Articles 13.2 and 10.2 of the 1320 MW and 1200/125/440 MW PPAs respectively. It is, therefore, required that the GCV of coal ought to be considered on 'As-Received-Basis' (ARB), including by adjusting the said GCV for stacking losses. In this regard, the MERC has failed to take note of MYT Regulations, 2015 which not only provides for 'As received' GCV but also includes adjustment for stacking loss by way of deducting 150 kcal/kg from GCV 'as received'.

5.11 Further, the issue of GCV for change in law compensation has been settled by the Tribunal in the matter of Sasan Power Limited

(supra) and is no longer *res integra*. The MERC has erroneously ignored the ***Wardha Power Judgment*** (supra) wherein this Tribunal has already determined that the compensation for Change in Law cannot be correlated to the GCV or other parameters submitted in the bid.

5.12 Reliance is also placed on Gujarat Electricity Regulatory Commission (GERC) order dated 03.08.2015 in Petition No. 1296/2013, wherein GERC considered GCV on 'as received basis' while approving compensation for Change in Law due to levy of Clean Energy Cess in a PPA concluded under Case -1 bidding under Section 63 of the 2003 Act. The concept of considering the GCV on 'as received' basis is also in line with methodology adopted by CERC for computation of Energy Charge Rate (ECR) for projects under Section 62 of the 2003 Act as per CERC (Terms and Conditions of Tariff) Regulations, 2014. The CERC has also relied on these Regulations in its order dated 18.05.2019 in the case of GMR Warora Energy Limited v. MSEDCL &Ors. ("**GMR Warora Order**").

5.13 The repeated contentions of MSEDCL that any quality/ quantity issues are necessarily to be resolved under the FSA as it is a contractual dispute between APML and Coal India Limited is erroneous and holds no merit. A similar submission was made before CERC in *Adani Power (Mundra) Limited Vs. UHBVNL* (Petition No. 97/MP/2017) which has been rejected by CERC vide order dated 31.05.2018.

5.14 APML had sought compensation for shortfall in supply of domestic coal as a result of changes in the NCDP 2007 and the MERC in the

Impugned Order concluded that the Change in Law in terms of the NCDP Amendment of 2013 pursuant to the CCEA decision had the effect of removing any assurance of coal supply altogether and that, consequently, any coal that the Appellant was required to procure from imports or domestically through e-auctions to meet the difference between their requirement and the coal actually supplied under the MoUs would squarely attract the Change in Law provisions of the PPAs. However, contrary to the aforesaid findings, the MERC has restricted the relief under change in law for the generation capacity of 1180 MW having FSA (Units 1&2) to the extent that the assured quantity of coal supply has been curtailed from 100% of the normative requirement under NCDP 2007 to 65%-75% of the requirement under NCDP 2013.

5.15 As per NCDP 2007, the Independent Power Producers including the Appellant were assured supply of 100% of the fuel quantity as per normative requirement by Coal India Ltd., including future capacity addition. As per the policy, it was Coal India Ltd.'s responsibility to meet the full requirement of coal under FSAs even by resorting to import of coal, if necessary.

5.16 On 26.07.2013, MoC notified changes in NCDP, 2007 in relation to coal supply for the next four years of the 12th Five Year Plan ("NCDP, 2013") and implemented CCEA's direction dated 21.06.2013. This changed the 100% assurance of coal supply under the erstwhile NCDP 2007 to 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan.

5.17 Following amendment to the NCDP 2007 as aforesaid, the MoP issued a letter on 31.07.2013 to all the State Governments, SERCs

and CERC advising them to allow additional cost of coal as a pass through in terms of the decision taken by the CCEA.

5.18 It is evident that MoP letter has two parts, first part deals with the relief for higher cost of imported/e-auction coal to be considered on case by case basis to the extent of shortfall in the quantity indicated in the LoA/FSA. The second part of the letter deals with the minimum supply obligation of Coal India Ltd. in the remaining 4 years of the 12th Plan period but this second part does not restrict the relief for higher priced coal to the difference between the minimum supply obligation and the quantity indicated in the LoA/FSA.

5.19 In view of the prevailing scenario of coal shortage and considering higher cost of alternate coal, it became imperative to compensate the power producer for the inability of the State owned coal companies to supply the assured quantity of coal. It is with this background that the CCEA evolved a mechanism vide its directive dated 21.06.2013 which was followed by an amendment in the NCDP on 21.07.2013 and culminated into the directions from the MoP to the Regulatory Commissions. In view of the aforesaid, the Appellant is required to be compensated for the actual shortfall in quantity of coal.

5.20 Further, the amended Tariff Policy dated 28.01.2016 provides that in case of reduced supply in domestic coal as against the assured quantity, the additional cost incurred in making up the shortfall shall be considered for compensation.

5.21 The judgment dated 11.04.2017 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 5399-5400 of 2016 and Batch Matters, titled as Energy Watchdog vs. Central Electricity Regulatory Commission and Ors.***("Energy Watchdog Judgment")*** clearly specifies that to the extent the supply from Coal India and other Indian sources is cut down, the parties shall be compensated for such change in law to restore the affected party to the economic position as if such change in law has not occurred. The Hon'ble Supreme Court has not restricted the shortfall to any number or percentage or time but has allowed it to actual shortfall.

5.22 Following the judgment in Energy Watchdog, this Tribunal has also vide its order dated 21.12.2018 in Appeal No. 193 of 2017 (GMR Kamalanga&Anr. vs. CERC) allowed the entire shortfall against firm linkage coal as well as tapering linkage to be compensated under the Change in Law mechanism without any restrictions in terms of ACQ percentage.

5.23 MERC has wrongly concluded to limit the Change in Law relief to shortfall in supply of domestic coal to the extent 25% under SHAKTI Policy and has not considered actual shortfall. The shortfall has to be determined against the quantity assured under the NCDP 2007 vis-à-vis actual supply. Relegating the Appellant to the contractual remedy against Coal India Ltd. for shortfall in supply of coal is no remedy at all since penalties for short supply stipulated in the FSAs offer no remedy at all and nor do they take away the obligation to supply the required quantity of coal.

5.24 The direction of MERC in the impugned order to intimate to MSEDCL in advance, the impact of cost of alternate coal on the

energy charges is practically not possible as the generating station does not operate using domestic and imported coal separately or in isolation. In case of domestic coal shortage, the plant is usually operated with blending of imported coal to the extent of the permitted design parameters. The extent of usage of imported/alternate coal depends on many unknown factors such as coal supply from CIL, healthiness of generating units, power demand of the State etc. Such directions by MERC amounts of modification of the applicable Regulations through an order and also amounts of modification of the terms of the PPA. The direction of MERC to consider the estimated energy charge rate of the current month for the purpose of MOD preparation is contrary to its own order dated 27.10.2016 in Case No. 125 of 2016, MA. No 18 and MA. No 21 of 2016 in Case No 125 of 2016 wherein the Commission directed Maharashtra State Load Despatch Centre (MSLDC) to consider energy charge rate for the previous month (n-1)th or (n-2)th whichever is possible.

5.25 It is clarified that despite the claim of carrying cost being rejected by MERC in the Impugned Order dated 07.03.2018 in Case No. 189 of 2013, such claim of carrying cost has been allowed by MERC through a separate order in Case No. 295 of 2018 and accordingly, there was no need to agitate the issue of carrying cost in the Appeal No. 182 of 2019. APML has, however, agitated the issue of carrying cost at LPS rate in the other Appeals in the batch.

6 **Mr. M. G. Ramachandran, learned senior counsel appearing for the Respondent No. 2 in Appeal No. 155 of 2019 – MSEDCL has made the following submissions in the written pleadings so also in the course of the hearings for our consideration:-**

6.1 The Appellant Generator's tariff was discovered through Competitive Bidding Process under Section 63 of Electricity Act 2003 where the discovered tariff is adopted by the State Commission and not under Section 62 of Electricity Act, 2003 wherein the State Commission determines the tariff on capital cost basis and any change in rate is passed through on cost plus basis. Thus, the determination of tariff by a competitive bid process as per Section 63 of the Act cannot be converted at a later stage as a tariff determination under Section 62 of the Act and any such attempt will be contrary to the Scheme and objective of the Act providing for competitive bid process.

6.2 Further, MSEDCL initiated the competitive bidding process for procurement of power on long term basis under Case-1 bidding where source of fuel is the responsibility of the Generator. It is submitted that the Request for Proposal (RFP) issued in the above bidding process mandates the bidder to make independent enquiry and satisfy himself with respect to all the required information, inputs conditions and circumstances and factors that may have any effect on his bid.

