

Rajasthan Electricity Regulatory Commission

Petition No. RERC- 392/13

In the matter of petition filed by M/s Adani Power Rajasthan Ltd. under Sections 61, 63 & 86 of the Electricity Act, 2003 read with statutory framework governing procurement of power through competitive bidding.

Coram:

Shri Vishvanath Hiremath, Chairman
Shri R.P. Barwar, Member
Shri S.C. Dinkar, Member

Petitioner : M/s Adani Power Rajasthan Limited

Respondents : Jaipur Vidyut Vitran Nigam Limited
Ajmer Vidyut Vitran Nigam Limited
Jodhpur Vidyut Vitran Nigam Limited

Date of hearings : 18.05.2017 and 07.09.2017

Presents :
1. Sh. Amit Kapur, Advocate for Petitioner
2. Ms. Susan Mathew, Advocate for Respondents

Date of Order: 17.05.2018

ORDER

1. Petitioner M/s Adani Power Rajasthan Limited (hereinafter referred to as "APRL") in the capacity of a generating company initially filed this petition on 22.04.2013 under Sections 61, 63 & 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 it has to bear on account of

increase in the coal cost of imported coal which it has to use due to non-allocation of coal by GoI as per the Coal Policy, 2007 after signing a Power Purchase Agreements (PPA) with Rajasthan distribution companies (Rajasthan Discoms) dated 28.01.2010.

2. The facts of the case as submitted by the Petitioner in its petition are summarised as under:

- (i) APRL is a power generating company as per Section 2(28) of the Electricity Act, 2003, incorporated as a special purpose vehicle by Adani Power Limited (APL), a subsidiary of Adani Enterprise Limited ("AEL") to develop and implement a coal based Thermal Power Plant with an installed capacity of 1320 (2x660) MW at Kawai, Distt. Baran, Rajasthan (hereinafter referred to as "the Kawai Project").
- (ii) A Memorandum of Understanding (MoU) was entered on March 20, 2008 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. 5000 Crore. Article 2.2 of the MoU provides that the 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.
- (iii) Petitioner on August 29, 2008, has requested GoR to advise Rajasthan Vidyut Utpadan Nigam Ltd. to enter into a MoU, to provide for allocation of coal blocks to Kawai Project under Govt. Dispensation scheme in light of the terms of MoU and the obligation of GoR to provide assistance towards coal requirement of the Kawai Project.
- (iv) AEL, on March 19, 2009, requested GoR for applying to MoC for allocation of coal block for Kawai Project under Government Dispensation Scheme which is pending and also to extend the validity of the MoU for a period of one year. The Petitioner on June 22, 2009 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 and also water linkage for the Project.

- (v) GoR, on August 04, 2009, conveyed to AEL that the validity of the MoU is being extended for a further period of one year i.e. till March 20, 2010 and issued a communication to RVUN stating the following:
- i. *"Validity of the MoU dated 20.03.08 is extended for one year up to 20.03.2010"*
 - ii. *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.*
 - iii. *RVUN may publicly invite tenders for mining & delivery of coal as was done in Parsa East & Kente Basan Coal Blocks taking into account the terms of the JV agreement/coal mining & delivery agreement signed with JV partner."*
- (vi) RVPN, on 25.02.2009, issued a RFP for "Procurement of Power for Long-term through tariff based competitive bidding process" under Case-1 bidding procedure for meeting the base load requirement of Jaipur Vidyut Vitran Nigam Limited, Ajmer Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited.
- (vii) Petitioner submitted its bid on August 06, 2009 in response to RFP offering a total contracted capacity of 1200 MW from Kawai Project. The levelised tariff offered in the bid was Rs 3.2483/kWh. The Petitioner later on agreed at a rate of Rs 3.238/kWh for 25 years. The tariff in the bid was quoted on the basis of domestic coal and imported coal was limited to the purpose of blending as a temporary fall back supports option.
- (viii) RVPN issued a Lol on December 17, 2009 to the Petitioner which was unconditionally accepted by the Petitioner vide communication dated December 18, 2009. The Petitioner on January 28, 2010, executed the PPA with 3 procurers namely Jaipur Vidyut Vitran Nigam Limited, Jodhpur Vidyut Vitran Nigam Limited and Ajmer Vidyut Vitran Nigam Limited for

supply of aggregate contracted capacity of 1200 MW. The Petitioner further submitted that the PPA postulated usage of domestic coal as the primary fuel while imported coal may be used as back up arrangement.

- (ix) Commission, vide its order dated May 31, 2010 issued in the petition (217/10) filed by RVPN seeking approval of the Commission for adoption of tariff, has adopted the tariff of Rs. 3.238 per kWh considering a rebate of one paise per unit as offered by the Petitioner in view of the support from GoR proposed to be extended.
- (x) The Government of Indonesia on September 23, 2010 promulgated the Indonesian Regulation to, inter-alia, mandate that with effect from September 23, 2011 holders of mining permits for production and operation of mineral and coal mines shall be obliged to sell coal and minerals in domestic and international markets (including to their affiliates) with reference to the Benchmark Price, which is set on the basis of prevailing prices in domestic and international markets.
- (xi) Petitioner issued a communication dated October 11, 2011 to MoP stating that CEA has recommended grant of coal linkages by Standing Linkage Committee (Long Term) for 12th Five Year projects that has been delayed for more than one year for various reasons due to which conditions subsequent under the PPA, couldn't be fulfilled. On February 06, 2012, the Petitioner issued a communication to RVUN since both the units of Kawai Project is going to be commissioned soon, hence requested to recommend Kawai Project for ad-hoc allocation of coal linkage at par with 11th Five Year Plan projects. Accordingly the GoR on February 17, 2012 requested MoP and MoC to regard this project at par with 11th Five Year Plan projects for the purpose of grant of coal linkage.
- (xii) The Petitioner on March 14, 2012 issued communication to MoP stating that the decision of PMO directing CIL to execute a FSA for 11th Five Year Plan projects does not address the problems that continue to affect the 12th Five Year Plan projects. Accordingly the Petitioner requested MoP to recommend allocation of coal linkages to the 12th Five Year Plan Projects against cancellation of LoAs for 11th plan projects. In response, the MoP

through its letter dated April, 26, 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 Paras East and Kente Basan upward so as to mitigate the demand of coal for power projects in Rajasthan.

- (xiii) GoR on November 05, 2012, in response to AEL's letter dated August 10, 2012 issued a communication stating that there is no surplus coal in Parsa East and Kente Basan coal blocks which could be allocated to Kawai Project.
- (xiv) The Petitioner and GoR continued to follow up this matter with MoP, MoC and Planning Commission for addressing the problem. However, no positive development happened and the Kawai Project was still deprived of coal linkage.
- (xv) Petitioner submitted that due to certain unforeseen, unprecedented and uncontrollable events, the Kawai project from which the power was to be supplied to the Respondents has become commercially impracticable and unviable and if not remedied the PPA will stand frustrated.
- (xvi) Due to non availability of domestic coal, Petitioner is constrained to use imported coal for the entire capacity at present, which was never envisaged. It is further submitted that sudden unforeseen rise in global import of coal and change in Indonesian law has resulted in considerable increase in the prices of coal imported from Indonesia.
- (xvii) It has further been submitted that the said developments constitute Force Majeure and have adversely impacted Kawai project's viability and as a result the project has become commercial impracticable under the prevailing conditions.
- (xviii) Petitioner is willing to perform its obligations under the PPA from its SDD i.e., 31.08.2013 or any date prior to SDD, however, the same can be fulfilled only if the Petitioner imports coal from Indonesia for the entire capacity

and the Petitioner is compensated as prayed for in this petition. It is submitted that if the Petitioner is required to generate power using imported coal and supply power without adjustment in the tariff, the consequential financial burden will be to the tune of Rs. 1221 Crores per annum approximately as compared to levelised energy charge under PPA.

(xix) At the prevalent tariff, this shall wipe out the entire net worth of the Petitioner within 2-3 years and render the Kawai Project commercially impracticable to perform. In these peculiar circumstances, Petitioner is seeking intervention of the Commission to establish an appropriate mechanism to offset in tariff the adverse impact of the unforeseen and uncontrollable events leading to escalation in the price of coal in such a way that the fuel cost escalation will be adjusted as a pass through and the monthly tariff adjustments will be permitted to allow a cushion to the Petitioner from uncontrollable and unforeseen changes in Fuel source and Fuel Cost escalations.

3. This Commission on 04.06.2013 heard the matter on admissibility and after considering the submissions made on behalf of the Petitioner, admitted the petition on 05.07.2013 for consideration and decision.

4. Respondent Discoms after receiving notice filed their reply on 01.08.2013. In the reply Respondent Discoms submitted as under:

i) *The petitioner is a power generating company, incorporated as a special purpose vehicle by M/s Adani Power Limited to develop and implement a coal based Thermal Power Plant with an installed capacity of 1320 MW based on super-critical technology at Kawai, Dist. Baran, Rajasthan (more particularly hereinafter referred to as "the Kawai Project") in the year 2008.*

ii) *On 23.10.2006, RVUN conveyed to Adani Exports Limited its selection as a Joint Venture Partner for the formation of a Joint Venture Company with RVUN and stated that the business activities shall be limited to mining and supply of coal from allotted captive coal block for requirement of existing/ new thermal power stations of RVUN and/or for new projects of the State, which may be set up in JV or IPP routes. On 2.08.2007, LOI was issued by RVUN.*

- iii) On 18.10.2007, a New Coal Distribution Policy was introduced by MoC assuring 100% of domestic coal to Power Plants.
- iv) On 20.03.2008 a Memorandum of Understanding was entered into between the GoR and AEL to implement the Kawai Project with an estimated investment of Rs.5000 crores. Article. 2.2 of the MoU states that "the 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". It is pertinent to mention here that in pursuance to the said MoU, the Government of Rajasthan had extended all its support to the Petitioner in the allotment of Coal linkage by the Ministry of Power and Ministry of Coal.
- v) On 16.05.2008, the Petitioner requested the Government of Rajasthan to allocate coal from the coal block being developed by Joint Venture (RVUN & AEL) 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.
- vi) On 21.05.2008, RVUN conveyed that the State will make its best efforts to facilitate for getting coal linkage/ coal block from the Central Government or any other sources for the Project. Further RVUN instructed the petitioner to apply for allocation of coal block with the Ministry of Coal at the earliest since such allocation is a time consuming process, as the coal block of the Joint Venture barely meet the requirements of RVUN Projects.
- vii) The petitioner sent various letters dated 28.05.2008, 9.06.2008, 11.06.2008, 16.06.2008, 29.08.2008, 8.09.2008 were sent to the Government of Rajasthan for the allotment of coal block/ coal linkage.
- viii) In order to meet the requirement of power of the State of Rajasthan, the respondents herein authorized Rajasthan Rajya Vidyut Prasaran Nigam Ltd (hereinafter referred to as "RVPN") as its authorized representative to carry out the bidding process for the selection of Successful Bidder for procurement of power for a long term under Case I bidding procedure for meeting the Base Load Power. Subsequent thereto RVPN on 25.02.2009 issued the Request for Proposal for Case I bidding process.
- ix) On 19.03.2009, the AEL requested the GoR for applying to Ministry of Coal for allocation of coal block for Kawai Project under the

Government Dispensation Scheme which is pending and also to extend the validity of the MoU for a period of one year.

