Petition No. 871 & 891 of 2013

And

Review Petitions 1062/2015 & 1104/2016

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

**PRESENT:**

1. Hon’ble Sri Desh Deepak Verma, Chairman
2. Hon’ble Sri Suresh Kumar Agarwal, Member

**IN THE MATTEROF:** Petition No. 871 of 2013 under section 86 (1) (f) of the Electricity Act, 2003 read with Regulations 156 of the UPERC (Conduct of Business) Regulations, 2004

AND

**IN THE MATTER OF**

M/s LancoAnpara Power Limited (LAPL)

411/9, Riverside Apartments,

New Hyderabad, Lucknow

**--------------- Petitioner**

Uttar Pradesh Power Corporation Ltd.

(through its Chairman),

7th Floor, Shakti Bhawan,

14, Ashok Marg,

Lucknow

**--------------- Respondent**

AND

**IN THE MATTER OF:** Petition no. 891 of 2013 opposing the claim of LAPL.

Uttar Pradesh Power Corporation Ltd.

(through its Chairman),

7th Floor, Shakti Bhawan,

14, Ashok Marg,

Lucknow

**--------------- Petitioner**

M/s LancoAnpara Power Limited (LAPL)

411/9, Riverside Apartments,

New Hyderabad, Lucknow

**--------------- Respondent**

AND

# Mr Rama ShankerAwasthi

301, Surbhi Deluxe Apartments

6/7,Dalibagh,Lucknow 226001

**The following were present**:

Shri V. P. Srivastava, CE, UPPCL

ShriVinodAsthana, SE, UPPCL

ShriHaroonAslam, EE, UPPCL

CA Manish Garg, Consultant, UPPCL

Shri Rajiv Srivastava, Advocate, UPPCL

Sri M.G.Ramchandran, Advocate, UPPCL

Shri K. Raja Gopal, CEO, LancoAnpara

ShriRanjan Kumar, ED, LancoAnpara

Shri G. P. Mishra, Deputy Manager, LancoAnpara

ShriArunTholia, GM (Commercial), LancoAnpara

Shri S. B. Upadhyay, Senior Advocate, LancoAnpara

ShriShubhamArya, Advocate, UPPCL

ShriSakyaSinghaChaudhary,Advocate, LancoAnpara

Shri R. S. Awasthi, Public Representative

ShriAmitOjha, VP, LancoAnpara

ShriTusharSrivastava, Advocate, LancoAnpara

**ORDER**

**(Date of Hearing 1 & 3rd June, 2017)**

The present matter arises from an appeal filed by Sri Rama Shanker Awasthi, a public representative, (Appeal No.173 of 2016 & I.A. No.373 of 2016 & IA No.569 of 2016) before Hon’ble APTEL challenging the order dated 23/11/2015 passed by the Uttar Pradesh Electricity Regulatory Commission in Petition Nos.871 and 891 of 2013 in the matters of M/s LancoAnpara Power Limited and UPPCL. Hon’ble Appellate Tribunal vide order dated 30 November, 2016 set aside the order dated 23.11.15 of the Commission and remanded the matter to the state commission with a direction to decide the matter afresh. The LAPL vide their letter dated 16.12.2016 requested the Commission to decide the matter in compliance to the decision of the Hon’ble APTEL.

M/s Lanco Anpara Power Limited is a Generating Company, within the meaning of Section 2(28) of the Electricity Act, 2003 (“**the said Act**”) and is having a generating station, Anpara C-Project with a total capacity of 1200 MW (2x600 MW) in the State of Uttar Pradesh. Uttar Pradesh Power Corporation Limited (“**UPPCL”**) is the Holding company/State Utility in Uttar Pradesh engaged in the business of bulk purchase of electricity for and on behalf of the distribution licensees in the State of Uttar Pradesh. In pursuance of a Competitive Bid Process initiated by the UPPCL under Section 63 of the said Act, Lanco entered into a PPA dated 12/11/2006 (as amended by the Supplementary Agreement dated 31/12/2009) with UPPCL for generation and supply of power of 1000 MW (subsequently increased to 1100 MW) from Anpara C Project on build, own, operate and maintain basis.

On 28/01/2013, Lanco filed Petition No.871 of 2013 under Section 86(1)(f) of the Electricity Act before the State Commission with the following prayers:

*“(a) To direct Respondents to clear all outstanding dues under the PPA till date;*

 *(b) To Pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents till the successful completion of the buy-out of the Plant;*

 *(c) In the alternative, pass an Order determining new tariff for the supply of power from the Anpara C Plant to Respondents, instead of a buy-out of the Plant keeping in view the viability and sustainability of the Plant after taking into account the accumulated losses of the Plant till date;*

*(d) Pass any other Order which may be consequential upon prayer (a), (b) and/or (c) and any other Order as this Hon’ble Commission may deem fit.”*

On 24/01/2013 and 11/02/2013, Lanco issued termination notices to UPPCL in terms of Article 15.4.6 of the PPA.

On 21/05/2013, UPPCL also filed a Petition being Petition No.891 of 2013 under Section 86(1)(f) of the said Act challenging the termination notice dated 24/01/2013 and buy out notice dated 11/02/2013 issued by Lanco.

By order dated 23/05/2013, the State Commission clubbed both the petitions and decided to hear them together. Both the petitions, i.e. petition no.871 and 891 of 2013 were decided by the Commission on 23.11.2015. The Commission had passed order to resolve the dispute between Uttar Pradesh Power Corporation Limited (LAPL) and M/s LancoAnpara Power Ltd (LAPL) by granting certain reliefs to LAPL under section 86(1)(f) of Electricity Act 2003 read with regulation 156 of UPERC (Conduct of Business) regulations 2004.

The Commission tried to find a solution to the problem, without disturbing the PPA under section 63 for which the authority flows to the Commission from section 86(1)(f) and the preamble of the Act. The purport of such an exercise was to provide a compensatory package, if at all due to LAPL without disturbing the PPA, so as to address the impediment which had been caused in functioning of this project on a viable basis. The Commission did not intent to change the terms of the agreement already entered into between LAPL and UPPCL. All that the Commission did was that it allowed some sort of compensatory package to LAPL over and above the existing tariff under section 63 on the recommendation of the expert committee constituted for the purpose and in consent with both the parties after appreciating the hardship faced by LAPL and recognizing the non-adherence of the material conditions contained in the RFP, default on the part of UPPCL in establishing ‘Payment Security Mechanism’ and its failure to make timely payment of the bills raised by LAPL towards electricity supplied to make Anpara-C plant viable and sustainable on long term basis coupled with the fact that UPPCL could not afford to lose Anpara-C which is very competitive. This compensatory tariff is to be revised or withdrawn as and when the hardships are removed or lessened.

As was been stated earlier ,the order dated 23.11.2015was challenged by the public representative Sri Rama Shankar Awasthi in Appeal no. 173 of 2016 filed in the Appellate Tribunal for Electricity. On this appeal the Hon’ble Appellate Tribunal passed an order on 30 November 2016 setting aside the order dated 23.11.15 of the Commission and remanding the matter to the state commission with a direction to decide the matter afresh after hearing the parties having regard to the full bench judgment of the Hon’ble Tribunal dated 7.4.2016 within a period of four months from the receipt of the order. The Hon’ble Tribunal also made an observation “we make it clear that in the merits of the case we have not expressed any opinion”.

The LAPL vide their letter dated 16.12.2016 intimated to the Commission about the decision of the Hon’ble APTEL and requested the Commission to fix the next date of hearing on the subject matter. The Commission fixed the case for hearing on 04th January 2017. On the date of hearing both the parties and the appellant Sri R.S. Awasthi appeared before the Commission. The Commission directed all the parties to raise the issue in their written submissions and fixed the next date of hearing as 07 Feb 2017. The LAPL filed their submissions on 19.01.2017 on affidavit. After the submissions of the LAPL the UPPCL sought one more week time to file their submissions. In the hearing on 7.2.2017 the Commission asked the Appellant Sri R.S. Awasthi regarding non filing of his submissions as per the directions of the Commission. Sri R.S. Awasthi requested for 15 days more time to file his submissions. The Commission in its order dated 14.2.2017 directed UPPCL to file its reply within 7 days and granted 10 days’ time to Sri R S Awasthi to file his submissions.M/s UPPCL filed their reply on 16.02.2017 in which they emphasized that in view of the order of the Hon’ble APTEL dated 30.11.2016 the Commission could exercise its adjudicatory power as contemplated in Section 86(1)(f) of the Electricity Act 2003 and could grant relief to LAPL if a case of force majeure or change in law was made out through the procedure provided in the PPA. They further stated that without following the procedure for invoking change in law and force majeure no relief can be claimed by LAPL as per their additional submissions. They also stated that in the additional submission of LAPL they have set up an altogether new case to somehow by pass the law laid down in the full bench judgment of Hon’ble APTEL dated 7.4.2016. They are also of the view that the submissions made by LAPL are materially at variance with the purpose for which petition no.871 of 2013 was filed by LAPL before this Commission. They submitted that UPPCL is willing to assist the Commission in arriving at a decision based on pleadings made in petition no.871/2013 and 891/2013 in consumer interest and which is in conformity with the applicable law.

LAPL again filed additional submissions on 28.02.17 asking for increase in tariff by Rs.0.270 per unit on various grounds. On this submission UPPCL filed an application in which they prayed for time up to 31 March 2017 to file their reply on the additional submissions dated 28.2.2017. Commission fixed another hearing for 24 March 2017 to hear the matter further. In the meantime, UPPCL filed their reply on additional submission of LAPL dated 28.2.2017, on 17.03.2017. in their submissions they pleaded that the pleadings made out in petition no. 871 of 2013 and the response to the aforesaid petition do not make out a case for revision in tariff under change in law or force majeure. They also mentioned that they have not found any averment in petition no.871 of 2013 on the basis of which a case for change in law and/or force majeure have been pleaded, and since there is no such pleading in petition no. 871 of 2013 the application of law as laid down by the full bench judgment of APTEL would warrant dismissal of the petition no. 871 of 2013 filed by LAPL in this Commission. LAPL submitted a rejoinder of UPPCL submissions on 22.3.2017. In the rejoinder LAPL pleaded that full bench judgment of APTEL requires this Hon’ble Commission to grant such reliefs to LAPL as available to it under the provisions of PPA and other project documents and a restricted reading of full bench judgment would make all such other reliefs non-acceptable those based on change in law and force majeure. They also pleaded that apart from change in law or force majeure there are other reliefs available to LAPL under the PPA and other project documents executed between the parties. Since these reliefs form part of contractual arrangement between UPPCL and LAPL the commission is required to examine whether any of the reliefs sought by LAPL falls within such contractual provisions in accordance with the principles set out in para 156 of the full bench judgment of APTEL. The Commission heard both the parties on 24th March 2017. Since the arguments were not completed again a hearing was held on 31 March 2017. In the meantime Sri RS Awasthi the appellant in the Tribunal filed his submissions on 28 March 2017. Sri Awasthi made the point that the scope in remand order dated 30.11.2015 passed by Hon’ble Tribunal is limited and the state commission is bound to act within the purview of the limited remand order. LAPL is raising new issues which have never been a part of the petition filed by LAPL or comes within the purview of the limited remand order of the Hon’ble Tribunal.

Sri Awasthi also emphasized that it is a well settled principle that a lower court has to act within the bounds of the remand order passed by the higher court. He also quoted the following cases in support of his argument:

1. *Mohan Lal v. Anandibai, (1971)1 SCC 813*
2. *K.P. Dwivedi-v-State of U.P. (2003) 12 SCC 572*
3. *Chandanmal –v- Rawatmal 1979 SCC OnLine Raj 52: AIR 1980 Raj 139*

Sri R.S.Awasthi submitted that in additional submission of LAPL they have sought to claim relief under the provisions of change in law and force majeure although there being no claim made under force majeure or change in law in petition no. 871 of 2013. He also mentioned that the Hon’ble Commission in its order dated 28.04.2014 has categorically mentioned that the new tariff or additional tariff can only be given to LAPL after expiry of the period of 25 years and this order has not been challenged by Lanco. Further para 25 of the order dated 28.4.14 of the Commission records that Lanco has modified its prayer as required, to grant suitable compensatory tariff to remove the difficulties faced by them. In brief Sri Awasthi has opposed entertainment of any plea of Lanco related to change in law and force majeure. Lanco also submitted a rejoinder to the submissions filed by Sri RS Awasthi on 31.3.2017. In this rejoinder LAPL has denied the arguments of Sri R.S. Awasthi and pleaded that Hon’ble APTEL has not expressed any opinion on the merits of the case and has directed to the Commission to decide the matter afresh in light of the full bench judgment of the Hon’ble APTEL. Therefore, the present proceedings would fall within the scope of an open remand. The scope of open remand is very wide as opposed to a limited remand and the present case being an open remand the whole case is remitted back to the Hon’ble Commission to be decided afresh. Accordingly the Commission can exercise its jurisdiction in accordance with law and decide the issue afresh after considering the submissions of the parties. They have pleaded that they will be entitled for reliefs as prayed for as well as other reliefs which the Commission deemed fit and proper.

The Commission passed its order on 12.4.2017 on the hearing held on 31 March 2017. The Commission recorded the summary of pleadings by LAPL, Sri R.S.Awasthi and UPPCL as under:

**Submissions of LAPL**

LAPL submitted the claims for relief on following grounds:

1. Deemed availability due to delay in handing over of land.
2. Under recovery of fixed charges due to coal issues.
3. Losses on account of higher heat rate, secondary oil consumption and O&M expenses due to coal issues.
4. Higher working capital due to coal issues.
5. Capital cost incurred on wharf wall due to coal issues.

**Submission of UPPCL**

1. The additional submission is in complete disjunction with the pleadings in the original petition.
2. No pleading in the petition No.871 of 2013, which referred to the change in coal policy or coal related logistics will qualify for Force Majeure under Article 12.3(f) read with Article 12.3(d) of the PPA
3. In additional submission, LAPL has sought relief under force Majeure/Change in Law, which was not sought in petition No.871 of 2013.
4. Full Bench Judgment of APTEL dated 07.04.2016, has restricted the claim for enhanced tariff to Force Majeure and Change- In- Law.
5. LAPL in its additional submission has tried to bring its claims under the ambit of Force Majeure and Change in Law in compliance of the Hon’ble APTEL Full Bench Judgment of APTEL dated 07.04.2016, about which the pleadings were not made in petition no. 871 of 2013.
6. No useful purpose is going to be served by submitting parawise reply to LAPL’s additional submission.
7. UPPCL to be directed for filing reply to additional submission of LAPL through a speaking order, only if the Commission finds the pleadings in the original petition qualify under ‘Change in Law’ or ‘Force Majeure’.

**Reply of LAPL on UPPCL submission**

1. That there is no inconsistencies in LAPL’s stand in its submissions made earlier and those made in the present proceedings.
2. A restricted reading of the Full Bench judgment as suggested by UPPCL cannot be sustained in Law as other provisions and agreement that also define contractual rights and obligations of the parties cannot be ignored.
3. LAPL had no reason or occasion in petition no.871 of 2013 to plead for relief under change in Law and Force Majeure or any other contractual provisions. Also the mandate of the Full Bench judgment requires this Commission to grant such relief as available under the provisions of the PPA and other contractual agreement.
4. The submission in earlier and present proceedings are made to disclose material and relevant facts that are necessary to establish the claims of LAPL. Also, the strict rule of pleadings does not apply to the quasi-judicial proceedings before the commission.
5. The Commission is required to examine whether there is any other relief forming out of contractual agreement between UPPCL and LAPL which do not fall under the ambit of ‘Change in Law’ and ‘Force Majeure’ in accordance with the Full Bench judgment.
6. The UPPCL in its reply has chosen not to reply on the merits of the claims by not providing parawise reply so as to delay the disposal of the petition.

**Submissions of Sri RS Awasthi**

Sri Rama Shankar Awasthi also submitted reply to the submissions of UPPCL on 28.03.2017 as under:

1. The pleadings taken by Lanco are in complete contradiction with the pleadings filed in main petition.
2. In remand case, the lower court has to act within the boundaries of remand order.
3. The relief has been sought under ‘Change in Law’ and ‘Force Majeure’ whereas there was no claim under these heads in original petition.
4. The relief may be granted only as per the provisions of the PPA.
5. Fuel supply is the responsibility of Lanco, so any interruption cannot be considered as change in Law.
6. The Force Majeure Article 12.3 of the PPA has no application.

The Commission enquired from UPPCL that as per them which reliefs were not allowablein concurrence with the judgment?

In reply **UPPCL submitted as under :**

1. No relief was granted in the Commission’s order under Change in Law.
2. As per the APTEL judgment relief is to be provided under Change in Law and Force Majeure only.
3. As a pre-requisite under the clause 14.2.3 of the PPA, LAPL was required to serve notice in Change in Law condition, which was not met by it.
4. Other pleadings are not emanating from pleadings in original petition.

In reply to above issues **LAPL submitted** that all the pleadings are as per original pleadings emanating from PPA.The Commission noted that if the pleadings are under the ambit of PPA and comes under Change in Law and Force Majeure, then only relief is to be provided.

**Sri R.S. Awasthi submitted** that the petitioner should trifurcate the claims under the head Indian Political Evens, Force Majeure and Change in Law. In reply to which LAPL submitted that they have already submitted the same in their additional submissions dated 28.2.2017.

The Commission enquired from UPPCL whether they are going to reply on merit or not? To which UPPCL submitted that it has replied on all the merits of the matter in their earlier submissions under the subject petitions on which the decision was made by the Commission and hence now they do not have anything to submit on merit.

Sri R.S.Awasthi again made some additional submissions on 26.4.2017. In this additional submission Sri Awasthi further emphasized his arguments that the Commission can only consider the issue of claims of LAPL as contained in petition no. 871 of 2013 and the Commission has no general regulatory power to give relief to LAPL. He pleaded that Lancodid not choose to file any appeal against the order dated 30.11.2016 in the Hon’ble Tribunal therefore this order became final and binding. Now LAPL cannot raise any issue on the aspect of general regulatory power to grant relief to LAPL. Sri Awasthi also referred the judgment of Hon’ble Supreme dated 11.4.2017 in civil appeal no. 5399-5400 of 2016. Sri Awasthi pointed out that Hon’ble Supreme Court has rejected the claim of M/s Adani Power Limited and Coastal Gujrat Power Limited on the exercise of general regulatory power of the state commissions to give compensatory tariff to them de-hors the provisions of the PPA. Sri Awasthi has mentioned that as per the judgment dated 11.4.2017 of Hon’ble Supreme Court there is only limited reliefs granted to the generator regarding the New Coal Distribution Policy (NCDP), in regard to non-availability of domestic coal on account of policy decision of the Central Government.No relief has been granted in regard to any other claims of the Generators either by exercise of general regulatory power by the Regulatory Commission or under Force Majeure or change in law. He has mentioned that the direction of Hon’ble Supreme Court is for the Central Commission to go into the matter afresh and determine what relief should be granted to these power generators which fall within the clause 13 of the PPA. Sri Awasthi has made submissions in the light of Hon’ble Supreme Court judgment dated 11.4.2017 specifically trying to interpret the judgment to show that very limited benefits have been granted to the generators by the Hon’ble Supreme Court and the Hon’ble APTEL has put a number of riders in exercise of powers by the Commission while granting the relief under change in law. Sri Awasthi has also submitted a list detailing the events relating to the setting up of this project. In the end Sri Awasthi has pleaded for dismissal of the petition.

