

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

**APPEAL NO. 202 of 2018**

**AND**

**APPEAL NO. 305 of 2018 & IA No. 1750 of 2018**

**Dated: 14<sup>th</sup> September , 2019**

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

**APPEAL NO. 202 of 2018**

**In the matter of:**

- 1. Jaipur Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,  
Vidhyut Bhavan, Jyoti Nagar,  
Jaipur- 302 005.
- 2. Ajmer Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,  
Old Power House, Hathibhata,  
Jaipur Road, Ajmer – 305 001.
- 3. Jaipur Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,  
New Power House, Industrial Area,  
Jodhpur – 352 001.

**...Appellant(s)**

**VERSUS**

- 1. Rajasthan Electricity Regulatory Commission**  
Through its Secretary,  
"Vidyut Vinyamak Bhawan,  
Near State Motor Garage,  
Sahakar Marg, Jaipur – 302 005.
- 2 Adani Power Rajasthan Limited,**  
Adani House, Near Mithakhali Circle,  
Navrangpura, Ahemedabad-380 009.  
Through its Vice President

**...Respondent(s)**

Counsel for the Appellant (s) : Mr. M.G. Ramachandran  
Ms. Ranjitha Ramachandran  
Mr. Shubham Arya  
Ms. Susan Methew  
Mr. Alok Pareek(Rep.)

Counsel for the Respondent(s) : Mr. Amit Kapur  
Ms. Poonam Verma  
Ms. Abiha Zaidi  
Ms. Tanesha Sultan Singh for R-2  
  
Mr. Pawan Sachdeva  
Mr. Padamjeet Singh  
Mr. Ashok Kumar Jain for Intervener

**APPEAL NO. 305 of 2018 & IA No. 1750 of 2018**

**In the matter of:**

**Adani Power Rajasthan Limited,**  
31-A, 6<sup>th</sup> Floor, Mahima Trinita,  
Plot No.5, Swej Farm,  
New Sanganer Road,  
Sodala, Jaipur – 302 019.

**...Appellant**

**VERSUS**

- 1. Rajasthan Electricity Regulatory Commission**  
Through its Secretary,  
“Vidyut Vinyamak Bhawan,  
Near State Motor Garage,  
Sahakar Marg, Jaipur – 302 005.
- 2 Jaipur Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,  
Vidhyut Bhavan, Jyoti Nagar,  
Jaipur- 302 005.
- 3. Ajmer Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,

Old Power House, Hathibhata,  
Jaipur Road, Ajmer – 305 001.

- 4. Jaipur Vidyut Vitran Nigam Ltd.,**  
Through Managing Director,  
New Power House, Industrial Area,  
Jodhpur – 352 001.

**...Respondent(s)**

Counsel for the Appellant (s) : Mr. Amit Kapur  
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Mr. Manoj Kumar Sharma for R-1  
  
Mr. M.G. Ramachandran, Sr. Adv.  
Ms. Ranjitha Ramachandran  
Ms. Anushree Bardhan  
Ms. Poorva Saigal  
Mr. Shubham Arya for R-2 to R-4

## **J U D G M E N T**

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

1. Both the Appeals being Appeal No. 202 of 2018 and Appeal No 305 of 2018 are directed against the Impugned Order dated 17.05.2018 passed by Rajasthan Electricity Regulatory Commission (hereinafter referred to as “**RERC/Rajasthan Commission**”) in Petition No.RERC-392/13.

**2. BREIF FACTS OF THE CASE(S)**

Brief facts of the case(s) are as follows:

- 2.1** Appeal No. 202 of 2018 is filed by Rajasthan Distribution companies and Appeal No. 305 of 2018 is filed by Adani Power Rajasthan Limited. The Appeals are cross Appeals challenging the order dated 17.05.2018 passed by RERC.
- 2.2** Appellant in Appeal No. 305 of 2018 and Respondent No 2 in Appeal No. 202 of 2018 is Adani Power Rajasthan Limited (hereinafter referred to as “**Adani Rajasthan**”), is a Generating Company as per Section 2(28) of the Electricity Act, 2003 and developed a coal based Thermal Power Plant with an installed capacity of 1320 MW (2 X 660) MW at Kawai, District-Baran, Rajasthan (hereinafter referred to as the “**Kawai Project**”).
- 2.3** Respondent Nos. 2 to 4 in Appeal No. 305 of 2018 and Appellant in Appeal No 202 of 2018 are the distribution licensees in the state of Rajasthan(hereinafter referred to as “**Rajasthan Discoms**”). Adani Rajasthan and Rajasthan Discoms executed a Power Purchase Agreement for supply of aggregate contracted capacity of 1200 MW.

**2.4** Adani Rajasthan had approached RERC by way of Petition No. 392 of 2013 involving Sections 61, 63 and 86 of the Electricity Act, 2003 read with Statutory framework governing procurement of power through competitive bidding for adjudication of dispute and approval of suitable compensation to offset the commercial burden Adani Rajasthan was bearing on account of increase in imported coal cost which Adani Rajasthan has to use due to non-allocation of coal by the Government of India (“**Gol**”) as per New Coal Distribution Policy, 2007 after signing a Power Purchase Agreement with Rajasthan Discoms dated 28.01.2010.

**2.5** RERC allowed the claims of Adani Rajasthan on account of change in New Coal Distribution Policy, 2007 (NCDP, 2007) as change in law under Article 10 of the Power Purchase Agreement but while doing so, RERC restricted the relief of change in law from the date of commercial operation (“**COD**”) to the date when Adani Rajasthan entered into Fuel Supply Agreement (“**FSAs**”) under the Scheme for Harnessing and Allocating Koyala Transparently in India (SHAKTI Scheme) notified by Gol. RERC also denied the claims of Carrying Cost to Adani Rajasthan.

2.6 Aggrieved by the above findings, Rajasthan Discoms have challenged the Impugned Order primarily on one issue, i.e. NCDP is not a change in law and Adani Rajasthan has challenged the Impugned Order on two issues: restrictions of date of application of relief for change in law and rejection of Carrying Cost.

3. The facts as brought before us by both the Appellants are summarized in the following paragraphs:-

- The Ministry of Power/MOP had issued Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees under Section 63 of the Act ("**the Bidding Guidelines**") on 19.01.2005.
- In order to meet the requirement of power of the State of Rajasthan, the Respondents, as Distribution Companies of State of Rajasthan and licensees within the meaning of Section 14 of the Act, authorized Rajasthan Vidyut Prasaran Nigam Ltd. ("**RVPN**") as their authorized representative to carry out the bidding process for the selection of successful bidder(s) for procurement of power for long term under Case-1 Bidding Procedure for meeting the Base Load power.
- On 23.10.2006, Rajasthan Rajya Vidyut Utpadan Nigam Limited ("**RVUNL**") - conveyed to Adani Enterprises Limited ("**AEL**") its selection as a Joint Venture Partner for the formation of a Joint

Venture (“**JV**”) Company with RVUNL. RVUNL further stated that the business activities of the proposed JV Company shall be limited to mining and supply of coal from allotted captive coal block for requirement of existing/new thermal power stations of RVUNL and/or for new projects of the State.

- On 02.08.2007, Letter of Intent (“**LoI**”) was issued by RVUNL in favor of AEL for developing the coal block under joint venture at *Parsa East* and *Kente Basan*, wherein it was provided that the coal from these Coal Blocks can be utilized at the discretion of Government of Rajasthan (“**GoR**”) for the new upcoming projects in the State under JV or IPP.
- On 18.10.2007, a New Coal Distribution Policy (“**NCDP**”) was Notified by the Ministry of Coal (“**MoC**”) assuring 100% (85% Normative Capacity) of domestic coal to Power Plants.
- On 20.03.2008, a Memorandum of Understanding (“**MoU**”) was entered into between the GoR and AEL for setting up a Coal Based Thermal Power Generation Project of 1200 MW  $\pm$  10% capacity near Kawai, District Baran, Rajasthan with an estimated investment of Rs. 5,000 crores. Article 2.2 of the MoU provides as under:-

*“State will facilitate implementation of the Project as may be required including making its best efforts to facilitate getting coal linkage/coal block from the Central Government or coal from any other source for the Project.”*

- On 16.05.2008, AEL requested the GoR to allocate coal from *Parsa East* and *Kente Basan* coal block being developed by the JV on adjustable basis for initial operation of the Plant to be commissioned in 33 months since the allotment of coal block for Kawai Project may take time.
- On 21.05.2008, RVUNL conveyed to the AEL that State will make best efforts to facilitate for getting coal linkage / coal block from the GoI or coal from any other source for the Project. RVUNL further asked AEL to apply for allocation of coal block/coal linkage with the MoC at the earliest since such allocation is a time-consuming process. RVUNL also informed AEL that *Parsa East* and *Kante Basan* coal blocks, which are meant for RVUNL projects, barely meet the requirement of RVUN Projects and hence, it will not be possible to provide coal from these blocks.
- On 28.05.2008, AEL requested GoR again to consider allotment of coal from coal blocks being developed by the JV at *Parsa East* & *Kente Basan* as a stop gap arrangement on returnable basis since the process of identification, allocation and then development of coal block takes a long time and without assured linkage/identified source of supply of coal, the case for financial closure including the Ministry of Environment and Forest (“**MOEF**”) clearance may not be processed by the concerned agencies.

- On 09.06.2008, 11.06.2008 and 16.06.2008, AEL, through various letters, requested GoR to facilitate allocation of coal for Kawai Project from *Parsa East & Kante Basan* coal blocks, in terms of the MoU entered into between AEL and GoR.
- On 29.08.2008, AEL requested GoR to advise RVUNL to enter into a MoU with Adani Rajasthan and to apply to MoC for allocation of coal blocks to Kawai Project under Govt. Dispensation Scheme to the Kawai Project in light of the terms of MoU and the obligation of GoR to provide assistance towards coal requirement of the Kawai Project.
- On 08.09.2008, Adani Rajasthan issued a communication to GoR providing status of various supports required from the GoR as per the MoU and stating that a request has been made to the Department of Energy, GoR for applying to MoC for allocation of coal block for the Kawai Project under Govt. Dispensation Scheme.
- On 25.02.2009, the Request for Proposal ("**RfP**") was issued by RVPNL for "*Procurement of Power for Long-term through tariff based competitive bidding process*" under Case-I bidding procedure for meeting the base load requirement of the Procurers.
- On 19.03.2009, AEL requested GoR for applying to MoC for allocation of coal block for Kawai Project under Government Dispensation Scheme, which was still pending, AEL further requested to extend the validity of the MoU for a period of one year.

- On 02.04.2009, Standard Bidding Document ('**SBD**') for Case 1 was notified by MoP.
- In April 2009, revised RfP was issued which was revised in line with SBD.
- On 22.06.2009, Adani Rajasthan sought GoR support in terms of the MoU for meeting fuel requirement for the Project by either allocation of surplus coal mined from existing coal blocks allocated to GoR or through future coal blocks to be allocated to GoR under Govt. Dispensation Scheme. Extension of the MoU, which was to expire on 20.03.2009, was also sought for one year so as to ensure smooth completion of the project development activities.
- Adani Rajasthan as an alternative was able to negotiate Indonesian coal at a discounted price of USD 36 per MT and on 25.06.2009, Coal Supply Agreement ("**CSA**") was signed between Adani Rajasthan and AEL for supply of standard coal for the Project from Indonesia. The CSA was subsequently terminated on 10.06.2010.
- On 02.07.2009, Adani Rajasthan applied to MoC requesting for grant of long-term coal linkage of 'F' grade coal from South Eastern Coalfields Limited ("**SECL**") for Kawai Project for 7.082 MMT per annum of coal.

- On 04.08.2009, GoR issued a communication to RVUNL stating the following:–

*“1. Validity of the MoU dated 20.03.08 is extended for one year upto 20.03.2010*

*2. RVUN may apply for allocation of coal blocks for meeting coal requirement of both super critical extension projects of RVUN & Kawai project under Govt. dispensation scheme. Price is to be determined by the Board of RVUN and premium is to be charged on the mining cost of the coal.*

*3. RVUN may publicly invite tenders for mining & delivery of coal as was done in Parsa East & Kente Bason Coal Blocks taking into account the terms of the JV agreement/coal mining & delivery agreement signed with JV partner.”*

- On 06.08.2009, Adani Rajasthan submitted its bid (dated 04.08.2009) in response to RfP offering a total contracted capacity of 1200 MW from Kawai Project. The levelized tariff offered in the bid was Rs. 3.2483/KWh and pursuant to negotiations, settled at a rate of Rs. 3.238/ kWh for 25 years. The tariff in the bid was quoted on the basis of domestic coal. Imported coal was limited only for the purpose of blending as a temporary fall back option, till domestic coal supply either from captive mine or under linkage was provided by the Govt. owned coal companies.
- On 12.08.2009, AEL requested RVUNL to allot *Kante* (Extn) coal block for meeting coal requirement of Chhabra 2x660MW, Suratgarh 2x660MW and Kawai 2x660 MW thermal Power Projects on pro rata basis as per installed capacities of the thermal power projects, referring to the advice of GoR to RUVNL. It was further stated, that

as against the earlier commitment of sale of 50% of power generated from the Kawai Project to the State of Rajasthan, AEL committed the entire power generated to the State provided it succeeds in the bidding process. The said communication also referred to the advice issued by GoR to RVUNL wherein RVUNL was asked to apply to MoC for allocation of coal blocks for meeting coal requirement of super thermal power stations of Chhabra 2x660MW, Suratgarh 2x660MW and Kawai 2x660 MW under the Govt. Dispensation scheme and requested RVUNL to make the necessary application.