6.3 As per the RFP clauses the seller has the sole responsibility to consider availability of the inputs necessary for supply of power such as all costs including capital and operating costs, O&M cost, statutory taxes, levies, duties at the plant location, risk premiums etc., and all such other input financial parameters and technology and parameters like Station Heat Rate (SHR) and Auxiliary consumption, location, type of fuel like gas or coal (imported or domestic etc.) and its specifications like Gross Calorific Value

(GCV) , transit losses, stacking losses etc., water and such all other input operational parameters for quoting of the tariff in bidding. The bidding documents had given bidder complete flexibility to quote escalable or non-escalable parameters for all the tariff components/Charges such as variable charges, fixed charges, transportation and handling charges. Accordingly, the Appellant had quoted the tariff considering all the above parameters.

6.4 Further the competitive bidding guidelines/documents do not provide that any parameters of Central or State Commission shall be considered as a reference for estimation and quoting of Tariff. The Bidder is responsible to fix its price, taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. The Appellant has submitted the bid based on the above which is the essence of any competitive bid process. Hence, the parameters submitted during the bidding process are to be strictly considered for calculation of impact. The Change in law calculation cannot be based on the parameters beneficial to Appellant, ignoring the bid assumed parameters. Further, there cannot be any claim on increase in input cost, due to change in input operational quality etc. parameter when the bidder is required to quote the tariff, considering all the inputs with provided flexibility.

6.5 The spirit of Article 13 in the PPA is the restitution of the economic position of generator due to change in law. Thus, Change in Law doesn't mean or cannot be interpreted as restitution by compensating with benefiting operational parameters against

considered/quoted bid assumed parameters or/and its operational inefficiency such as SHR, GCV, auxiliary consumption etc. It is pertinent to mention that Operational efficiency/ in-efficiency has no application to a tariff determined by competitive bid process as the bidders decided on the quoted tariff factoring all such aspects as per RFP provisions. Hence, considering the parameters determined by the appropriate Commission in its Tariff Regulation will be doubly beneficial to the Generator/Appellant in terms of quoted tariff which duly factors the applicable escalation index and decision on applicable parameters and also through Change in law calculation by considering the parameters benefitting to Appellant. Thus, the spirit of Section 63 under EA 2003 will get defeated.

6.6 Undisputedly, the SHR has been submitted by the Appellant itself for computation of quantum of coal required, while submitting its bid to the Respondent No 2. The Appellant upon self-evaluation by factoring all possible future eventualities had referred SHR of 2200 kcal/kWh, while submitting the bid and therefore it cannot at a later stage claim for its variations, because if bidders are permitted to vary the premise of their bid, then the sanctity and finality of bid parameters will lose its force and give an undue advantage to the bidder/supplier over the procurer and ultimately burden the end consumers of the Respondent No. 2. It is therefore incorrect to state that the Appellant did not bid on the basis of the SHR and therefore now it is not open for the Appellant to claim that the said SHR has no relevance or that SHR value was not the biddable parameter. SHR is one of the parameter for arriving at the specific coal consumption quantum and it is also the relevant factor to determine energy charge to be submitted in the bid. The same

SHR value is taken as the basis for quantum of coal for which the Fuel Supply Agreement (FSA) is executed by the Coal Company. The Appellant is entitled to and has secured the FSA from the coal company for precisely the said required coal quantum determined based on the SHR value and other bid assumed parameters.

6.7 In this regard, reliance is placed on the Judgment dated 13.04.2018 in the matter of *Adani Power Ltd. V. Gujarat UrjaVikas Nigam Ltd.(GUVNL)* in Appeal No. 210 of 2017 wherein this Tribunal has rightly held that in case I bidding process it is the bidder who has the discretion in the formulation of bid including SHR and therefore bears the responsibility for seeking/incorporating all the inputs in the bids for supply of power. Reliance is also placed on CERC order dated 19.12.2017, in the matter of D.B. Power Ltd. which holds that SHR should be as per bid for the purpose of computation of coal consumption. Further, CERC in its order dated 16.03.2018 in Petition No. 1/MP/2017 has also considered the bid SHR as a parameter to estimate the specific coal consumption.

6.8 MSEDCL further relies upon CERC order dated 25.04.2018 in Petition no. 239/MP/2017, in the matter of NTPC Tamil Nadu Energy Company Ltd. seeking the relaxation in operating norms for heat rate from 2351.25 Kcal/Kwh to 2375.22 Kcal/Kwh for 2019 wherein CERC has not allowed the relaxation in heat rate norms by observing that the generator with better O&M practices can achieve the specified heat rate norms.

6.9 CERC has considered the bid assumed parameters for computation of change in law events in numerous cases including

Sasan Power Ltd. (Petition No. 153/MP/2015 dated 19.02.2016), Costal Gujarat Power Ltd. (Petition No. 157/MP/2015 dated 17.032017 read with 22/RP/2017 dated 31.10.2017) and Adani Power Ltd. (challenged and upheld in judgment in Appeal No. 210 of 2017 dated 13.04.2018).

6.10 It is submitted that reliance by the Appellant/APML on the findings rendered by MERC in Case No. 123 of 2017, is of no relevance as in the said case, the issue was of auxiliary consumption for which the bid assumed parameters were not known, which clearly is not the case in hand, as the Appellant relied upon SHR, by mentioning the same in the bid itself. Also the reliance placed upon the case of *Wardha Power Co. Ltd. vs. Reliance Infrastructure Ltd.* is clearly distinguishable and is of no relevance, as the said judgment was related to the base price of coal being calculated on the basis of the bid, which is not relevant for consideration of normative quantum of SHR, which is the issue in the present case. Accordingly, the SHR which is quoted in the bid as parameter should be considered to calculate the specific coal consumption and energy charge calculation and therefore deviation as proposed by the Appellant is completely impermissible as the same would effect in a manner to alter the terms of the PPA which does not fall within the jurisdiction of either the MERC or this Tribunal.

6.11 The MERC MYT Regulations, 2019 specifies SHR (in Kcal/kWh) for different capacities of Generating sets viz. 2430 for 200/210/250 MW sets, 2400 for 300 MW sets, 2375 for 500 MW sets and 2230 for 600 MW sets. Further, M/s CGPL has declared an SHR of 2050 for its 800 MW capacity units which has been accepted by CERC

in order dated 06.12.2016 in Case No. 169/MP/2012. The capacity for Appellant's units is 660 MW and the same is between the range of 600 MW to 800 MW. Accordingly, the SHR of 2200 submitted in the bid by Appellant is in line with actual values.

6.12 It is submitted that the grade of coal consists of a range for e.g., G11 having range 4001-4300 kcal/kg. Therefore, the MERC vide Impugned Order determined the mid value to be taken for consideration. The reference GCV of domestic coal supply by Coal India Ltd. must be of the assured coal grade in LoA/FSA/MoU and alternate coal must be middle value of the GCV range or as GCV mentioned on the invoices in case of imported coal.

6.13 As per clauses 2.6 and 2.4.2 (6) xi of the RFP the bidder has the sole responsibility to deal with possibilities of availability of the inputs necessary for supply of power including fuel and its parameters like GCV, transportation, the losses during transportation, degradation of GCV during transportation, stacking etc. while quoting the tariff in bidding process. All such possibilities of non-availability of inputs or the cost thereof was required to be factored in the quoted tariff and the risk and reward of deciding on the quoted tariff, are entirely to the account of the selected bidder. It is pertinent to note that evaluation of GCV on the air dried basis by Coal Company was well known/ existing even prior to bidding and the Appellant was aware of the same. Accordingly, as per provisions of RFP, the Appellant is presumed to have considered and evaluated the GCV on as received basis and also factored in quoted tariff, hence, there will be double compensation to the Appellant if GCV is considered on as received basis as the

Appellant is also compensated by the Coal Company for grade slippage as per the provisions of the FSA.

6.14 The Appellant is having fuel supply Agreement (FSA) with SECL (Coal Company). According to FSA a specific grade of coal i.e. GCV range and quantum is allocated to the Appellant and in view of the foregoing submission, any quality/quantity issues are necessarily to be resolved under FSA provision of penalty mechanism, which is a contractual document between Appellant and SECL. It is the responsibility of the Coal Company to supply the specific grade of coal to the Appellant as per the contractual obligation under FSA so also of the Appellant to confirm the grade of coal received. Further in case of any quality issue of coal received, the Appellant has to pursue the matter with the Coal Company under the provisions of FSA for the compensation. Further as per terms and conditions of FSA, any deviation in economic position i.e. financial (Loss/ Gain) are to be restituted by the Coal Company. However, PPA and FSA are distinct contracts. Therefore, the answering Respondent – MSEDCL being governed by the PPA cannot be intended to restitute the Appellant for a contractual breach under the FSA to which it is not a party.

6.15 It is submitted that no change in law has occurred with respect to the coal quality. Admittedly, the Change in Law on account of NCDP, 2013 dealt only with the shortfall in the coal quantum. The principle of restitution therefore also needs to be evaluated in the said backdrop only, meaning thereby that since there is no change in law for coal quality there can be no restitution. In other words, any cost arising on account of reasons other than the shortfall

beyond the prescribed percentage under NCDP, 2013 is not covered under the change in law provisions.