- x) On 2.04.2009, Standard Bidding Documents for Case I was notified by Ministry of Power and therefore revised Request for Proposal was issued in conformity with Standard Bid Document.
- xi) The petitioner on 25.06.2009 entered into a long term Coal Supply Agreement with Adani Exports Limited for procuring coal from Indonesia at a discounted price of USD 36 per MT as a temporary fall back support arrangement option. The CSA was subsequently terminated on 10.06.2010. Further on 2.07.2009 the petitioner had applied for a long term coal linkage of 'F' grade coal from South Eastern Coalfields Limited for Kawai Project for 7.082 MMT per annum of coal.
- xii) On 6.08.2009, the petitioner submitted its bid in response to RFP premising its bid on domestic coal. On 7.09.2009, RVPN on behalf of the respondents sought clarification from the Petitioner as to on what basis the bid of the petitioner should be evaluated, whether on domestic coal basis or imported coal basis? For which the petitioner vide letter dated 12.09.2009 clarified that they are sure to get domestic fuel tie-up with support of the GoR, hence, in view of the same the bid should be evaluated on the basis of Domestic Coal tie-up. The petitioner being the lowest bidder by quoting a levelised tariff of Rs.3.2483 per kWh (revised to Rs.3.238 per kWh on 3.12.2009) won the bid for supplying 1200 MW of power for 25 years. Subsequent thereto a Letter of Intent dated 17.12.2009 was issued to the Petitioner, which was accepted by the petitioner on 18.12.2009 followed by the execution of Power Purchase Agreement between the Petitioner and the Respondents herein on 28.01.2010. In view of the provisions of the Guidelines of 2005, this Hon'ble Commission approved the tariff of Rs.3.238 per kWh for supplying 1200 MW power to the respondents on 31.05.2010.
- xiii) The Government of Indonesia promulgated the "Regulation of Ministry of Energy and Mineral Resources No.17 of 2010 regarding the procedure for setting Mineral and Coal Benchmark selling price" on 23.09.2010 (referred as New Indonesian Regulations) effective from 23.09.2011. As per the New Indonesian Regulations, all mining holders of minerals and coal are directed to sell the mineral and coal in domestic and international markets including to their affiliates on price aligned to the Notified Benchmark price which is premised on then prevalent international coal prices. It also directs all existing contracts to align with

the New Regulations by 23.09.2011 and further prohibited any sale of coal under pre-existing contractual arrangements that are not aligned with the New Indonesian Regulations, the violation of which results in imposition of penalty and cancellation of mining permits.

- xiv) On 27.01.2011, the GoR requested MoC for allocation of coal blocks identified by RVUN in "Go Area" of Chhattisgarh to RVUN to meet coal requirements of power projects in Rajasthan including Kawai Project under Government Dispensation Route.*
- xv) On 17.02.2012, GoR issued a communication to MoP & MoC requesting to regard the project of the petitioner at par with 11th five year plan projects for the purpose of grant of coal linkage which will ensure timely commissioning of the Project. It was also stated in the said communication that the application for coal linkage has been furnished with the CEA along with all requisite documents, but there is a delay in deciding the issue.*
- xvi) In reply to the above communication, the Minister of Power vide letter dated 26.04.2012 informed GoR that the Kawai Project has been recommended for linkage as a 12th Plan Project and in the meantime, the GoR may consider revising the mining plan capacity of the captive coal blocks allocated to them namely Parsa East and Kante Basan upward so as to mitigate the demand of coal for power projects in Rajasthan.*
- xvii) On 5.11.2012, the GoR issued a communication stating that there is no surplus coal in Parsa East & Kante Basan coal blocks which could be diverted to Kawai Thermal Power Project.*
- xviii) That vide letter dated 22.11.2012, the GoR informed the MoP and MoC that the Rajasthan Discoms have executed long term PPA with APRL (petitioner) and in case 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 further requested to looking in to the matter on priority basis. It was also requested to consider adhoc basis allocation so that the project starts supplying power to the State.*
- xix) That vide letter dated 26.11.2012, the Hon'ble Chief Minister of Rajasthan brought to the notice of MoP & MoC that the Kawai Power Project is yet to be provided coal linkage as the State faces acute shortage of power during Rabi season.*

- xx) Due to non-availability of domestic coal, the Petitioner was constrained to use imported coal for the entire capacity and started procuring coal from Indonesia since December, 2012 as the Kawai Project is in synchronization phase with the Scheduled Delivery Date being on 31.08.2013 which have huge financial implications upon of the petitioner.
- xxi) On 28.01.2013, GoR issued communication to Planning Commission for the urgency in coal allocation for Petitioner's Kawai Project.
- xxii) Vide communication dated 25.02.2013, the Petitioner informed the respondents herein that despite continual efforts on the part of GoR as well as the petitioner, Kawai Project is facing serious uncertainty regarding the coal supply that was envisaged at the time of bidding. It was also stated that non-availability of coal linkage has compelled the Petitioner to run the Project on coal imported from Indonesia as a fall back arrangement and due to drastic increase in price of imported coal, it is impractical for the petitioner to perform its obligations under the PPA and therefore requested for tariff revision till the coal block is allotted.
- xxiii) On 5.03.2013, the Rajasthan Discoms Power Procurement Centre issued a reply to the petitioner stating that the tariff related to supply of power will be governed by the PPA and therefore no deviation can be made from the PPA.
- xxiv) Therefore the present petition was filed by the petitioner before this Hon'ble Commission.

5. Further, Discoms have submitted in their reply on the issue of 'Change in Law' as under:

"a) It is stated that after execution of Power Purchase Agreement dated 28.01.2010, the Petitioner was having a valid Coal Supply Agreement dated 25.06.2009 for the purchase of coal at USD 36, however the New Indonesian Regulations has adverse direct impact on the said CSA whereby the rates specified in the CSA has become escalated almost 3 times, which was not envisaged at the time of the bid, resulted in the termination of the CSA on 10.06.2010. Moreover, The Hon'ble CERC in its advisory letter to MoP has also acknowledged the fact of Private Developer being compensated on account of use of the imported coal. Recently even Cabinet Committee on Economic Affairs (CCEA) have also given go-head for a mechanism that would allow the electricity generators to pass through to distribution utilities the cost of

expensive imported coal used by them. In view of above said fact there is a Change in Law and circumstances in the present case, which ultimately would cause an adverse impact upon the performance of the PPA."

- b) The Government of India issued the New Coal Distribution Policy (hereinafter referred to as "NCDP") as per which the availability of 100% of domestic coal was a fundamental premise which the Project was premised and project economics including the tariff at which power could be supplied under the Competitive Bidding Regime was worked out accordingly. On 17.02.2012, the Ministry of Coal, Government of India advised Coal India Ltd that for power utilities which have been commissioned after 31.03.2009, CIL should enter into Fuel Supply Agreements with only those power utilities which have long-term PPAs with distribution companies. Subsequently a new model FSA was issued by CIL on 19.04.2012 which substantially altered the terms and conditions of the NCDP and are contrary to the provisions in NCDP dated 18.10.2007 and would render short fall even in case of domestic coal in comparison to NCDP which provided for 100% supply, as applicable at the time of submission of bid.
- c) The Non-availability of coal and in action 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 the 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. As per Article. 2.2 of the MoU executed between AEL and GoR for implementation of Kawai Project with estimated investment of Rs.5000 crores, the 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. It is stated that the Government of Rajasthan had extended its full co-operation to the petitioner for the allotment of coal linkage to the Petitioner in the best way they could. There is no delay or latches on the part of the Government of Rajasthan in dealing with the issues of allotment of coal linkage. A bare perusal of the Various letters issued by the Government of Rajasthan including the Minister of Power and the Chief Minister requesting the Central Government for early allocation of coal linkage/ coal block to the Petitioner, would reflect the fact that the Government of Rajasthan did its best efforts to facilitate getting coal

linkage/ coal block to the petitioner. It has also applied for allotment of coal block through RVUN to MoC under Government Company Dispensation Scheme for development, mining and supply of coal for the Kawai Project. Further in its various communications issued to the Ministry of Power, Ministry of Coal etc, the Government of Rajasthan had also requested that if there is any delay in allocation of long term coal linkage, then to consider allotment of ad hoc coal blocks so as to enable the petitioner to commence supply under the PPA dated 28.01.2010, which fact was already admitted by the petitioner in its petition, more particularly at para starting from 101 of the petition.

d) -----

e) *It is stated that as per the petitioner, if they are forced to supply power at the levelised tariff, the same would result in unsustainable financial losses to the tune of Rs.1221 crores per annum which will result in networth of the project getting eroded within 2-3 years, which will also have a direct impact upon the PPA entered into with the answering respondents. If the PPA is not performed, the respondents will be forced to procure power from other sources at a very higher right and ultimately the consumers of the State of Rajasthan will be deprived of the affordable power and will have to bear the financial burden. Further the respondents will also lose one of its largest power projects which is almost commissioned and ready to generate power, that too at a very affordable price for a long term of 25 years. In this regard, it is to state that the contents of the PPA should be honored by both the parties.*

In view of the above it is requested to consider the interest of the procurer Discoms and there consumers under the PPA while deciding the Petition, keeping in view the rules, regulations and prevalling laws and guidelines."