Earlier UPPCL had taken a stand that they did not have to make any fresh pleadings on the facts. Then they chose to file pleadings on the merits on 27.4.2017. In their pleadings dated 27.4.2017 they based some of their arguments in the light of Hon’ble Supreme Court judgment dated 11.4.2017. The UPPCL submissions on the facts are summarized as under:

1. That Hon’ble Supreme Court order may be made applicable in this case when it is specifically proved by Lanco that their case is strictly same and similar. They have pleaded that the petition decided by the Hon’ble Supreme Court and the one filed by Lanco before the Commission are as different as Chalk and Cheese. They mentioned that in the case of Lanco, the application of regulatory powers of the Commission does not get attracted and also the pleadings of the Lanco that the Supreme Court judgment is not the nature of “judgment in rem” is misconceived and erroneous.
2. That Lanco did not file any second appeal against the order of the Tribunal dated 30.11.2016, therefore, the order dated 30.11.2016 has achieved finality.
3. That Section 63 of the Electricity Act 2003 and by virtue of guidelines in respect of competitive bidding process under section63 read with the model PPA notified by the Central Government, adoption of quoted tariff for the entire duration of the PPA has become sacrosanct. They have pleaded that power under section 86 of Electricity Act 2003 can not be used for the determination of variation in tariff.
4. That in respect of matter which are earlier dealt in the guidelines or in the PPA under section 79(1)(b), powers cannot be exercised contrary to the same. In the tariff based competitive bidding process, the matter related to tariff stands decided in the guidelines.
5. That in accordance with the Hon’ble Supreme Court order and Hon’ble APTEL order LANCO is not entitled to file any additional submission in the matter and proceedings before the Commission are restricted to the original petition filed by LANCO.
6. UPPCL has also submitted their observations on the claims of LAPL which are based on change in law or force majeure.

UPPCL further filed a letter dated 28.4.2017 stating that the Commission has abruptly concluded the proceedings and reserved the judgment. They requested for the reopening of the proceedings to enable UPPCL to submit their written and oral arguments on legal and financial issues.

Considering the application of UPPCL, the Commission fixed another hearings for 01.06.207 and 03.06.2017. Before these hearings UPPCL submitted fresh arguments on 31.05.2017. in the fresh submissions UPPCL has highlighted the observations of Hon’ble APTEL in their order dated 30.11.2016 and order of Hon’ble Supreme Court dated 11.04.2017 they have submitted the analysis of order and its relevance to the present case. The Commission while hearing the case on 03 June 2017 asked both the parties to submit their written submissions on the pleadings that they have made so far. LAPL submitted their written submissions on 09.06.2017 and UPPCL has also submitted their written submission on 09.06.2017.

The submission filed by LancoAnpara Power Limited (***‘LAPL’***) pursuant to the hearing held by this Hon’ble Commission on 03.06.2017 is briefly as follows:

1. It is pointed out in this regard that UPPCL has filed detailed submissions on 31.05.2017 wherein, in a clear departure from its earlier stand on various issues, UPPCL has now sought to raise factually contradictory and conflicting stands. The adoption of such conflicting stands in the submissions, such approbation and reprobation, is not allowed in law.
2. The Ministry of Power vide letter dated 15.04.2002 had granted linkage of 4.5 MTPA from the Khadia Extension mines to be transported through the existing MGR system for Anapara A & B.
3. Accordingly, they entered into a separate agreement for utilizing the shared facilities of existing power plants, which included MGR system, railway siding, auxiliary steam for start-up and operating period, raw water intake channel, user ash facilities and user switchyard facilities etc.
4. In fact, UPRVUNL had entered into FSA with LAPL on 12.11.2006 pursuant to the requirements of the RFP which set out in detail the obligations of UPRVUNL and LAPL w.r.t. the operation of the MGR system.
5. Further, to make the Project bankable, the RFP had mandated establishment of payment security mechanism by the procurers/State Discoms so as to facilitate private sector participation for the said Project.
6. The ‘Pit head coal availability’ assurance and the ‘Payment Security Mechanism’ were of vital importance having a direct and a high degree of correlation with the commercials of the Project in terms of its:
7. Availability of the machine to generate
8. Operating costs
9. Operational efficiency
10. Financing arrangement / closure
11. Financing cost – rate of interest, especially post COD

Therefore, when these two key representations i.e. ‘Pit head coal availability’ assurance and the ‘Payment Security Mechanism’ did not materialize despite the Project achieving COD on 10th December, 2011 (Unit 1) and 18th January, 2012 (Unit 2), then it changed the entire substratum of the Project, and thereby destroying the Project commercials and related financials. The deviations in respect of key project parameters such as non-availability of envisaged coal quantity, quality as well as means of transportation, and the absence of Payment Security Mechanism post COD completely altering the operating and financing scenario for this Project, forcing sub-optimal performance of the Plant and consequent financial losses.

1. Due to non-fulfillment of the obligations related to coal supply and Payment Security Mechanism, LAPL served notice for termination of the PPA vide their notice dated 24th January 2013 and 11th February 2013 and also served the Buy-Out notices to the buyers on 11th February 2013 following the process enshrined under the PPA. Pursuant to this, proceedings were initiated before this Hon’ble Commission by LAPL vide Petition No. 871/2013 and by UPPCL vide Petition No. 891/2013.
2. The key deviations from the bid documents vis-à-vis its impact are tabulated below for ready reference:

| **Items** | **Bid Stipulation** | **Actual Condition** | **Impact** |
| --- | --- | --- | --- |
| Coal Supply – Quality & Quantity | 100% linkage coal (4.5 MTPA with GCV 3885 kcal/kg) from nearby Khadia Expansion mine of NCL***Boiler and associated equipments have accordingly been designed and constructed as per Domestic coal quality specification.*** | * LOA/FSA Quantum: 4.182 MTPA (GCV 5111 kcal/kg)
* Actual linkage quantum supply is significantly lower - 1.97 MT during FY 2012-13
* GCV of supplied linkage coal is lower than GCV of coal considered during bid and allocation – 3562 kcal/kg for FY 12-13.
 | * Firing imported coal in non-blended form in the boiler designed for 100% domestic coal has resulted:
* *High downtime and maintenance cost*
* *Increase in Station Heat Rate*
* *Increased Working Capital requirement*
	+ *Higher cost of imported coal*
	+ *Increased Receivables*
 |
| Coal Logistics - transportation, receiving & handling systems  | ‘Pit Head’ Project - to receive entire coal through Merry Go Round (MGR) system in BOBR wagons (bottom opening wagons)***Accordingly, ‘Track Hopper’ has been constructed for Coal Receiving / Handling at plant.*** ***Also bought 96 Wagons & three Locomotives for pit head coal transportation from Khadia Expansion mine through MGR as per Vol II part 3, cl. 1.3(ii) of RFP*** | * Shortfall quantity over and above the linkage coal is supplied through Indian Rail (IR) rakes in BOXN wagons (side opening wagons) wherein each rake requires about 10 hours for unloading
* A significant portion of linkage coal supply by NCL through road mode – 30% for FY 12-13
 | * Wagon Tippler and blending facilities not envisaged as per bidding documents
* Absence of blending facility resulted in firing of imported coal (in non-blended form) which led to
	+ *Adverse impact on boiler efficiency*
	+ *Increased maintenance*
	+ *Frequent down time*

**Reduced Plant Load Factor below 65%** - Track Hopper is not designed to handle BOXN wagon rakes (nor road transported coal), hence plant has not been able to receive and feed adequate coal on daily basis. In addition to four BOBR linkage coal rakes, two BOXN rakes are also required each day for full load operations of both Units, and existing facilities are inadequate to unload these six rakes within 24 hours. |
| Payment Security Mechanism  | Payment Mechanism available as per PPA: * Direct Payment
* Standby Letter of Credit
* Default Security Agreement
* Government Guarantee

***Financing Plan for the project has considered the credit enhancement support on account of payment security mechanism for refinancing post COD.*** | Actual situation was:* Payments were not made by due date
* LCs issued by UPPCL were grossly inadequate and not in compliance with the provisions of PPA
* Default Contingency Accounts have not been created by Buyers
 | * Huge payment outstanding from UPPCL against unpaid bills led to inability to attain the required PLF, resulting in
* Erosion of Net Worth and Equity
* Degradation of Credit Rating

|  |  |
| --- | --- |
| **Period** | **Credit Rating** |
| **Jul 08** | BBB- Stable |
| **Feb 12** | BB+/- Negative |
| **Feb 13** | D - Default |

* Higher interest rate of Working Capital
* Lowered the options of getting refinance
 |

1. The Hon'ble Commission in its ***order dated 23.05.2013***, having regard to the difficulties that had arisen in the operation of PPA, and which difficulties have been admitted by UPPCL, posed the following questions before the parties:
2. Whether the solution within the terms of PPA can be explored with the sincere efforts of all the parties and the recourse of termination may be discussed subsequently, if required?

(ii) Whether it would be acceptable to both the parties if any “Compensatory Tariff” is allowed within the PPA?

1. Both the parties made their respective submissions on the above questions. LAPL requested this Hon'ble Commission to grant suitable compensatory tariff to remove difficulties being faced by them to ensure long term viability and sustainability of the plant. UPPCL vide its ***letter dated 05.03.2014*** indicated that they did not have any objection if the Commission takes the decision to provide LAPL an increased tariff due to various impediments faced by LAPL as long as the solution carved out in the matter falls within the legal frame work and it is in the general interest of the people of U.P. by providing cost effective electricity on a long term basis.
2. In view of the above, this Hon'ble Commission vide its ***order dated 28.04.2014*** decided to appoint an expert committee to suggest the compensatory tariff over and above the tariff as decided under the PPA which can restitute LAPL for the losses and difficulties it has been exposed on account of coal related deviations from bid assurances and due to Buyers’ failure to institute requisite Payment Security Mechanism.
3. The Expert Committee submitted its report on 3.3.2015 and its addendum report on 30.06.2015 wherein it recommended the following relief to be given to LAPL:
4. Compensation for recovery of the past losses of Rs. 499.58 Crores as against the actual accumulated losses of Rs. 653 Crs. claimed by LAPL; and
5. Compensatory tariff of Rs. 0.226 per kWh (levelised for the PPA duration) over and above the tariff determined through the bidding process as against Rs. 0.363 per kWh claimed by LAPL.
6. The above recommendations of the Expert Committee were accepted by this Hon'ble Commission in its order dated 23.11.2015, after detailed deliberations and after having followed the due legal process of public consultation.
7. The above order passed by this Hon'ble Commission in Petition Nos. 871 and 891 of 2013 was challenged in appeal by Sri Rama Shankar Awasthi, a consumer in the State, before the Hon'ble Appellate Tribunal. Hon'ble Tribunal did not go into the merits of the case and instead on the preliminary point as to set aside the order dated 23.11.2015 following its own Full Bench judgment passed on 07.04.2016 in Appeal No.100 of 2013. Accordingly, vide its order dated 30.11.2016 the Hon'ble Tribunal remanded the matter to this Hon'ble Commission with a direction to decide the same afresh after hearing the parties and having regard to the Full Bench judgment dated 07.04.2016.

**SCOPE, INTENT AND IMPACT OF THE JUDGMENT DATED 11.04.2017 PASSED BY HON’BLE SUPREME COURT**

1. While this Hon’ble Commission was hearing the parties in the remand proceedings, the issue of exercise of regulatory powers of the Commission vis-à-vis Section 63 has been settled by the Hon’ble Supreme Court vide its judgment dated 11.04.2017 (hereinafter referred to as ***‘Adani case’***). Hon’ble Supreme Court has upheld the exercise of regulatory powers by the Commission in cases where the tariff has been determined through competitive bidding route under Section 63. ***As per Hon'ble Supreme Court, the Regulatory Commission does not function de hors its general regulatory powers while adopting tariff under Section 63. The general regulatory power of the Central Commission under Section 79(1)(b) is the source of power to regulate, which includes the power to determine or adopt tariff. Hon'ble Court has further held that ‘determination’ of tariff is part of ‘regulating’ tariff and Section 79(1)(b) is a wider source of power to ‘regulate’ tariff.***Thus, the law laid down by the Full Bench of the Hon’ble Tribunal, that is, – *the Regulatory Commission has no regulatory power under Section 79(1)(b) of the Act to vary or modify the tariff or otherwise grant Compensatory Tariff to the generating companies, in case of tariff determined under Section 63 of the Act* – has been set aside by the Hon'ble Supreme Court, and the Full Bench judgment of Hon'ble Tribunal has lost its existence and is no longer good law. It is now the law declared by the Hon'ble Supreme Court which holds the field for all purposes. The Hon'ble Supreme Court has declared the law and upheld the pervasive regulatory powers of the Commission under Section 79(1)(b) (which will equally apply to Section 86(1)(b) in case of State Commissions) with regard to ‘regulation’ of tariff, which subsumes within it the power to ‘determine’ tariff under Section 62 as well as Section 63. Section 62 and Section 63 do not limit or circumscribe the general regulatory power of the Commission under Section 79. Apart from its tariff determination powers under Section 62 and Section 63, the Hon'ble Supreme Court has upheld the ability and the power of the Commission to exercise its general regulatory powers in the following manner, namely:
2. 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; and
3. 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.

(*Please refer to para 18 and 19 of the Supreme Court judgment*)

1. It is also important to underscore here that the above findings of the Hon'ble Supreme Court upholding the regulatory powers of the Commission vis-à-vis the tariff determined through competitive bidding route under Section 63 is not only limited to the process and procedure which leads to discovery and adoption of tariff under Section 63.

**IMPACT OF SUPREME COURT JUDGMENT ON THE PRESENT PROCEEDINGS**

1. The judgment dated 11.04.2017 passed by the Hon'ble Supreme Court has set aside the principle laid down by the Appellate Tribunal in its Full Bench judgment. This takes away the very basis of the Hon'ble Tribunal’s order dated 30.011.2016, in deference to which order the present proceeding is being held by this Hon'ble Commission.
2. It is submitted that this Hon’ble Commission while considering the matters afresh on remand, is bound by the principles enunciated in the judgment of the Hon’ble Supreme Court dated 11.04.2017 which is the law of the land. This Hon’ble Commission is duty bound to follow the ratio enunciated by the Apex Court as the same is binding on all courts subordinate to the Hon'ble Supreme Court.
3. The law is well settled that when a judgment is overruled, the law laid down in the overruled judgment ceases to operate and the new law laid down in the overruling judgment will come into force and all the matters pending as on that date or any future matters, will come under the fold of that new law. The case of ***Aditya Pharmaceuticals v. A.P. State Financial Corporation, AIR 2003 AP 413***may be noted in this regard, wherein the Hon'ble High Court held as follows:

*“It is well settled that under Article 141 of the-Constitution of India, the judgment of the Apex Court is the law and binding on all the Courts and further when the justice demands, Apex Court has power to overrule its earlier judgments.* ***When a judgment is overruled, the law laid down in the overruled judgment ceases to operate and the new law laid down in the overruling judgment will come into force and all the matters pending as on that date or any future matters, will come under the fold of that new law****.”* (emphasis supplied)

1. The facts of the Adani case are completely different and distinct from the present case. In the Adani case, the bidding was done on Case 1 basis where the entire risk of fuel was borne by the generator/ developer. It was in such circumstances that the Hon’ble Supreme Court held that the risk of coal price variation is a foreseeable risk and would not qualify for force majeure. However, any change in cost due to any change in Indian laws could be considered under change in law clause.
2. The Adani case did not deal with a situation as in the present case, where the underlying terms of the bid which clearly provided for source specific coal linkage and transportation and logistics, stood altered subsequently due to change in government policy. The fact of the present case are clearly distinguishable from the facts considered by the Hon'ble Supreme Court in the Adani case to the extent that in Adani’s case there was no fundamental dislodgment of the basis of the contract whereas in the present case such dislodgment is clearly established from the Expert Committee Report and upheld by this Hon'ble Commission.
3. Moreover, it is pertinent to note that the exercise of general regulatory powers in the case of PPA entered through competitive bidding u/s 63 has been upheld by the Hon’ble Supreme Court in ***All India Power Engineer Federation &Ors Vs. Sasan Power Ltd. &Ors. Etc****. (Civil Appeal Nos. 5881-5882 Of 2016 and batch),* wherein it has been held that if ***even in cases covered by Section 63*** if the tariff is increased ***at a subsequent point of time*** and if such increase is ***outside the four corners of the PPA***, then such amended tariff can be accepted by the Commission under sections 61 to 63 of the Electricity Act. The relevant extracts are reproduced below:

*“30. All this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act. This is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued. If* ***at any subsequent point of time such tariff is increased****, which increase is* ***outside the four corners of the PPA****,* ***even in cases covered by Section 63****, the* ***legislative intent and the language of Sections 61 and 62 make it clear*** *that the* ***Commission alone can accept such amended tariff*** *as it would impact* ***consumer interest*** *and therefore public interest.”* (emphasis supplied)

2.16 Therefore, the contention of UPPCL that this Hon’ble Commission is devoid of any regulatory powers to grant any compensation/ additional tariff even for concerns arising beyond the express terms of the PPA/ guidelines is clearly misconceived.