6.16 MSEDCL is making payment of approved Change in Law specifically of taxes, levies, duties etc. as considered in the coal invoices raised by SECL to the Appellant for provided specified grade of coal having specific GCV. Therefore, the Appellant despite receiving payment towards change in law events approved in earlier orders of the MERC based on the GCV as mentioned in invoice, the Appellant, for the change in law events in the present case, with an intent of deriving undue compensation alters its position and is seeking GCV of coal to be considered on "as received" basis which is an inferior value instead "on invoice" basis. The Appellant was aware of the degradation of GCV during the transit from source mine to the generation location even at the time of submission of the bid and is presumed to have factored the same in the quoted tariff in terms of Clauses 2.4 and 2.6 of the RFP therefore, now at a later stage, such change of stand cannot be allowed as it will cause undue burden the end consumers and unfair commercial gain to the Appellant.

6.17 The NCDP, 2013 Policy states that the higher cost of imported/market based e-auction coal be considered for being made a pass through on a case to case basis by the Appropriate Commission to the extent of actual supply of coal against the quantity indicated in the LoA/FSA or Coal India Ltd. supply as intimated in NCDP financial year-wise i.e. 65%, 65%, 67% and 75% of LoA, whichever is higher, for the remaining four years of the 12th plan for the already concluded PPAs based on tariff based

competitive bidding. The Hon'ble Supreme Court in the Energy Watchdog Judgment has ruled that NCDP, 2013 is a change in law and MERC in the order dated 07.03.2018 in Case no 189 of 2013 has rightly held that the shortfall in domestic coal supply by CIL should be assessed with reference to the maximum of (1) actual Quantum of coal offered for offtake by Coal India Ltd., and (2) the minimum assured quantum as per the NCDP 2013 for the respective year. Accordingly, MERC vide impugned order has rightly restricted the relief to 75% of ACQ for shortfall of coal on account of reduction in coal supply allocation under SHAKTI Policy as against 100% normative requirement assured under NCDP 2007. The impact of change in law is to be restricted to the quantum of shortfall after considering the minimum quantum to be supplied by Coal India Ltd. for the remaining four years of the 12th Plan and any shortfall between the minimum linkage quantum and the actual linkage coal received will be the matter of dispute between Coal India Ltd. and the Appellant.

6.18 Even NCDP, 2013 dated 26.07.2013 acknowledges the obligation of Coal India Ltd. to supply coal upto the revised minimum assured percentage of coal supply and accordingly states that so far as to meet the "balance FSA obligations", i.e., above the such minimum assured percentage, the same can be made through import coal on cost plus basis, subject to the willingness of the power plants. Also, the direction by the MoP to Electricity Regulatory Commission's dated 31.07.2013, categorically states that the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA and the

CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining 4 years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.

6.19 Further, the FSA provision for penalty for short level of lifting or short delivery under para 4.6.1 provides that if for a year, the level of delivery by the seller or the level of lifting by the purchaser falls below ACQ with respect to that year, the defaulting party shall be liable to pay compensation to the other party for such shortfall in level of delivery or level of Lifting.

6.20 The Energy Watchdog Judgment cannot be interpreted to mean grant of the relief more than what the law provides. The restitution under the PPA is only for the impact of change in law and not for the shortfall which is not covered under the change in law event meaning thereby that the compensation for change in law has to be restricted to the impact of change in law and not for impact de hors the change in law. Thus, change in law qua NCDP, 2013 has to be read and interpreted to the reduction to the specified percentage of coal supply and not below such assured percentage, for the simple reason that any reference to the supply below such assured percentage, is not owing to the change made through NCDP, 2013, rather it is because of the contractual deficiency on the part of the coal supplier. Moreover, a Procurer while entering into a PPA with a generating company is insulated from the payment and performance risk that the said generating company undertakes with any third party owing to the generating company's separate

contractual arrangements with such third parties and for default in performance of such obligation by any third party, a procurer cannot be made liable to compensate the generating company meaning thereby that the risk of coal supply below the assured quantity of coal as per NCDP, 2013 has to be met by taking appropriate remedial and proactive steps in accordance with the terms of the FSA/MoU and not through PPA.

6.21 In all the case laws pertaining to Case 2 bidding parameters cited during the proceedings, the contracting party that is not aware of the operational parameters factored by bidder while quoting tariff, was not made to bear the loss i.e., the generator therein and hence on the same analogy while dealing with cases pertaining to Case 1 bidding parameters the contracting party that is not aware of the operational parameters factored by bidder while quoting tariff i.e. the procurer in the present case should not be made to bear the loss.

6.22 Finally, the issue of claim of carrying cost at the rate of LPS has not been raised by APML either in their appeals (Appeal No 155 of 2019 or Appeal No 182 of 2019) or in any pleadings. The decision of the State Commission on the rejection of carrying cost is therefore final. However, since the said issue has been orally argued, MSEDCL has dealt the same in its arguments. The claim of carrying cost was denied by MERC in the order dated 07.03.2018 and in the appeal preferred by APML against the said order i.e., Appeal No. 182 of 2019, the rejection of claim of carrying cost has not been assailed.

6.23 Payment of Change in Law is to be made to the extent as contemplated under Article 13 of PPA and triggers under Article 13.2(b) only through MERC order, subject to appeals. After being qualified under Article 13.2(b), claim can be raised only through supplementary bills under Article 11.8, as contemplated under Article 13.4.2. Thus, in so far as the payment for change in law is concerned the same can only be raised in the mechanism as provided under Article 13 and not *de hors* the same. Once Supplementary bill is raised, Article 11.8.2 contemplates remittance by "due date", as indicated in those bills and it is only if payment is delayed beyond due date, then Late Payment Surcharge (LPS) would be applicable under Article 11.8.3 of the PPA and thus no claim for LPS can be made before such due date. The carrying cost is based on restitution principles, whereas late payment surcharge is at a higher percentage to disincentivize delaying the payment after due date.

Appeal No 116 of 2019

7 **Mr. M. G. Ramachandran, learned senior counsel appearing for the Appellant in Appeal No. 116 of 2019 – MSEDCL has made the following submissions in the written pleadings so also in the course of the hearings for our consideration:-**

7.1 The introduction of SHAKTI Policy is different and distinguished as compared to NCDP, 2013. SHAKTI Policy is an introduction of a New More Transparent Coal Allocation Policy for Power Sector by Ministry of Coal (MoC). SHAKTI Policy is thus undoubtedly altogether a new Policy and is not in any manner continuation of

NCDP, 2013. The same is clearly stated at the beginning of the letter dated 22.05.2017 issued by MoC introducing SHAKTI Scheme. The continuation of NCDP, 2013 has been dealt in Part-A of the letter dated 22.05.2017, whereas, the SHAKTI scheme is dealt in Part-B of the said letter as an altogether independent aspect, with different intent.

7.2 Para A of the letter speaks about LoA-FSA regime and is about the pending application in the old LOA/FSA regime of NCDP. Part B of SHAKTI notification is about granting coal linkages to the new capacities (not having LOA) wherein there is no mention of any (%) ceiling. APML has signed FSAs for remaining 2120 MW capacity under the regime of SHAKTI (Part B) for total ACQ of 5.8475 MMT per annum by succeeding in the auction carried out by Coal India Ltd. There is no mention of limitation for coal supply under these FSAs. Further, the FSAs mentioned the supply of coal till ACQ i.e. complete 100%.

7.3 The sub-heading (A) of the letter dated 22.05.2017 considers the entities with LOA/FSA. With regards to A(i), the reference is for signing of FSA with "*pending LOA holders*" when the "*all specified conditions of the LOA fulfilled within specified timeframe*." With regard to A(ii), the reference is for continuation of coal at 75% of ACQ even beyond 31.03.2017. The expression "continue to get coal" and "even beyond 31.03.2017" clearly indicates that the reference is to capacities who were already getting vial prior to 31.03.2017. Hence, there is no restriction on coal supply for new FSAs under SHAKTI Policy.

7.4 SHAKTI Policy provides 100% affirmative assurance of Ministry of Coal with regard to coal supply for the successful bidder through auction route. There is no such restriction of 75% of coal supply under Part-B of letter dated 27.05.2017 i.e. SHAKTI Policy. For whatever quantum, the bidder on their own assessment of the requirement has bid in the auction, if emerges successful, then such allocated entire self-assessed quantum fulfills the 100% requirement.

7.5 Therefore, while NCDP 2013 or any letter or direction restricting the supply to a quantum below the 100% mark could be change in law limited to the cut-off mark (assurance), shortfall in coal supply under SHAKTI cannot be regarded as change in law particularly in the absence of any indicated cut-off mark. Any shortfall in SHAKTI Policy would be a pure contractual dispute with CIL and the obligation of compensation thereof cannot be shifted upon the procurer neither under change in law nor under the guise of continuation of NCDP, 2013.

