IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 182 OF 2019

Dated: 14th September, 2020

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

In the matter of:

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

Versus

1. **Maharashtra State Electricity Distribution Company Ltd.**
Through its Superintending Engineer,
5th Floor, Prakashgarh, Plot No. G-9,
Anant Kanekar Marg, Bandra (East)
Mumbai – 700 051.

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

3. **Prayas (Energy Group)**
Unit III A & B, Degiri,
Joshi Railway Museum Lane,
Kothrud Industrial Area,
Kothrud, Pune – 411 038.

4. **The General Secretary,**
Thane Belapur Industries Association,
Rabale Village, Post Ghansoli,
Plot P-14, MIDC
Navi Mumbai – 400 701. **….Respondent(s)**

Counsel for the Appellant : Mr. Manpreet Lamba
Mr. Ramanuj Kumar

Counsel for the Respondent(s) : Mr. Udit Gupta
Mr. Anup Jain
Ms. S. Rama for R-1

Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. PoorvaSaigal
Mr. Pulkit Agarwal
Mr. Shubham Arya
Mr. Arvind Kumar Dubey
For R-3

J U D G M E N T

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

1. The instant Appeal No. 182 of 2019 has been filed by Adani Power Maharashtra Limited (APML) under Section 111 of the Electricity Act, 2003 against the Order dated 07.03.2018 passed by the Maharashtra Electricity Regulatory Commission in Case No. 189 of 2013 and Case No. 140 of 2014.

1.1 The Appellant is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 (hereinafter the "2003 Act") at Tiroda in the State of Maharashtra ("Tiroda Plant").

1.2 Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) Respondent (No.1) is a 'distribution licensee' authorized to undertake procurement, supply and distribution of electricity within the State of Maharashtra (hereinafter referred to as "*MSEDCL*").

1.3 Respondent Commission Respondent (No.2) is Maharashtra Electricity Regulatory Commission (MERC) a statutory authority constituted under the Electricity Regulatory Commission Act, 1998 with specific powers vested under section 86 of Electricity Act, 2003 and is represented through

its Secretary, World Trade Centre, Centre No. 1, 13th Floor, Cuffe Parade, Mumbai – 400005.

1.4 Prayas Energy Group Respondent (No.3) is a non-governmental, non-profit organization based in Pune, India. Prayas consists of four groups working on different sectors and issues : heath, energy, resources & livelihoods. Prayas is also recognized as a Scientific and Industrial Research Organization by the Department of Scientific and Industrial Research and Industrial Research, Government of India.

1.5 The General Secretary, Thane Belapur Industries Association, Navi Mumbai is Respondent (No.4) represents industries being consumers of electricity.

2. **Brief Facts of the Case**:-

The brief facts of the case are as follows:

2.1 APML and MSEDCL had entered into long-term Power Purchase Agreements ("***PPAs***") dated (a) September 8, 2008 for 1320 MW (hereinafter referred to as the "**1320 MW PPA**"); (b) March 31, 2010 for 1200 MW (hereinafter referred to as the "**1200 MW PPA**"); (c) August 9, 2010 for 125 MW (hereinafter referred to as the "**125 MW PPA**"); and (d) February 16, 2013 for 440 MW (hereinafter referred to as the "**440 MW PPA**") (hereinafter collectively referred to as the "**PPAs**"), pursuant to competitive bidding processes conducted by the Respondent No. 1 – MSEDCL under Section 63 of the 2003 Act read with the Standard Bidding Guidelines issued by the Ministry of Power (MoP).

2.2 MERC allowed the claims of APML on account of change in the New Coal Distribution Policy, 2007 (NCDP, 2007) as change in law under Article 13 of the 1320 MW PPA and Article 10 of the remaining PPAs, but while doing so, MERC restricted the relief of change in law in the range of 35% to 25% for the last four

years of the 12th Five Year Plan period, i.e. FY 2013-14 to FY 2016-17 on the basis of the minimum quantity of coal supply specified in the NCDP, 2013. As part of the change in law relief, MERC considered the SHR mentioned by APML in the bid documents and the middle value of GCV range of assured coal grade as per the FSA/LoA/MoU.

2.3 The facts as brought before us by the Appellant are summarized in the following paragraphs:

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

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

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

- On 12.11.2008 the SLC(LT) recommended issue of Letter of Assurance (LoA) by Coal India Limited (CIL) for 1180 MW capacity from Units 1 and 2 of the Tiroda Plant after noting that Lohara Coal Block, which was allocated to APML by the MoC for captive use, caters to the requirement for generation of 800 MW power.

- APML applied for coal linkages to the MoC and Government of India through letters dated 30.05.2009 and 09.06.2009 for the balance capacity of 1320 MW.

- On 01.06.2009 / 02.06.2009 and 06.06.2009, WCL and SECL issued two Letters of Assurance (LoAs) in favour of APML and assured supply of 2.185 MMTPA and 2.557

MMTPA respectively in respect of application dated 23.11.2007.

- On 21.10.2009, the MoP issued coal linkage policy for 12th plan projects stipulating mechanism for grant of LoA and weightage for priority.

- On 14.02.2012 / 31.05.2013 SLC (LT) decided to freeze grant of new coal linkages nullifying the coal supply assurance contained in NCDP, 2007.

- On 28.12.2012, Fuel Supply Agreement (FSA) was executed between APML and WCL for domestic coal linkage of 1180MW capacity from Units 1 and 2.

- On 19.03.2013, the FSA dated 28.12.2012 was amended and the quantum of coal assured by WCL was transferred to SECL vide an addendum to the FSA dated 28.12.2012. The FSA was further amended on 14.08.2013 and 07.03.2014 to *inter alia* provide for ACQ and grade adjustments.

- On 21.06.2013, the Cabinet Committee on Economic Affairs ("***CCEA***"), in view of the persistent shortage of domestic coal, approved a revised mechanism for coal supply to power producers.

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

- On 31.07.2013, the MoP issued a letter to the CERC and State Electricity Regulatory Commissions to consider as pass-through in tariff the cost of alternate coal (procured to meet the shortfall in supply of domestic linkage coal) on a case by case basis.

- On 17.12.2013, APML filed a petition bearing Case No. 189 of 2013 before the MERC seeking compensation on account of Change in Law.

- The MERC on 15.07.2014 disposed of APML's Petition in Case No. 189 of 2013, approving a framework for determination of compensatory fuel charge considering the CCEA decision of 21.06.2013 and the MoP's advice dated 31.07.2013.

- On 23.07.2014, in compliance with the MERC Order of 15.07.2014, APML filed another petition bearing Case No. 140 of 2014, *inter-alia*, for approving a mechanism for determination of compensatory tariff and to recognize the CCEA decision, NCDP amendment of 2013 and the MoP advice of 31.07.2013 as Change in Law event as per the provisions of the respective PPAs. The MERC, *vide* its order dated 20.08.2014, formulated a mechanism for pass-through of the compensatory fuel charge that had been allowed in Case No. 189 of 2013.

- On 09.09.2014, APML filed a Review Petition before the MERC bearing Case No. 159 of 2014 which was disallowed by the MERC as being devoid of merits except on the issue of effectiveness of the compensatory fuel charge.

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

- On 09.03.2016, APML filed appeals before this Tribunal vide Appeal Nos. 129 of 2016 and 130 of 2016 against MERC Orders in Case No. 189 of 2013 and 140 of 2014 disposing the Review Petition filed by APML. MSEDCL too filed cross appeals against the MERC orders vide Appeal Nos. 187 and 188 of 2016.

- On 11.04.2017, the Hon'ble Supreme Court of India pronounced its order in Case No. 5399-5400 of 2016 in the matter of *Energy Watchdog vs. CERC &Ors.* ("***Energy Watchdog Judgment***") on various aspects of compensatory tariff claims including the interpretation of change in law provisions in the PPA and the scope of regulatory power under Section 79(1)(b) of the 2003 Act.

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

- On 07.03.2018, MERC pronounced the Impugned Order in Case No. 189 of 2013 and 140 of 2014 wherein MERC allowed the claims of APML on account of changes in the NCDP, 2007 as change in law under Article 13 of the 1320 MW PPA and Article 10 of the remaining PPAs, but while doing so, the MERC restricted the relief of change in law for 1180 MW capacity to the extent of the minimum supply obligations specified for the CIL subsidiaries for the last four years of the 12th Five Year Plan period, i.e., FY 2013-14 to FY 2016-17 as per the NCDP, 2013 . The MERC further held that the alternate coal quantity for meeting the domestic coal shortfall shall be computed on the basis of the SHR mentioned by APML in the bid documents and the middle value of GCV range of assured coal grade for domestic coal as per the FSA/LoA/MoU.

- Hence, the present Appeal has come before us. The Appellant has sought the following reliefs:

  (a) Hold and declare that the impact of Change in Law shall not be linked to the net SHR as submitted in the Bid and instead the impact of Change in Law would be considered on the basis of SHR as per MERC MYT Regulations, 2011, or actual, *whichever is lower, and modify paragraphs 91 and 92 of the Impugned Order accordingly;*

(b) Hold and declare that the impact of Change in Law for domestic coal supply should not be computed considering the middle value of GCV range of assured coal grade and instead the impact of Change in Law would be considered on the basis of as received/ actual GCV of coal, and modify paragraphs 91 and 92 of the Impugned Order accordingly;

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

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

3. **Questions of law**:-

The Appellant has raised following questions of law:-

- Whether the MERC has rightly held that the impact of the Change in Law shall be available until the end of FY 2016-17, i.e. till the last year of the 12th plan period referred to in the CCEA decision and the New Coal Distribution Policy 2013?

- Whether the MERC was correct in limiting the relief for Change in Law until March 31, 2017 only even when supply of domestic coal has not been restored to 100% ACQ, as assured in New Coal Distribution Policy 2007?

- Whether the MERC was correct in holding that the net SHR submitted by the Appellant in its bid or SHR and Auxiliary Consumption norms specified under the MYT Regulations, 2011, whichever is superior shall form the basis for computing compensation in the event of Change in Law?

- Whether the MERC acted in an arbitrary and an unjust manner while determining the parameters for compensation to be granted to the Appellant on account of Change in Law in disregard of the PPA provisions and the principles laid down by the Hon'ble Supreme Court of India in the matter of *Energy Watchdog vs. CERC and Ors.* and the decision of this Tribunal

dated September 12, 2014 in the matter of *Wardha Power Industries Ltd. Vs Reliance Infrastructure Ltd*?

- Whether the MERC has erred in not allowing Carrying Cost to the Appellant in disregard of the restitution provision stipulated under the PPA?

- Whether the Impugned Order, in so far as it pertains to the issues for consideration in the present Appeal, is contrary to the principles of natural justice, equity and good conscience?

4. **Mr. Sajan Poovayya, learned senior counsel appearing for the Appellant has made the following submissions in the written pleadings so also in the course of the hearings for our consideration:-**

4.1 Learned counsel for the Appellant has submitted that the entire basis of Change in Law relief under the PPAs is to restore the affected party to the same economic position as if the Change in Law event had not occurred. The Appellant suffered the impact of Change in Law on account of changes in government policies relating to allocation and supply of domestic linkage coal assured under the NCDP, 2007. The Appellant had set up its generating station on the basis of assurance of 100% of normative coal supply contained in the NCDP 2007. However, due to change in government policy over time, the assurance of 100% normative coal supply was not fulfilled. In order to meet the shortfall in supply of domestic linkage coal, the Appellant had to procure coal from alternate sources and therefore, needs to be compensated in full for the additional expenses incurred by it in procuring such alternate coal. The MERC's decision to consider the superior of net SHR submitted in the Bid or SHR and Auxiliary Consumption norms as specified for new generating stations in Multi-Year Tariff (MYT) Regulations, 2011 as basis for computing the Change in Law compensation is flawed and without any basis in law.

