

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 135 of 2018 & IA NOs. 631, 728, 641 & 1389 of 2018

&

APPEAL NO. 54 OF 2019 & IA NO.56 of 2019

Dated: 20th December, 2019

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

APPEAL NO. 135 of 2018 & IA NOs. 631, 728, 641 & 1389 of 2018

In the matter of:

1. Haryana Power Purchase Centre (HPPC)
Sector 6, Shakti Bhawan
Panchkula, Haryana 134109
2. Dakshin Haryana Bijli Vitran Nigam Limited
Vidyut Nagar, Vidyut Sadan,
Hissar – 125005, Haryana
3. Uttar Hararyana Bijli Vitran Nigam Limited
Vidyut Sadan, Plot No. C-16, Sector 6,
Panchkula – 134112, Haryana
4. Haryana Power Generation Corporation Ltd.
Urja Bhawan, Sector 6,
Panchkula– 134112, Haryana - Appellants

Versus

1. GMR Kamalanga Energy Limited
Through its Managing Director
Skip House, 25/1 Museum Road
Bangalore – 560025

2. PTC India Limited
Through its Managing Director
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110066
 3. Central Electricity Regulatory Commission
Through its Secretary,
3rd and 4th Floor, Chanderlok Building
36, Janpath, New Delhi – 110001
 4. GRIDCO Limited
Through its Managing Director,
Vidyut Bhavan, Janpath
Bhubaneswar, Odisha -751022
 5. Bihar State Power (Holding) Company Limited
Through its Managing Director,
Vidyut Bhawan, Bailey Road,
Patna, Bihar – 800001
- Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran, Sr.Adv.
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s) : Mr. Vishrov Mukherjee
Mr. Yashawi Kant for R-1

Mr. Ravi Kishore
Ms. Rajshree Choudhary for R-2

Mr. R.K. Mehta
Ms. Himanshi Andley for R-4

Mr. Puneet Parihar
Mr. Nishant Kumar
Mr. Anish Upadhyay for R-5

APPEAL NO. 54 OF 2019 & IA NO.56 of 2019

IN THE MATTER OF:

GRIDCO Limited,
Through Chairman and Managing Director,
Janpath, Bhubaneswar
Odisha - 751022.

...Appellant

Versus

1. GMR Kamalanga Energy Limited,
Through Authorised officer,
Skip House, 25/1, Museum Road,
Bangalore - 560 025.
2. Haryana Power Purchase Centre,
Through Authorised officer,
Sector 6, Shakti Bhawan,
Panchkula, Haryana-134109
3. Dakshin Haryana Bijli Vitran Nigam Ltd,
Through Authorised officer,
Vidyut Nagar, Hissar (Haryana)
4. Uttar Haryana Bijli Vitran Nigam Ltd,
Through Authorised officer,
Vidyut Sadan, Plot No C/16,
Sector 6, Panchkula (Haryana)
5. Haryana Power Generation Corporation Ltd,
Through Authorised officer,
Urja Bhawan, Sector 6,
Panchkula (Haryana)
6. PTC India Ltd,
Through Managing Director,
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi.

7. Central Electricity Regulatory Commission,
Through Secretary,
Chanderlok Building, Janpath,
New Delhi - 110001. ...Respondents

Counsel for the Appellant : Mr. R.K. Mehta
Ms. Himanshi Andley

Counsel for the Respondent(s) : Mr. Vishrov Mukherjee
Mr. Yashawi Kant for R-1

Mr. M.G. Ramachandran, Sr.Adv.
Ms. Ranjitha Ramachandran
for R-2 to 4 & 5

Mr. Ravi Kishore
Ms. Rajshree Choudhary for R-6

Mr. Nishant Kumar
Mr. Anish Upadhyay for R-5

J U D G M E N T

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

1. The present Appeal being Appeal No. 135 of 2018 has been filed by the Appellants, Haryana Power Purchase Centre (HPPC) & Ors. under Section 111 of the Electricity Act, 2003 against the Order dated 20.03.2018 passed by the Central Electricity Regulatory Commission (hereinafter called the '**Central Commission**') in Petition No. 105/MP/2017, whereby the Central Commission has allowed the petition filed by the Respondent No. 1 – GMR Kamalanga Energy Limited inter

alia holding that firm linkage coal granted to GMR Kamalanga Energy Limited under Fuel Supply Agreement dated 26.03.2013 of Mahanadi Coalfields Limited (hereinafter referred as '**MCL**') has to be apportioned for generation and supply of power from the generation project of 3 x 350 MW = 1050 MW to all three Procurers namely the Appellants {hereinafter collectively referred to as the "**Haryana Utilities**"}, GRID Corporation of Orissa {hereinafter referred to as "**GRIDCO**"} and the two Bihar Distribution companies {hereinafter referred to as "**Bihar Utilities**"} along with the tapering linkage and the existence of shortage of coal in the generating stations has to be considered as a whole for 1050 MW. The claim of the Haryana Utilities that the contracted capacity of 300 MW for the Haryana Utilities is related to the FSA dated 26.03.2013 and the contracted Capacity of Haryana Utilities needs to be met from the coal availability under FSA dated 26.03.2013 fully and that the issue of shortage of coal for generation and supply of electricity should be considered only if there is a shortage in the availability under FSA dated 26.03.2013 qua the Generation and Sale to Haryana Utilities, has been rejected by the Central Commission.

- 1.1 Appeal No. 54 of 2018 has been filed by the Appellant, GRIDCO Ltd. under Section 111 of the Electricity Act, 2003 against the order dated 20.03.2018 in Petition No. 105/MP/2017 passed by Central Electricity

Regulatory Commission (CERC) to the extent CERC allowed pro-rating of linkage coal and usage of alternate source coal to meet the shortfall in linkage coal supply by GKEL for supply of power to its long term beneficiaries including the appellant GRIDCO relying upon the order dated 03.02.2016 in Petition No. 79/MP/2013 filed by GKEL.

1.2 The Appellants are aggrieved by the aforesaid Impugned Orders and have preferred the present appeals.

2. Brief Facts of the Case(s):-

Appeal No. 135 of 2018

2.1 The Appellant No.1, Haryana Power Purchase Centre is the nodal agency for procurement of power on behalf of the distribution licensees in the State of Haryana, being Appellants No. 2 and 3. The Appellant No. 4, Haryana Power Generation Corporation Limited initiated the competitive bid process on behalf of Respondent No. 2 and 3 for procurement of power based on which GKEL entered into the Power Purchase Agreements dated 7.08.2008 (hereinafter referred to as the 'PPAs'). The Appellants are referred to as '**Haryana Utilities**'.

2.2 The Respondent No. 1 GMR Kamalanga Energy Limited is a generating company within the meaning of the Electricity Act, 2003. GMR Kamalanga Energy Limited has established 3X 350 MW power plant at Kamalanga, Orissa. GMR Kamalanga Energy Limited is a Special

Purpose Vehicle of GMR Energy Limited and GMR Energy Limited was GMR Kamalanga Energy Limited's predecessor in interest in relation to the PPAs with Haryana Utilities (both are hereinafter referred to as '**GMR**').

2.3 The Respondent No. 2, PTC India Limited (hereinafter referred to as '**PTC**') is a trading licensee within the meaning of Electricity Act, 2003 and has arrangement for procurement of power from GMR.

2.4 The Respondent No. 3, Central Electricity Regulatory Commission ('**the Central Commission**') is the regulatory commission under the Electricity Act, 2003.

Appeal No. 54 of 2019

2.5 The Appellant GRIDCO Limited is a wholly owned Company of the Government of Odisha and is carrying on the functions of Bulk Supply of Electricity to four Distribution Companies in the State of Odisha w.e.f. 01.04.2005.

2.6 Respondents herein are the institutions / agencies as defined under Appeal No.135 of 2018 hereinabove.

3. Questions of Law (Appeal No.135 of 2018) :

3.1 Whether in the facts and circumstances of the case the Central Commission is right in ignoring the evidence available on record to link

the Long Term PPAs dated 07.08.2008 entered into by the Haryana Utilities entirely to the FSA dated 26.03.2013 and the utilization of the coal availability under the said FSA fully for generation and sale of electricity to the Haryana Utilities, and hold that both the FSA dated 26.3.2013 as well as the captive coal block allocation/tapering linkage are commonly for all the three beneficiaries, namely, the Haryana utilities, GRIDCO and the Bihar Utilities.

3.2 Whether the Central Commission is right in proceeding on the basis that the total quantum of coal supplied by MCL pursuant to the FSA dated 26.03.2013 is meant for use at the power plant of GMR with the capacity of 3 x 350 MW and, therefore, the availability of coal for the power plant from MCL under the said FSA is to be apportioned for Generation and supply between the three beneficiaries, namely, the Haryana Utilities, GRIDCO and the Bihar Utilities.

3.3 Whether in the facts and circumstances of the case the Central Commission is right in concluding that the FSA dated 26.3.2013 cannot be related only to specific PPA, namely, the PPAs dated 07.08.2008 entered into by the Haryana Utilities for 300 MW, the PPA dated 09.11.2011 entered into with Bihar Utilities for a capacity of 29.95 MW and under the Agreement dated 28.09.2006 and revised on 04.01.2011 with GRIDCO for 25% i.e. 125 MW (25% of 500 MW) besides utilization

of the coal for auxiliary consumption relating to the above three capacities.

- 3.4** Whether in the facts and circumstances of the case, the Central Commission has correctly considered the salient documents, namely, the PPAs 07.08.2008 with the Haryana Utilities specifically relate the fuel to be supplied by MCL and at that relevant time when the bid was invited by the Haryana Utilities and PPA was signed, the Letter of Assurance which GMR relied on is with reference to the FSA dated 26.03.2013 and not any tapering linkage or captive coal block;GMR itself had represented that the captive coal block and therefore the captive coal block are all related to the 550 MW from where the supply of electricity is to the Bihar Utilities and GRIDCO and not to Haryana Utilities.
- 3.5** Whether the Central Commission is right in law to give the reliefs to GMR despite GMR not placing the relevant documents and materials despite the Haryana Utilities having pointed out the discrepancies and inconsistencies in the claim of GMR?
- 3.6** Whether the Central Commission in passing the impugned order has contradicted its earlier Order dated 03.02.2016, which granted relief to GMR based only on the FSA dated 26.03.2013?

4. Questions of Law (Appeal No.54 of 2019) :

- 4.1** Whether the CERC was justified in adjudicating the issue of sharing of Firm Linkage Coal among the beneficiaries of GKEL in 105/MP/2017 without impleadment of GRIDCO Limited and without giving an opportunity to the Appellant GRIDCO to place its case?
- 4.2** Whether CERC erred in depriving the Appellant GRIDCO of fully availing the usage of Linkage Coal only for supply of power to GRIDCO who was the first beneficiary to execute the long term Power Purchase Agreement with GKEL on the basis of which GKEL obtained the Allocation of Linkage Coal?
- 4.3** Whether CERC erred in not considering the fact that GRIDCO PPA was the first long term PPA of GKEL signed in 2006 and also the first PPA to be operationalised in 2013?
- 4.4** Whether CERC erred in not considering the fact that coal is allotted under Fuel Supply Agreement (FSA) based on operationalisation of Power Purchase Agreements of long term beneficiaries of GKEL in spite of admission of GKEL that allotment of coal under FSA is based on operationalisation of PPA?

- 4.5** Whether CERC erred in considering pro-rating of Linkage Coal among the beneficiaries based upon the orders in Miscellaneous Petitions wherein the Appellant GRIDCO, an important stakeholder having 25% share in the installed capacity of the Thermal Station of GKEL was not impleaded as a party?
- 4.6** Whether CERC is justified in reaffirming the methodology stipulated at Para 56 and 73(b) of the order 03.02.2016 in Petition 79/MP/2013 in its subsequent order dated 20.03.2018 in Petition No. 105/MP/2017 allowing GKEL to recover the additional cost incurred on use of coal from alternate sources due to shortage in Linkage Coal and devised a formula for computing the Energy Charge Rate applicable for GRIDCO even though GRIDCO was not a party to the said cases?
- 4.7** Whether CERC erred in accepting GKEL's quotation of availability of coal for the Project from LOAs received from MCL and allotted Coal Blocks in Haryana and Bihar bids without hearing from GRIDCO that both LOA for Firm Linkage Coal and Coal Blocks were allocated to GKEL based on the recommendation of Government of Odisha in 2005 and 2007 respectively?
- 4.8** Whether CERC erred in not directing GKEL to provide all the FSAs, Amendments to FSA for supply of Firm and Tapering Linkage Coal by

MCL and ECL from time to time while adjudicating the Petition No.105/MP/2017?

4.9 Whether CERC erred in not taking into consideration the modified version of Clause 4.1.1 of FSA as mentioned in Amendment 2 dated 20.05.2014 to FSA dated 26.03.2013?

4.10 Whether the CERC erred in not mentioning the usage of SHAKTI coal for determination of Energy Charges in the impugned Order dated 20.03.2018 in respect of power supplied to GRIDCO, in spite of approving the supplemental PPA dated 08.02.2018 with regard to Shakti Coal vide order dated 21.02.2018 in Petition No. 41/MP/2018 filed by GKEL?

5. **In both of these appeals, the issues raised by the Appellants are similar in nature. Therefore, we thought fit to take up both the appeals together by passing a common judgment and order in the interest of justice and equity.**

6. **Shri M.G. Ramachandran, learned senior counsel appearing for the Appellant in Appeal No.135 of 2018 and Respondent in Appeal No.54 of 2019 has filed written submissions in the batch of Appeals for our consideration as under:-**

6.1 While the capacity of the generating station as a whole is 1050 MW, the contracted capacity for the Haryana Utilities is 300 MW. The

submissions of the Haryana Utilities before the Central Commission was that the FSA dated 26.03.2013 with MCL was specifically with reference to the entire 300 MW of the contracted capacity to Haryana Utilities, 125 MW to GRIDCO and 29.55 MW to Bihar Utilities. The fuel for the remaining 550 MW capacity was initially through a captive coal block to be available to GMR and now covered under the coal allocated to GMR under the Shakti Policy. Till the operationalization of the captive coal tapering linkage was given for 550 MW.

- 6.2** The issue for consideration of this Tribunal is whether the FSA with MCL which was for a limited capacity of 500 MW only should be taken for generation and sale of electricity to all the Procurers qua the installed capacity of 1050 MW or restricted to the supply of electricity against the contracted capacity of 300 MW to Haryana utilities (the Appellant), 125 MW to GRIDCO and 29.55 MW to Bihar Utilities.
- 6.3** A detailed summary of events in the case including the developments will clearly establish the position that the MCL firm linkage towards 500 MW was obviously restricted to the sale of electricity to Haryana Utilities of 300 MW, GRIDCO 125 MW and Bihar Utilities 29.55 MW and not to the entire 1050 MW.
- 6.4** Admittedly, GKEL had proceeded on two sources of coal procurement, namely:

- a. the firm coal linkage from MCL for 500 MW; and
- b. captive coal block or tapering linkage until the availability of coal from the captive coal block for the remaining 550 MW.

6.5 All the concerned parties, namely, the Haryana Utilities, GMR and MCL have related the firm coal linkage for 500 MW only for Haryana Utilities (300 MW), GRIDCO (125 MW) and Bihar Utilities (29.55 MW). They did not relate the coal linkage for 500 MW from MCL in respect of other contracted capacity related to generation and sale of electricity of the balance 550 MW.

6.6 In the circumstances mentioned above, it was incumbent on the Central Commission and GMR to consider the coal from MCL towards generation and sale of electricity for the entire 300 MW of Haryana Utilities.

6.7 The Haryana Utilities were not concerned with the tapering linkage for the 550 MW given by MCL or the captive coal block being proceeded with or cancelled etc. The implication of the captive coal block not being granted should visit only the balance 550 MW and cannot in any manner affect the firm coal allocation for 300 MW to Haryana Utilities. The above position stands clarified and confirmed by letters dated 07.02.018, 16.03.2018 and 03.04.2018 and 02.05.2018 from MCL .

- 6.8** In view of the above, the Impugned Order treating the MCL coal linkage for 500 MW as being commonly available to all the Procurers from the generation project of GMR is patently erroneous. The Central Commission has not considered the relevant documents in the context of the coal allocation made for 500 MW and independent of the same the coal allocation under the tapering linkage for 550 MW and more particularly the evidence on record being the bid submitted by GMR, the Fuel Supply Agreements executed by GMR and the letters by Coal Supplier, MCL as well as the decision of the Central Commission in the earlier proceedings being Order dated 03.02.2016.
- 6.9** The Order dated 03.02.2016 considering and allowing Change in Law for shortfall of coal for NCDP to GMR was concerned only with the FSA dated 26.03.2013. The tapering FSA dated 28.08.2013 was not even on record before the Central Commission as noted in Para 48 of the impugned Order.
- 6.10** The methodology for computation of impact of the change in law at Para 56 considered coal available from tapering linkage as alternate coal similar to imported coal and open market coal. Therefore, the coal as intended for the quoted tariff was related to the firm linkage and tapering linkage was considered as one of the many alternate coal options available to GMR .

6.11 Further the Order dated 03.02.2016 only dealt with the shortfall in coal as per NCDP and did not deal with any change in law in respect of the captive coal block or tapering linkage. GMR has not challenged any non consideration by the Central Commission of any claim relating to the tapering linkage or captive coal block. Thus, GMR cannot now claim any change in law in respect of the above under the guise of implementation of Order dated 03.02.2016.

6.12 The Order dated 03.02.2016 proceeded on two basis:

- a. The FSA relevant to capacity under the PPA with Haryana Utilities was FSA dated 26.03.2013 and the said FSA was sufficient for the contracted capacity with Haryana Utilities (300 MW);
- b. The coal if any under tapering linkage was alternate coal to meet the shortfall of the firm linkage.

6.13 The issues to be considered as :-

Whether the Coal Linkage with MCL for 500 MW is intended to be only for the capacity of 350 MW {Unit 1} and 150 MW {part of Unit 2} and the Captive Coal Block – tapering Linkage-Shakti Scheme for 550 MW the capacity of balance 200 MW of Unit 2 and 350MW of Unit 3, **which is the case of Haryana Utilities;**

OR

Whether the Coal Linkage with MCL for 500 MW and the Captive Coal Block – tapering Linkage-Shakti Scheme all together are commonly towards the for the entire capacity of 1050MW without any differentiation as to units 1 or Unit 2 or Unit 3, **which is the impugned order and is the case of GMR and possibly also Bihar Utilities**

OR

Whether the GRIDCO should be given first and priority claim over all other Procurers in regard the generation capacity allocated from 1050 MW from the generating station as a whole **which is the case of GMR GRIDCO**

6.14 As submitted hereinabove, GMR power station of 1050 MW had been given domestic coal through (i) firm coal linkage and (b) captive coal block, with tapering linkage and then allocation under SHAKTI Policy. The firm Coal Linkage FSA in the present case has been given with specific reference to generating unit/capacity and with specific reference to a PPA and not generally to a generating station of GMR as a whole. This is clear from the use of the expression Phase 1, Unit - 1 (later Unit 1 and part of Unit 2), capacity of 300 MW of which is Haryana PPA, capacity of 125 MW which is the GRIDCO PPA and 29.55 MW which is Bihar PPA.

6.15 The Captive Coal /tapering Linkage/Shakti Policy Coal are for the capacity/generating units/PPAs which were not covered under the firm Coal Linkage FSA. In terms of the conditions for such allocation itself it is not to replace any part of the firm Coal Linkage FSA and covers only the capacity/PPA quantum not covered by firm Coal Linkage FSA.

6.16 The primary contentions of GRIDCO and the response of Haryana Utilities are as under:

A. GRIDCO Contention No. 1:

- i. The PPA with GRIDCO was executed first i.e. 28.09.2006 and then revised 04.01.2011 and operationalized first on January 2013 and therefore GRIDCO has the first right over the Firm Linkage FSA dated 26.03.2013;
- ii. The contracted capacity of GRIDCO was 250 MW (as per PPA Dated 28.09.2006) and 262.5 MW (as per PPA Dated 04.01.2011) and 350 MW (increase on basis of unit 4 of 350 MW – wherein construction not even commenced)
- iii. The Government of Odisha had assisted GMR for allocation of firm linkage and coal block and therefore GRIDCO would have first right over the fuel supply.

Haryana Utilities Submissions to GRIDCO's Contention No. 1:

- a. It is not the contention of Haryana Utilities that GRIDCO should in any manner be affected in regard to its rights under its PPA with GMR.

GRIDCO is entitled to 25% of the capacity under each phase/generating unit. GRIDCO capacity is not a frozen aggregate capacity of 250MW/262.5 MW with reference to the aggregate 1000/1050 MW. As and when generating units are established, namely, either 500 MW units or revised 350 MW units, GRIDCO would have 25% of such unit capacity respectively.