7.6 Further, APML was contractually obligated under Article 13.3.2 of the PPA to serve the notice to MSEDCL, if it wishes to claim change in law. No such notice was ever served upon MSEDCL by APML, detailing the impact of change in law qua SHAKTI Policy. Thus, in the absence of service and prior intimation through such notice, APML is not entitled for any relief and communications made prior to introduction of SHAKTI Policy for NCDP on shortfall of coal, cannot be regarded as the one made even for SHAKTI Shortfall as APML need to meet out specific case of its impact as per Article 13.3.3 which, admittedly, has not been done. It is well

settled principle of law that non-compliance of the mandatory contractual terms would not entitle a party to claim any relief of any nature, being at the default by themselves at the first place.

7.7 Without prejudice to the above, assuming though not admitting that there is an issue of shortfall, even then the same would be computed only over and above the mart of allotted 5.8475 MTPA of coal under SHAKTI Scheme and not for any shortfall below the said quantum.

7.8 PPA provisions for restoration is restricted to the extent provided in the Article and cannot be considered de hors Article 10. If Article 10 does not provide for a relief, the same cannot be granted to the Appellant. There cannot be any dispute on the fact that there is no separate provision for carrying costs in the PPA. It is not open to APML to claim carrying cost/interest when the same is not specifically provided in the PPA.

8 **Mr.SajanPoovayya, Learned Senior Counsel appearing for the Respondent No 2 in Appeal No. 116 of 2019 has made the following oral submissions as also in the written submissions for our consideration:-**

8.1 MSEDCL has not disputed the findings of MERC in Case No. 189 of 2013 wherein MERC allowed Change in Law relief not only for the 1180 MW capacity tied up under the NCDP FSA and also for the 1320 MW capacity for which it had no FSA (until it got one under the SHAKTI Policy on 29.03.2018). Therefore, MSEDCL has

already accepted the principle that APML is entitled to Change in Law relief as a result of non-availability of domestic coal assured under NCDP 2007.

8.2 However, MSEDCL's contention is that SHAKTI Policy is not a successor to NCDP 2007 and NCDP 2013. The fact that SHAKTI Policy is a successor to the NCDP 2007 and NCDP 2013 is evident from the letter dated 22.05.2017 from the Ministry of Coal to Coal India Ltd. A bare reading of this letter makes it clear that even after the end of the 12th Plan Period (i.e., 31.03.2017), the availability of domestic linkage coal under the extant policy of GOI continues to be restricted to 75% of ACQ. APML further submits that all the pending applications for LoA have been closed and hence no further coal linkage would be permitted against such pending applications, which is contrary to the assurance of 100% coal supply contained in NCDP, 2007 prevailing at the time of Cut-off Dates under the respective PPAs.

8.3 Para A of SHAKTI Policy itself states that the coal supply would be continued at 75% of ACQ even after 31.03.2017 subject to availability. Merely because the nomenclature uses the term "New" does not establish that SHAKTI is not a successor to NCDP 2007. In fact, every government policy which seeks to alter, modify or replace the coal allocation regime contained in NCDP 2007 would be its successor and to the extent 100% normative coal supply is not provided to the generating companies, there will be a case of Change in law as per the principles laid down in ***Energy Watchdog*** case.

8.4 From a plain and literal interpretation of the Energy Watchdog Judgment (supra), any curtailment in coal supply from Coal India Ltd. or its subsidiaries due to changes in NCDP, 2007 entitles the generators to restitution. In this regard, reliance is placed on the judgment dated 14.09.2019 in *Jaipur VidyutVitran Nigam Limited vs. RERC &Ors. reported as 2019 SCC Online APTEL 98* in Appeal No. 202 and 305 of 2018 ***("Adani Rajasthan Judgment").***

8.5 Furthermore, CERC, *vide* its Order dated 16.05.2019 in *GMR Warora Energy Limited v. Maharashtra State Electricity Distribution Company Limited &Ors.* (Petition No. 8/MP/2014 & Petition No 284/MP/2018), wherein MSEDCL was also a party has already held SHAKTI Policy to be a successor and in continuation of the NCDP, 2013 and consequently allowed the actual shortfall in the coal supply without any restriction on any percentage of the ACQ, as Change in Law.

8.6 The issue of carrying cost is well settled and no longer res integra as per the judgment of the Hon'ble Supreme Court in *UHBVNL &Anr. vs. Adani Power Ltd. and Ors*. [C.A. No. 5865 of 2018]. In the said judgement, the Hon'ble Supreme Court has allowed carrying cost on the impact of change in law events under the principle of restitution enshrined in the PPAs. It was also held that the principle of restitution would apply as per the terms of the PPA and therefore, the compensation on account of change in law would arise from the date on which the change in law has occurred and not when the same has been determined by the concerned State Commission. The observation of the Hon'ble Supreme Court has also been relied upon by this Tribunal in the judgment of *Jaipur*

VidyutVitran Nigam Limited vs. RERC &Ors. [Appeal Nos. 202 of 2018 and 305 of 2018].

9 **We have heard learned seniorcounsel appearing for the Appellants and learned senior counsel appearing for the Respondents at considerable length of time and also perused the findings given in the various judgments relied upon by both the parties. Based upon the same, and the Impugned Order of the State Commission, the following issues emerge in the Appeals for our consideration :-**

Issue No.1:- Whether introduction of SHAKTI Policy does not amount to Change in Law under the PPAs entered into between APML and MSEDCL and whether APML has not provided notice of such Change in Law to the Respondent MSEDCL.

Issue No. 2:- Whether the MERC is correct in holding that for the purpose of Change in Law compensation, shortfall in domestic coal shall be limited to a maximum of 25% of ACQ after the introduction of SHAKTI Policy?

Issue No. 3:- (a) Whether the MERC was correct in holding that the SHR submitted by the Appellant in its bid or SHR and Auxiliary Consumption norms specified for new generating stations under the MYT Regulations, 2011, whichever is superior shall form the basis for computing Change in Law compensation under the PPAs?

(b) Whether the MERC was correct in holding that the reference GCV of domestic coal supplied by CIL shall be the middle value of GCV range of assured coal grade in LoA/FSA/MoU and not the GCV as received?

Issue No.4:- Whether the MERC was justified in directing APML to provide advance intimation of impact on energy charge by using alternate coal for the purpose of Merit Order Despatch?

Issue No.5:- Whether the Respondent MSEDCL is justified in contesting APML's entitlement to Carrying Cost.

Our Analysis & Findings

10. **Issue No.1:-**

10.1 Learned counsel for MSEDCL vehemently submitted that the SHAKTI Policy is a completely new way of coal allocation to IPPs and is not in continuation of NCDP 2013 and therefore, does not amount to Change in Law under the PPAs. Further, SHAKTI Policy itself does not intend to restrict the supply of coal as in the case of NCDP 2013 but provides 100% affirmative assurance of Ministry of Coal with regard to supply of coal to the successful bidder for the quantity of coal sought in the bid submission. Unlike NCDP 2013, allocation under the SHAKTI Policy is based on the bidder's own assessment of the quantum and therefore, any shortfall from that allocation would be a contractual dispute with CIL and the obligation of compensation cannot be shifted upon the procurer in the guise of change in law provision.

10.2 It is not in dispute that when APML submitted its bid to MSEDCL, the allocation of domestic coal supply was governed by the provisions of NCDP 2007 which was amended in July 2013. Thereafter, the SHAKTI Policy was introduced on 22.05.2017 which has done away with the system of allocation of coal linkage through SLC(LT) prevailing under the NCDP 2007 and 2013. Paragraph A of the SHAKTI Policy itself states that the coal supply

would be continued at 75% of ACQ even after 31.03.2017 subject to availability. The relevant paragraph is extracted below:

"The proposal of Coal linkages Allocation Policy for Power Sector has been under examination in this Ministry. With the approval of Cabinet Committee on Economic Affairs (CCEA), the following policy guidelines for allocation of Coal linkages to Power Sector have been decided:

> *"(A)Under the old regime of LoA-FSA:*
>
> *…*
>
> *(iii) The capacities totalling about 68000 MW as per the decision of CCEA dated 21.06.2013 would continue to get coal at 75% of ACQ even beyond 31.03.2017. The coal supply to these capacities may be increased in future based on coal availability."*

10.3 While APML has been allocated 5.84 MMT coal (ACQ) under the SHAKTI FSA, its grievance is that it is receiving a substantially reduced quantum under the said FSA, as against the assurance of 100% coal availability under NCDP 2007. This shortfall is in addition to the shortfall stipulated in Para (A) of the SHAKTI Policy which restricts coal supply at maximum of 75% of ACQ beyond 31.03.2017. The starting point of any discussion regarding Change in Law has to be that whether the relevant law or directive meets the test of Change in Law under the provisions of the PPAs?

