IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 168 OF 2019 &
IA NOS. 510 of 2019 & 1951 of 2019

Dated: 03rd November, 2020

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

In the matter of:

1. **Uttar Haryana Bijli Vitran Nigam Ltd.**
   Vidyut Sadan, Plot No. C-16,
   Sector 6, Panchkula, Hayana – 134112

2. **Dakshin Haryana Bijli Vitran Nigam Ltd.**
   Vidyut Nagar, Vidyut Sadan,
   Hissar, Haryana-125 005.

Through:

Haryana Power Purchase Centre
Shakti Bhawan, Sector 6,
Panchkula – 134109 (Haryana)

….**Appellant(s)**

Versus

1. **Adani Power (Mundra) Limited,**
   Through its Managing Director,
   Shikar, Near Mubhakali Circle,
   Navrangpura,
   Ahmedabad – 390 009.

2. **Prayas (Energy Group)**
   Through its Secretary,
   Athawale Corner, Karve Road,
   Deccan Gymkhana,
   Pune – 411 004.

3. **Central Electricity Regulatory Commission**
   Through its Secretary,
   3rd and 4th Floor, Chandralok ,
   36, Janpath, New Delhi-110001.

….Respondent(s)

Counsel for the Appellant : Ms. Ranjitha Ramachandran

Ms. Anushree Bardhan
Ms. PoorvaSaigal
Mr. Pulkit Agarwal
Mr. Shubham Arya
Mr. Arvind Kumar Dubey

Counsel for the Respondent(s) : Mr. Amit Kapur
Ms. Poonam Verma
Ms. Aparajita Upadhyay
Mr. Sidhant Kaushik
Ms. Sakshi Kapoor
Mr. Adishree Chakraborty
Mr. Saunak Kumar Rajguru for R-1

J U D G M E N T

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

1. The present Appeal is filed by two Haryana Distribution Companies namely UHBVNL and DHBVNL. The Appeal is directed against the impugned order dated 31.05.2018 passed by the Central Electricity Regulatory Commission (herein after referred to as the 'Central Commission') in Petition No. 97/MP/2017. The said Petition was filed by Adani Power Mundra Limited seeking implementation of the Supreme Court's judgment in Energy Watchdog & Anr. vs. CERC & Ors. (2017) 14 SCC 80 (hereinafter referred to as "**Energy Watchdog Judgement**") wherein Central Commission was directed to compute compensation on account of the domestic coal shortfall occasioned by Change in Law under Article 13 of the Power Purchase Agreements dated 07.08.2008 ("herein after referred to PPAs").

1.1 As per the Appellants, the Central Commission in the Impugned Order has considered the implication of the New Coal Distribution Policy, 2013 (herein after referred to as 'NCDP'), the letters and communications of the Central Government in regard to the extent of availability of domestic coal for generating power from Units 7, 8 and 9 of the Mundra Power Project (3 x 660 MW) of Adani Power Mundra Limited (herein after referred as '**Adani Power**'). Adani Power had

entered into PPAs with the Appellants herein for generation and sale of electricity from the aforesaid three generating units for a contracted capacity of 1424 MW.

1.2 As per the Appellants, the Central Commission has proceeded on the basis that Adani Power's bid for supply of 1424 MW of the contracted capacity was based on the domestic coal (NCDP 2007), despite the consistent stand taken by Adani Power that the bid submitted was premised on 70% domestic coal and 30% imported coal. Thus, there is an error in the approach adopted by the Central Commission for implementation of the Energy Watchdog Judgement by basing its decision on the fact that the bid submitted by Adani Power and supply of electricity from the generating units 7, 8 and 9 is premised entirely on the availability of domestic coal.

1.3 The Appellants also submitted that without prejudice to the above, there are some other errors in the decision of the Central Commission in deciding the methodology for computation of shortfall in the availability of domestic coal to be allowed as Change in Law in terms of the Energy Watchdog Judgement.

2. BRIEF FACTS OF THE CASE :-

2.1 Uttar Haryana Bijli Vitran Nigam Ltd & Dakshin Haryana Bijli Vitran Nigam Ltd (herein after referred as "Haryana Utilities / Appellants") are the distribution licensees undertaking the distribution and retail supply of electricity to the consumers at large in the State of Haryana. Haryana Utilities have entered into two PPAs both dated 07.08.2008 with Adani Power Mundra Limited (originally with Adani Power Limited) for procurement of contracted capacity of 1424 MW from generating units 7, 8 and 9 established by Adani Power at Mundra in the State of Gujarat.

2.2 The PPAs were entered into pursuant to a Tariff Based Competitive Bidding Process initiated by the Haryana Utilities under Section 63 of the Electricity Act, 2003 as per the Standard Bidding Guidelines notified by the Central Government.

2.3 As per the Appellants, the bid submitted by Adani Power was based on both imported coal and domestic coal.

2.4 Adani Power had filed Petition No 155/MP/2012 on 05.07.2012 before the Central Commission seeking *inter alia*, relief of increase in tariff on various grounds. One of the grounds was that the Indonesian Regulations promulgated by the Government of Indonesia providing for the application of benchmark price for export of coal from Indonesia resulted in higher price of coal and hence higher cost of generation of power. Adani Power also claimed: -

i. Force Majeure Event within the scope of Article 12; and

ii. Change in Law within the scope of Article 13 of the PPAs.

In addition, Adani Power had also claimed that there was a shortage in the availability of domestic coal.

2.5 Petition No 155/MP/2012 culminated into Orders dated 02.04.2013 and 21.02.2014 by the Central Commission which were appealed before this Tribunal by way of batch of appeals, lead being Appeal No. 100 of 2013. This Tribunal decided Appeal No. 100 of 2013 and batch vide Order dated 07.04.2016 which became a subject matter of proceedings in Civil Appeal Nos. 5399-5400 of 2016 and batch matters, namely, *Energy Watchdog* v *Central Electricity Regulatory Commission and Others*. The Supreme Court disposed of the Civil Appeals on 11.04.2017 and Energy Watchdog Judgement was passed wherein the Supreme Court, *inter alia*, held as under:

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

58. ..The Central Electricity Regulatory Commission will, as a result of this judgement, go into the matter afresh and determine what relief should be granted

to those power generators who fall within clause 13 of the PPA as has been held by us in this judgement. "

2.6 In the Energy Watchdog Judgement, the Supreme Court, however, rejected the claim of Adani Power for increase in price of coal due to change in Indonesian Regulations either on account of Change in Law or under Force Majeure provisions of the PPA (Article 12). The Supreme Court allowed Adani Power's claim of Change in Law *qua* domestic coal shortfall or non-availability and remanded the matter to the Central Commission for fresh determination of Change in Law issue *qua* domestic coal shortfall.

2.7 Pursuant to the said remand, Adani Power filed Petition No. 97/MP/2017 in May 2017 before the Central Commission seeking implementation of the Energy Watchdog Judgment. In the pleadings before the Central Commission in Petition No. 97/MP/2017, Appellants stated that the parties had proceeded on the basis of the NCDP, 2013 and its implication on Adani Power resulting into reduced availability of domestic coal. As per the Appellants, Adani Power itself had claimed relief in regard to 70% domestic coal as the bid was premised on 70% domestic coal and 30% imported coal.

2.8 Petition No. 97/MP/2017 was disposed of by way of the Impugned Order dated 31.05.2018. At Para 30, the Central Commission while dealing with the issue as to the quantum of domestic coal to be considered has, inter alia, recorded as under:

".....CEA/MoP recommended 70% of the installed capacity of 1980 MW and accordingly, the Petitioner was sanctioned the coal linkage corresponding to 1386 MW being 70% of the installed capacity. Therefore, the Petitioner could not have factored in its bid that it would supply 70% of the contracted capacity by using domestic coal and 30% by using imported coal. Accordingly, the Petitioner has been granted coal to generate 70% of 1980 MW installed capacity i.e. 1386 MW. Since the Petitioner has entered into PPAs for 1424 MW (1566 MW gross approximately) which is more than the linked capacity of coal, the Petitioner is entitled to get supply of full ACQ under the FSA i.e. 64.05 lakh tonnes per annum. In fact as per the data available on the website of MCL, the ACQ quantity and the effective ACQ quantity of coal granted to the Petitioner are the same i.e. 64.05 lakh tonnes which means that the Petitioner is entitled for the said quantity and ACQ is not required to be pro-rated again at 70% with reference to 1424 MW contracted capacity. Therefore, the contention of Prayas that the Petitioner is getting assured quantity of domestic coal to enable the generation to the extent of 1109 MW is not correct as the Petitioner is entitled under the FSA for assured quantity of coal to generate 1386 MW of electricity."

2.9 As per the Appellants, the above conclusion is contrary to the fundamental basis on which Adani Power had approached the Central Commission way back in the year 2012 for redressal in regard to the coal cost, the pleadings by Adani Power before the Central Commission, this Tribunal in the earlier round of proceedings and the Supreme Court including the pleadings and submissions made in Petition No. 97/MP/2017. The consistent and admitted stand of Adani Power had been that the bid submitted by Adani Power to the Appellants was premised on 70% of the coal availability from domestic sources and 30% being imported coal.

2.10 In the Impugned Order at Para 33, the Central Commission, while dealing with the specific contention that the Change in Law is applicable only for shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014-15, 2015-16 and 2016-17, had rejected the claim holding as under:

" ..... In our view, the contention of Prayas is not correct. As per Para 4.6 of the FSA, MCL is liable to pay compensation for the 'failed quantity' (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate at 0.01% calculated on the basis of the [single] average of base price as per schedule III of the FSA. Moreover this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% tor the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import."

2.11 As per the Appellants, this decision is also contrary to the decision already taken by the Central Commission in case of other generators with respect to the operating parameters; such as GMR Kamalanga Energy Limited order in 79/MP/2013 dated 03.02.2016; DB Power Limited - Petition No. 101/MP/2017 dated 19.12.2017 and 229/MP/2016 dated 19.12.2017; and GMR Warora Energy Limited - Petition No. 11/MP/2017 dated 16.03.2018.

2.12 As per the Appellants, in Para 35 of the Impugned Order, the Central Commission has held that Adani Power is entitled to compensation for the period 01.04.2013 to 31.03.2017 thereby granting retrospective operation of the MoP letter dated 31.07.2013 which is not permissible.

The phrase 'remaining four years' does not require full calendar years. The phrase denotes the financial years and therefore the period from 31.07.2013 to 31.03.2017 and not effective from 1.4.2013.

2.13 In Para 46 of the Impugned Order, the Central Commission has allowed the Change in Law as the difference between the actual cost of generation using alternate coal and energy charges quoted by Adani Power. As per the Appellants, the Change in Law is for procurement of alternate coal to make up for shortfall in domestic coal and therefore the compensation is for the difference between landed cost of domestic linkage coal (if the domestic coal was procured) and landed cost of alternate coal.

2.14 Aggrieved by the Impugned Order, the Appellants had filed a Review Petition No. 24/RP/2018 which was rejected by the Central Commission on 03.12.2018. Hence, the present appeal.

3. **We have heard Mr. M.G. Ramachandran, learned counsel for the Appellant, Mr. Amit Kapur, learned counsel for Respondent No.1 at considerable length of time and also carefully gone through their written submissions and arguments during the proceedings. The following four issues have emerged in the Appeal for our consideration**:-

Issue No.1:- Whether the Central Commission was justified in holding that Adani Power's bid was based entirely on domestic coal availability and hence entitled to Change in Law relief on account of domestic coal shortfall?

Issue No.2:- Whether shortfall in domestic coal was due to Change in Law and compensation should be limited to the difference between 100% of ACQ and 65%, 65%, 67% and 75% of ACQ as specified in NCDP 2013?

Issue No.3:- Whether the start date of Change in Law compensation allowed by the Central Commission amounts to retrospective operation of Ministry of

Power's letter dated 31.07.2013?

Issue No.4:- Whether the Central Commission erred in ignoring the methodology for computation of Change in Law compensation laid down in its earlier Order in Petition No. 79/MP/2013 – GMR Kamalanga Energy Ltd. & Anr. vs. DHBVNL &Ors. ("GMR Case")?

Our Consideration & Findings :-

4. **Issue No.1:-**

4.1 Learned senior counsel for the Appellant, Mr. M.G. Ramachandran submitted that Adani Power's bid was premised on both domestic coal and imported coal in a 70:30 ratio. Central Commission granted Change in Law relief on account of domestic coal shortfall by considering that Adani Power's bid was based entirely on domestic coal availability. This is inconsistent with the directions of Supreme Court in Energy Watchdog Judgement. He submitted that Adani Power had filed Petition No. 97/MP/2017 before Central Commission seeking implementation of the Energy Watchdog Judgment. However, in the Impugned Order, Central Commission went beyond the specific observations of the Energy Watchdog Judgment. Para 58 read along with Para 55 of the Energy Watchdog Judgment specifically provides that Adani Power's fuel source was 70% domestic and 30% imported coal. Central Commission proceeded on the basis that the entire 1386 MW under the PPAs is premised on domestic coal linkage. In doing so, Central Commission has overlooked the fact that only 70% of fuel requirement was premised on domestic coal and rest 30% on imported coal. While submitting the bid on 25.11.2007, Adani Power relied on the two Memorandum of Understandings for imported coal entered into by Adani Power with Messrs Coal Orbis, Germany and Kowa Company, Japan. During the bid submission, there was no LoA or FSA available with Adani Power in regard to the domestic coal. Adani Power, therefore, envisaged procurement through import of coal as against wholly relying on domestic coal. Further, Adani Power never

represented during PPA signing or during bid submission that Adani Power's fuel requirements were premised entirely on availability of domestic coal. With or without NCDP 2013, Adani Power was to source 30% of coal requirement for the PPA capacity using imports. Therefore, restitutive relief due to NCDP 2013 cannot relate to the said 30% and can only relate to the extent of 70% which was cut-down due to NCDP 2013.