- b. Accordingly, when the initial 500 MW capacity was envisaged initially, GRIDCO was entitled to 25% of 500 MW i.e. 125 MW. It is not that GRIDCO would have 250 MW (with reference to 25% of 1000 MW) in the first unit of 500 MW itself. If the second 500 MW unit does not come, GRIDCO would not get the second 125 MW and would therefore be entitled to only 125 MW qua the first unit of 500 MW.
- c. The above 125 MW qua first 500 MW has been continued and GRIDCO entitlement cannot be disputed when the unit configuration changed to 3 X 350 MW. GRIDCO entitlement of 125 MW qua 500 MW (350 of unit 1 and 150 out of unit 2) has been rightly considered. Haryana Utilities are not raising any issue in regard to the above share of 125 MW in the 500 MW, which is related to the firm linkage.
- d. Similarly, GRIDCO's entitlement of another 125 MW or 125 + 12.5 MW (on account of increase of balance capacity from 500 to 550 MW) can be only with reference to coal allocation secured by GMR for 550 MW i.e. captive coal block and tapering linkage and later SHAKTI Policy.

- e. In the above context, out of the 500 MW, GRIDCO, Haryana Utilities and Bihar Utilities will have rights in proportion to 125:300:29.55 MW. In this regard, the MCL has specifically clarified that the PPA capacity considered for firm linkage FSA dated 26.03.2013 is Haryana – 300 MW, GRIDCO – 125 MW and Bihar Utilities – 29.55 MW. GRIDCO's contention is therefore contrary to the specific stand of MCL.
- f. Haryana Utilities has not contended that its 300 MW should be considered first but only that the fuel supply under firm linkage FSA has to be proportionated at 300:125:29.55 in favour of Haryana: GRIDCO:Bihar which is as per MCL Letter.
- g. The PPA Dated 28.09.2006 with GRIDCO provides forentitlement of power for GRIDCO as up to 25% of the power sent out as under :

“2.2 ENTITLEMENT OF POWER FOR GRIDCO

*GRIDCO shall at all times have **the right to purchase from the Station up to 25 (twenty five) percent of the power sent out from the thermal power station(s)** excluding the quantum of power in excess of 80% Plant Load Factor and Infirm Power. GEL shall duly incorporated a term in the Agreements with third parties for sale of electricity or capacity pertaining to the Station, confirming the above rights of GRIDCO.*

- (a) ***The capacity allocated to GRIDCO shall be up to 25 (Twenty Five) percent of the installed capacity of the thermal power station as requisitioned by GRIDCO once each 5(Five) year block period. GRIDCO shall requisition the capacity up to 25 (Twenty Five) percent six months prior to the commencement of each 5 year block period. For the first 5(five) year block period, the requisition shall be given by GRIDCO six months prior to COD.”***

- h. Therefore, the contracted capacity is not an absolute 250 MW (out of 1000 MW) or 262.5 MW (out of 1050 MW) to be given first but 25% of power generated. Thus, when the installed capacity was intended to be 2 X 500 MW, the share of GRIDCO was 25% of first unit and 25% of second unit being 125 MW and 125 MW respectfully. Therefore, when the firm linkage was granted for 500 MW first unit, the share of GRIDCO was 125 MW out of such firm coal Linkage generation. GRIDCO cannot claim 250 MW out of the first unit of 500 MW.
- i. The recommendation by Government of Odisha for fuel allocation for the entire 1000 MW (later 1050 MW) was on the basis of the Memorandum of Understanding wherein the Government of Odisha had agreed to assist GMR. There was no condition that any fuel allocation would be first utilised for GRIDCO or that GRIDCO would have first right over the fuel. In fact this is not logical in as much as the share of GRIDCO is 25% of power generated. GRIDCO cannot claim that the entire power generated is to its account first and therefore cannot claim that the entire fuel received is to its account first.
- j. Government of Odisha had recommended both coal block and firm linkage. Therefore, there is no basis for GRIDCO to claim any such first

right over firm linkage. In any case, mere recommendation by the State Government for a power plant located in the State does not mean that the rights of other purchasers of power would be considered as secondary. If such contentions are accepted, there would be no inter-state sale of power as no procurer would wish to procure power from a power plant located in another state.

- k. The allocation of coal block or firm linkage is by Government of India based on the representation by GMR. Even if Government of Odisha had assisted, the same cannot give any special right to GRIDCO except as specifically stipulated in the allocation.
- l. The consideration of PPA capacity is as per allocation by Coal India Limited and not on any recommendation by Odisha. MCL has signed the firm linkage FSA dated 26.03.2013 with GMR considering 300 MW of Haryana Utilities, 125 MW of GRIDCO and 29.55 MW of Bihar Utilities.

B. GRIDCO Contention No.2:

- Allocation under SLC (LT) meeting on 02.08.2007 and Letter of Assurance dated 25.07.2008 is against a long term PPA and the only PPA at that time was GRIDCO and therefore the firm linkage was for GRIDCO.

Haryana Utilities Submission to Contention No. 2:

- (I) The existence of PPA is relevant at the time of execution of FSA by the Coal India Limited/subsidiaries. In this case, the firm linkage FSA was executed based on PPA of 300 MW of Haryana Utilities, 125 MW of GRIDCO PPA and 29.55 MW of Bihar utilities.
- (II) The firm linkage of 500 MW was granted even though the PPA with GRIDCO was only for 25% of power (which even as per GRIDCO is only 250 MW at that time). The firm Linkage was given equally because of 300 MW with Haryana Utilities. There is therefore no term of any superior right of GRIDCO and in any event any right of Gridco to cover an aggregate capacity of 250 MW or 262 MW.
- (III) In any case, the contracted capacity of GRIDCO is 25% of power generated. Since only Unit 1 of 500 MW was considered in SLC (LT) in 2007 and Letter of Assurance dated 25.07.2008, the share of GRIDCO was 25% of 500 MW i.e. 125 MW.

C. GRIDCO Contention No. 3:

- Based on submission of GMR, GRIDCO has contended that SLC (LT) Minutes dated 14.02.2012 indicate that tapering linkage of 2.384 MTPA (550 MW) is to be utilised for all three PPAs.

Haryana Utilities Submissions to Contention No. 3:

- i. The SLC (LT) Minutes for 14.02.2012 refers to Projects for likely benefits during 2012-13 as under :

| S. No. | Category | Project Name | Developer | Sector | Capacity (MW) | Status of Coal | Linked Capacity (MW) | LOA Quantity (MT) | Status of PPA |
|--------|----------|--------------------|------------|--------|---------------|------------------------------|----------------------|-------------------|---------------------------------|
| .. | .. | .. | .. | .. | .. | ... | .. | .. | .. |
| 12 | A | Kamalanaga TPP U 1 | GMR Energy | P | 500 | 500 MW Linkage; 550 MW Block | 500 | 2.334 | Yes (Orissa, Bihar and Haryana) |

- ii. The reference as such, is to Unit 1 with capacity of 500 MW and the reference to Linked capacity of 500 MW. GRIDCO (and also GMR) is selectively reading the LOA quantity of 2.384 MTPA and ignoring the specific references to capacity of 500 MW. The PPA being of Orissa, Bihar and Haryana is with reference to the 500 MW linked capacity from what was envisaged initially unit 1 or phase 1 and finally 350 MW unit 1 and 150 MW out of Unit 2.
- iii. This is also clear from the fact that 550 MW is referred for Block (i.e. coal block) and not as tapering Linkage. The quantity is for LOA quantity i.e. linkage quantity which is obviously for 500 MW.
- iv. Further MCL itself has in Letter dated 02.05.2018 clarified that the PPA furnished for 500 MW firm linkage is 300 MW of Haryana, 125 MW of GRIDCO and 29.55 MW of Bihar Utilities.

D. GRIDCO Contention No. 4:

- a. SHAKTI Policy was for allocation of coal to meet shortfall in firm linkage
- b. GRIDCO had agreed to such allocation to take advantage of the discount offered.

Haryana Utilities Submission to Contention No. 4:

- a. SHAKTI Policy is not meant to cover the shortfall in supply of coal under firm linkage or any other source. The allocation is a fresh allocation and meant for capacity of the power plants for which there is no previous allocation of fuel.
- b. There cannot be two sources of fuel/coal for the same contracted capacity i.e. GMR cannot have both allocation under SHAKTI policy and firm linkage for the same capacity. The fact that the GRIDCO consented for participation of GMR in SHAKTI Policy and GMR was allocated coal in this regard, means that such quantum of coal is not covered under pre-existing firm linkage FSA. Accordingly, the coal quantum under Shakti Policy was towards captive coal block quantum which did not fructify and nothing to do with firm Linkage coal with MCL

E. GRIDCO Contention No. 5:

- GRIDCO has made reference to various Tariff Orders and pendency of proceedings before the Hon'ble Supreme Court.

Haryana Utilities Submission to Contention No. 5:

Haryana Utilities were not a party to such Tariff Orders. The present dispute in the Appeal is between the Appellants and GMR. The rights of GRIDCO against GMR in any pending proceeding or Tariff Order is not relevant to the present dispute.

F. GRIDCO Contention No. 6:

- GRIDCO has sought to rely on CRISIL report presented by GMR which is apparently an analysis of Project Cost. This report records contention of GMR that only one source could have been identified in the bid and GMR had only identified linkage coal.

Haryana Utilities Submissions to Contention No. 6:

- i. The Report had been commissioned by GMR for project cost and is not relevant to Haryana utilities at all. The internal assumptions of GMR, if any, are also not important. The relevant document is the bid and the PPA.
- ii. The contention that GMR could have identified only one source of coal in the bid initiated by Haryana Utilities is wrong. The RFP required the Bidders to submit proof of fuel arrangement as under :

*“2.1.5 All Bidders are required to submit copies of **one or more** of the following –*

- (a) *Linkage letter from the fuel supplier; or*
- (b) *Fuel Supply Agreement between the Bidder and Fuel Supplier; or*
- (c) *Coal Block Allocation Letter/In principle approval for allocation of captive coal block from Ministry of Coal; or*
- (d) *Other details submitted by Bidders subject to acceptance by the Procurer as sufficient proof for demonstration of ability.*

The above proof of fuel arrangement is not required in case the fuel to be used by the Bidder is imported fuel.

2.1.5A The Successful Bidder is required to show a firm fuel supply agreement/linkage by the time limit specified for fulfillment of Conditions Subsequent as mentioned in the PPA.”

- iii. In a similar bid for Bihar Utilities, GMR had in fact referred to both linkage and coal block as under:

“(B) Details of primary fuel

- *Domestic Coal*
- *Coal India Ltd. (CIL) Coal Linkage*
- *LOAs received from Mahanadi Coalfields Ltd.,*
- *Rampia and Dip side of Rampia Coal block*
- *Grade E to F*

- iv. In any event, even if GMR/PTC could rely only on one source of coal and GMR/PTC chose firm linkage, then the relevant fuel source is firm linkage. It is not open for GMR/PTC to subsequently claim the consequences of shortfall in respect of any other source of coal. GMR/PTC cannot go beyond the bid conditions to claim multiple

sources of coal if at all the bid conditions required a single source of coal.

G. GRIDCO Contention No. 7:

- i. GMR failed to comply with the terms of the Clause 2.2 of the PPA dated 28.09.2006 with GRIDCO which required incorporation of a term in agreement with third parties confirming right of GRIDCO.
- ii. GMR had sought to dilute the rights of GRIDCO to qualify for bids of Haryana Utilities and Bihar Utilities.

Haryana Utilities Submission to Contention No. 7:

- a. Haryana Utilities had accepted the bid of GMR/PTC for 300 MW on the basis of proof of fuel arrangement of firm linkage from MCL. Haryana Utilities have not agreed to any priority being given to any other entity. Haryana Utilities is entitled to claim compliance of the PPA against GMR/PTC.
- b. The consequences of default, if any, by GMR of the PPA with GRIDCO are to be considered between GMR and GRIDCO. There cannot be any alteration of the PPA with Haryana Utilities or any claim for additional compensation by GMR from Haryana Utilities on such grounds.

H. GRIDCO Contention No. 8:

- GRIDCO has requested both GMR and MCL to provide details of correspondence made with Coal India Limited but the same is still awaited.

Haryana Utilities Submissions to Contention No. 8:

- i. Haryana Utilities has filed the Letters from MCL (Letter dated 02.05.2018 at Page 6 of I.A. No. 641 of 2018 dated 24.05.2018) which clearly specify that the firm linkage FSA had been signed by MCL against 300 MW of Haryana Utilities and 125 MW for GRIDCO and 29.55 for Bihar Utilities .
- ii. There was no consideration of PPA with Haryana Utilities for allocation of tapering linkage.

I. GRIDCO Contention No. 9:

- GRIDCO had submitted annual certificates to confirm power supply by GMR to GRIDCO as per the requirement of firm linkage FSA dated 26.03.2013 and hence GRIDCO has exclusive rights.

Haryana Utilities Submissions to Contention No. 9:

Submission of annual certificates is a requirement of FSA because the specific PPA was the basis for execution of FSA. The PPA with

Haryana Utilities was the basis of firm linkage FSA dated 26.03.2013 and MCL had also requested Haryana Utilities for such certificates.

Haryana Utilities have also submitted these certificates.

- 7. Shri R.K. Mehta, learned senior counsel appearing for the Appellant in Appeal No. 54 of 2019 and Respondent in Appeal No. 135 of 2018 has filed the submissions in the batch of Appeals for our consideration as under:-**

A Reply Filed Vide Affidavit dated 30.08.2018:

- 7.1** In Petition No. 105/MP/2017 GKEL inter-alia prayed as under was :

“52(a) Declare that the coal received under Firm Linkage corresponding to 500MW is to be utilised on pro-rata basis against the existing long term PPAs with GRIDCO, Haryana and Bihar respectively.”

- 7.2** Even though relief was claimed directly against GRIDCO and as such GRIDCO was a necessary party, GKEL did not implead GRIDCO as a party in the said petition. The impugned order has been passed behind the back of GRIDCO without hearing GRIDCO. The impugned order is therefore non-est and not binding on GRIDCO due to non-joinder of necessary party.

- 7.3** In this manner, GKEL attempted to keep GRIDCO out of the various Miscellaneous petitions and claimed higher cost of coal from alternate sources (i.e. E-auction, Imported, Open Market coal) by creating artificial shortfall in Firm Linkage Coal on the basis of CERC orders dated 03.02.2016 & 20.03.2018 .

- 7.4** GRIDCO has been consistently disputing the stand of GKEL regarding shortfall in Linkage Coal, pro-rating of Linkage Coal and use of alternate source Coal for supply to GRIDCO before CERC, Hon'ble Tribunal and Hon'ble Supreme Court.
- 7.5** CERC order dated 03.02.2016 cannot be construed to have attained finality as far as GRIDCO is concerned since GRIDCO was not impleaded as a party in the said petition even though it was a necessary and proper party. The Order dated 03.02.2016 is, therefore, not applicable to GRIDCO's PPA capacity.
- 7.6** The conduct of GKEL amounts to breach of contract as well as breach of trust qua Government of Odisha /GRIDCO since:
- a) Provision under Clause 2.2 of PPA dated 28.09.2006 between GKEL and GRIDCO was not complied by GKEL while executing Haryana and Bihar PPAs;
 - b) GKEL concealed the fact before different Forums, that it was allocated Firm Linkage Coal and Coal Blocks on recommendations of Government of Odisha in 2005 and 2007 respectively;
 - c) GKEL did not reveal the fact that it relied upon GRIDCO PPA signed in 2006 while for applying for Firm Linkage Coal and Coal Blocks;

- d) GKEL did not file the Format required for approval/allotment of Firm Linkage Coal before any Forum;
- e) GKEL malafidely utilised the Firm Linkage Coal Allotment to fulfil the requirements of bidding document for sale of power to Haryana and Bihar as revealed from the CRISIL Report. The relevant extract from the CRISIL report is quoted below:

XXXXXXXXXXXXXXXXXX. It is pertinent to note that it was proposed that coal required for supply for 262.5MW to be supplied to GRIDCO to meet its obligation under the PPA/MOU would be through CIL.

However, the standard bidding documents applicable at the time allowed for quoting based on only one source of fuel. Therefore, GKEL/PTC were forced to indicate linkage coal from MCL/CIL in their quote to Haryana Discoms though the internal assumption was to source substantial quantity of coal from its captive coal block.

- f) By virtue of the provisions of the MoU executed with Government of Odisha, GKEL could establish its Thermal Plant in the State of Odisha by availing all the facilities from various departments of State Government like Land, Water, Construction Power, Environment Clearances, Coal, Statutory Permits/ Clearances, Coal, Law & Order etc. and was successful in commissioning of its Thermal Power Plant.

It is thus submitted that GKEL is guilty of breach of contract/ trust qua Government of Odisha/GRIDCO which conduct of GKEL has

resulted in serious prejudice to the interest of consumers of the State Odisha.

7.7 GRIDCO has the first right on Firm Linkage Coal and Tapering Linkage Coal in view of the following:

- (i) MOU dated 09.06.2006;
- (ii) Recommendation of Government of Odisha in 2005 and 2007.
- (iii) No other Government of Long Term Beneficiary of GKEL made any effort for allotment of Firm Linkage Coal and Coal Block to GKEL;
- (iv) GRIDCO was first to sign long term PPA with GKEL in 2006,
- (v) GRIDCO was supplied power in January, 2013 from the Plant i.e. before any other long term beneficiary;
- (vi) As per the provision contained in Clause 4.1.1 of FSA dated 26.03.2013 ,amended subsequently vide Amendment No. 2 dated 20.05.2014;

7.8 GKEL intentionally suppressed inter –alia, the following important facts:

- a) Letters dated 08.12.2005, 28.04.2006, 10.05.2006, 05.01.2007 of GKEL to Govt. of Odisha requesting Govt. Of Odisha for recommendation for Firm Coal Linkage, revival of recommendation and to recommend for Coal Blocks;

- b) The fact that it was allocated Firm Linkage Coal and Coal Blocks on recommendations of Government of Odisha in 2005 and 2007 respectively;
- c) Acknowledgement of GKEL that it had got Firm Linkage Coal based on recommendation of Government of Odisha only in letter dated 23.03.2007 and letter dated 21.06.2007 addressed to Ministry of Coal, Government of India;
- d) GKEL has not filed the details of documents/applications/formats furnished before 1st meeting of SLC-LT on 02.08.2007 for obtaining Firm Coal Linkage and subsequent LOA dated 25.07.2008;
- e) Vide letter dated 24.12.2018 GRIDCO had requested GKEL to provide all the details in this regard, but GKEL is yet to comply with the request of GRIDCO;
- f) GKEL has not filed Standard Format for applying for Long Term Firm Coal Linkage, wherein there is a clear stipulation to mention the details of Power Purchase Agreement of the beneficiary.
- g) GKEL has not filed the Amendments/Side Agreements to FSA dated 26.03.2013 and 28.08.2013 respectively which show sequence of allocation of Firm and Tapering Linkage Coal with operationalization of PPAs.

- h) GKEL has concealed from CERC/Hon'ble Tribunal the Amendment No. 2 dated 20.05.2014 to FSA dated 26.03.2013 wherein coal apportionment has been clarified.

“XXXXXXXXXX The Annual Contracted Quantity of Coal agreed to be supplied by the Seller XXXX (including 10% transmission losses and auxiliary consumption. The quantity may vary depending on PPA furnished/to be furnished as per terms of FSA against LOA quantity) XXXXXXXXXXXXX The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser XXXXXXXXXXXXX plus an additional 10% of the quantity covered under long term PPA on account of transmission loss and auxiliary consumption within the overall ceiling of LOA quantity. To clarify, if the PPA furnished is 60% the ACQ shall be 66% of the LOA quantity.”

It submitted that, the PPA capacity of GRIDCO being 25% of installed capacity of GKEL i.e. 262.5 MW, the FSA covers entire PPA capacity under the Firm Linkage Coal allocated vide LOA and FSA thereof.

- i) GKEL has not disclosed that GRIDCO has been issuing Annual Certificate towards consistent supply of power to GRIDCO to maintain uninterrupted Firm Linkage coal supply by MCL.

7.9 Reply to specific contentions of GKEL:

- a) **GKEL Contention: Allocation of Linkage Coal are not PPA specific and instead it is for “End Use of Plant”.**

Submissions of GRIDCO:

- The Format of application for LOA has a specific requirement to provide details of PPA executed so that the coal requirement can be assessed accordingly.
- In Para 32 of its submissions dated 18.12.2018, GKEL has admitted as under:-

“XXXX This is in line with the Government policy that coal supply will be operational against supply of power under long term PPA.”

- In Para 33 GKEL has admitted as under:-

“It is submitted that FSAs were operational based on commencement of supply under specific PPAsXXXXXX.”

- In Para 20 GKEL has admitted the fact that:

“The ACQ under FSA was modified once the PPAs were operationalised”.