10.4 MSEDCL has not contested that the SHAKTI Policy meets the definition of Change in Law under the Article 13.2 of the 1320 MW PPA and Article 10.2 of the other three PPAs. MSEDCL, however, argued that SHAKTI Policy is not a successor to NCDP 2007 and therefore, it does not constitute Change in Law. In our opinion, it is immaterial whether SHAKTI Policy is a successor to NCDP 2007 or not. Article 13 of the 1320 MW PPA defines Change in Law as follows:

"***ARTICLE 13: CHANGE IN LAW***

13.1. Definitions

In this Article 13, the following terms shall have the following meanings:

13.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:
(i) The enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any law or;
(ii) A change in interpretation of any Law by a Competent Court of law, tribunal, Indian Governmental provided such court of law, tribunal, Indian Governmental Instrumentality is final authority under law for such interpretation.
But shall not include (i) any change in withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI charges or frequency intervals by an Appropriate Commission.
13.1.2 "Competent Court" means:
The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project."

Similarly, Article 10 of the PPAs for 1200 MW, 440 MW and 125 MW capacities define Change in Law as follows:

"***ARTICLE 10: CHANGE IN LAW***
10.1. Definitions
In this Article 10, the following terms shall have the following meanings:
10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring / non-recurring expenditure by the Seller or any income to the Seller :

- *the enactment, coming into effect, adoption, promulgation, amendment, modification or repeal (without re-enactment or consolidation) in India, of any law including rules and regulations framed pursuant to such Law;*
- *a change in interpretation or application of any Law by any Indian Governmental Instrumentality having the legal power to interpret or apply such law, or any Competent Court of Law;*
- *the imposition of a requirement of obtaining any Consents, Clearances and Permits which was not required earlier;*
- *a change in the terms and conditions prescribed for obtaining any Consents, Clearances and Permits or the inclusion of any new terms or conditions for obtaining such Consents, Clearances and Permits; except due to any default of the Seller;*
- *any change in tax or introduction of any tax made applicable for supply of power by the Seller as per the terms of this Agreement.*
  but shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission or (iii) any change on account of regulatory measures by the Appropriate Commission including calculation of Availability.

The cut-off date for 1320 MW PPA is 14.02.2008 and that for the other three PPAs is 31.07.2009. Therefore, there is no doubt that

the SHAKTI Policy was introduced after the cut-off dates under the respective PPAs.

10.5 From the above definitions, it is apparent that every government directive or policy which has the force of law and seeks to alter, modify or replace the coal allocation regime contained in NCDP 2007 would be treated as its successor and to the extent coal supply up to 100% of normative requirement is not provided to the generating companies, there will be a case of Change in Law as per the principles laid down in the *Energy Watchdog Judgment* and the terms of the PPAs. This position has been explained by the MERC in the Impugned Order as follows:

"16. Against the above background, the Commission now deals with APML's claim of Change in Law relating to SHAKTI Policy. This policy has been notified by the Ministry of Coal (MoC), Government of India (GoI) on 22 May, 2017. Under the provisions of PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would be covered within the definition of "Change in Law". "Indian Government Instrumentality' as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being Ministry under the Government of India is satisfying the requirement of 'an Indian Government Instrumentality' under the PPAs. Further, as per Energy Watchdog Judgment of the Supreme Court, if there is a change in any consent, approval or licence available or obtained for the Generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 is a Change in Law for which relief can be claimed by the Seller. Relevant part of Supreme Court Judgment is reproduced below:

[quote omitted]

17. As SHAKTI Policy has been notified by an Indian Government Instrumentality i.e. the Ministry of Coal and it is notified on 22 May, 2017 which is after the cut off date under the PPAs, the Commission holds that notification of 'SHAKTI Policy' is an event of Change in Law under the PPAs signed between APML and MSEDCL."

10.6 Learned Counsel for APML further submitted that this issue has been settled by the Tribunal in Jaipur VidyutVitran Nigam v. RERC

&Anr (supra). Relevant paragraphs from this order are extracted below:

"*12.3 From a bare reading of the SHAKTI Policy, it is clear that this policy has introduced further modifications to NCDP 2007 and NCDP 2013 such that the previous system of coal linkage allocation through the SLC(LT) mechanism has been done away with and a new transparent mechanism for coal linkage allocation has been introduced. The introduction of SHAKTI Policy, being notified after the cut-off date by an Indian Governmental Instrumentality, i.e., the Ministry of Coal, itself constitutes a Change in Law in terms of Article 10 of the PPA. Coal supply under SHAKTI FSA needs to be compared against the 100% coal supply assured under the NCDP 2007 and if there continues to be a shortfall, the generator would need to be compensated for such shortfall through the Change in Law provisions.*

12.4 We are inclined to agree with the submission of Adani Rajasthan that they cannot be penalized for uncontrollable factor/shortfall of coal once they have diligently availed all remedies available under the PPA and approached all relevant authorities and governmental instrumentalities. In GMR Kamalanga Energy Ltd. v. CERC &Ors. (Appeal No. 193 of 2017), we had occasion to consider, in the context of pre-SHAKTI FSA, as to whether relief for domestic coal shortfall needs to be limited to the ACQ levels specified in the FSA and we came to the conclusion that the impact or effect of change in law has to be considered against the originally assured quantum of coal. We also observed that "if the bid was based on the SLC allocation and LOA prior to the cut off date indicated in the PPA dated 09.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.

12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law

provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.

12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:

> *"57. …… This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred……"*

Therefore, the application of above decision would mean that to the extent supply of domestic coal to Adani Rajasthan is cut down, the same needs to be compensated through the Change in Law mechanism provided in the PPA. <u>For the aforesaid reasons, we hold that the RERC was not correct in limiting the relief to Adani Rajasthan till the grant of linkage coal under the SHAKTI Policy. The Impugned Order is set aside on this point and it is clarified that Adani Rajasthan shall be entitled to relief under Change in Law provision until there is a shortage in supply of domestic linkage coal, against the 100% supply assured under the NCDP 2007</u>."

While the above judgment has been appealed before the Hon'ble Supreme Court, there is no stay against the above judgment. As a result, the said judgment continues to govern the field on this issue.

10.7 We also take note of the CERC order dated 16.05.2019 in *GMR Warora Energy Limited vs. Maharashtra State Electricity Distribution Company Limited &Ors.* (Petition No. 8/MP/2014 & Petition No 284/MP/2018), wherein MSEDCL was also a party. In the said order, the CERC has also held SHAKTI Policy to be a successor and in continuation of the NCDP 2007 and consequently allowed the actual shortfall in coal supply without any restriction on any percentage of the ACQ, as Change in Law. The relevant extracts of the said order are as follows:

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

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

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

49. Under the PPAs, an event arising from the actions of an authority covered within the definition of 'Indian Governmental Instrumentality' would be covered within the definition of 'Change in Law'. 'Indian Government Instrumentality' as defined under the PPA includes any Ministry of the Government of India. The Ministry of Coal being a Ministry under the Government of India satisfies the requirement of 'an Indian Government Instrumentality' under the PPAs. Further, in terms of provisions of the respective PPAs and as decided in the Energy Watchdog case by the Hon'ble Supreme Court, if there is a change in any consent, approval or license available or obtained for the generation Project, which results in a change in the cost of generation and supply of the contracted power, it would be governed by the Change in Law provisions of the PPAs. Accordingly, any change in the assurance of supply of coal by amendment to the NCDP 2007 (that was applicable at the bid cut-off date) is a Change in Law for which relief can be claimed by the Seller. We have already held above that through the Shakti scheme, the Ministry of Coal has extended the applicability of provisions of NCDP 2013 beyond 31.3.2017. As Shakti Scheme has been notified by an Indian Government Instrumentality on 22.5.2017, which is after the cut-off date under the PPAs executed by the Petitioner, we hold that the notification of the Shakti Scheme constitutes a Change in Law event under the PPAs and the Petitioner is entitled to be

compensated, so as to restore it to the same economic position, as if such change in law had not occurred.

…
56. Accordingly, the compensation on account of coal shortage shall be worked out in accordance with the prescribed formula as above for the entire actual coal shortage without imposing any restrictions in terms of any % of the ACQ. The Petitioner is directed to furnish along with its monthly regular and/or supplementary bill(s), the computations duly certified by the auditor to the Respondent Discoms. The Petitioner and the Respondent discoms (MSEDCL & DNH) are directed to carry out reconciliation on account of these claims annually."