- On 07.09.2009, RVPN sought clarifications/documents from Adani Rajasthan for the purpose of evaluating Adani Rajasthan's bid which included for-

*“1. For Fuel Arrangement, in the bid both Domestic Coal as well as Imported Coal has indicated. You should clarify through a letter from MD/CEO being Full time Director/Manager on which basis of fuel the Bid should be evaluated”.*

- On 12.09.2009, Adani Rajasthan replied to the clarification sought vide communication dated 07.09.2009, inter-alia stating as follows:-

*“As per the provision of the RFP under clause no. 2.4.1.1 (B) (ii), a bidder can submit only one price from a generation source even if different types of fuels are used.*

***We contemplate to use domestic as well as imported coal for Kawai Project. A duly executed Fuel Supply Agreement for more than 50% of the coal requirement for a period of 5 years (as specified in RFP for meeting the fuel requirement on the basis of imported coal) has been submitted with the bid. Further we have also submitted with a bid a MoU, executed between the GoR and***

*AEL, wherein at Clause 2.2, the State has assured in making its efforts to facilitate in getting Coal Linkage/block or coal from any other source for the Power Project.*

*We meet the fuel requirement on the basis of imported coal tie-up. However, we are sure to get domestic fuel tie-up with support of the GoR. In view of this, we submit that our bid should be evaluated on the basis of Domestic Coal tie-up. We undertake that payment considering domestic coal escalations will be acceptable to us during the term of the PPA.”* [Emphasis added]

- On 03.12.2009, Adani Rajasthan issued a communication to RVPN stating that in view of the support offered by GoR for the development of Kawai Project, the levelized tariff is being reduced by 1 paisa to Rs. 3.238 per Kwh which will be reflected in the quoted capacity charge component for each contract year.
- On 17.12.2009, Lol was issued by RVPN to Adani Rajasthan.
- On 18.12.2009, Adani Rajasthan communicated its unconditional acceptance to the Lol, issued by RVPN.
- On 28.01.2010, Adani Rajasthan executed the PPA with 3 Procurers namely Respondent No. 2 to 4 for supply of aggregate contracted capacity of 1200 MW. The PPA postulated usage of domestic coal as the primary fuel while imported coal may be used as back up arrangement.
- On 15.02.2010, Adani Rajasthan conveyed to CMD-RVUN for getting allocation of captive coal block for supply of coal to Kawai Power Project and conveyed confirmation to accept washed coal.

Adani Rajasthan further requested RVUNL to execute Fuel Supply Agreement (“**FSA**”) at mutually agreed terms and conditions at an appropriate time.

- On 20.02.2010, AEL conveyed to GoR that Adani Rajasthan will now be supplying 91% power from the Kawai Project to Respondent Nos. 2 to 5 as against the prior commitment of 50% under the MoU and requested for extension of validity of the MoU, due to expire on 20.03.2010 for further one year.
- On 25.02.2010, Petition No. 217 of 2010 was filed by RVPNL before RERC on behalf of Rajasthan Discoms seeking approval of RERC for adoption of tariff quoted by Adani Rajasthan discovered through competitive bidding under Case-I in terms of Section 63 of the Act.
- On 31.05.2010, an Order was passed by RERC in Petition No.217 of 2010 in the matter of adoption of tariff for procurement of 1000 MW and approval for additional 200MW through the process of competitive bidding under Case-1 as per guidelines for determination of tariff by competitive bidding process. While approving the tariff quoted by Adani Rajasthan, RERC observed as under:-

*"39. The other important point raised by the party relates to relaxing the qualifying requirements for the fuel in case of M/s ARPL. This matter has been elaborately dealt with in the first report of the Bid Evaluation Committee, who found the party to be qualified as far as requirement for fuel is concerned based on tie-up for imported coal and at the same time found the option of use of domestic coal worth consideration on account of likely*

*advantage of lower escalation in tariff for domestic fuel than that of imported coal. **The procurer has subsequently taken undertaking from the bidder that lower escalation in two situations i.e. domestic coal or imported coal would be applied in tariff and by this they have tried to derive advantage of incurring lower fuel escalation cost. It may be mentioned that neither the guidelines of Government of India nor the bid documents anticipate such a situation wherein imported coal and domestic coal both - could be used by a developer and obviously, in such a situation, the Bid Evaluation Committee and procurer are required to take a decision which is in their best interest.***

- On 24.03.2011, Director General of Mineral and Coal, Indonesia issued Regulation No. 515K/32/DJB/20, specifying the formula for calculation of Benchmark Price with reference to international market price of coal (hereinafter referred to as '**Benchmark Price Regulation**'). The Benchmark Price Regulation and the Indonesian Regulation are jointly being referred to as '**New Indonesian Regulations**'.
- On 11.10.2011, Adani Rajasthan issued a communication to MoP, Gol stating that CEA has recommended grant of coal linkage by Standing Linkage Committee (Long Term) ("**SLC(LT)**") to Adani Rajasthan for 12th Five Year Plan projects which has been delayed for more than one year for various reasons due to which conditions subsequent under the PPA could not be fulfilled. Adani Rajasthan further stated that, lenders to Kawai Project have started levying penal interest due to delay in coal linkage allocation; it was also

stated that such delay will result in failure to supply contracted capacity to the Procurers/State utilities.

- On 06.02.2012, Adani Rajasthan issued a communication to RVUNL stating that linkage for Kawai Project is yet to be granted by SLC (LT) and allocation of linkage towards 12th Five Year Plan projects has been delayed. As a result, Kawai Project is facing uncertainty in terms of coal supply. It was also stated that both the units of Kawai Project will be commissioned soon, hence, it was requested to recommend Kawai Project for *ad hoc* allocation of coal linkage at par with 11th Five Year Plan projects which will ensure timely commissioning of Kawai Project.
- On 14.02.2012, the SLC (LT) considered the Application of the Adani Rajasthan. However, owing to shortage of Domestic Coal arrived at the following resolution:-

*“..Problems associated with linkages issued in the past are also reviewed and solutions recommended. Coal India Limited has reported that till January 2012, based on the authorization/recommendations of SLC(LT) for Power, the coal companies have issued 172 LoAs for a total capacity of 1,08,878 MW. This capacity excludes the power utilities already linked to CIL/SCCL, which were commissioned as on 31.3.2009, for which CEA/CIL has agreed for the Annual Contracted Quantity of 304.84 Million Tonnes per annum. Out of 1,08,878 MW, it has been estimated that 26,411 MW (3,835 MW during 2009-10. 5,905 MW during 2010-11 and 16,671 MW during 2011-12) LoA based power projects have been commissioned /are likely to be commissioned by 31.3.2012 ( in the 11<sup>th</sup> Plan) and the balance capacity of 82,467 MW is yet to come up. She mentioned that CIL has sent the status of 172*

*LoA/FSAs of power utilities and a copy of the same has been circulated with the agenda to all the members. The Committee would take up the status of each case, project-wise during the course of the meeting and recommend the further course of action. The general issues impacting large number of applicants was taken up for discussions first.*

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*“Chief General Manager (S&M), Coal India mentioned that CIL had been regularly bringing out the status of negative coal balance of CIL to the Standing Linkage Committee since 2004. During the period December, 2006 to March 2010 CIL issued 133 LoAs covering 115 power units involving a quantity of 312 MT. Besides these, CIL were required to issue fresh LoAs in line with the stipulation of NCDP for pre-NCDP linkages and LoAs for power units. The total load on CIL for capacity addition of power units as on date works out to about 423 MT. The gap, between the commitments through LoAs /FSAs with power sector and other consumers vis -à-vis production projections, works out to more than 400 MT, even if no fresh commitment is made throughout the 12th Plan period. It is, therefore, imperative for power stations to depend more on imported coal in the coming years. He mentioned that in this context, there may not be any scope for recommending fresh LoAs by the Committee for the 12th Plan period. The Committee noted this position but desired that to overcome the shortage to the maximum extent possible. CIL also needs to enhance their production.”*

- On 17.02.2012, GoR issued a communication to MoP & MoC stating that there have been requests made earlier for allocation of new coal blocks under Government Dispensation Route for the Project and also the fact that application for coal linkage has been furnished with the CEA along with all requisite documents. However, since no new coal block or the linkage has been granted, it was requested to regard the Project at par with 11th Five Year Plan projects for the

purpose of grant of coal linkage which will ensure timely commissioning of the Project.

- On 14.03.2012, by letter of date, the attention of MoP was drawn to the issue of coal linkage for Kawai Project. It was also stated that the decision of the PMO directing CIL to execute an FSA for 11th Five year plan projects does not address the problems that continue to affect 12<sup>th</sup> plan projects. In light of the non-availability of domestic coal and the prohibitive cost of alternate fuel, the Kawai Project has become unviable for the tariff committed and therefore, MoP was requested to recommend allocation of coal linkages to the 12th plan projects against cancellation of LoAs for 11th plan projects.
- On 26.04.2012, MoP, in response to GoR's letter dated 17.02.2012, informed GoR that the Kawai Project has been recommended for linkage as a 12th Plan Project and in the meantime, GoR may consider revising the mining plan capacity of the Captive Coal Blocks allocated to them namely *Parsa East* and *Kante Basan* upward as to mitigate the demand of coal for power projects in Rajasthan.
- Since, Adani Rajasthan did not receive any firm linkage of domestic coal for the Kawai Project even after the efforts of Adani Rajasthan

and the GoR, Adani Rajasthan on 21.06.2012 informed the Rajasthan Discoms:-

- (i) Regarding the uncertainties in the availability of coal supplies and the same being beyond their control.
- (ii) That the entire capacity of Kawai Project will be completed much in advance before the SCOD. Details regarding the progress of the Project were furnished and the issue of uncertainty surrounding the coal supply was raised. It was also stated that despite various efforts undertaken by GoR and Adani Rajasthan, neither coal block nor coal linkage has been allocated so far.
- (iii) That following the regulatory change in Indonesia which mandates export of coal only at the notified benchmark price (w.e.f. 11.09.2011), the cost of imported coal has risen too high so as to make the use of imported coal prohibitive and therefore, unless an early arrangement for supply of domestic coal is made, either through coal linkage or through allotment of captive coal blocks, the operations of Kawai Project will be hampered.

Adani Rajasthan also requested the Rajasthan Discoms to take up the coal supply issue with GoR as well as MoC for expeditious

allocation of captive coal block for Kawai Project and allocation of coal linkage for interim period till the coal block is developed.

- On 19.07.2012, MoP was apprised that Kawai Project is facing uncertainty regarding coal linkages since its Application for coal linkages forms part of 12th plan projects which has resulted in hampering of progress of the plant. Accordingly, request was made for review of progress of the 11th plan projects and to consider allocation of coal linkages to Kawai against cancellation of Letter of Assurance (“**LOAs**”) or capacity that may not be able to meet Government of India condition of commissioning before March 2015 and execution of long-term PPA with State DISCOMS.
- On 10.08.2012, AEL informed GoR that despite substantial progress being made in the implementation of the Kawai Project, the Project was facing the risk of getting stranded due to non-availability of domestic coal and the prohibitive tariff of imported coal was making the Project unviable for tariff committed. In view of the recommendation issued to GoR by the MoP to revise mining capacity of *Parsa East & Kanta Basan* Coal Blocks allocated to RVUN in order to meet the fuel requirement of Kawai Project, it was suggested that coal production may be suitably enhanced to meet the requirement of the Kawai Project in addition to the linked power projects of RVUN, i.e., Chhabra & Kalisindh TPS. Hence, GoR was

requested to grant coal linkage (surplus coal available) to Kawai Projects from *Parsa East &Kanta Basan* Coal Blocks.

- On 30.10.2012, Adani Rajasthan issued another communication to GoR, listing out various issues pertaining to supply of coal, in detail, as also stated earlier in various correspondences issued by Adani Rajasthan.
- On 05.11.2012, GoR, in response to Adani Rajasthan's letter dated 10.08.2012, issued a communication stating that there is no surplus coal in *Parsa East &Kente Basan* Coal blocks which could be allocated to Kawai Project.
- On 22.11.2012, GoR, referring to the letter dated 17.02.2012, issued a communication to MoP & MoC, stating that Respondent Nos. 2 to 5 have executed long term PPA with Adani Rajasthan. It was also stated that if long term coal linkage is not provided, then the State will be deprived of 1200 MW power at competitive rates and Rajasthan is already facing acute shortage. It was also requested that allocation of long term coal linkage to Kawai Project be looked into on a priority basis. In case it is not possible to take decision on long term coal linkage, allocation of coal *onad hoc* basis may be considered so that the Project starts supplying power to the State.
- On 26.11.2012, GoR brought to the notice of MoP & MoC that the Kawai Project is yet to be provided coal linkage, pending decision by

SLC (LT) for allocation of coal linkage to 12th plan projects. In light of the fact that Rajasthan faces acute shortage of power during Rabi season, it was requested that MoP may kindly intervene for grant of long-term coal linkage. It was also stated that if it is not possible to grant long term linkage immediately, coal linkage on ad-hoc basis may be granted for interim period till the time final decision regarding allocation of long-term coal linkage to 12th plan projects are taken. Rajasthan Discoms were copied on these letters by the GoR and therefore, the Discoms were aware of the efforts being made by Adani Rajasthan and the GoR to secure firm coal linkage for the Kawai Project.