It is, therefore, evident that for supply of contracted capacity of 262.5 MW under GRIDCO PPA executed in 2006, GKEL had sufficient quantum of Firm Linkage Coal i.e. 1.1235 MTPA under allocation of 2.14 MTPA Firm Linkage Coal followed by 2.384 MTPA of Tapering Linkage Coal.

- GKEL has submitted at Para 34 as per terms of Clause 4.1.1 of the FSA i.e.

“However, once the PPAs become operational, the total supplies of linkage coal is to be in proportion to the percentage of

generation covered under long term PPAs with DISCOMs as specifically provided under Clause 4.1.1 of both the FSAs.”

- Standing Linkage Committee (SLC-LT) Minutes dated 14.02.2012 indicate that the Tapering Linkage Coal of 2.384 MTPA is to be utilised for all three PPAs with GRIDCO, Haryana and Bihar because by this time GKEL was having all three long term PPAs signed in 2006, 2009 and 2011 respectively in place.
- There is no such mention of sharing of Firm Linkage Coal by SLC-LT in the Minutes of Meeting dated 02.08.2007 of SLC-LT. The attempt of GKEL in seeking to justify the pro-rating of Firm Linkage Coal on the basis of “End Use of Plant” and “Sharing of Coal” is therefore, wholly unjustified and untenable. It is reiterated that SLC-LT had considered allocation of Firm/Tapering Linkage Coal on the basis of information on concrete long term PPAs executed by GKEL at the time of application prior to SLC-LT meetings.
- The long term PPA was essential to determine and assess the quantum of coal requirement which was allowed in a phased manner based on the principle mentioned in Amendment 2 dated 20.05.2014 to the FSA dated 26.03.2013. As and when the

contracted capacity under long term PPA kept on increasing, the allocation of Firm Linkage and Tapering Linkage Coal had also been duly enhanced through execution of Side Agreements to FSA dated 26.03.2013 (Firm Linkage) and FSA dated 28.08.2013 (Tapering Linkage Coal) respectively .

- It is evident from the Fuel Supply Agreements and Amendments thereto signed from time to time that FSA's are PPA capacity specific.
- Amendment 2 dated 20.05.2014 clearly stipulates as follows:

XXXXXXXXXXThe ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreement(s) executed by the Purchaser XXXXXXXXXXXX

- GKEL had admitted that pro-rating of coal is to be effected from 01.09.2014 among all three beneficiaries. If pro-rating of coal depends upon commencement of supply of power under long term PPA, it implies that FSAs are PPA specific.
- In their letter dated 02.05.2018 MCL had rightly stated as under:

“XXXX based on the long term PPA(s) submitted by IPPs, effectively Annual Contracted Quantity (ACQ) under FSA is determined proportionate to the total LOA quantity and coal is released accordingly. XXXXXXXX”.

Therefore, the Firm and Tapering Linkage Coal has been allocated as per the PPA capacity and commencement of power supply to Long Term Beneficiaries.

- It is solely on the basis of PPA capacity that Ministry of Coal/SLC-LT/MCL/CIL determined the Firm/Tapering Coal requirement. Otherwise, such concessional Coal allotment would have also included the merchant capacity i.e. balance installed capacity of Thermal Station i.e. 155 MW (i.e.1050 MW- 895 MW).
- GKEL's request letter dated 02.08.2017 and consent of GRIDCO for participation in bidding under SHAKTI Scheme clearly mention about PPA details required to be submitted before CEA.
- GKEL has submitted that allotment of coal under FSA is based on operationalisation of PPA as mentioned at Para 18 of the CERC order 20.03.2018 in Petition No. 105/MP/2017 .The relevant extract of the order is quoted below:

"18.XXXXX The Petitioner has submitted that as per the Commission's order and FSA dated 26.3.2013, the Annual Contracted Quantity (ACQ) shall be in proportion of the percentage generation covered under long term PPAs with Discoms. ACQ of 2.0009 MTPA under FSA was supplied under NCDP till September, 2014 and the coal was allocated between the then operating PPAs: GRIDCO and PTC/Haryana. As the Bihar PPA became operational, the FSA quantum was revised to 2.14 MTPA from September 2014 and linkage coal supplied as per NCDP was allocated between the beneficiaries XXXX."

- In Para 32 of the order dated 20.03.2018 in Petition No.105/MP/2017 CERC has stated as follows:

“32.XXXXXXX The Petitioner was receiving 2.58 MTPA of coal from both firm and tapering linkage to meet the requirement for 618 MW and after operationalization of Bihar PPA, the Petitioner received 3.63 MTPA of coal to meet the requirement of 905 MWXXXXXX.”

- It has been admitted by GKEL that Coal India Ltd and its subsidiaries allocate coal to the station pro-rata to the operational capacities. However, it is not on pro-rata basis and instead in proportion to PPA capacity as explained in Amendment 2 dated 20.05.2014 to FSA dated 26.03.2013.
- Further, GKEL has admitted in Para 59 & 71 the views given by MCL vide letter dated 02.05.2018 wherein it has been clearly stated as under:

“In this connection, it is to intimate you that based on Long Term PPAs submitted by IPPs effective Annual Contracted Capacity (ACQ) under FSA is determined in proportion to total LOA quantity and coal is released accordingly. In case of Multiple PPAs coal is released to IPPs, considering the total PPA capacity and not bifurcated on the individual PPA”.

- b) **GKEL Contention: When a Generating Company has multiple PPAs supply of coal is linked to commencement of supply of**

power (Para 6 Page 3 of written Submission dated 18.12.2018):

Submissions of GRIDCO:

- GRIDCO submits that as per Clause 4.1.1. of FSAs as well as Amendments thereto and contentions of GKEL based on its long term PPAs, the allocation of Linkage Coal has to be as follows:

| Sl.No. | Beneficiary | PPA Capacity | Date of Operationalisation of PPA Capacity | Operationalisation of ACQ | Type of ACQ |
|--------|-------------|--------------|--|--|-----------------------------------|
| 1 | GRIDCO | 262.5MW | 27.01.2013 | ACQ proportion to 262.5MW | Firm Linkage |
| 2 | Haryana | 350MW | 07.02.2014 | ACQ in proportion to (262.5+350) 612.5MW | Balance Firm and Tapering Linkage |
| 3 | Bihar | 282MW | 01.09.2014 | (612.5+282)894.5 MW | Balance Tapering Linkage |

7.10 In Para 33 of Written Submissions submitted by GKEL on 18.12.2018, GRIDCO PPA capacity has been malafidely stated to be 125 MW. It is submitted that GKEL is trying to mislead the Hon'ble Tribunal by undermining GRIDCO PPA (2006) capacity by placing it after Haryana PPA (2009). Moreover, the PPA capacity can never be a reduced quantum of 125 MW under any circumstance whatsoever leading to violation of subsisting contracts and own admission by GKEL in Para 3(a) of affidavit dated 30.08.2018 and Para 4 of Written Submissions

dated 18.12.2018, Tariff orders of CERC in Petition No.77/GT/2013 and Petition No.61/GT/2016 respectively. It is reiterated that PPA capacity of GRIDCO stands as under:

| Sl.No. | Power Purchase Agreements | Installed Capacity of GKEL | Contracted Capacity |
|--------|---------------------------|----------------------------|---------------------|
| 1. | 28.09.2006 | 2X500MW | 250.0 MW |
| 2. | 04.01.2011 | 3X350MW | 262.5MW |
| 3. | 04.01.2011 | 4X350MW | 350.0 MW |

Note: The fourth Unit(350MW) is yet to be installed at thermal station of GKEL.

7.11 Moreover, when issue of Linkage Coal is sub-judice before Hon'ble Supreme Court in C.A. No. 2808 of 2018, GRIDCO should not be deprived of the benefit on account of consideration of Linkage Coal for its entire contracted capacity of 262.5MW.

7.12 In reply to Para 3 (a) (i) of Written Submissions of GKEL submitted on 18.12.2018, it is submitted that there is no such Phase-I and Phase II mentioned in any Memorandum of Understanding (MOU) signed by GKEL with Government of Odisha. It is a self-created interpretation of GKEL which is misconceived and untenable.

7.13 The consequences of constraint of GKEL to submit Linkage Coal/Coal Block for Bid evaluation purpose (i.e. for Haryana and Bihar) ought not to be loaded on GRIDCO by pro-rating Firm Linkage Coal and loading the cost of costly alternate source of Coal (E-auction, Imported, Open

market etc) on GRIDCO. Such a course will lead to serious injustice and irreparable prejudice to consumers of State of Odisha.

7.14 GKEL cannot be allowed to further its own interest and financials at the cost of benefits of concessional coal allocated to it solely based on the recommendations of Government of Odisha. GKEL is attempting to deprive GRIDCO of the benefits of concessional coal procured by it by the assistance of Govt. of Odisha from the inception of its Thermal Power Station.

7.15 GRIDCO PPA was executed on the basis of cost plus tariff mechanism unlike Haryana and Bihar and thus source of primary fuel for generation of electricity and supply to the State of Odisha is crucial to the cost of energy procured from GKEL as coal cost constitutes 60% of the total energy charges in case of a coal-based thermal power plant.

7.16 In order to ensure a reasonable cost of power Government of Odisha had recommended for Firm Linkage Coal and Coal Blocks in favour of GKEL in 2005 and 2007 respectively (filed herewith as Annexure-C(Colly)). GRIDCO's first right on concessional coal cannot, therefore, be denied under any circumstances whatsoever.

7.17 For both kinds of source of primary fuel, only Government of Odisha had issued required recommendations to the Ministry of Coal, Government of India, when it was unaware of other would be long term beneficiaries of GKEL.

7.18 Had there been no other long term beneficiary of GKEL, the Ministry of coal would have considered to reduce the quantum of Firm Linkage Coal to the extent of GRIDCO PPA only.

7.19 GRIDCO's PPA capacity cannot be amended/modified by GKEL under any circumstances to take undue advantage for pro-rating of Firm Linkage Coal.

7.20 The coal received by GKEL pursuant to the Firm Coal Linkage has, therefore, necessarily to be used primarily for supply of power to GRIDCO and the balance only can be used for supply of power to the other beneficiaries, who had entered into PPAs with GKEL, subsequently.

7.21 GKEL had misled CERC and Hon'ble Tribunal to justify its own interpretation of pro-rating of Firm Linkage Coal among the beneficiaries in contradiction to provisions of FSA which considers

operationalization of PPA and releases Firm/Tapering Linkage Coal in a phased manner.

7.22 Bihar PPA was made effective from 01.09.2014 and Haryana PPA was made effective from 07.02.2014. As per submission of GKEL pro-rating is to commence from September, 2014 and not before that. However, GRIDCO completely repudiates the pro-rating of Firm Linkage Coal allocated against its PPA and thereby create shortfall and plead for costly alternate source of coal.

7.23 Total requirement of Firm Linkage Coal for PPA capacity of GRIDCO is 1.1235 MTPA which is well within the allocation of 2.14 MTPA (100% Firm Linkage) in favour of GKEL. As and when there will be shortfall in 100% Firm Linkage Coal Supply, there will be shortfall in Firm Linkage Coal for PPA capacity of GRIDCO. Such shortfall was to be met from Tapering Linkage Coal only.

7.24 From the Data furnished in the Statement filed herewith by GRIDCO, it is observed that the actual Firm Linkage Coal supplied to GKEL was sufficient to generate PPA capacity of GRIDCO.

7.25 From the power supplied to GRIDCO, details of Linkage Coal (both Firm and Tapering) provided by GKEL in Form-15 every month, a

statement of the actual Firm Linkage Coal /Tapering Linkage Coal received vis-à-vis Coal requirement for supply of power to GRIDCO by GKEL is filed herewith.

7.26 The said statement shows that due to pro-rating of Linkage Coal by GKEL the actual quantity of Linkage Coal (Firm + Tapering) required to supply scheduled power to GRIDCO (Column [5]) could not be met. GKEL has considered less quantity of Linkage Coal as shown in Column-[6] for deriving monthly Energy Charge Rate (ECR) claimed on GRIDCO.

| FY | Power Supplied to GRIDCO(in MU) | Type of Linkage Coal | Actual Linkage Coal Received (in MTPA) | Actual Linkage Coal Required for supply to GRIDCO (in MTPA) | Quantity of Linkage Coal considered by GKEL by Pro-rating (in MTPA) |
|---------|---------------------------------|------------------------------|---|---|---|
| [1] | [2] | [3] | [4] | [5] | [6] |
| 2013-14 | 223.14 | Firm | 0.731176 | 0.154713 | 0.258198 |
| 2014-15 | 1136.85 | Firm+ Tapering | 2.207983 | 0.743757 | 0.663594 |
| 2015-16 | 1545.23 | Firm+ Tapering | 2.741910 | 1.003546 | 0.870885 |
| 2016-17 | 1364.39 | Firm+ Tapering (Upto June16) | 2.283188 | 0.897364 | 0.638208 |
| 2017-18 | 1482.91 | Firm | 2.072007 | 0.994884 | 0.685624 |

7.27 As per letter dated 02.05.2018 of MCL if GKEL had furnished such information on long term PPA with GRIDCO as mentioned in the Table mentioned therein giving priority to Haryana before GRIDCO, it is complete breach of contract/trust on the part of GKEL .

7.28 It is thus submitted that the Hon'ble Tribunal may be pleased to

- (a) Dismiss the appeal;
- (b) Direct that supply of the Firm Linkage Coal in terms of LOA dated 25.07.2008 and FSA dated 26.03.2013 only has to be considered for the Power supply to GRIDCO and only if the Firm Linkage Coal Supply is not sufficient the Tapering Linkage Coal and SHAKTI Scheme Coal can be utilized for supply of power to GRIDCO.

REJOINDER SUBMISSIONS ON BEHALF OF GRIDCO LIMITED TO SUBMISSIONS OF HARYANA UTILITIES DATED 28.08.2019 AND GKEL ON 04.09.2019

7.29 **Failure on the part of GKEL to place on record all necessary documents pertaining to allocation of Firm Linkage Coal by Standing Linkage Committee – Long term (SLC-LT) and thereafter by Mahanadi Coalfields Ltd. (MCL):**

- In spite of the order dated 15.01.2019 of Hon'ble Tribunal, GKEL has failed to place on record the information provided to MCL based on which PPA capacity of GRIDCO has been allegedly reduced to 125 MW under Fuel Supply Agreement as mentioned in the letter dated 02.05.2018 addressed to Haryana by MCL. Although GRIDCO applied for the copies of said documents under RTI, Mahanadi Coalfields Ltd. and Coal India Ltd , have declined to provide the same on the ground that since documents pertain to Third Party, copies cannot be given without consent of the

Third Party. It is thus submitted that adverse inference should be drawn for non-production of the said documents by GKEL.

- GKEL has not placed on record the following important documents either before CERC or before Hon'ble Tribunal :
 - a) True copy of the filled in Format for Long Term Linkage Coal submitted before the Standing Linkage Committee-Long Term.
 - b) True copies of the Documents /Information provided by GKEL to MCL based on which letter dated 02.05.2018 mentioning PPA Capacity of GRIDCO as 125 MW was issued to Haryana Utilities by MCL.

7.30 GKEL did not produce/place all the FSAs and other relevant documents which it failed to produce in the present Appeals, pertaining to GRIDCO in various proceedings before CERC:

- The following FSAs have not been placed by GKEL before CERC:
 - i. Amendment No. 2 dated 20.05.2014 to FSA dated 26.03.2013;
 - ii. FSA dated 18.09.2014 and
 - iii. FSA dated 24.09.2014 along with MCL letter dated 18.09.2014
- In absence of any specific mention about PPA Capacity of GRIDCO covered under FSA as 125 MW, such figure had been submitted before CERC as a break up of 425 MW allocated under first FSA dated 26.03.2013.

7.31 GRIDCO was not made a Party in Petition No. 105/MP/2017:

- As far as distribution of Linkage Coal (Firm/Tapering) is concerned, GRIDCO ought to have been made a party in Petition No. 105/MP/2017 in which GKEL had made a specific prayer for pro-rating of Linkage Coal amongst GRIDCO, Haryana and Bihar.
- It was only on the directions of Hon'ble Tribunal that GRIDCO was impleaded as a party in Appeal No. 135 of 2018 arising out of order of CERC in Petition No. 105/MP/2017.

7.32 Allocation of Linkage Coal under FSA is PPA specific

From different FSAs, it is evident that Distribution of Linkage Coal (Firm/Tapering) under FSA has to be PPA specific and also depends upon operationalization of PPA as evident from the following:

| Sl. No. | Long Term Beneficiary | Date of PPA and quantum of PPA Capacity | Date of Execution of FSA | Date of Commencement of Firm Power Supply |
|---------|-----------------------|--|--|---|
| 1. | Odisha/ GRIDCO | 2006 & 2011 25% of installed capacity i.e. 262.5 MW | 1. FSA dated 26.03.2013 (Firm Linkage of 425 MW) 2. FSA dated 28.08.2013 (Tapering Linkage) | 30.04.2013 |
| 2. | Haryana | 2008 (Haryana/PTC) 350 MW. 2009 (PTC/GKEL) 350 MW | 3. Amendment 1: to FSA dated 26.03.2013 13.11.2013 (Firm Linkage) | 07.02.2014 |
| 3 | Bihar | 09.11.2011 282 MW | 1. FSA dated 18.09.2014 for 29.55 MW Firm Linkage Coal 2. MCL Letter to ECL dated 18.09.2014 (Tapering for 161.37 MW) 3.FSA dated 24.09.2014 (Tapering for 98.63 MW) | 01.09.2014 |

7.33 Allocation of Linkage Coal is on the basis of First Come First Served Basis as per FSA:

a) As per modified version of Clause 4.1.1 vide Amendment No. 2 dated 20.05.2014 to FSA dated 26.03.2013.:

“XXX XXX To clarify, if the PPA furnished is 60% the ACQ shall be 66% of the LOA quantity but where the PPA furnished in 92% the ACQ shall be limited to LOA quantity .XXXXXXX. Whenever there is any change in the percentage of PPA(s), corresponding change in ACQ shall be effected through a side agreement. Such changes shall be allowed to be made only once in a quarter of the year. The change in ACQ for change in PPA during a quarter shall be made effective only from the beginning of the next quarter XXX XXX.”

The said Amendment No. 2 dated 20.05.2014 has not been filed by GKEL in the Convenience Compilation. The above Clause is as explained below:

| Beneficiary | GRIDCO | Haryana | Bihar | Total |
|---|---------------------------|-------------------------|-------------------------|--------------|
| Year of PPA Execution | 2006 and 2011 | 2008 and 2009 | 2011 | |
| Date of PPA operationalisation | April, 2013 | February, 2014 | September, 2014 | |
| PPA Capacity Covered under FSA for Firm Linkage Coal(including 10% for Transmission Loss and Auxiliary Consumption) | 262.5 | 205 | 29.55 | 500 |
| Date of FSA | 26.03.2013 and 13.11.2013 | | 18.09.2014 | |
| % Share of Firm Linkage during 100% supply by Coal Supplier | 262.5/500 =53% | 205/500 =41% | 32.5/500 =7% | |

- b) Therefore, Bihar and Haryana are getting undue share in Firm Linkage Coal by virtue of pro-rating by GKEL deviating from principle of distribution of linkage coal under FSA at the cost of GRIDCO's legitimate share. Moreover, during short supply of Firm Linkage Coal by the Coal supplier (MCL), such shortfall quantum is to be treated in the following manner:

| Scenarios | | GRIDCO | Haryana | Bihar | Remark |
|--|-----------|--|--|--|---|
| 100% Firm Linkage Coal supply by Company | Firm Coal | 100% of Firm Linkage Coal available for PPA Capacity i.e. 262.5 MW to be met from Firm Linkage | 100% of Firm Linkage Coal available for PPA Capacity | 100% of Firm Linkage Coal available for PPA Capacity | NO Shortfall |
| 80% Firm Linkage Coal supply by Company | Firm Coal | 80% of 53 % (Table-3) Firm available for PPA Capacity. | 80% of 41 % (Table-3) available for PPA Capacity | 80% of 7% (Table-3) available for PPA Capacity | Balance Shortfall to be met from Tapering Linkage Coal for GRIDCO |
| 65% Firm Linkage Coal supply by Company | Firm Coal | 65% of 53% available for PPA Capacity. | 65% of 41% available for PPA Capacity | 65% of 7% available for PPA Capacity | Balance Shortfall to be met from Tapering Linkage Coal for GRIDCO |

7.34 First Right of GRIDCO on Firm Linkage Coal:

- It is submitted that even though the allocated Firm Linkage, Coal Block and Tapering Linkage in favour of GKEL is for the entire Project, as per the Terms of FSA dated 26.03.2013 as amended vide Amendment dated 20.05.2014, the quantum and sequence of Coal distribution under FSA is determined based on PPA Capacity and operationalisation of PPA. This is proved beyond

any doubt by Confirmation letter dated 11.03.2013 of GRIDCO in reply to MCL letter dated 08.03.2013 (which was sent prior to signing of First FSA dated 26.03.2013).