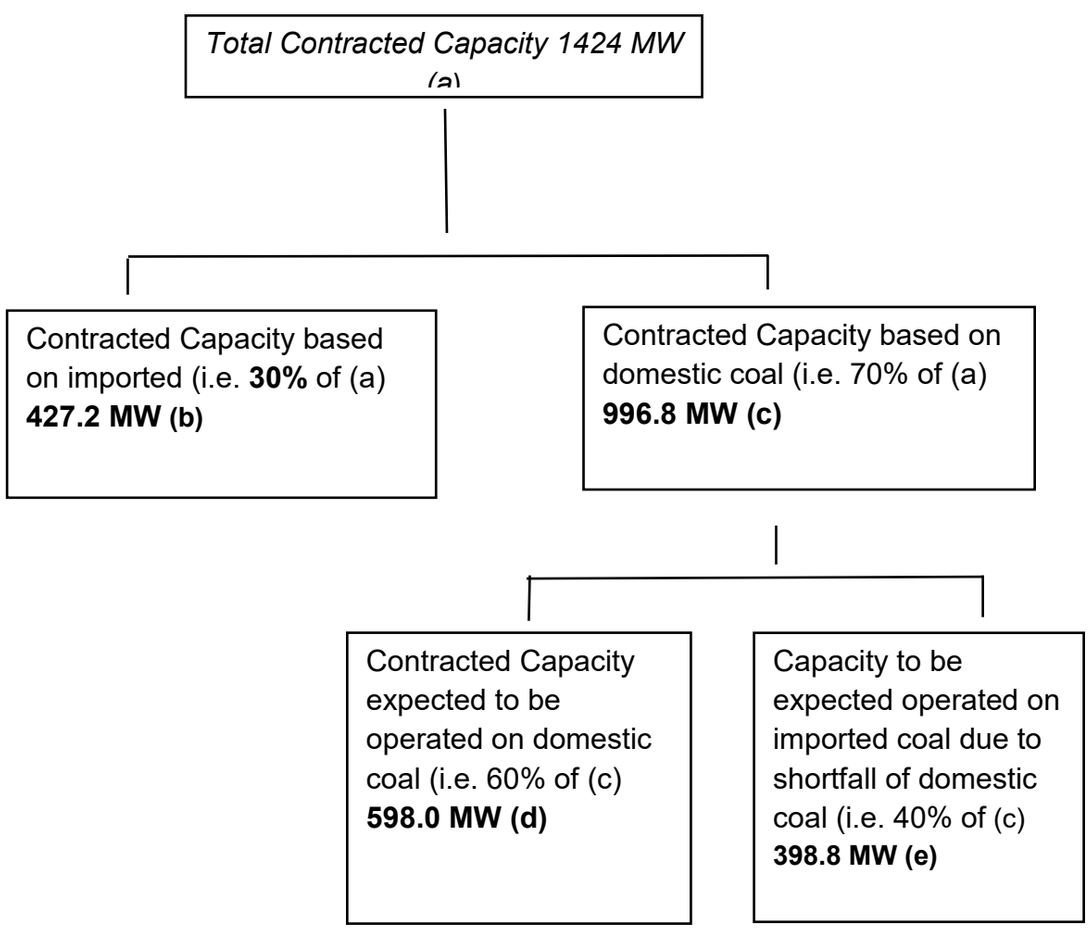
4.2 Learned senior Counsel further submitted that the consistent and the admitted stand of Adani Power has been that the bid submitted by Adani Power to the Haryana Utilities was premised on both domestic coal and imported coal in a 70:30 ratio. The finding returned by Central Commission in Para 30 of the Impugned Order is contrary to the basis on which Adani Power had approached Central Commission in 2012 to offset the additional coal cost (Petition No. 155/MP/2012); consistent pleadings by Adani Power before Central Commission, this Tribunal and the Supreme Court (Energy Watchdog proceedings) and then the pleadings and submissions made in Petition No. 97/MP/2017. With respect to the pleadings of Adani Power, reliance was placed on paras 18-21 of the Written Submissions, which are briefly extracted hereunder: -

"*18. In regard to the above the relevant pleadings and proceedings before the Central Commission, this Tribunal and the Supreme Court are as follows:*

(a) *Petition dated 05.07.2012 filed by Adani Power being Petition No. 155 of 2012 (Page 399 at 405, 406-407 Vol 11):*

> ***"13.At the time when the PPAs were executed by the Applicant expected to receive 70% indigenous/domestic coal supply from MCL (a subsidiary of CIL) and balance i.e. 30% from Indonesian coal*** *for which Applicant on 15th April 2018 have tied up with Adani Enterprises Limited (hereinafter referred to as "AEL") for the procurement of coal from Indonesia. As the Applicant's application for coal linkage waspending, it was provisionally agreed with AEL that subject to the coal linkage, the Applicant would procure balance quantity of imported coal from AEL.* ***For the procurement of the 70% domestic coal****, the Applicant received the Letter of Assurance (LOA) from MCL for 70% of it's capacity and Applicant further also achieved all the milestones which are required for execution of Fuel Supply Agreement.*
>
> ……

17. Our FSA with CIL also envisaged that CIL will supply quantity equivalent to 20% of Annual Contracted Quantum by Import of coal to meet supply trigger quantity of 80% for new FSAs. However, such supply shall only be made on the payment of imported coal prices by project developer which is way higher than the domestic coal. In case the developer does not opt for such imported coal offered under FSA, CIL obligation will be construed to be fulfilled to that extent. Therefore, the proportion of Contracted Capacity based on imported coal will increase as shown below due to shortfall in supply of committed coal by CIL.



The expected capacity to be operated based on imported and domestic coal:

		Original Scenario	*Expected Present Scenario*
Contracted Capacity	*MW*	*1424(a)*	*1424 (a)*
Capacity based on imported coal	*MW*	*427.2 MW (b)*	*826 MW (b+e)*
Capacity based on Domestic coal	*MW*	*996.8 MW (c)*	*598 MW (d)*
	% of Contracted Capacity	*70%*	*42%*

Emphasis Supplied

(b) *Order dated 02.04.2013 passed by the Central Commission in Petition No. 155/MP/2012:*

"6. The petitioner had made an application on 28.1.2008 to the Standing Linkage Committee (Long Term), Ministry of Coal, Government of India for long term coal linkage. The Standing Linkage Committee (Long Term) {(hereinafter "SLC(LT)} in its meeting held on 12.11.2008 decided that projects considered as coastal projects would have an import component of 30% for which the developer had to tie up sources directly and Letter of Assurance would be issued for 70% of the recommended capacity only. Accordingly, SLC (LT) authorized issuance of LOA by Coal India for capacity of 1386 MW for Phase IV of the project 70% of installed capacity of 1980 MW) in accordance with the provisions of New Coal Distribution Policy. The petitioner got a letter of assurance from Mahanadi Coal Field Ltd. vide its letter dated 25.6.2009 for 6.409 Million MT per annum which corresponded to 70% of fuel requirement of Phase IV of the project. The petitioner in its letter dated 23.9.2009 addressed to Haryana Power Purchase Centre, the authorized representative of Haryana Utilities, informed that LoA had been received by it from Mahanadi Coalfield Limited for supply of indigenous coal equivalent to 70% of its coal requirement and for the balance, it was proposed to use the imported coal from the petitioner's mines in Indonesia. The Petitioner entered into a Coal Supply Agreement (CSA) dated 9.6.2012 for supply of annual contracted quantity of 64.05 lakh Tonnes of coal per annum for a period of 20 years with Mahanadi Coalfields Ltd. As per Schedule VII of the CSA, supply of coal under CSA from domestic sources is not likely to exceed 80% of annual contracted quantity and balance 20% shall be sourced through import subject to confirmation by the petitioner either to accept the supply through import or to surrender the required annual contracted quantity. The petitioner has exercised its option to accept 20% of annual contracted quantity through import.

(c) *Order dated 21.02.2014 passed by the Central Commission in Petition No. 155/MP/2012:*

"102. In case of Haryana, the petitioner has quoted energy charges of Rs. 1.96 per unit in the bid. ***The premise of quoting energy charges was 70% domestic coal and 30% imported coal as per the affidavit submitted by petitioner****. Due to shortage of domestic fuel, the quantity of imported coal has increased in terms of contracted capacity which has been worked out as under;"*

{Emphasis supplied}

(d) *Affidavit dated 08.05.2015 filed by Adani Power in Appeal No.98 of 2014 before Tribunal (Page 481-482 Vol II):*

"4. I say that on 25.06.2009, coal linkage was granted to Adani Power for 70% of the installed capacity of 1980 MWs of Units 7,9 and 9

Mundra Power Project. ***Adani Power's bid dated 25.11.2007 was premised on 30% imported and 70% domestic coal linkage****…."*

{Emphasis supplied}

(e) Judgment dated 07.04.2016 passed by the TribunalinAppeal No. 100 of 2013 and Batch

"13. Adani Power did not opt for any escalation on the tariff for 25 years period either in the capacity charges or in the variable / energy charges. ***The bid of Adani Power was based on blend of domestic and imported coal in the ratio of 70:30****. In format 4, Adani Power indicated the representative fuel as coal and the fuel type as 'imported/indigenous coal'. In support of the fuel linkage, Adani Power submitted the copies of the MoUs dated 09/09/2006 and 21/12/2006 between AEL and M/s. Coal Orbis Trading GMBH and Kowa Company Limited of Japan respectively."*

[Emphasis supplied]

(f) Affidavit dated 04.08.2016 by Adani Power in Petition No. 155/MP/2012 (Page 483 at 484 Vol II)

*"**(b)…….***

Basis of Haryana PPA:

I say that Haryana bid price of Rs. 2.94/unit was premised on the blend of 70% indigenous coal and 30% imported coal which also included transmission charges and losses*. The bid relied on regulated CIL prices for domestic and long-term p rice hedge for imported coal that was then available in Indonesia market. Accordingly appropriate escalation factor was considered to derive the quoted energy charges in the bid.*

Details of Bid parameters assumed in the bids for Gujarat and Haryana including escalation factors are enclosed herewith as Annexure-II."

Further in the Annexure to the said Affidavit it was stated as under (quoted at Page 15 in the Appeal Vol I):

*"**Annexure II: Detailed of Bid Parameters assumed in the Bids for Gujarat and Haryana including escalation factors***

……

2. Basis of Bid – Haryana

Adani Power submitted bid for levelized tariff of Rs.2.94 per kWh in Haryana on 24.11.2007 wherein Energy Charges of Rs.1.38

per kWh (excluding transmission charge, losses & SFO) was based on the following assumptions:-

- ***Blending Ratio of Domestic : Imported = 70:30***
- *SHR - @ 2230 kcal/kg for coal*
- *Heat Rate Degradation- @ 0.25% post 3 years approximate*
- *Auxiliary Consumption - @ 6.5%*

[Emphasis supplied]

(g) *Cross Objections dated 17.08.2016 on behalf of Adani Power before Supreme Court in Civil Appeal No. 5348 of 2016 (Page 492 at Page 533, 534-535 Vol II):*

> *"II. Because Ld. Tribunal failed to appreciate that the definition of the term 'Law' and 'Change in Law', under the PPA, is to be interpreted in the context that **supply of power is predicated on imported coal (100% in case of Gujarat pursuant to Ld. Tribunal's Judgment dated 07.09.2011 and 30% in case of Haryana……***
>
> *KK. BECAUSE, Ld. Tribunals, failed to appreciate that:-*
>
> *……..*
>
> *(e) **Supply under the PPA is based on imported coal (30% in case of Haryana** and 100% in case of Gujarat) and the Project Documents are defined to include Fuel Supply Agreement. Any Change in Law affecting the Fuel Supply Agreement affects the Project and the operation thereof."*
>
> *[Emphasis supplied]*

(h) Judgment dated 11.04.2017 passed by the Supreme Court in Civil Appeal No. 5399-5400 and Batch reported as (2017) 14 SCC 80

> *"55. It was also argued, placing reliance upon the fact that a commercial contract is to be interpreted in a manner which gives business efficacy to such contract, that the subject matter of the PPA being "imported coal", obviously the expression "any law" would refer to laws governing coal that is imported from other countries. We are afraid, we cannot agree with this argument. There are many PPAs entered into with different generators. Some generators may source fuel only from India. **Others, as is the case in the Adani Haryana matter,would source fuel to the extent of 70% from India and 30% from abroad**, whereas other generators, as in the case of Gujarat Adani and the Coastal case, would source coal wholly from abroad. The meaning of the expression "change in law" in clause 13 cannot depend upon whether coal is sourced in a particular PPA from outside India or within India."*

[Emphasis supplied]

19. *It is submitted that the Impugned Order has been passed for implementation of the decision of the Supreme Court in the Energy Watchdog Case. It was therefore not open to the Central Commission to decide the matter contrary to the specific finding by the Supreme Court.*

20. *It is submitted that Para 57 and 58 of the decision in Energy Watchdog have to be read in the context of the Para 55 and Para 56 which lays refers to the Laws. Para 57 refers to the extent the supply of India Coal due to such change in law is cut down. When the premise is that Indian Coal was intended to be only for 70% of coal requirement for the generation, the consideration for shortfall has to be also against such percentage only. Further Para 58 refers to the relief to persons who source supply of coal from indigenous sources. This in context of Adani Power refers only to 70%. The above fact is also clear from pleadings and proceedings before the Central Commission, this Tribunal and the Supreme Court which are reproduced hereinbelow.*

21. *It is submitted that in the Petition No. 97/MP/2017 filed by Adani Power in pursuance to the above decision in Energy Watchdog, the following reflect the fact that Adani Power had premised the bid on 70% domestic coal and had sought for relief to that extent only:*

(a) <u>Petition No. 97/MP/2017 filed by Adani Power</u>(Page 283 at 288 and 290 of Appeal Vol I)