**APPLICABILITY OF HON'BLE SUPREME COURT’S DECISION IN THE FACTS OF PRESENT CASE**

1. In view of the judgment of the Hon’ble Supreme Court, the test to be applied for invoking the Commission’s regulatory powers is whether the situation presented before the Commission is specifically dealt with under the Competitive Bidding Guidelines (***‘CBG’***) and/or under the PPA. In other words, in cases where the PPA or the CBG clearly define the circumstances and the manner in which the quoted tariff can be changed, the Commission’s regulatory powers would be circumscribed by provisions of CBG and PPA. However, in a situation where the PPA or other legal and policy provisions are silent or inadequate, then the Commission can exercise its general regulatory powers to remedy the situation.
2. In our respectful submission, the facts and circumstances obtained in the present case warrant the exercise of general regulatory powers by this Hon'ble Commission since the CBG and/or the PPA do not contemplate and, therefore, do not provide for the situations which have arisen in the present case. In this regard, it is important to note that in the instant case **the fundamental basis of the PPA has been altered for which no relief is contemplated under the CBG or the PPA.**
3. In the backdrop of the assurances and representations made at the bid stage and the intrinsic peculiarities associated with the project, the Petitioner was faced with a despondent situation when NCL expressed its inability to supply the Anpara C Plant with the promised quantity and quality of long-term linkage coal from the Khadia mines due to the promulgation of various policy changes by the Government in respect of coal allocation/ supply, including but not limited to the New Coal Distribution Policy (NCDP).
4. This materially altered the fuel supply arrangements for the Plant in as much as there was a significant reduction in the quantity of linkage coal from the Khadia mines, as a result of which the Petitioner was constrained to source coal from non-linked sources also. Hence, the fundamental basis of the contract itself has been completely altered by subsequent events that have resulted in drastically undermining the viability of the plant and its operations.
5. The above developments materially altered the fundamental basis of the PPA, based upon which the Petitioner had bid for the Project and had undertaken the obligation to supply power from the Project to the Buyers/UPPCL for a period of 25 years at the quoted tariff. This Hon'ble Commission has also recognized that the material deviations from the RFP conditions in respect of coal availability and related logistics, and failure of Buyers to institute requisite payment security mechanism has unsettled the fundamental basis of Petitioner’s bid.
6. The coal supply and logistics related constraints and non-establishment of payment security mechanism perforce led to the following consequences for LAPL, namely:-
7. Lower Availability Factor resulting in Under Recovery of Fixed charges leading to accumulated losses.
8. Losses due to higher heat rate than quoted heat rate resulting in Under Recovery of Variable Charges on account of change in fuel mix & coal characteristics.
9. Higher Interest Rate in the absence of committed Payment Security Mechanism.
10. Increased cost of Working Capital.
11. Higher O & M expenditure due to change in Coal Mix.
12. Increase in consumption of Secondary Fuel Oil.
13. Increase in Capital Cost of the Project.
14. In this regard it is important to underscore that the provisions of the CBG and the PPA do not contemplate and, therefore, do not provide any redressal for a situation where the underlying assumptions and fundamental basis of the PPA are altered by subsequent events leading to a situation akin to frustration where the contract can therefore no longer be worked out in line with the earlier terms and conditions. Neither does the CBG/ PPA provide for a situation where the Seller/ LAPL can be restituted financially for any loss caused on account of default on the part of the Procurers. While the PPA provides for termination of PPA and consequential buy-out of the plant by UPPCL, it is silent on the fate of the parties where the option of termination and buy-out may not be workable having regard to other surrounding practicalities (as in the present case, where UPPCL despite not refuting the grounds of termination has clearly stated its intent to continue with the supply of power from the plant). In such a case, the Commission is required in exercise of its general regulatory power to work out relief within the framework of general law, which can compensate/ restitute LAPL for the loss/ increased cost arising out of such peculiar circumstances. It is important to underscore here that due to certain circumstances beyond Petitioner’s control, acute hardship was being caused to the Petitioner in performing within the boundaries of the PPA and that the reliefs / remedies prescribed under the PPA were not sufficient to address this hardship is an admitted fact and has been noted by this Hon'ble in its order dated 23.11.2015.
15. In its submission LAPL has also replied contentions of UPPCL raised vide their submission dated 31.5.2017.

**RELIEF AVAILABLE TO LAPL UNDER THE PROVISIONS OF THE PPA AND RELATED CONTRACTS**

**A.** **Relief for Deemed Availability on account of delay in handing over of project land to LAPL resulting in delay in achievement of commercial operation date (COD).**

* 1. UPPCL in reply to the claim of Rs.344.91 Crores has stated that the claim is not allowable mainly on the ground that there is no correlation between the handing over of the project land and delay in COD. In this regard, LAPL reiterates that it is admitted position that there was a delay of 7 months in handing over of the project land which has resulted in delay in COD and had that delay not occurred then LAPL would have achieved the COD before the RCOD and LAPL would have been entitled for not only the fixed charges for the period but would have also been eligible to get early commencing incentive as per provisions of the PPA. Additionally, this would have also helped LAPL in reducing the Capital Cost of the Project and the consequent debt on the project by way of savings in Interest During Construction (IDC) expenses.
	2. LAPL reiterates that as per Article 3.2 of the Facilities & Services Agreement (FSA) r/w Land Lease Agreement, the project land was to be handed over to LAPL within a stipulated and definite time period and admittedly there has been a delay of 7 months in handing over of the project land to LAPL. **The affidavit dated 17th October 2012 filed by UPPCL clearly accepts 7 months’ delay in handing over of the project land.**
	3. The Expert Committee report also recognizes the delay in COD. Relevant extracts of the report is reproduced below:

*“3.3.4Consequent to the condoning of Delay in COD by the Hon’ble UPERC,following components of increase in the costs become due on account of delay inCOD due to various reasons* ***including delay in handing over of site to LAPL****.”*

* 1. It is humbly submitted that though the total delay in achievement in COD was 254 Days as recognized by this Hon’ble Commission vide its order dated 09.11.2012, but LAPL is seeking relief computed on the basis of deemed availability of 60% only for the 7 months (214 days) delay period, which is clearly attributable to the delay in handing over of the site.
	2. It is reiterated that as per Clause 13.3.1 (ca) of the PPA, any default under the FSA is an Indirect Political Event which entitles the affected party (i.e. LAPL in this case) to such relief as is provided under Article 13.1.1 (b)(i) of the PPA.

**B. Relief for Under Recovery of Fixed Charges as per the PPA read along with Fuel Policy Agreement arising out of coal related hardships:**

1. UPPCL in its reply to the claim of Rs.559.12 Crores has stated that the claim is not allowable mainly on the ground that LAPL has failed to exercise due discretion in Project planning and execution. In this regard, LAPL reiterates that it is admitted position by Expert Committee in para 5.1.1.9 of the report that the design of boilers, coal handling system and related logistics & infrastructure have been configured as per the technical specifications stipulated in the RFPdocument. However, the coal handling system was rendered inadequate to deal with the situations actually experienced as the same were beyond those envisaged in the RFP and as complied by LAPL.
2. It is also relevant to mention that change in coal source, quantity, transportation arrangement due to various changes in government policies and directives as well as changed terms and conditions under the Fuel Supply Agreement were considered by the LAPL and UPPCL, while executing the Fuel Policy agreement.
3. Para 1.4 of the Fuel Policy provides that in case of non-availability of coal despite all reasonable efforts by the seller, the seller shall be compensated for the reduction in Availability or Availability Factor of the power station. The Fuel Policy takes note of the changed circumstances in which, UPPCL had agreed to such compensation.
4. Expert Committee in its report has also recognized the facts of difficulties. It is also concluded that deviations from the RFP provisions in respect of coal availability and logistics have adversely impacted the plant performance.

**C. Claim for losses on account of higher heat rate, higher secondary fuel consumption and higher O&M expenses on account of the deviations from the coal related bid conditions:**

1. It is an admitted position that the plant could not run at target Availability for the period of first two Contract Years due to deviations from the bid conditions with respect to coal source, availability and logistics. These changes in circumstances admittedly fall under Change in Law having regard to the provisions of the PPA. LAPL had duly notified the Respondents about the nature of the Change in Law and its impact on the operations of the plant vide letters dated 30th March 2012, 7th April 2012, 3rd July 2012 and 1stDecember 2012 which were never refuted by Respondents.
2. As a direct and natural result of these events LAPL had to suffer under-recovery of charges on account of plant running at substantially lower PLF than what it was required to run to achieve the heat rate quoted by LAPL. At the same time, due to the above events the plant perforce incurred higher secondary oil consumption and higher O&M expenses than what was considered by LAPL in their bid working due to frequent start-ups / shutdowns, sequential firing of indigenous and imported coal and other technical reasons details of which have already been submitted to the Hon’ble Commission during the proceedings vide LAPL submissions dated 7thJune 2014, 9th July 2014, 28th August 2014 and 30th December 2014. For the sake of brevity, the same are not being repeated and reliance be placed to LAPL’s submissions in this respect.
3. Higher expenses on account of higher heat rate, higher secondary oil consumption as well as higher O&M expenses are all direct and proximate results of various Government policies and directives including but not limited to New Coal Distribution Policy resulting in deviations from the bid conditions with respect to coal source, availability and logistics leading to plant running at substantially lower Availability/PLF. Therefore, they would squarely be covered by the Change in Law provisions as provided in the PPA.
4. It is submitted that a Change in Law defined under Article 14 as per PPA, constitutes an Indian Political Event as defined under Article 13 of the PPA.
5. The PPA under Clause 13.3 further provides that a *Change in law* qualifies as a *Direct Indian Political Event* under the PPA and the consequences of the occurrence of an *Indian Political Event* (which includes a *change in law*) have been provided under Clause 13.1.1(b), which inter alia provides that UPPCL shall be entitled to apply for relief(s) under and in accordance with Clause 14 in relation to an increase costs or reductions in revenue. Further, Article 14.3 provides as under:

*“14.3.1Within sixty (60) days of a notice being served pursuant to Article 14.2, the Parties shall meet and endeavour to agree on what amendment needs to be made to this Agreement through the Monthly Tariff Payment* ***to provide that the Seller is put into the same financial position as it would have been but for the and immediately prior to the occurrence of the Change in Law****.*

*14.3.2Upon reaching agreement on the amendment required to this Agreement pursuant to Article 14.3.1 the Parties shall execute such amending agreement to give effect to that agreement within thirty (30) days thereof.*

*14.3.3 If within sixty (60) days of the commencement of the meetings between the Parties pursuant to Article 14.3.1:*

*(a) the Parties are unable to reach agreement on the amendment required pursuant to Article 14.3.1; or*

*(b) having reached agreement on the amendment required pursuant to Article 14.3, no amending agreement has been executed within a further thirty (30) days of such agreement.*

*any Party may refer any areas of disagreement to be settled in accordance with Article 18.2 so that the necessary amendment to this Agreement pursuant to Article 14.3.2 is executed. The Parties shall execute such amending agreement so determined in accordance with Article 18.2 as soon as reasonably practicable after the recommendation under Article 18.2 is received.*

*14.3.4Notwithstanding the other provision of this Article 14, in case of any Change in Law, the impact of Change in Law shall be restricted to that in relation to any variation in costs of revenues directly attributable to such Change in Law only, and shall not include an variation in costs of revenues on account of any change in NQHR, and shall be put up to the UPERC for its approval after the impact of such Change in Law has been duly certified by the Expert under Article 18. Provided such Expert shall be an auditor in case the Change in Law relates to change in tax on generation or sale of electricity.”*

1. From the above, it is evident that the PPA envisages the following, in case an Indian Political Event occurs:

(i) The Buyer and the Seller shall endeavour to agree to a revision in the Monthly Tariff Payment;

(ii). The Seller should be placed into the same financial position as it would have been but for the and immediately prior to the occurrence of the Change in Law

(iii). The impact of Change in Law will be restricted to the extent of any variation in costs of revenues, that are directly attributable to such Change in Law.

1. Since, the above events qualify under the Change in Law provision of the PPA, LAPL is entitled to be restituted and entitled to be *“put into the same financial position”* as per Article 14.3.1 of the PPA.

In this regard, it is relevant to highlight that UPPCL in its reply to Petition No. 871 of 2013, has itself admitted that NCDP & other policy / directives changes with respect to coal source and availability constitute a Change in Law event. Thus, both the parties to the PPA in the present case are ad idem that the NCDP notified in 2007 constitutes change in law under the PPA, as well as the nature and effect of NCDP on the obligations of LAPL under the PPA. It is an accepted legal position that courts while interpreting contracts have to adopt the meaning which parties themselves, by words or actions, have placed upon contracts.

**D. Claim for Increased cost of Interest on Working Capital (IWC) due to higher actual coal cost than that was provided at the time of bidding on account of the deviations from the coal related bid conditions:**

(a) The RFP/PPA had envisaged the coal cost and its escalation at Rs 1045 per MT and 4% per annum respectively. However, in the actual practice, the cost has increased substantially due to deviations from the bid conditions as provided in the RFP. This incidence of increased IWC is a direct result of and entirely due to higher coal cost than the coal cost provided under the bid, which LAPL had to incur due to Change in Law events.

(b) As a direct and necessary consequence of various Government policies and directives resulting in deviations from the bid conditions with respect to coal source, availability and logistics, LAPL was forced to procure coal at almost three times the price than what was represented in the RFP. This perforce led to significant rise in the working capital requirements of LAPL. These events constitute and qualify as Change in Law under the PPA as already detailed under para 15 herein above and LAPL is entitled to be restituted and reimbursed the higher costs incurred by it towards increased IWC requirement.

(c) UPPCL in its reply dated 28.04.2017 has admitted the reasonability of LAPL’s claim for IWC and has stated that this claim may be considered to be eligible under Change in Law clause of the PPA.

(d) As regard LAPL’s claim for compensation on account of higher working capital due to three-fold increase in cost of coal compared to the cost as per the RFP document, the Expert Committee conducted a detailed investigation of the reasons which led to increase in the working capital furnished by LAPL vis-à-vis the norms for computation of working capital as per UPERC/CERC tariff regulation. The Expert Committee took special notice of the fact that the RFP document specifically indicated the cost of coal as Rs. 1045/MT.

*“(vi) The RFP document specifically indicated the cost of coal as Rs. 1045/MT and an escalation of 4% which formed the basis in the fixed charges tariff stream for 25 years in LAPL’s bid. Because of deviations from the RFP/bid conditions related to coal supply scenario, LAPL is also required to procure coal from other sources such as e-auction, open market and imports. This has resulted in higher coal cost and accordingly, a significantly higher working capital requirement.”*

It can, thus, be seen from above that in light of the peculiar facts and circumstances of the present case, the Expert Committee found it just and proper to award compensation for higher IWC to LAPL at the actual weighted average rate of interest on working capital. It needs to be appreciated that interest on IWC has been sought by LAPL and allowed by the Expert Committee only on the differential amount of working capital arrived at considering the coal cost given at the time of RFP and that actually incurred by LAPL. Therefore, interest rate assumed by LAPL at the time of bidding cannot be applied to such differential amount, which arose due to unforeseeable subsequent developments.

In this regard it is also important to point out here that while finalizing its report, the Committee had invited comments from UPPCL on its recommendations, including the allowable interest rate on working capital. UPPCL at that point of time also agreed to grant of interest rate on working capital at actuals.

**E. Recovery of capital cost incurred on account of installation of wharfwall coal loading facilities**

(a) The relief for capital expenditures on account of installation of Wharfwall Coal Loading platform at power plant site is admissible under Change in Law under the PPA as well as under Article 12.2.4 of the Facilities & Services Agreement (FSA). Article 12.2.4 of the FSA reads as follows:

 *“12.2.4 Notwithstanding anything contained to the contrary in this Agreement the Parties hereby agree that the Owner shall be responsible for assessing the adequacy of the Common Facilities and for the refurbishment and / or augmentation of the same if so required during the construction of the Use’s power station. If, in spite of such refurbishment and / or augmentation of the Common facilities by the Owner, the User shall still finds the Common Facilities inadequate for the purposes of this Agreement, the User shall augment the same at his cost to be recoverable in the manner indicated and specified by the UPERC.”*

(b) The capital cost of the Wharfwall facility as already ascertained and validated by the independent third party and accepted the Hon’ble Commission works out to be Rs. 55.30 Crores. The apportioned cost for 1100 MW capacity works out to be Rs 50.69 Crs with date of admissibility as 9th December 2013 (2ndAnniversary of the COD).

(c) In its reply dated 28.04.2017, UPPCL has itself admitted that the need for Wharfwall arose directly from implementation of NCDP and the claim made by LAPL may be considered to be eligible under Change in Law provisions of the PPA.

**CONCLUSION**

1. The facts relating to the complete change in the fuel supply and transportation arrangements and also relating to the payment defaults on the part of UPPCL are uncontroverted. Therefore, there is no dispute that the entire substratum of the bid and the contract executed pursuant thereto have been altered in the present case. It is also an admitted position that UPPCL is agreeable to an increased tariff to address such unforeseen situation provided the same is worked out within the framework of law.
2. The Hon’ble Supreme Court in the Adani judgment has upheld the regulatory power of this Hon’ble Commission to work out appropriate relief where the guidelines / contract do not contemplate the difficulties which have arisen, as is the case in the present facts. The Hon’ble Commission on the earlier occasion had adopted the recommendations of the Expert Committee, which after a thorough examination of all facts and after validating the extensive evidence placed before it, had proceeded to quantify the relief for LAPL based on well accepted principles of restitution. The findings on fact and the relief thereto have not been questioned by UPPCL at any stage. Hence, the same relief as recommended by the Expert Committee can be granted in its entirety by this Hon'ble Commission.
3. LAPL by its submission dated 28.02.2017 has also set out its claims emanating from the same set of facts and evidencehaving regard to the applicability of various provisions of PPA and other related contracts forming part and parcel thereof.
4. It is pertinent to mention that the above-mentioned deviations and defaults from the contractual documents have rendered Anpara C plant operations financially unviable and hence commercially unsustainable. Therefore, it is respectfully submitted that it is for this Hon’ble Commission to take a view on the basis on which LAPL’s claims need to be addressed, having regard to the facts that the difficulties arising out of the subsequent developments/ defaults have been unequivocally admitted by UPPCL, and the factum of loss has been established by the findings of the Expert Committee. This Hon'ble Commission in exercise of its jurisdiction under Section 86 has the power to grant all and any relief that is available in law, whether under broader regulatory powers or under the specific provisions of the PPA and/or by a combination of both while moulding the relief as may warranted by the facts and circumstances of the case.
5. LAPL accordingly prays to this Hon’ble Commission to grant appropriate relief as is available to the Petitioner / LAPL in law in the facts and circumstance of the case.