- In reply to stand of Haryana claiming First Right, GRIDCO claims First Right on Firm Linkage Coal on the basis of:
 - a) MOU dated 09.06.2006;
 - b) Recommendation of Government of Odisha in 2005 and 2007 and Admission of GKEL that it had got Firm Linkage Coal based on recommendation of Government of Odisha only;
 - c) First long term PPA with GKEL in 2006;
 - d) Commencement of supply of firm power in April, 2013 before any other long term beneficiary;
 - e) Confirmation of PPA Capacity to be 25% of “Total Capacity” vide letter dated 11.03.2013 in reply to MCL letter dated 08.03.2013;
 - f) Even GKEL had contemplated to supply entire PPA Capacity of 262.5 MW of GRIDCO using Firm Linkage Coal only, as evident from CRISIL Report.

7.35 Firm Linkage Coal cannot be for 125 MW PPA Capacity only in respect of GRIDCO

- Letter dated 11.03.2013 of GRIDCO in reply to letter dated 08.03.2013 of MCL confirms the PPA capacity of GRIDCO to be

262.5 MW i.e. 25% of total capacity under PPA dated 04.01.2011.

- MCL vide its letter dated 07.02.2018 had requested GRIDCO to confirm whether the IPPs are complying with terms and conditions of the PPA so as to ensure proper end-use of coal wherein GRIDCO's PPA Capacity has been mentioned as 262.5 MW under PPA dated 04.01.2011 and GRIDCO vide its letter dated 22.03.2018 had confirmed consistent supply of power by GKEL under the PPA.
- Coal allocation is **PPA Specific and not Unit Specific**. Underlying philosophy is that Linkage Coal, being a concessional fuel, is exclusively meant for the power supply to the distribution consumers covered under long term PPA. Linkage Coal cannot be used for supply of Merchant power, which is evident from the fact that although installed capacity of GKEL is 1050 MW, the linkage coal coverage is only for 895 MW and not for balance 155 MW.
- In the present case Firm Linkage Coal approval was for 500 MW, considering the already subsisting long term PPA of GRIDCO for 250 MW, i.e. 25% of the MOU/PPA installed capacity of 1000 MW and expected execution of long term PPA by GKEL for the balance 250 MW with other long term beneficiaries.

- In absence of all complete documents which were required to be placed by GKEL before Hon'ble Tribunal, considering backward calculation of distribution of Firm Linkage Coal under Fuel Supply Agreement, the distribution of 425 MW of Firm Linkage Coal in favour of GKEL vide FSA dated 26.03.2013 from total of 500 MW has been done by GRIDCO in the following manner:

| | |
|---|--|
| First Right of GRIDCO on Linkage Coal : 25% of 1000 MW (Confirmed to MCL vide letter dated 11.03.2013) | = 250 MW |
| Share of Haryana | : 350 MW X 500/1000 = <u>175 MW</u> |
| TOTAL | = 425 MW |
| 10% Escalation for Transmission Loss & Aux. Consumption (vide FSA dated 13.11.2013) | = 425+42.5 |
| | = 467.5 MW |
| Remaining Firm linkage Coal | : 500 MW – 467.5 MW = 32.505 MW |
| Balance Linkage Coal for Bihar (Vide FSA dated 18.09.2014) | : 29.55 +10% of 29.55MW = 32.505 MW |

Prima Facie, it appears that GKEL had intimated aforementioned break up of total 425 PPA Capacity to MCL for consideration under first FSA, which has not been placed before Hon'ble Tribunal to safeguard its long term contract with Haryana.

- GKEL has also not placed information regarding balance PPA Capacity for which SHAKTI Coal was sought for required to chalk out the entire picture of Firm Coal Allocation and SHAKTI Coal thereafter.

- Thermal Power plant installed capacity from the beginning was 1000 MW, Phase I as per MOU of 2006.
- PPA of GKEL with GRIDCO, i.e. Principal PPA of 2006, was the only PPA existing during approval by Standing Linkage Committee-Long Term (SLC-LT) and issue of LOA dated 25.07.2008.
- GRIDCO's share was 25% of Installed Capacity of Thermal Station of GKEL, i.e. 250 MW from inception.
- From various FSA's, it is crystal clear that allocation of Linkage Coal is proportionate to PPA Capacity as shown in the Tables above and sequence of supply depends upon operationalisation of PPA and is not Unit Specific. It is for this reason that Bihar PPA which was operationalised in September, 2014 has a share of 29.55 MW from 500 MW Firm Linkage Coal as per FSA dated 18.09.2014 and rest of its PPA capacity is to be met from Tapering Linkage Coal as per FSA dated 24.09.2014.
- Haryana cannot claim total 300 MW PPA capacity from 500 MW Linkage Coal as its entitlement is from the entire project and not from one Unit. Further, GRIDCO signed first long term PPA with GKEL in 2006 and firm power supply commenced in April, 2013 prior to supply of power to Haryana and Bihar and is first among three beneficiaries of GKEL in terms of PPA Capacity and operationalisation of PPA.

- Neither the first Firm Linkage Coal FSA dated 26.03.2013 nor the amendments thereto specifically mention PPA capacity of GRIDCO covered under it to be 125 MW. The allocation of Firm Linkage Coal may be other way round as explained above under Para 7 i.e. 250 MW of GRIDCO plus 175 MW of Haryana. Therefore, claim of Haryana and GKEL that its entire PPA capacity of 300 MW is covered under FSA dated 26.03.2013 is devoid of any supporting document.

7.36 Hon'ble Tribunal's Judgement dated 01.08.2017 in Appeal No.45 of 2016:

- Appeal No. 45 of 2016 pertains to FY: 2013-14 during which GKEL had claimed ECR on GRIDCO based on Firm Linkage Coal only during the period November, 2013 to March, 2014.
- GRIDCO had raised issue of higher ECR considered by CERC prior to COD of each Unit in spite of availability of sufficient quantity of Firm Linkage Coal during such period to GKEL. Such ECR had been considered in deriving Working Capital (a component of Annual Fixed Charges)
- Moreover, GRIDCO had challenged the said judgement before Hon'ble Supreme Court in Civil Appeal No. 2808 of 2017.
- Till date, GRIDCO in all its Applications/Petitions/ Appeals/ Civil Appeals/ Counter Reply/Written Submissions has been consistent

in maintaining its stand of availing PPA Capacity by use of Linkage (Firm + Tapering) Coal only.

7.37 GRIDCO opted for SHAKTI Coal in absence of Tapering Linkage Coal:

- GRIDCO gave consent for participation of GKEL in the Bidding Process for availing coal at discounted price i.e. **3 Paise/kWh and 1 Paise/kWh** under SHAKTI Scheme of Ministry of Power, Government of India.
- In spite of request made by GRIDCO to provide details of PPA Capacity intimated to MCL for allocation of SHAKTI Coal, GKEL did not provide the same to GRIDCO.
- If the monthly energy bills of Haryana, Bihar, GRIDCO are scrutinised simultaneously, the principle adopted by GKEL for deriving ECR and claiming energy charges from its beneficiaries could be ascertained.
- Ideally, distribution of Firm Linkage Coal and its treatment ought to be as shown above. In such case, any shortfall in Firm Linkage Coal is to be met from Tapering Linkage Coal to the extent of % of shortfall in supply by the coal supplier.
- Further, in absence of Tapering Linkage Coal, shortfall in Firm Linkage Coal is to be met from SHAKTI Coal.

7.38 Submissions on Other Issues:

- GRIDCO PPA dated 04.01.2011 was signed with GKEL prior to signing of FSA dated 26.03.2013. GKEL's submission in Para 50 of the Written Submission dated 04.09.2019 that GRIDCO was aware of the FSA entered into by GKEL, is therefore, factually incorrect.
- GKEL compromised with PPA Capacity of GRIDCO to qualify in competitive bidding for supply of power to Haryana, as evident from CRISIL Report which otherwise would not have been possible.
- Further, the stand of GRIDCO regarding use of Linkage Coal for supply of power to the host State in various Appeals/Submissions/Counter reply are as summarised below:
 - a) GRIDCO submissions in Petition No. 61/GT/2-016;
 - Affidavit dated 17.12.2016;
 - Affidavit dated 23.05.2017 ;
 - Written Submission dated 29.06.2017 ;
 - Additional Submission dated 26.08.2017;
 - b) Civil Appeal No. 2808 of 2018 before Hon'ble Supreme Court
 - It would be ironical that the host State on whose recommendation allocation of Linkage Coal /Coal Blocks in favour of GKEL was

granted will get costly power while cheaper power is sold outside to other States namely Haryana and Bihar.

- c) GKEL has agreed to supply all power to GRIDCO utilising Linkage Coal (Firm Linkage and in case of shortfall in supply by MCL and not because of pro-rating of Linkage Coal) and SHAKTI coal and this has been duly approved as a part of PPA dated 04.01.2011 as per recent OERC order dated 09.04.2019 in Case No. 63 of 2018.

7.39 Without prejudice to the above, it is submitted that Hon'ble Tribunal may direct GKEL to consider power supplied to GRIDCO at Linkage Coal till SHAKTI Coal supply commenced in March, 2018 and thereafter the supply of power to GRIDCO should be covered by Linkage Coal and SHAKTI Coal.

8. Shri Vishrov Mukherjee, learned counsel appearing for the Respondent GKEL in both the Appeals has filed the submissions for our consideration as under:-

8.1 Haryana Power Purchase Centre has challenged the Order of the Central Electricity Regulatory Commission dated 20.03.2018 allowing GMR Kamalanga Energy Limited's Petition No. 105/MP/2017. CERC held that:-

- (a) GKEL's supplementary bills were correct and in terms of Order

dated 03.02.2016 in Petition No. 79/MP/2013.

- (b) The Appellants shall pay GKEL's supplementary bills for July 2016 to March 2017 within one month.

8.2 The main issue that arises for adjudication in the present Appeal is whether firm coal linkage of 2.14 MTPA corresponding to 500 MW granted to GKEL on 02.08.2007 was granted to:-

- (a) The GKEL Power Plant; or
- (b) With earmarked end-use commitment of 300 MW supply to Haryana Discoms.

8.3 The Appellants case is predicated on certain errors of material facts:-

(a) *The 500 MW firm linkage is for Phase -I of the Project which only covers 29.55 MW of the Bihar PPA*

- (i) In terms of Memorandum of Understanding dated 09.06.2006 between GMR Energy Limited (parent company of GKEL) and Government of Odisha, Phase I of the Power Station comprised of 1000 MW (2 X 500 MW). The MOU noted source of coal as Talcher (MCL) with a proposal for a captive coal mine.
- (ii) This fact has been noted in Order of the CERC dated 16.05.2012 in Petition No. 20/MP/2012.
- (iii) The captive coal mine was allocated for 1000 MW (i.e. the entire capacity of the Power Station)

(b) Tapering Linkage is not for the Haryana PPA

- (i) SLC Minutes for meeting held on 14.02.2012 clearly note that Tapering Linkage was for all 3 states.
 - (ii) Even as per MCL communication dated 02.05.2018, MCL has clarified that coal is not allocated to a specific PPA but to the Power Station as a whole.
 - (iii) Haryana was aware that coal will be sourced from the captive coal block. This is evident from Minutes of Meeting held on 26.04.2011.
- (c) The Haryana bid required GKEL to indicate proposed source of coal which was MCL. The bid did not specify tapering or firm linkage and in any case both linkages are from MCL.
- (d) GKEL is bound by allocation terms and cannot utilize coal for any purpose that specified end-use. Since coal has been allocated to Power Station as a whole, GKEL has been allocating the same proportionately which is consistent with the SLC and MCL communique reflected above and Order of the Ld. CERC.
- 8.4** GKEL has developed a coal-fired 1050 MW (3 X 350) Power Project at village Kamalanga, District Dhenkanal in Odisha ("*Project*") with the following long term PPAs:-

- (a) Supply of 25% gross power (i.e. 262.5 MW) to GRIDCO in terms of the bilateral PPA dated 28.09.2006 (amended on 04.01.2011) (GRIDCO PPA). The supply of power commenced on 30.04.2013.
- (b) Supply of 350 MW gross power to Haryana Discoms based on competitive bidding through the following back-to-back arrangements:
 - (i) PPA with PTC India Limited dated 12.03.2009; and
 - (ii) PTC agreements with Haryana Distribution Companies dated 07.08.2008. Supply of power commenced on 07.02.2014. The Bid Submission date for the Haryana PPAs was 23.11.2007.
- (c) Supply of 282 MW gross power to Bihar SEB based on competitive bidding in terms of the PPA dated 09.11.2011 (BIHAR PPA). The supply of power commenced on 01.09.2014. The Bid Submission date for the Bihar PPA was 03.04.2011.

8.5 The fuel requirements for the Project were secured through the following arrangements: -

- (a) 2.14 MTPA firm linkage for 500 MW approved by SLC-LT on 02.08.2007. The LOA was issued on 25.07.2008.
- (b) On 06.11.2007, the Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium

comprising of GEL and five other allottees. This was confirmed on 17.01.2008.

- (c) Tapering coal linkage for 2.384 MTPA for 550 MW approved by SLC(LT). LOA was issued on 08.07.2009. The Tapering Linkage was to be made available till supply of coal from Rampia Coal Block started.
- (d) In terms of Minutes of the SLC(LT) Meeting held on 14.02.2012, linkage for 500 MW and 550 MW was allocated for all three power purchase agreements.
- (e) Pursuant to the LOAs, GKEL initially signed Fuel Supply Agreements dated 26.03.2013 and 28.08.2013 with MCL for 1.819 MTPA and 0.6556 MTPA corresponding to commencement of supply of power to the Appellants and GRIDCO.
- (f) Coal India Limited by its letter dated 26.02.2014 transferred 1.517 Mt. of tapering linkage coal from MCL to ECL. On 29.05.2014, ECL has signed an FSA with GKEL for 1.071 MTPA. On 24.09.2014, FSA signed with ECL was amended to 0.626535 MTPA.

8.6 The Appeals lack merit due to the issues summarized below:-

- (a) Order dated 03.02.2016 in Petition No. 79/MP/2013 which fastens the liability has attained finality and the Appellants have not challenged it till date.

- (b) As per the prevalent policy and law, coal was allocated to the Project as a whole and is not Procurer/PPA specific. It is noteworthy that the governing law treats all State Utilities procuring power from Projects (including those with coal linkages) at par.
- (c) Supply of coal is made against operational PPAs. The Annual Contracted Quantity (“**ACQ**”) was enhanced as and when supply under respective PPAs commenced.
- (d) Appellant’s contention that it has the first right over the firm coal linkage to the exclusion of State of Odisha and Bihar will lead to an anomalous situation where consumers in Bihar and Odisha will be forced to cross-subsidize consumers in Haryana. Besides being violative of Article 14 of the Constitution of India, this would be contrary to the allocation of coal to GKEL is for the project and not based on PPA/beneficiaries.

8.7 On 23.04.2013, GKEL filed Petition No. 79/MP/2013 claiming compensation for Change in Law events in relation to the Haryana PPAs including increase in cost of fuel due to shortfall of linkage coal

on account of deviation from the New Coal Distribution Policy (“**NCDP**”) and changes in the Fuel Supply Arrangements (“**FSA**”).

8.8 In the proceedings under Petition No.79/MP/2013, GKEL had submitted before the Ld. Central Commission that:-

- (a) GKEL had firm and tapering linkage as well as a captive coal block.
- (b) Coal from all sources would be allocated pro-rata corresponding to the PPA capacities.(in terms of Affidavit dated 02.09.2014)
- (c) Based on such pro-rated allocation, compensation for procurement of coal from alternate sources would be worked out. (in terms of Affidavit dated 02.09.2014). In fact, the Appellants have neither countered nor disputed this position set out in Affidavit dated 02.09.2014.

8.9 On 03.02.2016, Central Commission passed Order dated 03.02.2016 in Petition No. 79/MP/2016:-

- (a) Allowing GKEL to recover the additional cost incurred towards increase in taxes and duties (CIL elements),
- (b) Allowing GKEL to recover the additional cost for procurement of coal from alternate sources to overcome the shortage of linkage coal.
- (c) Devising a formula for computing the Energy Charge Rate (“**ECR**”) as

under:-

“55. We have considered the submission of the petitioners on the additional cost incurred on imported coal and open market coal procured due to shortage in linkage coal for Haryana generation during the months of February, 2014 and May to July,2014. The following mechanism as given in para 56 below is devised to compute actual additional cost incurred in a month to procure imported coal and coal from open market to make up the deficit portion of coal actually received from linkage.

*56. The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering SHR of 2378 kCal / kWh and Aux Consumption of 5.75%. **Since, the formulation is for mitigating coal shortage**, the Specific Oil Consumption has been considered as nil.*

*73. (b)the **additional coal cost incurred in a month due to shortage of linkage coal** shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given on para 56 above.”*

8.10 The Appellants complied with the Order dated 03.02.2016 by making payments to GKEL till June 2016. Subsequently, in defiance of Order dated 03.02.2016, the Appellants started asserting that the entire Linkage Coal was to be used for supply of power to it and refused to make the payments against the Supplementary Invoices raised by GKEL from the billing month of July 2016 onwards. The Appellants have not challenged Order dated 03.02.2016 till date.

8.11 Aggrieved by the aforesaid, GKEL repeatedly took up the matter with the Appellants. Based on discussions between the parties, it was agreed that GKEL will file a petition seeking confirmation that bills were validly raised in accordance with Order dated 03.02.2016. Thus, on 24.05.2017, GKEL filed Petition No. 105/MP/2017 seeking:

- (a) Confirmation of the fact that Bills had been raised correctly.
- (b) Recovery of an outstanding amount of Rs. 130.04 Crores from the Respondents (the Appellants herein) raised by way of supplementary bills by GKEL for the period July 2016 to June 2017; and
- (c) Regular payments pursuant to the Order dated 03.02.2016.

8.12 In terms of the Impugned Order, the Ld. Central Commission *inter-alia* confirmed that GKEL validly raised bills in accordance with Order dated 03.02.2016 in Petition No. 79/MP/2013 and held that:-

- (a) GKEL has correctly apportioned the linkage coal in proportion to the capacity being supplied to the Dakshin Haryana Bijli Vitran Nigam Limited (“**DHBVNL**”) and Uttar Haryana Bijli Vitran Nigam Limited (“**UHBVNL**”), collectively referred to as (“**Haryana Discoms**”), and issued Supplementary Bills in accordance with the formula devised in Order dated 03.02.2016 in Petition No. 79/MP/2013 (Para 33); and

- (c) Directed HPPC to pay Supplementary Bills raised by GKEL from Jul 2016 to March 2017 along with late payment surcharge within one month of the date of issue of the Impugned Order. (Para 33)

8.13 The Appellants have challenged the Impugned Order which was nothing but a mere confirmation of the order dated 03.02.2016, on the following grounds:-

- (a) In passing the Impugned Order, the Ld. Central Commission could not have interpreted the order dated 03.02.2016 to grant relief in respect of fuel supply agreement which was not considered in the Order dated 03.02.2016 and was not on record while passing of the Order dated 03.02.2016.
- (b) GKEL has failed to produce FSA related to tapering linkage. Further, there was no prayer by GKEL in Petition No. 79/MP/2013 for pro rata adjustment of coal under FSA dated 26.03.2013.
- (c) GKEL has in Petition No. 112/MP/2015 submitted that 100% fuel requirement for Bihar PPA was to be met from the captive coal block.
- (d) Haryana PPAs were based on firm linkage while Bihar PPA was based on linkage and captive coal.
- (e) The FSAs and amendments thereto recognize that share of Bihar PPA was only 29.55 MW in the firm linkage. Further, FSA dated 26.03.2013

was for Unit 1 (350 MW) and Unit 2 (150 MW) and not for the whole plant.

- (f) Under the FSA dated 26.03.2013, GKEL has declared that no coal block has been allocated for the capacity of 425 MW, which means that there was no coal block allocation vis-à-vis 300 MW under the said quantum.
- (g) Letters from MCL show that the contracted capacity of 300 MW for Haryana PPAs is covered under the firm linkage.
- (h) Allocation of coal under Shakti Scheme to GKEL is only in respect of GRIDCO PPA and Bihar PPA. This confirms that the FSA dated 26.03.2013 was sufficient for Haryana PPAs.

8.14 At the outset, it is submitted that the Impugned Order only confirms the Order dated 03.02.2016 which has not been challenged by the Appellants. The Appellants have not challenged Order dated 03.02.2016 till date and made payments till June 2016 on the basis of the Order. Order dated 03.02.2016 has attained finality. The Appellants are precluded from seeking to challenge the said methodology by way of the present appeals.