6. Commission in its proceedings held on 02.08.2013 observed that the last para of reply of the Discoms is too general in nature and even talks of Commission to consider their interest and that of consumers in deciding the matter instead of coming out clearly as to what is there stand and submission in respect of protecting their interest or consumer interest. Therefore, Commission directed Discoms to file revised reply stating their position and stand clearly on the submissions made by the Petitioner including their prayer.
7. Accordingly, Discoms filed their revised reply on 28.08.2013 which reads as

under:

- “1. -----
2. That at the outset it is stated that the petitioner is duty bound to perform its obligations under the Power Purchase Agreement dated 28.01.2010. Since the obligation of the Petitioner is strictly in accordance with the terms and conditions of the PPA, they should not be allowed to go beyond the PPA. Although the primary fuel described in the bid is domestic coal in case I bidding, it is an obligation of the bidder ie the Petitioner in the present case, to source the fuel from the alternate source and supply power within the stipulated time as prescribed in the PPA and as per the agreed terms and conditions of the PPA.
3. That it is stated that the case of the Petitioner does not fall within the “Force Majeure” clause in view of the submissions made in the reply submitted by the respondents earlier and therefore it is submitted that it is in the interest of justice that this Hon’ble Commission ought not pass any order declaring that the case of the petitioner constitutes Force Majeure as per PPA thereby discharging the petitioner from performing its obligations under the PPA on account of the frustration of the PPA. The respondents clarify that they oppose prayer (a) of the petitioner with regard to declaration of the occurrence of “Force Majeure”, and as a consequence the respondents oppose prayer (d) also.
4. That with regard to the rest of the prayer, the respondents states as follows:
 - 4.1 In the Statutory advice of Central Electricity Regulatory Commission u/s.79 (2) of the Electricity Act, 2003 dated 20.05.2013 to the letter of Ministry of Power seeking advice of CERC regarding impact on tariff on the concluded PPAs due to non availability of domestic coal, it was mentioned as follows:

“For claiming any benefits under change in law, the Project Developer would have to move the appropriate commission and the decision of that Commission in this regard would be final, in terms of Article. 10.3.3 and 10.3.4 of the Standard PPA. The appropriate Commissions are expected to take decisions on the merits of each case including the claims of the Project Developers for compensation on account of imported coal after consultation with the stakeholders.”
 - “7. The views expressed in the preceding paragraphs are based on general legal interpretation of the available documents including the model PPA. However, the issues raised in the reference of the Ministry of

Power shall be decided by the Appropriate Commission on a case to case basis based on the pleadings of the parties, provisions of the PPAs and in pursuance of the provisions of the Electricity Act, 2003, National Electricity Policy and Tariff Policy."

4.2 Similarly Cabinet Committee on Economic Affairs (CCEA) in its circular dated 21.06.2013 approves mechanism for coal supply to power producers, which reads as follows;

"..(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/SERC's 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 devised 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."

4.3 That after considering all aspects regarding the increased cost of power due to import of coal/ e-auction and its impact on the tariff of concluded PPAs and after considering the advice of CERC in this regard, the Ministry of Power had taken certain decisions, the relevant portion of the same is reproduced as follows;

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

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

4.4 The Ministry of Coal vide letter dated 26th July, 2013 has notified the changes in the New Coal Distribution Policy as approved by CCEA in relation to the coal supply for the next four years of the 12th Plan.

In view of the above reply it is stated that the taking into account the interest of all stakeholders including the generators and the procurers and their consumers, it is in the interest of justice that some mechanism should be adopted till the coal block/ linkages are allotted to the petitioner, to ensure that the respondents as well as its consumers will be benefited by the cheaper and ready power generated/ supplied by the Petitioner under the PPA dated 28.01.2010 for a long term of 25 years."

8. The matter was heard on 09.12.2013 and 24.04.2014. Sh. Amit Kapur, Advocate, appeared on behalf of Petitioner and made submissions. Ms. Susan Mathew, Advocate appeared on behalf of Discoms and made her submissions.
9. Commission framed the following issues for decision:
 - i. Whether facts leading to increase in the cost of fuel amount to 'force majeure conditions' as provided in the PPA.
 - ii. Whether the change brought about in the policy of allotment of coal by Government of India and prescribing benchmark rate for sale of coal by Indonesian Government fall within the scope of 'change in law', as contemplated under the provisions of the PPA.
 - iii. Whether petitioner has established that due to change in circumstances/policy in India and Indonesia, it is incurring extra cost in purchase of coal than the one contemplated while submitting the bid and signing of the PPA.
 - iv. Whether this Commission has power to award compensatory tariff to offset the increase in the domestic coal and imported coal in the circumstances submitted by the petitioner.
 - v. Whether petitioner is entitled to 'any interim increase' in the price incorporated in the PPA till a committee examines the facts and gives recommendations.
10. Commission after considering the facts and records and submissions placed before it vide its order dt. 30.05.2014 held that:

- (i) Change in the coal price does not fall under 'force majeure conditions' as provided in clause 9 of the PPA.
- (ii) Change in coal policy of Govt. of India and change in pricing of coal by Indonesian Government does not also fall within the ambit of the meaning of 'change in law', as contemplated under clause 10(1)(i) of the PPA and therefore, Petitioner is not entitled to additional cost on this ground.
- (iii) Petitioner has to be granted compensatory tariff over and above the tariff quoted in the PPA to offset the additional cost of fuel made to be borne by the petitioner on the imported coal due to non-allocation of Indian coal.
- (iv) Petitioner has to be granted an additional (25) paise per unit on the variable charges under the PPA as an interim measure pending determination of the additional tariff payable subject to future adjustments.

11. The above order of the Commission was challenged by the Petitioner as well as Respondent Discoms before the Hon'ble APTEL in Appeal No. 78 and 42 of 2015 respectively.

12. The Hon'ble Tribunal vide its order dated 11.05.2016 passed the following order in Appeal No. 42 of 2015 filed by Respondent Discoms:

"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."

13. Further, the Hon'ble Tribunal by its order dated 03.08.2016, in Appeal No. 78 of 2015 filed by Petitioner, remanded the matter to the Commission with the following order:

"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."

14. When the matter after remand was pending before this Commission, the full bench decision dt. 07.04.2016 of Hon'ble APTEL (based on which the above order was passed) came up for consideration before the Hon'ble Supreme Court in Civil Appeal Nos. 5399 of 2016 & Ors.
15. Hon'ble Supreme Court vide its judgment dated 11.04.2017 held as regards the claims based on Force Majeure and Change in Law and also on the powers of the Commission under Section 62 and 63 vis a vis Section 79 (1) (b) of Electricity Act, 2003 as under:

"18. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non-obstante clause, but it is a non-obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this Section on 19th January, 2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with clause 4.

19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's

power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

“Force Majeure

45. We are, therefore, of the view that neither was the fundamental basis of the contract dislodged nor was any frustrating event, except for a rise in the price of coal, excluded by clause 12.4, pointed out. Alternative modes of performance were available, albeit at a higher price. This does not lead to the contract, as a whole, being frustrated. Consequently, we are of the view that neither clause 12.3 nor 12.7, referable to Section 32 of the Contract Act, will apply so as to enable the grant of compensatory tariff to the respondents. Dr. Singhvi, however, argued that even if clause 12 is held

inapplicable, the law laid down on frustration under Section 56 will apply so as to give the respondents the necessary relief on the ground of force majeure. Having once held that clause 12.4 applies as a result of which rise in the price of fuel cannot be regarded as a force majeure event contractually, it is difficult to appreciate a submission that in the alternative Section 56 will apply. As has been held in particular, in the Satyabrata Ghose case, when a contract contains a force majeure clause which on construction by the Court is held attracted to the facts of the case, Section 56 can have no application. On this short ground, this alternative submission stands disposed of."

Change in Law

53. 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

"Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law. This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic

position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulation Commission. This being the case, we are of the view that though change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would."

16. After the above judgment of the Hon'ble Supreme Court, Petitioner filed an additional affidavit dated 11.05.2017 submitting as under:

- (i) Commission may be pleased to consider the contentions made in the present petition in light of the above findings and observations of the Hon'ble Supreme Court at paragraphs 53 and 54 of its order dt. 11.04.2017, which shall govern the issue of short supply/non-availability of domestic coal in modification of the arrangement contemplated or assurance given under NCDP as it has already been adjudicated by the Hon'ble Supreme Court and such events are held as Change in Law.
- (ii) Article 10 of the PPA dated 28.01.2010 i.e. PPA in the present case is identical to the Article 13 of the PPA dated 07.08.2008 referred to in the SC Judgment and the domestic coal supply arrangement as on cut-off date is also same for both projects. In both the cases, applications were submitted to Ministry of Coal for supply of coal in the light of the assurance given under NCDP, but coal linkage/LoA/FSA was not available as on cut-off date, which shall be the reference point for determining Change in Law as per PPA provisions. Therefore the judgment of Hon'ble Supreme Court squarely applies to the present case.
- (iii) Petitioner had applied for long term coal Linkage on 02.07.2009, i.e., prior to the bid submission on 06.08.2009 and hence premised its bid on domestic coal on the basis of NCDP. When the bid was submitted by Petitioner, the only policy that was prevailing was NCDP 2007, under which Gol 'assured' 100% supply and on the basis of that Petitioner applied for

long term coal linkage. APRL and the GoR have diligently followed-up the request for Coal linkage with the MoP and MoC but without any success. There was non-availability of domestic coal by Coal India Limited despite several efforts made by Petitioner and GoR.

- (iv) The decision of Government of India on 14.02.2012, that it is not possible to issue any fresh Letters of Assurances (LoA) is a change from the coal supply arrangement 'assured' under NCDP in October 2007 and qualifies as change in law in accordance with the Judgment of Hon'ble Supreme Court.
- (v) The subsequent decision on 31.05.2013 to keep all the unprocessed applications for grant of coal linkage, which includes the application dated 02.07.2009 of Petitioner is also a change in law.
- (vi) Both the aforesaid decisions of Gol in letters dated 14.02.2012 and 31.05.2013 are statutory in nature as held by the Hon'ble Supreme Court and Adani Rajasthan is required to be compensated in terms of Article 10 of the PPA to be restored to the same economic position as if the event had not occurred.
- (vii) Rajasthan Discoms had in all forms, specifically admitted before this Ld. Commission that the circumstances mentioned in the Petition filed by the APRL constituted Change in Law. It is a settled principle of law that an admission made by a party favouring the other side cannot be withdrawn later and such admission can at best be explained.
- (viii) In view of the aforesaid submissions, Petitioner is entitled for relief in terms of Article 10.3.2 to 10.3.4 of the PPA to be restored through monthly tariff payments to the same economic position as if such Change in Law event had not occurred. The Commission may be pleased to grant relief to Petitioner with effect from 31.05.2013 i.e., the date from which power supply under PPA was commenced on achieving the commercial

operation of Unit 1 of Kawai project, in terms of paragraph 4.7 of the Competitive Bidding Guidelines and Article 10 of the PPA.