> *"11. It is submitted that due to the above mentioned Change in Law events that took place from time to time (after cut-off date prescribed in Clause 4.7 of the Competitive Bidding Guidelines and Article 13 of the PPA), Adani Power was forced to procure the high cost imported coal {due to shortfall/unavailability of domestic coal to the extent of 70% as premised in its bid) to generate and supply the power at the rate under the PPAs.....*
>
> *……*
>
> *17. In the proposed methodology, other parameters including Energy Charge Rate for Other Coal have been worked out as follows:*

Parameter	***Unit***	***Formula***	***Value***	***Remark***
Common Parameters				
70% of Scheduled Energy at Haryana Periphery	*MU*	*K*	*6,956*	*At Haryana Periphery; Based on REA*

Parameter	***Unit***	***Formula***	***Value***	***Remark***
Transmission Loss	*%*	*L*	*3.85%*	*PoC loss as per NLDC*
Normative Auxiliary Consumption	*%*	*M*	*7.76%*	*As per CERC Norms provided in Tariff Regulations, 2009& 2014 plus 1.92% for FGD*
Gross Generation	*MU*	*N=K/(1-L)/(1-M)*	*7,835*	
Gross SHR	*KCAL/kwh*	*0*	*2,309*	*As per CERC Norms provided in Tariff Regulations, 2009 &2014*
Domestic Coal				
Actual Domestic Coal Quantum corresponding to PPA	*M Tons*	*P*	*35,85,319*	
Domestic Coal GCV	*Kcal/Kg*	*Q*	*3,397*	*As certified by 3rd Party sampling agency*
Energy from Domestic Coal	*MU*	*R=PXQ/0/1000*	*5,274*	
Imported /Alternate Coal				
Balance Energy from Imported Coal	*MU*	*S=N-R*	*2,560*	
GCV of imported Coal	*Kcal/Kg*	*T*	*4,490*	*As certified by 3rd Party*

Parameter	***Unit***	***Formula***	***Value***	***Remark***
				sampling agency
Wt. Avg. price of imported coal	*Rs./MT*	*U*	*4,435*	*As per Auditor Certificate*
ECR-other coal excluding Transmission Charges	*Rs./kWh*	*V=(O*U)[T*(1-L)*(1-M)/1000*	*2.57*	

Further in the Annexure to the Petition also, the consideration was on 70% (the relevant extract quoted in Appeal at ***Page 17-19 Vol I****)*

"***Annexure III:***

Statement indicating the compensation applicable for the period up to March 2017

Particulars	***Unit***	***2012-13***	***2013-14***	***2014-15***	***2015-16***	***2016-17***
Step 1						
Energy Charge Rate (ECR quoted)	*Rs./kWh*	*1.190*	*2.145*	*2.161*	*2.181*	*2.198*
Energy from Domestic Coal	*Rs./kWh*	*1,238*	*3,107*	*4,584*	*5,583*	*5,275*
Step 2						
ECR-other coal excluding Transmission Charges	*Rs./kWh*	*2.227*	*2.444*	*2.340*	*2.300*	*2.569*
Transmission Charges	*Rs./kWh*	*0.48*	*0.43*	*0.44*	*0.33*	*0.41*
ECR-other coal (at Delivery Point including Transmission Charges	*Rs./kWh*	*2.707*	*2.874*	*2.780*	*2.630*	*2.984*
Balance Energy from Imported Coal	*MU*	*827*	*4,908*	*2,650*	*2,284*	*2,560*

Step 3						
Wt. Avg. ECR chargeable at Delivery Point	*Rs./kWh*	*1.798*	*2.591*	*2.388*	*2.311*	*2.455*
Loss per Unit	***Rs./kWh***	***0.608***	***0.446***	***0.227***	***0.130***	***0.257***
Scheduled Energy at Haryana Periphery	*MU*	*1,890*	*7,214*	*6,445*	*7,010*	*6,956*
Change of Law Relief in Common Parameters	***Rs. Crs.***	***114.88***	***321.92***	***146.11***	***91.32***	***178.66***

Common Parameters						
70% of Scheduled Energy at Haryana Periphery	*MU*	*1,890*	*7,214*	*6,445*	*7,010*	*6,956*
Transmission Loss	*%*	*0.00%*	*1.71%*	*3.51%*	*3.48%*	*3.85%*
Normative Auxiliary Consumption	*%*	*8.42%*	*8.42%*	*7.67%*	*7.67%*	*7.67%*
Gross Generation	*MU*	*2,064*	*8,014*	*7,234*	*7,867*	*7,835*
Gross SHR	*Kcal/kwh*	*2,354*	*2,355*	*2,309*	*2,309*	*2,309*
Domestic Coal						
Actual Domestic Coal Quantum corresponding PPA	*M Tons*	*8,87,228*	*21,78,866*	*32,65,047*	*39,96,480*	*35,85,319*
Domestic Coal GCV	*Kcal/Kg*	*3,283*	*3,356*	*3,241*	*3,226*	*3,397*
Energy from Domestic Coal	*MU*	*1,238*	*3,106*	*4,583*	*5,583*	*5,274*

Imported/Alternate Coal						
Balance Energy from Imported Coal	*MU*	*827*	*4,908*	*2,650*	*2,284*	*2,560*
GCV of imported Coal	*Kcal/kg*	*4,871*	*5,272*	*4,791*	*4,522*	*4,490*
Wt. Avg. price of imported coal	*Rs./MT*	*4,221*	*4,926*	*4,326*	*4,014*	*4,435*
ECR other excluding Transmission Charges	*Rs/kWh*	*2.33*	*2.44*	*2.34*	*2.30*	*2.57*

(b) *Rejoinder dated 04.08.2017 filed by Adani Power to Reply by Appellants in Petition No. 97/MP/2017 (Page 351 at 357 Vol II)*

> *"14. It is submitted that the contents of paragraphs 4 to 6 of the Reply, are incorrect, arbitrary, devoid of facts and therefore denied. It is submitted the figure of 1109 MW is on gross basis, while that of 1139 MW on net basis which in itself is an incorrect comparison and it cannot therefore be said that the quantum of coal received from MCL was sufficient to meet the obligation of Adani Power under PPAs dated 07.08.2008. With regards to submissions of Adani Power vide affidavit dated 08.05.2015 filed before the Tribunal, it is submitted that as per the decision of the Supreme Court, the scope for grant of relief be in accordance with the restitutive principle enunciated in Article 13 of PPA.* ***The Petitioner's bid was based 70% on domestic coal and therefore, as stated above, the Petitioner has also proposed relief only corresponding to the energy short of 70% of scheduled energy generated using alternate coal****. It is submitted that the contention of Haryana Utilities that Adani Power is making profit by using domestic coal is patently incorrect and without any basis, as is evident from the Audited Annual Accounts of Adani Power Company which are available in the public domain."*
>
> *(Emphasis Supplied)*

(c) *Rejoinder dated 04.08.2017 filed by Adani Power to Reply by Prayas (Energy Group) in Petition No 97/MP/2017(Page 365 at Page 366) 370, 372, 373-374 Vol II)*

> *"2. It is regretted that Prayas has misrepresented the following aspects in its Reply:*

2.1 Prayas's Assertion: That claim of Adani Power that the PPA tariff assumes 100% domestic coal allocation based on the New Coal Distribution Policy 2007 ("NCDP") is patently false and erroneous.

Adani Power's Stand: No such statement has been made by Adani Power."

……

*7. **The issue that Adani Power's bid was premised on domestic and imported coal in the proportion 70-30 has attained finality**. It is imperative to note at no point in the proceedings before this Ld. Commission, the Tribunal or the Supreme Court has this objection been raised by any party including Prayas and to raise the said issue before this forum at this belated stage is inappropriate. It is submitted that raising such irrelevant contentions at this belated stage is only a dilatory tactic on behalf of Prayas to further delay the legitimate entitlement of Adani Power and to derail the process of justice.*

……

*14. It is submitted that the contents of paragraphs 2(b) and (c) of the Reply, are wrong, devoid of facts and therefore denied. It is denied that the FSA is signed based on only PPA capacity. It is signed for 70% of 1980 MW. **In fact, Adani Power has submitted the bid based on 70% domestic coal and balance 30% from imported coal much before execution of FSA. Therefore, Adani Power has proposed relief only for the energy shortfall of 70% of scheduled energy generated using alternate coal**. This is also prudent considering the fact that the relief has to be provided without deviating from the basis of the bid. "*

……

*18. It is submitted that the contents of paragraphs 2(h) of the Reply, save and except matter of record, all averments and allegations made therein are wrong and denied. Prayas has inter-alia not considered the transmission loss and auxiliary loss. Adani Power once again reiterates that the availability under the PPA is much higher than normative as contented by Prayas and therefore, any further computation based on such incorrect assumption deserves to be rejected summarily. **Prayas has contended that relief ought to be given for 70% portion based on domestic coal without analyzing the computation provided by Adani Power which is for the energy shortfall of 70% of scheduled energy generated using alternate coal**.*

……..

> *21. It is submitted that the contents of paragraph 4 of the Reply, save and except matter of record, all averments and allegations made therein are wrong and denied. It is submitted, in terms of Adani Power's affidavit dated 08.05.2015, Adani Power has considered entire domestic coal received from Mahanadi Coalfields ltd. under Fuel Supply Agreement dated 09.06.2012 towards power supplied to Haryana Utilities under PPAs dated 07.08.2008 till the time Adani Power enters into long term PPA with regard to balance capacity or till Government of India permits use of linkage coal towards supply on short term or medium term since the compensation was determined based on Regulatory Power de hors the PPA. However, subsequent to the Judgment of the Supreme Court, the scope for grant of relief shall be in accordance with the restitutive principle enunciated in Article 13 of PPA.* ***Adani Power's bid was based on 70% capacity based on domestic coal and therefore, as stated above, Adani Power has also proposed relief only corresponding to the energy short of 70% of scheduled energy generated using alternate coal****.*

4.3 Adani Power through its pleadings has admitted the arrangement of fuel procurement in a 70:30 ratio. He relied on a position of law that admission is the best evidence and referred to *Steel Authority of India Ltd.* vs.*Union of India* (2006) 12 SCC 233. He also submitted that Courts cannot go beyond the pleadings of the parties or grant relief beyond the relief sought by parties and referred to *Manohar Lal* vs. *Ugrasen* (2010) 11 SCC 557.

4.4 CEA's decision dated 12.11.2008 in the SLC(LT) meeting was never claimed as a Change in Law event by Adani Power in any petition. Impugned Order relied on the said decision despite there being no mention by Adani. There is no reference to the same even in the Energy Watchdog Judgment. Central Commission has premised its reasoning based on SLC(LT) meeting minutes. Thus, Central Commission in a remand proceeding, has gone beyond the Energy Watchdog Judgment, which is untenable.

4.5 In reference to the LoA dated 25.06.2009, it was argued that the normative requirement of coal for the Plant for the Appellants was 6.409 MT per annum. Reference was then placed on Schedule I of the FSA to contend that the linked capacity under the FSA is 70% of the Unit capacity (i.e. 70% of 1980 MW). Further so far as the Appellants are concerned, linked capacity under the FSA ought to be considered as 1139 MW (70% of 1424 MW). Out of 1139 MW capacity, Adani Power was required to supply 70% of the same based on domestic coal from MCL/SECL and for the balance 30%, Adani Power had to rely on imported coal. This is because Adani Power's bid was premised on both domestic and imported coal in a 70:30 ratio. During the hearing, Mr. Ramachandran fairly conceded that Adani Power has been using entire actual coal received from MCL towards the power supplied under the Haryana PPAs. It is for the first time in this Appeal, that Adani Power is trying to establish that the bid was for 100% domestic coal which is contrary to all documents on record. Principles of waiver, estoppel and acquiescence by conduct also applies against Adani Power. Having taken a consistent stand that the bid was premised on domestic coal and imported coal in a 70:30 ratio, Adani Power cannot now claim that it was based on 100% domestic coal.

4.6 He further submitted that the Central Commission on its own and without any basis has considered that the source of coal was to be 100% domestic coal. The Appellant's review petition challenging this finding was also erroneously rejected by the Central Commission vide order dated 03.12.2018. Adani Power in its Reply has sought to mix up the issue of 70:30 ratio which was the premise of the PPA and the bid and 100% of coal as per the FSA. These are

two different concepts. Coal supply under FSA is to be used to the full extent for supply of power to the Appellants and not to any other procurer. Any arrangement for domestic coal to meet the requirement of 70% of total requirement would be similarly considered. For example, if Adani Power has two FSAs – 50% for domestic coal and 50% for imported coal, the coal supplied against FSA for domestic coal would be considered entirely for the project but would constitute only a proportion (50%) of total requirement.

4.7 ***Per contra***, Mr. Amit Kapur, learned counsel appearing on behalf of Adani Power argued that Central Commission rightly computed restitutive relief to Adani Power in the Impugned Order pursuant to the principles settled in Energy Watchdog judgement and the challenge by the Appellants is misplaced and misconstrued. He submitted that the Supreme Court in Energy Watchdog Judgment has not put any fetters or ceilings or contemplated any deductions or withholdings in computing the compensation to a party affected by shortfall in supply of domestic coal by Coal India and its subsidiaries, viz.: -

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

58. However, Shri Ramachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced

even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources. It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal's judgment and the Commission's orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment."

4.8 He submitted that the Appellants sought procurement of 2000 MWs power on long-term basis on 25.05.2006. Adani Power submitted the bid for supply of 1424 MWs of power to the Appellants on 24.11.2007. As such, the cut-off date was 17.11.2007. On 07.08.2008, two PPAs were signed with each of the Haryana Utilities for supply of 712 MWs x 2 =1424 MWs. Relevant clauses of the PPAs provide that out of the installed capacity of 660 MWs x 3 Units = 1980 MWs, the contracted capacity for each Discom was 712 MWs. To deliver the contracted capacity of 1424 MWs at the Haryana periphery, the gross generation to be allocated in Phase-III for Haryana Utilities would be 1565.67 MWs, accounting for the permitted transmission loss of 2.85% (41.77 MW) and auxiliary consumption of 6.38% (99.90 MW).