4.2 The MERC has failed to consider that all the four PPAs between the Appellant and MSEDCL were entered into through Case-1 competitive bidding process wherein SHR is not a bid parameter. In Case-1 bidding, unlike Case-2 projects, there is no requirement to quote the SHR or net heat rate in the bid submitted by the bidders. In fact, in a Case – 1 bidding process, the bidder is required to quote only fixed charges and variable charges and hence, MERC's requirement that the Change in Law compensation to be computed on the basis of the SHR submitted in the bid is erroneous and contrary to the provisions of the PPAs and of the Standard Bidding Guidelines issued by the Ministry of Power. The Appellant in its Written Submission has referred to the following provisions of the Standard Bidding Guidelines notified by the MoP on January 19, 2005:

"*4.2. In case of long term procurement with specific fuel allocation (Case 2), the procurer shall invite bids on the basis of capacity charge and net quoted heat rate. The net heat rate shall be ex-bus taking into account internal power consumption of the power station.*

5.14 In the case of procurement under Case-1,
(i) the bidder shall quote the price of electricity at the interconnection point, i.e., being the point where the electric lines of the generating station connect to inter/intra statetransmission network.

5.15 The bidder who has quoted lowest levellised tariff as per evaluation procedure, shall be considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices."

4.3 The Appellant has also referred to the provisions contained in the Request for Proposal (RfP) dated 15.05.2009 issued by MSEDCL, as extracted below:

"*1.2 The Procurer proposes to select the Bidder(s) having the prescribed qualifications and whose Quoted Tariff is determined to be acceptable as per the provisions of Clause 3. 5 to become Seller(s).*"

"*B. viii. Bidders shall have the option to quote firm Quoted Capacity Charges and/or firm Quoted Energy Charges for the term of the PPA, i.e., where the Quoted Escalable Capacity Charges and / or Quoted Escalable Energy Charges shall be 'nil' for all the Contract Years.*"

"3.5.3 The Bidder with the lowest Levelized Tariff shall be declared as the Successful Bidder for the quantum of power (in MW) offered by such Bidder in its Financial Bid."

By reference to these provisions of the Standard Bidding Guidelines and the RfP, the Appellant emphasizes that there is no requirement for the bidders to quote SHR or net heat rate in a Case 1 project. Further, nowhere does the RfP mention that the bidder/APML shall quote SHR or net heat rate, which would be the criteria to determine the successful bidder.

4.4 Reference is also made to Recital D of the PPA dated 08.09.2008 executed between APML and MSEDCL for 1320 MW, which states as follows:

"*Based on the most competitive tariff, terms and conditions offered by the Seller, the Procurer has selected the Seller to sell the generation capacity and supply of electricity in bulk to the Procurer to the extent of 1320 MW capacity in aggregate on the terms and conditions contained in the RFP documents*."

The Appellant submits that as per the RfP terms, Schedule 10 (Quoted Tariff) of the PPA (1320 MW) contains a two-part tariff, namely, "Quoted Non-Escalable Capacity Charge" and "Quoted Non-Escalable Energy Charge". There is no mention of SHR or GCV anywhere in any of the 4 PPAs. Thus, when the Appellant's tariff was not discovered on the basis of any coal quality or efficiency parameters, it cannot be the Respondent's case that the compensation for change in law must be linked to the so-called "bid assumed parameters", which are non-existent.

4.5 The learned counsel further submitted that the MERC appears to have inadvertently omitted to take note of its own order in *JSW Energy Ltd. vs. MSEDCL (*Case No. 123 of 2017) pronounced on the same day as the Impugned Order wherein it has correctly held that Auxiliary Consumption, which is an operating parameter like the SHR, shall be applicable as per the norms laid down by the MERC in the MYT Regulations. Accordingly, once the MERC has decided to adopt the norms

prescribed in the MYT Regulations for one of the operating parameters, the same principle ought to be followed for the SHR which is also an operating parameter and has been specified as such by the MERC. The relevant extracts from Case No. 123 of 2017 case relied upon are as under:-

"19.11 In view of the above, financial impact of Change in Law on the auxiliary consumption to restore the generator to the same economic position as if such Change in Law has not occurred is allowed. ***The Change in Law shall be applicable on auxiliary consumption of the Unit as per the Norms laid down by the Commission or actual, whichever is less since the tariff of the project is based on Competitive Bidding the auxiliary power consumption considered is not known****.However this auxiliary consumption should be at a normative value corresponding to Scheduled generation only. Moreover, this Change in Law with respect to auxiliary consumption shall not include power consumption for staff colonies of the generating station."*

4.6 Learned counsel for the Appellant has further relied on this Tribunal's judgment dated 12.09.2014 in the matter of *Wardha Power Industries Ltd*. v. *Reliance Infrastructure Ltd*. in Appeal No. 288 of 2013 ("***Wardha Power Judgment***") which held that consideration of bid parameters may not lead to the correct compensation under Change in Law. The relevant extracts from the case relied upon are as under:-.

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

27. For example, if the price of coal calculated on the same base as used in the bid is more than the prevalent price of coal, then using the base price of coal for computing the compensation for Change in Law will result in over

> ***compensation to the Seller. Similarly, if the coal price calculated on the same base as used in bid is less than the actual price of coal, it will result in under compensation to the Seller. In both these cases, the affected party will not be restored to the same economic position as if such Change in Law has not occurred, as intended in the PPA."***

The Appellant submitted that the finding of this Tribunal in Wardha Power Judgment is in reference to the same format of RfP on which MSEDCL has relied.

4.7 The learned counsel for the Appellant has further submitted that the SHR submitted as part of the qualifying requirement in the bid is estimated prior to award of EPC contract for the project and may vary from actual SHR. Therefore, the SHR or GCV mentioned in the bid as part of the qualifying requirements of the RFP has little or no relevance to the determination of Change in Law compensation payable to the Appellant and would defeat the restitutive principle of the PPA as the affected party will not be put back into the same economic position.

4.8 The learned Counsel submitted that the SHR mentioned by the Appellant in its bid to MSEDCL was for the limited purpose of indicating that the raw material required for the purpose of operating the plant was tied-up from different sources. Submission of coal quantities from different sources (which is part of the qualifying requirements) cannot be arbitrarily elevated to a bid parameter contrary to the express terms of the Bidding Guidelines, RfP and the terms of the PPA and then used to deny the entitlement of the Appellant to receive compensation for Change in Law in terms of the PPAs. The Hon'ble Supreme Court in the Energy Watchdog Judgment has not found this as limiting or constraining factor for the right of the generator to obtain relief for Change in Law. At paragraph 42, the Hon'ble Supreme Court observed as follows:

"*..the fact that the fuel supply agreement has to be appended to the PPA is only to indicate that the raw material for the working of the plant is there and is in order.*"

4.9 MSEDCL's contention that APML should not be allowed to pass on its plant inefficiencies as part of any Change in Law relief is fully addressed in the relief sought by APML, i.e., coal quantity for change in law relief should be computed on the basis of actual SHR or, that prescribed under the MERC MYT Regulations, 2011 for the corresponding Unit capacity, whichever is lower. By taking the lower of the two values, APML has ensured that no inefficiency will be passed on to the Discoms or the consumers.

4.10 This issue has been settled by the Tribunal and is no longer res integra. In the matter of Sasan Power Limited v. CERC &Ors, order dated 13.11.2019 (Appeal No. 77 of 2016), this Tribunal held as follows:

> *"**19.8.1** We have carefully considered the rival contentions of both the parties and also taken note of various judgments relied upon by the parties. It is the main contention of the Appellant that principle of change in law provisions of PPA is restoration to the same economic position. On the other hand, the Respondents contend that SHR as quoted in the bid should be considered for computation of coal quantity to arrive at actual compensation to be made to the Appellant.*
>
> ***19.8.2.*** *Having regard to the contentions of the Appellant and the Respondents and after critical analysis of the issue, we are of the opinion that while we have held that compensation of various levies cannot be linked to the dispatched quantity of coal, the compensation should not be restricted to bid SHR. It is also relevant to note that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters.*
>
> ***19.8.3.*** *In light of the above, we are of the opinion that for determination of coal consumption for scheduled generation, SHR should be based on the actual instead of bid SHR. However, to adequately protect the interest of the procurers and consumers at large, the SHR is required to be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009..."*

4.11 The Learned counsel for the Appellant as an additional argument submitted that this Tribunal apart from holding that the bid SHR has no relevance for determining the compensation for change in law of Case-1 PPAs, has also returned similar finding in Case-2 PPA. Sasan Power is a Case 2 project wherein net quoted heat rate is a bid parameter and despite that, the Tribunal rejected the plea to apply bid SHR as the basis for computing Change in Law relief.

4.12 The learned counsel for the Appellant has also relied upon the order passed by the CERC on 31.05.2018 in Petition No. 97/MP/2017 which is related to domestic coal shortfall and wherein the CERC has considered SHR as per applicable CERC norms or actual, whichever is lower, for allowing Change in Law compensation.

4.13 The learned Counsel for the Appellant has further stated that MSEDCL's reliance on the order of this Tribunal in *Adani Power Ltd. v. GUVNL (Appeal No. 210 of 2017)* is misplaced. MSEDCL has conveniently omitted to draw attention to part of the said order which states "*In Case-1 bidding, the Appellant is required to quote only the tariff (and not SHR)…".* Further, relief to the appellant (Adani Power Mundra) in that case was denied solely on the ground that the State Commission's order had attained finality. The said judgment is clearly distinguishable on facts and has no bearing on the issues raised in the present case.The relevant extract of the said order relied upon by the Appellant is as below:

> *"iii. …In the present case the Appellant was not required to disclose the SHR based on which it has quoted the tariff. The issue of disclosing the SHR came for the first time before the Gujarat Commission while making claims under Change in Law Events by the Appellant. Based on the figures of SHR produced before the Gujarat Commission, the Gujarat Commission allowed to give effect to Change in Law claims based on the said SHR. The Appellant continued to claim the benefits under Change in Law based on the approved SHR by the State Commission. It is the Appellant who is only aware about the formulation of its bid including SHR for submission to the Respondent Nos. 2 to 4. The Appellant has also*

not challenged the said orders of the Gujarat Commission and these orders have achieved finality."

4.14 Further, the Ministry of Power, on 08.03.2019 by way of an Office Memorandum, has also directed/clarified to consider Normative SHR for the purpose of deriving ACQ. The relevant extract is as below:

"3.3 Approval with regard to ACQ based on efficiency: ACQ per MW entitlements for all thermal power plants, irrespective of their age or technical parameters, shall be calculated based on Normative Station Heat Rate with upper ceiling of 2600 kcal/kwh."