- (ix) In the light of the observations of Hon'ble Supreme Court, Petitioner proposed the following methodology for grant of relief under Change in Law which is based on difference between actual fuel cost and cost of domestic coal if linkage would have been made available to Adani Rajasthan by Coal India Limited as per NCDP, 2007.

"Change in Law relief = Actual landed cost of alternate coal as certified by Auditor– landed cost of Domestic Linkage coal"

- (x) The above formula is on principle and accommodates changes for both increase and decrease in the cost of coal. Further, the landed cost of linkage coal includes taxes and duties prevailing at the time of Bid. The amount of compensation shall be reduced to the extent of approved Change in Law by this Ld. Commission. Relief for the past period may be calculated based on the above stated methodology to be approved by the Commission.
- (xi) Petitioner has already incurred huge loss on account of energy charges so far during the period up to February 2017 and any further delay in grant of relief is adding to the injury and jeopardizing the project operations and supply of power to the Rajasthan Discoms as the lenders are also not willing to extend any further support to the project.
- (xii) Consequent to non-availability/shortfall in domestic coal, Petitioner has no other option and is constrained to procure imported coal/ market coal. Such procurement is at additional cost. This has aggravated the financial difficulties as the additional fuel cost is to be funded by additional borrowing which in turn has resulted in additional interest burden. Further, as the moisture content in imported coal is very high as compared to domestic coal, there is substantial increase in Station Heat Rate and

additional financial loss on this account. All these factors contribute to increase in interest on working capital as well.

- (xiii) Article 10 of the PPA contemplates that the affected party is to be restored to the same economic position as if such change in law has taken place. Therefore, Petitioner is entitled to carrying cost from the date of cause of action till the payment of compensation. Under these circumstances, it is necessary for the Commission to ensure that Petitioner is compensated restoring its economic position under Article 10 of the PPA. It is settled principle of law that the person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages.
- (xiv) Principle of recovery of cost of funding is an established philosophy of regulatory jurisprudence as Carrying Cost. It has been held by the Hon'ble Supreme Court that if a person is deprived of the use of money, to which he is legitimately entitled to, has a right to be compensated for the deprivation, call it by any name. Interest pendent lite is not a matter of substantive law. For doing complete justice between the parties, such power has always been inferred. In this regard, reliance is made on following judgments of Hon'ble Supreme Court: (i) *Secy, Irrigation Department, Govt. of Orissa Vs. GC Roy* reported as (1992) 1 SCC 508 (CB): para 43 and (ii) *Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age* reported as (1996) 1 SCC 516: paras 3 &4.
- (xv) Entitlement to carrying cost is a settled position of law and the Commission under its regulatory powers also can grant carrying cost even when there is no specific provision in the PPA/Guidelines.
- (xvi) Commission may pleased to approve the methodology as provided hereinabove and direct the Rajasthan Discoms to pay compensation on

account of Change in Law from the date of commencement of supply along with the carrying cost as per said methodology to restore *Petitioner* to the same economic position. For interest on deferred payment till the date of payment by Rajasthan Discoms, the base rate of SBI plus 350 basis points should be made applicable.

(xvii) In view of above facts and circumstances, *Petitioner* prayed to approve the methodology as proposed and direct the Rajasthan Discoms to pay compensation provisionally for past period within 30 days as well as for future period as per said methodology subject to adjustment based on final approval.

(xviii) Hon'ble Supreme Court vide the SC Judgment has upheld the legal and jurisprudential basis of exercise of regulatory powers of the Central Commission and State Commission under Section 79(1)(b) and Section 86(1)(a) and (b) of the Electricity Act, 2003 to regulate the tariff of competitively bid out PPAs under Section 63 of the Electricity Act. The observations of the Hon'ble Supreme Court in paras 18 and 19 are extracted as under.

"18. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this Section on 19th January, 2005, which guidelines have been amended from time to time."

(xix) Regulatory powers of this Commission have been settled to expanse of which Hon'ble Supreme Court in the Judgment of All India Power Engineer Federation and Ors. Vs. Sasan Power Ltd. & Ors. reported as (2017) 1 SCC 487 has also upheld the regulatory powers of the Commission.

(xx) Regulatory Commissions have regulatory power to increase/vary tariff even outside the PPA. The argument that tariff under competitive bidding PPAs is sacrosanct and that SC has rejected the existence of Regulatory

powers under the Act with reference to 63 PPAs is factually incorrect. In the facts and circumstances of the case on hand, the Hon'ble Supreme Court had come to the conclusion that relief can be granted under Change in Law in accordance with PPA provisions.

- (xxi) As regards contention of Rajasthan Discoms that Petitioner had an option to terminate PPA, it is submitted that one of the prayers is to discharge from performing PPA. However, since Rajasthan Discoms have admitted that APRL is entitled to compensation under Change in Law vide additional affidavit and the entitlement of relief to APRL due to non-availability of coal linkage has been consistently upheld at each forum and the GoR has also been continuously putting efforts to ensure long term coal linkage for the project, Petitioner has been supplying uninterrupted power to the State. Therefore, such stand taken by Rajasthan Discoms particularly at this stage is not justified.
- (xxii) Petitioner has served the notice for Change in Law on 25.02.2013 i.e. much before the commencement of supply of power under the PPA. Therefore, it is factually incorrect to state that APRL never contemplated issuing a notice.
- (xxiii) As regards contention that Petitioner quoted non-escalable tariff, it is submitted that the said contention is factually incorrect as quoted tariff is partially-escalable. Further, there is no restriction for an event being considered as change in law based on nature of tariff i.e. escalable or non-escalable tariff. Change in Law provision applies in the same manner irrespective of tariff being escalable or non-escalable.
- (xxiv) In view of the aforesaid submissions, Petitioner is entitled for relief in terms of Article 10.3.2 to 10.3.4 of the PPA to be restored through monthly tariff payments to the same economic position as if such Change in Law event had not occurred. The Commission may please to grant relief to

Petitioner with effect from 31.05.2013 i.e., the date from which power supply under PPA was commenced on achieving the commercial operation of Unit 1 of Kawai project, in terms of paragraph 4.7 of the Competitive Bidding Guidelines and Article 10 of the PPA.

17. Ms. Susan Mathew, Advocate appearing for Respondents also filed additional affidavit in reply to that of the Petitioner as under:

- (i) Hon'ble Supreme Court vide its judgment dt. 11.04.2017 has considered for grant of relief is under the change in law provision in respect of a change in the Policy of the Government of India in the availability of domestic coal from the coal companies against the Letter of Linkage, Letter of Assurance etc. The Hon'ble Supreme Court has dealt with the change in law when the coal linkage was given for a specified quantum and subsequently under the Government Policy, the Fuel Supply Agreement (FSA) is directed to be signed by the coal company for a lesser quantum. The said situation has no application to the present case in view of the fact that Petitioner had no coal linkage or Letter of Assurance from any coal company on the date of the bidding which has been taken away by the promulgation of the New Coal Distribution Policy or change in the New Coal Distribution Policy.
- (ii) Hon'ble Supreme Court in the said judgment has not granted any relief in regard to any other claims of the Generators either by exercise of general regulatory powers by the Regulatory Commission or under Force Majeure or Change in Law.
- (iii) The Hon'ble Supreme Court in Para 54 of the said decision has clearly stated the limited extent to the Change in Law held in favour of the Generators. In respect of aspects other than those dealt with in the said decision, the Hon'ble Supreme Court has rejected the claim of the

Generators. These include the exercise of regulatory powers to grant/check relief.

- (iv) The contention of the Petitioner that the Hon'ble Supreme Court has upheld the exercise of general regulatory powers to give monetary relief to the Generators is erroneous and devoid of any merit. Para 18 and 19 of the said decision of the Hon'ble Supreme Court clearly show that the Hon'ble Supreme Court has rejected the claim of the Generators of the existence of the power under the Electricity Act, 2003 with reference to Sections 61, 62 or 64 of the Act.
- (v) The Hon'ble Supreme Court has specifically approved that the non-obstante clause contained in Section 63 clearly provides for the non-application of Section 62 of the Electricity Act, 2003. Accordingly, by virtue of the non-obstante clause contained in Section 63 and more importantly by virtue of the Guidelines provided under Section 63 read with Model PPA notified by the Central Government, the quoted tariff to be adopted by the Appropriate Commission is for the entire duration of the PPA. The non-obstante clause prohibits the Appropriate Commission to exercise powers under Section 62 (4) or 64 (6) of the Act to re-determine or vary or amend the tariff. Thus, Section 63 having prohibited the variation in the tariff under the statutory scheme, it is not open to the Appropriate Commission to claim that it can exercise powers under Sections 79 (1) (a) or (b) or 86 (1) (a) or (b) to regulate tariff by varying the tariff either by increasing it or by decreasing it.
- (vi) It is well settled that the entire provisions of the Act should be read in context. It is not harmonious interpretation of the provisions of the Act to use the general provision to make the specific provision redundant. Section 63 of the Act is a specific provision. It specifically provides for non-application of the provisions of Section 62 dealing with the re-determination of tariff and, therefore, the powers under Sections 79 and

86 of the Act cannot be used for such re-determination or variation in the tariff.

- (vii) As per the decision of the Hon'ble Supreme Court, if there is a guideline and such guidelines deal with the aspect of circumstances under which the quoted tariff can be varied, the variation in tariff is an occupied field by the Guidelines and there cannot be any exercise of general regulatory power to grant relief when such relief is not admissible as per the provisions dealt in the guidelines or the model PPA attached to the guidelines.
- (viii) According to the Hon'ble Supreme Court, the aspect of matter not being dealt by Guidelines would arise only if an aspect is not at all dealt by the Guidelines, it cannot arise for matters dealt by the Guidelines but the claim does not fit within the scope of the provisions of the Guidelines. It will be preposterous that a variation in tariff having being dealt under the documents notified by the Central Government as part of the Guidelines (Risk allocation, force majeure, change in law, escalable tariff, Central Commission's indexation), Petitioner can be allowed to take the stand that if the claim falls under any of the specific provisions of the Guidelines, it will claim in accordance with the Guidelines and in case it does not fulfill the conditions to get the relief under the Guidelines, it will claim that the Commission should exercise general regulatory powers to grant the relief. This will make mockery of the guidelines and the documents notified by the Central Government as a part of the Guidelines dealing with specific aspects and providing for conditions to be satisfied for the relief under the specific aspects.
- (ix) Further, Petitioner is claiming that it was selected as the successful bidder and the Power Purchase Agreement was premised on domestic coal. In this regard it is submitted that in terms of the Bidding Documents i.e. RFP, the bids were invited from the interested persons for Long Term

Generation and Supply of Electricity. The Bid was under Case-1 procedure as per the Guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003.