4.9 He submitted that on 12.11.2008, the Standing Linkage Committee (Long-Term) of Ministry of Coal recommended that LoA be issued for Phase-III for a capacity of 1386 MWs, being 70% of 1980 MWs. On 25.06.2009, LoA was issued for 70% of 1980 MWs, i.e., 1386 MWs with the annual contracted capacity being 6.409 MT per annum of Grade "F" Coal. On 09.06.2012, Fuel Supply Agreement was signed by Mahanadi Coalfields Ltd. with Adani Power for supply

of 64.05 Lakh Tonnes per annum as set out in Schedule-I, i.e., the linkage capacity was 70% of the installed capacity, i.e., for 1386 MW out of 1980 MW.

4.10 In proceedings before Central Commission and this Tribunal, Haryana Utilities have consistently taken the following position: -

(i) ***Haryana Utilities reply dated 31.12.2012 to Petition No. 155/MP/2012***:

"*Para13: …Similarly, the coal linkage with Mahanadi Coal Field Limited was obtained subsequent to the submission of the bid. Further, the Petitioner has fuel linkage with Mahanadi Coal Field for 70% of the capacity of Units 7, 8 and 9 and the Petitioner is in a position to generate and supply 1424 MW of the contracted capacity out of such fuel linkage…."*

"Para 14 to 17: …Without prejudice to the above, the Petitioner has coal linkage arrangement with Mahanadi Coal Field Limited for procurement of coal which is sufficient for generation of electricity of 1424 MW for supply to the Haryana Utilities…The Petitioner is required to give priority for generation and supply of 1424 MW contracted capacity to the Haryana Utilities."

(ii) ***Written Submissions on behalf of Haryana Utilities dated 05.05.2015 in Appeal No. 98 of 2014 and Appeal No. 100 of 2013:***

"40. In view of the above, the following are the basis foundation for determining the extent of compensatory tariff, if any, to be considered for the hardship alleged by Adani Power:
(a) quoted energy charges for the period from SCOD and till 31.03.2017, namely till 3 years from the date of the Order dated 21.02.2014 considered by the Central Commission;
(b) proportion of domestic coal and imported coal taken at 70: 30. The FSA/Coal Supply Agreement dated 09.06.2012 with Mahanadi Coal Fields Ltd for Coal Supply for 70% of the total capacity of the 1980 MW (Reference Page 244 of the Volume E);
(c) quantum of domestic coal available from the CIL of 58% against 70%;
(d) Admittedly the bid assumption are:
a. GCV = 5200 kcal/kg
b. SHR = 2230 kcal/kwh
c. Auxiliary Consumption = 6.5%
41. In view of the above assumptions, two aspects to be considered are –
(a) to mitigate, Adani Power should use the entire domestic coal availability towards the contracted capacity of the Appellants first, then

the imported coal for the deficit to read the targeted PLF. Further, the entire domestic coal available should be accounted for 1424 MW;
(b) The above would be fair and proper in calculating the compensatory tariff/hardship after having held that under the Power Purchase Agreement, Adani power has no right to claim any tariff adjustment either for Force Majeure or for Change in Law. It is a question of dealing with Adani Power hardship and not a cause of action to enforce legal rights."

(iii) ***Haryana Utilities reply dated 31.07.2017 in Petition no. 97/MP/2017***:

"6…… It is submitted that with regard to the consumption of Coal, respondents relied on the affidavit of petitioner dated 8.5.2015 filed before APTEL where petitioner admitted that the entire actual domestic coal received from MCL would be allocated towards the power supplied under the Haryana PPAs for the purpose of computation of compensatory tariff. Thus the actual coal received from MCL is required to be considered towards power supplied under Haryana PPAs for the purpose of relief under force majeure."

"14.b (iv)…..Hence, the entirety of domestic coal available from MCL under the FSA is to be and should be exclusively adjusted with the obligations as owed to the Respondents only."

(iv) ***Haryana Utilities IA No. 12 of 2018 dated 04.03.2018 in Petition No. 97/MP/2017***:

"9….It is submitted that the entire quantum of domestic coal available from MCL under the FSA dated 9.6.2012 was to be exclusively used for generation and supply of electricity to the Haryana Utilities under the PPA dated 7.8.2008. Adani Power had filed an affidavit being dated 8.5.2015 before the Appellate Tribunal for Electricity in the earlier proceedings being Appeal No. 100 of 2013 in pursuance to the Order dated 7.5.2015, as under: …

> *5. I say that currently Adani Power is supplying power under long term PPAs to Appellant Discoms only from Units 7-9 Adani Power is in the process of entering into long term PPAs for the balance capacity of 556 MW. I say that the entire actual domestic coal received from MCL will be allocated towards the power supplied under Haryana PPAs for the purpose of computation of compensatory tariff in accordance with Government of India guidelines. Adani Power will accordingly raise the invoices for compensatory tariff and will revise the invoices raised till date. "*

(v) ***Haryana Utilities Written Submissions and rejoinder dated 01.05.2018 in IA No. 21 of 2018 in Petition No. 97/MP/2017***:

"4…….The primary pre-condition for claiming such relief is that the Adani Power shall utilise all the coal available from the linked mines for generation and supply of electricity to Haryana Utilities from Units 7, 8

and 9 of the Mundra Power Project and shall claim only the additional cost incurred to procure alternative coal including imported coal only to the extent of the actual shortage in the quantum of coal from the linked mines, due to the domestic coal companies not making available the quantum rom the linked mines."

"8. (b)…In view of the above specific admission by Adani Power the entire quantum of coal offered by MCL and SECL and available to Adani Power should be considered as available for Generation and supply of electricity to Haryana Utilities. Adani Power cannot. Be allowed to wriggle out of the above admission."

4.11 He further submitted that as directed by this Tribunal on 07.05.2015, Adani Power filed an Affidavit dated 08.05.2015 in Appeal No. 98 of 2014 and Appeal No. 100 of 2013 confirming that:-

"4. I say that on 25.06.2009, coal linkage was granted to Adani Power for 70% of the installed capacity of 1980 MWs of Units 7, 8 and 9 [of] Mundra power project. Adani Power's bid dated 25.11.2007 was premised on 30% imported and 70% Domestic Coal linkage. Accordingly, the allocation of coal for the long term PPA capacities is demonstrated herein below:-

Particular		
Gross Capacity of Phase IV	*MW*	*1980*
Contracted Capacity of Haryana PPA / % of gross capacity	*MW*	*1424 (71.91% of 1980 MW)*
Balance Capacity (presently 400 MW tied up in Medium term PPA)	*MW*	*556 (28.09% of 1980 MW)*
Total Capacity for which linkage is granted @70%	*MW*	*1386 (70% of 1980)*
Linkage Capacity corresponding to Haryana PPA on prorate	*MW*	*997 (71.91% of 1386)*
Linkage Capacity corresponding to Balance Capacity on prorate	*MW*	*389 (28.09% of 1386)*

4.12 It is at the insistence of Haryana Utilities that the entire domestic coal linkage came to be allotted for the Haryana PPAs, i.e., linkage for 1386 MWs has been allotted towards the 1566 MW gross capacity. This position is consistent with the Ministry of Coal

Guidelines and the then existing Coal Distribution Policy which permits linkage coal to be used only for generation and supply under long term PPAs. Adani Power is neither claiming nor is it entitled to claim any Change in Law compensation for the alternate coal (imported, e-auction or otherwise) for the 180 MW which is not covered by the linkage coal, i.e., 1566 MW gross less 1386 MW (covered by linkage coal). He submitted that any curtailment in coal supply from CIL or its subsidiaries due to changes in NCDP, 2007 entitles the generators to complete restitution to an economic position as if the change in law had not occurred. The Central Commission considered the matter afresh and scrupulously followed the directives in Energy Watchdog Judgement in the Impugned Order. Adani Power incurred additional expenditure for procuring coal on account of a change in policy (NCDP, 2007 to NCDP, 2013) which resulted in shortfall in quantity of coal assured under the FSA *vis-à-vis* the quantity supplied. The Central Commission granted relief on account of cut-down in domestic coal supply. The Central Commission has rightly considered the terms of the PPAs, NCDP, 2007, NCDP, 2013, LoA, FSA dated 09.06.2012, CCEA decision dated 21.06.2013 culminating in MoP letter dated 31.07.2013 and the revised Tariff Policy dated 28.01.2016. The Impugned Order is in compliance of both the letter and spirit of the Energy Watchdog Judgment. Since the decision to allocate domestic coal to the extent of 70% of the recommended capacity by CEA/MoP for coastal plants was taken in the SLC[LT] meeting dated 12.11.2008, i.e., subsequent to the cut-off date (17.11.2007), the same establishes Adani Power's claim for full compensation. Adani Power was issued LoA for the coal linkage corresponding to 1386 MW (being 70% of the installed capacity of 1980 MW). As such,

Adani Power could not have factored in its bid any developments post the cut-off date. The Central Commission correctly concluded that the relief ought to be given on 100% of ACQ (which corresponds to 70% of installed capacity) and not 70% of the contracted capacity. Neither the bid nor the PPA recognizes that 70% of the contracted capacity is based on domestic coal. It is clear from the minutes of SLC(LT) meeting that Adani Power applied for the grant of linkage for entire installed capacity of Units 7, 8 and 9, i.e., 1980 MW (3x660). If the contentions of Haryana Utilities are accepted, the same would be in violation of the letter and spirit of the directions of the Energy Watchdog Judgment which upholds the principle of restitution. In this regard, para 9 of the judgment of the Supreme Court in *Uttar Haryana Bijli Vitran Nigam Ltd &Anr*. vs. *Adani Power Ltd. &Ors*. [(2019) 5 SCC 325] was also relied upon. It was also pointed out that in Sl. No. 21 of the said minutes' Annexure, Adani Power's plant was considered which records that the entire installed capacity of Adani Power's project was considered for linkage allocation. However, as per the decision of the SLC(LT), Adani Power was granted linkage only to the extent of 70% of installed capacity, i.e., 1386 MW. Had Adani Power intended to avail 30% of fuel commitment through import, then Adani Power would not have applied to SLC(LT) for linkage allocation for the entire installed capacity. It was also emphasized that the remaining 30% allocation was 'deferred' and accordingly was to be taken up in the future. Under such circumstances, capacity corresponding to such ACQ, *i.e.,* 1386 MW ought to be considered for Change in Law compensation. There cannot be two different basis for computation of relief - one for computation of energy for relief (i.e. 70%) and

another for consideration of coal quantum (i.e. 100%) for energy available from domestic coal as claimed by the Haryana Utilities.

Our Findings :-

4.13 Learned senior counsel for the Appellant submitted that in the Impugned Order, the Central Commission went beyond the specific observations of the Energy Watchdog Judgment. He relied on paragraphs 55 and 58 to contend that Adani Power's fuel source was 70% domestic and 30% imported coal. The Central Commission proceeded on the basis that the entire 1386 MW under the PPAs is premised on domestic coal linkage. The Central Commission overlooked the fact that only 70% of fuel requirement was premised on domestic coal and the rest 30% on imported coal. He further submitted that with or without NCDP 2013, Adani Power was to source 30% of coal requirement for the contracted capacity using imported coal. Any restitutive relief due to NCDP 2013 cannot relate to the 30% imported coal and can only relate to the extent of 70% domestic coal which was cut-down due to NCDP 2013.

4.14 The learned senior counsel highlighted that while submitting the bid, Adani Power relied on the two MoUs for imported coal entered into by Adani Power with Messrs Coal Orbis, Germany and Kowa Company, Japan. During the bid submission, there was no LoA or FSA available with Adani Power in regard to the domestic coal. Adani Power never represented during PPAs signing or during bid submission that Adani Power's fuel requirements were premised entirely on availability of domestic coal. The consistent and the admitted stand of Adani Power has been that the bid submitted by Adani Power to the Haryana Utilities was premised on both domestic

coal and imported coal in a 70:30 ratio. The finding returned by the Central Commission in Para 30 of the Impugned Order is contrary to the basis on which Adani Power had approached the Central Commission back in 2012 to offset the additional coal cost and also in the pleadings before this Tribunal. He has placed reliance on paragraphs 18-21 of the Written Submissions filed in the present Appeal.

4.15 The learned senior counsel submitted that Adani Power through its pleadings has admitted the arrangement of fuel procurement in a 70:30 ratio. He referred to the legal position stating that admission is the best evidence and placed reliance on *Steel Authority of India Ltd.* vs. *Union of India* (2006) 12 SCC 233. He also stated that the Courts cannot go beyond the pleadings of the parties or grant relief beyond the relief sought by parties and relied upon *Manohar Lal* vs. *Ugrasen* (2010) 11 SCC 557. Principles of waiver, estoppel and acquiescence by conduct were also referred to. Ld. Senior Counsel also submitted that CEA's decision dated 12.11.2008 in the SLC(LT) meeting was never claimed as a change in law event by Adani Power in any petition. There is no reference to the same even in the Energy Watchdog judgment. The Central Commission has premised its reasoning based on SLC(LT) meeting minutes and doing that in the remand proceeding amounts to going beyond the Energy Watchdog Judgment.

4.16 This Tribunal had sought clarification from Ld. Senior Counsel whether the MoUs referred to by the Ld. Senior Counsel were entered specifically for the concerned Project (i.e. Mundra TPS - Units 7, 8 and 9) or whether those were general agreements of Adani Enterprises Ltd. with the said coal companies since Adani

Enterprises Ltd engages itself in the business of importing coal for various customers. The Ld. Senior Counsel clarified to this Tribunal that these were general agreements.