UPPCL has also filed WS on 9.6.2017 as follows:

**BID WERE BASED ON AMENDED RFP AS DIRECTED BY THE HON’BLE COMMISSION AND NOT ON THE BASIS OF UNAMENDED INITIAL RFP ISSUED:**

1. UPRVUNL (the Nodal Agency) had specifically approached the Hon’ble Commission for the approval of the bidding process then proposed by UPRVUNL. The RFP and other bidding documents including the Draft of the PPA developed for the purpose was submitted to the Hon’ble Commission for approval. This Hon’ble Commission entertained UPRUNVL’s Petition being No. 257 of 2005 and passed the Order dated 19.10.2005 and Review Order dated 06.02.2006 passed in the Review Petition No. 297 of 2005 and connected Petitions. There was a specific direction by the Hon’ble Commission to amend the RFP and bidding documents, which was implemented.
2. The bid of LancoKondapalli Power Limited, the present Promoter and the majority shareholders of the Appellant was accepted and the Letter of Acceptance was issued on 27.9.2006. The PPA dated 12.11.2006 was signed thereafter.
3. The PPA in Clause 20.4 provides as under:

“*20.14 Deviations from Standard Bid Documents/Competitive Bidding Guidelines*

*In case, any provision of this agreement is inconsistent with the provisions of the Standard Bid Documents or Competitive Bidding Guidelines, issued by Government of India, this Agreement shall prevail as per the order of UPERC dated October 19th, 2005 an February 6th, 2006,*”

1. In terms of the above, even stipulation contained in the Guidelines or RFP documents forming part of the Guidelines, providing for coal linkage etc. to be given in a Case-2 bidding stood modified as deviation approved by the Hon’ble Commission.
2. It is therefore not open to Lanco to rely on the representation made in the initial RFP or bid documents in regard to sourcing of coal from Khadia mines or GCV of coal. **In the absence of definitive coal linkage for the project from Khadia mines and specific observation contained in the orders dated 19.10.2005 and 06.02.2006 the bid was submitted by Lanco and letter of acceptance was issued and the project was awarded based on the superseding stipulation that the risk of fuel availability is of the Seller namely Lanco.** It is therefore not correct to proceed on the basis that the bid was conditional upon the availability of coal from Khadia mines or that the power plant was to be designed and constructed based on the definitive availability of coal from Khadia mines.

**Petitions filed before the Hon’ble Commission:**

1. The Petition No. 871 of 2013 was filed by Lanco on 28.1.2013 related to the payments outstanding from UPPCL and for determination of new tariff for supply of power or in the alternative Lanco sought to terminate the PPA and claimed that UPPCL should undertake the buy-out and to determine the new tariff till the successful buy-out of the power plant as claimed by Lanco.
2. The Petition No. 891 of 2013 was filed by UPPCL on 21.5.2013 challenging the termination of the PPA and also the buy-out notice issued by Lanco.

**Orders passed by the Hon’ble Commission in Petitions No. 871 and 891 of 2013:**

1. On 31.1.2014, the Hon’ble Commission was pleased to frame the following two issues to be considered in the matter:

*“(i) Whether the solution within the terms of PPA can be explored with the sincere efforts of all the parties and the recourse of termination may be discussed subsequently, if required?*

*(ii) Whether it would be acceptable to both the parties if any “Compensatory Tariff” is allowed within the PPA?”*

1. Thereafter, on 28.4.2014 the Hon’ble Commission was pleased to hold that the compensatory tariff is payable to Lanco on the lines of the decision made by the Central Commission in Adani Power Limited’s case dated 21.2.2014 and also by the Maharashtra Electricity Regulatory Commission vide Order dated 21.08.2013. The Hon’ble Commission appointed a Committee to recommend the compensatory tariff to be paid to Lanco over and above the tariff as per the PPA.
2. On 23.11.2015 the Hon’ble Commission decided on the grant of the quantum of compensatory tariff based on the recommendation of the Committee appointed.
3. It is pertinent to mention that Lanco did not file any Appeal against either order dated 28.04.2014 or the Order dated 23.11.2015 passed by the Hon’ble Commission. To this extent, the decision of the Hon’ble Commission to not to allow the termination of the PPA or enforce the claim for buy-out of the power plant by UPPCL had become final. It is not open to Lanco to raise any issues on the above aspects of the claim made by Lanco in Petition No. 871 of 2013.
4. It is however mentioned that UPPCL had filed a Review Petition being No. of 2015 placing on record that UPPCL had not agreed to the termination of the PPA or any other consent as recorded in the order dated 23.11.2015. The Review Petition is on the files of the Hon’ble Commission.

**Orders of the Hon’ble Appellate Tribunal for Electricity:**

1. By Order dated 30.11.2016 passed in Appeal No. 173 of 2015, the Hon’ble Appellate Tribunal has been pleased to set aside the Order of the Hon’ble Commission passed in Petition No. 871 of 2013 for grant of compensatory tariff in exercise of the general regulatory powers. Lanco did not challenge the Order of the Hon’ble Appellate Tribunal dated 30.11.2016. The judgement holding that no compensatory tariff can be paid in exercise of the regulatory powers has become final and binding in so far as Lanco is concerned, notwithstanding any developments in any other cases.
2. In the order-dated 30.11.2016, the Hon’ble Tribunal had remanded the matter for consideration of the matter in the light of the Hon’ble Tribunal judgment.

**Orders passed by the Hon’ble Supreme Court in Civil Appeal Nos. 5399-5400 of 2016 and Batch matters:**

1. By Order dated 11.4.2017, the Hon’ble Supreme Court considered the appeal arising out of the Order dated 7.4.2016 passed by the Hon’ble Appellate Tribunal in the matter of Adani Power and other connected matters in relation to considering the promulgation of the Indonesian Regulations as a Force Majeure Event. The Hon’ble Appellate Tribunal had in the said Order dated 7.4.2016 set aside the decision of the Central Commission holding that it has regulatory powers to give compensatory tariff to Adani Power and others on account of the bench marking of the coal price under the Indonesian Regulations promulgated effective 23.9.2011.
2. By Order dated 11.4.2017 the Hon’ble Supreme Court has been pleased to set aside the decision of the Hon’ble Tribunal in so far as it proceeds to grant relief to Adani Power on the basis of treating the promulgation of the Indonesian Regulations as a Force Majeure Event. The limited extent to which a relief is admissible to the generator under the Orders of the Hon’ble Supreme Court dated 11.4.2017 is in regard to the New Coal Distribution Policy **`NCDP’)** and the relief is further limited to the non-availability of domestic coal for which a linkage had been granted or a Letter of Assurance has been issued by the Coal Companies due to change in the Policy of the Government of India and consequent to the Coal Company not signing the Fuel Supply Agreement (**`FSA’)**for the full quantum as given in the Letter of Assurance or Linkage.

**Present claim of Lanco:**

1. At present, Lanco is claiming that Lanco is still entitled to compensatory tariff, which the Hon’ble Commission can grant in exercise of the general regulatory powers, de hors the provisions of the PPA. Lanco is purporting to rely on the decision of the Hon’ble Supreme Court dated 11.04.2017 mentioned above along with the decision dated 08.12.2016 in Civil Appeal No. 5239-40 of 2016 in the matter of All India Power Engineer Federation and Others –v- Sasan Power Limited [(2017) 1 SCC 487] in support of its claim that the Hon’ble Commission can exercise general regulatory powers. It has been submitted by Lanco that by exercising the power under Section 79 (1)(b)/86(1)(b) of the Electricity Act, 2003, the Appropriate Commission (the Central Commission and this Hon’ble Commission) can give compensatory tariff even where Lanco’s claim do not fall under Article 12 of the PPA dealing with Force Majeure, Article 13 dealing with Indian Political Event and Article 14 dealing with Change in Law.
2. **The other claims made by Lanco are:**
	1. That UPPCL is guilty of approbating and reprobating. UPPCL had consented to the grant of relief to Lanco on account of the non-availability of coal from Khadia Mines, which was the pithead mine for the Power Station and could be connected to the Merry Go Round (MGR) system.
	2. UPPCL, in the present proceedings, had on 27 April 2017 represented that it has no submission to make but has subsequently filed detailed submissions after the judgment had been reserved. There cannot be any submission made after the judgment is reserved and before the judgment is pronounced.
3. The monetary relief sought by Lanco is related to the capacity charges/fixed charges on account of investments to be made by Lanco consequent to the non-availability of coal from the linked Khadia Mines. Lanco is not claiming any relief in regard to the variable charges/energy charges. In this regard, the relief sought by Lanco are at Pages 8 to 16 of the Petition No. 871 of 2013.
4. **Submissions in brief on behalf of UPPCL:**
	1. The decision of the Hon’ble Supreme Court has held that there cannot be any exercise of regulatory powers de hors the PPA to vary (increase) the quoted capacity charges.
	2. There is no issue on the scope of consideration of energy charges. It is as per actuals based on the quoted station heat rate and as per the Formula contained in Schedule 8 of the PPA.
	3. Section 79 (1)(b) or 86(1)(b) cannot be invoked to vary a quoted tariff when the bidding process is as per Section 63 of the Electricity Act, 2003.
	4. In the present case, the bidding process undertaken by UPRVUNL is a tariff based competitive bid process as per the Guidelines of the Central Government as provided in Section 63 of the Electricity Act, 2003 notwithstanding that at the relevant time, the Central Government had not developed the bidding documents for Case-2 (Project site specific) projects. UPRVUNL had adopted the bidding documents given by the Central Government for Case-1 bidding with appropriate modifications, had presented the bidding documents with modifications (deviations) before the Hon’ble Commission and this Hon’ble Commission had approved the documents vide order dated 19.10.2005 and review order 06.02.2006.
	5. The approval was granted by the Hon’ble Commission treating the bidding process as being under Section 63 of the Electricity Act, 2003. Lanco had participated in the process and submitted its bid based on the same. It is therefore, not open to Lanco to raise any issue on the bidding undertaken being not covered by Section 63 of the Electricity Act at this stage.
	6. The plea in regard to Case-1 or Case-2 bidding or the process being allegedly not covered by Section 63 etc. are being raised by Lanco as an afterthought. These were not raised in the earlier proceedings before the Hon’ble Commission or in the Appeal before the Hon’ble Appellate Tribunal. These aspects cannot be considered in a remand proceeding. It is well settled that the scope of remand is limited and restricted and cannot be utilised to raise new pleas.
	7. UPPCL never consented to the grant of compensatory tariff to Lanco. In fact, as per the decision of the Hon’ble Supreme court in decision dated 08.12.2016 in Civil Appeal No. 5239-40 of 2016 in the matter of All India Power Engineer Federation and Others –v- Sasan Power Limited [(2017) 1 SCC 487], there cannot be any such consent by the Procurer-Distribution Licensee without the approval by the Hon’ble Commission. In any event, after the order dated 23.11.2015 of the Hon’ble Commission having being set aside by the Hon’ble Appellate Tribunal, anything done prior to the said order on legal aspects stands washed out. UPPCL cannot be said to be estopped on submissions on legal issues.
	8. UPPCL is entitled to make submissions in the present proceedings based on the law prevalent after the decision dated 11.04.2017 of the Hon’ble Supreme Court in Civil Appeal No. 5399 of 2016. There is no question of UPPCL approbating or reprobating in the said context.
	9. UPPCL had in fact filed a Petition being Review Petition 1104 of 2016 seeking review of the order dated 23.11.2015 passed by the Hon’ble Commission in which it has been wrongly recorded that UPPCL had consented to the order dated 23.11.2015. It has already been placed on record that the consent of UPPCL had been that the matter should be decided by the Hon’ble Commission in accordance with law and keeping the interest of the consumer at large. The above representation was at the time when the decisions of the Central Commission and Maharashtra State Commission were that regulatory powers can be exercised to grant compensatory relief. Subsequently, after the order 23.11.2015 was passed by the Hon’ble Commission, there have been decisions of the Hon’ble Tribunal i.e. on 07.04.2016 and decision dated 11.04.2017 passed by the Hon’ble Supreme Court which have settled the issue to the contrary.
	10. Lanco is mixing up the issue of energy charges being paid as per the actual cost of coal procured, the deemed capacity charges for non-availability of coal etc. dealt in the Fuel Policy entered into between Lanco and UPPCL in pursuance to the PPA and the claim for increased capacity charges in respect of which relief is sought in the present Petition. The Fuel Policy does not say that Lanco will be entitled to entitled to increased capacity charges over and above the quoted tariff.

**Detailed Analysis of the decision of the Hon’ble Supreme Court:**

1. The judgement of the Hon’ble Supreme Court dated 11.04.2017 does not approve or lay down that the Regulatory Commissions have the general power to grant monetary relief by exercise of Regulatory Powers. In the said decision, the Hon’ble Supreme Court has been pleased to reject the claim of the Generators, namely, Adani Power Limited and Coastal Gujarat Power Limited on the exercise of general regulatory powers to give compensatory tariff to them de-hors of the provisions of the PPA.
2. A perusal of the judgement clearly shows that there is only a limited relief granted to the Generators in regard to the New Coal Distribution Policy (**NCDP**) in regard to the non-availability of domestic coal as per the Coal Linkage or Letter of Assurance by virtue of the change in the policy decision of the Central Government. No relief has been granted 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. The operative part of the decision of the Hon’ble Supreme Court is in Para 54 which reads as under:

*54. However, ShriRamachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013, which modifies the 2007 policy* ***and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources.*** *It is to this limited extent that change in law is held in favour of the respondents. Certain other minor contentions that are raised on behalf of both sides are not being addressed by us for the reason that we find it unnecessary to go into the same. The Appellate Tribunal’s judgment and the Commission’s orders following the said judgment are set aside. The Central Electricity Regulatory Commission will, as a result of this judgment, go into the matter afresh and determine what relief should be granted to those power generators who fall within clause 13 of the PPA as has been held by us in this judgment. 55. All the appeals are disposed of accordingly.*

1. It may be seen from the above that the direction of the Hon’ble Supreme Court is for the Central Commission to go into matter afresh and determine what relief should be granted to these power generators who fall within the Clause 13 of the PPA as has been held by the Hon’ble Supreme Court in the decision. Article 13 of the PPA deals with Change in Law. A perusal of the judgement of the Hon’ble Supreme Court will show that the Change in Law considered and decided in favour of the Generators by the Hon’ble Supreme Court is restricted in regard to the New Coal Distribution Policy as would be clear from Para 54 (quoted above) itself.
2. It is submitted that had the decision of the Hon’ble Supreme Court was to give relief to the Generators in regard to the exercise of general regulatory powers, the Hon’ble Supreme Court would have remanded the matter back to the Central Commission to consider not only the impact of Change in Law qua the New Coal Distribution Policy and shortage in the availability of domestic coal but also in regard to the exercise on regulatory powers or any other aspect. The Hon’ble Supreme Court in Para 54 of the said decision has clearly stated that it is to a limited extent that the Change in Law is held in favour of the Respondents – Generators. In respect of other aspects other than those dealt with in the said decision, the Hon’ble Supreme Court has rejected the claim of the Respondents – Generators. These include the exercise of regulatory powers to grant relief.
3. Paras 18 and 19 of the said decision cannot be relied on to contend 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. The decision cannot be read with some passages of the judgement selectively and out of context..Paras 18 and 19 of the said decision of the Hon’ble Supreme Court read 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 stand alone 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.”*

A perusal of the above would 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.

1. 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. Section 62 (4) of the Act deals with the re-determination of a tariff already determined under Section 62 (1). The power of the Regulatory Commission to re-determine the tariff can be traced only with reference to the provisions of Sections 62 (4) or Section 64 (6) of the Act. Section 64 deals with the procedure with reference to tariff determined under Section 62.
2. 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 the Model PPA notified by the Central Government in exercise of the powers under Section 63 as a part and parcel of the Guidelines, the quoted tariff to be adopted by the Appropriate Commission is for the entire duration of the PPA. The quoted tariff is sacrosanct being pursuant to a Tariff Based Competitive Bidding Process held in accordance with under Section 63. The non-obstante clause prohibits the Appropriate Commission to exercise powers under Section 62 (4) of the Act or under Section 64 (6) of the Act to re-determine or vary or amend the tariff.
3. Thus, Section 63 having prohibited the variation in the tariff under the statutory scheme, it is not open to claim that the Commission 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. The intention of the Parliament is clear, namely, that the Tariff Based Competitive Bid Process determined tariff should not be valid in terms of Sections 62 of 64 of the Electricity Act and accordingly the powers under Sections 79 or 86 of the Act cannot be exercised to set at nought what is prohibited under Section 63 read with Sections 62 and 64 of the Act.
4. It is well settled that the provisions of the Act should be read together in context. It is not harmonious to interpretthe 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.
5. In the above context, if Paras 18 and 19 (quoted above) of the decision of the Hon’ble Supreme Court is considered, it is abundantly clear that the Hon’ble Supreme Court dealt with the issue of regulatory powers under Section 79 (1) (b) in the context of the process and procedure culminating in the adoption of the tariff.
6. A combined reading of the above shows that the powers of adoption provided in the Guidelines or under Section 63 can also be traded to Section 79 (1) (b). Accordingly, the mere fact that the Competitive Bidding Process held does not necessarily mean that the State Commission shall adopt. In exercise of the regulatory powers the State Commission is entitled to scrutinise the entire process and come to the conclusion whether the process as envisaged in the Guidelines had been duly followed. The issues such as whether the Procurer had strictly followed the rules of the Commission, whether the Evaluation Committee has properly addressed the issue and determined that the tariff quoted is aligned to market forces, whether at the time of the adoption of the tariff it is possible for the Procurer to get power from other sources at much cheaper rate and, therefore, it may not be conducive to the interest of the consumers to adopt the tariff quoted etc., can all be exercised by the Regulatory Commission with reference to Sections 79 (1) (a) or (b) or 86 (1) (a) or (b) of the Act. It cannot be that these powers can be exercised in a manner that the Regulatory Commission adopts the tariff on a particular day and thereafter exercises the power under Sections 79 (1) (b) or 86 (1) (b) to amend or vary the tariff.
7. Section 79 (1) (a) or (b) or Section 86 (1) (a) or (b) cannot be read in an isolated manner of over-reaching or overriding the powers to give relief to the Generators notwithstanding the entire scheme provided in Sections 61, 62, 63 and 64 of the Act.
8. While making submissions with reference to Para 19 of the decision of the Hon’ble Supreme Court, Lancois ignoring various aspects dealt in the judgement. For example, the judgement clearly lays down that in respect of matters which are already dealt in the Guidelines or in the PPA, Section 79 (1) (b) powers cannot be exercised contrary to the same. In the Tariff Based Competitive Bidding Process, the matters relating to tariff stands already decided in the Guidelines. The matter of risk allocation, circumstances where such quoted tariff shall be subject to future adjustment or variation are specifically dealt in the Guidelines read with the Model PPA, namely –
9. when the tariff provides for escalable component, the manner in which escalation will be addressed shall be by the Central Commission/Appropriate Commission;
10. in case of Force Majeure, what kind of tariff adjustment to be done is provided in Article 12 of the PPA;
11. in case of Change in Law, the tariff adjustment to be made is provided in Article 13 of the PPA;
12. The scheme of the Electricity Act is clear.The power to vary or re-determine the tariff contained in the statute in Section 62 (4) and 64 (6) of the Act has been made non-applicable to the quoted tariff under Section 63. In these circumstances, the issue of quoted tariff stands a different field under section 63 read with the Guidelines notified by the Central Government and the Model PPA. Accordingly, even in terms of the observations, the decision contained in Paras 18 and 19 of the Hon’ble Supreme Court’s Order dated 11.4.2017, there cannot be an exercise of power under section 79 (1) (b) or para-materia under Section 86 (1) (a) or 86 (1) (b) of the Act.
13. Similarly, the reliance placed on decision dated 08.12.2016 in Civil Appeal No. 5239-40 of 2016 in the matter of All India Power Engineer Federation and Others –v- Sasan Power Limited [(2017) 1 SCC 487] with reference to Para 31 as supporting exercise of regulatory power is totally out of context. The said paragraph deals with the negative i.e. even if some relief is to be granted by virtue of consent of the parties in respect of a tariff determined under Section 63, the same cannot be done without the approval of the Hon’ble Commission. This does not mean that the Hon’ble Supreme Court has held that the Appropriate Commission will have the regulatory power to grant relief in matters of tariff. The judgment of the Hon’ble Supreme Court has to be read in the context. Firstly, in that case, the Hon’ble Supreme Court was dealing with the issue of Commercial Operation Date (COD) and not tariff. In the context of COD, it was stated that irrespective of whether the PPA is pursuant to Section 62 or Section 63, there cannot be a claim based on consent of the parties. It has to be with the approval of the Hon’ble Commission. Similarly, in the context of Section 63 and quoted tariff also, if any change in tariff is admissible on account of the implication of Force Majeure, Indian Political Event or Change in law or even based on quoted escalable tariff (which is in accordance with the PPA, there cannot be relief by consent of the parties without the approval of the Appropriate Commission). For example, the Hon’ble Supreme Court has held that relief is admissible under Change for New Coal Distribution Policy in certain circumstances in respect of Section 63 quoted tariff. In such cases, parties cannot mutually agree on the quantum of relief and the same has to be determined by the Appropriate Commission.
14. The pith and substance of the decision of the Hon’ble Supreme Court in the above two matters can be summarised as under:
	1. 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.
	2. 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), Lanco 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 fulfil the conditions to get the relief under the Guidelines, it will claim that the Hon’ble 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.