- On 16.01.2013, Energy Department, GoR informed Planning Commission, Gol details of the power projects that are adversely affected in respect of not getting adequate supply of coal and gas and generation lost due to shortage of fuel. Adani Rajasthan's Kawai Power Project was shown as completed but not able to execute FSA as MoC, Gol was yet to grant coal linkage. It was also pointed out that Adani Rajasthan's Project was under advance stage of completion and needed immediate allocation of required coal linkages.
- On 23.01.2013, RVUNL conveyed to GoR their understanding that MoP, in December 2011, had recommended to MoC for grant of

linkage coal for Kawai Project. It was, further, stated that communication had been made to the Planning Commission, GoI regarding the power projects which are yet to secure fuel availability and also that a separate recommendation may be made, after due consideration, as requested by Adani Rajasthan.

- On 28.01.2013, GoR issued communication to Planning Commission, GoI for the urgency in coal allocation for Adani Rajasthan's Kawai Power Project. It was stated that PPA with State DISCOMS had already been signed and as per the MoU by State Government with Adani, GoR would assist in securing coal linkage. It was also stated therein that if coal is not made available to Kawai Project, the State will be deprived of 1200 MW power which will result in huge power crisis.
- On 25.02.2013, Adani Rajasthan issued a communication to the Rajasthan Discoms stating that despite continuous efforts on the part of GoR as well as the Adani Rajasthan, Kawai Project is facing serious uncertainty regarding the coal supply that was envisaged at the time of bidding, i.e. from *Parsa Kante* coal block or procuring linkage coal under NCDP,2007. It was, also, stated that non-availability of coal linkage has compelled Adani Rajasthan to run the Project on coal imported from Indonesia, as a fall back arrangement. Following promulgation of a new regulations by the Indonesian Govt.

regarding export of coal from Indonesia, there has been a drastic increase in the price of imported coal which has put constraints on the viability of the Project, making it impractical for Adani Rajasthan to perform its obligations under the PPA. Thus, till the time coal block/linkage is allotted to Adani Rajasthan in the 12<sup>th</sup> five year plan, the tariff at which supply of power from the Project is to be made, needs to be revised. It was also stated that the Adani Rajasthan will be able to commence supply of power to Rajasthan prior to the SCOD with a revised tariff for the period until domestic coal is made available for the Project. It was further stated that the non-availability of coal coupled with the high cost of imported coal puts the situation squarely under the scope of Change in Law under Article 10 and/or Force Majeure under Article 9 of PPA.

- On 05.03.2013, Rajasthan DISCOMS Power Procurement Centre (**RDPPC**) issued a communication to Adani Rajasthan, in response to the letter dated 25.02.2013, wherein RDPPC did not deny the Force Majeure / Change in Law events notified vide letter dated 25.02.2013. Further, it was stated in the said letter that the PPA was entered between Adani Rajasthan and Rajasthan Discoms under Case-I and as per Case-I location, technology and fuel is not specified by the procurer. It was also stated that the tariff related to supply of power will be governed by the PPA and cannot be deviated

from. In the said letter Rajasthan Discoms have not mentioned that Adani Rajasthan's bid was not based on domestic coal.

- On 24.04.2013, in light of the foregoing circumstances, even prior to commissioning of the Units, Adani Rajasthan was constrained to file Petition No. RERC-392/2013 before RERC with a prayer to, *inter alia*, restore the Project to a viable economic condition in context of the various uncontrollable factors, including unavailability of domestic coal, which had occurred since the signing of the PPA.
- On 31.05.2013, the SLC (LT), keeping in view the severe coal shortage scenario decided not to entertain any fresh applications for coal linkage and to keep all the unprocessed applications (like that of Adani Rajasthan) in abeyance.
- Thereafter, on 04.06.2013, RERC heard the matter on admissibility and, after considering the submissions made on behalf of the Adani Rajasthan, admitted the Petition on 05.07.2013.
- In the meanwhile, Cabinet Committee on Economic Affairs ("**CCEA**") by way of its Resolution dated 21.06.2013 approved mechanism for coal supply to power producers, in light of the overall domestic shortage of coal, as under:-
  - i) *"Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 M W including cases of tapering linkage, which are likely to be commissioned by 31.03.2015.*

*Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.*

- ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 67 percent and 75 percent of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan.*
  - iii) To meet its balance FSA obligations, CJL may, import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. TPPs may also import coal themselves. MoC to issue suitable instructions.*
  - iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue Suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs Including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.*
  - v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.03.2015, having long term PPAs and a high Bank exposure and without affecting the above decisions”*
- On 05.07.2013, RERC, while admitting the Petition, passed an Order observing that RERC is empowered to adjudicate any dispute claiming any change regarding determination of tariff or any tariff

related matters or which partly or wholly could result in change in tariff as per Clause 5.17 of the Competitive Bidding Guidelines.

- On 26.07.2013, MoC notified amendments in the NCDP,2007 on the basis of the CCEA Resolution, in relation to the coal supply for the next four years of the 12<sup>th</sup> Plan. Significantly, the 2013 amendment to NCDP 2007 did not disturb the assurance of 100% normative coal supply to the IPPs except for the remaining four years of the 12<sup>th</sup> five year plan.
- Pursuant thereto, on 31.07.2013, MoP issued a Letter wherein it stated that:-
  - (i) Several meetings at various levels in the government have been held in view of the fact that Gol and CIL have not signed any FSA post March 2009.
  - (ii) In February 2012, decision was taken that FSAs will be signed to the full quantity as mentioned in LoAs for 20 years with a trigger level of 80% for levy of disincentive and CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported, based on information provided by MoC.
  - (iii) Higher cost of import coal/market-based e-auction coal can be considered for being made pass through on a case to case basis to the extent of shortfall in the quantity by CERC/SERC

and CIL is to supply coal of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th plan.

- Additionally, on 31.07.2013, Rajasthan Discoms filed their reply in Petition No. RERC-392/2013 before RERC acknowledging that there is a Change in Law in the present case which will cause adverse impact upon the performance of the PPA.
- On 01.08.2013, Adani Rajasthan filed an affidavit furnishing the actual cost of generating and supplying electricity from the Kawai Project to the Respondents.
- On 08.08.2013, Coal India Limited (“**CIL**”) wrote to its subsidiaries informing about the approval, *inter alia*, to supply coal to power plants of 4660 MW capacity and other similarly placed power projects that do not have any fuel linkage subject to availability of coal. CIL annexed MoC's letter dated 17.07.2013 addressed to CIL regarding signing of FSAs and supply of coal to the thermal power plants commissioned or likely to be commissioned by 31.03.2015. It also referred to MoP's Office Memorandum dated 14.05.2013 regarding pooling of prices of imported and domestic coal.
- On 20.09.2013, CIL issued communication stating that supply of coal to power plants with an aggregate capacity of 4660 MW may be made, subject to availability of coal, provided availability of such coal does not affect availability of coal to the projects of 78,000 MW

capacity and higher grades of coal not taken by FSA holders/coal from evacuation bottlenecks may be offered to abovementioned power plants (4660 MW) under MoU without any long-term commitments.

- Meanwhile, RERC *vide* Interim Order dated 30.05.2014 observed that Adani Rajasthan is entitled to Compensatory Tariff over and above the Tariff Quoted in the PPA to offset the additional cost of fuel made to be borne by Adani Rajasthan on the imported coal due to non-allocation of Indian/domestic coal.
- The aforementioned Order dated 30.05.2014 of RERC was challenged by the Adani Rajasthan as well as Respondents before this Tribunal by way of Appeal No. 78 of 2015 and 42 of 2015 respectively.
- Further to the above statutory developments and Changes in Law, Gol notified the revised Tariff Policy 2016, which also covered the cases which did not receive coal Linkages, though "assured" under NCDP to supply 100% of normative requirement by CIL at notified prices. Clause 6.1 of the amended Tariff Policy states as under:-

*"6.1 Procurement of power*

*..... However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of*

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

- In the meanwhile, this Tribunal passed Judgment dated 07.04.2016 in Appeal No. 100 of 2013 and batch matters (“**Full Bench Judgment**”), while taking cognizance of a similar situation and, *inter alia*, held that:-
  - (i) The increase in price of coal on account of the promulgation of the Indonesian Regulation as also the non-availability/short supply of domestic coal constitutes a Force Majeure Event in terms of the Power Purchase Agreement.
  - (ii) Relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission in light of the findings of the Full Bench decision.
- Subsequent to the Full Bench Judgment, this Tribunal *vide* its Order dated 11.05.2016 passed the following Order in Appeal No. 42 of 2015 filed by Respondents:-

*“In our Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters, we have held that the Appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by a competitive bidding process under Section 63 of the said Act. We have also held that if a case of Force Majeure or Change in Law is made out, relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission.*

*Therefore, the Rajasthan Commission could not have granted any compensatory tariff under Section 94(2) of the said Act. Pertinently, in this case, the Rajasthan Commission has held that a case of Force Majeure or Change in Law is not made out.*

*In the circumstances, the Appeal is partly allowed. Impugned Order dated 30/5/2014 passed by the Rajasthan Commission in Case No.RERC-392/2013 is set aside except to the extent it holds that there is no Force Majeure and Change in Law under the Power Purchase Agreement dated 28/01/2010. We, however, make it clear that we have not examined whether a case of Force Majeure or Change in Law is made out or not. Accordingly, all connected IAs are also disposed of.*

- Subsequently, this Tribunal vide its Order dated 03.08.2016 in Appeal No. 78 of 2015 filed by Adani Rajasthan wherein this Tribunal remanded the matter to RERC, observing as follows:-

*“By Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters, the Full Bench of this Tribunal has held that the Appropriate Commission has no regulatory power to grant compensatory tariff to the generating companies where the tariff is discovered by a competitive bidding process under Section 63 of the said Act. The Full Bench has also held that if a case of Force Majeure or Change in Law is made out, relief available under the PPA can be granted under the adjudicatory power of the Appropriate Commission. The Full Bench has also held that it is not possible to stretch the definition of the term Change in Law to include Change in Policy.*

*In view of the above, in our opinion, it is necessary for the Rajasthan Commission to examine the matter in the light of the Full Bench Judgment dated 7/4/2016 in Appeal No.100 of 2013 and batch matters. Hence, without expressing any opinion on the merits of the case including the issue of Force Majeure involved in this case, we set aside the impugned order and remand the matter to the Rajasthan Commission and direct the Rajasthan Commission to examine the matter in the light of the aforesaid Full Bench judgment. Appeal is disposed of.”*

- This Tribunal's Full Bench Judgment was challenged before the Supreme Court by way of Civil Appeal Nos. 5399-5400 of 2016 and Batch Matters, titled as ***Energy Watchdog Vs. Central Electricity Regulatory Commission and Ors.*** The Hon'ble Supreme Court passed its Judgment in aforesaid Civil Appeals on 11.04.2017 and held as follows:-

- i) The State Commission has jurisdiction over power plant where the generation and supply take place within the State. On the other hand, the moment generation and sale take place in more than one State, the Central Commission becomes the Appropriate Commission under the Act.
- ii) Adoption of tariff under Section 63 takes place by virtue of general regulatory power. The general regulatory power of the Central Commission under Section 79(l) (b) of the Electricity Act, 2003 is the source of the power to regulate, which includes the power to determine or adopt tariff. The Appropriate Commission is bound by the Competitive Bidding Guidelines and must exercise its regulatory functions, albeit under Section 79(l)(b), only in accordance with those guidelines. Further, in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given

situation even then the Commission's general regulatory powers under Section 79(l) (b) can be exercised.

iii) In so far as the applicability of Clause 13 to a change in Indian law is concerned, the Respondents i.e. Generating Companies are on firm ground. Both the letter dated 31.07.2013 of the Government of India and the amended Tariff Policy are statutory documents and have the force of law

- On 07.05.2017, Adani Rajasthan filed its Additional Affidavit to place on record the Supreme Court's Judgment dated 11.04.2017, along with Appropriate Submissions regarding its applicability to the present case.
- On 16.08.2017, CCEA approved a new policy for allocation of future coal linkages in a transparent manner for power sector. This policy was christened as SHAKTI Scheme.
- On 01.09.2017, Rajasthan Discoms filed their Reply to Additional Affidavit filed by Adani Rajasthan.
- On 17.05.2018, RERC after hearing the matter at length passed the Impugned Order. Allowing the Petition filed by the Adani Rajasthan, while on one hand, the RERC allowed the claim on account of Change in Law events sought by the Adani Rajasthan under Article 10 of the PPA, however, on the other hand, RERC disallowed claim of Adani Rajasthan qua Carrying Cost and restricted the claim of

Adani Rajasthan w.e.f. the date of COD until the date of execution of FSA under the SHAKTI Scheme.

- Hence, the present Appeal has come before us.

**4. We heard both the parties at length. Based on the above facts, the following points arise for our consideration:-**

**Appeal No. 202 of 2018**

- (a) Whether RERC is justified in granting relief of Change in Law to Adani Rajasthan on account of NCDP, 2013 when no coal linkage had been granted to Adani Rajasthan under NCDP 2007?
- (b) Whether RERC is justified in holding that non-allocation of coal linkage to Adani Rajasthan in terms of NCDP 2007 is a change in law under the PPA?
- (c) Whether RERC is justified in holding that the bid was premised on domestic coal by ignoring the unconditional acceptance of Adani Rajasthan of the condition that the quoted tariff rate and domestic coal escalation rate would be applicable even in case of use of imported coal as back up arrangement?
- (d) Whether RERC is justified in treating the decision of the Standing Committee on Linkage (SLC) as a change in law for non-allocation of coal, when there was no vested right to Adani Rajasthan for supply of coal?