4.17 Learned senior counsel submitted that the normative requirement of coal for the Units 7, 8 and 9 was 6.409 MT per annum as mentioned in the LoA dated 25.06.2009 and Schedule I of the FSA provides that the linked capacity under the FSA is 70% of the said Units' capacity (i.e. 70% of 1980 MW). Further so far as Haryana Utilities are concerned, linked capacity under the FSA ought to be considered as 1139 MW (70% of 1424 MW). Out of 1424 MW capacity, Adani Power was required to supply 70% of the same based on domestic coal from MCL/SECL and for the balance 30%, Adani Power had to rely on imported coal. This is because Adani Power's bid was premised on both domestic and imported coal in a 70:30 ratio. During the hearing, Mr. Ramachandran admitted that Adani Power has been using entire actual coal received from MCL towards the power supplied under the Haryana PPAs.

4.18 Another provision relied upon by the Ld. Senior Counsel is Clause 4.6.1 of the FSA which provides for the compensation for 'failed quantity' of coal. Coal companies will not pay any compensation if supply of coal is above 80% of ACQ but not 100%. Any compensation for coal supply below 80% is a contractual issue between Adani Power and MCL and the Haryana Utilities cannot be burdened with the same.

4.19 He further highlighted that Adani Power in its Reply had sought to mix up the issue of 70:30 ratio which was the premise of the PPA and the bid and 100% of coal as per FSA. These are two different

concepts. Coal supply under FSA is to be used to the full extent for supply of power to Haryana Utilities and not to any other procurer. Any arrangement for domestic coal to meet the requirement of 70% of total requirement would be similarly considered. For example, if Adani has two FSAs – 50% for domestic coal and 50% for imported coal. The coal supplied against FSA for domestic coal would be considered entirely for the project but would constitute only a proportion (50%) of total requirement.

4.20 ***Per contra**,* learned counsel for Adani Power submitted that the Central Commission has correctly determined the 'extent' to which Adani Power was affected due to domestic coal shortfall to compute the relief under Article 13 of the PPAs. Ld. Counsel highlighted that the Central Commission computed restitutive relief to Adani Power in terms of the principles settled in Energy Watchdog judgement (2017) 14 SCC 80. The Hon'ble Supreme Court in Energy Watchdog Judgement has not put any fetters or ceilings or contemplated any deductions or withholdings in computing the compensation to a party affected by shortfall in supply of domestic coal by Coal India and its subsidiaries. He referred to paragraphs 56 and 57 of the Judgment. He highlighted a sequence of events to show that on 07.08.2008 two PPAs were signed with each of the Haryana Utilities for supply of 712 MWs each, i.e., 1424 MWs. Gross generation allocated in Phase-III for Haryana Utilities was 1565.67 MWs accounting for the permitted transmission loss of 2.85% (41.77 MW) and auxiliary consumption of 6.38% (99.90 MW). Although the CERC Regulations provided Auxiliary Energy Consumption to be 6.5%, Adani Power is accounting for actuals which is a lower value. He referred to the SLC (Long-Term) meeting of Ministry of Coal

dated 12.11.2008 which recommended that LoA be issued for Phase-III for a capacity of 1386 MWs, being 70% of 1980 MWs. LoA was issued on 25.06.2009 for 70% of 1980 MWs, i.e., 1386 MWs. FSA was signed by Mahanadi Coalfields Ltd. with Adani Power for supply of 64.05 Lakh Tonnes per annum -the linkage capacity being 70% of the installed capacity, i.e., for 1386 MW out of 1980 MW. He brought to our attention that since the decision to allocate domestic coal to the extent 70% of the recommended capacity by CEA/MoP for coastal plants was taken in the SLC[LT] meeting dated 12.11.2008, i.e., subsequent to the cut-off date (17.11.2007), Adani Power could not have factored in its bid any developments post the cut-off date. It was also pointed out that in Sl. No. 21 of the said minutes' Annexure, Adani Power's plant was considered which records that the entire installed capacity of Adani Power's project was considered for linkage allocation. However, as per the decision of the SLC(LT), Adani Power was granted linkage only to the extent of 70% of installed capacity, i.e., 1386 MW. Had Adani Power intended to avail 30% of fuel commitment through import, then Adani Power would not have applied to SLC(LT) for linkage allocation for the entire installed capacity. It was also emphasized the remaining allocation was 'deferred' and accordingly was required to be taken up in the future.

4.21 Learned counsel then highlighted the consistent stand of Haryana Utilities through their Pleadings, referred to in paragraph 7 of the Written Submissions to show that it was only on Haryana Utilities' insistence that the entire domestic coal linkage came to be allotted towards 1565.67 MW. It was clarified that Adani Power is neither claiming nor is it entitled to claim any Change in Law compensation

for the alternate coal (imported, e-auction or otherwise) for the 180 MW which is not covered by the linkage coal, i.e., 1566 MW gross less 1386 MW (covered by linkage coal).

4.22 He submitted that there cannot be two different basis for computation of relief, one for computation of energy charges (i.e. 70%) and another for consideration of coal quantum (i.e. 100%) for energy available from domestic coal as claimed by the Haryana Utilities.

4.23 We have carefully considered the rival submissions of the parties. The primary issue before us is to determine whether Adani's bid was based entirely on domestic coal availability and the Central Commission arrived at the correct finding on this account or not? While it is the contention of the Appellants that the bid was not entirely based on domestic coal and that it was based on 70% domestic coal and 30% imported coal, we need to examine the intent and applicability of the Energy Watchdog Judgement and see if the Central Commission has acted as per the Energy Watchdog Judgement. The Central Commission was performing its duty in remand proceedings to assess the implication of change in law due to shortfall in availability of domestic coal. In order to assess the change in law impact, the events that occurred after the cut-off date, i.e.,17.11.2007 will need to be looked into. Ld. Counsel for Adani Power submitted that the allocation of domestic coal for 70% of the installed capacity of Units 7, 8 & 9 came from the decision of SLC(LT) meeting dated 12.11.2008. Since Adani Power's bid was submitted much before this SLC(LT) decision, Adani Power could not have factored in its bid any developments post the cut-off date. Adani Power had applied for linkage for the entire installed capacity

of the three units. We note that Adani Power's intention was to obtain linkage allocation for the entire installed capacity and there was no bifurcation for 70% domestic or 30% imported in the application for coal linkage. We also note from the minutes of SLC(LT) meeting that while granting 70% domestic linkage, the SLC(LT) deferred the remaining allocation to be taken up in the future. This makes it clear that SLC(LT)'s decision to limit 70% linkage coal allocation was not influenced or dictated by the fact that Adani Power had intended to source 30% imported coal to meet its power supply obligation under the PPAs; rather it was a decision based on prudence based on prevailing circumstances and the request for the remaining 30% domestic coal was to be taken in future. Due to shortfall in domestic coal availability during that time, SLC(LT) was not able to commit a future date and only mentioned that the remaining linkage will be considered at a future date.

4.24 We also note that the SLC(LT) minutes dated 12.11.2008 recommended that LoA be issued for Phase-III for a capacity of 1386 MWs, being 70% of 1980 MWs, i.e., the installed capacity of 1980 MW. The minutes do not speak about the allocation based on contracted capacity. To argue that the calculation for the normative requirement of coal is to be done from the contracted capacity is an imaginative argument and cannot be substantiated from the pleadings. On 25.06.2009, LoA was issued for 70% of 1980 MWs, i.e., 1386 MWs with the annual contracted capacity being 6.409 MT per annum of Grade "F" Coal. On 09.06.2012, Fuel Supply Agreement was signed by Mahanadi Coalfields Ltd. with Adani Power for supply of 64.05 Lakh Tonnes per annum as set out in Schedule-I, i.e., the linkage capacity was 70% of the installed

capacity, i.e., for 1386 MW out of 1980 MW. We have noted the pleadings relied upon by the parties on the issue of 70:30 division. The reliance by the Appellants to submit that Adani Power's bid was premised on 70: 30, domestic: imported coal is not correct because the bid was silent on any percentage but the division/bifurcation came about as a consequence of the SLC(LT) meeting dated 12.11.2008. The Appellants have not shown anything in the bid submission of Adani Power to show that Adani Power in fact furnished the 70:30 bifurcation of domestic and imported coal sources to the Appellants. As per PPA, change in law has to be decided based on the position prevailing 7 days prior to the bid submission date. The Appellants have strongly relied on pleadings in other proceedings to make a case for 'admission' on the part of Adani Power with regard to 70:30 division of coal sources. We are not convinced that these pleadings amount to an unqualified admission by Adani Power of the fact that it had submitted its bid based on 70% domestic coal and 30% imported coal. It is important to notice that at the insistence of Haryana Utilities, Adani Power has been using the entire domestic coal linkage allotted to it for the Haryana PPAs, i.e., linkage for 1386 MWs has been allotted towards the contracted capacity under the PPAs. This position is consistent with the Ministry of Coal Guidelines and the then existing Coal Distribution Policy which permits linkage coal to be used only for generation and supply under long term PPAs. Since Adani Power is neither claiming nor is it entitled to claim any Change in Law compensation for the alternate coal (imported, e-auction or otherwise) for the 180 MW which is not covered by the linkage coal, there is no error in the findings of the Central Commission. Any curtailment in coal supply from CIL or its subsidiaries due to

changes in NCDP, 2007 entitles the generators to complete restitution to the same economic position as if the change in law had not occurred. The Central Commission considered the matter afresh and scrupulously followed the directions contained in Energy Watchdog Judgement in the Impugned Order. Adani Power incurred additional expenditure for procuring coal on account of a change in law (NCDP, 2007 to NCDP, 2013) which resulted in shortfall in quantity of coal assured under the FSA *vis-à-vis* the quantity supplied. The Central Commission granted relief on account of a cut-down in domestic coal supply. There is no dispute by the Appellants that the decisions of CCEA on 21.06.2013 culminating in the notification of NCDP 2013 amounts to Change in Law under Article 13 of the PPAs.

4.25 As far as the reliance on the MOU's with foreign companies are concerned, we note that a generating company of this size would make some arrangements for coal procurement especially when the holding company itself is in the business of trading/coal mining. That is why we had raised a query to the Ld. Senior Counsel whether the MOUs were specific to this project or were they generic in nature and the Ld. Senior Counsel fairly stated that the MOUs are general in nature. This shows that Adani Power annexed the MoUs with the bid only to show its competence to participate in the bid and by no means can they be taken to mean that the bidder was to procure imported coal (to the extent of 30%) for this project to supply power to the Appellants. In addition, if MoUs are to be taken as the basis for supply based on imported coal, then there would be no need to divide the coal sources in 70:30 ratio, one may even argue that the

entire contracted capacity under the PPAs was linked to imported coal sources. However, this is clearly not the case.

4.26 The Central Commission has rightly applied the concept of Change in Law to effectively analyse the events post the cut-off date. The submission that SLC(LT) meeting minutes cannot be relied upon is neither logical nor justifiable since it is an important document which throws light on the reasons behind reduction of coal linkage allocation to only 70% of installed capacity while the rest was to be considered later. The SLC(LT) minutes is undoubtedly post the cut off date and cannot be ignored. It must also be seen that the SLC(LT) meeting minutes is a document of governmental instrumentality and is in public domain. The Central Commission as a regulator has rightly analysed the events post the cut-off date to arrive at the conclusion whether Adani Power was entitled to change in law relief for 100% of contracted capacity or only up to 70%. The Central Commission is right in concluding that Adani Power is entitled to Change in Law compensation for the entire 100% shortfall in domestic coal vis-à-vis the ACQ under the FSA.. In the Energy Watchdog Judgement, the Hon'ble Supreme Court has already held that the rules, orders, guidelines or notifications issued by an Indian Governmental Instrumentality qualifies as an event of Change in Law and the affected party must be restituted to the same economic position as if the event had not occurred. Therefore, we do not find any merit in the Appellants' submission that Adani Power's bid was premised on imported coal to the extent of 30% therefore, affirm the Central Commission's findings on this issue.

5. **Issue No.2:-**

5.1 Learned senior counsel for the Appellant, Mr. M.G. Ramachandran submitted that shortfall in domestic coal due to Change in Law [NCDP, 2013] and compensation for the same should be limited to the difference between 100% of ACQ and 65%, 65%, 67% and 75% of ACQ as specified in NCDP 2013. He submitted that there has to be a nexus between the change in law event and the impact of such change in law event. Actual effect of change in law events should be the benchmark for ascertaining actual impact on project cost. Therefore, what has to be seen is whether NCDP 2013 'impacted' to the extent of 65% of ACQ or to any extent below 65% of ACQ. Plain understanding of NCDP 2013 and MoP's letter dated 31.07.2013 shows that actual impact due to NCDP 2013 is restricted to 65% of ACQ. Reliance in this regard was placed on specific paras - Paras 56, 57 and 58 of Energy Watchdog Judgment. With respect to the true construction of "higher cost of imported coal to be allowed as pass-through" in MoP's letter dated 31.07.2013, it was argued considering an example that procurer will compensate for 100 MT-65 MT i.e. 35 MT and not 100 MT-50 MT, where the actual supply is only 50% of ACQ. If there is no effect/impact of an event, such event cannot be construed as a change in law event, for it fails to satisfy the essential pre-condition of the change in law clause of the PPAs. Para 6.1 of the Tariff Policy, 2016 relates back to the MoP's letter dated 31.07.2013 where it states that "*as per the advisory…*" Therefore, Tariff Policy, 2016 cannot be read in isolation since it is not an independent decision of Government of India. The use of phrases like "*to this limited extent*", "*to the extent it does so*" in Energy Watchdog Judgment indicates that Energy Watchdog

restricts the change in law relief to the trigger levels specified in NCDP 2013.

5.2 ***Per contra***, Mr. Amit Kapur, learned counsel appearing on behalf of Adani Power argued that Change in Law relief on account of changes to NCDP, 2007 ought to be allowed on actuals and cannot be restricted to the trigger values of ACQ specified in NCDP 2013. He submitted that on 18.10.2007, the Government of India through Ministry of Coal issued NCDP 2007. Some of the salient features of the NCDP, 2007 were: -

(i) Power utilities including Independent Power Producers ("*IPPs*") were assured supply of 100% of the fuel quantity as per normative requirement by Coal India Ltd. Paragraph 2.2 of the NCDP, 2007 is quoted as under: -

> "*100% of the quantity as per the normative requirement of consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by the Ministry of Coal and linkage/Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly.*"

(ii) The linkage system was replaced with a more transparent bilateral commercial arrangement of enforceable FSAs (Paragraph 2.3).