- (x) As per RFP document, sourcing of fuel and its transportation is left entirely to the discretion of the Bidder. The Successful Bidder shall bear complete responsibility to tie up the fuel linkage and the infrastructural requirements for fuel transportation, handling and storage.
- (xi) Petitioner in its bid submitted on 6.8.2009, for the fuel arrangement had specified both domestic coal and imported coal. Petitioner had furnished the Coal Supply Agreement dated 25.6.2009 entered into with its Holding Company Adani Enterprises Limited Adani Enterprises Limited confirmed a firm arrangement for mining and supply of coal from the mines in Indonesia, the requisite amount of standard coal for the Kawai Project.
- (xii) Along with the Bid, Petitioner also submitted a Memorandum of Understanding entered into with the Government of Rajasthan in regard to the support to be given by the State Government to get the domestic coal linkage. However, in the MoU with the Government of Rajasthan, there is no assurance given for coal. It only mentions that the Government of Rajasthan will 'make its best effort to facilitate getting coal linkage/ coal block from the Central Government or coal from any other source for the Project'.
- (xiii) The bids were invited and awarded independent of any such MoU with the Government of Rajasthan. For being eligible on domestic coal, the requirement of the RFP was that "the Bidder shall have made firm arrangements for fuel tie up either by way of mine allocation or fuel linkage'. Such arrangements shall be for the quantity of fuel required to generate power from the power station at Normative Availability for the

total installed capacity for the term of PPA. The MoU can thus not be a basis of its eligibility for bidding on domestic coal.

- (xiv) As on the date of the submission of the Bid i.e. 6.8.2009, Petitioner did not have the assurance for allotment of coal mine or giving coal linkage for any quantity of coal from the Central Government nor any coal linkage or Letter of Assurance or Fuel Supply Agreement from any of the Coal Companies.
- (xv) Thus, the eligibility was determined on the basis of imported coal. If it is claimed by Adani that the bid was premised on domestic coal, it would have been rejected as it did not meet the eligibility criteria for domestic coal as laid down in the RFP.
- (xvi) As per Article 3.1.1 of the PPA, it was the responsibility of the Seller i.e. Petitioner to execute the Fuel Supply Agreement within 10 months of the effective date i.e., 28.01.2010. This responsibility was at its risk and cost and not that of the procurers. It is pertinent to note that this responsibility, at the Sellers risk and cost, was not qualified by any Change of Law event.
- (xvii) To take relief under the Change in Law article 10 of the PPA, Petitioner was required to intimate the Rajasthan Discoms by giving a 'notice to the Procurers of such Change in Law as soon as reasonably have known of the Change in Law'. The Petitioner has not given any such notice. This is because Change in law is applicable only in case of reduction in quantity from the quantity mentioned in the FSA or allocation letter or letter of linkage or letter of assurance by the Central Government or Coal Companies. When there is no such fuel assurance, there cannot be any change in law and it is for this reason that the Petitioner never contemplated issuing a notice thereof.

- (xviii) Further, Petitioner did envisage use of imported coal in substantial quantum for the project, at least for the first five years of the PPA, which are yet to be over.
- (xix) Petitioner is not entitled to the benefits of Change in Law provision under Article 10 of the PPA for non-availability of domestic coal from the mines of Coal India Limited on the ground that the Petitioner's bid is held to be eligible on imported coal for which the Supreme Court in its decision dt. 11.4.2017 has held cannot be subject to Change of Law.
- (xx) Petitioner's bid was primarily based on the FSA entered into with Adani Enterprises Limited, which clearly provides that Petitioner has to pay escalation at PRC Rates. It is, therefore, a conscious decision on the part of Petitioner to bid knowing fully that any price increase in the imported coal will not be a ground for claiming increase from the Rajasthan Discoms. Petitioner had quoted non-escalable tariff despite its agreement for imported coal entered into with Adani Enterprises Ltd. for escalation at PRC Rates. Inability to make fuel arrangement cannot be a ground for escalation in tariff as arrangement of fuel is a condition subsequent to be met by the Seller viz. Petitioner at its risk and cost and this condition is not even qualified by Change in Law events.
- (xxi) The decision of the Hon'ble Supreme Court dt 11.4.2017 applies only when there is some kind of Letter of Assurance or Letter of Linkage with 100% availability of coal but due to the policy change made by the Central Government, the full quantum of coal is not made available; However, there was neither any assurance from the Central Government for supply of coal or any quantity nor any arrangement between Adani Power and Coal India Limited/Subsidiary Companies either by any Letter of Intent or Letter of Assurance or Fuel Supply Agreement which can be said to have been affected by any change in Law.

- (xxii) Petitioner's MoU with the Rajasthan Government provides only for the Government to act in a facilitating manner. It does not create legal obligation on the part of the Government of Rajasthan much less the Rajasthan Discoms. Petitioner contemplated use of imported coal in substantial amount for a period of at least five years of the PPA, which is not yet over.
- (xxiii) As regards Force Majeure on account of non-availability of coal, it is submitted that Petitioner had entered into the Coal Supply Agreement dated 25.6.2009 with its Holding Company Adani Enterprises Limited wherein Adani Enterprises Limited confirmed a firm arrangement for mining and supply of coal from the mines in Indonesia.
- (xxiv) Petitioner i.e. APRL had contracted to pay Adani Enterprises Limited the price of coal under the CERC Price Index Mechanism. Despite the above, Petitioner chose to submit its bid with quoted energy charges partly escalable and partly non-escalable. Therefore, Petitioner took the calculated risk in so far as the bid submitted by quoting partly non-escalable energy charges and this was done in order to be competitive with the reduced price in comparison to other bidders.
- (xxv) The said Coal Supply Agreement specifically provided that the price shall be as per the CERC Price Index Mechanism and Petitioner had submitted the bid based on the existing Coal Supply Agreement with the above price condition. Therefore, it is not possible for Petitioner to claim that there is an impact of the promulgation of the Indonesian Regulations leading to Force Majeure Event as decided by the Hon'ble Tribunal in its order dated 7.4.2016.
- (xxvi) It is also pertinent to mention that after the Letter of Intent was issued to Petitioner on 17.12.2009 and the PPA was executed on 28.01.2010 and even pending the allocation of domestic coal by the Government of

India for the Kawai Power Project, on 10.6.2010 Petitioner and Adani Enterprises Limited purported to terminate the Coal Supply Agreement. There is no reason indicated in the termination. With the termination of the Coal Supply Agreement dated 25.6.2009, Adani had no firm arrangement for procurement of coal for the Kawai Power Project. But for the termination, Petitioner would have got the coal as per the Coal Supply Agreement and at the price indicated in the Coal Supply Agreement. There would not have been any impact on the promulgation of the Indonesian Regulations on the procurement of coal by Adani Enterprises Limited, in the context of the price under the Coal Supply Agreement was already aligned to the market force.

(xxvii) The Force Majeure Event pleaded by Petitioner, namely, non-availability of domestic coal and consequently the need to import coal from Indonesia need to be examined. The Force Majeure Event has to be considered with reference to the impact of a firm agreement which Petitioner had at the time of the bidding for procurement of coal, namely, either domestic coal or imported coal. As at the time of the bidding, Adani did not have any linkage or the Letter of Intent or the Letter of Assurance from any coal company in India for procurement of domestic coal. The bid submitted by Petitioner itself clearly stated that it is proposing to get domestic coal from the coal companies in India for its project at Rajasthan.

(xxviii) In view of the above, Petitioner cannot claim any impact of any Force Majeure on account of the non-availability of domestic coal from the Central Government by allocation of coal block or by grant of coal linkage. It is not the case of Petitioner that the domestic coal could not be procured by it without the coal linkage or without the coal allocation. Further, it is not the case of Petitioner that it cannot procure coal from

Adani Enterprises Limited, the Trading Company which is also the Holding Company of Petitioner.

(xxix) Alternatively, in any event, to the extent of 3.15 Million MT Petitioner was bound to procure coal from Adani Enterprises Limited. The Foreign Exchange Rate Variation in respect of the procurement of 3.15 Million MT cannot be said to be on account of any Force Majeure Event. In fact, there cannot be any impact on the Foreign Exchange Rate Variation in view of the specific clause contained in the Bidding Documents that the exchange rate fluctuation shall be to the account of the Bidder. Petitioner had duly accepted the same while submitting the bid. The issue would then arise as to whether Petitioner can procure the balance quantum of coal required which is about 2 Million MT from domestic sources. As mentioned herein above, Adani, at the time of the bidding, could not have proceeded on the basis that the coal linkage or coal block allocation would be given by the Central Government. Further, even in the Memorandum of Understanding with the Government of Rajasthan, the procurement of domestic coal from other sources was envisaged. Accordingly, the 2 Million MT of domestic coal was available to Petitioner for procurement. In fact, the illustrative tariff computation given by Petitioner itself indicates that it had procured 126,168 ton domestic coal for the month of June 2016. Accordingly, Petitioner was in a position to purchase domestic coal to the extent of at least 1.51 Million MT. Petitioner had not disclosed the quantum of domestic coal procurement for the entire period. If Petitioner had disclosed such quantum, it will be clear that substantial quantum of domestic coal was available to it for procurement during the relevant period.

(xxx) In view of the above, there is no merit whatsoever in the submissions made by Petitioner in relation to Change in Law or Force majeure. No

relief is admissible to Petitioner as claimed or otherwise under change in Law, Force majeure or others using Regulatory powers of the Commission.

(xxxi) It is also well settled that no carrying cost is to be allowed as per the decision of the Central Commission. The Rajasthan Discoms would crave reference to the order dated 16.02.2017 in Review Petition 1/RP/2017 in petition no. 402/MP/2014. Petitioner is not entitled to any benefit for Force Majeure event.

Commission's analysis and decision

18. Commission has heard Ld. Counsels appearing for both the parties. They have made elaborate submissions both on Law and facts. Commission has considered the submissions made by the parties both in writing and orally and also all the material documents submitted in support of the claims made by the Petitioner and reply to the same by the Respondents besides the judgments and orders of the Hon'ble Supreme Court, APTEL and this Commission cited during the course of the arguments.

19. Though both the parties have made submissions in petition and reply on the issue of Force Majeure and Regulatory power of Commission under Section 86 (1) (f) of the Electricity Act, 2003. However, during the course of arguments they have mainly concentrated only on one issue i.e. whether there is Change in Law in the present case and whether Petitioner is entitled to any relief under terms of PPA. Therefore, Commission has looked into the only issue relating to Change in Law not the other two.