10.8 CERC issued the above order upon a remand of the matter from this Tribunal in order dated 14.08.2018 in Appeal No. 111 of 2017. The CERC has also upheld the introduction of SHAKTI Policy as Change in Law in *MB Power (Madhya Pradesh) Limited v. Uttar Pradesh Power Corporation Limited* (Petition No. 156/MP/2018) vide its order dated 03.06.2019 and in *Adani Power (Mundra) Limited Vs. Uttar Haryana BijliVitran Nigam Limited &Anr.* (Petition No. 251/MP/2018) vide order dated 13.06.2019.The relevant paragraphs from the CERC's order in *Adani Power (Mundra) Limited* are reproduced below:

"25. In our view, the submissions of the Respondents are misconceived. Petition No. 97/MP/2017 was filed by the Petitioner for determination of compensation due to change in law pursuant to the directions of the Hon'ble Supreme Court in its judgment dated 11.4.2017and the Commission had granted the relief upto 313.2017. Even though the said Petition was filed on 1.5.2017 i.e. prior to the notification of the Shakti Policy by the GOI, the Petitioner had not made any submissions in this regard during the course of the proceedings in the said Petition. This, however, does not preclude the Petitioner from filing a separate Petition and seek continuation of relief under change in law beyond 31.3.2017 in terms of the Shakti policy, based on the judgment of the Hon'ble Supreme Court. As per the principle laid down by the Hon'ble Supreme Court in Energy Watchdog case, any change in the assurance of supply of coal by amendment to NCDP 2007 is change in law for which relief can be claimed by the Seller and the party affected by change in law is entitled to be compensated (through monthly tariff payments) so as to restore it to the same economic position as if such change in law has not occurred. Accordingly, we proceed to examine whether the Petitioner is entitled for compensation for domestic linkage coal shortfall beyond 31.3.2017.

…

30. Considering the fact that the Petitioner's plant is also covered in the capacity totaling 68000 MW as per decision of CCEA dated 21.6.2013, the Commission's decision in its earlier order dated 16.5.2019 is applicable in the present case. Accordingly, the Petitioner is entitled for relief under change in law and is required to be restored to the same economic position in terms of Article 13.2 of the PPA till the shortfall continues including the period covered by NCDP 2013 and subsequently continued by SHAKTI Scheme beyond 31.3.2017."

10.9 It is thus seen that the CERC has also applied the principles laid down by the Hon'ble Supreme Court in Energy Watchdog Judgment to conclude that the SHAKTI Policy had continued the shortfall in domestic coal supply even beyond 31.03.2017. Accordingly, SHAKTI Policy, having continued restriction on coal supply even after 31.03.2017, is an event of change in law as per the Energy Watchdog Judgment.

10.10 Learned counsel for the MSEDCL also argued that APML had not complied with the condition of serving a mandatory notice for Change in Law under Article 13.3.2 of the 1320 MW PPA. Such notice, as per MSEDCL, should have included the details of Change in Law and its effect on APML. In such an event, MSEDCL would have purchased power from other available options through its Merit Order Despatch (MOD). It is seen from the records, however, that APML has been agitating the issue of shortfall in domestic coal supply and need for compensation for procurement of higher priced coal from alternate sources since 2013 before the MERC and this Tribunal. Admittedly, MSEDCL has been a party in all the proceedings. This seems to be a mere technical objection. There was no occasion for a fresh notice for coal shortage under the SHAKTI Policy since the shortfall in coal supply was already under consideration of the MERC in Petition Nos. 189 of 2013 and

140 of 2014 (both decided on 07.03.2018) and in Case No. 167 of 2018 (decided on 01.08.2018). As the matter in relation to Change in Law due to shortfall of coal was pending before the MERC, MSEDCL was fully aware of the ongoing shortfall in domestic coal supply. APML wrote various letters to MSEDCL in relation to (i) SHAKTI Policy and amendment/ approval of PPA as required under the SHAKTI Policy; and (ii) in relation to the continuation of curtailment of coal supply to 75% of ACQ and its consequences on APML as well as MSEDCL/ end consumers before filing the Petition in Case No. 290 of 2018 before MERC.

10.11 In addition, it is seen from the records that APML issued a letter on 02.08.2017 to MSEDCL informing about SHAKTI Policy and requesting to authenticate the PPA details to be submitted to the CEA. MSEDCL, in response, vide its letter dated 09.08.2017 certified the details to be submitted to the CEA for participation under the SHAKTI auction. Subsequently, APML and MSEDCL signed a Supplementary PPA on 24.01.2018, which was approved by the MERC on 20.03.2018. APML also intimated MSEDCL about the coal supply restriction of 75% of ACQ being continued under the SHAKTI Policy as a result of which it was forced to utilise costlier imported coal to mitigate the shortage in domestic coal supply. Therefore, there does not appear any merit in the contention of MSEDCL that it was not provided required notice of Change in Law under SHAKTI Policy. APML had filed the Petition underlying the Impugned Order after giving ample notices to MSEDCL regarding the impact of SHAKTI Policy and the shortfall in coal supply thereunder and therefore, the requirement of

notifying the Change in Law event under the PPAs was duly satisfied.

10.12 **We do not find force in the submissions of the Appellant, MSEDCL, in Appeal No. 116 of 2019 that the introduction of SHAKTI Policy does not amount to Change in Law under the respective PPAs. All the ingredients of Change in Law under the respective PPAs are duly met and therefore, the Impugned Order is upheld on this issue.**

11 **Issue No.2**:-

11.1 In the Impugned Order, the MERC has returned the following findings:

"23. As observed earlier, notification of SHAKTI Policy constitutes Change in Law event under the PPAs. Hence, the Commission rules that APML needs to be compensated for shortfall of coal on account of reduction in coal supply allocation (not below 75% of ACQ) under SHAKTI Policy as against 100% normative requirement assured under NCDP, 2007. Further, till the time new FSA was signed under SHAKTI Policy, the coal supply had already commenced in the year 2018 without any FSA for corresponding generating capacity. Thus for that period, as ruled under its Order dated 7 March, 2018 in Case No. 189 of 2013, entire differential in quantity and price is allowed as Change in Law compensation to restore APML to the same economic position with respect to 1320 MW capacity of Unit 4 and 5.

24. Methodology and parameters to be used for computing relief under the Change in Law for capacity having FSA and not having FSA has already been mentioned in Order dated March 07, 2018 in Case No. 189 of 2013. Same methodology and parameters should be adopted for computing relief under Change in Law for the period beyond March 31, 2017 till availability of coal improves and APML gets assurance of coal supply equivalent to 100% of its normative requirement as assured under NCDP, 2007."

11.2 As per the NCDP 2007, coal allocation was assured for meeting 100% of normative requirement of APML's generating station, including future capacity addition. On 26.07.2013, i.e., after the cut-

off date under the respective PPAs, the GOI amended the NCDP 2007 based on the CCEA decision of 21.06.2013. The relevant amendment is set out hereinbelow:

"The New Coal Distribution Policy (NCDP) was issued vide Ministry's Office Memorandum No. 23011/4/2007-CPD dated 18th October 2007, laying down the guidelines for distribution and pricing of coal to various sectors. As per 2.2 of the said policy, Power Utilities including Independent Power Producers were to be supplied 100 percent of the quantity as per their normative requirement through Fuel Supply Agreement(s) (FSA) by Coal India Limited (CIL) at fixed prices to be declared / notified by CIL. As per para 5.2, in order to meet the domestic requirement, CIL was to import coal as required from time to time, if feasible and adjust the overall price accordingly.

2. Government has now approved a revised arrangement for supply of coal to the identified Thermal Power Stations (TPSs) of 78,000 MW capacities commissioned or likely to be commissioned during the period from 01.04.2009 to 31.03.2015. Taking into account the overall domestic availability and the likely actual requirements of the TPPS, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages. To meet its balance FSA obligations towards the requirement of the said 78,000 MW TPPs, CIL may import coal and supply the same to the willing power plants on cost plus basis. Power plants may also directly import coal themselves, if they so opt, in which case, the FSA obligations on the part of CIL to the extent of import component would be deemed to have been discharged.

3.Para 2.2 and 5.2 of the New Coal Distribution Policy issued vide OM No. 23011/4/2007-CPD dated 18.10.2007 stand modified to the above extent."

11.3 Following the aforesaid amendment to NCDP 2007 and pursuant to the CCEA decision of 21.06.2013, the MoP issued a letter on 31.07.2013 addressed to all the State Governments, CERC and SERCs advising them to allow additional cost of coal as a pass through in terms of the decision taken by the CCEA. In the said letter it is, inter alia, stated as follows:

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

(i) …

(ii) …

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

…

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

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

11.4 Learned counsel for MSEDCL submitted that the aforesaid MoP letter allows compensation for shortfall in supply up to 65-75% in the relevant years. Any shortfall in supply below 65% is a contractual dispute between the coal supplier and the generator and not a result of Change in Law. Learned counsel for the APML contended that this is a misreading of the MoP letter by MSEDCL. We are in agreement with the counsel for APML. It is seen that the MoP letter has two parts: first part deals with the relief for higher cost of imported/e-auction coal to be considered on case by case basis to the extent of shortfall in the quantity indicated in the LoA/FSA. The second part of the letter deals with the minimum supply obligation of CIL in the remaining 4 years of the 12th Plan period but this second part does not restrict the relief for higher priced coal to the difference between the minimum supply obligation and the quantity indicated in the LoA/FSA.