8.15 In *Hope Plantations Ltd. Vs. Taluk Land Board, Peer made & Anrs.*, reported as (1999) 5 SCC 590, Hon'ble Supreme Court has

explained the scope of finality of the Judgment of this Court by observing as under:

*“One important consideration of public policy is that the decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authority and other principle that no one should be made to face the same kind of litigation twice ever because such a procedure should be contrary to consideration of fair play and justice. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstrably wrong. **When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it.**”*

8.16 The Appellants contention that the Impugned Order has gone beyond Order dated 03.02.2016 is incorrect. It is evident from Paragraph 33 of the Impugned Order that CERC has merely reiterated its earlier Order and upheld the bills raised by GKEL in terms of Order dated 03.02.2016 in Petition No. 79/MP/2013.

Coal supply to Plant as whole and not Procurer Specific

8.17 GKEL had quoted tariff for Haryana PPAs considering coal availability for the Project from linkage coal and its own Captive Coal blocks based on

- (a) SLC-LT approval dated 02.08.2007 for 500 MW; and
- (b) Ministry of Coal decision dated 06.11.2007 to allocate Rampia and Dip side Rampia coal blocks to GKEL.

8.18 At the time of bid submission for Haryana, the SBD did not permit inclusion of different sources of coal – linkage, captive etc. Therefore, GKEL had cited linkage from CIL/MCL. Use of coal from the Captive Coal block was envisaged for the entire Plant as evident from the allocation letter dated 17.01.2008 wherein GKEL share of coal reserves is 138 MT @ 4.6 MT for 30 years to meet coal requirement of the Project as a whole.

8.19 Coal supply was to the Project as a whole and not Procurer Specific is supported by:-

(a) The SLC minutes dated 14.02.2012 clearly state that the tapering linkage coal of 2.384 MTPA is to be utilized for all three PPAs with **GRIDCO, Haryana and Bihar Discoms.**

(b) Clause 4.2 of the FSA dated 26.03.2013 signed with MCL clearly states that:-

*“the total quantity of coal supplied pursuant to this Agreement is meant for **use at Power Plant (3x350 MW)**, 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA).”*

8.20 It is submitted that LoA and FSA are for the station and never for a particular PPA as contended by the Appellants. Further, the Appellant’s contention that the apportionment of coal (from firm linkage) is to be done proportionally between the Appellants (300 MW), GRIDCO (150

MW) and Bihar (29.55 MW) is erroneous. It is submitted that the end-use stated in these documents is for the Station/ Plant. This was confirmed by MCL in terms of letter dated 02.05.2018 which stated that the Coal is released for the total PPA capacity and not bifurcated on the basis of individual PPAs.

8.21 In terms of Clause 4.1 of the FSA, the ACQ shall be in proportion of the percentage generation covered under long term PPAs with Discoms.

The relevant portion of Clause 4.1 is reproduced below:-

“4.1.1... The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/ have signed the back to back long term PPA(s) with DISCOMs.”

It is only commencement of supply of coal which is linked to commencement of supply under the PPA. For example, if supply of power to Bihar commenced before Haryana, the ACQ would have been allocated /operationalized similarly.

8.22 In view of the above, contention of Haryana that the tapering linkage granted in relation to coal block cannot be linked to 300 MW is wrong. In fact, the linkage coal/ coal block or tapering linkage are allocated for the station and to be utilized for all three PPAs. In fact, allocating coal under the FSA to Haryana Discoms to the exclusion of Bihar and GRIDCO will be contrary to the provisions of the FSA.

8.23 As brought out above, the allocation of coal was for the Project as a whole and not Procurer/PPA wise. This is evident from the following:-

- (a) LOAs dated 25.07.2008 and 08.07.2009 were for the plant as a whole.
- (b) Allocation letter dated 17.01.2008 for the Captive Coal mine is for 4.6 MT which is sufficient for 1050 MW, being the installed capacity of the Project.
- (c) Minutes of the SLC-LT dated 14.02.2012 note that the entire linkage (firm and tapering) is for all the 3 PPAs.
- (d) Letter dated 02.05.2018 issued by Mahanadi Coalfields Limited ("MCL") states that CIL and its subsidiaries had allocated coal to the Project on pro-rata basis vis-à-vis the operational capacities and not on basis of procurers. The letter specifically states that *"in case of multiple PPAs, coal is released to the IPPs considering the total PPA capacity and not bifurcated on the basis of individual PPAs"*. The aforesaid only confirms the provision of clause 4.1.1 of the FSAs which also talks of allocation of coal on pro-rata basis to long term PPAs executed by the Discoms directly through PTC.

8.24 If the Appellant's contention is upheld, it will lead to an anomalous situation wherein GRIDCO and Bihar Discoms will end up cross-subsidizing supply of power to Haryana Discoms. It is submitted that the Ld. Central Commission has rightly allowed pro-rata allocation of

linkage and alternate coal so as to ensure that the impact is equally apportioned.

8.25 Since the allocation is not PPA specific, allocation of coal to one procurer to the exclusion of others will be contrary to the terms of such allocation.

8.26 Further, such action will also be contrary to Article 14 of the Constitution of India since it will result in equals being treated unequally.

8.27 The above position has been confirmed by the Impugned Order. The relevant portion of the Impugned Order is reproduced below:-

"33. In the light of the above discussion, it cannot be inferred from the language of para 48 of the order dated 3.2.2016 that the requirement of Haryana PPA shall be met from the firm linkage under the FSA dated 26.3.2013 and shortfall thereof shall be met through import and open market coal. Such an interpretation goes against the coal allocation by Ministry of Coal to power plant of the Petitioner as a whole and will put the GRIDCO PPA and Bihar PPA at some disadvantage vis a vis Haryana PPA."

"...Therefore, in light of the allocation of firm as well as tapering linkage for all three beneficiaries and our order dated 3.2.2016 in Petition No. 79/MP/2013, the firm and tapering linkage coal supplied to the Petitioner has to be apportioned on pro rata basis to all beneficiaries of the project and the cost of procurement of coal from alternate sources to meet the shortfall of firm and tapering linkage coal has also to be apportioned pro rata based on power supplied to these beneficiaries. Accordingly, the contention of Haryana Discoms to appropriate the coal supplied under firm linkage towards the capacity being supplied to them instead of pro-rata apportionment to all the beneficiaries is not correct."

(Emphasis Supplied)

8.28 The Appellant's contention that captive coal mine was only for 550 MW of capacity is misplaced. The total coal requirement for the project is around 4.5 MTPA which corresponds to the coal mine allocation.

8.29 The Tapering linkage FSA with MCL was signed on 20.05.2014 and Tapering linkage FSA with ECL was signed on 29.05.2014. Actual supply of Tapering Linkage started from MCL in the month of June, 2014 and from ECL in the month of July, 2014, when only GRIDCO and Haryana PPAs were operational. The tapering Linkage supplies started well before the power supply to Bihar Discoms commenced (01.09.2014).

8.30 After commencement of supply under the Bihar PPA in September 2014, the FSAs for the Project were amended to cater to the total requirement of 823 MW towards Long Term PPA (905 MW with auxiliary power consumption & losses) in the following manner:

| FSA | Till September 2014 | | From 01 October 2014 | |
|---------------------------|---------------------|------------|----------------------|------------|
| | MTPA | MW | MTPA | MW |
| Firm MCL | 2.0009 | 467 | 2.14 | 500 |
| Tapering MCL | 0.2384 | 55 | 0.8669 | 200 |
| Tapering ECL | 0.294525 | 96.25 | 0.62653 | 205 |
| Total For Station* | 2.53 | 618 | 3.63 | 905 |

** Actual Coal Supplied was as per the terms of the NCDP*

8.31 At the time of filing Petition No. 79/MP/2013, the FSA for firm MCL linkage was 1.819 MTPA and only GRIDCO and Haryana PPAs were operational. Once supply began under the Bihar PPA, linkage was allocated for the Bihar PPA also. This is in line with the Government policy that coal supply will be operationalized against supply of power under long term PPA.

8.32 The FSAs were operationalized based on commencement of supply under specific PPAs. Haryana PPAs (330 MW gross) and GRIDCO (25% of energy generation i.e. 125 MW net and 137.5 MW gross) commenced together and was followed by Bihar PPA. Thus, supply for 467.5 MW (Haryana and GRIDCO PPA) was marked against 500 MW linkage and the balance quantum of that linkage was marked against the Bihar PPA. Balance supply of Bihar PPA (252.5 MW) and GRIDCO PPA (151.25 MW) were marked against the tapering linkage operationalization.

8.33 However, once the PPAs become operational, the total supplies of linkage coal is to be in proportion to the percentage of generation covered under the long term PPAs with the Discoms as specifically provided under clause 4.1.1 of both the FSAs.

8.34 The Appellant's claim that in case firm linkage is apportioned between all the beneficiaries, only 186.98 MW out of 300 MW would be covered, even if entire quantum of coal under firm linkage is supplied, is erroneous. As noted by the Ld. Central Commission, GKEL had fuel linkage for the entire 1050 MW. The Impugned Order as well as the Order dated 03.02.2016 clearly provides for allocation of the linkage coal pro-rata to the scheduled generation of all the long term PPAs.

8.35 Depending on the actual supply of coal quantity for the station and the scheduled generation of all the long term PPA holders, the Appellants may get linkage coal on pro-rata basis. This is further substantiated by the fact that during the initial months from February 2014, the supply of linkage coal was such that there was hardly any coal cost pass through compensation billed to Haryana Discoms.

8.36 As regards the issue of procurement of coal under SHAKTI Scheme, the following may be noted:-

- (a) On 04.08.2017, GKEL wrote to PTC intimating that GKEL intended to participate in the auction under SHAKTI Scheme to secure coal for shortfall quantities in firm linkage. GKEL requested PTC to certify the details pertaining to the PPA for supply of power to Haryana. This was essential for GKEL to be eligible for coal supply under SHAKTI Scheme

for quantum of power being supplied to the Haryana Discoms. This letter was forwarded by PTC to the Haryana Discoms on 07.08.2017.

- (b) On 07.08.2017, representatives from GKEL met officials from HPPC. Haryana Discoms refused to certify the details of the Haryana PPA for the purpose of participation in auction under the SHAKTI Scheme.
- (c) On 07.08.2017, GKEL submitted its expression of interest for participation in the SHAKTI auction and mentioned all three PPAs.
- (d) On 10.08.2017, GKEL wrote to CEA providing particulars of the long-term PPAs with Haryana, GRIDCO and Bihar. GKEL was constrained to mention that the Haryana Discoms had not provided the necessary certification.

8.37 In spite of being repeatedly approached for their consent, Haryana Discoms withheld consent for procurement of coal under the SHAKTI Scheme. Such consent of the procurer is a mandatory condition for allocation of coal under the SHAKTI Scheme. As such by their own acts and omissions, Haryana Discoms ensured that no coal could be allocated on account of their PPA under the SHAKTI Scheme solely due to their refusal to grant consent. Having withheld their consent, Haryana Discoms cannot now rely on SHAKTI scheme.

8.38 Moreover, SHAKTI scheme has no bearing on the present case since it is an alternate mode for procurement of coal to overcome the shortfall of linkage coal. The only reason for non-inclusion of the Appellants was their refusal to give consent. This has been noted by the Ld. Central Commission in its Order 19.03.2018 in IA. No. 12 of 2018 in Petition No. 105/MP/2017 as under:-

“12. The Applicant has placed on record the order dated 21.2.2018 in Petition No. 41/MP/2018 for a direction on the Respondent, GMR to provide all details of bids/ allocations carried under the Shakti Scheme on the ground that these documents were not disclosed to the Haryana discoms and the same has been concealed to extract a favorable order from the Commission. During the hearing, the learned counsel for GMR produced letter dated 4.8.2017 from GMR to PTC and letter dated 7.8.2017 of PTC India Ltd to Haryana discoms, wherein proposal for participation of GMR in Shakti Scheme was brought to the notice of Haryana discoms for their consideration. The learned counsel for GMR submitted that since no response was received from Haryana discoms, they could not participate in the Shakti Scheme in respect of Haryana PPA. The learned counsel for applicant did not refute the claim of the learned counsel for GMR. In our considered view, the participation of GMR in the Shakti Scheme and the documents therein have no bearing on the reliefs sought for by GMR in Petition No. 105/MP/2017.”

Other Submissions

8.39 It is submitted that, while GKEL has been meeting the PPA obligations and supplying power to Haryana since 07.02.2014, and also incurring the costs of funding towards these change in law and coal pass through costs; however, it is not being paid the legitimate claims all these years which has led GKEL in extreme financial distress. Furthermore, in view of the extant RBI guidelines, the Project runs the risk of being declared

as a Non-Performing Asset, which is only on account of default in payment by the Discom.

8.40 The Appellants have misinterpreted the order of the Ld. Central Commission and are misleading this Hon'ble Tribunal by quoting certain provisions of the FSA dated 26.03.2013, that no coal block has been allocated for the capacity of 425 MW. It is submitted that:-

- (a) The captive coal block was for the entire capacity of 1050 MW.
- (b) It was envisaged that till such time that the coal block did not become operational, coal would be procured under linkage route.
- (c) The FSA executed by GKEL with MCL was a standard FSA format prepared by Coal India Limited. The intention behind making the declaration was that till the time Captive Coal block was not operational, GKEL will use linkage coal under FSA.
- (d) The coal linkages were for the plant as a whole. The LOAs and FSAs clearly state that the end use of coal is for the entire Plant and not specific to any PPA. Further, SLC LT dated 14.02.2012 also states that the tapering linkage of coal (2.384 MTPA) is for all the three Discoms i.e. GRIDCO, Haryana (Appellants) and Bihar. It is also noteworthy that FSA dated 26.03.2013 does not provide that it is for Unit 1 (350 MW) and Unit 2 (150 MW).

- (e) Coal India Limited and its subsidiaries allocated coal to the Plant pro-rata vis-à-vis the operational capacities which is clearly mentioned in the MCL letter dated 02.05.2018. The relevant portion of the letter dated 02.05.2018 is reproduced below:-

*“...in this connection, this is to intimate you that based on the long term PPA(s) submitted by IPPs, effective Annual Contracted Quantity (ACQ) under FSA is determined proportion to the total LOA quantity and coal is released accordingly. **In case of multiple PPAs, coal is released to the IPPs considering the total PPA capacity and not bifurcated on the basis of individual PPA. ...”***

8.41 In light of the foregoing, the Ld. Central Commission has rightly held that firm as well as tapering linkage coal supplied to the Appellants has to be apportioned on pro-rata basis to all beneficiaries and cost of procurement of coal from alternate sources to meet the shortfall of firm linkage coal has to be apportioned pro rata based on power supplied to these beneficiaries. Thus, LoA and FSA are for the station and not for a particular PPA as contended by the Appellants. The end-use stated in these documents is for the Station/ Plant.

8.42 It is submitted and clarified that GKEL has not suppressed any information from the Central Commission. Further, the Ld. Central Commission, in terms of Order dated 03.02.2016 was fully aware of the entire source of fuel for the Project and there was no presumption of any kind.

8.43 Additionally, the Appellants ought to be precluded from raising any other grounds as it is attempting to open up Order dated 03.02.2016 which has attained finality. It is submitted that for reasons set out in GKEL's Reply and the present Note, the Appeal ought to be dismissed.

8.44 Despite the Central Commission's direction to the Appellants to make payments for the undisputed change in law events, the Appellants have neither complied with the said order nor challenged it. It is submitted that the Appellants, by way of its Rejoinder dated 03.10.2018 has admitted that it is not disputing claims for Change in Law relating to Taxes.

8.45 In view of the above, the present Appeals ought to be dismissed.

9. SUBMISSIONS OF, GKEL IN RESPONSE TO SUBMISSIONS MADE BY GRIDCO LTD./Haryana Utilities

A1. Proceedings with respect to GRIDCO

9.1 On 23.04.2013, GKEL filed Petition No. 77/GT/2013 for determination of tariff for power supplied under the GRIDCO PPA for the period 01.04.2013 to 31.03.2014. In Petition No. 77/GT/2013, GKEL submitted that:-

(a) The Project supplies power under 3 PPAs namely, the GRIDCO PPA,

Bihar PPA and Haryana PPAs.

- (b) The Project was premised on linkages granted in terms of LOA dated 25.07.2008 (Firm Linkage and LOA dated 08.07.2009 (Tapering Linkage) and the said linkages would be considered.
- (c) GKEL had claimed that in case of shortfall in supply of linkage coal, GKEL would be compelled to procure coal from alternate sources, the cost of which would be on pass through basis. In this regard, GKEL had also furnished prices of three main types of coal -Domestic linkage coal, E-Auction Coal and Imported Coal.

9.2 GKEL filed Affidavit dated 31.07.2014 in Petition No. 77/GT/2013 and Tariff Filing Forms,Form-15 giving detailed information regarding utilization of coal for supply of power under the GRIDCO PPA. As per the said Forms, GKEL was utilizing Firm linkage as well as Open market, Imported and E-Auction also. Thereafter, supply under Tapering Linkage commenced from June 2014. GKEL proportionately utilized the coal.

9.3 In the Written Submissions dated 14.08.2013 filed by GRIDCO in Petition No. 77/GT/2013, GRIDCO admitted that proceedings under Section 62 and 63 are entirely different and cannot be equated.

9.4 On 11.04.2014, GKEL filed Rejoinder to GRIDCO's Reply wherein

GKEL submitted that:-

- (a) The process under Section 62 of the Electricity Act, 2003 (“**Act**”) is entirely different from process under Section 63.
- (b) GKEL had filed Petition No. 79/MP/2013 and 81/MP/2013 seeking compensation inter-alia for Change in Law events.

9.5 In Affidavit dated 31.07.2014, GKEL placed on record LOA dated 25.07.2008 (Firm linkage), LOA dated 08.07.2009 (Tapering linkage), FSA dated 26.03.2013 (Firm linkage) and FSA dated 28.08.2013 (Tapering linkage). Further, GKEL submitted that due to diversion of part of Tapering Linkage coal from MCL to ECL, GKEL was *inter-alia* bearing higher transportation cost which impacted overall fuel cost. Accordingly, fuel cost for GRIDCO will include Firm and Tapering Linkage.

9.6 On 23.01.2015, GKEL filed Affidavit in Petition No. 77/GT/2013 placing on record the report prepared by CRISIL for the Project. The CRISIL Report expressly provides that **GKEL had assumed that the available coal would be distributed on pro-rata basis for capacity under the respective PPAs and assumed fuel cost on a consolidated pro-rata basis.** The relevant portion of the CRISIL Report is reproduced below:-

“GKEL assumed that the coal available shall be distributed on pro-rata basis for capacity under the respective basis. Since the Project has different fuel supply arrangements, i.e. linkage coal from MCL and coal

from the captive coal block (once operational), GKEL while bidding assumed the fuel cost on a consolidated basis and pro-rated against the respective contracted capacities.

...

In our view, based on the Coal Distribution Policy, GKEL seems to have a valid basis for assuming full coal from linkage and captive coal blocks together.”

It is noteworthy that GRIDCO has not objected to the findings of the CRISIL Report and is in fact relying on the CRISIL Report in Appeal No. 54 of 2019.

- 9.7** On 12.11.2015, the Ld. CERC issued Order in Petition No. 77/GT/2013 in terms of which the ECR as submitted by GKEL was approved.
- 9.8** As against the 77/GT Order, GKEL preferred Appeal No. 35 of 2016 while GRIDCO filed Appeal No. 45 of 2016. In Appeal No. 45 of 2016, GRIDCO *inter-alia* challenged the findings of the Ld. CERC *qua* Energy Charge Rate.
- 9.9** On 24.05.2017, GRIDCO filed its Written Submissions in Appeal No. 45 of 2016. In terms of the Written Submissions, GRIDCO admitted that linkage coal is to be in proportion to the quantum tied up under long term PPAs. The relevant portion of the Written Submissions filed by GRIDCO is extracted hereunder:-

“10.9 Clause 14(1)(d) of the CERC Tariff Regulations, 2009 mandates for long term Power Purchase Agreements for supply of linkage coal to GKEL in proportion to the quantum tied up in the PPA”

9.10 On 01.08.2017, this Hon'ble Tribunal dismissed Appeal No. 45 of 2016 wherein GRIDCO had *inter-alia* challenged ECR (“**Judgment dated 01.08.2017**”). Against Judgment dated 01.08.2017, GRIDCO filed Civil Appeal No. 2808 of 2018 before the Hon'ble Supreme Court. In Civil Appeal No. 2808 of 2018 , GRIDCO reiterated its stand taken in Appeal No. 45 of 2016 and submitted that ECR should have been derived based on weighted average rate of linkage coal, which included Tapering Linkage and Firm Linkage. The relevant portion of C.A No. 2808 is extracted hereunder:-

*“o. In Para 121 of the Impugned Order, CERC has observed that ECR is worked out considering the weighted average price and GCV of coal procured and burnt for the preceding three months from COD of Unit I, UU and III. **It is submitted that ECR should have been derived solely based on the weighted average rate of Linkage coal, as GKEL has signed Fuel Supply Agreement for 500 MW of firm and 550 MW for tapering linkage coal with MCL and at no point of time GKEL had operated more than one unit (350 MW) during the period under review. The question of shortage of linkage coal and resorting to other sources of coal (E-Auction/Imported Coal) does not arise.**”*

9.11 On 01.04.2016, GKEL filed Petition No. 61/GT/2016 for determination of tariff from 01.04.2014 to 31.03.2019 and true-up of tariff determined from COD to 31.03.2014. In the Energy Charge Rate claimed by GKEL for FY 2014-15 to 2018-19, GKEL considered coal from both, Firm and Tapering linkage as well as Imported and coal from other sources also.