Change in Law

20. On the issue of Change in Law both the parties have made the following submissions:

21. It is submitted on behalf of the Petitioner that :

- (i) The following are the essentials of the Change in Law provision in the PPA dated 28.01.2010:
 - (a) Change in Law events inter alia include the enactment, modification of any Law occurring after the cut-off date i.e. 7 days before the bid deadline;
 - (b) The definition of Law includes a notification by an Indian Governmental Instrumentality;
 - (c) The definition of Indian Governmental Instrumentality includes any ministry, department, board, agency or other authority of Government of India.
 - (d) Any recurring/ non-recurring expenditure arising due to Change in Law is to be compensated in terms of Article 10.
 - (e) The objective of Article 10 is to restore the affected party to the same economic position as if the Change in Law event had not occurred.
- (ii) If the above said criteria as laid down in Article 10 of the PPA are satisfied, there is no reason why Change in Law has to be denied.
- (iii) The Hon'ble Supreme Court, at para 53 of its judgment dt. 11.04.2017 has inter alia decided that the letter of Government of India dated 31.07.2013 and revised Tariff Policy are statutory documents and have force of law. The ratio in the said judgment is that any change in arrangement for supply of coal in modification of the NCDP dated 18.10.2007 is a Change in Law.
- (iv) Contrary to the assurance held out in the NCDP to supply 100% of normative requirement of coal for all IPPs including for future capacity additions, on 14.02.2012 Government of India decided that no fresh linkage shall be granted in view of shortage of coal.
- (v) Therefore, in line with above findings of Hon'ble Supreme Court, the decision of Gol dated 14.02.2012 to the extent that it is not in a position

to grant coal linkage to 12th Plan projects which includes Kawai project also, is a modification to the coal supply arrangement contemplated under NCDP and therefore squarely qualifies as a Change in Law. Petitioner is therefore entitled to be restored to the same economic position by allowing the higher cost of imported/any alternate coal that is being procured in lieu of the coal supply assured from CIL under NCDP.

- (vi) As regards contention of Respondents that Adani Power quoted non-escalable tariff, it is submitted that the said contention is factually incorrect as quoted tariff is partially-escalable. Further in view of reasons quoted herein above, it is amply clear that there is no restriction for an event being considered as change in law based on nature of tariff i.e. escalable or non-escalable tariff. Change in Law provision applies in the same manner irrespective of tariff being escalable or non-escalable.
- (vii) On 31.07.2013, Rajasthan Discoms filed reply before the Commission acknowledging that there is Change in Law in the present case which will cause adverse impact upon the performance of the PPA. The relevant extract reads as under:-

“The non-availability of coal and in action 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 of the 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.”

- (viii) The Rajasthan Discoms are therefore estopped from disputing that the claim of Petitioner falls within the meaning of Change in Law as per the PPA.

22. In view of the aforesaid submissions, Petitioner submitted that it is entitled for relief in terms of Article 10.3.2 to 10.3.4 of the PPA to be restored through monthly tariff payments to the same economic position as if such Change in

Law event had not occurred. The Commission may be pleased to grant relief to Petitioner with effect from 31.05.2013 i.e., the date from which power supply under PPA was commenced on achieving the commercial operation of Unit 1 of Kawai project, in terms of paragraph 4.7 of the Competitive Bidding Guidelines and Article 10 of the PPA.

23. Per contra it is submitted on behalf of the Respondents that

- (i) Hon'ble Supreme Court vide its judgment dt. 11.04.2017 has considered for grant of relief is under the change in law provision in respect of a change in the Policy of the Government of India in the availability of domestic coal from the coal companies against the Letter of Linkage, Letter of Assurance etc. The Hon'ble Supreme Court has dealt with the change in law when the coal linkage was given for a specified quantum and subsequently under the Government Policy, the Fuel Supply Agreement (FSA) is directed to be signed by the coal company for a lesser quantum. The said situation has no application to the present case in view of the fact that Petitioner had no coal linkage or Letter of Assurance from any coal company on the date of the bidding which has been taken away by the promulgation of the New Coal Distribution Policy or change in the New Coal Distribution Policy.
- (ii) As per RFP document, sourcing of fuel and its transportation is left entirely to the discretion of the Bidder. The Successful Bidder shall bear complete responsibility to tie up the fuel linkage and the infrastructural requirements for fuel transportation, handling and storage.
- (iii) As on the date of the submission of the bid, Petitioner did not have the assurance for allotment of coal mine or giving coal linkage for any quantity of coal from the Central Government nor any coal linkage or Letter of Assurance or Fuel Supply Agreement from any of the Coal

Companies.

- (iv) To take relief under the Change in Law article 10 of the PPA, Petitioner was required to intimate the Rajasthan Discoms by giving a 'notice to the Procurers of such Change in Law as soon as reasonably have known of the Change in Law'. The Petitioner has not given any such notice. This is because Change in law is applicable only in case of reduction in quantity from the quantity mentioned in the FSA or allocation letter or letter of linkage or letter of assurance by the Central Government or Coal Companies. When there is no such fuel assurance, there cannot be any change in law and it is for this reason that the Petitioner never contemplated issuing a notice thereof.
- (v) Petitioner did envisage use of imported coal in substantial quantum for the project, at least for the first five years of the PPA, which are yet to be over.
- (vi) Petitioner's bid was primarily based on the FSA entered into with Adani Enterprises Limited, which clearly provides that Petitioner has to pay escalation at PRC Rates. It is, therefore, a conscious decision on the part of Petitioner to bid knowing fully that any price increase in the imported coal will not be a ground for claiming increase from the Rajasthan Discoms. Petitioner had quoted non-escalable tariff despite its agreement for imported coal entered into with Adani Enterprises Ltd. for escalation at PRC Rates. Inability to make fuel arrangement cannot be a ground for escalation in tariff as arrangement of fuel is a condition subsequent to be met by the Seller viz. Petitioner at its risk and cost and this condition is not even qualified by Change in Law events.
- (vii) The decision of the Supreme Court dt. 11.04.2017 does not apply to the facts of this case.

24. Before considering the above submissions, Commission deem it appropriate to quote the judgment of Hon'ble Supreme Court in Energy Watchdog, Prayas & Ors. case which relates to Change in Law:

"Change in Law

46. It has been submitted on behalf of the counsel for the respondents, that the guidelines of 19th January, 2005, as amended by the 18th August, 2006 amendment, make it clear that any change in law, either abroad or in India, would result in the consequential rise in price of coal being given to the power generators. Since various provisions of the guidelines as well as the power purchase agreements are referred to, we set them out herein:

Guidelines

"Clause 2.3.

2.3 Unless explicitly specified in these guidelines, the provisions of these guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these guidelines is specified later in these guidelines under para 5.16.

Clause 4.3

4.3. Tariffs shall be designated in Indian Rupees only. Foreign exchange risks, if any, shall be borne by the supplier. Transmission charges in all cases shall be borne by the procurer.

Provided that the foreign exchange rate variation would be permitted in the payment of energy charges [in the manner stipulated in para 4.11 (iii)] if the procurer mandates use of imported fuel for coastal power station in case-2.

Clause 4.7. (unamended)

Any change in tax on generation or sale of electricity as a result of any change in Law with respect to that applicable on the date of bid submission shall be adjusted separately.

Clause 4.7 (amended).

Any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for RFP bid submission shall be adjusted

separately. In case of any dispute regarding the impact of any change in law, the decision of the Appropriate Commission shall apply.

5.4. Standard documentation to be provided by the procurer in the RFQ shall include - (ii) Model PPA proposed to be entered into with the seller of electricity. The PPA shall include necessary details on:

- Risk allocation between parties;
- Technical requirements on minimum load conditions;
- Assured off take levels;
- Force majeure clauses as per industry standards;
- Lead times for scheduling of power;
- Default conditions and cure thereof, and penalties;
- Payment security proposed to be offered by the procurer.

Clause 5.6. Standard documentation to be provided by the procurer in the RFP shall include - (ii) PPA proposed to be entered with the selected bidder. The model PPA proposed in the RFQ stage may be amended based on the inputs received from the interested parties, and shall be provided to all parties responding to the RFP. No further amendments shall be carried out beyond the RFP stage;

Clause 5.16 (old)

Deviation from process defined in the guidelines

Clause 5.16. In case there is any deviation from these guidelines, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 days.

Clause 5.17 (old)

Arbitration

Clause 5.17. The procurer will establish an Amicable Dispute Resolution (ADR) mechanism in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. The ADR shall be mandatory and time-bound to minimize disputes regarding the bid process and the documentation thereof. If the ADR fails to resolve the dispute, the same will be subject to jurisdiction of the appropriate Regulatory Commission under the provisions of the Electricity Act, 2003.

Clause 5.16 (new)

Deviation from process defined in the guidelines

5.16 In case there is any deviation from these guidelines, the same shall be subject to approval by the Appropriate Commission. The Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 90 days.

Clause 5.17 (new)

Arbitration

Clause 5.17 Where any dispute arises claiming any change in or regarding determination of the tariff or any tariff related matters, or which partly or wholly could result in change in tariff, such dispute shall be adjudicated by the Appropriate Commission. All other disputes shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996.

Power purchase agreement

"Bid Deadline" shall mean the last date for submission of the Bid in response to the RFP, specified in Clause 2.8 of the RFP;

"Dispute" means any dispute or difference of any kind between a Procurer and the Seller or between the Procurers (jointly) and the Seller, in connection with or arising out of this Agreement including any issue on the interpretation and scope of the terms of this Agreement as provided in Article 17;

"Electricity Laws" means the Electricity Act, 2003 and the rules and regulations made thereunder from time to time along with amendments thereto and replacements thereof and any other Law pertaining to electricity including regulations framed by the Appropriate Commission;

"Fuel" means primary fuel used to generate electricity namely, _____",

"Fuel Supply Agreements" means the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for the supply of the Fuel;

"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 Government

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;

“Project Documents” mean

- a Construction Contracts;*
- b Fuel Supply Agreements, including the Fuel Transportation Agreement, if any;*
- c O&M contacts;*
- d RFP and RFP Project Documents; and*
- e Any other agreements designated in writing as such, from time to time, jointly by the Procurers and the Seller;*

13. ARTICLE 13: CHANGE IN LAW

13.1 Definitions

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

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

- (i) the enactment, bringing into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a competent Court of law, tribunal 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 Procurers under the terms of this Agreement, or (iv) any change in the (a) Declared value of Land for the Project or (b) the cost of implementation of 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, 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. Provided that if Government of India does not extend the income tax holiday for power generation projects under Section 80 IA of the Income Tax

Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemed to be a Change in Law.