**SCOPE AND IMPLICATION OF SECTION 7991)(b) or 86(1)(b) WITH REFERENCE TO SECTION 63 ADOPTED TARIFF**

1. Further, Section 79 (1) (b) cannot be read in an independent manner to infer an over-reaching power as if the provisions of Section 79 (1) (b) is with the stipulation `not withstanding anything contained in any other provisions of the Act’. Section 79 does not provide for a non-obstante clause.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. Section 62 (4) of the Act deals with the re-determination of a tariff already determined under Section 62 (1). The power of the Regulatory Commission to re-determine the tariff can be traced only with reference to the provisions of Sections 62 (4) or Section 64 (6) of the Act. Section 64 deals with the procedure with reference to tariff determined under Section 62.
2. 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 the Model PPA notified by the Central Government in exercise of the powers under Section 63 as a part and parcel of the Guidelines, the quoted tariff to be adopted by the Appropriate Commission is for the entire duration of the PPA. The quoted tariff becomes sacrosanct being pursuant to a Tariff Based Competitive Bidding Process held in accordance with under Section 63. The non-obstante clause prohibits the Appropriate Commission to exercise powers under Section 62 (4) of the Act or under Section 64 (6) of the Act to re-determine or vary or amend the tariff.
3. 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. The intention of the Parliament is clear, namely, that the Tariff Based Competitive Bid Process determined tariff should not be valid in terms of Sections 62 of 64 of the Electricity Act and accordingly the powers under Sections 79 or 86 of the Act cannot be exercised to set at nought what is prohibited under Section 63 read with Sections 62 and 64 of the Act. It is well settled that the entire provisions of the Act should be read in context.
4. In the above context, if Paras 18 and 19 of the decision of the Hon’ble Supreme Court is considered, it is abundantly clear that the Hon’ble Supreme Court is dealing with the issue of regulatory powers under Section 79 (1) (b) in the context of the process and procedure culminating in the adoption of the tariff. A combined reading of the above shows that the powers of adoption provided in the Guidelines or under Section 63 can also be traded to Section 79 (1) (b). Accordingly, the mere fact that the Competitive Bidding Process held does not necessarily mean that the State Commission shall adopt. In exercise of the regulatory powers the State Commission is entitled to scrutinise the entire process and come to the conclusion whether the process as envisaged in the Guidelines had been duly followed. The issues such as whether the Procurer had strictly followed the rules of the Commission, whether the Evaluation Committee has properly addressed the issue and determined that the tariff quoted is aligned to market forces, whether at the time of the adoption of the tariff it is possible for the Procurer to get power from other sources at much cheaper rate and, therefore, it may not be conducive to the interest of the consumers to adopt the tariff quoted etc, can all be exercised by the Regulatory Commission with reference to Sections 79 (1) (a) or (b) or 86 (1) (a) or (b) of the Act. It cannot be that these powers can be exercise in a manner that the Commission adopts the tariff on a particular day and thereafter exercises the power under Sections 79 (1) (b) or 86 (1) (b) to amend or vary the tariff.
5. If the submissions made by Lanco on the interpretation of the Hon’ble Supreme Court’s decision dated 11.4.2017 is correct, the Hon’ble Supreme Court would have remanded the matter back to the Central Commission to exercise regulatory powers and to grant relief or would have upheld the decision of the Central Commission dated 21.2.2014 granting compensatory tariff in exercise of the general regulatory powers. Whereas under Order dated 11.4.2017 the Central Commission is required to consider the limited aspect of domestic non-availability of coal as per the Letter of Assurance or Letter of Linkage on account of subsequence changes in the New Coal Distribution Policy.
6. In view of the above, the submissions made by Lanco on the implication of the Hon’ble Supreme Court’s decision dated 11.4.2017 is devoid of any merit and is liable to be rejected.
7. In view of the above decisions relied on by Lanco, namely, of **Badrinath–v-Government of Tamil Nadu 2000 (8) SCC 395, State of Punjab–v-Davinderpal Singh Bhullar 2011 (14) SCC 770, Chairman cum Managing Director Coal India Limited–v-AnantaSaha 2011 (5) SCC 142, Uttar Pradesh Pollution Control Board–v-Kanoriya Industrial Limited (2001) 2 SCC 549, State of Gujarat–v-GordhandasKeshavji Gandhi AIR 1962 GUJ 128** and other cases relied on have no application to the facts of the present case. The attempt made by Lanco is to deviate from core issue involved in the present proceedings and claim relief which is totally inadmissible even as per the decision of the Hon’ble Supreme Court dated 11.4.2017. Lanco having no merit whatsoever in the claim is now raising various external and irrelevant issues to confuse the matter.
8. It is submitted that Lanco is referring to the above and other judgments which lays down the general principles of law. There cannot be any dispute on such general principles such as the decision of the Hon’ble Supreme Court is a law declared as per Article 141 of Constitution of India. In fact, it is the case of UPPCL that with the decision of the Hon’ble Supreme Court in the order dated 11.04.2017 passed in Civil Appeal Nos. 5399-5400 of 2016, the law in regard to the regulatory jurisdiction stands settled. As mentioned hereinabove, there cannot be any exercise of general regulatory power to grant any monetary relief. In the present case, Lanco has not been able to establish any change in law within the meaning of Article 13 of the PPA. There is no implication of NCDP. Under these circumstances, there is no case whatsoever for Lanco to claim any relief.

**Re: New Coal Distribution Policy {NCDP}**

1. The relevant part of decision of the Hon’ble Supreme Court dated 11.04.2017 {Compensatory Tariff Matter} on the aspect of New Coal Distribution Policy {NCDP} is extracted as under:

*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)I/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.*

*54. However, ShriRamachandran, learned senior counsel for the appellants, argued that the policy dated 18th October, 2007 was announced even before the effective date of the PPAs, and made it clear to all generators that coal may not be given to the extent of the entire quantity allocated. We are afraid that we cannot accede to this argument for the reason that the change in law has only taken place only in 2013****, which modifies the 2007 policy and to the extent that it does so, relief is available under the PPA itself to persons who source supply of coal from indigenous sources****. It is to this limited extent that change in law is held in favour of the respondents.*

1. The Hon’ble Supreme Court was therefore, considering the issue in the context of the policy documents and specific communications. The extracted parts of the decision on NCDP have to be read together and in the context of the policy documents and communication referred to. The decision cannot be read in the context of some sentence selectively.
2. The highlighted part herein above clearly envisage a situation of existence of a Letter of Assurance {LOA} or Linkage of coal provided in pursuance of the earlier coal policy of 2007 but FSA being not signed in pursuance of the same for the quantum of coal for which the linkage is given or letter of assurance is given. The assured quantum or Annual Contracted Quantum {ACQ} referred in the above is the quantum for which the linkage or letter of assurance is given. It is merely the reference to the policy document of 2007 of 100% coal being made available to the power projects.
3. The context of para 54 of the decision is different. Para 54 deals with the arguments raised that even policy dated 18th October, 2007 did not provide for 100% domestic coal and the possibility of shortage and importation of coal and higher price being payable fir such imported coal. This does not mean that even without a linkage or letter of assurance being there before 2012/2013 there is an assured quantum universally available to App power project developers setting up the project in India intending to use domestic coal. The ore condition is clearly the stipulations contained in the documents as highlighted above in para 1 namely linkage letter or letter of assurance.
4. The subsequent change in law considered by the Hon’ble Supreme Court is change from the quantum of coal assured in the coal linkage or letter of assurance issued by the Central Government /Coal India Limited to lesser quantum by virtue of subsequent change in the years 2012 and 2013 as a condition for application of change in law provisions in Article 13 of the PPA.
5. Accordingly if the project developer does not have either coal linkage or letter of assurance for a specified quantum of coal at the time when change in the coal allocation policy was made in the years 2012 and 2013 there is no question of there being any change in law within the scope of Article 13 of the PPA. In such cases there is no existing assurance for coal supply of a specified quantum under the pre existing policy which can be said to have been reduced by any subsequent change in policy .

**Re: Coal availability aspects:**

1. In the present proceedings Lanco is raising issues on the availability of coal to the project from Khedia Expansion Project of Northern Coal Fields (**NPL)** referring to coal linkage at the time of the RFP. Based on the above, Lanco is seeking to allege that there is a change of law with reference to the NCDP.
2. At the outset, it is submitted that coal availability issue need to be considered in the light of the two orders passed by the Hon’ble Commission dated 19.10.2005 and 06.02.2006. Lanco having participated in the bid on the terms and conditions contained in the bid documents, as amended by above orders passed by the Hon’ble Commission, cannot raise any issues based on any documents or correspondences referring to any arrangement of coal from Khadia mines or representation that may have been given by UPPCL prior to the said orders. The PPA is based on the bidding conditions existing as per the orders of the Hon’ble Commission and not otherwise. It is therefore, submitted that the submissions of Lanco on the coal aspects i.e. non-availability of coal from Khadia mines as originally envisaged is to be rejected.
3. The claim of Lanco is not on the non-availability of coal but more on the change in the sources of coal available i.e. a change from the source of coal identified at the time of the bidding which did not materialise and the coal linkage has been given to other sources involving certain alleged additional capital expenditure to be incurred by Lanco.
4. The coal issue raised by Lanco has no relation whatsoever to the issue of Change in Law decided by the Hon’ble Supreme Court in regard to NCDP. In the decision of the Hon’ble Supreme Court what has been considered is the shortage in the availability of coal from the linked sources, namely, in the quantum as per the Letter of Linkage or Letter of Assurance given and the inability of the Coal Company to sign the FSA to the full extent of the reason of change in the NCDP. Such a situation does not arise in the present case. Further more, the present case of Lanco is in regard to Case 2 Competitive Bid Process where the energy charges is allowed on the basis of a formula contained in Schedule 7 and the Bid Process was only to decide on the quoted capacity charges. The coal price as per the purchase cost as well as the coal transportation and unloading is allowed on actual basis. There is, therefore, no impact on Lanco in so far as the change in the source of coal availability.
5. The claim of Lanco in the present proceedings is for increased capacity charges or additional capacity charges over and above the quoted capacity charges. The increase in capacity charges claimed has nothing to do with the energy charges payable. The capacity charges was quoted by Lanco as per its decision at the time of the submission of the bid. It was for Lanco to factor all the relevant aspects. It is not open to Lanco to claim any additional capacity charges except for the Change in Law as provided in Article 13 of the PPA.
6. Lanco is claiming indirectly the cost of establishing certain alleged additional facilities for coal handling. In other words, Lanco is seeking that it had to incur additional capital expenditure on account of the change in the source of coal originally envisaged from Khedia Mines to other linked mines.
7. It is submitted that a similar claim was made by Sasan Power Limited in Civil Appeal Nos. 9643-44 of 2016 filed before the Hon’ble Supreme Court arising out of the Order dated 7.4.2016 passed by the Hon’ble Supreme Court. Sasan Power Limited had claimed an increase in the capacity charges on account of exchange rate fluctuation. The Hon’ble Tribunal by Order dated 7.4.2016 had rejected the same. The Hon’ble Supreme Court had also not allowed the same. The Civil Appeals filed by Sasan Power were disposed of vide Order dated 20.4.2017.
8. Without prejudice to the above, it is submitted that the bid given by LancoKondapalli was in pursuance of the RFP Documents as finally approved by the Hon’ble Commission vide Order dated 19.10.2005. In Para 5 of the above Order (quoted above), sourcing of coal has been considered. It was clearly pointed out that the selected bidder shall be responsible for obtaining its requirements of fuel for the power station and he is free to get the supply from any source. The role assumed by the State Government was only of a facilitating nature. The fuel risk is of the Seller. The RFP Documents was modified accordingly as per the terms of the Order dated 19.10.2005 passed by the Hon’ble Commission. The issue of environmental clearance and the FSA with NCL was also deliberated and decided. Further, in a subsequent Order dated 6.2.2006 the Hon’ble Commission had clarified that these are the responsibility of the Seller (Selected Bidder).
9. Further, Article 13.3.3 of the PPA which deals with the Change in Law stipulates as under:

*It is expressly understood that a fuel supply interruption caused by the Fuel Supplier or the Seller shall not constitute an Indian Political Event.*

1. In the circumstances mentioned above, the bidders were duly informed about the status of coal availability and more importantly the responsibility for arranging coal has been of the successful bidder i.e. the person selected to develop the project which in the present case is Lanco.
2. All the bidders including LancoKondapalli had submitted the bid in pursuance of the above. It is, therefore, not open to Lanco to raise issue of the coal being not available from Khedia Mine and coal being available through other linked sources only and consequently certain additional capital expenditure had to be incurred for establishing the power projects. In terms of the RFP Documents it was the responsibility of the participating bidder to factor all expenditure as a part of the quoted capacity charges excluding only specific elements contained in the formula given in Schedule 7 of the PPA.
3. In the context of the above Lanco is wrongly referring to various developments prior to the Order dated 19.10.2005. These developments have no relevance after the Hon’ble Commission has given its ruling in the Order dated 11.10.2005 and further clarified in the review order dated 6.2.2006 and more importantly when LancoKondapalli had submitted its bid after the above clarification. It is, therefore, not open to Lanco to raise such issues after having participated in the bidding with the full knowledge of the issues decided by the Hon’ble Commission in the above Order.
4. In the circumstances mentioned above, Lanco had the full knowledge that the coal may not be available from the Khadia Mines, there will be necessity to procure coal from other sources, there will be a necessity to develop power projects facilities keeping in view the procurement of coal from sources other than khedia Mines including aspects such as transportation of coal, railway siding facilities to be created, road transportation of coal etc. These were to be developed by Lanco as a part of the obligation assumed under the PPA.
5. In view of the decision of the Hon’ble Supreme Court dated 11.4.2017 reliance placed by Lanco on general regulatory powers considered in cases such as ***K. Ramanathan –v- State of Tamil Nadu &Anr (1985) 2 SCC 116, Jiyajeerao Cotton Mills Ltd. &Anr –v- Madhya Pradesh Electricity Board &Anr. 1989 Supp (2) SCC 52, Cellular Operators Assn. of India &Ors. –v- UOI (2003) 3 SCC 186 and Deepak Theatre Dhuri –v- State of Punjab 1992 Supp. (1) SCC 684*** is without any merit. These are general principles and have no application to tariff discovered and adopted through the process of competitive bidding as per Section 63 of the Electricity Act, 2003.
6. In the circumstances mentioned above, Lanco without any justification whatsoever, has been placing reliance on past events and has been wrongly alleging that there was a material change in the coal availabiluty with reference to Khadia mines. The bid condition based on which Lanco submitted the bid is clearly to the contrary.

**RELIANCE PLACED ON FUEL POLICY**

1. The Fuel Policy agreed to between UPPCL and Lanco is in pursuance to Clause 7.9.1 of the PPA which reads as under:

*“7.9 Fuel Purchasing*

*7.9.1 The Seller shall be responsible for obtaining its requirements of fuel for the Power Station on the best terms reasonably obtainable, having regard to the terms of the fuel policy adopted by the Parties from time to time, subject to Article 7.9.2 and the Seller’s commitments under existing Fuel Supply Agreement that have been jointly approved by the Buyers.”*

1. The above clause itself speaks about the responsibility for procurement of fuel for the Power Station to be of Lanco. The Fuel Supply Agreement defined in the PPA also provides that its an agreement to be entered into by Lanco (Seller) with the approval of the Buyer. This also provides that it is a responsibility of the Lanco to sign the Fuel Supply Agreement. The Fuel Policy Agreement does not state that sourcing of the coal from Khadia Mine is the condition subsequent to which Lanco is required to fulfil its obligations or that Lanco is to arrange the facilities at the Power Station based only on coal availability from Khadia Mines through MGR System. On the other hand, the Fuel Policy even envisages procurement of coal from other sources, including imported coal.
2. Clauses 1.4 etc. of the Fuel Policy speaks about the implication of target availability being not achieved on account of non-availability of coal but does not speak about the implication of any increased capital cost for sourcing of coal by Lanco from sources other than Khadia Mines.
3. In any event, as mentioned herein, the above aspects of the Fuel Policy are matters related to fuel cost and not in any manner relate to change in the capital cost for increase in the capacity charges.