4.15 Therefore, MSEDCL's contention that the FSA quantity, i.e., ACQ was determined on the basis of SHR mentioned in the bid documents is erroneous. Accordingly, any methodology for computing the compensation for Change in Law, which restricts or precludes the Appellant from recovering the actual cost incurred in procuring the alternate coal to meet the shortfall in supply of domestic linkage coal caused by the Change in Law event, is contrary to the PPAs and judgments of the Hon'ble Supreme Court as also of this Tribunal and the Appellant is entitled for Change in Law relief based on normative SHR as per MERC MYT Regulations, 2011/2015 or actual SHR, whichever is lower so that the Appellant is restored to the same economic position as if the Change in Law had not occurred.

4.16 The learned counsel for the Appellant has vehemently submitted that the MERC in the Impugned Order has committed an error in holding that for computing impact of approved Change in Law events, the GCV would be the middle value of the GCV range of the assured coal grade in LoA/FSA/MoU, instead of the actual as received GCV since the same does not result in restoring the Appellant to the same economic position and is contrary to the fundamental principle of Change in Law provision of the PPAs, namely,Article 13.2 of the 1320 MW PPA and Article 10.2 of the PPAs for 1200/125/440 MW, which require that the purpose of

compensating the Party affected by a Change in Law is to restore, through Monthly Tariff Payments, the affected Party to the same economic position as if such Change in Law has not occurred. The methodology approved by the MERC in the Impugned Order subjects the Appellant to a notional GCV, which would in most cases be higher than the actual / as received GCV, and would result in the Appellant being entitled to compensation for a lower quantity of alternate coal. This will leave the Appellant in a worse economic position (and not in the same economic position) since it would not be compensated for the entire quantity of alternate coal procured to meet the shortfall in supply of domestic linkage coal.

4.17 The counsel for the Appellant had submitted before the MERC that the actual GCV based on third party sampling certificate ought to be considered for relief under Change in Law in order to restore the Appellant to same economic condition in terms of the PPAs. This submission was in line with various orders issued by the CERC (Petition No. 235/MP/2015, for instance). Furthermore, in its earlier orders on Change in Law, such as in Case No. 2 of 2014 and Case No. 163 of 2014, the MERC had not stipulated any condition regarding 'Middle value of the GCV range' of the assured coal grade for the purpose of computing Change in Law compensation. MERC, therefore, erroneously stipulated a new condition for the Appellant ignoring its own prior orders.

4.18 The learned counsel for the Appellant has also submitted that the MERC overlooked the fact that GCV specified by Coal India Ltd and its subsidiaries is on 'Air-Dried Basis' (ADB), which represents GCV measured by heating the coal to bring it to certain specified laboratory conditions (5% moisture, 60% humidity and 40^{o}C temperature). Whereas the GCV used for computation of Energy Charge is always on 'As Received basis' (ARB), which is derived on the basis of the following empirical formula:

GCV (ARB) = GCV (ADB) [(100-TM)/(100-IM)]

Where, TM = Total Moisture; IM = Internal Moisture

In other words, the computation of GCV(ADB) is at laboratory conditions which parameters do not exist under normal operating conditions. Since coal received at the plant and fired in the boiler is in a different condition than the laboratory condition, heat loss on account of moisture has to be taken into account over which the generators have no control. Keeping this aspect in view, the CERC in Tariff Regulations, 2014 has allowed further deduction of 85 kCal/kg from the actual GCV measured on receipt to provide adjustment for storage loss.

"(2) Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to three decimal places in accordance with the following formulae:

(a) For coal based and lignite fired stations:

ECR = {(SHR – SFC x CVSF) x LPPF / (CVPF + SFC x LPSFi + LC x LPL} x 100/(100 – AUX)

Where,

AUX =Normative auxiliary energy consumption in percentage.

CVPF = Weighted Average Gross calorific value of coal as received, in kCal per kg for coal based stations less 85 Kcal/Kg on account of variation during storage at generating station;

Therefore, If the GCV on Air Dried Basis is considered instead of GCV on "As Received Basis" for computation of alternate coal requirement, it will not restore the Appellant to the same economic position as provided in Articles 13.2 and 10.2 of the 1320 MW and 1200/125/440 MW PPAs respectively.

4.19 Further, the MERC has failed to take note of the MYT Regulations, 2015 which not only provides for 'As received' GCV but also includes adjustment for stacking loss by way of deducting 150 kcal/kg from GCV 'as received'. The Relevant

portion of MYT Regulations, 2015 relied upon is reproduced as under:

"48.6 Adjustment of ECR [Fuel Surcharge Adjustment] on account of variation in price or heat value of fuels

Any variation in Price and Gross Calorific Value of coal/lignite or gas or liquid fuel as received at unloading point less actual stacking loss subject to the maximum stacking loss of 150 kcal/kg vis-à-vis approved values shall be adjusted on month to month basis on the basis of average Gross Calorific Value of coal/lignite or gas or liquid fuel in stock received and weighted average landed cost incurred by the Generating Company for procurement of coal/lignite, oil, or gas or liquid fuel, as the case may be for a power Station:"

4.20 Further, the learned counsel for the Appellant has argued that the issue of GCV for change in law compensation has been settled by the Tribunal and is no longer *res integra*. In the matter of Sasan Power Limited (supra), this Tribunal held as follows:

"*22.10.4 We have perused the rulings in various judgments of this Tribunal relied upon by the Respondent/SPL to note that compensation for Change in Law event is to be paid on the basis of actuals in line with the provisions of Article 13 of the PPA which requires the affected party to be restored to the same economic position as if such Change in Law event had not occurred.*

……

22.10.6 It is also relevant to note from another Order of the Central Commission dated 15.11.2018 in Petition No. 88/MP/2018 in the case of GMR Warora Energy Limited vs. MSEDCL &Anr., wherein CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.

22.10.7 ***In the light of above, we are of the opinion that the technical parameters such as SHR and GCV quoted in the bidding documents cannot be considered for deciding the coal requirement for the purpose of calculating relief under Change in Law.*** *Accordingly, we hold that the Central Commission has analyzed this issue in detail and passed the impugned Order in a judicious manner. Hence, any interference by this Tribunal is not called for.*"

4.21 Further, the Learned Counsel for the Appellant submitted that MERC has erroneously ignored the ***Wardha Power Judgment*** (supra) wherein this Tribunal has already determined that the compensation for Change in Law cannot be correlated to the GCV or other parameters submitted in the bid.

4.22 The Learned Counsel for the Appellant has also placed reliance on the judgment passed by CERC in the case of *GMR Warora Energy Limited v. MSEDCL &Ors.* in the order dated 18.05.2019 ***("GMR Warora Order"),*** wherein the CERC specifically rejected MSEDCL's plea regarding consideration of the middle value of GCV band as the appropriate methodology for change in law compensation and held as under :-

> *"51. The Petitioner has submitted that it is entitled to be compensated for shortfall in linkage coal beyond 31.3.2017 in terms of the Commission's order dated 16.3.2018 in Petition No. 1/MP/2017 (GWEL V MSEDCL &ors). The Respondent, MSEDCL placing reliance of MERC orders dated 3.4.2018 in Case No. 154/2013, Order dated 7.3.2018 in Case No. 189/2013 and Order dated 19.4.2018 in Petition No. 102/2016* ***has submitted that the Station Heat Rate (SHR) to be computed for relief ought to be the net SHR as submitted in the bid or the SHR and Auxiliary Consumption norms specified for new thermal generating stations as per CERC Tariff Regulations, whichever is superior. It has further submitted that GCV to be considered ought to be middle value of the GCV range mentioned in the invoices supplied to the Petitioner****.*
>
> *52. It is pertinent to mention that similar submissions of the Respondent, MSEDCL were considered by the Commission in Petition No. 88/MP/2018 and it was observed by order dated 15.11.2018* ***that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take SHR specified in the tariff Regulations as a reference point instead of other parameters suggested by MSEDCL. It was also held that SHR as a bidding document cannot be considered for deciding the coal requirement for the purpose of calculating relief under change in law.*** *The relevant portion of the order is extracted hereunder:*
>
> *"30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to consider the bid parameters are not acceptable. The Respondent has also relied on MERC order with regard to GCV. As regards SHR, it was also*

suggested by MERC that net SHR as submitted in the bid or SHR norms specified for new thermal stations as per MYT Regulations, whichever is superior, shall be applicable. In our view, the decision in the said order has been given in the facts of the case and does not have any binding effect in case of the projects regulated by this Commission. ***Moreover, the SHR given in the bid are under test conditions and may vary from actual SHR. The Commission after extensive stakeholders' consultation has specified the SHR norms in the 2014 Tariff Regulations.*** *Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.*

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

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

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

4.23 The Appellant has further submitted that the contention of MSEDCL that any quality/ quantity issues are necessarily to be resolved under the FSA, as it is a contractual dispute between the Appellant and Coal India Limited is erroneous and holds no merit. A similar submission was made before the CERC in *Adani Power (Mundra) Limited Vs. UHBVNL* (Petition

No. 97/MP/2017) which was rejected by the CERC in its order dated 31.05.2018 holding as follows:

> *"25. The MoP letter dated 31.7.2013 and the Revised Tariff Policy have been held by the Hon'ble Supreme Court as having the force of law and read in context with the Article 13 of the PPAs, constitute Change in Law. Accordingly, this Commission has been directed by the Hon'ble Supreme Court to consider the case of the Petitioner afresh and grant relief as admissible under the PPAs.* ***Therefore, the shortfall in the supply of coal by CIL or its subsidiaries vis-a-vis the quantum indicated in the LOAs/FSAs to be made up through import and/or market based imported coal and the expenditure on that account shall be permitted to be recovered as compensation under the provisions of Change in Law in terms of the PPAs****.*
>
> *…*
>
> *34. …As per the above provisions,* ***the Petitioner is entitled to compensation for any shortfall in supply of coal by CIL vis-a-vis the quantity indicated in LOA/FSA****. Hence, the Petitioner is entitled to compensation for any shortfall in the supply of coal with respect to the quantity indicated in the FSA i.e. 64.05 lakh tonnes."*

4.24 The Learned counsel for the Appellant has further submitted that the Appellant had sought compensation for shortfall in supply of domestic coal as a result of changes in the NCDP 2007 and the MERC in the Impugned Order concluded that the Change in Law in terms of the NCDP Amendment of 2013 pursuant to the CCEA decision had the effect of removing any assurance of coal supply altogether and that, consequently, any coal that the Appellant was required to procure from imports or domestically through e-auctions to meet the difference between their requirement and the coal actually supplied under the FSA/MoUs would squarely attract the Change in Law provisions of the PPAs. However, contrary to the aforesaid findings, the MERC at paragraphs 72 and 73 of the Impugned Order has held as under:

> *"72. From the CCEA decision and the consequent NCDP 2013 and MoP Advisory quoted earlier, it is clear that the shortfall in domestic coal supply by CIL for Units 1 & 2 having FSA has to be determined with reference to the minimum assured supply of 65%, 65%, 67% and 75% for the corresponding year of the 12th Plan Period. The Change in Law for these Units having FSA is to the extent that the assured quantity of coal supply has been curtailed from 100% of the normative requirement under NCDP 2007 to 65%-75% of the requirement under NCDP 2013. Hence, if in any year the actual coal supply by CIL is, say, only 50% and the minimum assured quantum for the relevant year was 75%, the shortfall in CIL supply for the purpose of Change in Law relief would be 25 % (100%*

earlier assured minus 75% now assured), and not 50% (100% earlier assured minus 50% actually supplied). The shortfall in actual coal supply against the revised assured quantum is a contractual matter between APML and CIL in the background of the NCDP 2013, and not on account of Change in Law.The Commission also finds merit in MSEDCL's contention that the quantum of coal offered by CIL should be considered for determining the shortfall rather than the actual off-take out of it by APML. Hence, the shortfall in domestic coal supply by CIL should be assessed with reference to the maximum of (1) actual quantum of coal offered for offtake by CIL, and (2) the minimum assured quantum as per the NCDP 2013 for the respective year.