**Appeal No. 305 of 2018**

- (e) Whether RERC is justified in restricting the claims of Adani Rajasthan for change in law till the date of execution of FSA under the Shakti scheme?
- (f) Whether RERC failed to accept the settled position of law and the equities regarding award of Carrying Cost as claimed by Adani Rajasthan?
5. We have heard arguments of counsel for both the Appellants and the Respondents in both the Appeals in detail over several hearings.
6. **Shri M.G. Ramachandran, learned counsel appearing for the Appellants in Appeal No.202 of 2018 has filed the written submissions for our consideration as under:-**
- 6.1 The Appellants in Appeal No. 202 of 2018 have based its case primarily on the submission that the legal rights of Adani Rajasthan under NCDP 2007 and/or MoU dated 20.03.2008 to get domestic coal for Kawai Project have not been taken away by any subsequent change in law developments. These developments do not constitute change in law under Article 10 of the PPA since as on the cut off date, there was no Letter of Intent or Letter of Assurance or FSA or any commitment or obligation or assurance on the part of the Government of India or Standing Linkage Committee to provide coal linkage or captive coal block for domestic coal availability to Kawai Project.

**6.2** Learned Counsel for the Appellants in Appeal No. 202 of 2018 has submitted that Adani Rajasthan's bid for supply of electricity to the Appellants/Rajasthan Discoms was based only on an expectation and possibility to get coal linkage or coal block in future with the support of Government of Rajasthan. It was also argued that Adani Rajasthan's bid was actually based on firm back up arrangement under duly executed Coal Supply Agreement dated 25.06.2009 with its holding company Adani Enterprises Limited for getting imported coal for a period of 5 years from COD.

**6.3** Learned Counsel for the Appellants/Rajasthan Discoms relied upon the provisions of NCDP 2007, provisions of Bid Guidelines, RfP and the model PPA, Adani Rajasthan's bid, PPA provisions and Coal Supply Agreement furnished along with the bid in support of his submissions. The Coal Supply Agreement was taken to be fulfilment of bid conditions. The commitment to use imported coal was made on the premise that the same would be available as back up arrangement if domestic coal linkage or the domestic captive coal block is not finalized by the time of the commercial operation and till such time domestic coal is available. He further submitted that since there was no assurance of domestic coal on the cut-off date, the back-up arrangement of imported coal was to continue for 5 years and

therefore was applicable for the period until the domestic coal became available under the SHAKTI Scheme i.e. January 2018. Reliance is placed on a clarification dated 07.09.2009 sought from Adani Rajasthan in regard to the following:-

*“With respect to the aforesaid Bid submitted by you in response to RfP dated 25.02.09, the following clarifications/documents are required for your bids to be evaluated:*

- 1. For fuel arrangement, in the Bid, both Domestic Coal as well as Imported Coal has indicated. You should clarify through a letter from MD/CEO, being Full time Director/Manager on which basis of fuel, the Bid should be evaluated.”*

**6.4** Adani Rajasthan on 12.09.2009 had clarified as under:-

*“We are in receipt of your letter No. RVPN/PC/SE/NPP/E-4/F-415/D.563 dated 7<sup>th</sup> Sept 2009 requesting therein to submit certain clarifications/documents in relation to our response to the RFP submitted on 6<sup>th</sup> August 2009. In response, we submitted hereunder our para wise clarifications/documents for your kind consideration:*

- 1. As per the provision of the RFP under clause No. 2.4.1.1(B)(ii) a bidder can submit only one price bid from a generation source, even if different types of fuels are used.*

*We contemplate to use Domestic as well as Imported coal for Kawal Project. A duly executed Fuel Supply Agreement (FSA) for more than 50% of the coal requirement for a period of 5 years (as specified in RFP for meeting the fuel requirement] on the basis of imported coal) has been submitted with the bid. Further, we have also submitted with the bid a MoU executed between the Government of Rajasthan and Adani Enterprises Ltd., wherein at clause the 2.2, the State has assured in making its best efforts to facilitate in getting Coal/Linkage/Block or Coal from any other source for the Power Project.*

*We meet the fuel requirement on the basis of imported coal tie-up. However, we are sure to get domestic fuel tie-up with support of the Government of Rajasthan. In*

*view of this, we submit that our bid should be evaluated on the basis of Domestic Coal tie-up. We undertake that payment considering domestic coal escalation will be acceptable to us during the term of the PPA.”*

Pursuant to this, Lol was issued, which was duly accepted by Adani Rajasthan on 18.12.2009. PPA was then executed on 28.01.2010.

**6.5** With reference to the issue that bid was not premised exclusively on domestic coal, Ld. Counsel for Appellants submitted that the bid was not exclusively premised on the domestic coal linkage or domestic captive coal block to be allocated to Adani Rajasthan but the bid was also premised on the back up arrangement of the imported coal for which Adani Rajasthan had a concluded agreement with AEL for a period of 5 years from COD. Adani Rajasthan's plea that imported coal agreement was given with the bid only for the purpose of qualification and not with the intention to implement the same would mean that the qualification was wrongly obtained by Adani Rajasthan. Hence, Adani Rajasthan cannot now take a plea that domestic coal was the only basis on which the bid was given.

**6.6** Adani Rajasthan's reply that there was a back-up arrangement for import of coal vide CSA dated 25.06.2009 and the said arrangement was furnished to meet the qualification requirement under the RfP is merely an afterthought. Subsequent communications/pleadings of Adani Rajasthan in different proceedings cannot fundamentally

change the representation given by Adani Rajasthan in regard to the fuel arrangement at the time of the bidding based on which Adani Rajasthan was selected for the Project.

**6.7** RERC's conclusion that the bid was based on domestic coal is wrong as the reference to the communication of Government of Rajasthan or Ministry of Power, Govt. of India do not in any manner affect the obligation of Adani Rajasthan to procure imported coal under the CSA till such time an allocation of domestic coal is granted.

**6.8** On the issue that NCDP 2007 did not assure 100% domestic availability, Ld. Counsel submitted that for new applicants for domestic coal, such as Adani Rajasthan, where there is no existing coal linkage or letter of linkage or letter of assurance or FSA etc., the entitlement is only that the application for Coal Linkage would be considered by the Standing Linkage Committee and not that there shall be definitive allotment of 100% domestic coal linkage to the applicant. The term "considered" by the Standing Linkage Committee cannot by any stretch of imagination be construed as a commitment to give 100% domestic coal Linkage.

- 6.9** Adani Rajasthan's claims that NCDP, 2007 assured all prospective power projects that they would be granted linkage for 100% of normative requirements of domestic coal from the date of the commercial operation is incorrect. The allocation is at the discretion of the Central Government and cannot be claimed as a matter of right by Adani Rajasthan. In the absence of any firm commitment for domestic coal, Adani Rajasthan had represented and furnished the back up agreement with Adani Enterprises Limited for imported coal.
- 6.10** In the absence of any Letter of Intent, Letter of Assurance or the Fuel Supply Agreement or any commitment or obligation or assurance on the part of the Government of India or standing linkage committee to provide coal linkage or captive Coal Block for domestic coal availability to Adani Rajasthan, as on the cut off date or the date specified for fulfilling the condition subsequent of signing the FSA as per the PPA including the extended date if any, there was no impact of change in law under Article 10 of the PPA on account of the subsequent NCDP, 2013 or Standing Linkage Committee's decision to reduce the quantum of coal availability.
- 6.11** With respect to applicability of Energy watchdog case, Ld. Counsel submitted that the case refers to a situation where there is firm

commitment in the form of LoA or Lol as on the cut off date or within the period specified for fulfilment of conditions subsequent of signing of FSA for domestic coal or otherwise. In the present case, there was no Lol or LoA or FSA for Adani Rajasthan to claim the application of Change in Law under Article 10 of the PPA on the basis of Energy Watchdog judgment.

**6.12** Learned Counsel for the Appellants/Rajasthan Discoms submitted that reply of the Rajasthan Discoms dated 31.07.2013 before RERC in Petition No. 392 of 2013 has been selectively referred to by Adani Rajasthan. The reply has to be read as a whole. Any inference drawn by the Rajasthan Discoms on the terms and conditions of the PPA entered into between the parties in terms of the Tariff Based Competitive Bid Process cannot be considered as an absolute admission superseding the stipulations contained in the bidding documents duly accepted by Adani Rajasthan and more particularly the stipulations contained in the bid submitted by Adani Rajasthan. Similarly, Adani Rajasthan is wrongly interpreting the Order dated 31.05.2010 passed by RERC in Case No. 217 of 2010. The observations contained in the said Order was in the context of the energy charges payable by the Rajasthan Discoms to Adani Rajasthan. The issue of evaluation of the bid under one category,

namely, domestic coal or imported coal was clearly taken care of when Adani Rajasthan itself clarified that the bid may be evaluated on the basis of domestic coal tie up and the payment may be considered based on the domestic coal escalation rate and the same was incorporated in the Letter of Intent dated 17.12.2009. Adani Rajasthan is also mixing up the issue of evaluation of the bid for the purpose of selecting Adani Rajasthan and the issue of Letter of Intent and signing of the PPA with sourcing of coal by Adani Rajasthan. The Order dated 31.05.2010 of the RERC did not in any manner provide that no imported coal shall be used and Adani Rajasthan could be held to be selected only based on the use of domestic coal. Infact that there was no bar on Adani Rajasthan to use imported coal at any time. This is particularly when Adani Rajasthan itself had stated that imported coal was a fallback arrangement and in fact was the only firm source of coal available at the time of the bid/PPA. Rajasthan Discoms submitted that the clarification given by Adani Rajasthan vide letter dated 12.09.2009 in the bid selection process which is a contemporaneous document clearly supports the case of the Rajasthan Discoms.

**6.13** Ld. Counsel further submitted that under the SHAKTI Policy, Adani Rajasthan has been given the coal supply to the full extent of the

normative requirement for supply to Rajasthan. Any shortage in the supply of coal under the Shakti Policy by the Coal Company, namely, NCL/SECL are contractual matters to be sorted out between Adani Rajasthan and the Coal Company. The allocation of coal under the SHAKTI Policy cannot be taken as confirmation that Kawai Project of Adani Rajasthan was entirely based on the availability of domestic coal as per the bid submitted by Adani Rajasthan. Ld. Counsel for Rajasthan Discoms submitted that there is no restriction on the use of imported coal for generation and sale of electricity from the said project to the Rajasthan Discoms. Ld. Counsel submitted that the CSA entered into between Adani Rajasthan and Adani Enterprises Limited for imported coal was also the basis for submission of the bid, particularly, till such time the domestic coal linkage or the captive coal block is granted to Adani Rajasthan.

**6.14** Ld. Counsel for the Appellants/Rajasthan Discoms denied applicability of Memorandum dated 24.05.2013 issued by Ministry of Coal and the revised Tariff Policy of 2016 as both being subsequent developments. The Appellants/Rajasthan Discoms also contended that no principle or methodology was approved by RERC for computation of change in law compensation. It has also disputed the methodology suggested by Adani Rajasthan for computation of

change in law and submitted that at the most, computation of the compensation would be the difference in the quoted energy charges (subject to escalation) which would be payable to Adani Rajasthan if the domestic coal was available or the actual landed cost of domestic coal, whichever is higher and the price at which coal is secured from alternative sources.

**7. Mr. Amit Kapur, learned counsel appearing for the Respondent (Adani Rajasthan) in Appeal No. 202 of 2018 has filed the written submissions for our consideration as under:-**

**7.1** Adani Rajasthan's bid was premised on domestic coal is evident from the admission of Rajasthan Discoms in affidavit dated 31.07.2013 that non-availability of domestic coal for Kawai Project in accordance with the assurance given by the Indian Governmental Instrumentality in line with NCDP, 2007 is a Change in Law event. Such an admission is enough to conclude that the project was based on domestic coal. This position is also supported by Adani's application for domestic coal linkage, bid submissions on 06.08.2009, RVPNL's letters dated 07.09.2009 and the clarification of Adani Rajasthan dated 12.09.2009, the definition of "Fuel" in the PPA itself, Government of Rajasthan letters dated 25.06.2014, CCEA decision, and most importantly, the confirmation issued by the RUVNL (the holding company of the Rajasthan Discoms) to Adani

Rajasthan confirming “domestic coal” as the coal source under the PPA for the purpose of meeting the eligibility requirements under the SHAKTI Scheme. The above are clear admissions by Rajasthan Discoms prior to impugned Order as well as post to impugned order and are sufficient to conclude that the Bid/PPA is based on domestic coal.

**7.2** Energy Watchdog case is squarely applicable to the present case of Adani Rajasthan. A table was furnished by Adani Rajasthan showing the comparison of coal linkage status as on the cut-off date under the Haryana PPA (the subject matter of decision in Energy Watchdog case) and that under the Rajasthan PPA, to show the applicability of the Energy Watchdog case. The NCDP, 2007, Government of India letter dated 14.02.2012 (SLC meeting), Government of Rajasthan letter dated 17.02.2012, MoC letter dated 02.04.2013, SLC minutes of meeting dated 31.05.2013, CCEA decision dated 21.06.2013, presidential directive dated 17.07.2013, letter dated 14.11.2013 and the amended NCDP of 2013 were read along with MoP letters dated 31.07.2013 and the revised Tariff Policy of 2016. Relevant extracts of Energy Watchdog case relied upon are as under:-

“56. However, in so far as the applicability of clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under clause 13.1.1 if there is a change in any consent, approval or licence available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under clause 13.1.1. It is clear from a reading of the Resolution dated 21st June, 2013, which resulted in the letter of 31st July, 2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18th March, 2007 stands modified as the Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable.

.....