**Reliance placed on expert committee report:**

1. It is submitted that Lanco cannot place any reliance on the expert committee report. The expert committee was appointed in pursuance of the decision of the Hon’ble Commission dated 28.04.2014 in the context of exercise of regulatory power to grant monetary relief dehors the terms and conditions of the PPA. As mentioned hereinabove, this order as well as subsequent order dated 23.11.2015 passed by the Hon’ble Commission on the aspect of regulatory powers has no force after it has been set aside by the Hon’ble Appellate Tribunal vide order dated 30.11.2016 and further in view of the decision of the Hon’ble Supreme Court dated 11.04.2017. All the observations made by the expert committee are non-est and have no legal basis. In any event, as mentioned hereinabove, the issue of coal availability from Khadia mines and change to another linkage etc. was envisaged in the bid conditions by virtue of the order dated 19.10.2005 and the review order dated 06.02.2006.

**Various claims made by Lanco:**

1. As mentioned hereinabove, Lanco is not aggrieved by non-availability of domestic coal. The case of Lanco is for increase in the capacity charges on account of alleged shifting of coal sources and also the consequences of lower availability factor, higher heat rate, under-recovery of variable charges on account of higher heat rate, higher interest rate in the absence of payment security mechanism, increased cost of working capital, higher Operational and Maintenance expenses, increase in consumption of secondary fuel oil, apart from increase in capital cost of the project. Such claims made by Lanco are patently erroneous and strikes at the very scheme of tariff based competitive bid process where it is for the bidder to assume all the risks associated with the implementation of the power project.
2. Firstly, as mentioned hereinabove, there is no basis for the claims of Lanco alleging that the coal source was shifted on account of any factor attributable to UPPCL after the bid had been given. The consequential claims made by alleging such shifting of sources is to be rejected in view of the allegation of shifting of sources being erroneous.
3. Secondly, such claims made are indirect, remote and is not on account of any direct implication of the specific provisions of the PPA or the bidding documents. Thirdly, the RFP documents contains specific stipulation as under:

*“3. Nature of Information*

 *The purpose of this RFP is to provide Bidders with basic and preliminary illustrative information to assist them in the formulation of their Bids and is issued upon the express understanding and agreement that the Bidders will use if only for the purposes of preparing and submitting Bids and for other purposes necessarily associated therewith and for no other purpose whatsoever.*

 *Each Bidder unconditionally agrees, understands and accepts that this RFP does not and does not purport to contain all the information and data each Bidder and their advisors may desire or require in reaching decisions as to their involvement with the Project or contain information that has been independently or thoroughly verified.*

 *Each Bidder must thus conduct its own investigations and analysis and should check the accuracy, reliability and completeness of the Information and obtain independent advice in relation to the same from appropriate sources. Bidders should form their own views as to what information provided in this RFP or separately is relevant to any decisions that they make and should make own independent investigations in relation to such additional information as they may require.*

 *Each Bidder unconditionally agrees, understands and accepts that this RFP and the Information may not be appropriate for all persons and it is not possible for UPRUVNL, the Government Representatives, UPPCL, their employees or advisors to consider the investment objectives, financial situation and particular needs and abilities of each person who reads or uses the RFP or the Information. Certain Bidders may have a better knowledge of the proposed project and related information than others.*

 *Each Bidder unconditionally agrees, understands and accepts that the Information contained in this RFP or any other information, which may be provided to Bidder from time to time, is subject to change without notice. Further, it should in no event be assumed that there will be no deviation or change in any Information provided. The Government Representatives or UPRVUNL or UPPCL may, in their absolute discretion, but without being under any obligation to do so, update, amend or supplement the Information including the evaluation methodology in this RFP at any time prior to the submission of Financial Bid.*

*Each Bidder unconditionally agrees, understands and accepts that while this RFP has been prepared in good faith, neither UPRVUNL, the Government Representatives, UPPCL, or their employees or advisors make any representation or warranty, express or implied, or accept any responsibility or liability, whatsoever, in respect of any statements or omissions herein, or the accuracy, completeness or reliability of the Information and shall incur no liability in this regard and hereby disclaim all liability, under any law, statute, rules or regulations or any legal theory as to the accuracy, reliability or completeness of this RFP or the Information, even if loss or damage is caused by any act of omission on the part of UPRVUN, the Government Representatives, UPPCL or their employees or advisors, whether negligent or otherwise.*

…………………………………………………………………………………………….

*3.1.2 The RFP documents issued to the bidders have been filed with the UPERC. In respect of the proceedings before the UPERC, the orders of the UPERC dated 19th October 2005 and 6th February 2006 are appended hereto as Annexure G.*

 *The dates indicated in Clause 3.1.1 above, are tentative and non binding. The dates for activities as listed hereinabove any be postponed by UPRVUNL, but shall not ordinarily and without notice be advanced. Postponement may occur at any time or any stage of the Bid Process, with or without notice, for any reason, as UPRVUNL deems fit in its sole discretion.*

1. Fourthly, there is no representation in any place, either in the bid documents or in the PPA that there will be any monetary adjustment for increase in tariff for any reasons as referred to in Para 4.1 of the submissions of Lanco. In fact, the PPA restricts the tariff adjustment by increase only for change in law. The consequences for lower availability factor losses on account of any of the aspects alleged by Lanco is not provided in the bid documents or in the PPA. These aspects are matters of risk and reward based on the decision of the bidder to quote a tariff.
2. It is submitted that Lanco is attempting to re-open the quoted tariff and is seeking to convert the competitive bid tariff as a capital cost based tariff determination, by raising issues such as under recovery of fixed charges, higher plant net heat rate, higher secondary oil consumption, higher rate of interest on term loans, increased cost on working capital, increase in the secondary fuel oil consumption, increase in the capital cost etc which is totally impermissible. Such an attempt made will destroy the sanctity of the bid process and the sanctity of the contract entered into pursuant to a Tariff Based Competitive Bid.
3. Without prejudice to the above and the fact that various aspects raised on the implications of operations are not relevant considerations, on the specific aspects referred to by Lanco in Paras 5.6 onward, the UPPCL would crave reference to its reply dated 28.04.2017. The contents of the same may be read as a part of these submissions.
4. For the reasons mentioned herein above, there is no merit in the submissions of Lanco. The Petition No. 871 of 2013 filed by lanco is liable to rejected.

As has been pointed out in the above submissions, Hon’ble APTEL in their order dated 30.11.2016 had quashed the earlier orders of the Commission and had remanded back the matter to the Commission for re-examination in the light of full bench judgment of the Hon’ble APTEL dated 30.11.2016.

While the Commission was engaged in deciding this matter afresh,the Hon’ble APTEL full bench order dated 30.11.2016 was challenged in civil petition no.4999-5000 of 2016 before Hon’ble Supreme Courtand the same was decided on 11.4.2017. Hon’ble Supreme Court has quashed the Full Bench order of Hon’ble APTEL and has given its finding on the powers of the Commission regarding determination of tariff, the applicability of change in law, force majeure and the applicability of PPA. Since the full bench order of Hon’ble APTEL dated 30.11.2016 has been quashed by the apex court, this Commission is under an obligation to take into consideration the peculiar situation arising out of quashing of full bench order of Hon’ble APTEL dated 30.11.2016 and the law laid down by the apex court in the matter of determination of tariff in projects approved under section 63 of Electricity Act 2003. In their written submissions, both the parties have based their arguments on Hon’ble Supreme Court Judgement dated 11.4.2017.

From the examination of facts of this case it is distinctly established that the full bench order of Hon’ble APTEL and the verdict of Hon’ble Supreme Court was in reference to the cases of M/s Adani Power Limited and Coastal Gujrat Power Limited where the basic issue was the Change in law outside the country. But in case of LAPL there was no issue related to change in law outside the country. Although the Commission in its order dated 15.11.2015 had used the word compensatory tariff but in fact the commission had granted the relief to LAPL primarily on the basis of provisions of PPA which the Hon’ble Supreme Court has also found valid. In their pleadings M/s LAPL had made some additional claims in the fresh hearing but later they withdrew their additional claims and agreed to restrict their claims as per their earlier petition no.871 of 2013.

As earlier stated the Commission had initiated proceedings in December 2016 as per the remand order of the APTEL dated 30.11.2016 and the pleadings continued based on APTEL,s full bench judgement dated 30.11.2016 but the course of pleadings changed after the Supreme Court order in Civil Appeal no. 5399-5400 of 2016 on 11.4.2017.

Hon’ble Supreme Court has made the specific observations regarding tariff determination in case of generation projects whose tariff is adopted under Section 63 of the Electricity Act, 2003. On three important issues viz. regulatory powers of the Commission, Force Majeure and Change in law, the observations of the Hon’ble Supreme court are reproduced hereunder:

**Regulatory powers of the Commission**

 *“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 Governments 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 all together. 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 determine the tariff in accordance with the provisions of the Act (after laying down the conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by transparent process of bidding.In either case the general regulatory power of the Commission under Section 79(1)(b) is the source of power to regulate, which includes the power to determine or adopt tariff.In fact Section 62 and Section 63 deal with determination of tariff which is part of regulating tariff. Whereas determining tariff for interstate 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 Govt. under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory function, 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**

*“Force Majeure is governed by the Indian Contract Act 1872. In so far as it is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. In so far as to force majeure event occurs de hors the contract, it is dealt with by rule of positive law under Section 56 of the Contract Act.”* Section 32 and 56 are set out herein:

“32. **Enforcement of Contracts contingent on an event Happening -** *Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.”*

56.  **Agreement to do impossible act –“***An agreement to do an act impossible in itself is void.*

**Contract to do act afterwards becoming impossible or unlawful.***A contract to do an act which, after the contract made becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

**Compensation for loss through non-performance of act known to be impossible or unlawful.***Where one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promise sustains through the non- performance of the promse.”*

“It is clear from the above that the doctrine of frustration cannot apply to these cases as the fundamental basis of the PPAs remains unaltered. Nowhere the PPA state that coal is to be procured only from Indonesia at a particular place. In fact it is clear on a reading of the PPA as a whole that the price payable for the supply of coal is entirely for the person who sets up the power plant to bear. It is clear that an unexpected rise in the price of coal will absolve the generating companies from performing their part of the contract for the very good reason that when they submitted their bids, this was a risk they knowingly took. We are of the view that the mere fact that the bid may be non-escalable does not mean that the respondents are precluded from raising of the plea of frustration, if otherwise it is available in law and can be pleaded by them. But the fact that a non-escalable tariff has been paid for, for example, in the Adani case, is a factor which may be taken into account only to show that the risk of supplying electricity at the tariff.We are, therefore, of the view that neither was the fundamental basis of the contract dislodged not was any frustrating event, except for a rise in the price of coal, excluded 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 indicated was upon the generating company.”

**Change in Law**

“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. Page 51 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.

**Clause 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 offtake 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.**

**“**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 terms of this Agreement as provided in Article17;

“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 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 statue, 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

1. Construction Contracts;
2. Fuel Supply Agreements, including the Fuel Transportation Agreement, if any;
3. O&M contracts;
4. RFP and RFP Project Documents; and
5. Any other agreements designated in writing as such, from time to time, jointly by the Procurers and the Seller;

**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” mean s 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 extended the income tax holiday for power generation projects under Section 80IA of the Income Tax Act, upto the Scheduled Commercial Operation Date of the Power Station, such non-extension shall be deemd to be aChange 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 consequences 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.

1. **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 terms 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.”

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 licensees 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.”

“………………”

“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 license 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 Page 61 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. “

“………………”

“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.”

From the above findings of the Hon’ble Supreme Court, following tenets of law are adequately clarified:

1. The Commission has power to determine tariff under competitive bidding projects, the tariff of which is adopted under Section 63 but in this process the Commission will follow the guidelines issued by the Central Govt. and if some issue is not provided for in the guidelines the Commission can use its general regulatory power.
2. The force majeure could be a reason for change in discovered tariff provided the issue is covered by the doctrine of frustration as per Section 56 of the Indian Contract Act 1872. Force majeure will not apply unless the fundamental basis of the contract is dislodged. Merely because it has become onerous to perform will not qualify under the force majeure. But force majeure could be a reason for change in discovered tariff if one person has promised to do something which he knew or, with reasonable diligence, might have known, and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promiseesustains through the non-performance of the promise.
3. Change in National coal distribution policy is covered under the change in law as the guidelines regarding bidding clearly state that 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 will amount to change in law.
4. 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.

Now the Commission has to decide the petition No. 871 of 2013 of LAPL and petition no. 891 of 2013 of UPPCL afresh in the light of above judgement of Hon’ble Supreme Court. Accordingly the Commission has re-examined the earlier order dated 23.11.2015 asfollows:

Anpara ‘C’ project was put to bid through Case-2 bidding and the RFP provided the following:

1. That 100% linkage coal ( 4.5 MTPA with 3885kcal/kg) from Khadia expansion mine of NCL would be provided through existing MGR system.
2. The transportation of coal shall be done through BOBRN wagons.
3. The plant’s technical specifications were given with the bid.
4. 256 Acres of land and necessary water would be provided.
5. Payment security mechanism shall be established as PPA

The RFP was provided to the bidders on 20.2.2006 and the successful bidder LAPL signed the PPA on 12.11.2006. After signing the PPA, LAPL tried for handing over of the proposed site but that was delayed. But later the land issue was resolved and the 1st unit of 600 MW was commissioned on 10.12.2011 and the 2nd Unit came on 18.1.2012. Ever since the commissioning of the plant the things were not moving smoothly primarily because of Change in NCDP and non- establishment of payment security mechanism and also abnormal delays in liquidating the power purchase dues by UPPCL. Ultimately LAPL filed petition no. 871 of 2013 and made following prayers:

1. To direct the respondents to clear all outstanding dues under the PPA till date;
2. To pass an order determining new tariff for supply of power from the Anpara’C’ plant to Respondents till the successful completion of bye out of the plant;
3. In alternative, pass an order determining new tariff for supply of power from the Anpara ’C’ plant to the Respondents , instead of a buyout of the plant keeping in view the viability and sustainability of the plant after taking into account the accumulated losses of the plant till date;
4. Pass any other Order which may be consequential upon prayer (i), (ii) and /or (iii) and any other Order as the Hon’ble Commission may deem fit.

LAPL also filed additional submissions on 11.3.13, 3.4.13, 3.5.13 and a rejoinder on 14.5.13.

UPPCL the Respondent in the petition filed by LAPL, also filed a petition No. 891 of 2013 on 21.5.2013 challenging the LAPL’s termination notice dated 13.1.2013 and the buyout notice dated 11.2.2013. The Commission clubbed both the petitions vide order dated 23.05.2015.

Since the matter related to termination of PPA due to fundamental change in premise of the project, breach of conditions regarding payment security mechanism and also non- payment of full dues of LAPL by UPPCL. The Commission heard the cases on various dates as mentioned in the order dated 28.04.2014. During the course of hearing ,instead of termination of PPA, LAPL requested for compensatory tariff and UPPCL alsogave their tacit acceptance urging the Commission to intervene by providing an appropriate compensatory tariff to LAPL.

In view of the above, the Commission constituted the expert Committee in which some changes were made when required. The expert committee was asked to take into consideration the issues of the change in availability of coal due to NCDP policies including change in the logistics due to shortage of coal in FSA and its effect on the performance of LAPL. The committee was asked to obtain all the actual data required with due authentication from independent auditors to ascertain the actual impact in costs. The Committee was also asked to suggest the ‘Compensatory Tariff’ necessary to address the problems faced/being faced by LAPL so as to ensure consistent supply of power to the State and at competitive tariff in the larger public interest. Such compensatory tariff shall be applicable for the period the hardship due to shortage under the coal linkage continues. The Committee was also at liberty to suggest any further measures which could be practicable and judicious to address the situation.

The Expert Committee submitted its report on 3.3.2015 and its addendum report on 30.06.2015. The copies of the reports were forwarded to GoUP and UPPCL for their comments. The presentations on the report were made by the Committee before the Commission and the stakeholders on 24.4.2015, 27.5.15 and 30.06.205. The reports were uploaded on the Commission’s website and the comments were invited by 29.05.2015. The public hearing was fixed for 5.10.15 at 11:30 hrs in the office of the Commission. During the hearing, one Sri R.S. Awasthi made written submission on behalf of consumers, a copy of which was given to LAPL for reply. LAPL submitted its reply and the copy was sent to Sri. R.S. Awasthi on 12.10.2015 on his request.

The report submitted by the Expert Committee pointed out the uniqueness of LAPL power projects as follows:

1. 2x600 MW coal based thermal power plant has been built on only 256 acres of land, which is lower than norms specified by Central Electricity Authority (CEA) for similar power projects. The CEA norms would require about 620 Acres of land for a power project of this size (excluding the ash disposal area, corridors for ash slurry, raw water and coal).
2. Mine specified coal linkage (Khadia expansion Mine of NCL) and shared logistics (MGR) for movement of coal rakes with UPRVUNL’s existing power stations of AnparaA& B.
3. The project didn’t envisage receipt & unloading of coal through BOXN wagons as well as road transportation through trucks.
4. The project didn’t envisage raw coal storage as well as reclaiming coal for crushing. The bottom hopper in the coal yard and the connected system was not provided.
5. The stacker-reclaimer was provided only one in number, in case of breakdown, the plant could face serious problem of coal supply from the storage yard in case of non-receipt of timely rakes.
6. Due to above reasons, it is later proposed by LAPL to install one non Wagon Tippler and Emergency reclaiming facility in the coal yard.
7. LAPL had also to provide wharf wall facility to receive and build additional storage of coal for feeding to the station under emergencies of short supply of coal. The coal could be transported through road by trucks.
8. In view of the extreme shortage of land area of the power plant, it is very difficult to accommodate any additional facilities as per the best engineering practices adopted in the industry. This will include adequate redundancies. Etc.

LAPL sought compensation on the following accounts:

1. Lower availability Factor resulting in Under Recovery of Fixed charges leading to accumulated losses
2. Losses due to higher heat rate than quoted heat rate resulting in Under Recovery of Variable Charge on account of change in fuel mix & coal characteristics.
3. Higher Interest Rate in the absence of committed Payment Security Mechanism
4. Increased cost of Working Capital
5. Higher O&M expenditure due to change in Coal Mix
6. Increase in consumption of Secondary Fuel Oil
7. Increase in Capital Cost of the Project

Each one of these has been analyzed by the Committee with reference to the circumstances arising due to various reasons. The existing UPERC and CERC regulations as well as the various bid parameters considered by LAPL at the time of bidding were duly taken care of by the Expert Committee.