- 9.12** On 12.01.2017, GKEL filed its Rejoinder in Petition No. 61/GT/2016 and submitted that coal was being apportioned on pro-rata basis in terms of the 79/MP Order.
- 9.13** On 11.04.2017, Haryana Discoms had filed impleadment application (I.A No. 18 of 2017) in Petition No. 61/GT/2016 before Ld. CERC asserting that GKEL is apportioning coal on pro-rata basis among all beneficiaries of the Project.
- 9.14** CERC, in terms of Order dated 31.05.2017, dismissed I.A No. 18 of 2017 filed by Haryana Discoms in Petition No.61/GT/2016. CERC held that the issues raised by Haryana Discoms regarding pro-rata allocation of coal are in terms of the procedure laid down in the 79/MP Order, and there is no reason to examine the same in proceedings for tariff determination. Therefore, GRIDCO was aware all along that GKEL is pro-rating firm and tapering linkage coal for all 3 procurers.
- 9.15** On 22.11.2017, GKEL filed its Response to GRIDCO's submissions in Petition No. 61/GT/2016 and stated that:-
- (a) Coal was being allocated on pro-rata basis in terms of the 79/MP Order.
 - (b) GRIDCO's challenge to utilisation of coal from other sources for determining ECR was dismissed by this Hon'ble Tribunal in terms of Judgment dated 01.08.2017.

9.16 It is noteworthy that till date GRIDCO has not challenged the 79/MP Order. On 29.06.2018, Ld. CERC issued Order in Petition No. 61/GT/2016 confirming the principle laid out in the 79/MP Order and reaffirmed in the Impugned Order that coal is to be allocated on pro-rata basis among all beneficiaries.

A2. Proceedings with respect to Haryana

9.17 On 23.04.2013, GKEL filed Petition No.79/MP/2013 claiming compensation for Change in Law events in relation to the Haryana PPAs including increase in cost of fuel due to shortfall of linkage coal on account of deviation from the New Coal Distribution Policy (“**NCDP**”) and changes in the Fuel Supply Arrangements (“**FSA**”).

9.18 It is pertinent to note that proceedings with respect to Haryana and determination of tariff of power supplied to GRIDCO were going on simultaneously.

9.19 On 03.02.2016, the CERC passed the 79/MP Order :-

- (a) Allowing GKEL to recover the additional cost incurred towards increase in taxes and duties (CIL elements);
- (b) Allowing GKEL to recover the additional cost for procurement of coal from alternate sources to overcome the shortage of linkage coal and devising a formula for computing the same (Para 55-56 and 73 of the

79/MP Order).

- 9.20** Haryana Discoms complied with the 79/MP Order by making payments of Supplementary Bills raised by GKEL till June 2016, including payments towards coal cost incurred on account of shortfall of firm linkage of coal and procurement of coal to GKEL.
- 9.21** Additionally, GKEL filed Appeal No. 195 of 2016 before this Hon'ble Tribunal challenging the Change in Law claims disallowed by the Ld. CERC in terms of the 79/MP Order. This Hon'ble Tribunal pronounced Judgment in Appeal No. 195 of 2016 on 27.05.2019. It is pertinent to note that Haryana Discoms did not file any appeal against the 79/MP Order.
- 9.22** Thereafter, on 22.09.2016, Haryana Discoms raised the issue with respect to quantification of linkage fuel/calculation in respect of shortfall in linkage fuel and sought clarification. Haryana Discoms also returned the Supplementary Bills raised by GKEL from July 2016 onwards and stopped making payments towards not only the cost of coal from alternate sources but also undisputed change in law amounts towards excise duty, clean energy cess and royalty which are admitted and accepted claims.
- 9.23** Despite several attempts by GKEL to resolve the issue amicably and

clarification provided to Haryana Discoms (that the Supplementary bills are raised by GKEL in accordance with the formula prescribed in the 79/MP Order), Haryana Discoms continued to withhold payments. Subsequently, based on discussions between the parties, it was agreed that a petition would be filed before the Ld. CERC for seeking clarification on the said issue.

9.24 On 23.05.2017, GKEL filed Petition No. 105/MP/2017 seeking:-

- (a) Declaration that the coal received under the firm linkage corresponding to 500 MW is to be utilized on pro rata basis against the existing long term PPAs with GRIDCO, Haryana Discoms and Bihar Discoms.
- (b) Direction to Haryana Discoms to make payments against the invoices raised by GKEL in accordance with the 79/MP Order.

9.25 On 20.03.2018, Ld. CERC passed the Impugned Order reiterating the 79/MP Order and clarified that coal is to be apportioned on pro rata basis for all beneficiaries viz. Bihar Discoms, GRIDCO and Haryana Discoms.

9.26 In terms of the Impugned Order, Ld. CERC *inter-alia* upheld and re-affirmed the 79/MP Order and held that:-

- (a) Coal received by GKEL under firm and tapering linkages is to be apportioned on pro-rata basis among all beneficiaries. And the cost of

procurement of coal from alternate sources, to meet the shortfall of firm and tapering linkage coal, has to also be apportioned pro-rata, based on the power supplied to the beneficiaries.

- (b) GKEL has correctly apportioned the linkage coal in proportion to the capacity being supplied to Dakshin Haryana Bijli Vitran Nigam Limited (“**DHBVNL**”) and Uttar Haryana Bijli Vitran Nigam Limited (“**UHBVNL**”), collectively referred to as (“**Haryana Discoms**” / “**Respondent Nos. 2-5**”), and issued Supplementary Bills in accordance with the formula devised in the 79/MP Order; and
- (c) Directed Haryana Discoms to pay Supplementary Bills raised by GKEL from July 2016 to March 2017 along with late payment surcharge within one month of the date of issue of the Impugned Order.

A3 Pro-rata allocation of linkage coal is in terms of the LOA and FSA

9.27 GKEL has developed its Plant envisaging to fulfil its fuel requirement from firm linkage coal and Captive Coal block (against which tapering Linkage was granted). In this regard, it is pertinent that the fuel requirements for the Project were secured through the following arrangements: -

- (a) 2.14 MTPA firm linkage for 500 MW approved by the Standing Linkage Committee (Long -Term) (“**SLC-LT**”) on 02.08.2007. The LOA was issued on 25.07.2008.

- (b) On 06.11.2007, the Ministry of Coal intimated its decision to allocate Rampia and Dip Side Rampia coal blocks in Odisha to a consortium comprising of GEL and five other allottees. This was confirmed on 17.01.2008.
- (c) Tapering coal linkage for 2.384 MTPA for 550 MW approved by SLC-LT vide Minutes dated 12.11.2008. LOA was issued on 08.07.2009. The Tapering Linkage was to be made available till supply of coal from Rampia Coal Block started.
- (d) In terms of Minutes of the SLC-LT Meeting held on 14.02.2012, linkage for 500 MW and 550 MW was allocated for all three power purchase agreements.
- (e) Pursuant to the LOAs, GKEL initially signed Fuel Supply Agreements dated 26.03.2013 and 28.08.2013 with MCL for 1.819 MTPA and 0.6556 MTPA corresponding to commencement of supply of power to GRIDCO and Haryana Discoms.
- (f) Coal India Limited by its letter dated 26.02.2014 transferred 1.517 Mt. of tapering linkage coal from MCL to ECL. On 29.05.2014, ECL has signed an FSA with GKEL for 1.071 MTPA. On 24.09.2014, FSA signed with ECL was amended to 0.626535 MTPA.

9.28 Coal supply is to the Project as a whole and not Procurer Specific. This is supported by:-

- (a) SLC minutes dated 14.02.2012 clearly note the firm linkage capacity of 500 MW was intended for Odisha, Bihar and Haryana. Incidentally, the reconfiguration of the Phase-1 of the Project from 2x500 MW to 3x 350 MW had already taken place in October 2010 much prior to the aforesaid SLC minutes.
- (b) Clause 4.2 (End-use of Coal) of the FSA dated 26.03.2013 signed with MCL which clearly states that:-
- “the total quantity of coal supplied pursuant to this Agreement is meant for **use at Power Plant (3x350 MW)**, 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA).”*
- (c) Clause 2 and Clause 5B of the MOU dated 09.06.2006 between Govt. of Odisha and GMR Energy Limited (“**MOU**”) in terms of which the allocation of captive coal mine/coal linkage was for the purpose of the entire Project.
- (d) In terms of the Judgment dated 21.12.2018 in Appeal No. 193 of 2017, coal linkage is to be reckoned with reference to the LOA and not the FSA. Moreover, neither the firm linkage nor the tapering linkage LOA is specific to any particular unit. Further, since there was no FSA at the time of bid submission for Haryana, the LOA cannot be reckoned with reference to any particular unit or the Haryana PPA.
- (e) The Project supplies power to all three Procurers cumulatively from all the three units. None of the PPAs specify a particular unit from where

power is to be supplied for a particular Procurer. With effect from COD of the Third Unit 25.03.2014 till 17.03.2015, GKEL was supplying power to all three Procurers from all the three units on aggregate basis. There was no segregation of unit or capacity on the basis of the Procurer. With effect from 18.03.2015, the Third Unit of the Project was connected to the State Transmission Network. Thereafter, Haryana and Bihar are being supplied power from Unit-1 and Unit-2 and GRIDCO is being supplied power from Unit-3 of the Project.

- (f) The argument of entitlement to firm linkage based on commencement of supply is completely misplaced for the following reasons:
- (i) Neither the LOA nor any of the PPAs allocated quantum of coal against any particular unit or Procurer.
 - (ii) The reference to Unit-1 and Unit-2 in the FSA's dated 26.03.2013 (as amended on 13.11.2013 and 18.09.2014) and 28.08.2013 is simply because those 2 Units were due to be commissioned. This argument made by GRIDCO and Haryana would lead to absurdity inasmuch as GKEL has the freedom to supply power to Haryana from any of the Units. GKEL has been supplying power to all three discoms from all three units. Therefore, if power was being supplied to Haryana from Unit-2, applying the argument made by GRIDCO in Haryana, the entitlement of either of them to linkage

coal would stand modified. This has never been the intention.

- (iii) Taking another example, if supply to Haryana was delayed on account of unforeseen factors, subsequent PPA would assume priority over the Haryana PPA. This again would lead to absurd consequences.

9.29 LOA and FSA are for the station as a whole and never for a particular PPA. It is submitted that the end-use stated in these documents is for the Station/ Plant. This was confirmed by MCL in terms of letter dated 02.05.2018 which stated that the Coal is released for the total PPA capacity and not bifurcated on the basis of individual PPAs.

9.30 In terms of Clause 4.1 of the FSA, the ACQ shall be in proportion of the percentage generation covered under long term PPAs with Discoms. The relevant portion of Clause 4.1 is reproduced below:-

“4.1.1... The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/ have signed the back to back long term PPA(s) with DISCOMs.”

9.31 Haryana and GRIDCO have submitted that a pre-requisite for grant of coal linkage was the existence of a Long Term PPA. This is factually incorrect since:-

- (a) On date of grant of linkage as well as allocation of coal mine, there was

no requirement to have a Long Term PPA for grant of such linkage. This is evident from the SLC minutes as well as the LOAs. The only condition required to be fulfilled for grant of LOA was the period in which the Project was due to be commissioned.

- (b) This is evident from the SLC minutes dated 02.08.2007 wherein GMR application was approved while application by M/s Nagpur Power and Industries Ltd. was deferred. The relevant portion of the SCL minutes is set-out below:-

“b) CASES DISCUSSED AND DEFERRED IN EARLIER MEETINGS OF SLC(LT) DUE TO VARIOUS REASONS

The representative of Ministry of Power informed that this Power Plant is likely to come up during 11th Five Year Plan and therefore, the Committee approved issuance of LOA for 500 MW (1st Phase) capacity on normative basis.

The representative of Ministry of Power informed that this Power Plant (Nagpur Power & Industries Ltd.) is unlikely to come up during the 11th Five Year Plan. Therefore, the committee deferred the proposal.”

- 9.32** The condition of having a Long Term PPA before operationalisation / execution of FSA was introduced on 04.04.2012 vide Presidential Directive issued by the President of India through Ministry of Coal requiring Coal India Ltd and its subsidiaries to enter into FSA only with those Generating Companies which had a Long Term PPA. This factum is noted in the PIB Press Release dated 07.05.2012 as well as Coal

India's Annual Report for Financial Year 2012-13. Since the requirement for having a Long Term PPA was introduced only in 2012, neither the firm nor tapering linkage could have been premised or allocated to any specific PPA.

9.33 It is only commencement of supply of coal which is linked to commencement of supply under the PPA. For example, if supply of power to Haryana commenced before GRIDCO, the ACQ would have been operationalized similarly. In fact, the linkage coal/ coal block or tapering linkage are allocated for the station and to be utilized for all three PPAs.

9.34 GRIDCO's reliance on Clause 4.1.1 of the FSA dated 26.03.2013 is misplaced. Commencement of supply of coal is linked to commencement of supply under the PPA. The requirement under the FSA to provide PPA details is to ensure that quantum of coal dispatched relates to the **requirement** for generation of power from the Project under long term PPAs and that coal supplied is not diverted/ sold to third parties. This **requirement** is the aggregate requirement of the power plant and not PPA specific. The supply of coal is for the power plant as a whole and not PPA wise. The same is recorded in the recital of the addendum dated 20.05.2014 to FSA dated 26.03.2013.

9.35 As per Government of India Policy (& Presidential Directive), when a

Generating Company has multiple PPAs, supply of coal is linked to commencement of supply of power.

9.36 Allocation of coal was for the Project as a whole and not Procurer/PPA wise. This is evident from the following:-

- (a) LOAs dated 25.07.2008 and 08.07.2009 were for the plant as a whole.
- (b) Allocation letter dated 17.01.2008 for the Captive Coal mine is for 4.6 MT which is sufficient for 1050 MW, being the installed capacity of the Project.
- (c) Minutes of the SLC-LT dated 14.02.2012 note that the entire linkage (firm and tapering) is for all the 3 PPAs.
- (d) Letter dated 02.05.2018 issued by MCL states that CIL and its subsidiaries had allocated coal to the Project on pro-rata basis vis-à-vis the operational capacities and not on basis of procurers. The letter specifically states that *“in case of multiple PPAs, coal is released to the IPPs considering the total PPA capacity and not bifurcated on the basis of individual PPAs”*. The aforesaid only confirms the provision of clause 4.1.1 of the FSAs which also talks of allocation of coal on pro-rata basis to long term PPAs.

9.37 GRIDCO's contention that it has the first right over the firm coal linkage to the exclusion of Haryana Discoms and Bihar, if accepted, will lead to an anomalous situation where consumers in Bihar and Haryana will be

forced to cross-subsidize consumers in Odisha. Besides being violative of Article 14 of the Constitution of India, this would be contrary to the allocation of coal to GKEL, the same being for the project and not based on PPA/beneficiaries.

9.38 GRIDCO in its submissions dated 24.05.2017 in Appeal No. 45 of 2016 admitted that linkage coal is to be in proportion to the quantum tied up under long term PPAs. Further, GRIDCO has taken the same stand before the Hon'ble Supreme Court in Civil Appeal No. 2808 of 2017.

9.39 The understanding that coal allocated for the Project as a whole was required to be apportioned pro rata is also evident from the following:-

- (a) GRIDCO was aware that GKEL had been granted the Rampia and Dip Side Rampia coal block for capacity of 1000 MW to meet the coal requirement of the Project. The same is recorded in Petition no. 77/GT/2013. Even Haryana was aware of not only the coal block allocation but also that GKEL intended to use coal from the Coal Block for Haryana PPAs. It is for this reason that Haryana Discoms sought status of the captive coal block.
- (b) On 06.06.2015, GKEL wrote to GRIDCO regarding shortage of linkage coal and requested that GRIDCO take up the issue with Ministry of Coal, Govt. of India.
- (c) Pursuant to the said letter, Department of Energy, Govt. of Odisha

wrote to Ministry of Coal, Govt. of India on 09.11.2015, wherein it recommended that 350 MW of tapering linkage coal be shifted from ECL to MCL and full quota of tapering linkage coal be supplied to GKEL through MOU from MCL. Govt. of Odisha further acknowledged that shift in source of tapering linkage coal would result in an increase in the tariff by approximately Rs. 2/unit. If supply of power to GRIDCO was to be exclusively from firm linkage, there was no occasion to recommend transfer of tapering linkage on the ground of increase in tariff for GRIDCO.

A4 GRIDCO does not have first right over firm linkage coal

9.40 GRIDCO has relied on Letters dated 19.12.2005 and 12.01.2007 which recommended coal block allocation/linkage allocation. These letters were written by Govt. of Odisha and were for allocation of coal to the Project as a whole and not for GRIDCO's share of power. A recommendation is required in order to establish the credentials of the Project. This is evident from letters by GEL to Govt. of Odisha dated 08.12.2005 and 28.04.2006. It is pertinent to note that **letter dated 28.04.2006 clearly mentions that any long-term coal linkage granted by the SLC is to the Project.**

9.41 Recommendations made in terms of Letters dated 19.12.2005 and 12.01.2007 are with the objective to secure fuel linkage for the **entire**

project. The recommendations were not limited to the GRIDCO PPA. The said recommendations were made in order to ensure that the Project comes up in Odisha and contributes to the development of the state in terms of job creation, etc. There was no condition that any fuel allocation would be first utilised for GRIDCO or that GRIDCO would have the first right over the fuel.

9.42 Mere recommendation by Govt. of Odisha cannot mean that rights of other procurers are secondary. If that were the case, no procurer would wish to procure inter-state power and would only procure from projects located within the state. Further, the coal allocation (in terms of firm linkage or the FSA) does not provide for any priority for the state of Odisha.

9.43 The Government of Odisha was under the obligation to support and recommend coal linkage for the Project in terms of Clause 2 and 5B of the MOU. The operative portions of the clauses are reproduced hereunder:-

“2. This MOU affirms the commitment of GEL to establish a Thermal Power Plant and assistance of the Government for providing land and recommending for captive coal mines or for coal linkages and acquiring major clearances/approvals including right of way and other project inputs like water etc. as per the existing Law and Rules.

[...]

5. The areas of assistance and co-operation between the Government and GEL are listed below

A. Land [...]

B. Coal

(i) *The Government agrees to facilitate allotment of coal blocks for the purpose of mining to be utilised for the Project and would provide all assistance for such allocation, in accordance with the provisions of applicable Law and Rules which would include but not be limited to recommendation to the Central Government Authorities (like Ministry of Coal, Ministry of Power, Central Electricity Authority and any other entities within or outside the State)*

[...]

(i) *In case no coal block is allotted for the subject power station, as an alternative to captive mining facility, the Government will assist GEL to get the allocation of long-term coal linkage of suitable quantity and quality to meet its requirement by recommending the proposal to the Ministry of Coal and such other entity, as may be necessary.”*

9.44 Recommendations were for the Project as a whole, since all recommendations made by Govt. of Odisha were for 1000 MW Project. It is standard procedure for the host State to submit a recommendation letter for allocation of coal. Additionally, if the GRIDCO PPA was the basis for allocation of coal, linkage would have been to the extent required for the GRIDCO PPA (262.5 MW) and not for 500 MW.

9.45 Neither MOU nor subsequent PPA amendments record Firm Linkage as the source of coal. This is unlike the Haryana and Bihar PPAs which clearly mention the sources of coal. Thus, GRIDCO's contention that it has the first right over firm linkage coal as GKEL had submitted the GRIDCO PPA in its application for grant of linkage is misplaced.

9.46 Merely because supply of power commenced to GRIDCO before Haryana and Bihar, does not entitle GRIDCO a superior claim over the linkage coal to the disadvantage of consumers in Haryana and Bihar. The commencement of supply of power was in terms of the respective PPAs. However, allocation of coal was in terms of the allocation by SLC and the LOAs/FSA which contemplated use of allocated coal for the project as a whole.

9.47 Further, at the time of amending the GRIDCO PPA on 04.01.2011, GRIDCO did not raise the issue of usage of Firm Linkage Coal. Further, GRIDCO was aware of the FSAs entered into by GKEL. The amended GRIDCO PPA did not mention neither Firm Linkage Coal nor the FSA dated 26.03.2013 between GKEL and MCL.