(iii) Since 100% of the normative requirement was to be provided by Coal India Ltd., 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 (Paragraph 5.2).

(iv) The FSA would also be executed for 100% of the normative coal requirement.

5.3 The MoP's reference dated 09.05.2013 to the Central Commission regarding the adjustment in tariff of concluded PPAs to allow higher cost of imported coal as pass through is relevant:-

> "***Subject: Impact on tariff on the concluded PPAs due to domestic coal availability***.
>
> *…Coal linkages have been granted for power projects under the New Coal Distribution Policy 2007 (NCDP), which mandates that CIL will meet 100% of normative requirement of power sector…*
>
> *…Thus, while the fuel price risk would have been taken into account and factored in the escalable component of energy charges, it is assumed that no fuel availability risk would have been taken into consideration on account of the LOAs given by CIL.*
>
> *2. It now transpires that on account of the limited availability of coal Ministry of Coal has indicated that CIL may not be in a position to supply more than 60 to 65% of ACQ to those power producers who had been earlier issued LOAs of normative quantities corresponding to 85% PLF. Simultaneously, it has been proposed that the disincentive trigger for coal supply would be brought down from 90% to 60 to 65% by CIL in the new fuel supply agreements to be signed with these power producers. This obviously would create a situation where the power producers would have to arrange fuel from open market including imports either through CIL or directly…*
>
> *3. The Cabinet Committee on Economic Affairs (CCEA) has also considered the situation arising out of the inadequate availability of coal leading to the non-fulfillment of its LOA commitments on the part of CIL. CCEA has decided the following guidelines in its meeting held on 05.02.13 in respect of generating plants commissioned/to be commissioned during the period 1.4.09 to 31.03.15:*
>
> *i) CIL will provide imported coal on cost plus basis to all producers willing to take such coal.*
>
> *ii) that the higher cost of imported coal will be allowed as a pass through.*
>
> *4. In view of the circumstances stated above CERC is requested to advice the Government on the manner in which the issue of fuel availability risk arising out of CIL's inability to meet its LOA commitments could be addressed with regard to power producers who have already entered into long term PPAs with distribution companies based on such commitments and the feasibility of passing on the additional cost of*

procuring market fuel incurred by the power developers on account of the circumstances stated in the aforesaid paras. CERC is also requested to suggest appropriate ways for issuing advisory to SERCs/State Governments which may necessitated to be issued by MoP for the implementation of the above."

5.4 He further submitted that on 20.05.2013, the Central Commission issued its statutory advice *qua* requirement to make suitable changes to NCDP 2007 and other statutory documents so as to allow pass-through of additional cost incurred by generators to meet balance coal requirement. The Central Commission acknowledged that "*it is the full responsibility of CIL to meet the full requirement of coal under FSAs even by resorting to import, if necessary*". On 21.06.2013, CCEA, considering the overall domestic availability and actual requirements, decided that "*FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of annual contracted quantity (ACQ)…"* and directed MoC to issue suitable orders supplementing NCDP, 2007 and MoP to issue directions to Electricity Regulatory Commissions.

5.5 He submitted that 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, which is NCDP 2013 and implemented CCEA's direction dated 21.06.2013. This changed the 100% assurance of coal supply under the erstwhile NCDP 2007. On 31.07.2013, GoI through MoP communicated changes to NCDP 2007 to all ERCs and directed the ERCs to take appropriate steps to immediately implement NCDP 2013. Few relevant excerpts are relevant *viz.*: -

"…2. *(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 the quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs"

5.6 He then referred to the revised Tariff Policy, 2016 notified on 28.01.2016. Clause 6.1 of the Tariff Policy, 2016, extracted below provides for pass through of additional cost incurred to meet coal requirements in view of cut-down in domestic coal supply *vis-à-vis* the assured quantum in terms of NCDP 2007 or in the FSA/LoA:-

"*6.1 Procurement of Power*

…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."

5.7 He highlighted that due to inadequate availability of domestic coal, GoI revised NCDP, 2007 and issued certain directions regarding inability of the state-owned coal companies to supply the assured quantity of coal to the power producers. Recognizing that due to shortfall in availability of coal, generating companies would be compelled to purchase coal from alternate sources and to avoid rendering the PPAs unviable, GoI itself agreed to compensate for any shortfall of domestic coal from NCDP, 2007 (100% entitlement). This formed the basis of the binding/statutory decisions to compensate (pass through) for the higher coal cost as referred. He relied on the Energy Watchdog Judgment where the Supreme Court has held that NCDP, 2013 is a change in law event and allowed restitutive relief to generators on account of domestic coal shortfall

faced due to actions of Indian Government Instrumentalities. The documents of the Government of India are statutory and binding documents and explicitly provide for restituting the generator in an event of any coal shortfall in supply from Coal India Ltd. In this regard, reliance was placed on Paras 56 and 57of the Energy Watchdog Judgment which are already quoted by us above.

5.8 He also submitted that the Supreme Court in Energy Watchdog Judgment has also held that the purpose of compensating the party affected by Change in Law, i.e., generator in the present case, is to *"restore the affected party to the same economic position as if such change in law had not occurred"*. The compensation is not pegged at or limited to any ceiling but premised on 'actual' increase in cost of selling power. In fact, all the statutory documents referred also envisage pass through of actual additional cost. 'Actual incremental expenditure' for the actual shortfall in coal supply *vis-à-vis* the 100% assurance under NCDP, 2007 cannot be restricted in view of the restitutive principle enshrined in the PPAs, the statutory documents referred and Paras 56 and 57 of the Energy Watchdog Judgment. An example was given that if 100 MT is the normative requirement of coal supply as committed under NCDP 2007 and the actual supply by CIL is only 40 MT, then generator is entitled to change in law relief for the 60MT shortfall (100-40 MT). He then submitted that from a plain and literal interpretation, any curtailment in coal supply from Coal India Ltd. or its subsidiaries due to changes in NCDP, 2007 entitles the generators to restitution. Reliance was placed on the Tribunal's judgment dated 14.09.2019 in *Jaipur Vidyut Vitran Nigam Limited* vs. *RERC & Ors.* reported as 2019 SCC Online APTEL 98 ("***Adani Rajasthan Judgment***"). Importing the modified

limit of 65%, 65%, 67% and 75% of ACQ respectively as ceiling to compensation is an extraneous extrapolation sought by Haryana Utilities to pare down the judgment in Energy Watchdog which cannot be countenanced. He made a 'without prejudice' argument and stated that the '*minimum*' assured supply of coal in terms of NCDP, 2013 is an acknowledgement that generators are, in effect, entitled upto 100% of the assured ACQs of coal even after coming into effect of NCDP 2013. Shortfall of coal in terms of NCDP, 2013 relates back to the bid cut-off date since: -

(a) NCDP, 2013 is not merely prospective in applicability, and applies to "*the already concluded PPAs*".

(b) The Tribunal in Adani Rajasthan Judgment held that "*…for reckoning the change in law the position prevailing as on the cut-off date is relevant."*

5.9 It was again pointed out that as on bid cut-off date, the generator was entitled to 100% domestic coal supply under NCDP, 2007 and therefore, the Change in Law compensation needs to be calculated *vis-à-vis* 100% minus actual shortfall and not limited to any percentage of ACQ. This position has also been confirmed by the Central Commission in the Impugned Order.

5.10 On the issue as to what was the relief available to generators prior to NCDP 2013, he submitted that the Competitive Bidding Guidelines (CBG), 2005 as amended on 18.08.2006 (i.e. prior to cut-off date) envisages change in law reliefs since 2006 itself. Unamended Guideline 4.7 and amended version of the same were read out and distinguished. It was categorically pointed out that the amended clause 4.7 provides for adjustment *qua* change in law

relief *inter-se* between parties. It is only when the dispute arises that the Commission's interference is required. Article 13.2 of the PPA was relied upon to submit that the 'parties' and not the 'Court' as the first instance should give effect to restitution while determining the Change in Law events. Article 13.4.1 of the PPA was then read out to highlight that such adjustment in monthly tariff payment shall be effective from the date of occurrence of change in law. Therefore, instead of date of filing of the Petition before Commission, the relevant factor to be considered is the date when a generator faces adverse implications of any change in law event. Assuming there was no relief prior to NCDP 2013, the restitutive provisions of Competitive Bidding Guidelines and the PPA remain intact and safeguard generators' claim for change in law reliefs. Paras 19 and 20 of the Energy Watchdog Judgment was also read with greater emphasis to highlight the regulatory powers of the Commission and that there could never be an assumed closure of remedies available to the generating companies prior to 2013.

5.11 Responding to the issue as to what is the 'assurance' referred in the Tariff Policy, it was submitted that the assured supply relates back to NCDP 2007. In this regard, Mr. Sajjan Poovayya, learned senior counsel (arguing counsel in the connected batch of matters involving similar issues), submitted that the Tariff Policy, 2016 deals with three elements of assurance *viz.* (i) LoAs, (ii) FSAs and (iii) NCDP 2007 commitment to supply 100% normative requirement as envisaged in Para 2.2 of NCDP 2007 which even covers 'future commitments'. Mr. Kapur further read Para 5.2 of NCDP 2007 with greater emphasis. Paras 12.1, 12.5 and 12.6 of the *Adani Rajasthan Judgment* were also read to highlight that the issue has been

already examined by the Tribunal wherein it was held that the generator is entitled to restitution with regard to actual supply vis-à-vis the assured supply under NCDP 2007.

Our Findings:-

5.12 It was submitted by the Ld. Senior Counsel for the Appellants that there has to be a nexus between the change in law event and the impact of such change in law event. Actual effect of change in law events should be the benchmark for ascertaining actual impact on project cost. Therefore, what has to be seen is whether NCDP 2013 'impacted' to the extent of 65% of ACQ or to any extent below 65% of ACQ. He highlighted that the plain reading of NCDP 2013 and MoP's letter dated 31.07.2013 shows that actual impact due to NCDP 2013 is restricted to 65% of ACQ. He placed reliance on paragraphs 56, 57 and 58 of Energy Watchdog judgment. Mr. Ramachandran illustrated before us that the true construction of higher cost of imported coal to be allowed as pass-through in MoP's letter dated 31.07.2013 would mean that procurer will compensate for 100 MT- 65 MT i.e. 35 MT and not 100 MT-50 MT, where the actual supply is only 50% of ACQ. If there is no effect/impact of an event, such event cannot be construed as a change in law event. He submitted that Tariff Policy, 2016 cannot be read in isolation since it is not an independent decision of GoI. He emphasized on phrases like "to this limited extent", "to the extent it does so" in Energy Watchdog judgment to argue that Energy Watchdog restricts the change in law relief to the trigger levels specified in NCDP 2013.

5.13 He further submitted that on the basis of NCDP 2007, coal companies entered into contracts with generators offering 100% of the coal requirement to achieve the normative generation availability. If prior to NCDP 2007, the coal made available by coal companies was less than 100% of the coal requirement to achieve the normative generation availability, the same was not a result of any change in law. Such non-supply was only a matter of commercial dealings between the coal companies and the generators. He submitted that Adani Power's contention that the penalty payable by coal companies is too little cannot be a ground for granting compensation for change in law.

5.14 He further submitted that parameters such as SHR etc. relate to the machine performance, namely turbine heat rate and boiler efficiency. SHR, AECs etc. have no relation to the impact of NCDP 2013. Had such change in law event not taken place, generator would not have been entitled to claim any relief on the parameters that the generator could not achieve.

5.15 ***Per contra***, learned counsel for Adani Power submitted that the Central Commission has rightly considered Change in Law compensation for the overall shortfall in domestic coal and not limited to 65%, 65%,67%,75% of ACQ. He relied upon paragraphs 2.2, 2.3 and 5.2 of NCDP 2007 to highlight that CIL was under an obligation to supply 100% of normative requirement of coal. He referred to MoP reference dated 09.05.2013 to CERC for statutory advice, CERC's statutory advice dated 20.05.2013, CCEA's decision dated 21.06.2013, NCDP 2013 and MoP's directive dated 31.07.2013 to highlight the policy intent to entitle generators to pass through of additional cost incurred for procuring alternate coal in lieu

of domestic coal shortfall. He highlighted Clause 6.1 of the Tariff Policy 2016 and submitted that the said provision further clarifies the position regarding entitlement of the generators to pass through of additional cost incurred for procuring alternate coal.

5.16 Hon'ble Supreme Court in Energy Watchdog Judgment has held that the purpose of compensating the party affected by shortfall in supply of coal by Coal India Ltd. is to restore the affected party to the same economic position as if such change in law has not occurred. For such restitution, compensation is not pegged at or limited to any particular ceiling but premised on 'actual' increase in cost of selling power. From a plain and literal interpretation of the extracted paragraphs of the Energy Watchdog Judgement, any curtailment in coal supply from Coal India Ltd. or its subsidiaries due to changes in NCDP, 2007 entitles the generators to restitution to the full extent.