11.5 Further, this reading of the MoP letter/advice is supported by the amended Tariff Policy dated 28.01.2016 (**"Tariff Policy, 2016"**). The relevant extract of the Tariff Policy, 2016 is as below:

"However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31.7.2013."

It is seen from the above paragraph that the Tariff Policy, 2016 while referring to the MoP letter of 31.07.2013 does not make any reference to limiting the relief for shortfall in supply of domestic linkage coal to the minimum quantity of supply assured under the NCDP, 2013. It is undisputed that both the MoP letter and the Tariff Policy, 2016 are statutory instruments and have been held to be Change in Law by the Hon'ble Supreme Court in the *Energy Watchdog Judgment* and do not restrict the Change in Law relief to the minimum supply quantity specified in the NCDP 2013, rather the relief is to be allowed to the extent of shortfall against the quantity specified in the LoA/FSA. Further, the shortfall has to be determined against the 100% quantity assured under the NCDP 2007, which was the regime prevailing on the respective cut-off dates, vis-à-vis actual supply and the same is unambiguously stated in the amended Tariff Policy, 2016. The changes in coal supply regime and the coal cost pass through initially through the MoP letter dated 31.07.2013 and subsequently notified in the Tariff Policy, 2016 was brought about in the backdrop of prevailing shortage of domestic coal supply and the inability of state owned coal companies to meet the coal supply requirements assured under the NCDP 2007. The Government of India also realized that such shortfall will result in generating companies purchasing coal from alternate sources for meeting the power supply obligations

under the PPA and in effect would result in higher fuel costs to the generating companies.

11.6 Learned counsel for APML pointed out that the Hon'ble Supreme Court in the *Energy Watchdog Judgment* has clearly specified that to the extent the supply from CIL and other Indian sources is cut down, the parties shall be compensated for Change in Law to restore the affected party to the same economic position as if such Change in Law has not occurred. The Energy Watchdog Judgment has not placed any restriction on the entitlement of shortfall vis-à-vis the minimum assured supply quantity of 65% to 75%, as claimed by MSEDCL. The relevant extract of *Energy Watchdog Judgment* is as follows:

"57. Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents under Section 3 of the Act and have force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred…"

11.7 This Tribunal had the occasion to consider the issue of relief for shortfall in domestic coal supply in its order dated 21.12.2018 in *GMR Kamalanga&Anr. Vs. CERC* (Appeal No. 193 of 2017). In that case, the Tribunal allowed the entire shortfall in terms of firm linkage of coal as well as tapering linkage of coal to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources without any restrictions in terms of ACQ percentage. The relevant paragraph from the said order is extracted below:

"*64 In the light of the above foregoing reasons, shortfall of firm linkage of coal as well as tapering linkage of coal, GKEL is entitled to be compensated for meeting the expenditure involved in procuring coal from alternate sources to meet the shortfall of coal from domestic sources."*

11.8 We have reaffirmed the said position in *Jaipur VidyutVitran Nigam Limited vs. RERC &Ors.* (Appeal Nos. 202 of 2018 and 305 of 2018) as follows:

12.5 In the instant case, we have found in the previous paragraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. <u>The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ</u>. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.

12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:

[quote omitted]

Therefore, the application of above decision would mean that to the extent supply of domestic coal to Adani Rajasthan is cut down, the same needs to be compensated through the Change in Law mechanism provided in the PPA. For the aforesaid reasons, we hold that the RERC was not correct in limiting the relief to Adani Rajasthan till the grant of linkage coal under the SHAKTI Policy. The Impugned Order is set aside on this point and it is clarified that Adani Rajasthan shall be entitled to relief under Change in Law provision until there is a shortage in supply of domestic linkage coal, against the 100% supply assured under the NCDP 2007."

11.9 The above findings of this Tribunal have been upheld by the Hon'ble Supreme Court on 31.08.2020 in its judgment in Jaipur VidyutVitran Nigam v. Adani Power Rajasthan Limited and Anr. (Civil Appeal No. 8625-8626 of 2019) as extracted below:

"48. Shri C. AryamaSundaram argued that the FSA related approximately 61 per cent of the fuel requirement. Thus, the change in law claim may be confined to 35 to 40 per cent. The argument cannot be accepted as bidding was not based on dual fuel, but was evaluated on domestic coal. There was no such stipulation that evaluation of bidding was done on domestic basis; the tariff was to be worked out in the aforesaid ratio of 60:40 per cent of imported coal and domestic coal respectively. Apart from that, we find from the order of the APTEL, that change in law provision would be limited to a shortfall in the supply of domestic linkage coal. The finding recorded by the APTEL is extracted hereunder:

> *"12.5 In the instant case, we have found in the previousparagraphs that Adani Rajasthan's bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre SHAKTI FSAs.*
>
> *12.6 The Supreme Court in Energy Watchdog judgment has already concluded as follows:*
>
> *"57. …… This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sourcesis cut down, the PPA read with these documents provides*

in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred……" (emphasis supplied)

49. It was clarified that APRL would be entitled to relief under the change in law provision to the extent of shortage in supply in domestic linkage coal. Thus, we find no merit in the submission raised. We find the findings of the APTEL to be reasonable, proper, and unexceptional."

11.10 We are, therefore, in agreement with the learned counsel for APML that the MERC has erred in concluding that the compensation for shortfall in supply of domestic coal needs to be limited to a maximum of 25% of ACQ under the SHAKTI Policy. We have already held that the domestic coal supply shortfall has to be measured against the quantity assured under the NCDP 2007 vis-à-vis actual supply by the CIL and its subsidiaries. Relegating APML to the contractual remedy for shortfall in supply of coal is no remedy at all since the penalties for short supply stipulated in the FSAs offer no remedy at all and nor do they take away the obligation to supply the required quantity of coal assured in the NCDP 2007. The Tariff Policy, 2016 provides for a complete pass-through of cost of procurement of alternate coal in the event of a shortfall in supply of linkage coal by CIL and its subsidiaries. Restricting Change in Law relief to a maximum of 25% shortfall in domestic coal supply will not restore APML to the same economic position as stipulated under Articles 13.2 and 10.2 of the 1320 MW and 1200/125/440 MW PPAs respectively.

11.11 **Thus, the finding of MERC in the Impugned Order on the issue of restricting the quantum of shortfall of domestic coal to a maximum of 25% of ACQ violates the fundamental principlesof**

restitution under the Change in Law provisions under the PPAs.

12. **Issue No. 3:-**

We have dealt with these two issues (3 (a) & 3 (b)) in great detail vide our judgment dated 14.09.2020 in Appeal No. 182 of 2019 and these are common issues in the batch of appeals involving the same PPAs. Therefore, for the detailed reasons given in Appeal No. 182 of 2019, we set aside the Impugned Order on the above issues and hold that the change in law compensation shall be calculated on the basis of the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR achieved by APML, **whichever is lower**. Similarly, in order to restore the affected party APML to the same economic position, change in law compensation shall be computed and paid by reference to the actual GCV of coal as received at the plant site.

13. Issue No.4: -

13.1 MERC in the Impugned order has held that the Appellant, APML has to intimate MSEDCL in advance for estimated impact on energy charge for each alternate source of coal separately. The relevant paragraphs from the Impugned Order are as follows:

25. Notwithstanding the dispensation ruled above, the Commission is of the opinion that in case of Change in Law event which has a continuing impact, intent of the notice needs to be understood in broader prospective.

25.1. Such notice should be treated as intimation from the seller to the buyer that cost of power will become higher on account of higher cost of fuel procured from alternate source so as to supply the full contracted power as per PPA. Under such circumstances, before scheduling such power which is generated from the costly alternate coal/fuel, buyer i.e. the Distribution Licensee who is mandated to keep its power procurement costs at lowest possible level, could look for the other alternate cheaper sources of power

supply, if available. For a Distribution Licensee to undertake such measures so as to reduce its cost of power procurement it is important that it gets proper intimation from the Seller of such possibility of increase in cost of power from contracted sources well in advance.

25.2. If Distribution Licensee finds such higher rate not competitive in comparison with other available sources for procurement of power, then it can ask the Generator not to generate such power using coal from alternate sources. Based on such inputs, if the Distribution Licensee decides not to schedule energy generated from costly coal and intimates such decision to Maharashtra State Load Despatch Center (MSLDC), then for the purpose of approving Daily Schedule, even though Generator could declare higher availability on account of adequate coal stock procured from alternate source, SLDC should consider capacity intimated by the Distribution Licensee as schedulable capacity of such Generator.