73. Accordingly, the determination of the shortfall in domestic coal supply by CIL for the capacity tied up under PPAs from the generation capacity of 1180 MW capacity having FSA (Units 1 &2) is as illustrated below:

Table 11: Illustration of quantification of coal shortage for capacity tied up under PPAs from 1180 MW capacity having FSA (Units 1 & 2)"

Particulars	***Legend***	***For the year (Scenario 1)***	***For the year (Scenario 2)***
Quantum of domestic coal assured in LoA/FSA	*A*	*100 MT*	*100 MT*
Minimum assured quantum of domestic coal for the relevant year as per NCDP 2013	*B*	*65%*	*65%*
	C=AXB	*65 MT*	*65 MT*
Actual quantum of domestic coal offered by CIL	*D*	*50 MT*	*80 MT*
	E= D/A	*50%*	*80%*
Maximum of (1) minimum assured quantum in NCDP 2013 for the respective year, and (2) actual quantum of domestic coal offered by CIL	*F= Maximum of B and E*	*65%*	*80%*
Shortfall in domestic coal supply by CIL	*G= 100%-F*	*35%*	*20%*

4.25 As per NCDP 2007, the Independent Power Producers including the Appellant were assured supply of 100% of the fuel quantity as per normative requirement by Coal India Ltd., including future capacity addition. The linkage system was replaced with a more transparent bilateral commercial arrangement of enforceable Fuel Supply Agreements (FSAs) and 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.

4.26 On 26.07.2013, MoC notified changes in NCDP, 2007 in relation to coal supply for the next four years of the 12th Five Year Plan ("NCDP, 2013") pursuant to the decision taken by the Cabinet Committee on Economic Affairs (CCEA) on 21.06.2013. This changed the assurance of 100% normative coal supply contained in the NCDP 2007. It is not in dispute that the NCDP 2013 constitutes Change in Law as defined in the respective PPAs.

4.27 In addition to the amendment to the NCDP 2007 as aforesaid, pursuant to the CCEA decision, the MoP issued a letter on 31.07.2013 to all the State Electricity Regulatory Commissions (SERCs) and the CERC advising them to allow additional cost of coal as a pass through in terms of the decision taken by the CCEA. In the said letter it is, inter alia, stated as follows:

> *"2. After considering all aspects and the advice of the CERC in this regard, Government has decided the following in June 2013:*
>
> *(i) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.*
>
> *(ii) …*
>
> *(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 b**eing made a pass through** on a case to case basis by CERC/SERC to the extent of shortfall in quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th plan for **the already concluded PPAs based on tariff based competitive bidding**.(emphasis given)*
>
> *5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government"*

4.28 From the above, it is evident that the MoP letter has two parts: first being the relief for higher cost of imported/e-auction coal

to be considered on case by case basis to the extent of shortfall in the quantity indicated in the LoA/FSA. The second part of the letter deals with the minimum supply obligation of Coal India Ltd. in the remaining 4 years of the 12th Plan period but this second part does not restrict the relief for higher priced coal to the difference between the minimum supply obligation and the quantity indicated in the LoA/FSA. In fact, even paragraph 2 (i) of the letter extracted above states that the quantity of 65% to 75% was specified for the purpose of levy of disincentive under the FSA but this is not linked to the relief offered for higher cost of imported or market based coal on a case-by –case basis as a pass through in tariff. It is undisputed that the MoP letter dated 31.07.2013 has been held by the Hon'ble Supreme Court in Energy Watchdog Judgment as having the force of law and constituting as a Change in law under the terms of Case 1 PPA in question in that order.

4.29 Learned counsel for the Appellant further submitted that the above reading of the MoP letter/advice is further supported and strengthened by the Tariff Policy amendment dated 28.01.2016 which states as follows:

*"**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.**"*

It is seen from the above paragraph that the Tariff Policy amendment while referring the MoP letter of 31.07.2013 does not make any reference to limiting the relief for shortfall in supply of domestic linkage coal to the maximum quantity of

supply assured under the NCDP, 2013. It is also evident that both the MoP letter and the Tariff Policy dated 28.01.2016, which are statutory instruments and have been held to be Change in Law by the Hon'ble Supreme Court in the Energy Watchdog Judgment do not restrict the Change in Law relief to the minimum supply quantity specified in the NCDP 2013, rather the relief is to be allowed to the extent of shortfall against the quantity specified in the LoA/FSA. Further, the shortfall has to be determined against the 100% normative quantity assured under the NCDP 2007, being the law prevailing as on cut-off date, vis-à-vis actual supply and the same is unambiguously stated in the revised Tariff Policy of 2016.

4.30 In this backdrop, the Learned counsel for the Appellant submitted that the MERC has wrongly concluded that the shortfall in supply of domestic coal needs to be ascertained against the assured supply under NCDP 2013. MERC already concluded that NCDP 2013 which reduced the assured 100% supply of domestic coal and the MoP advice of 31.07.2013 constitute Change in Law events under the respective PPAs and that the Appellant needs to be compensated for the additional cost incurred in meeting the shortfall in domestic coal supply. Consequently, there was no basis for the MERC to limit the Change in Law relief to shortfall in supply of domestic coal to the extent of 25% to 35% only. The shortfall has to be determined against the quantity assured under the NCDP 2007 vis-à-vis actual supply and the same is unambiguously stated in the revised Tariff Policy. Relegating the Appellant to the contractual remedy against Coal India Ltd. for shortfall in supply of coal is no remedy at all since penalties for short supply stipulated in the FSAs offer no remedy at all and nor do they take away the obligation to supply the required quantity of coal. The revised Tariff Policy provides for a complete pass-through of cost of procurement of alternate

coal in the event of a shortfall in supply of linkage coal by CIL and its subsidiaries.

4.31 The Learned counsel for the Appellant contended that the Hon'ble Supreme Court in Energy Watchdog Judgment has held that the purpose of compensating the party affected by change in law, i.e., Appellant in the present case, is to *"restore the affected party to the same economic position as if such change in law has not occurred"*. Having read and interpreted the NCD 2013 and the MoP advice of 31.07.2013, the Hon'ble Supreme Court has not limited the change in law relief to the minimum quantity assured under the NCDP 2013. In fact, in paragraph 57 of the said judgment, the Hon'ble Court has held as follows:

> ***"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."*

Therefore, the change in law relief / compensation is to be provided to the extent of supply from Coal India and other Indian sources is cut down and is not limited to the supply quantities provided in the NCDP 2013. The learned counsel, therefore, submitted that the MERC fell in error in not following and giving full effect to the order of the Hon'ble Supreme Court in the Energy Watchdog Judgment.

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

4.33 The said position has been reaffirmed (albeit in the context of shortfall arising in the context of coal allocation under SHAKTI Policy) by this Tribunal in *Jaipur Vidyut Vitran Nigam Limited vs. RERC & Ors. reported as 2019 SCC Online APTEL 98* in Appeal No. 202 and 305 of 2018 ***("Adani Rajasthan Judgment").*** Relevant paragraphs which were relied upon are reproduced as under:-

> *"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.*
>
> *12.3 From a bare reading of the SHAKTI Policy, it is clear that this policy has introduced further modifications to NCDP 2007 and NCDP 2013 such that the previous system of coal linkage allocation through the SLC(LT) mechanism has been done away with and a new transparent mechanism for coal linkage allocation has been introduced. The introduction of SHAKTI Policy, being notified after the cut-off date by an Indian Governmental Instrumentality, i.e., the Ministry of Coal, itself constitutes a Change in Law in terms of Article 10 of the PPA. Coal supply under SHAKTI FSA needs to be compared against the 100% coal supply assured under the NCDP 2007 and if there continues to be a shortfall, the generator would need to be compensated for such shortfall through the Change in Law provisions.*
>
> *12.5 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 source sis 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*."*

4.34 In view of the foregoing submissions, the finding of the MERC in the Impugned Order restricting the Change in Law relief to maximum of 35% shortfall in domestic coal does not restore the Appellant to the same economic position contrary to the Change in Law provisions of the PPAs. The restriction

imposed by the MERC in the Impugned Order is in the teeth of Articles 13.2 and 10.2 of the 1320 MW and 1200/125/440 MW PPAs respectively which envisages that the entire additional expenditure incurred on account of change in law has to be allowed as a pass through in tariff. Restriction to maximum of 35% shortfall of domestic coal will result in non-recovery of the actual additional expenditure incurred by the Appellant on account of Change in Law events. Accordingly, the shortfall has to be determined against the 100% normative quantity assured under the NCDP 2007, being the law prevailing as on cut-off date, vis-à-vis actual supply and the Appellant should be compensated on actual shortfall in domestic coal till such time the Coal India Ltd supplies coal to the extent of the quantity assured in NCDP 2007.

4.35 With regard to the MERC disallowing carrying cost on the compensation for Change in Law, the counsel for the Appellant has clarified during the course of the arguments that the MERC has allowed carrying cost to the Appellant through a separate order in Case No. 295 of 2018 and accordingly, there was no need to agitate the issue of carrying cost in the instant Appeal. He has, however, submitted that APML has agitated the issue of disallowance of carrying cost at the LPS rate in the other Appeals in the batch.

5. Mr. M. G. Ramachandran, learned counsel appearing for Respondent / MSEDCL has made the following submissions in the written pleadings so also in the course of the hearings for our consideration:-

5.1 The learned senior counsel for MSEDCL has submitted that the Appellant – Generator's tariff was discovered through Competitive Bidding Process under Section 63 of Electricity Act, 2003 where the discovered tariff is adopted by the State Commission and not under Section 62 of Electricity Act, 2003 wherein the State Commission determines the tariff on capital cost basis and any change in rate is passed through on cost

plus basis. Thus, the determination of tariff by a competitive bid process as per Section 63 of the 2003 Act cannot be converted at a later stage as a tariff determination under Section 62 of the 2003 Act and any such attempt will be contrary to the Scheme and objective of the 2003 Act.

5.2 Further, MSEDCL initiated the competitive bidding process for procurement of power on long term basis under Case-1 bidding where source of fuel is the responsibility of the Generator. It has been submitted that the Request for Proposal (RFP) issued in the above bidding process provides as under:

> ***"5.*** *FUEL: The* ***choice of fuel****, including but not limited to coal or gas,* ***its sourcing and transportation is left entirely to the discretion of Bidder****. The Successful Bidder(s) shall bear complete responsibility to tie-up the fuel linkage and the infrastructural requirements for fuel transportation, handling and storage."*
>
> *2.1.2.2 Consents, Clearances and Permits: The Bidder shall* ***submit documentary evidence*** *with regards to the following (In case the Bidder is an Trading Licensee, the Bidder shall ensure that the entity developing the power station has obtained such Consents, Clearances and Permits and the Bidder shall submit documentary evidence regarding the same in its Bid)*
>
> *(b) Fuel: In case of domestic coal, the Bidder shall have made firm arrangements for fuel tie up either by way of mine allocation or fuel linkage. Such* ***arrangement shall be for the quantity of the fuel required to generate power from the power station at Normative Availability for the total linked capacity for the term of PPA****."*

5.3 As per the RFP clauses, the bid with the computation of coal, the parameters etc., were left to the discretion of and to be decided by APML itself while giving the quoted tariff, which would be operative during the entire duration of the PPA. APML had also specifically stated in the Bid that its Bid is consistent with all the requirement of RFP and that the information submitted is complete and correct and that it would be solely responsible for errors and omission in the bid. Therefore, if the parameters for computation of coal are not accurate or the actual parameters are not as efficient as provided in the Bid, the same is to the account of APML and hence APML cannot

claim any relief against the Procurer, after undertaking the compliance of RFP.