5.17 This Tribunal was also apprised of the efforts undertaken by Adani Power regarding the problems faced due to coal shortage prior to NCDP 2013 since the power plant was operational since 2012 and that time NCDP 2007 was applicable. It was submitted that Adani Power had made several representations to GoI regarding the coal shortage issues even prior to NCDP 2013. It was further clarified that it was in fact, on 05.07.2012 that Adani Power filed the Petition before the Central Commission (155/ MP/ 2012) claiming restitutive relief which was prior to NCDP 2013 coming into effect (which ultimately culminated in Energy Watchdog Judgment). It was further brought to the Tribunal's attention that the Petition before the Central Commission had also claimed change in law relief to

restitute Adani Power on account of change in GOI/CIL policy. It was also clarified that the relief available to the generators before NCDP 2013 was also restitutive as provided in the Competitive Bidding Guidelines 2005 as amended on 18.08.2006 (i.e. prior to cut-off date). It was categorically pointed out that the amended clause 4.7 of the Bidding Guidelines provides for adjustment *qua* change in law relief inter-se between the parties. It is only when the dispute arises that the Commission's interference is required. Article 13.2 of the PPA was relied upon to state that 'parties' and not the 'Court' as the first instance should give effect to restitution while determining the impact of change in law events. Article 13.4.1 of the PPA was referred to highlight such adjustment in monthly tariff payment shall be effective from the date of occurrence of the change in law. The important date that is to be considered is the date from which a generator faces adverse implications of any change in law event. The restitutive provisions of Competitive Bidding Guidelines and the PPA remain intact and safeguard generators' claim for change in law reliefs even before the NCDP 2013. Secondly, it was also clarified that generators are entitled to full and complete restitution for any shortfall in supply of coal as against the assured quantity in the NCDP 2007. Energy Watchdog also puts no fetters to the entitlement to the change in law compensation on actuals. An example was given that if 100 MT is the normative requirement of coal supply as committed under NCDP 2007 and the actual supply by CIL is only 40 MT, then generator is entitled to change in law relief for the 60MT shortfall (100-40 MT). All statutory documents including NCDP 2007, MoP reference dated 09.05.2013, CERC's statutory advice, CCEA decision, NCDP 2013, MoP's directive dated 31.07.2013 and Clause 6.1 of Tariff Policy indicate that CIL

was under an obligation to supply 100% of normative requirement of coal as per NCDP 2007. The notional figure of 65% came only because of CIL's inability to meet the domestic fuel supply requirement as assured under NCDP 2007. NCDP 2013 should in fact be construed as an administrative sanction to ensure supply of coal by CIL for at least upto 65% and other respective percentage for the remaining four years of the 12th Five Year Plan Period.

5.18 We note that an interesting argument has been made by both the parties regarding the extent of assurance of coal supply by Coal India Limited and to what extent would a generator be entitled to claim change in law for the shortfall in coal supply by Coal India Limited. While considering these submissions, we have to be mindful of the fact that the relief that is being considered here is a restitutive relief, which must bring the affected party to the same economic position as if the change in law event had not occurred. The Supreme Court has also specifically recognised the restitution principle in the Energy Watchdog Judgement. Our attention was brought to the Tariff Policy of 2016 which when carefully read would mean that the assurance of coal supply relates back to NCDP 2007. The Tariff Policy deals with three elements of assurance- Letter of Assurances, Fuel Supply Agreements and the commitment to supply 100% normative requirement in terms of NCDP 2007 covering future commitments. The interpretation is quite wide to consider the overall impact of change in law and the shortfall in coal supply due to a change in law event.

5.19 We quote the relevant extracts of NCDP 2007, NCDP 2013 and the tariff policy 2016 and our earlier judgement:-

- **NCDP 2007**

2.2. Power Utilities including Independent Power Producers (IPPs)/ Captive Power Plants (CPPs) and Fertilizer Sector

100% of the quantity as per the normative requirement of the consumers would be considered for supply of coal, through Fuel Supply Agreement (FSA) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. The units/power plants, which are yet to be commissioned but whose coal requirements has already been assessed and accepted by Ministry of Coal and linkage/ Letter of Assurance (LOA) approved as well as future commitments would also be covered accordingly.

2.3 Other consumers

75% of the quantity as per the normative requirement of the consumers/actual users would be considered for supply of coal through FSA by CIL at notified prices to be fixed and declared by CIL. The balance 25 % of coal requirement of the units will be sourced by them through e-auction / import of coal etc., as per their preference. The units which are yet to be commissioned but whose coal requirement has already been assessed and accepted by Ministry of Coal and linkage/LOA approved as well as future commitment finally made would also be covered accordingly.

All the existing linkage holders of erstwhile core and non-core sector and not having FSAs would be required to enter into FSA with coal companies. At present small and tiny consumers in non core sector, whose annual consumption is less than 500 metric tonnes are eligible to get coal through State nominated agencies/NCCF etc. The scope of coverage through State nominated agencies is now being increased upto 4200 tonnes per annum. It means that now the distribution of coal to units whose requirement is upto 4200 tonnes per annum will be done through the agencies nominated by State Government. Units whose requirement is more than 4200 tonnes per annum will take coal directly from Coal India Limited/Subsidiary companies through FSAs. As far as the linked consumers of erstwhile non core sector, whose annual requirement is less than 4200 tonnes are concerned, they would be given the option to either entering into FSA with the coal company as per the terms and conditions, including satisfaction level applicable to the other consumers or they may opt out of FSA regime and access their coal requirement through agencies nominated by State Governments.

5. Policy of New Consumers

5.2 *For new commitments including short-term tapering commitment to consumers having captive coal block, Power Utilities, CPPs, IPPs, Fertilizer units, and others would be issued an enforceable Letter of Assurance for supply of coal and thereafter they would be entitled to enter into FSA within a stipulated time subject to fulfilment of certain conditions to be stipulated therein. For Power Utilities including Independent Power Producers (IPPs) and Captive Power Plants (CPPs), cement sector and sponge iron sector, the present system of linkage committee at the level of Government would continue. CIL will issue LoA after approval of applications by the Standing Linkage Committee (Long term). However, for other sectors the task of issuing letter of assurance, will be the responsibility of CIL.*

In order to meet the domestic requirement of coal, CIL may have to import coal as may be required from time to time, if feasible. CIL may adjust its overall price accordingly. Thus, it will be the responsibility of CIL Coal companies to meet full requirement of coal under FSAs even by resorting to imports, if necessary.

- **NCDP 2013**

1. The New Coal Distribution Policy (NCDP) was issued vide this Ministry's Office Memorandum No. 23011/4/2007-CPD dated 18.10.2007, laying down the guidelines for distribution and pricing of coal to various sectors. As per para 2.2 of the said policy, Power Utilities including Independent Power Producers were to be supplied 100 per cent of the quantity as per their normative requirement through Fuel Supply Agreement(s) (FSAs) 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 (TPPs) of 78,000 MW capacity 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 these 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. Cases of tapering linkage would get coal supplies as per the Tapering Linkage Policy. 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.

4. The above guidelines will also be applicable to the distribution of coal from Singareni Collieries Company Limited (SCCL).

5. CIL and its subsidiaries and SCCL are advised to take further action accordingly.

- **Tariff Policy, 2016**

"***6.1 Procurement of Power***

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

However, some of the competitively bid projects as per the guidelines dated 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."*

- **Jaipur Vidyut Vitran Nigam Ltd. vs. RERC &Ors 2019 SCC OnLine APTEL 98 (dated 14.09.2019)**

12.1 In order to appreciate the issue as to what would be the date up to when the relief of change in law would be applicable, two elements need to be examined, first, there is a shortfall in coal, and the second, the shortfall is on account of change in law. Once we have examined these, then there is no doubt that the relief will have to be made available until the shortfall continues. RERC in the Impugned Order held that in the present case there is a Change in Law event and this has been upheld by us in the paragraphs above. RERC seems to have lost sight of the fact that impact of change in law must be computed, based on the difference between 100% domestic coal supply assured in NCDP 2007 vis-à-vis actual domestic coal supply, until the shortage of domestic coal exists. The fact that the FSA under the Shakti scheme was executed in January 2018 for certain quantum would not mean that the assurance of supply of 100% domestic coal has been met.

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. 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.

5.20 We have examined the issue in our above mentioned judgement holding that the extent to which 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. This incorporates the spirit of restitution else the objective of restitution will not be fulfilled.

5.21 Another important aspect to be noted is Clause 4.6.1 of the FSA which provides for meagre compensation payable by the coal companies if the supply of coal is below 80% of the ACQ. There is no compensation if the supply is upto 80% and not 100%, i.e., the coal companies will not pay any compensation for the shortfall up to 20% of ACQ. Hence the argument of the Appellants is that the generating company should pursue its remedy under the FSA. The reason given by the Appellants is that any compensation for coal supply below 80% is a contractual issue between Adani Power and MCL and the Haryana Utilities cannot be burdened with the same. We do not agree with this contention. It is the legitimate expectation of a generating company that if 100% ACQ is promised then that must be met, if not then the generating company will be compensated. Clause 4.6.1 implementation is certainly a contractual issue but a provision cannot be so one sided that one party's legitimate expectation is far from met. Further, the NCDP 2007 which was the basis for Adani Power's bid to the Appellants, does not state anywhere that a meagre compensation for supply below 80% of ACQ would be sufficient relief or compensation to the generators. If that was the case, there would be no meaning to the

100% normative supply assurance contained in the NCDP 2007. Penalty clauses in the FSA provisions are subsequent developments after the cut-off date and the generator could not have taken in to account the scenario of meagre amount of compensation by the coal companies for failing to supply the assured quantity. Since the main issue before us is the implementation of Change in Law event as was held by the Hon'ble Supreme Court in Energy Watchdog judgement, we need to ensure that the restitution principle is fulfilled. The Central Commission has correctly applied the principles settled by the Hon'ble Supreme Court in the Impugned Order. The argument that the shortfall below 80% is a contractual arrangement under the FSA was already dealt by us and rejected in the Adani Rajasthan case which is extracted above.

5.22 We also note that the Supreme Court on 31.08.2020 in its judgment in Jaipur Vidyut Vitran Nigam v. Adani Power Rajasthan Limited and Anr. (Civil Appeal No. 8625-8626 of 2019) has observed as under:-

> *"48. Shri C. Aryama Sundaram 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 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 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."

5.23 Therefore this issue is no longer res integra. This issue has been considered and deliberated in detail in our judgment in Appeal No. 182 of 2019 (*Adani Power Maharashtra Limited v. MERC & Ors.*) decided on September 14, 2020. We quote relevant paragraphs from the aforesaid order:

"9.12 From the above decision, it is clear that the methodology for compensation in case of shortfall in domestic coal under the NCDP regime cannot be different from the methodology for compensation in case of shortfall under the SHAKTI Policy. This Tribunal has already held that the shortfall in domestic coal supply needs to be measured against 100% supply assurance contained under the NCDP 2007 and when measured against this assurance, restricting Change in law relief to the maximum of 35% to 25% for the respective four years of the 12th plan is not justified. This issue is, therefore, decided in favour of the Appellant and the Impugned Order is set aside to the extent it limits the Change in Law relief to the Appellant with reference to the maximum

of (1) actual quantum of coal offered for offtake by CIL, and (2) the minimum assured quantum as per the NCDP 2013 for the respective year. We direct that the Respondent MSEDCL shall compute Change in Law compensation on the basis of actual shortfall in supply of domestic coal suffered by the Appellant from the start date approved by the MERC.

9.13 There is no dispute that coal is a nationalised commodity in India and the supply/distribution of linkage coal is under the control of Government of India. Majority of coal supply is under the monopoly of Coal India Ltd. Therefore, non-availability of coal linkage or shortage in coal supply is a sovereign/quasi-sovereign risk which is agreed to be absorbed by state owned distribution companies in the PPAs entered through Case-1 competitive bidding process. From this perspective as well, it is imperative that the entire shortfall need to be absorbed by the procurer discoms. We are aware of the fact that many IPPs are financially stressed and are at the brink of insolvency due to several reasons not in their control such as delay in payments by distribution companies even for the undisputed regular monthly bills, disputes raised by distribution companies on change in law claims and the consequent delay in reimbursement of expenditure already incurred on account of prolonged litigations etc. It is necessary in the interest of all stakeholders and in public interest that these issues are addressed pragmatically and proactively.

9.14 We would also like to add that the Supreme Court in its Judgment dated 25.02.2019 in Uttar Haryana Bijli Vitran Nigam & Anr. v. Adani Power Ltd. &Ors [(2019) 5 SCC 325] had also recognized the restitution principle for Change in Law relief. This can be fulfilled when the actuals are taken into account to compensate the Generator. In this case, the Generator has clearly indicated that the parameters which will be beneficial to the consumers (whether as per the Regulations or the actuals, whichever is lower) will be adopted for the change in law relief."

5.24 Accordingly, we find no merit in the contentions of the Appellants and hold that the Central Commission has correctly allowed the Change in Law relief to Adani Power to the extent of actual shortfall suffered by it since the same cannot be limited to the percentages specified in the NCDP 2013. This issue is decided accordingly.

6. **Issue No.3:-**

6.1 Learned senior counsel for the Appellant, Mr. M.G. Ramachandran submitted that the impact of Change in Law due to NCDP 2013 ought to be considered effective from 31.07.2013. However, Central Commission held that Adani Power is entitled to compensation for

the period between 01.04.2013 to 31.03.2017. This amounts to retrospective operation of NCDP 2013, which is untenable. It was argued that it is a settled position of law that substantive law has no retrospective application.

6.2 ***Per contra***, learned counsel, Mr. Amit Kapur submitted that the contention of the Appellants to limit the period for grant of Change in Law relief to the period 31.07.2013 to 31.03.2017 instead of 01.04.2013 to 31.03.2017 seeks to reopen the ruling in Energy Watchdog case. Denial of economic restitution for adverse effect of Change in Law during 01.04.2013 to 31.07.2013 would violate the directives of Supreme Court and binding policy decisions. He submitted that the FSA considers ACQ for the entire financial year and not on monthly basis. The directions in CCEA decision, MoP letter and NCDP-2013 also relate to ACQ and not part of ACQ as contended by the Haryana Utilities. MoP letter contemplated the pass through of higher cost of coal procurement through alternate sources. MoP letter dated 31.07.2013 makes it clear that the period in question is the remaining four years of the 12th Plan, i.e., from 01.04.2013 to 31.03.2017.