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

58. However, Shri Ramachandran, learned Senior Counsel for the appellants, argued that the Policy dated 18-10-2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that

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

- 7.3** Learned Counsel for Adani Rajasthan emphasized that the Energy Watchdog upheld the Change in Law claim of the generator in that case when there was no LoA or FSA as on the cut-off date under the relevant PPA. The Hon'ble Supreme Court has proceeded on the basis that the NCDP 2007 provided an assurance of 100% normative coal supply to the IPPs and this assurance was diluted or taken away by subsequent decisions through CCEA decision dated 21.06.2013, NCDP 2013, Ministry of Power letter dated 31.07.2013 and the statutory Revised Tariff Policy 2016 and since such decisions were made or issued by an Indian Governmental Instrumentality, the same qualified as Change in Law events under the provision of the PPA. The definition of Change in Law under the Rajasthan PPA and that under the Haryana PPA (discussed in the

Energy Watchdog judgement) is identical and therefore, the principles laid down by the Hon'ble Supreme Court in Energy Watchdog judgement squarely applies in the instant case.

**7.4** The fact that pursuant to SHAKTI Policy, Adani Rajasthan executed a supplementary PPA with the Appellants/Rajasthan Discom on 11.01.2018 is on the basis of the information submitted by Adani Rajasthan (endorsed by the Rajasthan Discoms) to CEA mentioned "Source of coal as per the PPA" "Domestic Coal". Based on this confirmation, CEA confirmed that Adani Rajasthan is eligible for participation in the auction process under SHAKTI scheme since PPA is based on Domestic coal.

**7.5** Contention of Rajasthan Discoms that Adani Rajasthan could procure coal from any other source is wrong since the identified source of fuel under the PPA is domestic coal; imported coal is mentioned only as a back-up arrangement meaning imported coal was envisaged as a temporary or stop-gap arrangement to meet any temporary shortfall in supply of domestic coal.

**7.6** It is wrong to say that tariff cannot be increased on the basis of imported coal use. Imported coal in the present case was to be used as a fall back option. The Appellants/Rajasthan Discoms are trying to

confuse the Tribunal. Energy Watchdog case makes it clear that tariff structure does not preclude seller from seeking available remedy under the PPA or in law.

**7.7** The methodology proposed by Adani Rajasthan was not contested by the Appellants/ Rajasthan Discoms before RERC and they cannot now question the same before this Tribunal.

**7.8** In any case, methodology is based on the difference between the actual fuel cost of alternate coal and cost of domestic coal if linkage would have been granted to Adani Rajasthan. It is premised on the principle of pass-through of additional expenditure incurred in procuring alternate coal as mandated by CCEA, MoP, Revised Tariff Policy and Hon'ble Supreme Court.

**8. The contentions of the parties in Appeal No. 305 of 2018 are summarized below:-**

**8.1** Ld. Counsel for the Adani Rajasthan submitted that RERC has wrongly restricted the claim of Change in Law to Adani Rajasthan with effect from COD till the domestic coal linkage was granted under SHAKTI Policy. RERC ignored that Adani Rajasthan had specifically prayed for approval of relief for past period as well as for future period based on the methodology proposed. Impact of

Change in Law must be computed based on the difference between 100% domestic coal supply assured in NCDP, 2007 *vis-à-vis* actual domestic coal supply. RERC has wrongly restricted the Change in law compensation till the date of grant of linkage under SHAKTI Policy especially when there is no such restriction under the PPA or SHAKTI Policy or Energy Watchdog case. SHAKTI Policy and the FSA thereunder continues the restriction in coal supply to 75% of the ACQ. This is evident from the FSAs executed by Coal India subsidiaries with Adani Rajasthan on 07.02.2018 which mentions that there is no penalty on the coal supplier for any supply shortfall up to 75% of the ACQ. The FSA with Northern Coalfields Limited is for 2.91 MMT and the two FSAs with South Eastern Coalfields Limited is for 0.7 MMT and 0.5 MMT. Hence, even after the FSAs, there continues to be shortfall in coal quantity, as against the 100% coal supply assured under the NCDP 2007.

- 8.2** The Supreme Court in Energy Watchdog case has already concluded that any cut down in domestic coal supply due to the decision of any Government Instrumentality is a change in law and the affected party needs to be restored to same economic position. The same ratio as decided in Energy Watchdog case applies to the

restriction in coal supply continued by Ministry of Coal (MoC) for the FSAs executed under the SHAKTI Policy.

**8.3** RERC erred in not granting Carrying Cost to Adani Rajasthan. This is contrary to the provisions of the PPA (which recognizes restitution) and the judgment in Energy Watchdog case. This is also violative of the principles of S. 61(b) of the Electricity Act, 2003 and the Tariff Policy, 2016.

**8.4** On the contrary, Ld. Counsel for the Respondents in Appeal No. 305 of 2018/Rajasthan Discoms submitted that Adani Rajasthan's argument that Adani Rajasthan is entitled to a relief even after the execution of FSA under the SHAKTI scheme is wrong. There is no limitation under the Shakti Scheme that the bidders for coal should bid for or otherwise shall be supplied a restricted quantum of coal i.e. less than the normative requirements of coal. The Shakti Scheme and the policy of the Government of India permit the bidder to participate in the bid process and bid for 100% of the normative requirement of coal without any limitation. It is open to the bidder to have sought for 100% of the normative requirement of coal in bidding process. In regard to the above, in the Order dated 24.01.2018 passed by RERC in Petition No. 1313 of 2018 filed by Adani Rajasthan for approval of the Supplementary PPA executed

between Adani Rajasthan and the Rajasthan Discoms, RERC had taken into account the terms of the Shakti Scheme, the discount in tariff offered by Adani Rajasthan for the balance period of the PPA with the Rajasthan Discoms and the Policy of the Government of India (Ministry of Coal).

- 8.5** The participation by Adani Rajasthan in the bid under the Shakti Scheme was for the coal linkage of 4.12 MTPA from the Northern Coalfield Limited (“**NCL**”) and South Eastern Coalfield Limited (“**SECL**”) for an aggregate capacity of 1283 MW. The allocation of coal under the Shakti Scheme by NCL/SECL was to the extent of 4.12 MTPA. The quantum of 4.12 MTPA of coal allocation from NCL/SECL is adequate for generation of electricity from the Kawai project to the extent of the contracted capacity of 1200 MW of the Rajasthan Discoms. In any event, it was for Adani Rajasthan to have decided on the bidding for adequate quantum of coal under the Shakti Scheme so that it is in a position to meet the 100% of the normative requirement of power supplied to the Rajasthan Discoms under the PPA entered into with them.
- 8.6** Any shortfall in the said quantum of coal for which Adani Rajasthan was allocated the coal linkage under the Shakti Scheme cannot be

considered as a change in law and is a commercial agreement between Adani Rajasthan and NCL/SECL.

- 8.7** The reliance on MoC letter dated 22.05.2017 is wrong. The reference to 75% of ACQ is not the allocation under new SHAKTI Scheme but for capacities which were allocated by way of LOA/FSA prior to the Letter dated 22.05.2017. Admittedly, Adani Rajasthan did not have any LOA/FSA with Coal Companies and therefore would not be covered under sub-heading (A). Adani Rajasthan does not fall within the 68000MW referred therein.
- 8.8** While NCDP, 2013 or any letter or direction given by the Central Government could be a change in law, the shortage of supply under a Scheme duly evolved and assurance of supply to a specified quantum is given by the Coal Companies, in the present case NCL/SECL, is not on account of any law. These are contractual matters to be dealt with between Adani Rajasthan and NCL/SECL.
- 8.9** Adani Rajasthan's claim for Carrying Cost has been rightly rejected. Adani Rajasthan did not produce any document before RERC in this regard. It was observed by RERC that Adani Rajasthan never raised any supplementary bill on the ground of change in law as required under the Clause 10.5.2 of the PPA. It was further stated in the said order that the question of Carrying Cost/interest would have arisen if

Adani Rajasthan had raised bill from time to time, however even after filing the Petition, Adani Rajasthan has not raised any supplementary bill towards impact of change in law. RERC therefore with the observation that the prayer for Carrying Cost is beyond the scope of prayer in the original Petition and considering the judgments cited in support of the claim of Carrying Cost has disallowed the said prayer.

**8.10** The change in law provision contained in the PPA, namely, Article 10 needs to be read with the provisions of the Article 8.8 of the PPA. This has been specifically stated in Article 10.5.2 which deals with the tariff adjustment payment on account of change in law as well as in Article 8.8 which refers to change in law under Article 10. Article 10.5.2 provides that such tariff adjustments for change in law has to be claimed by Adani Rajasthan through a supplementary bill as mentioned in Article 8.8.

**8.11** In view of the above the provisions relating to the restoration of Adani Rajasthan to the same economic position cannot be read in isolation. The restoration of economic position is not in absolute form and is conditional to other expression used “to the extent contemplated in this Article 10” which necessarily requires (a) the formula under Article 10.2 to be applied (b) the effect to be given for

Article 10.5.2 read with 8.8 regarding supplementary invoice to be raised for amounts determined as payable, time period to be allowed for payment of supplementary bill and issue of Carrying Cost/interest/late payment surcharge being applicable only in the event of non-payment of amount by the due date mentioned in the supplementary invoice.

**8.12** The Respondents/Rajasthan Discoms relied upon NTPC case and submitted NTPC case is squarely applicable to the present case. When the PPA does not provide for interest for the period prior to due date as per the supplementary bill to be raised, the interest cannot be granted. The principle of restitution as applied to defaults etc cannot be applied in the present case.

**9. We have heard learned counsel appearing for the Appellant, learned counsel for the Respondent Commission and learned counsel for the Respondent/DISCOM at considerable length of time and 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 principal issues emerge in the instant Appeals for our consideration:-**

**APPEAL NO. 202 of 2018**

**ISSUE NO.1:** Whether the State Commission was justified in holding that bid of Adani Rajasthan was based on domestic coal?

**ISSUE NO.2:** Whether in the facts and circumstances of the case, there was a change in law event in terms of Article 10 of the PPA and Energy Watchdog Judgment applicable in the present case ?

**APPEAL NO. 305 of 2018**

**ISSUE NO.3:** Whether RERC is justified in restricting the claims of Adani Rajasthan for change in law till the date of execution of FSA under the Shakti scheme?

**ISSUE NO.4:** Whether RERC failed to accept the settled position of law and the equities regarding award of Carrying Cost as claimed by Adani Rajasthan?

**Our Consideration & Analysis:**

**10. ISSUE NO.1:-**

**10.1** To decide the issue of basis of Adani Rajasthan's bid, it is relevant to extract the portions from the Impugned Order on the issue. The relevant extract is quoted as under:-

*“40. In the bid, Petitioner has specifically quoted domestic coal as primary fuel and imported coal as a fall back support arrangement. The word ‘Primary’ used in the bid denotes that domestic coal will be the main fuel and imported coal will be a fall back fuel. Therefore, the contention of the Respondents that the bid of the Petitioner was based on the imported coal is contrary to RFP and PPA and hence cannot be accepted.*

41. The MoU signed by GoR with the Petitioner and subsequent correspondence made by GoR for allocation of coal with Gol also substantiate the above that domestic coal was the main fuel to be used for generation. If either of the fuel could be used as primary fuel irrespective of the cost involved as contended by the Respondents, GoR would not have followed the Gol so vigorously for allocation of coal to the Petitioner. While interpreting the contract, the subsequent conduct is also a relevant factor.

42. Commission observes from record that Respondents accepted the bid not because of FSA produced in support of imported coal was there but because it was based on the rate quoted which was considered most competitive when compared to other bid and fully appreciating the fact that the 'domestic coal linkage' can be obtained by the Petitioner as per condition subsequent clause of the PPA.

43. Looking to the bid submitted by Petitioner, the terms of PPA and order of the Commission adopting tariff and recent allocation of coal by Gol under Shakti Scheme, no ambiguity remains on the fact that the bid was based on domestic coal and imported coal was only as fall back support arrangement. Therefore, there is no merit in the contention of the Respondents that bid was not based on domestic coal.

44. Respondents accepted the bid of the Petitioner knowing fully well that there is no coal linkage at that time. When Respondents sought clarification from the Petitioner to the effect that on what basis, (i.e. domestic coal or imported coal) its bid shall be evaluated, Petitioner specifically clarified that their bid be evaluated on the basis of domestic coal tie up as it has a MoU with GoR wherein State Government has assured in making its best effort in getting coal linkage from any other source for the project and they are sure to get domestic fuel tie up. On receiving clarification only by the Petitioner Respondents evaluated the bid on domestic coal basis.

45. Therefore, Commission is of the considered view that if the bid submitted by the Petitioner is read with PPA, it is clear that the fuel quoted for generation was domestic coal and not imported coal.”

**10.2** It would thus appear that RERC has dealt with this issue in detail.

Several efforts were made from time to time by Government of Rajasthan to facilitate grant of coal linkage to Adani Rajasthan.

However, the grant of coal linkage could not materialize till the time of the PPA execution or even later. This would not mean that Adani Rajasthan had not premised its bid on NCDP, 2007 which was the applicable policy at the time of the bid. When the Rajasthan Discoms sought their clarification, Adani Rajasthan expressly stated that their bid should be evaluated on the basis of domestic coal tie-up since they had placed reliance upon the provisions of the MoU with the Government of Rajasthan (GoR) and anticipated that they would be allotted a captive coal block or, they would be awarded domestic coal linkage since they were meeting the criteria for award of coal linkage at the relevant time and GoR was fully supporting their efforts to receive grant of domestic coal linkage. It is in this backdrop that Adani Rajasthan communicated to Rajasthan Discoms that imported coal has been considered only as a back-up option or arrangement.