A5 ***GRIDCO is seeking to reopen issue of proportionate usage of coal as settled by this Tribunal's Judgment dated 01.08.2017***

9.48 GKEL filed Petition No. 77/GT/2013 for determination of tariff *qua* the 262.6 MW power supplied to GRIDCO from the Project. On 12.11.2015, Ld. CERC passed the 77/GT Order and determined the Energy Charge Rate (“**ECR**”) applicable for power supplied to GRIDCO under the GRIDCO PPA.

9.49 GRIDCO filed Appeal No. 45 of 2016 before this Hon’ble Tribunal impugning the 77/GT Order *inter-alia* claiming the ECR determined by

Ld. CERC was too high. GRIDCO submitted that Ld. CERC ought to have considered only linkage coal and not imported, e-auction and open market coal. It is pertinent to note that GRIDCO did not dispute the use of tapering linkage which conclusively establishes that GRIDCO did not have a preferential right over firm linkage coal.

9.50 This Hon'ble Tribunal in Judgment dated 01.08.2017 dismissed Appeal No. 45 of 2016. GRIDCO filed Civil Appeal No. 2808 of 2018 against Judgment dated 01.08.2017 before the Hon'ble Supreme Court. The same is pending. The stand taken before this Hon'ble Tribunal and the Hon'ble Supreme Court by GRIDCO is that GKEL is required to use firm and tapering linkage coal for supply of power to GRIDCO This is in contrast to the stand taken in the present appeal that GRIDCO has to be supplied only from firm linkage. The relevant portion of Civil Appeal No. 2808 of 2017 is reproduced hereunder:-

“XV. Because the Learned Tribunal erred in upholding the Energy Charge Rate as determined by the Commission on the ground that the same was in conformity with the 2009 Regulations;

[...]

e. [...] However, the ECR as per the Impugned Order in respect of GRIDCO varies between 266.802 paise/kWh to 297/619 paise/kWh, based on the weighted average rate of Imported, E-auction and Open market coal, which is extremely high and unjustified.

[...]

g. When CERC directed GKEL to submit three months coal and oil

data, it would have been more prudent to consider the actual coal oil data as utilised in the Thermal plant instead of taking the open market data as the period in question was already over. The data taken as reference has led to an exaggerated ECR which would have been much less, if price of linkage coal would have been considered.

[...]

- n. Since the Impugned Order dated 12.11.2015 is the Tariff Order in respect of the share of GRIDCO, i.e. State entitlement of power, the ECR should have been based on linkage coal data.*
- o. [...] It is submitted that ECR should have been derived solely based on the weighted average rate of Linkage Coal, as GKEL has signed Fuel Supply Agreement for 500 MW of firm and 550 MW of tapering linkage coal with MCL and at no point of time GKEL had operated more than one unit (350 MW) during the period under review. The question of shortage of linkage coal and resorting to other sources of coal (E-Auction/Imported Coal) does not arise.”*

9.51 The issues regarding, sources of coal supply and computation of ECR, (including GKEL using tapering linkage, alternate and imported coal) stand settled by this Hon’ble Tribunal. GRIDCO cannot be permitted to re-agitate the same under the guise of the present Appeal.

9.52 Further, in Petition No. 77/GT/2013, GKEL had claimed that in case of shortfall in supply of linkage coal, GKEL would be compelled to procure coal from alternate sources, the cost for which would be on pass through basis. In this regard, GKEL had also furnished landed prices of three main types of coals – Domestic Linkage Coal, E-Auction Coal and Imported Coal. The ECR was approved by Ld. CERC (and upheld by Hon’ble Tribunal) in terms of the said submission.

9.53 GRIDCO was aware of pendency of Petition No. 79/MP/2013 filed by GKEL. In GKEL's rejoinder dated 11.04.2014 in Petition No. 77/GT/2013, GKEL had specified that it had separately filed Petition No. 79/MP/2013 and Petition No. 81/MP/2013 for compensation due to Force Majeure and Change in Law events as regards the Haryana PPAs (thereby leading to increase in capacity and energy charges). It was also specified that the reasons for filing separate petitions by GKEL was that impact on project cost was likely to vary in cost-plus mechanism for tariff determination applicable to GRIDCO PPA vis-à-vis tariff determined through competitive bidding. Therefore, GRIDCO's contention that it was unaware of pendency of the aforesaid petitions is incorrect.

9.54 GRIDCO's reliance on the CRISIL Report is misplaced. GRIDCO has selectively quoted portions of the CRISIL Report. The said Report expressly provides that GKEL had assumed that coal available would be distributed on pro-rata basis for capacity under the respective PPAs and assumed fuel cost on a consolidated and pro-rata basis.

9.55 GRIDCO was also aware that GKEL is pro-rating the linkage coal among all beneficiaries in terms of the 79/MP Order. Haryana Discoms had filed impleadment application (I.A No. 18 of 2017) in Petition No. 61/GT/2016 before the Ld. CERC wherein Haryana Discoms had

submitted that GKEL is apportioning coal on pro-rata basis among all beneficiaries of the Project. The same was dismissed by Ld. CERC in terms of Order dated 31.05.2017 wherein it was held that pro-rata allocation of coal was being done in terms of the procedure laid down in the 79/MP Order. Thus, there was no reason to examine the same in proceedings for tariff determination.

A6 GRIDCO is entitled to SHAKTI coal only because ACQ under FSA is insufficient to meet coal requirement for GRIDCO PPA

9.56 On 16.08.2017, CIL issued the SHAKTI Scheme Document (“**Shakti Scheme Document**”). In terms of the Shakti Scheme Document, for GKEL to apply for auction, it had to satisfy the eligibility criteria, set out in Clauses 3 and 4.

9.57 In terms of Clause 3.3.2, the Eligible Energy Requirement must be 90% of the annual energy requirement of the specified end use plant for the capacity against which the bidder has concluded PPAs **less** annual energy requirement of the Specified End Use Plant met through any captive coal mine **less** adjustment for any existing coal linkages. The relevant portion of Clause 3.3.2 is reproduced hereunder :-

*“3.3.2 For the purpose of this Auction, the CEA Approved Quantity for each Specified End Use Plant shall be calculated by CEA as follows (“**CEA Approved Quantity**”):-*

9.58 Further, Clause 4.1.2 provides Additional Eligibility Criteria. In terms of the same, the bidder (i.e. GKEL) has to have already concluded PPAs and:-

- (a) should not have coal linkage at all; or
- (b) having coal linkage for quantity which is less than 90% of their coal requirement, computed as per consumption norms prescribed in Annexure VIII.

The operative portion of Clause 4.1.2 of the Shakti Scheme Document is reproduced hererunder:-

“4.2.1 Additional Eligibility Criteria

4.1.2.1 The Bidder having already concluded PPAs in respect of the Specified End Use Plant registered under Clause 3.1 and;

- (a) No having coal linkage at all; or*
- (b) Having coal linkage for quantity which is less than 90% of their coal requirement computed as per consumption norms prescribed in Annexure VIII”*

9.59 It is evident from the foregoing, that GKEL’s eligibility to participate in the SHAKTI Scheme vis-à-vis the GRIDCO PPA would arise only when the FSA ACQ was insufficient to meet the PPA commitments. Since the captive coal block had been cancelled on 25.08.2014 and the tapering linkage had expired on 01.07.2016, at the time of participation in the SHAKTI auction, the only coal linkage available was the firm linkage. Pertinently, Procurer consent is necessary for participation under the Shakti Scheme.

- 9.60** If GRIDCO's contention was correct, there was no occasion for GRIDCO to grant permission to GKEL for participating in the Shakti Scheme since there would have been no shortfall between the coal requirement for PPA capacity (262.5 MW) and the firm linkage ACQ (500 MW).
- 9.61** GRIDCO granted consent to GKEL to participate in the SHAKTI auction vide letter dated 09.08.2017. The grant of consent itself implies that the firm linkage ACQ was to be apportioned pro rata between GRIDCO, Haryana Discoms and Bihar Discom and the balance coal procured under SHAKTI.
- 9.62** GRIDCO also filed Petition No. 63 of 2018 before Ld. Odisha Electricity Regulatory Commission seeking approval of the GRIDCO PPA along with Amendment dated 08.02.2018 regarding SHAKTI Coal. OERC, vide Order dated 09.04.2019 accorded approval to the GRIDCO PPA and Amendment dated 08.02.2018.
- 9.63** Having accepted the benefit of SHAKTI coal, GRIDCO ought not to be permitted to resile from the admitted and accepted position that firm linkage is to be allocated pro rata and the balance quantum be procured under SHAKTI. This is more so since GKEL has changed its economic position by participating in and procuring coal under SHAKTI. Therefore, GRIDCO is bound by its representation and acceptance of

SHAKTI coal and cannot claim that only firm linkage coal ought to be utilized for GRIDCO PPA.

9.64 Haryana Discoms opted to not grant consent for SHAKTI coal even though GKEL requested for Haryana's consent. GKEL sought Haryana's consent since Firm Linkage was not sufficient to meet the proposed capacity for Haryana.

A7 ***GRIDCO was not a necessary party in Petition No. 79/MP/2013 and Petition No. 105/MP/2017***

9.65 GRIDCO has submitted that it was not a party in before Ld. CERC wherein GKEL had sought pro-rata allocation of coal. Accordingly, Orders passed by the Ld. CERC are not applicable to GRIDCO. In response, it is submitted that:-

(a) Petition no. 79/MP/2013 and Petition No. 112/MP/2015 were filed seeking compensation for Change in Law events affecting the Haryana PPA and Bihar PPA, respectively. It is submitted that the said PPAs are pursuant to competitively bid process and have been approved by the concerned state electricity regulatory commissions under Section 63 of the Electricity Act, 2003. The GRIDCO PPA is under Section 62 of the Act and is a cost-plus PPA. Accordingly, there was no need to make

GRIDCO a party. Proceedings under section 62 and 63 are entirely different. Accordingly, there was no requirement to implead GRIDCO.

- (b) The Ld. CERC in terms of the 61/GT Order has recorded submissions regarding pro-rata allocation of coal. By way of Rejoinder dated 12.01.2017 and Affidavit dated 22.11.2017, GKEL had submitted that linkage coal is being utilised in accordance with 79/MP Order. Further, GRIDCO had challenged the computation of ECR in Appeal No. 45 of 2016 before this Hon'ble Tribunal and this Hon'ble Tribunal had rejected the contentions raised by GRIDCO vis-à-vis computation of ECR vide judgment dated 1.8.2017.

9.66 GRIDCO has submitted that GKEL has intentionally suppressed Order of the Ld. CERC dated 07.04.2017 in Petition No. 112/MP/2015 ("**Order dated 07.04.2017**") wherein shortfall in linkage coal was denied. Further, that Order dated 03.02.2016 and 07.04.2017 are contradictory in nature. In response, it is submitted that:-

- (a) The present Appeal arises out of the Impugned Order passed in Petition No. 105/MP/2016. The said petition was filed solely to clarify Order dated 03.02.2016 passed by Ld. CERC in Petition No. 79/MP/2013. On the other hand, Petition No. 112/MP/2015 was filed by GKEL seeking compensation for Change in Law events impacting the Bihar PPA. Accordingly, there was no need to mention Order dated

07.04.2017 in the present proceedings. Thus, GKEL has not suppressed or misled the Ld. CERC or this Hon'ble Tribunal.

- (b) The issue of Order dated 03.02.2016 being contradictory to Order dated 07.04.2017 is immaterial to the present Appeal. It is submitted that GKEL had challenged Order dated 07.04.2017 before this Tribunal by way of Appeal No. 193 of 2017. This Tribunal, in terms of Judgment dated 21.12.2018 has, *inter-alia*, held that shortfall in linkage coal is a Change in Law event.

9.67 In any event GRIDCO has been heard on the issue of pro-rata allocation of coal in the tariff determination proceedings and no prejudice has been caused.

A8 Other Submissions

9.68 GRIDCO's reliance on clause 2.2 of the GRIDCO PPA is misplaced. The objective behind Clause 2.2 is that GRIDCO's share of 25% of the installed capacity of the Project remains intact. It is submitted that the Haryana Discoms and Bihar Discoms were aware of the capacity allocated to GRIDCO from the Project. Furthermore, GKEL has not entered into any agreement wherein the said allocation (of 25% power and power at above 80% PLF at variable cost) is negatively affected. It is further submitted that the Haryana PPAs and the Bihar PPA were based on the standard PPA format (part of the standard bidding

documents) issued by the Ministry of Power, Government of India.

9.69 GRIDCO's claim is barred by limitation as GRIDCO was aware as far back as December 2016 that linkage coal was being allocated by GKEL on pro-rata basis. A copy of Affidavit dated 07.11.2016 filed by GKEL.

9.70 CERC was aware of the FSAs and all relevant documents before passing Orders pertaining to all the beneficiaries. It is submitted that there was no need to place the MOU/other documents before the Ld. CERC for adjudication of claims under the Haryana PPAs. It is submitted that this argument was taken by GRIDCO before this Hon'ble Tribunal in Appeal No. 45 of 2016 and dismissed in terms of Judgment dated 01.08.2017. GRIDCO cannot be permitted to re-agitate this issue.

9.71 Providing Annual Certificates does not result in GRIDCO having the first right over firm linkage coal. In fact, Haryana Discoms and Bihar have also provided these annual certificates.

9.72 GRIDCO's reliance on Order dated 20.03.2018 in Petition No.105/MP/2017 is misplaced. GRIDCO has reproduced contentions advanced by Haryana Discoms and submitted the same as findings of the Ld. CERC which is erroneous.

9.73 GRIDCO's reliance on Ld. Odisha Electricity Regulatory Commission's Order dated 12.06.2013 in Case No. 117 of 2009, 31 of 2010 and 56 of 2012 is erroneous. In the said Order, Ld. OERC held that coal procured

through Administered Price Mechanism cannot be diverted for merchant sale of power. The aforesaid finding is premised on the fact that there was only one operational long term PPA between GRIDCO and M/s Sterlite Energy Limited and that the generator ought not to profit by selling power on merchant basis by utilising coal procured through APM.

9.74 The abovementioned order is not applicable to the present proceedings involving three operational long term PPAs with GRIDCO, Haryana Discoms and Bihar Discoms.

9.75 In view of the foregoing submissions, it is clear that GRIDCO is re-agitating issued already decided by this Tribunal and is misleading this Tribunal. GRIDCO was always aware that both, Firm and Tapering Linkage coal would be used for supply of power under the GRIDCO PPA and regarding pro-rata allocation of coal.

10. We have heard learned counsel appearing for the Appellants and learned counsel for the Respondents at considerable length of time and we have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following main issues emerge in the instant Appeals for our consideration:-

Issue No.1 :- Whether in the facts and circumstances of the case, the Central Commission is right in holding that both the FSA dated 26.03.2013 as well as the captive coal block / tapering linkage are

commonly for all the three beneficiaries namely Haryana utilities, GRIDCO and the Bihar utilities and cannot be related to specific PPA.

Issue No.2:-

Whether in the facts and circumstances of the case, the Central Commission has correctly considered the salient documents namely PPAs, FSAs/LOAs relating to linkage coal, captive coal block, tapering linkage etc. before arriving at the decision of proportionment of supplied coal among the three beneficiaries.

Issue No.3:-

Whether the Central Commission was justified in adjudicating the issue of sharing of coal linkage among all the beneficiaries of GKEL in Petition No.105/MP/2017 without impleadment of GRIDCO an important stakeholder having 25% share in the installed capacity of the power generation.

Our Consideration & Analysis:-

11. Issue No.1:-

11.1 Learned counsel for the Appellant in Appeal No.135 of 2018, Haryana Utilities submitted that out of the total generating capacity of the power station (1050 MW), the contracted capacity for the Haryana Utilities is 300 MW and it is their stand that the FSA dated 26.03.2013 with MCL was specifically with a reference to the entire 300 MW of the contracted

capacity to Haryana Utilities. In addition, 125 MW to GRIDCO and 29.55 MW to Bihar Utilities. Learned counsel further submitted that the fuel for the remaining 550 MW capacity was initially through a captive coal block and later on covered under the coal allocated to GMR under the Shakti Policy. Besides, till the operationalization of the captive coal block, tapering linkage was given for 550 MW.

11.2 Learned counsel for Haryana Utilities vehemently submitted that the issue for consideration of this Tribunal is whether the FSA with MCL was for a limited capacity of 500 MW only should be taken for generation and sale of electricity to all the Procurers qua the installed capacity of 1050 MW or restricted to the supply of electricity against the contracted capacity of 300 MW to Haryana utilities (the Appellant), 125 MW to GRIDCO and 29.55 MW to Bihar Utilities. He further contended that admittedly GKEL had proceeded on two sources of coal procurement, namely the firm coal linkage from MCL for 500 MW; and captive coal block or tapering linkage until the availability of coal from the captive coal block for the remaining 550 MW. Learned counsel for Haryana Utilities was quick to submit that the Haryana Utilities are not concerned with the tapering linkage for the 550 MW given by MCL or the captive coal block being proceeded with or cancelled etc. As a matter of fact, the implication of the captive coal block not being granted

should visit only the balance 550 MW and cannot in any manner affect the firm coal allocation for 300 MW to Haryana Utilities. Learned counsel accordingly contested that the impugned order treating the MCL coal linkage for 500 MW was being commonly available to all the Procurers from the generation project of GMR is patently erroneous as the Central Commission has not considered the relevant documents in the context of the coal allocation made for 500 MW. He further submitted that the order dated 03.02.2016 considering and allowing Change in Law for shortfall of coal for NCDP to GMR was concerned only with the FSA dated 26.03.2013 whereas the tapering FSA dated 28.08.2013 was not even on record before the Central Commission as noted in Para 48 of the impugned Order.

11.3 Learned counsel for the Appellant in Appeal No.54 of 2019/GRIDCO submitted that the PPA with GRIDCO was executed first i.e. on 28.09.2006 and then revised on 04.01.2011 and operationised first in January, 2013. Therefore, GRIDCO has the first right over the firm linkage FSA dated 26.03.2013. Further, the contracted capacity of GRIDCO was 250 as per PPA dated 29.08.2006 and 262.5 MW as per PPA dated 01.04.2011 while computed with the installed capacity of 1000 MW and 1050 MW respectively.

11.4 Learned counsel for GRIDCO emphasised that as per the MOU, the Govt. of Odisha has assisted GMR for allocation of firm linkage of coal block, therefore, GRIDCO would have first right over the full linkage supply. Further, allocation under SLC-LT meeting on 02.08.2007 and LOA dated 25.07.2008 is against a long term PPA and only PPA at that time was GRIDCO PPA and as such the firm linkage was only for GRIDCO. Learned counsel further contended that based on the submissions of GMR, the SLC, LT minutes dated 14.02.2012 indicate that tapering linkage of 2.384 MTPA (550 MW) is to be utilised for all three PPAs. Further, the SHAKTI policy was for allocation of coal to meet shortfall in firm linkage and GRIDCO had agreed to such allocation to take advantage of the discount offered. To substantiate his arguments, learned counsel for GRIDCO also relied on **CRISIL** report presented by GMR which records the contention of GMR that only one source could have been identified in the bid and GMR had only identified linkage coal.

11.5 Learned counsel for GRIDCO was quick to point out that GMR failed to comply with the terms of Clause 2.2 of the PPA dated 28.09.2006 with GRIDCO which required incorporation of a term in agreement with third parties confirming right of GRIDCO. He contended that GMR sought to dilute the rights of GRIDCO to qualify for bids of Haryana & Bihar

utilities. Additionally, GRIDCO has also submitted annual certificates to confirm power supply by GMR to GRIDCO as per the requirement of firm linkage FSA dated 26.03.2013 to emphasise that GRIDCO has executorial rights.

11.6 *Per contra*, learned counsel appearing for GKEL submitted that the Haryana utilities has challenged the order of the Central Commission dated 20.03.2018 allowing “GKEL” Petition No. 105/MP/2017 that supplementary bills were correct and in terms of Order dated 03.02.2016 passed in Petition No. 79/MP/2013 and the Appellants shall pay GKEL’s supplementary bills for July 2016 to March 2017 within one month. The main issue that arises for consideration of this Tribunal is whether firm coal linkage corresponding to 500 MW granted to whole power plant or earmarked for end-use commitment of 300 MW supply to Haryana Discoms. Learned counsel for GKEL vehemently submitted that in terms of Memorandum of Understanding (MOU) dated 09.06.2006 between GMR Energy Limited and Government of Odisha, Phase I of the Power Station comprised 1000 MW (2 X 500 MW) installed capacity with identified source of coal as Talcher (MCL) with a proposal for a captive coal mine. This fact has been duly noted in the order of the Central Commission dated 16.05.2012 in Petition No. 20/MP/2012. The

captive coal mine was allocated for 1000 MW capacity of the Power Station. Besides, SLC Minutes for meeting held on 14.02.2012 clearly note that Tapering Linkage was for all the 3 states. Further, even as per MCL letter dated 02.05.2018, it has been clarified that coal is not allocated to a specific PPA but to the Power Station as a whole. Haryana utilities were aware that coal will be sourced from the captive coal block. Learned counsel emphasised that as per Haryana bid, GKEL was to indicate proposed source of coal which was MCL and the bid did not specify tapering or firm linkage and in any case both linkages are from MCL. In fact, GKEL is bound by allocation terms and cannot utilize coal for any purpose that specified end-use. Since coal has been allocated to Power Station as a whole, GKEL has been allocating the same proportionately which is consistent with the SLC and MCL communications reflected above and Order of the CERC.