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

5.5 The spirit of Article 13, i.e., Change in law in the PPA is the restitution of the economic position of generator due to change in *(i) the enactment bringing into effect, adoption, promulgation, amendment, modification or repeal of any law or (ii) a change in interpretation of any Law by a Competent Court of Law, Tribunal or Indian Governmental Instrumentality provided such Court of Law, Tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation. But shall not include any change in any withholding tax on income or dividend distributed to the shareholder of the Seller, or (ii) change in respect of UI Charges*. Thus, Change in Law doesn't mean or cannot be interpreted as restitution by compensating the benefiting operational parameters against considered/quoted bid assumed parameters or/and its operational inefficiency such

as SHR, GCV, auxiliary consumption etc. It is pertinent to mention that Operational efficiency/ inefficiency has no application to a tariff determined by competitive bid process as the bidders decided on the quoted tariff factoring all such aspects as per RFP provisions. Hence, considering the operating norms/parameters specified by the MERC in its Tariff Regulation will bring double benefit to the Generator/Appellant; one through the quoted tariff which duly factors the applicable escalation index and decision on applicable parameters and second through Change in law calculation by considering the parameters benefitting to Appellant and thus the spirit of Section 63 under the 2003 Act will get defeated.

5.6 Undisputedly, the SHR has been submitted by the Appellant itself for computation of quantum of coal required to operate the Plant, while submitting its bid to the Respondent No 1. The Appellant upon self-evaluation by factoring all possible future eventualities had submitted SHR of 2200 kcal/kWh, while submitting the bid and therefore it cannot at a later stage claim for its variations, because if the bidders are permitted to vary the premise of their bid, then the sanctity and finality of bid parameters will lose its force and give an undue advantage to the bidder/supplier over the procurer and ultimately burden the end consumers of the Respondent No. 2. It is, therefore, incorrect to state that the Appellant did not bid on the basis of the SHR and therefore now it is not open for the Appellant to claim that the said SHR has no relevance or that SHR value was not the biddable parameter. SHR is one of the parameter for arriving at the specific coal consumption quantum and it is also the relevant factor to determine energy charge to be submitted in the bid. The same SHR value is taken as the basis for quantum of coal for which the Fuel Supply Agreement (FSA) is executed by the Coal Company. The Appellant is entitled to and has secured the FSA from the coal

company for precisely the said required coal quantum determined basis the SHR value and other bid assumed parameters. The Appellant cannot now claim that the SHR was indicative since it was used to arrive at the coal quantum. Coal quantum in a competitive bid process is required for many aspects, namely, the coal requirements under the FSA, the Fuel Transportation Agreement (FTA), change in law event impact, etc. Such an important criterion cannot be termed as indicative.

5.7 The Learned counsel placed reliance on the judgment dated 13.04.2018 of this Tribunal in the matter of *Adani Power Ltd. V. Gujarat Urja Vikas Nigam Ltd.(GUVNL)* in Appeal No. 210 of 2017, which has held the following:

"We observe that the bid of the Appellant for supply of power to the Respondent Nos. 2 to 4 was based on Case 1 of the competitive bidding guidelines issued by GoI, In case-1 bidding, the Appellant is required to quote only (he tariff (and not SHR) and it is solely ***Responsible for seeking/incorporating all the inputs in the bids for supply of power to the Respondent Nos 2 to 4…."***

"…. It is the Appellant who is only aware about the formulation of its bid including SHR for submission to the Respondents No. 2 to 4. "

"In view of above the contention of the Appellant to ***consider margin over the design SHR*** *as per the Central Commission's Tariff Regulations, 2009 or to consider actual SHR whichever is lower does* ***not arise****"*

5.8 Learned counsel for MSEDCL submitted that this Tribunal has rightly held that in case I bidding process it is the bidder who has the discretion in the formulation of bid including SHR and therefore bears the responsibility for seeking/incorporating all the inputs in the bids for supply of power. In the case of tariff based competitive bid under Section 63 of the 2003 Act, the parameters are left to be decided by the bidder and better parameters are given to be competitive throughout the duration of the PPA including for adjustments in tariff for change in law in substitution of those provided in the Tariff Regulations. If APML is willing to accept the ceiling of the parameters provided in the Tariff Regulations applicable to Section 62 determination then there is no rationale for APML

to claim that the parameters for coal computation, voluntarily provided by APML in the bid, should not be applied. MSEDCL has also relied upon the CERC order dated 19.12.2017, in the matter of D.B. Power Ltd. which holds that SHR should be as per the bid submission for the purpose of computation of coal consumption. MSEDCL further relies on the CERC order in Petition No. 1/MP/2017 dated 16.03.2018 which has also considered the bid SHR as a parameter to estimate the specific coal consumption. The relevant extract of the order relied upon is as under:-

'The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering ***bid assumed SHR*** *or normative SHR as per CERC 2009-14 Tariff Regulations whichever is lower and Bid assumed AEC or normative AEC* as *per CERC 2009-14 Tariff Regulations whichever* is *lower. Since, the formulation is for mitigating coal shortage, the Specific Oil Consumption has been considered as nil.*
Step-1: ECR Linkage coal (Delivery point) = ECR QUOTED Step.2: ECR Other coal (Delivery point) =
{{SHR / Weighted Average GCV of other coal…."

5.9 Learned counsel for MSEDCL further relies upon CERC order dated 25.04.2018 in Petition no. 239/MP/2017, in the matter of NTPC Tamil Nadu Energy Company Ltd. seeking the relaxation in operating norms for heat rate from 2351.25 Kcal/Kwh to 2375.22 Kcal/Kwh for 2019 wherein CERC has not allowed the relaxation in heat rate norms and held as under:

"The Petitioner has submitted that it is facing difficulty in achieving heat rate norms in terms of Regulation 36 (C) (b) of the 2014 Tariff Regulations in respect of this generating station. Accordingly, It has prayed that the Commission may exercise the power to relax under Regulation 54 of the 2014 Tariff Regulations and grant the prayer tor fixing the heat fate norms from 2351.25 Kcal/Kwh to 2375.22 Kcal/Kwh. ***In our view, the heat rate norms have been prescribed after consideration of the recommendation of CEA and extensive stakeholder's consultations.*** *The failure of the generating station of the Petitioner to achieve the heat rate norms cannot be considered as the sufficient ground for exercise of power to relaxation.* ***The Petitioner with better 0 & M practices can achieve the specified heat rate norms.*** *In our view, there is no merit in the submissions of the Petitioner to grant the relief prayed for and the same is beyond /the scope of Regulation 54 of the 2014 Tariff Regulations. Based on the above discussions, the prayer of the Petitioner is rejected and the Petition is, therefore, not maintainable."*

5.10 The learned counsel for the Respondent No. 2 further submitted that CERC has considered the bid assumed parameters for computation of change in law events in numerous cases including Sasan Power Ltd. (Petition No. 153/MP/2015 dated 19.02.2016), Costal Gujarat Power Ltd. (Petition No. 157/MP/2015 dated 17.032017 read with 22/RP/2017 dated 31.10.2017) and Adani Power Ltd. (challenged and upheld in judgment in Appeal No. 210 of 2017 dated 13.04.2018).

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

5.12 The MERC MYT Regulations, 2015 specifies SHR (in Kcal/kWh) for different capacities of Generating sets viz. 2430 for 200/210/250 MW sets, 2400 for 300 MW sets, 2375 for 500 MW sets and 2230 for 600 MW sets. Further, M/s CGPL has declared an SHR of 2050 kCal/kWh for its 800 MW capacity units which has been accepted by CERC in order dated

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

5.13 MSEDCL in its final Written Submissions has submitted that the basic and fundamental aspect is that if the change in law had not occurred, APML would not have been entitled to any higher tariff on the basis that it could not achieve the bid parameters or that its assumptions on such parameters were erroneous. If AMPL is not entitled to higher compensation for not achieving the norms/parameters when there is no change in law, there is no rationale for claiming such higher compensation beyond the parameters when there is a change in law. There is no change in law leading to an increase in parameters.

5.14 The Learned Counsel for Respondent No. 1, MSEDCL has further submitted that the grade of coal consists of a range for e.g., G11 having the GCV range of 4001-4300 kcal/kg. Therefore, the MERC vide Impugned Order determined the mid value to be taken for consideration. The reference GCV of domestic coal supply by Coal India Ltd. must be of the assured coal grade in LoA/FSA/MoU and alternate coal must be the middle value of the GCV range or as GCV mentioned on the invoices in case of imported coal.

5.15 As per clauses 2.6 and 2.4.2 (6) xi of the RFP, the bidder (the Appellant herein) has the sole responsibility to deal with possibilities of availability of the inputs necessary for supply of power including fuel and its parameters like GCV, transportation, the losses during transportation, degradation of GCV during transportation, stacking etc. while quoting the tariff in bidding process. All such possibilities of non-availability of inputs or the cost thereof was required to be factored in the quoted tariff and the risk and reward of deciding on the quoted

tariff, are entirely to the account of the selected bidder. It is pertinent to note that evaluation of GCV on the air dried basis by Coal Company was well known/ existing even prior to bidding and the Appellant was aware of the same. Accordingly, as per provisions of RFP, the Appellant is presumed to have considered and evaluated the GCV on 'as received basis' and also factored in quoted tariff. Hence, there will be double compensation to the Appellant if GCV is considered on as received basis as the Appellant has already factored in all the losses relating thereto while quoting its tariff in the bid.

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

5.17 It is also pertinent that no change in law has occurred with respect to the coal quality. Admittedly, the Change in Law on

account of NCDP, 2013 dealt only with the shortfall in the coal quantum. The principle of restitution therefore also needs to be evaluated in the said backdrop only, meaning thereby that since there is no change in law for coal quality there can be no restitution. In other words, any cost arising on account of reasons other than the shortfall beyond the prescribed percentage under NCDP, 2013 is not covered under the change in law provisions.