**10.3** We deal with this issue as follows:-

i) There was an MoU entered into between Adani Enterprises Limited and Government of Rajasthan on 20.03.2008 where Government of Rajasthan had assured its support for allocation of captive coal block or coal linkage. On the basis of such assurance, Adani Rajasthan had applied for long term coal linkage on

02.07.2009, i.e., prior to the submission of the bid. The bid was submitted on 06.08.2009. In the bid, the tariff quote was in the domestic linkage coal format and Adani Rajasthan did not quote in imported coal format. Therefore, we agree with the contention of Adani Rajasthan that if the bid was not premised on domestic coal, RUVNL would not have allowed tariff to be quoted in linkage coal format. The RFP provided for six scenarios for quoting tariff and the bidder had an option of choosing any one of the scenarios viz (i) captive coal block (ii) linkage coal (iii) imported coal (iv) imported gas (v) domestic gas and (vi) hydro. Adani Rajasthan had submitted the bid in the format meant for linkage coal. Relevant portion IX of the RFP shows that there were only two scenarios i.e. scenario (i) and scenario (ii) where the bid can be submitted on the basis of domestic coal. The arguments of the Discoms that these scenarios would also include coal procured through e-auction or any other option from the domestic market does not have much force and lacks merit since the scenarios expressly contemplate quotation for captive coal block or linkage coal. E-auction coal is not a firm or long-term source of domestic coal which would underpin the bid for power supply under a long-term PPA. Another argument of Rajasthan Discoms that the generating company is expected to get coal from any other source is also not correct since there was express stipulation from Adani

Rajasthan that its bid should be evaluated on the basis of domestic coal tie-up.

(ii) We cannot lose sight of fact that Rajasthan Discoms in their reply dated 31.07.2013 filed before RERC had admitted that non-availability of domestic coal for the Kawai project due to the change in assurance given under NCDP, 2007 is a Change in Law event.

The relevant portion of the reply is extracted, which reads as under:

*“The non-availability of coal and inaction on the part of Central Government also put the case of the petitioner within the scope of Change in Law. It is stated that the Change in Law is also a result of failure on the part of the Government of India instrumentality to provide linkage coal supply to Kawai Project in accordance with the assurance given to the petitioner as well as in line with the New Coal Distribution Policy dated 18.10.2007.”*

(iii) This categorical admission is in itself enough to conclude that the Kawai project was based on domestic linkage coal. The Rajasthan Discoms while selecting Adani Rajasthan as a successful bidder had also considered that it would be beneficial for the Discoms to take into account the escalation rates for domestic coal offered by Adani Rajasthan. This is evident from the RERC order dated 31.05.2010 in Case No. 217/2010. The Rajasthan Discoms took the decision in their best interest. Once they have considered the fuel cost of domestic coal as the basis of the bid, it is not open for them to contend otherwise at this stage. It is also to be noted that after the submission of the bid, RVPNL on 07.09.2009 had sought a

clarification from Adani Rajasthan regarding the basis for the evaluation of the bid. Adani Rajasthan on 12.09.2009 duly clarified that the bid should be evaluated based on domestic coal.

(iv) Thereafter, Rajasthan Discoms executed the PPA. Article 1.1 of the PPA defines "Fuel" to mean the primary fuel used to generate electricity, namely, domestic coal/ imported coal as a back-up arrangement. From the definition, it is clear that the primary fuel to generate electricity from the project has been mentioned as domestic coal. In addition, the definition contemplates imported coal as a fall back arrangement. The meaning of 'fall back support arrangement' was considered by us in the order dated 24.09.2018 at para 17 to mean that primarily the domestic coal will be the main fuel and imported coal will be used only as fall back fuel. Moreover, the reliance of Rajasthan Discoms on fall back arrangement of imported coal to contend that the bid was not based on domestic coal or to deny relief to Adani Rajasthan cannot be accepted in the light of their categorical admission in the reply filed on 31.07.2013 as stated in above paragraphs and also when Rajasthan Discoms themselves have certified that the source of fuel under the PPA is domestic coal. It is noted that there is no reference to imported coal at all in the letter issued by Rajasthan Discoms to enable Adani Rajasthan to participate in SHAKTI Scheme coal linkage auction.

(v) Further, there is merit in the submissions of Adani Rajasthan that the FSA to be submitted within 10 months of signing of the PPA under Article 3.1.1 of the PPA (as a condition subsequent) is different from the imported coal CSA submitted as part of the qualification requirements. If the said “CSA” was the same as the FSA contemplated under Article 3.1.1 of the PPA, then the definition of “Fuel” would have referred to imported coal as the primary fuel and there would have been no separate requirement to submit the FSA to the Rajasthan Discoms ten (10) months after the execution of the PPA as part of fulfilment of conditions subsequent.

(vi) A series of documents mentioned and relied upon before us shows that the PPA was based on domestic coal. We notice that the Government of Rajasthan has made consistent efforts by writing letters to various authorities in Government of India to grant domestic coal linkage to Kawai project of Adani Rajasthan. In this regard reference was made to the Rajasthan Discoms’ affidavit dated 31.07.2013, letter of Government of Rajasthan dated 25.06.2014 to Ministry of Power, Coal, New and Renewable Energy and RUVNL’s confirmation regarding domestic coal as the source of fuel for the PPA for the purpose of eligibility under the SHAKTI scheme. Further, Adani Rajasthan has submitted that certain decisions by Government of India also establish that their bid was

based on domestic coal. In this context, reliance was placed on the MoP's letter dated 19.06.2013 and the CCEA decision dated 21.06.2013 which included Kawai Project under the 4660 MW capacity eligible to receive domestic coal supply subject to availability. It was reiterated that the whole sequence of events show that the CSA submitted as part of the bid was only to demonstrate the readiness of the raw material. We find from the above referred documents that the bid of Adani Rajasthan was based on domestic coal. We are in agreement with the finding of RERC that the eligibility to get coal linkage under SHAKTI scheme itself is sufficient to conclude and hold that the PPA in question is based on domestic coal.

**10.4** Such participation in SHAKTI scheme is also based on the endorsement given by Rajasthan Discoms. An extract of the letter issued by RUVNL to Central Electricity Authority for the purpose of certifying eligibility of Adani Rajasthan to receive coal under the SHAKTI Policy is set out below:

*"No.RUVNL/CE/SE(PP)/F.APR/D.203*

*Date : 04.08.2017*

*Sh.N.S. Mondal (Director TPPD),  
Thermal Project Planning & Development,  
Sewa Bhawan, R.K. Puram, New Delhi-110066.*

**Subject:** *Furnishing of PPA details of Power Projects for which coal is sought under New Coal Linkage Policy for Power Sector-2017, SHAKTI.*

*On the subject cited above, please find enclosed herewith duly authenticated PPA details in the format as desired in respect of 1320 MW Kawai Thermal Project of M/s APRL for needful in the matter.*

*Ecl. : As above.*

*Chief Engineer  
RUVNL, Jaipur*

.....

**FORMAT FOR FURNISHING DETAILS OF PPA WITH DISCOMS FOR LONG/MEDIUM TERM SALE FOR POWER FOR WHICH LINKAGE IS REQUESTED UNDER SHAKTI SCHEME**

1. Name of Project	<i>Kawai Thermal Power Project, Rajasthan</i>
2. Capacity (MW) and unit configuration	<i>1320 MW (2 X660 MW)</i>
3. Name of Developer as per Co. registration/Registration No.	<i>Adani Power Rajasthan Ltd./ U40104GJ2008)LC052743</i>
4. COD (Actual/Anticipated)	<i>Actual COD : Unit-1 : 31.05.2013 Unit-2 : 31.12.2013</i>
5. Status of PPA 5.1 Name of DISCOM/Lead Procurer (In case of more than one PPA details may furnished separately for each PPA)	<i>1. Jaipur Vidyut Vitran Nigam Ltd. (Lead Procurer) 2. Jodhpur Vidyut Vitran Nigam Ltd. 3. Ajmer Vidyut Vitran Nigam Ltd.</i>
5.2 If the PPA has been signed as Back to Back with Trader the following details may be furnished.	<i>Not Applicable</i>
5.2.1 Name of Trader	
5.2.2 PPA capacity (MW)	
5.2.3 Date of signing of PPA with Trader	
5.2.4 Tenure	
6. Capacity (MW) for which PPA has been signed either directly with Discom/Lead Procurer or through Trader as back to back (specify Gross capacity, in case of Net capacity approved Aux. consumption and Transmission loss if any shall be taken into account)	<i>PPA Capacity (net of Aux consumption at bus bar) : 1200 MW  Aux Consumption (as per CERC norms) : 6.5% Gross PPA Capacity : 1283 MW</i>

7. Tenure (Years)	25 years
8. Date of signing of PPA with Discom	28.01.2019
9. Effective date of supply of power as per PPA	31.08.2013
10. Actual date of supply of power	31.05.2013(supply of firm power)
11. PPA valid up to (date)	30.12.2038
12. Remaining period of the PPA in Years	21 years
<b>13. Source of coal as per PPA and adopted by Regulator</b>	<b>Domestic Coal</b>

.....”

**10.5** Based on such submission, the CEA confirmed that Adani Rajasthan is eligible for participation in the auction process since the PPA is based on domestic coal as endorsed by the Rajasthan Discoms. Accordingly, Adani Rajasthan participated in the auction process and became a successful bidder for allocation of coal linkages. Having acknowledged that PPA is based on domestic coal, Rajasthan Discoms cannot change their stand before us. In view of the above observations, it is held that the PPA was based on domestic coal and the findings of the RERC on this issue in the impugned order do not suffer from any infirmity or perversity. Accordingly, interference of the Tribunal on this issue is not called for.

**11. ISSUE NO.2:-**

**11.1** When the matter was being argued in the preliminary stage and the IA 915 of 2018 in Appeal No. 202 of 2018 was being heard, we in our interim order dated 24.11.2018 specifically observed though

*prima facie* that in terms of the Energy Watchdog case any change in arrangement for supply of coal due to modification of NCDP is a change in law. We had also noted that it is not in dispute that the assurances held out in the NCDP, 2007 to supply 100% of normative requirement of coal for all IPPs including for future capacity additions was not adhered to by the Government of India. This is evident from the minutes of SLC(LT) meeting held on 14.02.2012, wherein the Committee noted the CIL's position that there was no scope to grant further coal linkages for the 12<sup>th</sup> Plan Period. Subsequently, in its meeting held on 31.05.2013, the SLC(LT) decided to keep all the applications received for grant of coal linkages in abeyance. It is also not in dispute that, Kawai project finds a place in the 12<sup>th</sup> Plan Projects.

**11.2** SLC(LT) is a body set up by the Ministry of Coal to decide upon the coal allocations to end-users including IPPs and it, therefore, falls within the definition of "Indian Governmental Instrumentality" in Article 1.1 of the PPA. The decision of SLC(LT) to keep in abeyance the applications for coal linkage including that made by Adani Rajasthan in effect is a change or modification to the assurance of 100% coal supply contained in NCDP 2007. No argument has been advanced or document placed on record to suggest that the

application made by Adani Rajasthan was kept in abeyance on account of any deficiency in the application, clearly it was a policy decision made by the SLC(LT), an Indian Governmental Instrumentality, to not allot any further coal linkages under the pending applications in light of overall coal shortage projected by CIL, as against the supply commitments already made under the LoAs/FSAs. Therefore, the decision of SLC(LT) on 31.05.2013 to deviate from the 100% supply assurance contained in NCDP 2007 amounts to a 'Change in Law' as per the terms of Article 10 of the PPA.

**11.3** If any project is affected by such change in law, it is entitled to be restored to the same economic position by allowing the higher cost of any alternate coal that is being procured as against the assurance of domestic coal supply assured from Coal India Limited and its subsidiaries. Furthermore, Rajasthan Discoms have categorically acknowledged before RERC that there is change in law in the case in hand, which will cause adverse impact upon the Seller's performance under the PPA. The arguments of the Rajasthan Discoms at the stage of the Interim Application and at the time of final hearing remain similar and has the same thrust. The Rajasthan Discoms contended that Energy Watchdog case is not applicable to

the present case in view of the fact that Adani Rajasthan had no coal linkage or Letter of Assurance or FSA from any coal company on the date of bidding, which has been taken away by the introduction of NCDP, 2013 replacing NCDP, 2007. They also contended if only Adani Rajasthan had allocation of coal from Government of India or coal linkage arrangement and if there is any shortfall or deficiency in supply of coal from the allotted quantity, then only the question of payment of compensation would arise on account of change in NCDP, 2007, which came to be replaced by NCDP, 2013.

**11.4** To examine the tenability of arguments advanced by Rajasthan Discoms, a comparison between the provisions of the PPA involved in Energy Watchdog case vis-à-vis the PPA involved in the present case is relevant. Now let us consider the relevant clause of those two PPAs:-

**(i) Definition of Law and Article 13 of the PPA involved in Energy Watchdog case:-**

*“Law” means, in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include all applicable rules, regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include all rules, regulations, decisions and orders of the Appropriate Commission;*

**“Change in Law”** means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline:

(i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of law, tribunal or Indian Governmental Instrumentality provided such Court of law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement or (iv) any change in the (a) the Declared Price of Land for the Projector (b) the cost of implementation of the resettlement and rehabilitation package of the land for the project mentioned in the RFP or (c) the cost of implementing Environmental Management Plan for the Power Station mentioned in the RFP ;OR (d) the cost of implementing compensatory afforestation for the Coal Mine, indicated under the RFP and the PPA;

But shall not include (i) any change in any withholding tax on income or dividends distributed to the shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission.