Our Findings:-

6.3 Learned senior counsel for the Appellants submitted before us that the impact of change in law due to NCDP 2013 ought to be considered effective from 31.07.2013. He submitted that the Central Commission in the Impugned Order has committed a mistake by observing that Adani Power is entitled to compensation for the period between 01.04.2013 to 31.03.2017. This essentially is

retrospective operation of NCDP 2013, which is not permissible in law.

6.4 ***Per contra*****,** learned counsel for Adani Power submitted that the contention of the Appellants to limit the period for grant of Change in Law relief to the period 31.07.2013 to 31.03.2017 instead of 01.04.2013 to 31.03.2017 seeks to reopen the ruling in Energy Watchdog case. Denial of economic restitution for adverse effect of Change in Law during 01.04.2013 to 31.07.2013 would violate the directives of Supreme Court and binding policy decisions. It was pointed out that the FSA considers ACQ for entire year and not on monthly basis. The directions in CCEA decision, MoP letter and NCDP-2013 also relate to ACQ and not part of ACQ as contended by the Appellants. MoP letter dated 31.07.2013 makes it clear that the period in question are the remaining four years of the 12th Plan, i.e., from 01.04.2013 to 31.03.2017.

6.5 We have heard the parties on this issue of date of applicability of relief for change in law. We feel that the intent of all the letters of the ministry referred here is to consider financial year. The fact that the outer date considered by the Ministry of Power is 31.03.2017 shows that the intent is to take into account the impact for the financial year. It cannot be the case that the Ministry of Power has randomly chosen a date without application of mind. Moreover, as per the decision of CCEA the pass through of higher cost of imported coal is to be allowed for the balance four years of 12th Five Year plan period. We also note that CCEA considered this issue in February 2013. To apply relief from 31.07.2013 does not make logical sense as the MoP letter dated 31.07.2013 consolidated the earlier decisions on this issue which were under active consideration of

several authorities from time to time starting from early 2013 onwards. The fact that the decision was concluded in July 2013 would not deprive the party of the relief it is entitled to just because the decision was under consideration only. Further, ACQ is considered on a financial year basis and not on the basis of part of the financial year. Therefore, the date applied by the Central Commission in the Impugned Order is correct and take the principle of restitution to the logical end also in terms of Energy Watchdog Judgement. We decide this issue against the Appellant.

7. **Issue No.4**:-

7.1 Learned senior counsel for the Appellant, Mr. M.G. Ramachandran submitted with respect to the methodology arrived at by Central Commission to compensate Adani Power, that the same is contrary to the methodology previously arrived at in GMR, DB Power etc. matters. Adani Power had admitted to the formula adopted in the GMR case and sought implementation of the same. The Central Commission should not have departed from such formula.

7.2 It was further submitted that the Central Commission has erroneously allowed the change in law as the difference between the actual cost of generation using alternate coal and energy charges revenue under the PPAs. To the extent of the coal supply quantum actually made available under the FSA, Adani Power is only getting the quoted energy charges but bearing the difference between the landed cost of the domestic coal and the quoted energy charges. If the Change in Law had not occurred, Adani would have to bear cost of difference between quoted energy charges and the landed cost of domestic coal. Further, parameters such as Station

Heat Rate (SHR) etc. relate to the machine performance, namely turbine heat rate and boiler efficiency. SHR, Auxiliary Energy Consumption (AEC) etc. have no relation to the impact of NCDP 2013. Had such change in law event not taken place, generator would not have been entitled to claim any relief on the parameters that the generator could not achieve.

7.3 ***Per contra***, Mr. Amit Kapur submitted relief must be calculated based on the difference between actual cost of generation with alternate coal and the quoted energy charges. It was also argued that the contention of the Haryana Utilities is contrary to their own stand before the Central Commission and is another attempt to curtail the restitutive relief granted to Adani Power in terms of the provisions of the PPAs. During the proceedings before the Central Commission, Adani Power had proposed a methodology based on the methodology approved by Central Commission in the GMR case considering quoted tariff under the PPAs as the base. The Haryana Utilities agreed to this proposition during the said proceedings, as is recorded in: -

(a) Record of Proceedings of hearing dated 10.08.2017 as under:-

"3. In response to the Commission's query as to whether the methodology adopted by the Petitioner in the light of the methodology given in GMR case ***is acceptable to the Haryana Utilities****, learned counsel replied in the positive"*

(b) Order of the Central Commission dated 28.09.2017 in IA No. 57 of 2017 in Petition No. 97/MP/2017 (proceedings relating to interim relief), it is recorded as follows:

> *"7… Haryana Utilities who is the only respondent* ***has not objected to the calculation*** *made by the Applicant."*

7.4 He further submitted that the Central Commission computed compensation as a difference between actual cost of generation using alternate coal and energy charges as per the PPAs in line with the formula approved in the GMR case. Being an admitted position on part of the Haryana Utilities, they cannot be permitted to challenge it now. The Central Commission's order dated 03.12.2018 in Review Petition No. 24/RP/2018 filed by the Haryana Utilities against the Impugned Order, was also referred to, *viz*: -

> *"25… It is apparent from the above that the Commission, after due consideration of the submissions of the Adani Power and Prayas had consciously decided on the methodology for computation of relief due to shortage of domestic coal under change in law for the period from 1.4.2013 to 31.3.2017 in Para 46 of the impugned order. The Review Petitioners had not suggested any methodology of calculation of the relief due to shortage of domestic coal. On the other hand, the Review Petitioners in their reply dated 28.7.2017 in the Petition No. 97/MP/2017 had stated that "the reliance to the decision of GMR is wholly in appropriate". The Review Petitioners are now suggesting an alternative formula for computation of the relief under change in law. As already reiterated in the earlier part of the order, the review cannot be used for substitution of a view already taken with a new view. Therefore, the review on the ground is not maintainable."*

He further submitted that, it is no longer open to Appellants to contest the methodology since the methodology approved in this case is on the same lines of methodology approved by the Ld. Central Commission in GMR case and it has also attained finality as noted in the Judgment of the Hon'ble Tribunal dated 20.12.2019 in Appeal No. 135 of 2018 and in Execution Petition No. 2 of 2020 dated 22.05.2020 in same Appeal. In this regard, relevant para in E.P. No. 02 of 2020 is noteworthy: -

> *"8…This Tribunal further held that the order dated 03.02.2016 passed by CERC in Petition No. 79/MP/2013 had attained finality since the Respondents therein had not challenged the same and that the order passed in Petition No.105/MP/2017 was a confirmation of the methodology pertaining to the directions laid down in order dated 03.02.2016 passed by CERC in Petition No. 79/MP/2013. The relevant portion of the said Judgment of the Tribunal reads as under:-*
> *"11.12…As such, the Central Commission vide its order dated 03.02.2016 ruled that for computing the Energy Charge Rate, the coal coming from all modes of procurement has to be apportioned among the three said procurers namely GRIDCO, 7 Haryana & Bihar. This order has attained finality as none of the appellants has challenged the same and the impugned order dated 20.03.2018 is nothing but confirmation of the findings and derived methodology as per order dated 03.02.2016…*

7.5 He also submitted that the Central Commission followed a methodology consistent with that approved in the GMR case and other earlier Orders being Order dated 16.05.2019 in Petition Nos. 8/MP/2014 and Petition No. 284/MP/ 2018 in the matter of *GMR Warora Energy Limited* vs*. MSEDCL &Ors*., Order dated 03.06.2019 in Petition No. 156/MP/2018 in the matter of *MB Power (Madhya Pradesh) Limited* vs*. Uttar Pradesh Power Corp. Ltd.* and Order dated 12.06.2019 in Petition No. 118/MP/2018 in the matter of *TRN Energy Private Limited vs Paschimanchal Vidyut Vitran Nigam Ltd. & Ors.*

7.6 In respect of the operating parameters like SHR and auxiliary energy consumption, it was argued that this Tribunal, in the earlier judgments, has already held that operating parameters cannot be considered as per bid assumptions viz, *M/s Wardha Power Company Limited* vs. *Reliance Infrastructure Limited & Another,* reported as2014 SCC Online APTEL 142; *Jaipur Vidyut Vitran Nigam Limited* vs. *RERC &Ors.* 2019 SCC OnLine APTEL 98 and Judgment dated 13.11.2019 in *Sasan Power Limited vs. CERC & Ors.* Appeal No. 77 of 2016.

Our Findings:-

7.7 Learned senior counsel for the Appellant submitted that the Central Commission in the Impugned Order has wrongly allowed the change in law as the difference between the actual cost of generation using alternate coal and energy charges under the PPAs. To the extent of the coal quantum actually made available under the FSA, Adani is only getting the quoted energy charges but bearing the difference between the landed cost of the domestic coal and the quoted energy charges. If the change in law had not occurred, Adani would have had to bear the cost of difference between quoted energy charges and the landed cost of domestic coal.

7.8 The methodology adopted by the Central Commission is contrary to the methodology previously adopted in earlier cases of GMR, DB Power etc. matters. Adani Power had admitted to the formula adopted in the GMR Kamalanga case and sought implementation of the same. The Central Commission should not have departed from such formula.

7.9 ***Per Contra***, learned counsel for Adani Power submitted that Adani Power had proposed a methodology based on the methodology approved by the Central Commission in the GMR case considering quoted tariff under the PPAs as the base. The Appellants had agreed to this proposition during proceedings before the Central Commission. Record of Proceedings of hearing dated 10.08.2017, Order of CERC dated 28.09.2017 in IA No. 57 of 2017 in Petition No. 97/MP/2017 and CERC order dated 03.12.2018 in Review Petition No. 24/RP/2018 were relied upon by the learned counsel.

7.10 We have seen the Record of Proceedings as relied upon by the learned counsel for Adani Power and are extracted below:-

- RoP for hearing dated 10.08.2017 as under: -

> *"3. In response to the Commission's query as to whether the methodology adopted by the Petitioner in the light of the methodology given in GMR case* ***is acceptable to the Haryana Utilities****, learned counsel replied in the positive"*

- Order of Central Commission dated 28.09.2017 in IA No. 57 of 2017 in Petition No. 97/MP/2017 (proceedings relating to interim relief):-

> *"7… Haryana Utilities who is the only respondent* ***has not objected to the calculation*** *made by the Applicant."*

- Order of Central Commission dated 03.12.2018 in Review Petition No. 24/RP/2018 filed by the Appellants against the Impugned Order:-

> *"25… It is apparent from the above that the Commission, after due consideration of the submissions of the Adani Power and Prayas had* ***consciously decided on the methodology for computation of relief due to shortage of domestic coal under change in law for the period from 1.4.2013 to 31.3.2017 in Para 46 of the impugned order.*** *The Review Petitioners had not suggested any methodology of calculation of the relief due to shortage of domestic coal. On the other hand, the Review Petitioners in their reply dated 28.7.2017 in the Petition No. 97/MP/2017 had stated that "the reliance to the decision of GMR is wholly in appropriate".* ***The Review Petitioners are now suggesting an alternative formula for computation of the relief under change in law. As already reiterated in the earlier part of the order, the review cannot be used for substitution of a view already taken with a new view.*** *Therefore, the review on the ground is not maintainable."*

7.11 We have noted that the Central Commission has computed compensation as a difference between actual cost of generation and energy charges as per PPAs in line with the formula approved in the GMR case. Having agreed to the methodology proposed by Adani Power before the Central Commission, it is not correct on the part of the Appellants to now dispute that methodology. The Central

Commission has followed a methodology consistent with that approved in the GMR case and other earlier Orders as referred above in the submissions. We also note that, it is no longer open to Appellants to contest the methodology which has attained finality as noted in the Judgment of this Tribunal dated 20.12.2019 in Appeal No. 135 of 2018 and in Execution Petition No. 2 of 2020 dated 22.05.2020 in same Appeal.

7.12 We also note that the operating parameters cannot be considered as per bid parameters as has been observed by us in our earlier judgements which are referred above in the submissions. This Tribunal has already held that the SHR/GCV submitted in the bid (when it is not a bid parameter as per the bidding guidelines) by a generating company is not to be used as the basis for computing the coal shortfall requirement and thereby for computation of change in law compensation to be awarded to the generating company. Such linking of change in law compensation to the SHR/GCV mentioned in the bid documents would not restitute the affected party to the same economic position if the approved change in law event had not occurred.

7.13 This issue is already settled by multiple decisions of this Tribunal including the latest decision in Appeal No. 182 of 2019 decided on September 14, 2020. The operational parameters are therefore rightly considered by the Central Commission and the formula has been rightly adopted. This issue is decided accordingly.

8. **Summary of Findings:-**

Based on issuewise consideration & analysis stated supra, we summarise our findings as under:-

8.1 **Issue No.1**:- We do not find any merit in the Appellant's submission that Adani Power's bid was premised on imported coal to the extent of 30% and accordingly affirm the findings of Central Commission on this issue.

8.2 **Issue No.2**:- We hold that the Central Commission has correctly allowed the change in law reliefs to Adani Power to the extent of actual coal shortfall suffered by it since the same cannot be limited to the percentage specified in the NCDP-2013.

8.3 **Issue No.3**:- We hold that the date of applicability for change in law relief considered by the Central Commission in the impugned order is correct and takes the principle of restitution to the logical end in terms of Energy Watchdog Judgment.

8.4 **Issue No.4**:- This issue is already settled by multiple decisions of this Tribunal including the latest decision in A.No.182 of 2019 decided on 14.09.2020. The operational parameters are, therefore, rightly considered by the Central Commission and the formula has been adopted correctly.

ORDER

In light of the above, we are of the considered view that the issues raised in the Appeal are devoid of merits and hence the Appeal No. 168 of 2019 is dismissed. The impugned order dated 31.05.2018 passed by Central Electricity Regulatory Commission in Petition No. 97/MP/2017 is hereby upheld.

In view of the disposal of the Appeal, the relief sought in the IA Nos. 510 of 2019 & 1951 of 2019 do not survive for consideration

and accordingly, stand disposed of.

No order as to costs.

Pronounced in the Virtual Court on this **03rd day of November, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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