13.1.2 "Competent Court" means:

The Supreme Court or any High Court, or any tribunal or any similar judicial or quasi-judicial body in India that has jurisdiction to adjudicate upon issues relating to the Project.

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, 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 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.

a Construction Period

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

For every cumulative increase/decrease of each Rupees Fifty crores (Rs.50 crores) in the Capital Cost over the term of this Agreement, 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. Provided that the Seller provides to the Procurers documentary proof of such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 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 Rs.fifty (50) crores.

Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Central Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an

amount equivalent to 1% of Letter of Credit in aggregate for a Contract Year.

13.3 Notification of Change in Law

13.3.1 If the Seller is affected by a Change in Law in accordance with Article 13.2 and wishes to claim a Change in Law under this Article, 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.

13.3.2 Notwithstanding Article 13.3.1, the Seller shall be obliged to serve a notice to all the Procurers under this Article 13.3.2 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 jointly have the right to issue such notice to the Seller.

13.3.3 Any notice served pursuant to this Article 13.3.2 shall provide, amongst other things, precise details of:

- (a) the Change in Law; and
- (b) the effects on the Seller of the matters referred to in Article 13.2.

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:

- (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.

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.

17.3.1 Where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the

Tariff or determination of any of such claims could result in change in the Tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

18.1 Amendment

This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary."

47. The respondents have argued before us that it is clear from the change made in clause 4.7 of the guidelines read with clause 5.17 that any change in law impacting cost or revenue from the business of selling electricity shall be adjusted separately. Learned counsel for the respondents have argued that "any change in law" is not qualified and, therefore, would include foreign law. According to them, the power purchase agreement is subservient to the guidelines and can never negate the terms of the guidelines. Under clauses 4.7 and 5.1.7 of the guidelines, these guidelines are binding on all parties including the procurers and any deviation there from has to be approved by the appropriate Commission. Therefore, according to them, the PPA must be read as including foreign laws as well. On the other hand, our attention was invited to the definition of "electricity laws" and it was argued that clause 13 would have to be read in the light of the PPA provisions and so read it would not include changes in Indonesian law, being foreign and not Indian Law.

48. Both the guidelines and the model PPA, of which clause 13 is a part, have been drafted by the Central Government itself. It is, therefore, clear that the PPA only fleshes out what is mentioned in clause 4.7 of the guidelines, and goes on to explain what the expression "any change in law" means. This being the case, it is clear that the definition of "law" speaks of all laws including electricity laws in force in India. Electricity laws, as has been seen from the definition, means the Electricity Act, rules and regulations made thereunder from time to time, and any other

law pertaining to electricity. This being so, it is clear that the expression "in force in India" in the definition of law' goes with "all laws". This is for the reason that otherwise the said expression would become tautologous, as electricity laws that are in force in India are already referred to in the definition of "electricity laws" as contained in the PPA. Once this is clear, at least textually it is clear that "all laws" would have to be read with "in force in India" and would, therefore, refer only to Indian laws. Even otherwise, from a reading of clause 13, it is clear that clause 13.1.1 is in four different parts. The first part speaks of enacted laws; the second speaks of interpretation of such laws by Courts or other instrumentalities; the third speaks of changes in consents, approvals or licences which result in change in cost of the business of selling electricity; and the fourth refers to any change in the declared law of the land for the project, cost of implementation of re-settlement and rehabilitation or cost of implementing the environmental management plan. 'Competent Court' in clause 13.1.2 is defined as meaning only the judicial system of India.

49. First and foremost, the expression "any law" occurs in both sub-section (1) and sub-section (2) of clause 13.1.1, which expression must be given the same meaning in both sub-sections. This being the case, as in sub-clause (2), this expression would refer only to Indian law, the same meaning will have to be given to the very same expression in sub-clause (1). Even otherwise, sub-clauses (1) and (2) form part of the same contractual scheme in that sub-clause (1) refers to the enactment of laws, whereas sub-clause (2) relates to interpretation of those very laws by a competent Court of law/Tribunal or Indian Government instrumentality. 'Competent Court', as we have seen above, speaks only of the Indian judicial system and, therefore, the enactments spoken of in sub-clause (1) would necessarily refer only to Indian enactments.

50. However, we were referred to other clauses in the PPA, for example, clauses 12.4(f)(ii), 4.1.1(a) and 17.1, all of which speak of Indian law. It was, therefore, argued that wherever the parties wanted to refer to Indian law, they did so explicitly, and from this it should be inferred that the expression "law" would otherwise include all laws whether Indian or otherwise.

51. This argument is based on the Latin maxim *expressio unius est exclusio alterius*. This maxim has been referred to in a number of judgments of this Court in which it has been described as a 'useful servant but a dangerous master'. (See for example *CCE v. National Tobacco Co. of India Ltd.*, (1972) 2 SCC 560 at Para 30).

From a reading of the above, it is clear that if otherwise the expression "any law" in clause 13 when read with the definition of "law" and "Electricity Laws" leads unequivocally to the conclusion that it refers only to the law of India, it would be unsafe to rely upon the other clauses of the agreement where Indian law is specifically mentioned to negate this conclusion.

52. It was also argued, placing reliance upon the fact that a commercial contract is to be interpreted in a manner which gives business efficacy to such contract, that the subject matter of the PPA being "imported coal", obviously the expression "any law" would refer to laws governing coal that is imported from other countries. We are afraid, we cannot agree with this argument. There are many PPAs entered into with different generators. Some generators may source fuel only from India. Others, as is the case in the Adani Haryana matter, would source fuel to the extent of 70% from India and 30% from abroad, whereas other generators, as in the case of Gujarat Adani and the Coastal case, would source coal wholly from abroad. The meaning of the expression "change in law" in clause 13 cannot depend upon whether coal is sourced in a particular PPA from outside India or within India. The meaning will have to remain the same whether coal is sourced wholly in India, partly in India and partly from outside, or wholly from outside. This being the case, the meaning of the expression "any law" in clause 13 cannot possibly be interpreted in the manner suggested by the respondents. English judgments and authorities were cited for the proposition that if performance of a contract is to be done in a foreign country, what would be relevant would be foreign law. This would be true as a general statement of law, but for the reason given above, would not apply to the PPAs in the present case.

53. 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. This being the case, on 31st July, 2013, the following letter, which is set out in extenso states as follows:

FU-12/2011-IPC (Vol-III)
Government of India
Ministry of Power

Shram Shakti Bhawan, New Delhi
Dated 31st July, 2013

"To,
The Secretary,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.

Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13

Sir,

In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement (FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.

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

i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.

ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.

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

3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years of the 12th Plan (copy enclosed).

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

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

This issues with the approval of MOS(P)/C."

Encl: as above

Yours faithfully,

Sd/-

(V.Apparao)

Director

This is further reflected in the revised tariff policy dated 28th January, 2016, which in paragraph 1.1 states as under :

1.1 In compliance with Section 3 of the Electricity Act 2003, the Central Government notified the Tariff Policy on 6th January, 2006. Further amendments to the Tariff Policy were notified on 31st March, 2008, 20th January, 2011 and 8th July, 2011. In exercise of powers conferred under Section 3(3) of Electricity Act, 2003, the Central Government hereby notifies the revised Tariff Policy to be effective from the date of publication of the resolution in the Gazette of India.

Notwithstanding anything done or any action taken or purported to have been done or taken under the provisions of the Tariff Policy notified on 6th January, 2006 and amendments made thereunder, shall, in so far as it is not inconsistent with this Policy, be deemed to have been done or taken under provisions of this revised policy.

Clause 6.1 states:

6.1 Procurement of Power

As stipulated in para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements. However, some of the competitively bid projects as per the guidelines dated 19th January, 2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in Letter of Assurance/FSA the cost of imported/market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by Appropriate Commission on a case to case basis, as per advisory issued by Ministry of Power vide OM NO.FU-12/2011-IPC (Vol-III) dated 31.7.2013.

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

25. From the above extract of the judgment it is clear that as per the Hon'ble Supreme Court change in coal allocation policy by Gol, amount to Change in Law.

26. Commission observes that Gol had issued coal policy on 18.10. 2007. The relevant portion of the said policy applicable to power utilities read as under:

“2.2 Power utilities including Independent Power Producers (IPPs)/ Captive Power Plants and Fertilizer Sector

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

27. It is observed from the above that Gol had said that 100% of the quantity of coal for IPPs will be considered.

28. Petitioner participated in the bid, invited by RVPN based on expected coal linkage as per the policy, by submitting its bid dated 31.07.2009

29. Considering the rate quoted by the Petitioner as most competitive, RVPN accepted the Petitioner's bid and signed the PPA dated 28.01.2010.

30. It is observed from the material placed before the Commission that Petitioner vide its letter dt. 02.07.2009 had applied to Standing Linkage Committee Ministry of Coal, Gol for grant of coal linkage to its Kawai project as per NCDP of 2007 on the ground of contemplated supply of power to Rajasthan Discoms and MoU signed with GoR on 20.03.2008.

31. Standing Linkage Committee in its meeting held on 14.02.2012 considered the application of the Petitioner. However, noting the position of short availability of coal, as stated by CIL that there is a gap between commitment through LoAs/FSAs with power sector companies and other consumers vis-à-vis production projections, came to the decision that there may not be any scope for recommending fresh LoAs for the 12th Plan

period. The relevant extract of the minutes of Linkage Committee (produced as Annex-7 by the Petitioner along with Additional Affidavit dt. 11.05.2017) read as under:

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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 11th 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.

“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." (emphasis supplied)

32. Further, Standing Linkage Committee in its meeting held on 31.05.2013 on the issue regarding acceptance of fresh applications for seeking LoAs recommended as under: (Produced as Annex- 10 by the Petitioner along with Additional Affidavit dt. 11.05.2017)

"In view of the huge gap in supply and demand of coal, it was recommended that receipt of fresh applications of LOAs from power sector be kept in abeyance for a period of two years. Thereafter, the matter would review.

As regards unprocessed applications, it was recommended that the fees deposited by them could be deposited to the Govt. account but the processing of these applications should be kept in abeyance. Whenever, it would be decided to accept fresh applications for LoAs, such unprocessed applications would get precedence over fresh applications to be received." (emphasis supplied)

33. On 21.06.2013, Cabinet Committee on Economic Affairs (CCEA) passed a resolution wherein it was approved that FSAs to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity for the remaining four years of the 12th Five year Plan and directed to consider the feasibility of higher cost of imported coal being allowed as a pass through in case of PPAs signed on competitive bid basis.