.....

### **13.2 Application and Principles for computing impact of Change in Law**

While determining the consequence of Change in Law under Article 13, the Parties shall have due regard to the principle that the purpose of compensation the Party, affected by such Change in Law, is to restore through Monthly Tariff payments, to the extent contemplated in this Article 13, the affected Party to the same economic position as if such Change in Law has not occurred.”

#### **(ii) Definition of Law and Article 10 of the present PPA.**

“Law” shall mean in relation to this Agreement, all laws including Electricity Laws in force in India and any statute, ordinance, regulation, notification or code, rule, or any interpretation of any of them by an Indian Governmental Instrumentality and having force of law and shall further include without limitation all applicable rules,

*regulations, orders, notifications by an Indian Governmental Instrumentality pursuant to or under any of them and shall include without limitation all rules, regulations, decisions and orders of the Appropriate Commission;*

## **“ARTICLE 10 CHANGE IN LAW**

### **10.1 Definitions**

*In this Article 10, the following terms shall have the following meanings:*

*10.1.1 "Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior to the Bid Deadline resulting into any additional recurring/non-recurring expenditure by the Seller or any income to the Seller:*

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

### **10.2 Application and Principles for computing impact of Change in Law**

10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.

### **10.3 Relief for Change in Law**

#### **10.3.1 During Construction Period**

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Power Station in the Tariff shall be governed by the formula given below:

For every cumulative increase/ decrease of each Rupees Sixteen crore Fifty Lakh (Rs.16.50 crore) in the Capital Cost during the Construction Period, the increase/ decrease in Non Escalable Capacity Charges shall be an amount equal to zero point two six seven (0.267%) of the Non Escalable Capacity Charges. In case of Dispute, Article 14 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/ decrease exceeds amount of Rupees Sixteen crore Fifty Lakh (Rs.16.50 crore).

#### **10.3.2 During Operating Period**

The compensation for any decrease in revenue or increase in expenses to the Seller shall be payable only if the decrease in revenue or increase in expenses of the Seller is in excess of an amount equivalent to 1 % of the value of the Letter of Credit in aggregate for the relevant Contract Year.

10.3.3 For any claims made under Articles 10.3.1 and 10.3.2 above, the Seller shall provide to the Procurers and the Appropriate Commission documentary proof of such increase/ decrease in cost of the Power Station or revenue/ expense for establishing the impact of such Change in Law.

10.3.4 The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Articles 10.3.1 and 10.3.2, and the date from which such compensation shall become effective, shall be final and binding on both the Parties subject to right of appeal provided under applicable Law.

#### **10.4 Notification of Change in Law**

10.4.1 *If the Seller is affected by a Change in Law in accordance with Article 10.1 and the Seller wishes to claim relief for such a Change in Law under this Article 10, it shall give notice to the Procurers of such Change in Law as soon as reasonably practicable after becoming aware of the same or should reasonably have known of the Change in Law.*

10.4.2 *Notwithstanding Article 10.4.1, the Seller shall be obliged to serve a notice to the Procurers under this Article 10.4.2, even if it is beneficially affected by a Change in Law. Without prejudice to the factor of materiality or other provisions contained in this Agreement, the obligation to inform the Procurers contained herein shall be material.*

*Provided that in case the Seller has not provided such notice, the Procurers shall have the right to issue such notice to the Seller.*

10.4.3 *Any notice served pursuant to this Article 10.4.2 shall provide, amongst other things, precise details of:*

*(a) the Change in Law; and*

*(b) the effects on the Seller.*

#### **10.5 Tariff Adjustment Payment On account of Change in Law**

10.5.1 *Subject to Article 10.2, the adjustment in monthly Tariff Payment shall be effective from:*

*(i) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*(ii) the date of order/ judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

10.5.2 *The payment for Change in Law shall be through Supplementary Bill as mentioned in Article 8.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff."*

**11.5** It may be seen from the above that in both the PPAs, Change in Law is defined as the occurrence of any event after the date, which is

seven (7) days prior to the Bid Deadline. Therefore, for reckoning the change in law the position prevailing as on cut-off date is relevant. In both cases, the basis for the bid in respect of the fuel was assurance under NCDP, 2007 and there was no Letter of Assurance or FSA for the project at the time of the bidding. The Rajasthan Discoms have not denied the factual position/comparison of the PPAs. That being the case, there is no merit in the argument of Rajasthan Discoms that Energy Watchdog case is not applicable to the present case. We note that as on cut-off date the law prevailing is NCDP 2007 in both the cases. The supply assurance contained in NCDP 2007 was changed or altered for the Kawai Project by the decision of SLC(LT) on 31.05.2013. The main thrust of Adani Rajasthan's arguments is that even before the amendment of 2013 in NCDP 2007, the decision taken by SLC(LT) in May 2013 amounts to a Change in Law event under the PPA. The 2013 amendment to NCDP 2007 may be seen as a continuum of the SLC(LT)'s decision in May 2013 since it was Coal India's inability to meet the committed/assured coal supply that prompted the Ministry of Coal to issue the amendment to NCDP in July 2013, based on the CCEA decision in June 2013. The CCEA decision of June 2013 directed as follows:

*"The Cabinet Committee on Economic Affairs (CCEA) today approved the following mechanism for supply of coal to power producers:*

- (i) Coal India Ltd. (CIL) to sign Fuel Supply Agreements (FSA) for a total capacity of 78000 MW including cases of tapering linkage, which are likely to be commissioned by 31.03.2015. Actual coal supplies would however commence when long term Power Purchase Agreements (PPAs) are tied up.*
- (ii) Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal quantity of 65 percent, 65 percent, 67 percent and 75 percent of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan.*
- (iii) To meet its balance FSA obligations, CIL may import coal and supply the same to the willing Thermal Power Plants (TPPs) on cost plus basis. TPPs may also import coal themselves. MoC to issue suitable instructions.*
- (iv) Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC. MoC to issue suitable orders supplementing the New Coal Distribution Policy (NCDP). MoP to issue appropriate advisory to CERC/SERCs including modifications if any in the bidding guidelines to enable the appropriate Commissions to decide the pass through of higher cost of imported coal on case to case basis.*
- (v) Mechanism will be explored to supply coal subject to its availability to the TPPs with 4660 MW capacity and other similar cases which are not having any coal linkage but are likely to be commissioned by 31.03.2015, having long term PPAs and a high Bank exposure and without affecting the above decisions.”*

**11.6** The Kawai Project falls within the 4660 MW capacity for which the CCEA directed that coal will be supplied subject to availability and as a result, the supply assurance contained in NCDP 2007 was altered and the supply assurance was effectively removed or taken away by the aforesaid CCEA decision. In implementation of the CCEA decision, the MoC issued the NCDP 2013 amending the NCDP 2007

and effectively restricted coal supplies to between 65-75% of the ACQ for the identified capacities. Adani Rajasthan has, therefore, contended that the SLC(LT) decision of May 2013, the CCEA decision of June 2013 and the consequential amendment to NCDP in July 2013 constitute Change in Law events under Article 10 of the PPA. In addition, on the basis of the CCEA decision, the MoP issued an advisory to the CERC and SERCs on 31.07.2013 and the Tariff Policy was amended by the Government of India on 28.01.2016 which provides for pass-through of higher coal cost to meet the shortfall in domestic coal supplies as against the assured quantity.

**11.7** We find force in the submissions of Adani Rajasthan since the decisions of SLC(LT), CCEA, the MoC and the MoP are the decisions of Indian Governmental Instrumentality and each of these decisions removed or took away the 100% coal supply assurance contained in NCDP 2007 which was the basis of the bid by Adani Rajasthan to the Rajasthan Discoms. Since each of these decisions were made after the cut-off date, they qualify as Change in Law and entitle Adani Rajasthan to relief in terms of Article 10 of the PPA.

**11.8** Further, the principles laid down in Energy Watchdog is relevant to the extent that in both cases, at the time of submission of bids, there was no LoA or FSA in the hands of the generator and in both cases the assured supply of domestic coal was cut down due to certain policy decisions taken by an Indian Governmental Instrumentality. We are, therefore, in agreement with the findings of RERC that Energy Watchdog case is applicable to the present case.

**11.9** The Rajasthan Discoms' argument that Adani Rajasthan did not have any coal linkage allocation and hence the change in NCDP, 2007 does not qualify as change in law event under Article 10 of the PPA is unsustainable. There is no doubt that at the time of submission of bid, NCDP, 2007 was the policy framework governing the allocation of coal linkage to IPPs. As analysed by us in the previous paragraphs, the bid of Adani Rajasthan was based on domestic coal allocation which allocation could only have been made pursuant to the provisions of NCDP, 2007. It follows that any change in NCDP 2007 which alters or modifies the governing framework of domestic coal allocation and meets the definition of "Law" under the PPA, then such a change would qualify as Change in Law under Article 10 of the PPA. The change in NCDP, 2007 is carried out by an Indian Governmental Instrumentality and hence the definition of

'Law' read with the provision of 'Change in Law' makes it clear that this act of change in NCDP, 2007 is a Change in Law event. The decision of this Tribunal to disallow change in law for domestic coal on the ground that the word "Policy" is not covered in the definition of 'Law' under PPA was reversed by the Hon'ble Supreme Court in Energy Watchdog Case. In Energy Watchdog case, the Supreme Court has recognized the change in NCDP, 2007 as a Change in Law event for a project which did not have any LoA or FSA at the time of bid submission. Therefore, it is immaterial for determination of Change in Law event that Adani Rajasthan did not have the coal linkage allocation at the time of submission of its bid to Rajasthan Discoms. Hence, the findings of RERC are consistent with the principles laid down in Energy Watchdog case and we uphold the Impugned Order to that extent.

**11.10** Coming to the objection of Rajasthan Discoms to the methodology adopted by Adani Rajasthan for arriving at the compensation to be paid by the Discoms towards Change in Law claim, it is noted that Adani Rajasthan had adopted the methodology in terms of the mandate in the CCEA decision dated 21.06.2013, MoP letter dated 31.07.2013, revised tariff policy dated 28.01.2016 and the Energy Watchdog case. In fact, all these documents recognize/ specify that

the principle for compensation for change in law event is to give pass-through of the additional cost incurred on procurement of coal from alternate sources to mitigate the shortfall in domestic coal supply in order to restore the affected party to the same economic position. The RERC after considering all this had allowed Adani Rajasthan in para 60 of the Impugned Order to raise supplementary invoices towards domestic coal shortfall. In this regard, it was brought to our attention that Rajasthan Discoms did not object to the methodology during the proceedings before the RERC. The methodology was proposed by Adani Rajasthan in its affidavit dated 09.05.2017. We noticed that in the Appeal also the methodology proposed by Adani Rajasthan was not objected to by the Rajasthan Discoms and the Discoms only stated at a later stage that RERC had not adjudicated upon the methodology and hence, there was no clarity. It is noted that in an application filed during the pendency of these appeals, for clarification of the Impugned Order before the State Commission with regard to the methodology proposed by Adani Rajasthan and approved by RERC, RERC has observed that the impugned order was detailed and warrants no further clarification. Relevant extracts of RERC order dated 08.01.2009 in IA No. 6 in Petition No. 392/13 are mentioned hereinunder:-

*“...10.Commission observes that after considering all the submissions made by the parties and material documents placed on the record. Commission has passed detailed and reasoned order.”*

**11.11** From the records before RERC, it appears that the Rajasthan Discoms had not pleaded any specific objection to the methodology proposed by Adani Rajasthan. The fact that Rajasthan Discoms had not contested the methodology before RERC would bar Rajasthan Discoms to question the elements of methodology at this stage.

**11.12** The methodology was disputed by Rajasthan Discoms only during pleadings stage of this appeal. Rajasthan Discoms in its Written Submission dated 15.04.2019 states that the change in law relief should be restricted to the difference between the (i) landed cost if alternative coal (imported coal) and (ii) the landed cost of domestic linkage coal or the quoted energy charge (whichever is higher in (ii)). From the impugned order and the observation made in clarification petition, RERC seems to have given its consideration to the methodology proposed by Adani Rajasthan and basis that issued a direction to the Rajasthan Discoms to verify the bills and invoices of alternate coal purchased and additional costs incurred by Adani Rajasthan and arrive at the compensation payable to Adani Rajasthan. RERC's direction to the Discoms to verify the additional

costs incurred by Adani Rajasthan in procuring alternate coal shows that it did not find any infirmity in the methodology proposed by Adani Rajasthan.

**11.13**The purpose of change in law relief/compensation is to restore the affected party to the same economic position as if the change in law had not occurred. In the instant case, this would involve compensating Adani Rajasthan for the cost incurred in purchasing alternate coal to meet the non-availability of domestic coal promised under the NCDP 2007. The MoP letter of 31.07.2013 as well as the Revised Tariff Policy of 2016 support the principle of compensation to the generators for the additional cost incurred in procuring alternate coal. The methodology proposed by Adani Rajasthan prima facie appears to be consistent with the principle/basis of compensation for shortfall/non-availability of domestic coal given by the MoP and we do not find any reason to interfere with the same.