The summary of recommendations of the Committee is given in the following paragraphs:

1. **One-time compensation for the past losses/under-recoveries from COD (10th December, 2011) to the date of PPA termination notice (11th February, 2013) with interest as per SBI PLR:**

After assessing the capability of LAPL plant in respect of generation capacity taking into account the force outage, partial outages, giving due consideration to the start-up times etc., the Committee concluded that the compensation could be awarded in the following manner:

This will comprise of the following three components:

1. Under Recovery of Fixed Charges

=[Fixed Charges payable for 80% Availability at PPA Tariff]-[Fixed Charges already paid for the period]

1. Under Recovery of Variable Fuel Charges due to the higher actual Heat Rate due to lower PLF resulting from inadequate coal supplies

= [Variable Fuel Charges payable at Net Heat Rate of 2732\*kcal/kWh-Variable Fuel Charges already paid based on the PPA Net Heat Rate of 2511\*\*kcal/kWh] x Scheduled Generation for the period.

\*As estimated by the Committee (refer para 5.3.2.3(ii)(a) of the Report)

\*\*As per PPA

1. Compensation for increased Secondary Oil Consumption

After detailed study of the operation data, the Committee came to the conclusion that LAPL had to run the Units below 40% generation for almost 25% of the time i.e. when the declared availability was more than 50% and both units were required to run at lower loads. The Committee was rather stringent in awarding this compensation since a bare minimum of one oil burner at 50% turndown ration was considered for oil support. This is a tough operating condition and the operating engineers will have to exert to affect this condition in case the oil consumption is to be minimized under this condition.

Accordingly, following compensation is arrived at:

Compensation for Secondary Oil Consumption

=0.9mlxWeighted Average Secondary Oil Cost for the concerned period x Gross Generation for the period

1. **Compensation after the date of PPA termination notice (i.e. from 12th February 2013 onwards):**

These compensations have been mainly considered with a view to enabling LAPL to continue operating the plant with better financial conditions from considerations of sustainability etc.

This will comprises of the following components:

1. **Compensation for Higher Interest Cost**

LAPL had furnished the data regarding the rise in the interest rate after COD because of which the liability for interest payment on the debt had considerably increased. The stipulations of UPERC & CERC Regulations were also studied which were primarily meant for the cost plus tariffs. The Committee concluded that these costs are in any case to be borne if the interest payment on debt were to be complied. It is also noted that the primary lender of Anpara C is none other than the REC, a Govt. of India undertaking. The UPERC Regulations intended 100% compensation on this account for cost plus tariff projects. The Committee after going through the data furnished by LAPL and the various regulations in force very strongly felt that this actual burden had to be compensated fully to LAPL, in case LAPL has to comfortably operate the plant in a sustainable manner.

The following compensation is thus arrived at:

Compensation for higher interest cost:

= Outstanding debt as on beginning of a financial year x (weighted average interest rate during the year in % - weighted average interest rate based on CLA)/100

The Committee also considers that in the interest of the UP and its consumers, it is necessary for UPPCL to fulfill their PPA obligation of providing the 3-tier payment security mechanism at the earliest, and after improvement in the plant technical and financial performance, both UPPCL and LAPL must make bet efforts to get the loan refinanced so as to reduce the interest burden. Post refinancing, if the actual interest rate falls below the rate of interest as per the Common Loan Agreement, the benefit arising out of it will be passed on by LAPL to UPPCL in accordance with the provisions of UPERC regulation.

1. **Compensation for Higher Working Capital**

The RFP/PPA had envisaged the coal cost and its escalation of Rs1045 per MT and 4% per annum respectively. However, in the actual practice the cost has increased substantially due to deviations from the bid conditions as provided in the RFP. Accordingly, a compensation becomes due on this account. Various regulations also provide the truing-up the working capital interest cost. The Committee, therefore agreed for full compensation on this account mainly because the cost numbers etc. were stipulated in the bid documents.

The compensation, thus worked out, is as under:

Compensation for Interest on Working Capital:

= [2 Months Receivables + Cost of Coal corresponding to 1.5 Months Coal Stock] calculated considering the difference between weighted average actual coal cost for the year in Rs./MT and Coal cost as per the bid escalated @ 4% till the given year x Actual Weighted Average Rate of Interest on Working Capital.

Above shall be annually trued up.

1. **Compensation for Higher O & M Expenses**

LAPL had claimed that their O&M expenses have considerably increased due to the varying quality of coal received by them from different sources in India and that of imported coal. The Committee examined the information submitted by LAPL and was of the view that in case of quality of coal broadly falls within the range specified, there should not be a case for increased O&M. LAPL couldn’t substantiate their claim in this regard and accordingly compensation on this account was not agreed to.

**Compensation on O&M charges allowed = NIL**

However, the Committee recognized that there is a deficiency in the basic plant design and engineering due to the fact the certain stipulations were provided in the RFP documents and it was mandatory for LAPL to comply with those. The Committee, therefore, strongly recommends that these deficiencies must be made good so that the Availability and reliability of plant operations could be increased. This would involve installation of Wagon Tipper, Bottom Discharge Hopper in the coal yard to enable raw coal to be retrieved from the yard for crushing and blending for supply to the power station. Further, another stacker reclaimer is also required to deal with the situation of any outage of the only stacker reclaimer at site. This would avoid any outage of the plant for non-availability of the stacker reclaimer and under the condition of inadequate coal supplies.

The O&M charges on account of these additional facilities will obviously become due as and when these are installed. LAPL would need to approach UPERC for necessary additional tariff on this account.

1. **Compensation for Secondary Oil Consumption**

It is seen that in view of the fact that there is no absolute assurance of coal supply in adequate quantity from the source envisaged in the RFP/PPA for Anpara C project, LAPL would ultimately need to organize coal supply from different sources with due approvals. In spite of the best efforts, one could make in this direction to get uniform quality of coal supply, the variations in the quality of coal received from different sources is bound to happen as in case of other power projects in the country. The Committee has also observed that as per information furnished vide LAPL submission dated 30th December 2014, an specific oil consumption of only 0.2 ml/kWh has been indicated at the time of bid submission. In case, this is to be taken as authentic, this number is on lower side as compared to various norms in existence today for the projects based on Section 62 of Electricity Act 2003 – cost plus tariff. The current CERC norms provide for secondary oil consumption of 0.5 ml/kWh whereas UPERC norms stipulate a figure of 0.75 ml/kWh.

In view of the above, the Committee considers it appropriate if the reimbursement with regard to secondary oil consumption is allowed to the extent of0.5ml/kWh as envisaged in the CERC norms. This will be a rather pragmatic approach towards sustainability of the project in the long run since receipt of coal of varying quality is seen to be imminent. Accordingly, the Committee has agreed to work out compensation on this account of additional oil to the tune of 0.5 ml/kWh less 0.2 ml/kWh on sustainable basis.

Therefore, the Committee recommends compensation for secondary oil consumption

=0.3 ml x Weighted Average Secondary Oil Cost for the period x Gross Generation.

It is also recommended that LAPL shall not be entitled for any compensation on account of increased oil consumption even if the conditions arise again to necessitate the units to operate below 40% load since general increase in secondary oil consumption is being recommended over and above the bid assumption.

1. **Compensation for increase in Capital Cost**
2. The Committee felt that the issue regarding creation of additional facilities like installation of Wharf wall (already established), Wagon Tippler, additional stacker reclaimer, providing bottom hopper in the coal stockyard for feeding uncrushed coal from the yard to the crushers including the related structures, conveyors and other feeding arrangement, as required including bulldozers, pay loaders etc. shall be reimbursed in the form of appropriate tariff as & when these facilities are established by LAPL in progressive manner. The details of the expenditures on these accounts shall be furnished by LAPL to UPPCL and Hon’ble UPERC for their approvals/tariff fixation. For computation of compensation the norms of UPERC extant Tariff Regulations will be applied.
3. LAPL’s submission regarding compensation for increase in capital cost due to delay in project COD on account of reasons stated vide UPERC earlier Order dated 9th November 2012 was examined by the Committee. The Committee came to the conclusion that this involves issues which would fall beyond the scope of the Committee and the Committee suggested LAPL to approach the Hon’ble UPERC for appropriate order.
4. **Compensation for Higher Heat Rate**

No compensation on this account is agreed for normal operation since the heat rate primarily depends on the machine loading as well as the steam parameters and not a function of coal supplies.

**Compensation for Higher Heat Rate = NIL**

 **Payment and Payment Security Mechanism:**

The Committee recommends that payment and payment security mechanism as mandated under RFP/PPA should be implemented by UPPCL. In case of non-compliance of the same by UPPCL within a definite time frame, the Committee recommends that Hon’ble UPERC to allow LAPL for 3rd Party sale of power and issue standing directions to grant open access, as required.

**Other Recommendations:**

1. Committee feels that the turndown ratio provided for the Fuel Oil burners of boilers as1:2 is on the higher side resulting into higher oil consumption even at the minimum turndown. Accordingly, it is recommended that action should be initiated urgently to modify the oil guns and related control valves etc. to affect a turndown ratio of at least 1:4 so that the oil guns could be fired at the minimum oil consumption levels (50% of the existing levels).
2. Precautions for procurement of Imported Coal – With a view to ensure the boiler operation in a stable mode without having any deleterious effect on the heating surfaces, burners, fans etc. following suggestions are made;
	1. Extreme caution needs to be exercised to limit the firing of high calorific value coal within safe limits with reference to loading of the boiler so that the heat release rates etc. could be contained within design values. This can be easily worked out by the calorific value of the coal being fired, the individual burner firing capacity and the designed burner area heat release rates etc.
	2. Special attention to be paid to the volatile matter content of the coal from the point of view of boiler water walls overheating/erosion point of view.
	3. Sulphur content in the coal is also important and could be kept under control only by blending of coal or not buying the high Sulphur coal. Appropriate broad coal blending facilities needs to be provided.

**Summary of compensations, as worked out by the Committee, is given the following table:**

|  |
| --- |
| 1. **Compensation for the past losses (COD till the date of notice of termination i.e. 11th February 2013):-**
 |
| S No | Elements | LAPL Request(RsCrores)\* | As determined by the Committee (RsCrores) |
| 1. | Under recovery of fixed charges | 401.31 | 401.31 |
| 2. | Under recovery of Variable Charges | 81.66 | 77.46 |
| 3. | Compensation for Higher Secondary Oil Consumption | 26.01 | 20.81 |
| **Total** | 508.98 | 499.58 |

 \*LAPL has claimed for past Losses of Rs.653Crs for the period from COD to 11th February 2013 – already authenticated by E&Y based on audited financials of LAPL. However, the Committee noted that these claims which are proposedly based on some actual numbers of expenditure etc. These claims are not valid since the PPA was in existence and any claim can be with reference to the PPA conditions only. Accordingly, the number of 653 Cr as the losses of under recovery before 11th February 2013 is misleading. The actual losses with reference to PPA works out only 508.98 Cr. as shown in the above table and these have been considered by the Committee.

1. **Compensatory Tariff from 12th February 2013 onwards**

*(Levelized for PPA duration)*

|  |  |  |  |
| --- | --- | --- | --- |
| S No | Elements | LAPL Request(Rs/kWh) | As determined by the Committee (Rs/kWh) |
| 1. | Interest on Loan | 0.069 | 0.069 |
| 2. | Interest on Working Capital | 0.062 | 0.062 |
| 3. | O&M Expense  | 0.079 | 0 |
| 4. | Secondary Fuel Consumption | 0.078 | 0.024 |
| **Total** | 0.288 | 0.155 |

**Note:** In addition to the above, LAPL has claimed compensation of Rs.0.075 per kWh (levelized for the PPA duration) for increase in capital cost of the project consequent to delay in project COD due to various reasons including delay in handing over of the project site.

**Other Recommendations:**

* + 1. LAPL have informed that they have considered on ROE of 16%. The Committee recommends that LAPL will take a cut of at least 0.5% over the assumed number of 16% in view of the compensations claimed by them.
		2. In view of the recommendations for compensations for the past losses and the future compensatory tariff, it is strongly recommended that the clauses in the PPA relating to the termination of PPA etc. shall be suitably reviewed and modified in the best interest of UPPCL as well as LAPL.
		3. In spite of the payment security mechanism being in place, the situation in respect of coal supply and payment etc. continues to be the same as before the date of notice of termination, the following measures shall be adopted:
1. NCL along with UP Govt. should ensure entire supply of coal from Khadia mines as envisaged in the RFP/PPA or else the alternate sources of supply should ensure the quality of coal to be within stipulated parameters.
2. UPPCL, UP Govt. shall impress upon Indian Railways to ensure transportation of coal through BOBR wagons only in case coal is to be received through Railway wagons from alternate sources.
3. LAPL shall be allowed to sell their power outside UP and UPERC shall facilitate grant of open access for the purpose by way of suitable directions to UP SLDC.
4. LAPL shall also be eligible for compensation on the same principles as indicated in para 6.1 of the recommendations in case similar situation arises.
	* 1. UP Government and UPPCL shall take up with REC, the lead lender for the project not to charge higher rate of interest from the project to keep the tariff of the project low, the benefit of which shall accrue to the consumers of UP as per the provisions of UPERC Regulations.

The Committee also submitted an addendum of the report. The summary, conclusion and recommendation in the addendum report is are follows :

The break-up of LAPL claim of Rs.0.075/kWh ( levelized for PPA duration) as per the following table.

|  |  |  |
| --- | --- | --- |
| Elements | Cost | Tariff (Levelised for PPA duration) |
| [Rs Cr] | [Rs/kWh] |
| [1] | [2] | [3] |
| Increase in Interest During Construction (IDC) | 282.56 | 0.075 |
| Increase due to variation in foreign exchange | 282.00 |
| Increase in Capital Costs due to other reasons | 62.61 |
| Total | 627.17 |

The summarized recommendation is as below:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| S. No. | Item | Cost as claimed by LAPL(Rs Cr) | Cost as Allowed(Rs Cr) | Tariff based on Column 3\* (Rs/kWh) |
| [1] | [2] | [3] | [4] |
| A | Scheduled COD to Actual COD |
| (i) | Additional IDC | 221.58 | 221.58 | 0.027 |
| (ii) | Forex Variations\*\* | 208.78 | 184.68 | 0.022 |
| (iii) | Other Reasons\*\*\* | 62.61 | 55.30 | 0.007 |

After the receipt of the two sets of the report a public hearing in matter was held by the Commission on 5.10.2015. During the Public Hearing Sri R.S. Awasthi consumer representative presented his detailed objections both orally and through written submissions. The copy of the same was served to LAPL for reply. The copies of LAPL reply dated 9.10.15 was sent to Sri Awasthi on 12.10.15.

After considering the objections of Sri Awasthi and the replies given by LAPL the Commission found the following view:

**The Commission’s view**

1. There are certain undisputed facts in the case. To recapitulate, LAPL, who had successfully won a bid in the year 2006 for supply of coal based power to UPPCL, served a notice of termination of PPA effective from 11.02.2013 alleging (a) material deviation from the RFP conditions in respect of coal supply and associated logistics and (b) failure on the part of UPPCL to establish requisite ‘Payment Security Mechanism’, two important requisites based on which the Project was bid for by LAPL. Pursuant to notice of termination of the PPA on 11.02.2013, LAPL had also served Buy-Out Notices to the UPPCL. UPPCL opposed the termination notices issued by LAPL and also the maintainability of the petition filed by LAPL. Subsequently, during the course of proceedings, UPPCL accepted the facts of hardship being faced by LAPL on account of above mentioned reasons and requested the Commission vide letter no 859/C.E./PPA dated 5.3.2014 issued by Managing Director, UPPCL, to settle the issue by providing an increased tariff due to various impediments faced by LAPL as long as the solution carved out in the matter falls within the legal framework and it is in the general interest of the people of U.P. by providing cost effective electricity on a long term basis. UPPCL has also admitted during the hearings that the power from LAPL is cheaper than the power from other many sources and has repeatedly emphasized the need of power from LAPL to meet the demand in the state of Uttar Pradesh.Further, it is also an acknowledged fact that being a pithead power station the variable charges for LAPL will always remain competitive in comparison to other IPPs.

The Commission had also observed that both parties admit that due to certain circumstances beyond their control, acute hardship was being caused in performing within the boundaries of the PPA and the reliefs / remedies prescribed under the PPA were not sufficient to address this hardship. Therefore, in the larger public interest of the consumers which admittedly is the basic ingredients of the Electricity Act, 2003, both UPPCL and LAPL had requested the Commission to work out a sustainable solution by way of grant of increased tariff etc. In consideration of the distinctive facts, both parties also admitted during the hearings that it may not be possible to resolve the disputes within the confines of the PPA as the PPA may not have envisaged these hardships and therefore, requested the Commission to intervene and explore the possibility of increased / compensatory tariff to resolve the impasse that have arisen.

During the course of the hearing, LAPL contended that the tariff adopted by the Commission u/s 63 of the Electricity Act, 2003 has become redundant in view of their termination notice and therefore either there was a buyout option or else if LAPL were to continue to operate the plant, it could only be on a new tariff to be determined by UPERC in exercise of its regulatory powers. UPPCL has unequivocally admitted its default in establishing 'Payment Security Mechanism'. Upon hearing the parties and considering their written submissions, decided case laws on the subject and recognizing the hardship faced by LAPL on account of Coal Availability and Payment Security Mechanism and considering the consent given by UPPCL vide its MD’s letter dated 05.03.2014 to allow increased tariff, the Commission constituted a Committee of experts to assess as to what could be justifiable components of thiscompensation. The Committee, vide the Commission’s order dated 28.04.2014 and 12.5.2014, was to suggest the compensatory tariff over and above the tariff as decided under the PPA and also to suggest any further practicable and judicious measures to address the situation. TheExpert Committee submitted its report on 03.03.2015 and 30.06.2015. The report of the Expert Committee was put on the Commission’s website [**www.uperc.org**](http://www.uperc.org)**.** A public hearing to this effect was held and the submission made by the concerned parties were taken on record and the final order was reserved by UPERC by order dated 19.10.2015.