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

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

based competitive bidding. The Hon'ble Supreme Court in the Energy Watchdog Judgment has ruled that NCDP, 2013 is a change in law and MERC in the Impugned Order has rightly held that the shortfall in domestic coal supply by CIL should be assessed with reference to the maximum of (1) actual Quantum of coal offered for offtake by Coal India Ltd., and (2) the minimum assured quantum as per the NCDP 2013 for the respective year. The Learned counsel for MSEDCL has strongly argued that the impact of change in law is to be restricted to the quantum of shortfall after considering the minimum quantum to be supplied by Coal India Ltd. for the remaining four years of the 12th Plan and any shortfall between the minimum linkage quantum and the actual linkage coal received will be the matter of dispute between Coal India Ltd. and the Appellant and has relied upon the following extract of the Impugned Order:-

> *"72. From the CCEA decision and the consequent NCDP 2013 and MoP Advisory quoted earlier, it is clear that the shortfall in domestic coal supply by CIL for Units 1 & 2 having FSA has to be determined with reference to the minimum assured supply of 65%. 65%, 67% and 75% for the corresponding year of the 12th Plan Period. The Change in Law for these Units having FSA is to the extent that the assured quantity of coal supply has been curtailed from 100% of the normative requirement under NCDP 2007 to 65%-75% of the requirement under NCDP 2013.* ***Hence, if in any year the actual coal supply by CIL is say, only 50% and the minimum assured quantum for the relevant year was 75%, the shortfall in CIL supply for the purpose of Change in Law relief would be 25 % (100% earlier assured minus 75% now assured), and not 50% (100% earlier assured minus 50% actually supplied). The shortfall in actual coal supply against the revised assured quantum is a contractual matter between APML and CIL in the background of the NCDP 2013, and not on account of Change in Law. The Commission also finds merit in MSEDCL's contention that the quantum of coal offered by CIL should be considered for determining the shortfall rather than the actual off-take out of it by APML. Hence, the shortfall in domestic coal supply by CIL should be assessed with reference to the maximum of (1) actual quantum of coal offered for offtake by CIL, and (2) the minimum assured quantum as per the NCDP 2013 for the respective year."***

5.20 Even NCDP, 2013 letter dated 26.07.2013 acknowledges the obligation of Coal India Ltd. to supply coal upto the revised minimum assured percentage of coal supply and accordingly

states that so far as to meet the "balance FSA obligations", i.e., above the such minimum assured percentage, the same can be made through import coal on cost plus basis, subject to the willingness of the power plants. Also, the direction by the MoP to Electricity Regulatory Commission's dated 31.07.2013, categorically states as under:-

> *"4. As per the 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 4 years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding."*

5.21 Further, the FSA provision for penalty for short level of lifting or short delivery under para 4.6.1 is as under:-

> *"If for a year, the level of delivery by the seller or the level of lifting by the purchaser falls below ACQ with respect to that year, the defaulting party shall be liable to pay compensation to the other party for such shortfall in level of delivery or level of Lifting .... "*

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

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

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

5.24 Finally, the counsel for MSEDCL submitted that the issue of claim of carrying cost at the rate of LPS has not been raised by APML in their appeal, nor any pleadings, however, since the said issue has been orally argued, therefore he has dealt the same in his arguments. He further argued that in fact, the claim of carrying cost was denied by MERC in the impugned order dated 07.03.2018 and in the appeal preferred by APML against the said order i.e., Appeal No. 182 of 2019 the rejection of claim of carrying cost has not been assailed.

5.25 Payment of Change in Law to be made to the extent as contemplated under Article 13 of PPA and triggers under Article 13.2(b) only through an MERC order, subject to appeals. After being qualified under Article 13.2(b), claim can be raised only through supplementary bills under Article 11.8, as contemplated under Article 13.4.2. Thus, in so far as the

payment for change in law is concerned the same can only be raised in the mechanism as provided under Article 13 and not *de hors* the same. In terms of Article 13, a Generator can only raise a claim for Change in Law, once the same is duly so approved by the State Commission and not before that. Moreover, such claim/payment is also made subject to the appeals, but at no point of time the right to claim payment thereof arises before the confirmation order of the State Commission, as clearly so stipulated under Article 13.2(b).It is only after the concerned State Commission approves the event by categorising it as a Change in Law event, then the mechanism under Article 13.4.2 to raise claim thereof and realize the payment triggers, i.e., as per Article 11.8 by raising supplementary bill. Once Supplementary bill is raised, Article 11.8.2 contemplates remittance by "due date", as indicated in those bills and it is only if payment is delayed beyond due date, then Late Payment Surcharge (LPS) would be applicable under Article 11.8.3 of the PPA and thus no claim for LPS can be made before such due date. The carrying cost is based on restitution principles, whereas late payment surcharge is at a higher percentage to disincentives delaying the payment after due date.

5.26 Ms. Ranjitha Ramachandran, learned counsel appearing for Respondent No. 3 – Prayas (Energy) Group has adopted the submissions made by the Respondent No. 2, MSEDCL and therefore, we do not find it necessary to extract from the written arguments submitted by the Respondent No. 3.

6. We have heard arguments of counsel for both the Appellant and the Respondent, MSEDCL in detail over several hearings. We have critically analyzed the rival contentions of learned counsel for the Appellant and learned counsel for the Respondents and also perused the findings given in the various judgments relied upon by both the parties. Based upon the

same, and the Impugned Order of the State Commission, the following issues arise for our consideration:-

Issue No.1: Whether the MERC was correct in holding that the net SHR submitted by the Appellant in its bid or SHR and Auxiliary Consumption norms specified for new generating stations under the MYT Regulations, 2011, whichever is superior shall form the basis for computing Change in Law compensation under the PPAs?

Issue No.2: Whether the MERC was correct in holding that the reference GCV of domestic coal supplied by CIL shall be the middle value of GCV range of assured coal grade in LoA/FSA/MoU and not the GCV as received?

Issue No.3:- Whether the MERC was correct in holding that for the purpose of Change in Law compensation for 1180 MW capacity, shortfall in domestic linkage coal shall be assessed by considering the coal supply as the maximum of (1) actual quantum of coal offered for offtake by CIL under the LoA/FSA and (2) the minimum assured quantum in NCDP 2013 for the respective year.?

Our Consideration & Analysis

7. **Issue No.1:-**

7.1 MSEDCL in its Note of Arguments dated 17.02.2020 and final Written Submissions has argued that APML cannot be allowed compensation or increase in tariff independent of the bid parameters for the effect of change in law where the quoted tariff in the competitive bid process based on which APML has been selected and per unit tariff is being given is based on the bid assumed parameters. The Change in Law impact cannot be given on a different parameter or on actual coal consumption.

7.2 It is undisputed that all thefour PPAs entered into by APML with MSEDCL have been concluded through a Case-1 bidding process. A bare perusal of the Standard Biding Guidelines

notified by the Ministry of Power (extracted in Paragraph 5.2 above) shows that the bidder is not required to quote SHR or GCV as a bid parameter in a Case I bidding process. The bidder is required to quote only fixed and variable charges. Hence, MSEDCL's contention that APML had quoted SHR in its bid to MSEDCL and therefore, it was a "bid assumed parameter" has no merit or relevance. Case 1 bids are determined on the basis of the lowest quoted levelised tariff and not on the basis of quoted net heat rate. As pointed out by the Counsel for the Appellant, the RFP issued by MSEDCL had expressly stated as follows:

> *"3.5.3 The Bidder with the lowest Levelized Tariff shall be declared as the Successful Bidder for the quantum of power (in MW) offered by such Bidder in its Financial Bid."*

The RFP provision makes it clear that the MSEDCL did not select APML for supply of contracted capacity on the basis of quoted net heat rate but on the basis of quoted lowest levelized tariff. Therefore, there is merit in the Appellant's submission that when its tariff was not discovered on the basis of any coal quality or efficiency parameters, it cannot be MSEDCL's case that the compensation for Change in Law must be linked to the SHR mentioned in the bid documents as a bid assumed parameter. In a case 1 bidding, SHR cannot be termed as a bid assumed parameter; the fact that the Appellant had mentioned certain SHR figure as part of the qualifying requirements must be seen for what it is, i.e., to demonstrate availability of raw materials for the plant such SHR is submitted under test conditions, which is bound to vary from the actual SHR.

7.3 MSEDCL, in its Written Submissions, has laid great emphasis on the SHR and GCV submitted by the Appellant as part of its coal quantity declaration. MSEDCL's submission that if the change in law had not occurred, Appellant would not have been entitled to any higher tariff on the basis that it could not

achieve the bid parameters or that its assumptions on such parameters were erroneous, while attractive on the face, misses the point. The Appellant has not sought higher tariff on the ground that it has failed to achieve the bid parameter of SHR or GCV as a result of Change in Law. It is also not the case of Appellant that the actual SHR or GCV is to be considered for the entire electricity supplied, the Appellant case is limited to shortfall or non-availability of linkage coal supply. The Appellant's submission on the contrary is that as part of the selection process through competitive bidding, it was neither required to and nor has it committed to any particular operating norms (SHR or GCV) to MSEDCL, the only value it has committed to supply power to MSEDCL is the Quoted Tariff. This position is to be contrasted with a Case 2 bid scenario wherein the bidder expressly makes a commitment to operate its generating station at the quoted net heat rate. The key point is that a Case 1 PPA does not make any express provision for computation of shortfall coal quantity when the successful bidder / generator is faced with the shortfall in supply of assured domestic coal due to a change in law. The issue of SHR or GCV, etc. arises in this context, i.e., when the PPA does not make an express provision what should be the appropriate norms or values to apply to determine the shortfall in coal quantum. MSEDCL's submission that the change in law impact must be ascertained by reference to the coal quantum and other parameters given by the Appellant as a part of the bid, if accepted, would tantamount to making or elevating these figures as a bid parameter and such a treatment would be completely contrary to the Standard Bidding Guidelines. Further, MSEDCL itself has argued that the choice of fuel, its sources, computation, transport arrangement, etc. were left to the discretion of the bidders. This means that MSEDCL in fact did not treat the coal quantum (or SHR or GCV underlying such computation) submitted by the bidder as sacrosanct or inviolable because if

that were the case, the PPA would have made provision stating that such coal quantum and the accompanying SHR and GCV would be applied for all purposes during the operation period. However, no such provision is to be found in the PPA.

7.4 The Appellant has pointed out that the MERC has already held in its order dated 07.03.2018 in Case No.123 of 2017 that auxiliary consumption has to be considered as lower of actual or MYT norms for the purpose of change in law compensation. We are of the view that the Commission should have followed the same approach for SHR also in the instant case. We find no reason for the MERC to apply two different principles for Auxiliary Consumption and SHR, when both are operational parameters and the Commission was dealing with the same PPA in both cases.

7.5 The Appellant has also relied upon this Tribunal's judgment in *Wardha Power Industries Ltd*. *vs. Reliance Infrastructure Ltd*. (Appeal No. 288 of 2013). In that case, the Tribunal came to the following conclusions:

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

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

the same economic position as if such Change in Law has not occurred, as intended in the PPA."

In Wardha case, this Tribunal came to the conclusion that it was not correct to consider the SHR and GCV of coal given in the bid documents to establish the coal requirement and then determine the Change in Law compensation since the same may result in over-compensation or under-compensation to the seller/generating company. The Appellant has pointed out that Wardha Power's bid was also under Case 1 and the PPA provisions are same as that of APML's PPAs with MSEDCL and based on a similar format of the RfP as floated by MSEDCL for procurement of power in the instant case. We are not in agreement with MSEDCL's contention that the Wardha Power Judgment is distinguishable on facts. The principle decided in Wardha case squarely applies to the instant case also since in that case too, this Tribunal was considering the relief for Change in Law under a similar Case-1 bid PPA. MSEDCL has attempted to distinguish this decision on the ground that the said decision proceeds on the basis that seller in its bid had not quoted price of coal and the price of coal had been computed by backward calculation. However, such intention is not correct since the Tribunal specifically ruled that it would not be proper to use the SHR or GCV given in the bid to establish the coal requirement and it is exactly that the same issue which arises in the instant case.