11.7 Advancing his arguments further, learned counsel for the Respondent, GKEL contended that the Appellants (GRIDCO & Haryana Utilities) have challenged the impugned order dated 20.03.2018 on one or the other ground. Learned counsel was quick to point out that the Appellants herein have not challenged the Central Commission's order dated 03.02.2016 till date and have made payments to GKEL till June 2016 on the basis of the same which has attained finality. Accordingly,

Appellants are precluded from seeking to challenge the said methodology devised in that order by way of present appeals. Learned counsel further contended that in spite of being repeatedly approached for their consent, Haryana Discoms withheld consent for procurement of coal under the SHAKTI Scheme which is a mandatory condition for allocation of coal under the SHAKTI Scheme. As such by their own acts and omissions, Haryana Discoms ensured that no coal could be allocated on account of their PPA under the SHAKTI Scheme solely due to their refusal to grant consent and having done so, Haryana Discoms cannot now rely on SHAKTI scheme. Moreover, SHAKTI scheme has no bearing on the present case since it is an alternate mode for procurement of coal to overcome the shortfall of linkage coal. These facts have been noted by the Central Commission in its Order dated 19.03.2018 in IA. No. 12 of 2018 in Petition No. 105/MP/2017 under Para 12. Learned counsel for Respondent / GKEL further submitted that it filed an affidavit on 23.01.2015 in Petition No. 77/GT/2013 placing on record the report prepared by CRISIL which expressly provides “that “GKEL had assumed that the available coal would be distributed on pro-rata basis for capacity under the respective PPAs and assumed fuel cost on a consolidated pro-rata basis. To substantiate his contentions, learned counsel for the Respondent/GKEL indicated that on 24.05.2017, GRIDCO filed its written submissions

in Appeal No. 45 of 2016 in terms of which the linkage coal is to be in proportion to the quantum tied up under long term PPAs. The said appeal was dismissed on 01.08.2017 by this Tribunal against which GRIDCO has filed civil appeal before the Hon'ble Supreme Court in which GRIDCO reiterated its stand taken in Appeal No.45 of 2016.

11.8 Regarding computation of ECR , based on weighted average rate of coal including firm linkage and tapering linkage., learned counsel reiterated that in view of above, Haryana discoms and GRIDCO were well aware of all facts that GKEL is pro-rating for linkage & tapering linkage coal for all three procurers. Learned counsel for the Respondent/GKEL summed up that as stated supra the impugned order is nothing but confirmation of the findings under its order dated 03.02.2016 which have not been challenged till date by any of the Appellants and has attained finality. Learned counsel placed reliance on the Hon'ble Supreme Court judgment in case *Hope Plantation Ltd. vs. Taluk Land Board, Peermade & Anrs. Reported as (1999) 5 SC 590* which has held that when the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it.

Our Findings:-

11.9 We have carefully analysed the submissions made by the learned counsel for the Appellants and learned counsel for the Respondent

generator and also taken note of the various judgments/orders cited by the parties. The main arguments of the learned counsel for Haryana utilities and GRIDCO have been to highlight that for one or the other reasons, they have the first right in coal allocated under firm linkage by MCL. While GRIDCO relates its claim of first right with the PPA signed by it at first, rendered numerous assistance to the generator for obtaining various coal linkages including firm linkage, tapering linkage, allocation of coal block etc.. On the other hand, Haryana utilities have relied on the bid submitted by GKEL to supply their 300 MW of power presuming that the same was based on entire coal supply from firm linkage. In the process of their submissions, learned counsel for the Appellants have referred to several documents including communications from MCL, Ministry of Power, SLC meetings, FSAs' etc and have tried to interpret the documents in favour of their first use of the cheaper coal coming from firm linkage. The basic presumptions of GRIDCO and Haryana utilities are that the coal supplied from MCL have been made effective on the basis of specific PPA and not for the power station as a whole. In other words, while GRIDCO contend that their share of power as 262 MW to be adjusted from the firm linkage of 500 MW at first and then only Haryana utilities and Bihar utilities get the benefit of balance linkage coal in proportion of their PPA capacities. Similar is the claim of Haryana utilities that their entire 300 MW capacity

should be adjusted against linkage coal at first and thereafter to GRIDCO / Bihar utilities.

11.10The learned counsel for Respondent/GKEL have placed on record a number of documents to claim that the coal coming from any mode of procurement is meant for the power plant as a whole and does not refer to any specific PPA of the beneficiaries. Learned counsel cited the reference of MOU dated 09.06.2006 between GMR and Govt. of Odisha as per which the source of coal was Talchar (MCL) with a proposal for a captive coal mine. The captive coal mine was allocated for 1000 MW i.e. the entire capacity of the power station. Further from the SLC minutes of meeting dated 14.02.2012, MCL communication dated 02.05.2018 and minutes of meeting dated 26.04.2011, it is clearly evident that the tapering linkage is for all the three states, coal is not allocated to a specific PPA and coal will be sourced from the captive coal block for supply to Haryana. The Central Commission passed its order dated 03.02.2016 in Petition No.79/MP/2016 which allow among others GKEL to recover the additional cost for procurement of coal from alternate sources to overcome the shortage of linkage coal and devised a formula for computing the Energy Charge Rate (ECR) by considering the apportionment of coal cost corresponding to the scheduled generations for Haryana Discom and GRIDCO.

11.11 Learned counsel for GKEL highlighted that the impugned order dated 20.03.2018 only confirms the order dated 03.02.2016 which has not been challenged by any of the Appellants and has attained finality and as such the Appellants are precluded from seeking to challenge the said methodology by way of the present appeals which is also contrary to the rulings of the Hon'ble Supreme Court in its judgment in the case of *Hope Plantation Ltd. vs. Taluk Land Board, Peermade & Anrs. Reported as (1999) 5 SC 590.*

11.12 After critical analysis of the rival submissions of the parties herein and it is pertinent to note that the entire dispute is caused due to assumptions of the Appellants namely Haryana utilities and GRIDCO that they have first right on the firm linkage coal and total linkage coal was meant for their corresponding PPAs. On the other hand, the Respondent/GKEL is of the opinion that the coal has been allocated from time to time for power plant as a whole and not keeping in view the end-use i.e. PPA specific. As such, the Central Commission vide its order dated 03.02.2016 ruled that for computing the Energy Charge Rate, the coal coming from all modes of procurement has to be apportioned among the three said procurers namely GRIDCO, Haryana & Bihar. This order has attained finality as none of the appellants has challenged the same and the impugned order dated 20.03.2018 is

nothing but confirmation of the findings and derived methodology as per order dated 03.02.2016. The relevant portion of the Central Commission's order dated 03.02.2016 reads as under:-

"55. We have considered the submission of the petitioners on the additional cost incurred on imported coal and open market coal procured due to shortage in linkage coal for Haryana generation during the months of February, 2014 and May to July,2014. The following mechanism as given in para 56 below is devised to compute actual additional cost incurred in a month to procure imported coal and coal from open market to make up the deficit portion of coal actually received from linkage.

*56. The Energy Charge Rate (ECR) for Scheduled Generation at delivery point be computed in steps as shown below, considering SHR of 2378 kCal / kWh and Aux Consumption of 5.75%. **Since, the formulation is for mitigating coal shortage**, the Specific Oil Consumption has been considered as nil.*

*73. (b)the **additional coal cost incurred in a month due to shortage of linkage coal** shall be computed on ex-bus scheduled energy and shall be pro-rated corresponding to the scheduled generation for Haryana Discoms as per methodology given on para 56 above."*

11.13While referring to SLC minutes of meeting dated 14.02.2012, it is noticed that tapering linkage coal of 2.384 MTPA is to be utilised for all 3 PPAs with GRIDCO, Haryana and Bihar discoms. Further, clause 4.2 of the FSA dated 26.03.2013 signed with MCL also states as under:-

*"4.1.1... **The ACQ shall be in proportion of the percentage of Generation covered under long term Power Purchase Agreements** executed by the Purchaser with the DISCOMs either directly or through PTC(s) who has/have signed the back to back long term PPA(s) with DISCOMs."*

We also take note of a letter dated 02.05.2018 issued by MCL stating that CIL and its subsidiaries had allocated coal to the project on pro rata basis vis-a-vis the operational capacity and not on the basis of procurers PPAs.

11.14In view of the above, it would thus emerge that if the contentions of the Appellants are upheld, it will lead to an anomalous situation wherein GRIDCO and Bihar Discoms will end up cross subsidising supply of power to Haryana discoms. Keeping these aspects in view, Central Commission has passed the impugned order confirming the above position as reproduced below:-

"33. In the light of the above discussion, it cannot be inferred from the language of para 48 of the order dated 3.2.2016 that the requirement of Haryana PPA shall be met from the firm linkage under the FSA dated 26.3.2013 and shortfall thereof shall be met through import and open market coal. Such an interpretation goes against the coal allocation by Ministry of Coal to power plant of the Petitioner as a whole and will put the GRIDCO PPA and Bihar PPA at some disadvantage vis a vis Haryana PPA."

"...Therefore, in light of the allocation of firm as well as tapering linkage for all three beneficiaries and our order dated 3.2.2016 in Petition No. 79/MP/2013, the firm and tapering linkage coal supplied to the Petitioner has to be apportioned on pro rata basis to all beneficiaries of the project and the cost of procurement of coal from alternate sources to meet the shortfall of firm and tapering linkage coal has also to be apportioned pro rata based on power supplied to these beneficiaries. Accordingly, the contention of Haryana Discoms to appropriate the coal supplied under firm linkage towards the capacity being supplied to them instead of pro-rata apportionment to all the beneficiaries is not correct."

(Emphasis Supplied)

11.15In the light of the above, we are of the opinion that the supply of coal from all modes of procurement has to be considered for the power plant as a whole and not specific to PPA of the State beneficiaries. The Central Commission has rightly analysed the matter considering all the relevant material placed before it and has passed the impugned order by assigning cogent reasoning. The impugned order as such does not suffer from any infirmity or perversity and intervention of this Tribunal is not called for as far as this issue is concerned.

12. Issue No.2:-

12.1 Learned counsel for the Appellant Haryana utilities submitted that FSA dated 26.03.2013 with MCL was subsequently with reference to the entire 300 MW of the contracted capacity to Haryana Utilities, 125 MW to GRIDCO and 29.55 MW to Bihar Utilities. The fuel for the remaining 550 MW capacity was initially through a captive coal block to be available to GMR and till the operationalization of the captive coal block, a tapering linkage was given for the same. Learned counsel for the Appellant Haryana utilities submitted that in the circumstances of the case, it was incumbent on the Central Commission and GMR to consider the linkage coal from MCL towards generation and sale of electricity for the entire 300 MW and Haryana utilities. He further contended that the Haryana Utilities were not concerned with the

tapering linkage for the 550 MW given by MCL or the captive coal block being proceeded with or cancelled etc. as the implication of the captive coal block was meant only for the balance 550 MW and cannot in any manner affect the firm coal allocation for 300 MW to Haryana Utilities. To substantiate his contentions, learned counsel cited the reference of various letters dated 07.02.018, 16.03.2018 and 03.04.2018 and 02.05.2018 from MCL . The order dated 03.02.2016 considering and allowing change in law for shortfall of coal for NCDP to GMR was concerned with the FSA dated 26.03.2013 and the tapering FSA dated 28.08.2013 was not even on record before the Central Commission as noted in Para 48 of the impugned order.

12.2 Learned counsel appearing for GRIDCO contended that the PPA with GRIDCO was executed first i.e. 28.09.2006 and then revised on 01.04.2011 and operationalised first on January, 2013. Accordingly, GRIDCO has the first right over the firm linkage FSA dated 26.03.2013. Learned counsel for GRIDCO vehemently submitted that the contracted capacity of GRIDCO was 250 MW as per PPA dated 28.09.2006 and 262.5 MW as per PPA dated 04.01.2011. Further, Govt. of Odisha had rendered all assistance to GMR for allocation of firm linkage and coal block and, therefore, GRIDCO would have first right over the fuel supply. It is the contentions of GRIDCO that allocation under SLC(LT)

meeting on 02.08.2007 and LOA dated 25.07.2008 was against a long term PPA and the only PPA at that time was GRIDCO PPA, therefore, the firm linkage was for GRIDCO.

12.3 Learned counsel was quick to point out that based on the submissions of GMR, SLC(LT) minutes dated 14.02.2012 indicate that tapering linkage of 2.384 MTPA (550 MW) was to be utilised for all three PPAs. Referring to various other related documents/letters such as coal allocation under Shakti Policy, CRISIL report, bids of Haryana & Bihar utilities, annual certificates to confirm power supply by GMR to GRIDCO etc., learned counsel for GRIDCO emphasised that the first right to use firm coal linkage rests with GRIDCO and after meeting its share, other utilities may be considered.

12.4 *Per contra*, learned counsel for Respondent/GKEL at the outset submitted that in view of the divergent interpretations and understanding of the Appellants namely Haryana & GRIDCO, the main issue that arises for adjudication in the present appeal is whether firm coal linkage of 2.14 MTPA corresponding to 500 MW to GKEL on 02.08.2007 was meant for the power plant as a whole or for earmarked end-use commitments to sharing capacities namely 262.5 MW for GRIDCO, 300 MW for Haryana and 29.55 MW for Bihar utilities. Learned counsel for GKEL further contended that the original MOU

dated 09.06.2006 between GMR and Govt. of Odisha envisaged source of coal as Talchar (MCL) with a proposal for captive coal mine for the entire capacity of power plant i.e. 1000 MW (2 X 500 MW).

12.5 Learned counsel cited reference of all communications of MCL, SLC meetings, several meetings with utilities etc. to establish that coal linkage, tapering or other modes of procurement was commonly for all the three states and not for a specific PPA. Learned counsel for Respondent/GKEL was quick to submit that not only various communications but also the order dated 03.02.2016 of the Central Commission in Petition No.79/MP/2013 fastened liabilities to all the stakeholders including state beneficiaries and the generator and the same has attained finality as none of Appellants has challenged it till date.

Our Findings:-

12.6 We have critically evaluated the pleadings and submissions of all the parties and also perused various documents / communications placed on record for our consideration. While contentions of Haryana utilities are that firm coal linkage with MCL for 500 MW is initiated to be only for their capacity of 250/300 MW (unit-I) & 150 MW (Part of unit-II) and the captive coal block / tapering linkage/ Shakti Scheme for 550 MW is for balanced capacity of 200 MW of Unit-II & 350 MW of Unit-III. On the

other hand, it is GRIDCO's contention that it should be given first and priority claim over all other procurers in regard to the generation capacity allocated from 1050 MW. In other words, the share of GRIDCO as 250/262.5 MW should be met from coal of firm linkage (500 MW). The third option which is the case of Respondent/GKEL and also that of Bihar utilities is that the entire coal coming from linkage, captive coal block, tapering linkage, Shakti Scheme etc. are meant for the entire capacity of 1050 MW of the power plant without any differentiation as to units.

12.7 We have gone through the analysis and findings of the Central Commission in the impugned order as well as in its previous order dated 03.02.2016 vide which it has held that the coal coming to power plant is meant for the entire capacity as a whole and not PPA specific as claimed by the Appellants. It is also noticed that the impugned order is mere confirmation of the methodology derived by the Central Commission vide its order dated 03.02.2016 which has not been challenged by any of the Appellants and has attained finality. Also looking at FSA dated 26.08.2016 signed with MCL, it reflects that

*“the total quantity of coal supplied pursuant to this Agreement is meant for **use at Power Plant (3x350 MW)**, 500 MW under Normal Linkage (425 MW generation capacity covered under long term PPA).”*

It is pertinent to note that condition of having a long term PPA before

operationalisation / execution of FSA was introduced on 04.04.2012 vide presidential directives through Ministry of Coal requiring CIL and its subsidiaries to enter into FSA only with those generating companies which had a long term PPA. Hence, neither the firm nor tapering linkage could be premised or allocated to any specific PPA. In fact, the requirement under FSA to provide PPA details is to ensure that quantum of coal despatched relates to requirement for generation of power under long term PPAs and the coal supplies are not diverted / sold to third party. It is also noted that issue of proportionate uses of coal stands settled by this Tribunal's judgment dated 01.08.2017 in Appeal No.45 of 2016 and GRIDCO is seeking to re-open those issues through this instant Appeal.

12.8 In view of the above facts, pleadings and submissions of the parties, we are of the opinion that the Central Commission having due regard to all the material placed before it has passed the impugned order and there does not appear any infirmity or ambiguity. Hence, interference of this Tribunal is not called for on this issue.

13. Issue No.3:-

13.1 Learned counsel for the Appellant , GRIDCO alleged that GRIDCO was not made a party in Petition No.105/MP/2017 and submitted that as far as distribution of linkage coal (firm/tapering) is concerned, GRIDCO

ought to have been made a party in the said petition in which GKEL had made a specific prayer for pro-rating of linkage coal amongst the beneficiaries. He further submitted that it was only on the directions of this Tribunal that GRIDCO was impleaded as a party in Appeal No.135 of 2018 arising out of CERC Order in Petition No. 105/MP/2017. Learned counsel was quick to submit that GKEL has failed to produce / place all the related documents and has tried to conceal many of the facts arising out of these communications.

13.2 *Per contra*, learned counsel for GKEL vehemently submitted that the allegations made by GRIDCO are without any base or rationale. He submitted that GRIDCO was not a necessary party in Petition No. 79/MP/2013 and PetitionNO.105/MP/2017. GKEL's counsel further submitted that these petitions were filed seeking compensation for change in law events affecting Haryana & Bihar PPA concluded under Section 63 of the Act. The GRIDCO PPA is under Section 62 of the Act and is a cost plus PPA. Hence, there was no need to make GRIDCO, a party.

Our Findings:-

13.3 Having regard to the contentions of the learned counsel for the Appellant, GRIDCO and learned counsel for the Respondent/GKEL, it is relevant to note that GRIDCO was not made a party before the Central

Commission wherein GKEL had sought pro rata allocation of coal. It is the contention of the GRIDCO that as it was not a party before CERC , hence orders passed by the Central Commission are not applicable to GRIDCO. While looking at the petitions referred herein, it is noted that these petitions were filed seeking compensation for change in law event affecting the Haryana PPA & Bihar PPA respectively which are pursuant to competitive bidding process and even duly approved by the respective Regulatory Commission under Section 63 of the Act. It is noticed that GRIDCO PPA is cost plus PPA under Section 62 of the Act and as the proceedings under Section 62 & 63 are entirely different, it emerged that there was no need to make GRIDCO a party. Further, GRIDCO had challenged the computation of ECR based on formula devised by the order of Central Commission in Petition No. 79/MP/2013 in Appeal No.45 of 2016 before this Tribunal. The said Appeal was dismissed by this Tribunal vide judgment dated 01.08.2017 rejecting the contentions raised by GRIDCO vis-a-vis computation of ECR.

13.4 In view of the facts stated supra, we are of the opinion that GRIDCO was not a necessary party in Petition No. 79/MP/2013 and Petition No.105/MP/2017 before the Central Commission .

Summary of Findings:-

14. In view of the analysis and findings in above-mentioned paras, the summary of our findings are as under:-

Issue No.1:-

The Central Commission is right in holding that both the FSA dated 26.03.2013 as well as the captive coal block / tapering linkage are commonly for all the three beneficiaries and cannot be related to specific PPA namely Haryana PPA dated 07.08.2008, Bihar PPA dated 09.11.2011 and GRIDCO PPA dated 28.09.2006 (revised on 04.01.2011)

Issue No.2:-

We hold that the before passing the impugned order, the Central Commission has considered all the documents/materials placed before it correctly and judiciously.

Issue No.3:-

We hold that GRIDCO was not a necessary party while adjudicating the Petition No.105/MP/2017 which related to compensation under change in law events for PPAs executed through competitive bidding route under Section 63 of the Act.

ORDER

In the light of facts and analysis, as stated supra, we are of the considered view that the issues raised in the present appeals being Appeal Nos. 135 of 2018 & 54 of 2019 are devoid of merits. Hence, the Appeals are dismissed.

The impugned order dated 20.03.2018 in Petition No.105/MP/2017 passed by Central Electricity Regulatory Commission is hereby upheld.

In view of the disposal of the Appeals, the relief sought in the IAs do not survive for consideration, accordingly stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **20th day of December , 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

pr