25.3. In the past, in order to optimize its power procurement cost, MSEDCL has given zero schedules/Reserved Shutdowns to Generators which are placed at higher level in Merit Order Stack. Methodology stipulated in this Order is on those similar principles. Although such advance intimation of the rate would be an estimated value only and not the final rate, the methodology will strengthen the existing MoD mechanism wherein generators are placed in MoD stack based on its variable rate for previous period.

25.4. With advance intimation of rate, Distribution Licensee will be in better position to optimize its power procurement cost while the sanctity of giving a notice containing full details about any incidence of change in law would also be maintained. It is certainly not a perfunctory exercise, but a choice to the buyer to evaluate its options while dealing with the cost impact.

"26. Accordingly, in line with the above mentioned analysis, in future, APML needs to intimate to MSEDCL about estimated impact on energy charge for using costly alternate source of coal whenever it falls short of the allocation under the linkage coal. The Commission expects that this methodology would be implemented with effect from 1 March, 2019. Meanwhile, MSEDCL and APML should work out modalities including frequency and time of communicating such advance intimation of estimated impact of Change in Law within the provisions/principles of the PPAs…"

13.2 Learned counsel for APML submitted that its generating station does not operate using domestic and imported coal separately or in isolation. In case of shortfall in domestic coal, the plant is usually operated with blending of imported coal to the extent of the permitted design parameters and it is not feasible for APML to estimate in advance the impact on energy charges. The extent of

usage of imported coal / alternate coal depends on many unknown factors such as the coal supply from CIL, the health of generating units, the power demand of the State etc. Further, such a direction by the MERC amounts to modification of the applicable Regulations through an order and also amounts to a modification of the terms of the PPAs between APML and MSEDCL, both of which are impermissible in law.

13.3 Learned counsel for APML further submitted that the MERC in a dispute raised by one of the generators in Maharashtra for preparation of monthly MOD stack by the State Load Despatch Centre (SLDC), vide its daily order dated 27.10.2016 in Case No. 125 of 2016, MA. No. 18 and MA. No. 21 of 2016 in Case No. 125 of 2016 had directed as follows:

"10. The Commission directs MSLDC to always seek details of MOD rates from MSPGCL, MSEDCL, TPC-G, RInfra-G and VIPL-G such as backup calculations, cost breakup, basis of various components, period (whether (n-1)th or (n-2)th) and verify the MOD rates before preparation of MOD stack."

Thus, the MERC has directed the Maharashtra State Load Despatch Centre (MSLDC) that for the purpose of preparation of monthly (n) MOD stack, the Energy Charges Rate/ Variable Charges of the previous month (n-1)th or (n-2)th should be considered to the extent whichever is available. MERC in its aforementioned order has not differentiated the MOD stack preparation on the basis of different fuel sources for the same generating station.

13.4 Learned counsel forAPML also submitted that MOD principle of (n-1)th or (n-2)th month is a general principle being followed by almost all the State Load DespatchCentres across the country which is

based on actual energy charge and not estimated energy charges. The direction given by the MERC to APML is discriminatory since the actual energy charge of (n-2) month of Maharashtra State Power Generation Company Ltd. (MSPGCL – the State Genco) stations is used for MOD stack. Being a regulator for the entire electricity sector, MERC must not adopt different mechanisms/standards for IPPs and State owned generating stations. The principle of MOD stack is very well established and should not be tinkered with considering the estimated cost of alternate source of fuel being used to make-up the shortfall in allocation under coal linkage. The MERC vide the Impugned Order has sought to modify the common MOD principle which is followed not only in the State of Maharashtra but across the country, which is a clear discrimination to the APML's generating station.

13.5 TheAPML's counselargued that the advance intimation of estimated impact on energy charge for each alternate source of fuel is practically not possible as the coal available for generation will be from multiple sources with varying quality and storing different coal qualities in dedicated bunkers will upset the coal consumption plan. In addition, the use of blended coal is a very dynamic situation which changes depending on the coal supplies received at the plant site.

13.6 Learned counsel forAPML pointed out that Regulation 48 of the MERC Tariff Regulations, 2015 provides for a single value of energy charge to be provided in the monthly invoice of a generating station based on landed cost of primary fuel and other coal related components and the said Regulation does not provide for

specifying energy charges based on sources of fuel for each generating station.

13.7 We have considered the submission**s** made by APMLvis-à-vis the findings in the impugned order. It is relevant to note that no submission to the contrary has been advanced by the Respondent, MSEDCL on this issue. In the Impugned Order, MERC appears to have expanded the intent of Change in Law notice as a means of intimation to the buyer of power that on account of intended use of alternate coal, the cost of power is likely to increase and then the distribution licensee may decide to not schedule such costly power. Firstly, no such intent can be deciphered from the provisions of the PPA which require a change in law notice to be given to the procurers. MERC has not deliberated upon how this regime will impact the implementation of change in law provision in other scenarios. For example, if there is a change in rates of taxes or duties, which entitles the generator to seek change in law relief, can it still be said that the procurer should be intimated about the impact of such changes in taxes or duties to enable them to decide whether to schedule power or not. In our view, this does not appear to be the intent of change in law notice to the procurers under the PPAs. This is for the simple reason that whether there will be impact on MSEDCL would be known only after MERC decides the change in law claim. Until such time notice given by sellers merely to intimate the occurrence of change in law event, in our view, will not influence decisions related to scheduling of power on merit order principles. In any event, in so far as preparation of MOD stack is concerned, the normal practice is to prepare MOD on the basis of the energy charge bill of (n-1)th or (n-2)th month is taken

into account in the order of precedence. Therefore, the impact of a regular or consistent usage of alternate coal will in anyway be reflected in the MOD stack, albeit with the lag of one or two months.

13.8 **We thus find that the advance intimation requirement as directed by the MERC is not consistent with the normal rules of MOD preparation and does not provide a level playing field for IPPs leading to discrimination.**

14. **Issue No.5:-**

14.1 Learned counsel for MSEDCL, in its Note of Arguments submitted on 02.07.2020 and in its final Written Submissions has contended that the issue of claim of carrying cost at the rate of Late Payment Surcharge (hereinafter referred to as "**LPS**") has not been raised by APML in the instant appeal and therefore, rejection of carrying cost by the MERC must be deemed as final.

14.2 Learned counsel for APML, in response, submitted that in the Impugned Order, MERC has allowed APML to levy carrying cost from the date the Change in Law became effective. Relevant paragraph from the Impugned Order is extracted below:

"28. In view of above and considering settled position of Law regarding carrying cost, the Commission allows APML to claim carrying cost from the date the Change in Law events have affected it to the date of the present Order. Further the rate of interest for the payment of carrying cost shall be as specified for the interest on working capital in the MYT Regulations applicable to the relevant periods."

Therefore, APML had no reason to challenge the Impugned Order on the issue of carrying cost.

14.3 **We find that the allowance of carrying cost is a settled position of law and MERC has accordingly allowed the same to the Appellant, APML. Moreover, there is no contest on this issue by any party on this issue.**

Summary of Findings:-

15. Based on discussions and issuewise findings stated supra, we summarize our findings as under**:-**

15.1 **Issue No.1:-**We hold that the introduction of SHAKTI POLICY amounts to change in law and all the ingredients of change in law are duly met under the respective PPAs. The impugned order is therefore affirmed on this issue.

15.2 **Issue No.2**:- We hold that findings in the impugned order relating to the issue of restricting the quantum of shortfall in domestic coal to a maximum of 25% are against the basic principles of restitution under the change in law provisions of the PPAs.

15.3 **Issue No.3**:- In line with our judgment dated 14.09.2020 in Appeal No.182 of 2019, we hold that the change in law compensation shall be calculated based on the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR whichever is lower and actual GCV of coal as received as the plant site.

15.4 **Issue No.4**:- We find that the directions issued by the State Commission regarding advance intimation requirement is not

consistent with normal Rules of MOD preparation and also does not provide a level playing field for IPPs.

15.5 **Issue No.5**:- We find that allowance of carrying cost is a settled position of law and the State Commission has already allowed the same to the Appellant, APML.

16. In view of the above, the Appeal No. 155 of 2019 deserves to be allowed and Appeal No. 116 of 2019 is liable to be dismissed.

ORDER

For the foregoing reasons, we are of the considered view that the issues raised in the Appeal No. 155 of 2019 have merits and hence, appeal is allowed. The Appeal No.116 of 2019 is dismissed as devoid of merits.

The impugned order dated 07.02.2019 passed by Maharashtra Electricity Regulatory Commission in Case No. 290 of 2018 is hereby set aside to the extent decided in our findings, stated supra.

The State Commission is directed to issue the consequential orders as expeditiously as possible within a period of three months from the pronouncement of this judgment / order.

In view of the disposal of the Appeal, the relief sought in the IA No.505 of 2019 in Appeal No. 116 of 2019 does not survive for consideration and accordingly,stands disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **28th day of September, 2020.**

(S.D. Dubey)
Technical Member

(Justice ManjulaChellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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