7.6 We have also seen that the judgment of this Tribunal in Wardha Power was relied upon by the CERC in its order in *GMR Warora Energy Limited v. MSEDCL* (Petition No. 88/MP/2018) wherein the current Respondent No. 2 was a party. The CERC came to the following conclusion:

"29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited Vs. Reliance Infrastructure Limited & anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents

for establishing the coal requirement. The relevant observations of APTEL are extracted as under:

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

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

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

7.7 Further, CERC in its order dated 16.05.2019 in *GMR Warora Energy Limited v. MSEDCL and Anr.* (Petition No. 284/ MP/

2018, wherein MSEDCL was once again the contesting Respondent) relied on the aforesaid order and held as follows:

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

7.8 The CERC's findings in GMR Warora case (88/MP/2018) has already been accepted by this Tribunal in Sasan Power case. Moreover, this Tribunal has reiterated the principle that change in law compensation for shortfall in supply of domestic coal has to be determined by reference to the operating parameters specified in the relevant tariff regulations. In the matter of *Jaipur Vidyut Vitran Nigam Limited vs. RERC &Ors*. (Appeal Nos. 202 of 2018 and 305 of 2018) order dated 14.09.2019, this Tribunal has held as follows:

> *"14.2 Rajasthan Discoms are directed to pay the amount of Change in Law compensation, as approved herein, along with applicable Carrying Cost by duly verifying the relevant supporting documents for fuel cost and as per applicable Tariff Regulations for operating parameters. Since Adani Rajasthan has already incurred the costs in procuring alternate coal and supplying power to the Rajasthan Discoms using such coal, equity requires that the compensation payments for the period up to the date of this order be made expeditiously".*

7.9 MSEDCL has argued that the said judgment was related to Change in Law and not for operating parameters and that the operating parameters of Adani Rajasthan cannot be compared with the MSEDCL PPAs as APML itself has suo moto declared the SHR of 2200 Kcal/Kwh in its bid submission to MSEDCL. Further, in its written submissions, MSEDCL has placed heavy

reliance on the table consisting of the coal requirement estimated by the Appellant based on the SHR of 2200 Kcal/Kwh and stated that the said SHR is sacrosanct and cannot be changed for the purpose of determining compensation for Change in Law. We are not persuaded by this submission since (i) there is no requirement for a bidder to quote SHR or GCV in a Case-1 bid; and (ii) SHR in the bid is submitted under test conditions and even before the contracts for project equipment are awarded by the successful bidder. Further, it has been correctly pointed out by the Appellant that submission of coal quantities as part of technical requirements of RfP cannot be arbitrarily elevated to a bid parameter contrary to the express terms of the PPA.

7.10 We are in agreement with the additional argument placed by the Appellant that this Tribunal has also considered this issue in the judgment in *Sasan Power Limited v. CERC &Ors,* dated 13.11.2019 (Appeal No. 77 of 2016). Relevant paragraphs from this order are extracted below:

"18.13.3 *We also noticed that the Central Commission has passed subsequent Orders where it has held that bid assumptions cannot be the basis for compensation under Change in Law (Order dated 15.10.2018 in Petition No. 88/MP/2018 in case of GMR Warora Energy Ltd v MSEDCL). The objective of change in law provision under Article 13 is restoration to the same economic position and the same has been highlighted and accepted by the Hon'ble Supreme Court as well as this Tribunal in various cases such as Energy Watchdog and Adani Carrying Cost judgments of the Hon'ble Apex Court and Sasan 161 and GMR 193 judgments of this Tribunal.*

…..

*"**19.8.1***We have carefully considered the rival contentions of both the parties and also taken note of various judgments relied upon by the parties. It is the main contention of the Appellant that principle of change in law provisions of PPA is restoration to the same economic position. On the other hand, the Respondents contend that SHR as quoted in the bid should be considered for computation of coal quantity to arrive at actual compensation to be made to the Appellant.*

19.8.2. *Having regard to the contentions of the Appellant and the Respondents and after critical analysis of the issue, we are of the opinion that while we have held that compensation of various levies cannot be linked to the dispatched quantity of coal, the compensation should not be restricted to bid SHR. It is also relevant to note that the Central Commission has in subsequent orders taken a position that compensation for Change in Law events cannot be restricted to bid parameters.*

19.8.3. *In light of the above, we are of the opinion that for determination of coal consumption for scheduled generation, SHR should be based on the actual instead of bid SHR. However, to adequately protect the interest of the procurers and consumers at large, the SHR is required to be capped to the applicable normative levels contained in the CERC Tariff Regulations, 2009..."*

Our Findings:-

7.11 The Appellant is correct in submitting that Sasan Power is a Case 2 project wherein net quoted heat rate is a bid parameter and despite that, this Tribunal rejected the plea to apply bid SHR as the basis for computing Change in Law relief under that PPA in the context of a parimateria Change in law provision. We do not find any force in MSEDCL's submission that the Sasan Power judgment has not considered the authoritative pronouncement given by this Tribunal in Adani Power's decision in Appeal No. 210 of 2017. In fact, the decision in Adani Power's case was on the peculiar facts of that case and limited on the point that the decision of GERC decision has attained finality. Such issue is not present in Sasan Power case.

7.12 A perusal of the order of this Tribunal in *Adani Power Ltd*. v. *GUVNL* (Appeal No. 210 of 2017) indicates that the appellant, Adani Power, in that case had accepted the State Commission's order providing relief for change in law basis the SHR submitted by the appellant itself to the State Commission. Thereafter, the appellant did not challenge the order of the State Commission and it attained finality. Therefore, it would not be appropriate to rely on the aforesaid order to support the proposition that the Tribunal has accepted SHR mentioned in a Case 1 bid as the basis for determining change in law compensation.

7.13 MSEDCL has also argued that the Appellant's stand that it is ready to accept the ceiling norms provided in the MERC MYT Regulations means or implies that it had agreed to operate on better norms provided in the bid documents. This argument once again proceeds on the misguided premise that the

Appellant was required to make any commitment to the MSEDCL as regards the operating norms as part of its bid submission. As explained hereinabove, bidder is not required to commit to any operating norms as part of a Case 1 bid and no such provision is to be found in the PPA. Therefore, there is no merit in this contention of MSEDCL.

7.14 From the aforesaid discussion, it emerges that this Tribunal has already held that the SHR 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 mentioned in the bid documents would not restitute the affected party to the same economic position as if the approved change in law event had not occurred. This issue is therefore decided in favour of the Appellant and the Respondent No. 2 is directed to allow change in law compensation on the basis of the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR achieved by the Appellant, whichever is lower. This would sufficiently protect the interests of the consumers against any plant inefficiency being passed on to the Discoms or the consumers.

8. **Issue No. 2:-**

8.1 In the Impugned Order, the MERC has held that the reference GCV of domestic coal supplied by CIL for computing Change in Law compensation would be the "Middle value of the GCV range of the assured coal grade in LoA/FSA/MoU". The Appellant has assailed this finding of the MERC as arbitrary and without any basis in law. The Appellant has also cited the decisions of this Tribunal and of the CERC in support of its contention.

8.2 Learned counsel for the MSEDCL, on the other hand, has sought to justify the MERC's findings on the basis that the price

of domestic linkage coal supplied by the CIL are linked to a particular grade specified in the LoA/FSA and each grade has a range of GCV values. Since compensation is sought by the Appellant for shortfall in supply of domestic coal, the middle value of GCV range of the assured grade of coal provides a rational basis for computing the alternate coal requirement of the Appellant and thereby the compensation for such alternate coal. Other contentions of the Respondent No.1 are set out in the paragraphs above.

8.3 It is worth mentioning that when we are considering the parameters or reference values for determining Change in Law compensation to the generator, the foremost principle that needs to be borne in mind is that the generator has suffered due to a change in policy of the Government of India and as per the provisions of the PPAs, the generator is entitled to be restored to the same economic position as if the Change in Law had not occurred. This is a restitutive principle which must be adhered to in its true spirit. With respect to the parameters of the bid, sufficient precaution has been taken by the Generator to pass on the benefits to the consumers.

8.4 For GCV issues also the Appellant has mainly relied on this Tribunal's judgment in Wardha Power case. The Appellant additionally has pointed out that this issue has already been decided by the Tribunal and is no longer res integra. In the *Sasan Power* judgment (*supra*), this Tribunal held as follows:

> "*22.10.4 We have perused the rulings in various judgments of this Tribunal relied upon by the Respondent/SPL to note that compensation for Change in Law event is to be paid on the basis of actuals in line with the provisions of Article 13 of the PPA which requires the affected party to be restored to the same economic position as if such Change in Law event had not occurred.*
>
> *……*
>
> *22.10.6 It is also relevant to note from another Order of the Central Commission dated 15.11.2018 in Petition No. 88/MP/2018 in the case of GMR Warora Energy Limited vs. MSEDCL &Anr., wherein CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a*

reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.

22.10.7 In the light of above, we are of the opinion that the technical parameters such as SHR and GCV quoted in the bidding documents cannot be considered for deciding the coal requirement for the purpose of calculating relief under Change in Law. Accordingly, we hold that the Central Commission has analyzed this issue in detail and passed the impugned Order in a judicious manner. Hence, any interference by this Tribunal is not called for."

8.5 The Appellant has further placed reliance on the CERC order dated 16.05.2019 in GMR Warora*Energy Ltd v. MSEDCL and Anr.* **(**Petition No. 284/ MP/ 2018) wherein the Ld. CERC has held as follows:

"51. The Petitioner has submitted that it is entitled to be compensated for shortfall in linkage coal beyond 31.3.2017 in terms of the Commission's order dated 16.3.2018 in Petition No. 1/MP/2017 (GWEL V MSEDCL &ors). The Respondent, MSEDCL placing reliance of MERC orders dated 3.4.2018 in Case No. 154/2013, Order dated 7.3.2018 in Case No. 189/2013 and Order dated 19.4.2018 in Petition No. 102/2016 has submitted that the Station Heat Rate (SHR) to be computed for relief ought to be the net SHR as submitted in the bid or the SHR and Auxiliary Consumption norms specified for new thermal generating stations as per CERC Tariff Regulations, whichever is superior. It has further submitted that GCV to be considered ought to be middle value of the GCV range mentioned in the invoices supplied to the Petitioner.

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

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

conditions and may vary from actual SHR. The Commission after extensive stakeholders' consultation has specified the SHR norms in the 2014 Tariff Regulations. Therefore, it would be appropriate to take SHR specified in the Regulations as a reference point instead of other parameters as suggested by MSEDCL.

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

32.In case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on „as billed" basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on „as billed' basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on „as received' basis. Therefore, it will be appropriate if the GCV on „as received" basis is considered for computation of compensation for Change in law."

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

8.6 From the judgments cited above, it is clear that this Tribunal as well as the CERC has consistently taken the view that the reference GCV for the purposes of change in law compensation shall be the actual GCV. We also note that the GCV specified in the tariff regulations is also the actual GCV on as received basis. MERC has not provided any reasoning or explanation as to why it considered the application of middle range of assured grade of linkage coal as the appropriate reference for computing the quantum of shortfall coal. It is a fact that there is no guidance in the PPAs or in the Bidding Guidelines as to the reference GCV that should be applied in case of change in law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. However, the overarching principle for change in

law compensation is that the generating company should not be left in a worse economic position. As stated above, in *Wardha Power* judgment (supra), this Tribunal has already rejected the reverse computation of coal price from the quoted energy charge in the bid since the coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred. Therefore, the GCV as received shall be the appropriate basis to assess the quantum of shortfall in domestic coal and calculate the Change in law compensation accordingly.