**11.14**Since Rajasthan Discoms had not raised any specific objection before the RERC to the methodology proposed by Adani Rajasthan, their objection or alternate proposal before us is a belated objection and the same cannot be considered in appeal. In this connection, useful reliance may be placed on the judgment of the Hon'ble Supreme Court in the case of *Ram Sarup Gupta v. Bishnu Narain*

*Inter College*, (1987) 2 SCC 555, wherein the Court observed as follows:

*“6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In *Bhagwati Prasad v. Chhandramaul* {AIR 1966 SC 735 : (1966) 2 SCR 286, 291} a Constitution Bench of this Court considering this question observed:*

*“If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both*

*parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the court cannot do injustice to another. ”*

**11.15** Further, in Appeal No. 45 of 2016 (Gridco Ltd. vs.GMR Kamalanga Energy Ltd.), this Tribunal had disallowed raising of fresh plea at the stage of appeal. The relevant paragraph from that order is extracted below:

*“The Central Commission also submitted that the Appellant has not indicated reasons why these issues cannot be raised before the Central Commission. It is settled in law that fresh issues cannot be raised in an appeal. We agree with the contention of the Central Commission that fresh issues cannot be taken at the appeal stage. Hence, we are not inclined to deal with these issues in the present Appeal.”*

With the above observations, we dismiss the issues raised by the Rajasthan Discoms.

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

**12.1** In order to appreciate the issue as to what would be the date up to when the relief of change in law would be applicable, two elements

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

**12.2** The fact that shortfall continues even after the execution of FSA would mean that the compensation to make up for this shortfall would need to continue until the shortfall exists. The findings of RERC in paragraph 52 and 53 of the Impugned Order demonstrate that Adani Rajasthan's claims has been restricted from COD till domestic coal linkage is granted under Shakti Scheme. There is no reason provided for restricting the claim till the grant of coal linkage under the SHAKTI scheme. This according to us is in violation of

intent of Article 10 of the PPA which mandates that the affected party needs to be resituated / restored to the same economic position.

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

**12.4** We are inclined to agree with the submission of Adani Rajasthan that they cannot be penalized for uncontrollable factor/shortfall of coal once they have diligently availed all remedies available under the PPA and approached all relevant authorities and governmental instrumentalities. In *GMR Kamalanga Energy Ltd. v. CERC & Ors.*

(Appeal No. 193 of 2017), we had occasion to consider, in the context of pre-SHAKTI FSA, as to whether relief for domestic coal shortfall needs to be limited to the ACQ levels specified in the FSA and we came to the conclusion that the impact or effect of change in law has to be considered against the originally assured quantum of coal. We also observed that *“if the bid was based on the SLC allocation and LOA prior to the cut off date indicated in the PPA dated 09.11.2011, any new condition including supply of imported coal or penalty provisions cannot be taken into consideration.”*

**12.5** In the instant case, we have found in the previous paragraphs that Adani Rajasthan’s bid was premised on domestic coal on the basis of the 100% domestic coal supply assurance contained in NCDP 2007. Since SHAKTI Policy and the FSA executed thereunder still do not meet the assurance of 100% supply of domestic coal to Adani Rajasthan, it would follow that Adani Rajasthan would need to be compensated for any shortfall in supply of domestic linkage coal even post grant of coal linkage under the SHAKTI Policy. Rajasthan Discoms have not disputed that the introduction of SHAKTI Policy constitutes a Change in Law under the PPA. Their contention is that any shortfall of coal under the SHAKTI FSA by the coal companies is a contractual matter to be sorted out between Adani Rajasthan and

the coal companies. We are not persuaded by this argument for the reason that we have already held in GMR Kamalanga case that the contractual conditions or limitations were not present in NCDP 2007 at the time of bid submission by Adani Rajasthan. This contention of Rajasthan Discoms is also against the principle laid down in Energy Watchdog judgment. The SHAKTI Policy continues the earlier coal supply restriction to 75% of ACQ. If actual supply of domestic linkage coal under the SHAKTI FSA is higher, it goes without saying that the generator's relief or compensation under the Change in Law provisions would be limited to the actual shortfall in supply of domestic linkage coal. We also note that there is no rational basis to assume that the supply under the SHAKTI FSAs would be higher or better than that under the pre-SHAKTI FSAs.

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

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

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

**13. Issue No.4 :-**

**13.1** Coming to the second issue in Appeal No. 305 of 2018, it is relevant to note that in terms of Article 10.2.1 of the PPA the Affected party is to be restored to the same economic position as if the 'Change in Law' event had not occurred. Adani Rajasthan contends that one of the key ingredients for such restitution as contemplated under the PPA would be the payment of 'Carrying Cost' from the date the Change in Law event occurred till the date of raising the claim/invoice. Late Payment Surcharge would apply for the subsequent period as per PPA provisions in the event of delay in payment by the Discoms beyond the Due Date.

**13.2** Adani Rajasthan submitted that this Tribunal has already allowed Carrying Cost under the same PPA for another set of Change in Law claims. In Appeal No. 119 of 2016 and 277 of 2016 (Adani Power Rajasthan Ltd. vs. RERC & Ors.), this Tribunal held as follows:-

*“xxviii. Now we have reached to the final issue raised by APRL related to carrying cost on the allowed Change in Law events. For the sake of brevity, we are not discussing the claims of APRL and counter claims of the Discoms on this issue as the said issue has been decided by this Tribunal in its judgement dated 13.4.2018 in Appeal No. 210 of 2017 in case of Adani Power Ltd. v. CERC wherein this Tribunal after detailed analysis has allowed carrying cost on the allowable Change in Law events. The claims and counter claims of the parties have been taken into account while applying the said decision of this Tribunal in the present judgement. We straight way come to the relevant portion of the said judgement which is reproduced below:*

...

*This Tribunal vide above judgement has considered that allowed Change in Law events are to be passed onto the Procurer by a way of adjustment to the tariff. Further, it has been held that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s).*

*xxix. Now let us analyse the provisions of the PPA in the present case in light of the above judgement of this Tribunal. The relevant extract from the PPA is reproduced below. It is also observed that the Gujarat Bid-01 PPA have no provision for restoration to the same economic position as if Change in Law hasnot occurred. Accordingly, this decision of allowing Carrying Cost will not be applicable to the Gujarat Bid-01 PPA.”*

*This Tribunal vide above judgement has considered that allowed Change in Law events are to be passed onto the Procurer by a way of adjustment to the tariff. Further, it has been held that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the*

*Seller is eligible for carrying cost for such allowed Change in Law event(s).*

*“10.2 Application and Principles for computing impact of Change in Law 10.2.1 While determining the consequence of Change in Law under this Article 10, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through monthly Tariff Payment, to the extent contemplated in this Article 10, the affected Party to the same economic position as if such Change in Law has not occurred.”*

*From the above it can be seen that due to Change in Law event, the affected party is to be restored to the same economic position as if Change in Law event has not occurred.*

*Further, from the perusal of the PPA we hold that the allowed Change in Law event (s) is to be passed on to the Procurer by way of adjustment in Tariff.*

*xxx. We also observe that the PPA in the present case is having similar provisions as in case of the judgement of this Tribunal produced above on the issue related to the carrying cost.*

*Accordingly, in view of our discussions as above, this issue is considered in favour of APRL/Appellant.”*

**13.3** Subsequent to the above judgment, the Tribunal’s judgment in Adani Power (Mundra) Ltd. v. CERC & Ors. was challenged before the Hon’ble Supreme Court in Civil Appeal No. 5865 of 2018. The Hon’ble Supreme Court vide its order dated 25.02.2019 has upheld Tribunal’s order with the following observations:

*“6. It will be seen that Article 13.4.1 makes it clear that adjustment in monthly tariff payment on account of change in law shall be effected from the date of the change in law [see sub-clause (i) of clause 4.1], in case the change in law happens to be by way of adoption, promulgation, amendment, re-enactment or repeal of the law or change in law. As opposed to this, if the change in law is on account of a change in interpretation of law by a judgment of a Court or Tribunal or governmental*

*instrumentality, the case would fall under sub-clause (ii) of clause 4.1, in which case, the monthly tariff payment shall be effected from the date of the said order/judgment of the competent authority/Tribunal or the governmental instrumentality. What is important to notice is that Article 13.4.1 is subject to Article 13.2 of the PPAs.*

*7. Article 13.2 is an in-built restitutionary principle which compensates the party affected by such change in law and which must restore, through monthly tariff payments, the affected party to the same economic position as if such change in law has not occurred. This would mean that by this clause a fiction is created, and the party has to be put in the same economic position as if such change in law has not occurred, i.e., the party must be given the benefit of restitution as understood in civil law. Article 13.2, however, goes on to divide such restitution into two separate periods. The first period is the “construction period” in which increase/decrease of capital cost of the project in the tariff is to be governed by a certain formula. However, the seller has to provide to the procurer documentary proof of such increase/decrease in capital cost for establishing the impact of such change in law and in the case of dispute as to the same, a dispute resolution mechanism as per Article 17 of the PPA is to be resorted to. It is also made clear that compensation is only payable to either party only with effect from the date on which the total increase/decrease exceeds the amount stated therein.*

*8. So far as the “operation period” is concerned, compensation for any increase/decrease in revenues or costs to the seller is to be determined and effected from such date as is decided by the appropriate Commission. Here again, this compensation is only payable for increase/decrease in revenue or cost to the seller if it is in excess of an amount equivalent to 1% of the Letter of Credit in aggregate for a contract year. What is clear, therefore, from a reading of Article 13.2, is that restitutionary principles apply in case a certain threshold limit is crossed in both sub-clauses (a) and (b). There is no dispute that the present case is covered by sub-clause (b) and that the aforesaid threshold has been crossed. The mechanism for claiming a change in law is then set out by Article 13.3 of the PPA.*

*9. In Civil Appeal No. 6190 of 2018, the PPA contains Article 13.4 as follows:*

*“13.4 Tariff Adjustment Payment on account of Change in Law  
13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:*

*(a) the date of adoption, promulgation, amendment, re-enactment or repeal of the Law or Change in Law; or*

*(b) the date of order/judgment of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.*

*(c) the date of impact resulting from the occurrence of Article 13.1.1.*

*13.4.2 The payment for Changes in Law shall be through Supplementary Bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the*

*Seller after such change in Tariff shall appropriately reflect the changed Tariff.”*

*It will be seen that sub-clause (c) does not occur in the PPA in Civil Appeal No.5865 of 2018. As we have held that the present case is governed by sub-clause (i) of Article 13.4.1, it is obvious that sub-clauses (b) and (c) have no application to the facts of the present case.*

*10. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the*

*order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.*

...

*16. Lastly, the judgment of this Court in Energy Watchdog v. Central Electricity Regulatory Commission and Ors., (2017) 14 SCC 80 was also relied upon. In this judgment, three issues were set out and decided, one of which was concerned with a change in law provision of a PPA. In holding that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPAs, this Court referred to Clause 13.2 as follows:*

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

*There can be no doubt from this judgment that the restitutionary principle contained in Clause 13.2 must always be kept in mind even when compensation for increase/decrease in cost is determined by the CERC.*

*17. In this view of the matter, the appeals are accordingly dismissed.”*

**13.4** Therefore, in terms of the decisions of this Tribunal and the Hon'ble Supreme Court cited above, Adani Rajasthan is undoubtedly entitled for Carrying Cost from the date the Change in Law event came into

force. The RERC fell in error in denying the claim for Carrying Cost to Adani Rajasthan. Further, since carrying cost is nothing but a compensation towards the time value of money and restitution in terms of the PPA, we deem it appropriate that the carrying cost be paid on the same basis as the late payment surcharge under the PPA. Hence we hold that the impugned order is liable to be set aside on this issue.

**14. Summary of our Findings:-**

**14.1** In view of the discussions and reasoning mentioned hereinabove, we hold that bid of Adani Rajasthan was based on domestic coal and accordingly covered under the Change in Law event in terms of PPA and the judgment of Hon'ble Supreme Court in Energy Watchdog case. Further, Adani Rajasthan is also entitled for Change in Law under the Shakti Scheme as well as payment towards carrying cost.

**14.2** Rajasthan Discoms are directed to pay the amount of Change in Law compensation, as approved herein, along with applicable Carrying Cost by duly verifying the relevant supporting documents for fuel cost and as per applicable Tariff Regulations for operating parameters. Since Adani Rajasthan has already incurred the costs in procuring alternate coal and supplying power to the Rajasthan

Discoms using such coal, equity requires that the compensation payments for the period up to the date of this order be made expeditiously.

**14.3** We are informed that Rajasthan Discoms have already paid 50% of the Change in Law claim approved by the RERC, pursuant to the order of the Hon'ble Supreme Court. Accordingly, Rajasthan Discoms are directed to verify the documents submitted by Adani Rajasthan and make balance 50% payment along with Carrying Cost within two months from the date of this Judgment & order.

**14.4** For the Change in Law claim pertaining to the period after the grant of coal linkage under the SHAKTI Policy, Rajasthan Discoms shall make payment along with Carrying Cost to Adani Rajasthan within three months of it submitting the claim along with the requisite supporting documents.

### **ORDER**

For the forgoing reasons, as stated supra, we are of the considered opinion that issues raised in the Appeal No. 202 of 2018 are devoid of merits and hence Appeal is dismissed.

We find merits in the Appeal No. 305 of 2018 and accordingly it is allowed.

The Impugned order passed by Rajasthan Electricity Regulatory Commission dated 17.05.2016 in Petition No. RERC-392 of 2013 is hereby partly upheld and partly set aside to the extent of our findings and directions set out in Para 14.1 to 14.4 above.

In view of the disposal of the Appeals, the relief sought in the IA No. 1750 of 2018 does not survive for consideration and accordingly stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **14<sup>th</sup> day of September, 2019.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / ~~NON-REPORTABLE~~**

Pr