34. Further, Ministry of Coal, Gol on 26.07.2013 subsequently issued an 'Office Memorandum' which read as under: (produced as Annex-12 by the Petitioner along with Additional Affidavit dt. 11.05.2017)

"The New Coal Distribution Policy (NCDP) was issued vide this Ministry's Office Memorandum No. 23011/4j2007-CPD dated 18.10.2007, laying down the guidelines for distribution and pricing of coal to various sectors. As per para 2.2 of the said policy, Power Utilities including Independent Power Producers were to be supplied 100 per cent of the

quantity as per their normative requirement through Fuel Supply Agreement(s) (FSAs) by Coal India Limited (CIL) at fixed prices to be declared/notified by CIL. As per para 5.2, in order to meet the domestic requirement, CIL was to import coal as required from time to time, if feasible and adjust the overall price accordingly. (emphasis supplied)

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

35. On 31.07.2013, Ministry of Power, Govt also wrote a letter to Central Electricity Regulatory Commission which read as under: (produced as Annex- 13 by the Petitioner along with Additional Affidavit dt. 11.05.2017)

"To,
The Secretary,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Impact on tariff in the concluded PPAs due to shortage in domestic coal availability and consequent changes in NCDP.

Ref. CERC's D.O. No.10/5/2013-Statutory Advice/CERC dated 20.05.13

Sir,

In view of the demand for coal of power plants that were provided coal linkage by Govt. of India and CIL not signing any Fuel Supply Agreement

(FSA) after March, 2009, several meetings at different levels in the Government were held to review the situation. In February 2012, it was decided that FSAs will be signed for full quantity of coal mentioned in the Letter of Assurance (LOAs) for a period of 20 years with a trigger level of 80% for levy of disincentive and 90% for levy of incentive. Subsequently, MOC indicated that CIL will not be able to supply domestic coal at 80% level of ACQ and coal will have to be imported by CIL to bridge the gap. The issue of increased cost of power due to import of coal/e-auction and its impact on the tariff of concluded PPAs were also discussed and CERC's advice sought.

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

- i) taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.
- ii) to meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.
- iii) higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.

3. Ministry of Coal vide letter dated 26th July 2013 has notified the changes in the New Coal Distribution Policy (NCDP) as approved by the CCEA in relation to be coal supply for the next four years of the 12th Plan (copy enclosed).

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

5. The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government. This issues with the approval of MOS(P)/C."

36. It is submitted by the Petitioner that Gol did not allocate coal to its plant even though it had applied for the same due to above policy change.

37. According to the Petitioner the above policy change amount to Change in Law as per Clause 10.1.1 read with definition Clause of 'Law' of PPA. Consequently it shall be given the benefit of Change in Law as per PPA.
38. Respondents have argued that the judgment of the Hon'ble Supreme Court does not apply to the case of Petitioner as they had neither coal linkage, FSA nor LoA as per coal policy and hence there is no Change in Law in terms of Clause 10.1.1 of PPA. Respondents have further contended that the bid of the Petitioner was based on imported coal as Petitioner had no coal linkage.
39. Commission has looked into the RFP dated 31.07.2009 to examine the above contention of Respondents.
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.
46. This Commission in its order dt. 30.04.2014 had held that change in policy of Gol doesn't amount to be Change in Law.
47. The Hon'ble APTEL in appeal against the above order affirmed the view taken by this Commission.
48. However, the Hon'ble Supreme Court in the Energy Watch Dog's case, reversing the view of Hon'ble APTEL has held that change in policy of Gol in

grant of coal, amount to Change in Law.

49. It is observed that the Ministry of Coal, Gol modified the NCDP, 2007 on 26.07.2017 which is referred to at para 34 of this order. It is observed from 'Office Memorandum' dt. 26.07.2013 that Gol under 2007 policy intended to supply 100% of the normative requirement of coal.
50. Therefore, Commission is of the view that once coal which was supposed to be allocated to Petitioner as per NCDP 2007, is not allotted to the Petitioner due to change in policy in 2012/2013, the same amount to Change in Law in terms of Clause 10.1.1 read with the definition of 'Law' of PPA and as per the Hon'ble Supreme Court judgment and Petitioner is entitled to relief from the date of its application, as application for coal linkage was earlier to policy change.
51. It is observed that recently Ministry of Power vide its letter dt. 04.01.2018 has advised all SERCs to adopt/ approve the amended or supplemental PPA between the developer and the procurer for supply of electricity by generating company to a distribution licensees under already concluded PPA based on domestic coal under para B (II) of Ministry of Coal OM No. 23011/15/2016-CPD dated 22.05.2017 regarding policy guidelines of SHAKTI policy of the Government.
52. It is observed based on the above new policy and PPA executed under Section 63 of the Act by the Petitioner coal linkage under the SHAKTI policy has been granted to the Petitioner and accordingly Petitioner has executed a supplementary PPA giving a discount of 2 paise on the tariff approved in the PPA.
53. Therefore, Petitioner is entitled to relief as provided in Clause 10.3 of the PPA w.e.f. the date of CoD till domestic coal linkage is granted in 'SHAKTI' Scheme.

Relief

54. Since Commission has come to the conclusion that non allocation of coal due to change of NCDP, 2007 in 2012 amount to Change in Law in terms of Clause 10 of the PPA. As a consequence, Petitioner is entitled to relief as provided in Clause 10.3 of the PPA for the additional cost incurred on procurement of coal, which was not allocated by Coal India as per NCDP 2007.

55. The Hon'ble Supreme Court has interpreted a similar provision in the case of Energy Watchdog Vs CERC. The same is as below:

“53. 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.”

56. Clause 10.2 and 10.3 of the PPA, which deal with the impact of Change in Law, read as under:

10.2 Application and Principles/or 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

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. (emphasis supplied)

10.3.4 *The decision of the Appropriate Commission, with regards to the determination of the compensation mentioned above in Article 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."*

57. In this regard, Petitioner submitted that the Article 10 of the PPA contemplates that the affected party is to be restored to the same economic position as if such change in law has taken place. Therefore, Petitioner is entitled to carrying cost from the date of cause of action till the payment of compensation. Under these circumstances, it is necessary for the Commission to ensure that Petitioner is compensated restoring its economic position under Article 10 of the PPA. It is settled principle of law that the person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by whatever name it may be called viz. interest, compensation or damages.

58. Petitioner submitted that it is entitled for relief in terms of Article 10.3.2 to 10.3.4 of the PPA to be restored through monthly tariff payments to the

same economic position as if such Change in Law event had not occurred. The Commission should grant relief to Petitioner with effect from 31.05.2013 i.e., the date from which power supply under PPA was commenced on achieving the commercial operation of Unit 1 of Kawai project, in terms of paragraph 4.7 of the Competitive Bidding Guidelines and Article 10 of the PPA.

59. It is observed from the petition that Petitioner to claim relief under the terms of the PPA has to provide to the procurers and Commission the documentary proof of increase/decrease in cost of power or revenue or expenses for establishing the impact of such Change in Law as per Clause 10.3.3. However, Commission observes that Petitioner has not produced any material in this regard and it has only produced some sample calculations.
60. Therefore, Commission directs Petitioner to furnish to the Respondents all relevant material details as required under Clause 10.3.3 along with documentary evidence in support of its claim such as invoices of coal purchased (both domestic and imported) for its Rajasthan Plant, additional cost incurred on imported coal and domestic coal actually used etc., its monthly generation, auxiliary consumption, SHR, etc. duly authenticated by the statutory auditor and demonstrate the actual impact on it due to Change in Law. Respondents shall verify the above claim thoroughly at its own level keeping in mind the RFP documents, the quote given by Petitioner on tariff, provisions of RFP/PPA, bidding guidelines, FSA executed by the Petitioner for procuring imported coal as fall back arrangement etc. and in light of judgment of Hon'ble APTEL in Sasan Power Ltd. Vs CERC & Ors. reported in 2017 ELR (APTEL) 0508 and other judgments of Hon'ble Supreme Court and APTEL and then arrive at the compensation payable to Petitioner within three months from the date Petitioner submits its claim along with all requisite supporting document/material.

61. Petitioner has submitted that as its case falls within the definition of Change in Law as provided in PPA, in addition to relief of Change in Law, Commission may please to order carrying cost.
62. Petitioner also submitted that the principle of recovery of cost of funding is an established philosophy of regulatory jurisprudence as Carrying Cost. It has been held by the Hon'ble Supreme Court that if a person is deprived of the use of money, to which he is legitimately entitled to, has a right to be compensated for the deprivation, call it by any name. Interest pendent lite is not a matter of substantive law. For doing complete justice between the parties, such power has always been inferred. In this regard, reliance is made on following judgments of Hon'ble Supreme Court: (i) *Secy, Irrigation Department, Govt. of Orissa Vs. GC Roy* reported as (1992) 1 SCC 508 (CB): para 43 and (ii) *Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age* reported as (1996) 1 SCC 516: paras 3 &4.
63. Entitlement to carrying cost is a settled position of law and the Commission under its regulatory powers also can grant carrying cost even when there is no specific provision in the PPA/Guidelines.
64. Commission has considered the above argument in the light of pleading and facts placed before the Commission. From the facts and documents placed before the Commission it is observed that Petitioner has never raised any supplementary bill on the ground of Change in Law as required under the Clause 13.4.2 of the PPA. Question of Carrying cost/interest would have arisen if Petitioner had raised bill from time to time. Even after filing petition, Petitioner has not raised any supplementary claim as impact of Change in Law, though its claimed Change in Law.
65. Further, what has been sought in petition is a formula for raising the bill therefore, Commission is of the considered view that Petitioner is not entitled

to make a claim for carrying cost. Due to the facts of this case the judgment cited in support of claim of carrying cost has no application.

66. Commission observes that the Petitioner's claim for 'Change in Law', which was not granted by this Commission in earlier order, is being granted now as per decision of Hon'ble Supreme Court dated 11.04.2017. Therefore, Petitioner would not be entitled to any carrying cost for the amount now payable for the period prior to the date of finalization of the admissible amount of compensation by Respondents in pursuance to this Commission's order.

67. This petition is allowed in part. Both Respondents and Petitioner shall implement this order in terms of direction contained in para (60) expeditiously. There is no order as to the cost.

(S.C. Dinkar)
Member

(R.P. Barwar)
Member

(Vishvanath Hiremath)
Chairman