8.7 The argument advanced on behalf of the Respondent No. 1 that any quality/quantity issues are necessarily to be resolved under the FSA as it is a contractual dispute between APML and SECL is erroneous and holds no merit. A similar submission was made before the CERC in *Adani Power (Mundra) Limited Vs. UHBVNL* (Petition No. 97/MP/2017), which is extracted below:

"i. The judgment of the Hon'ble Supreme Court granting relief in case of domestic coal non-availability is restricted to such quantum, which MCL after having issued the LOA and entered into a FSA does not supply by reason of the policy decisions taken by the Government of India. It does not apply to contractual issues between the Petitioner and MCL and non-fulfillment of the obligation by MCL in making available the requisite quantum of coal when the same is not by reason of any policy decision taken by the Government of India."

Above argument was, however, rejected by the CERC with the following observations:

"25. The MoP letter dated 31.7.2013 and the Revised Tariff Policy have been held by the Hon'ble Supreme Court as having the force of law and read in context with the Article 13 of the PPAs, constitute Change in Law. Accordingly, this Commission has been directed by the Hon'ble Supreme Court to consider the case of the Petitioner afresh and grant relief as admissible under the PPAs. Therefore, the shortfall in the supply of coal by CIL or its subsidiaries vis-a-vis the quantum indicated in the LOAs/FSAs to be made up through import and/or market based imported coal and the expenditure on that account shall be permitted to be recovered as compensation under the provisions of Change in Law in terms of the PPAs.
33. According to Prayas, change in law is applicable only for the 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 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to paycompensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 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% for 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…….

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

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

8.8 We are in agreement with the observations made by the CERC. Relegating the Appellant to the contractual remedy under the FSA when the genesis of the Appellant's claim is Change in Law under the PPA would not be appropriate. It is, however, made clear that if the Appellant were to receive any disincentive or compensation from the coal company on account of short supply or grade slippage, such compensation will be adjusted/credited against the Change in Law compensation payable by the Respondent, MSEDCL.

Our Findings:-

8.9 For the aforesaid reasons, this issue is decided in favour of the Appellant and it is directed that the compensation for the Change in Law approved by the MERC shall be computed on the basis of actual GCV of coal received.

9. **Issue No.3:-**

9.1 In Paragraph 72 of the Impugned Order, the MERC has decided as follows:

> *"72. From the CCEA decision and the consequent NCDP 2013 and MoP Advisory quoted earlier, it is clear that the shortfall in domestic coal supply by CIL for Units 1 & 2 having FSA has to be determined with reference to the minimum assured supply of 65%, 65%, 67% and 75% for the corresponding year of the 12th Plan Period. The Change in Law for these Units having FSA is to the extent that the assured quantity of coal supply has been curtailed from 100% of the normative requirement under NCDP 2007 to 65%-75% of the requirement under NCDP 2013. Hence, if in any year the actual coal supply by CIL is, say, only 50% and the minimum assured quantum for the relevant year was 75%, the shortfall in CIL supply for the purpose of Change in Law relief would be 25 % (100% earlier assured minus 75% now assured), and not 50% (100% earlier assured minus 50% actually supplied). The shortfall in actual coal supply against the revised assured quantum is a contractual matter between APML and CIL in the background of the NCDP 2013, and not on account of Change in Law.The Commission also finds merit in MSEDCL's contention that the quantum of coal offered by CIL should be considered for determining the shortfall rather than the actual off-take out of it by APML. Hence, the shortfall in domestic coal supply by CIL should be assessed with reference to the maximum of (1) actual quantum of coal offered for offtake by CIL, and (2) the minimum assured quantum as per the NCDP 2013 for the respective year.*

9.2 The Appellant has assailed the MERC's finding to limit the Change in Law relief to the ACQ percentages specified in the NCDP 2013 (i.e., in the range of 35% to 25% in the four years of the 12th Plan) on the basis that the MERC's decision does not restore the Appellant to the same economic position as if the Change in Law had not occurred. The Appellant also argued that MERC's decision is patently contrary to the *Energy Watchdog Judgment* of the Hon'ble Supreme Court since no limitation or restriction has been placed by the Hon'ble Supreme Court on the Change in Law relief to be given to the generators on account of the Change in Law brought about by the NCDP 2013, the MOP letter of 31.07.2013 and the Tariff Policy, 2016.

9.3 ***Per contra,*** the Respondent MSEDCL, on the other hand, has mainly argued that the Change in Law in the form of NCDP 2013 has only taken place in 2013 which brings down the assured quantum of coal from 100% to 65%, 65%, 67% and

75% in the last four years of the 12th plan period. MSEDCL has placed strong emphasis on paragraph 58 of the *Energy Watchdog Judgment* to submit that relief is available under the PPA only to the extent of supply assurance existing as on the cut-off date under the PPA is cut down and not beyond that. If the coal companies fail to supply coal even up to the minimum quantum specified in the NCDP 2013, then it is a contractual dispute between the coal suppliers and the generator, APML to resolve but supply quantum below 65% - 75% post NCDP 2013 cannot be treated as having arisen on account of a Change in Law. Other contentions of the Respondent No.1 are enumerated in paragraphs 5.18 to 5.22 above.

9.4 We have carefully considered the rival contentions of the parties. There is no dispute that the NCDP 2013, the MoP letter dated 31.07.2013 and the Tariff Policy, 2016 are statutory instruments and have been held by the Hon'ble Supreme Court in *Energy Watchdog Judgment* to constitute Change in Law under a parimateria change in law provision contained in Adani Power's PPA with Haryana Discoms. It is also undisputed that the NCDP 2007 provided assurance of 100% normative coal supply to the IPPs including future projects and APML is stated to have set up its generating station on the basis of such 100% assurance. Removal of this 100% supply assurance has been upheld by the MERC as constituting Change in Law affecting under the PPAs. The submission of the Appellant that this finding of the MERC is not challenged by MSEDCL is not in dispute. The only issue in dispute is whether the relief to APML should be limited to the ACQ percentages specified in the NCDP 2013, i.e., 100% - (65% to 75%, as applicable).

9.5 In our considered view, in order to ascertain the scope of relief available to APML, the two principal documents, namely, the NCDP 2013 and the MoP letter dated 31.07.2013 need to be read together since they both are documents giving effect to

the CCEA decision of 21.06.2013, which sought to comprehensively deal with the prevailing coal shortage scenario in the country and the continuing inability of coal companies to meet their commitments to provide coal supply to the power producers.

9.6 The MoP letter dated 31.07.2013 is extracted below:

> *"2. After considering all aspects and the advice of the CERC in this regard, Government has decided the following in June 2013:*
>
> *(i) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.*
>
> *(ii) …*
>
> *(iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.*
>
> *4. As per decision of the Government, the higher cost of import / market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in quantity indicated in the LoA/FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LOA for the remaining four years of the 12th plan for the already concluded PPAs based on tariff based competitive bidding.*
>
> *5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government."*

9.7 Paragraphs 2(iii) and 4 of the MoP letter read together provide that the higher cost of imported / market based e-auction coal are to be considered for being made pass through by the CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/FSA. Paragraph 2(i) and the second part of paragraph 4 of the letter deal with the minimum supply obligation of coal companies in the range of 65% to 75% of ACQ during the last four years of the 12th plan. However, these ACQ percentages appear to be the threshold for levy of disincentives on the coal companies if the supply were to fall below that threshold, they do not restrict the relief available to the generators to the difference between the minimum supply obligation and the quantity indicated in the LoA/FSAs. Appellant

is correct in stating that the two parts of paragraph 4 of the MoP letter are joined by a conjunction "and" which suggests that the relief for higher cost of imported / market based coal to the power producers is not linked to the supply quantity of 65% to 75% of ACQ for the last four years of the 12th plan.

9.8 We are in agreement with the Appellant that the above described reading of the MoP letter is consistent with the revised Tariff Policy of 2016 which states as follows:

> *"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 the Letter of Assurance /FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31.7.2013."*

It is seen from the above quoted paragraph that both the MoP letter and the revised Tariff Policy, which are statutory instruments and have been held to be Change in Law by the Hon'ble Supreme Court in *Energy Watchdog* do not restrict the Change in Law relief to the minimum supply quantity specified in the NCDP 2013. In fact, both the documents have been issued by the Ministry of Power and consistently state that the relief for the cost of imported / market based coal for making up the shortfall in domestic linkage coal is to be allowed to the extent of shortfall vis-a-vis the assured quantity (i.e., the 100% quantity assured under NCDP 2007) or the quantity indicated in the LoA/FSA. It is also noteworthy that the NCDP 2013 itself does not state anything regarding the pass-through of higher cost coal in tariff. The pass-through of higher cost alternate coal was introduced by the Ministry of Power in conjunction with the MoC's decision to amend the NCDP 2007 and therefore, two documents are complementary to each other but the scope of pass-through or the Change in Law relief

cannot be curtailed by reference to the minimum ACQ percentages specified in the NCDP 2013. Such a stand, as advocated by the Learned counsel for MSEDCL, would not only be contrary to the MoP letter dated 31.07.2013 and the Revised Tariff Policy, 2016 but would also be contrary to the restitutive principle contained in the Change in Law provisions of the PPAs and the ratio decided in the Energy Watchdog Judgment.

Our Findings:-

9.9 Learned counsel for the Appellant has drawn our attention to the Tribunal's decision in *GMR Kamalanga & Anr. vs. CERC* (order dated 21.12.2018 in Appeal No. 193 of 2017) wherein the entire shortfall against firm linkage coal as well as tapering linkage was allowed to be compensated under the Change in Law mechanism without any restrictions in terms of ACQ percentage.

9.10 The same position has been reaffirmed (albeit in the context of shortfall arising in the context of coal allocation under the SHAKTI Policy) by this Tribunal in *Jaipur Vidyut Vitran Nigam Limited vs. RERC &Ors*. (Appeal Nos. 202 of 2018 and 305 of 2018) wherein it was held as under:

> "*12.3 From a bare reading of the SHAKTI Policy, it is clear that this policy has introduced further modifications to NCDP 2007 and NCDP 2013 such that the previous system of coal linkage allocation through the SLC(LT) mechanism has been done away with and a new transparent mechanism for coal linkage allocation has been introduced. The introduction of SHAKTI Policy, being notified after the cut-off date by an Indian Governmental Instrumentality, i.e., the Ministry of Coal, itself constitutes a Change in Law in terms of Article 10 of the PPA. Coal supply under SHAKTI FSA needs to be compared against the 100% coal supply assured under the NCDP 2007 and if there continues to be a shortfall, the generator would need to be compensated for such shortfall through the Change in Law provisions.*
>
> *12.5 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…

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."

9.11 The above findings of this Tribunal have been upheld by the Hon'ble 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 fo 2019) as extracted below:

"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."

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.

10. In view of the discussions and our analysis, stated supra, all the three issues raised in the Appeal for decision of this Tribunal stand decided in favour of the Appellant. The Appeal, therefore, deserves to be allowed.

ORDER

For the foregoing reasons, we are of the considered view that the issues raised in the instant Appeal No. 182 of 2019 have merits and hence, appeal is allowed.

The impugned order dated 07.03.2018 passed by Maharashtra Electricity Regulatory Commission in Case Nos. 189 of 2013 and 140 of 2014 are hereby set aside to the extent challenged in the Appeal and our findings, stated supra.

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

No order as to costs.

Pronounced in the Virtual Court on this **14th day of September, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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