The Commission before proceeding in the matter pondered as to under what legal provisions a dispute of this nature may be entertained. The fact of acute hardship having been accepted by UPPCL, a solution to the problem needs to be found. Going strictly by the PPA, post termination notice by UPPCL, the option of buyout by UPPCL existed. UPPCL, however, has not come forth for this option. Any other arrangement may result into costly power from this plant and that is why UPPCL does not want to let go of this cheaper source of power. In this background compensation package seems to be the only solution to keep the project afloat. An issue which came up here was regarding the question of Commission's jurisdiction in giving such compensation package. In our view, the jurisdictional powers bestowed upon State Commissions are much wider under the provisions of Electricity Act 2003 and have been so designed as to take care of such exigencies. The jurisdiction of State Commission under Section 86(1)(f) of the Act has no restriction on the nature of disputes. It can adjudicate upon so long as it is inter-se licensees or inter-se generator and licensee, as held by the Hon'ble Supreme Court in Gujarat UrjaVikas Nigam Ltd, VsEssar Power Ltd in which Hon'ble Supreme Court has decided that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction or limitation in Section 86(1) (f) about the nature of dispute. Section 86 of the EA 2003, gives plenary power to the State Commission to regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating company through agreements for purchase of power for distribution and supply within the state. It is well settled that the power to regulate carries with it full power over the things pertinent to the subject matter and in absence of restrictive words, the power must be regarded as plenary. Under the EA, 2003 the Commission has been vested with dual role of adjudicator for disputes in its capacity of a quasi-judicial authority under section 86(1)(f) and regulator to implement the provisions of EA, 2003 section 86(1)(b).

The Commission has a statutory obligation to protect and balance the interests of all stakeholders within the sector. The objective behind the Act as stated in the Preamble is to inter alia ensure that the interests of all stakeholders within the sector are adequately balanced and protected and that the sector as a whole progresses in a healthy manner. Hence, the Commission comes to the conclusion that the Act not only empowers but even necessarily casts responsibility on the Commission to adjudicate such distinctive issues to provide affordable power in the interest of the consumers of the State.

It will also have to be kept in mind that this project, even though taken up under section 63 of the Electricity Act, 2003, under the bidding route, had a distinct feature of Facilities and Services Agreement and also a Fuel Policy between the parties under which UPPCL had certain obligation to meet, coal availability being one of them. In this respect, this project is not the usual section 63 project but is distinct in nature and also, its bidding documents differ from the standard documents approved by the Government of India for Case-2 bidding under section 63 of the Electricity Act, 2003. It is known that due to the reduction in quantity of coal supply from the Khadia mines, fuel supply materially altered for this project and resulted in procurement of coal from non-linked sources. To bring coal from non-linked sources, BOXN wagons and road transport were used which was not envisaged in the PPA. LAPL had to create infrastructural facilities for non-linkage and imported coal at the Plant. Due to shortages and these limitations, the performance under the PPA has been affected significantly. It is also established that the PLF and Availability Factor were badly affected due to the use of non-linkage coal and as a result LAPL under recovered the fixed charges. The variable charges were also affected due to higher heat rate and secondary oil consumption. It has been accepted by both the parties that the capital cost, interest on loan and working capital have increased in the changed scenario.

Further, the lack of Payment Security Mechanism, a fact admitted by both the parties, has further deteriorated the performance of LAPL. As a result, the dispute arose which has not been evenly covered under the terms of the PPA. The events were unforeseen and unprecedented*.* Obviously, if UPPCL’s obligations were not met by them, the responsibility for the consequences thereof cannot be cast upon the project proponenti.e.LAPL.

In its order dated 28.4.14, the Commission had taken a view that the issue of non-availability of adequate fuel linkage from Coal India Limited for the project of the LAPL may be a temporary phenomenon which could be resolved in future. LAPL therefore, needs to be compensated for the intervening period with a compensation package over and above the tariff discovered through the competitive bidding. The compensatory tariff could be variable, proportionate to the hardship that the petitioner is suffering on account of the unforeseen events and could be only for the period that the hardship continues. As and when the hardship on account of non-availability of linkage coal is removed or lessened, the compensatory tariff shall be revised or withdrawn.

Taking into consideration the Commission’s own observations on the issues of hardships and the Expert Committee’s conclusions in their reports, the Commission had come to the conclusion that it would be fully justified in ensuring that the Consumers/UPPCL continue to avail cheaper power from Anpara C plant of LAPL on long-term basis. While doing so the Commission felt that it was duty bound to attend to the hardships being faced by LAPL in running its Anpara C plant. Therefore, recognizing the nature of the facts and circumstances of the present case, prayer / consent of both the parties and recommendations of the Expert Committee, the Commission comes to the conclusion that LAPL should be allowed some compensation / compensatory tariff to make its Anpara C plant viable and sustainable on long term basis.

The Expert Committee has, after detailed examination of the issues and following the principle of balancing the interest of the consumers of the State and the long-term viability and sustainability of the operations of the Project, has recommended the Compensation / Compensatory tariff for LAPL in its detailed reports. The Commission recognizes the efforts put in by the Expert Committee in making such an exhaustive report.

The Expert Committee which also consisted of a representative of UPPCL and the Government of UP recommended a package which was discussed threadbare in the presentations before all the stakeholders and also in the Public Hearing. UPPCL agreed to the above recommendations with of course some conditions regarding payment schedule, interest and date of applicability of order etc.

After due examination of the Expert Committee report and responses/comments received on the same, the Commission feels that the compensation/compensatory tariff, suggested by the Expert Committee to make the plant viable and sustainable on long term basis coupled with the fact that consumers of the State/UPPCL cannot afford to lose the power from the project which is very competitive can be allowed by UPERC.

1. In view of the above submissions and deliberations and for 'safeguarding interest of Consumers of the State of UP' and at the same time to allow ‘recovery of cost of electricity in a reasonable manner', considering the distinctiveness of the case and request of UPPCL as well as LAPL for a sustainable solution, the Commission decides to allow compensation / compensatory tariff as suggested by the Expert Committee and admitted by LAPL and UPPCL in the process as follows:
	* + - 1. **Compensation for recovery of the past losses** (from COD to the date of notice of termination i.e. 11th February 2013):

|  |  |  |  |
| --- | --- | --- | --- |
| S No | Elements | LAPL Request (RsCrores)\* | As determined by the Committee and approved by the Commission(RsCrores) |
| 1 | Under recovery of fixed charges | 401.31 | 401.31 |
| 2 | Under recovery of Variable Charges | 81.66 | 77.46 |
| 3 | Compensation for Higher Secondary Oil Consumption | 26.01 | 20.81 |
| **Total** | **508.98** | **499.58** |

The Commission noted Expert Committee’s observation that LAPL claimed for past Losses of Rs 653 Crs for the period from CoD to 11th February 2013. However, the Committee did not find it valid since the PPA was in existence and any claim could be with reference to the PPA conditions only. Accordingly, the figure of Rs 653 Cr claimed as the losses of under recovery before 11th February 2013 was revised to Rs 508.98 Cr. by LAPL for examination by the Committee.

It was directed, considering the pre- condition put forth by UPPCL, that this amount of Rs. 499.58 Crs. shall be paid by UPPCL in twelve monthly installments starting January, 2016 and as an equitable proposition LAPL would not charge any interest since 11.2.2013 to the date of payment. The paid amount will be considered by the Commission in ARR of Discoms proportionately.

**B. Compensatory Tariff for sustainability of the project** *(Levelized for the PPA duration***):**

|  |  |  |  |
| --- | --- | --- | --- |
| S. No. | Elements | LAPL claim [Rs/kWh] | As determined by the Committee and approved by the Commission[Rs/kWh] |
| 1. | Interest on Loan | 0.069 | 0.069 |
| 2. | Interest on Working Capital | 0.062 | 0.062 |
| 3. | O&M Expenses | 0.079 | 0 |
| 4. | Secondary Fuel consumption | 0.078 | 0.024 |
| 5. | Increase in Capital Cost\* | 0.075 | 0.071 |
| **Total** | **0.363** | **0.226** |

\* Due to delay in project CoD caused by various reasons including delay in handing over of the project site.

However in lieu of compensatory tariff over and above the tariff determined through the bidding process, LAPL would provide a cut of 0.5% in the Return of Equity which shall be reflected in the monthly bills of supplied electricity. The ‘Compensatory Tariff’, would necessarily be applicable prospectively i.e. from the date of this order of the Commission and shall be allowed in the ARR as agreed by UPPCL.

1. It may be mentioned here that since the Commission has based its decision on the consent of both the parties i.e. generator (supplier) and procurer (buyer), the terms of payment of items mentioned at the bottom of A & B above in para 23, shall be precondition for any payout under this order of the Commission.

It is also directed that as and when the hardship on account of non-availability of linkage coal and payment security mechanism etc. is removed or lessened, the compensatory tariff will be revised or withdrawn on petition filed by any of the two parties.

1. LAPL is further directed to take measures for technical improvements like increasing the turn down ratio of fuel oil burners and precautions in procurement of coal as recommended by the Expert Committee. LAPL must also make best efforts to get the loan refinanced so as to reduce the interest burden. Post refinancing, if the actual interest rate falls below the rate of interest as per the Common Loan Agreement, the benefit arising out of it will be passed on by LAPL to UPPCL.

Government of UP and UPPCL should ensure entire supply of coal from Khadia mines as envisaged in the RFP/PPA and shall take up with REC, the lead lender for the project, not to charge higher rate of interest from the project to keep the tariff of the project low, the benefit of which shall accrue to the consumers of UP.GoUP and UPPCL shall also impress upon Indian Railways to ensure transportation of coal through BOBR wagons only in case coal is to be received through Railway wagons from alternate sources.

**Findings of the Commission:**

We would first like to make certain observations which are crucial and central to arriving at final conclusions in this case:

1. After the Hon'ble APTEL, vide it's judgement and order dated 30.11.2016,had set aside the order of this Hon'ble Commission dated 23.11.2015 in connected petitions NO. 871 / 2013 and 891 / 2013 following its full bench judgment dated 7.4.2016 and remanded the matter for consideration by this Hon'ble commission, this Commission is required to examine the issues confined to the pleadings in the connected petitions.

1. Affidavits exchanged before this Commission in the proceedings conducted in compliance of the order dated 30.11.2016 passed by Hon’ble the APTEL at variance with the pleadings contained in connected Petitions No. 871/2013 and 891/2013 could not be entertained as per the settled law in a catena of judgments ***(BachhajNahar V. NilimaMandal&Ors. 2008 (17) SCC 491); (Kalyan Singh Chouhan Vs. C.P. Joshi 2011 (11) SCC 786).*** This would apply to varying stands, sometimes even diametrically opposite, taken by UPPCL as also to other parties to the case.
2. The central issue considered by Hon’ble the APTEL was stated in Para 28 of the order dated 30.11.2016. It read*, "The central issue is whether the state Commission was right in granting compensatory tariff to LANCO in exercise of its regulatory powers. Once this Court has taken a view that such a course is not permissible, the impugned order which has taken recourse to regulatory power to grant compensatory tariff will have to be set aside.”* Thus, the Crux of the judgment of Hon’ble APTEL dated on 30-11-2016 thus was that this Hon’ble Commission in exercise of its regulatory powers "could not have granted compensatory tariff to LANCO". Hon’ble APTEL had, however, clarified that they have not expressed any opinion on the merits of the case.
3. The entire basis of the order of Hon’ble APTEL dated 30.11.2016 was, however negated by the judgment and order of Hon’ble supreme court dated 11.4.2017 in Civil Appeal number 5399-5400 of 2016 and connected appeals. The relevant law has been interpreted by Hon’ble Supreme Court in Paras 18 and 19 of its judgment. Since by interpreting the construction of S.63 of the Act, 2003, Hon’ble Supreme court in paragraph 19 has held that it is difficult to state that when the commission adopts tariff under S.63 its function de hors it's regulator powers under S.79 (1)(b). The corresponding provisions for the state commission is S.86( 1)(b) . The Hon’ble Supreme Court is always ‘law of land’ and the conclusion reached by theHon’ble Supreme Court in paragraph 18 and 19 of its judgment is clearly a *‘judgment in rem’*.
4. Thus, the legal position would be that this Commission, where the case has been remanded to by Hon’ble APTEL, as to decide the matter but now on the basis of conclusions drawn by Hon’ble Supreme Court. In terms of this judgment, this Commission is mandated to examine the claim of LAPL under provisions of PPA,specifically under ' Force majeure’(Article 12) , ‘Indian political events’(Article 13) and 'change in law'(Article 14).Further this examination has to be primarily based on pleadings exchanged before the Commission’s order dated 23.11.2015.

Now we set upon examining different issues specific to this case, in the light of Hon’ble Supreme Court order dated 11.4.2017 in Civil Appeal No.5399-5400 of 2016. The Commission has heard the parties and the public representatives in detail and come to the final conclusion as under:

1. **Whether the change in NCDP in 2007 is a Change in Law or not**.

Article 13 of the PPA signed between both the parties has a clause no.13.1 which specifies the relief for Indian Political Events. Sub clause 3 of Indian Political Events includes Change in Law and provides that the seller shall be entitled to apply for relief under and in accordance with article 14.1 in relation to any increased costs or reductions in revenue attributable to a Change in Law. Clause 15.1 further elaborates that if directly due to one or more Changes in Law:

1. the Seller’s revenue or costs directly attributable to the Project are increased or decreased by not less than fifty (50) lakh Rupees in a Contract year; or
2. the seller is required to undertake capital expenditure directly attributable to the Project of not less than fifty (50) lakh Rupees in order to perform its obligations or exercise its rights pursuant to this Agreement,then this Article 14 shall apply.

Provided that the amounts mentioned in sub-articles (a) and (b) above shall escalate from year to year based on the Indian Wholesale Price Index (WPI).

The PPA does not define in detail the events which will be covered by Change in Law but Hon’ble Supreme Court has accepted the fact that the guidelines issued by Govt. of India in 2005(as amended from time to time) regarding tariff based bidding will be considered in this regard. In Civil Appeal no.5399-5400 of 2016 Hon’ble Supreme Court has considered the following as a Change in Law:

“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,

In case of LAPL consents/approvals for allocation of 4.5 million ton coal were provided which was withdrawn by change in NCDP. Therefore, this development is covered by a Change in Law. The Hon’ble Supreme Court in its judgment dated 11.4.2017 has categorically mentioned that Change in Indonesian Law would not qualify under Change in Law under the guidelines read with the PPA, change in Indian law certainly would.

1. **Whether not opening the Letter of Credit, not creating the payment security mechanism and not making the timely payment of bills as per Article 10 of the PPA will qualify as force majeure?**

Sub clause (b) of Article 12.1 of the PPA reads as under:

“every Party shall be entitled to claim relief in relation to a Force Majeure Event under Article 4.5 or this Article 12.”

The Article 12 of the PPA defines certain events to be covered in Force Majeure Events but the Hon’ble Supreme Court judgment dated 11.4.2017 has extensively dealt with the meaning and interpretation of force majeure. Hon’ble Supreme Court has inter alia commented on Force Majeure as under:

**Quote:**

**“Force Majeure”** is governed by the Indian Contract Act, 1872. In so far asit is relatable to an express or implied clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. In so far as a force majeure event occurs de hors the contract, it is dealt with by arule of positivelaw under section 56 of the Contract. Section 32 and 56 are set out herein:

“**32. Enforcement of contracts contingent on an event happening** – C*ontingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contract becomes void.”*

**“56. Agreement to do impossible act***– An agreement to do an act impossible in itself is void.”*

**Contract to do act afterwards becoming impossible or unlawful.***A contract to do an act which, after the contract made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

**Compensation for loss through non-performance of act known to be impossible or unlawful.***Where one person has promised to do something which he knew or, with reasonable diligence, might have known,and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the non-performance of the promise.*

UPPCL did not open Letter of Credit and did not create any payment security mechanism obviously because they did not have the LC limits, enough revenue to provide escrow mechanism and make the full payment of energy bills. Inspite of this, UPPCL in the PPA has promised to establish the Letter of Credit and payment Security Mechanism, thus promising to do an impossible act and as LAPL (promisee) did not know this act to be impossible and unlawful, such promisor ( UPPCL) must make compensation to such promisee (LAPL) for any loss which such promisee (LAPL) sustains through the non-performance of the promise.

Payment Security Mechanism, Letter of Credit and timely payment were the fundamental basis of the contract. UPPCL not adhering to its promise has altered the fundamental basis of the PPA therefore this default is covered by the doctrine of frustration.

Although Article 15 of the PPA provided the conditions for termination of PPA for default of the either party. In this case LAPL has exercised its rights to terminate the contract by giving a termination notice to UPPCL on 24.01.2013 under clauses 13.6 read with 13.3.1 of the PPA. LAPL has also served buy out notice to UPPCL on 11.2.13. But in the instant case UPPCL did not show any inclination for termination of the PPA and buy out of the plant. They in fact wanted the survival of PPA and agreed for the resolution of dispute by agreeing to pay the compensatory tariff. On the basis of the observations of the Hon’ble Supreme Court the fundamental dislodgment of the PPA by not providing the payment security mechanism, not issuing the Letter of Credit and not making timely payment of bills is covered by force majeure and entitles LAPL for compensation in lieu of termination of PPA.

1. **Whether awarding additionaltariff as a matter of compensation, in competitive bidding projects is in the purview of the Commission?**

Hon’ble Supreme Court has very clearly mentioned that the tariff in section 63 projects can also be determined by the Commission within the provisions of the PPA in the light of the guidelines of Government of India regarding competitive bidding projects. The detailed observations of the Hon’ble Supreme court on this issue have been dealt with in the earlier part of this order.

**Commission’s Conclusion:**

After considering the above guiding principles laid down by Hon’ble Supreme Court in its judgment dated 11.4.2017, the Commission has re-examined the compensatory tariff allowed to LAPL vide its order dated 23.11.2015. The Commission had based the compensatory tariff on the recommendations of the Expert Committee that had examined various claims in detail and had based its conclusion on detailed data submitted before the Committee. The Expert Committee, it may be stated here, consisted of some very eminent people in the field of electricity and also comprised of MD, UPPCL. The Committee had allowed full recovery of fixed charges on the ground that the plant would have operated at targeted 80% capacity but for the change in NCDP and other payment related issues. We find no reason to disallow the difference of fixed charges admissible at 80% capacity and the actual fixed charges paid to LAPL.

The Committee has recommended a sum of Rs.77.46 crore as a compensation for recovery of variable fuel charges after analyzing the impact of lower PLF and other technical reasons. As per OEMs technical parameter corresponding to 45% PLF the station’s gross heat rate was 2527 kkal/kWh. Whereas actual plant heat rate on weighted average basis for the period upto 11.2.2013 was 2776 kkal/kWh. The committee moderated this to 2731kkal/kWh and allowed the difference between 2732 kkal/kWh and 2511 kkal/kWh. The Commission does not find any ground to disallow this allowance.

The Committee has also examined the actual secondary oil consumption during the period from COD till 11.2.13 and found that it was 2.02 ml/kWh. The committee noted that as per OEM instructions, if the boiler load is reduced below 40% the boiler would need secondary oil support. The Committee found that the unit had operated of 51% of the time below 40% average load. The Committee on the basis of their analysis recommended an additional reimbursement of 0.8 ml/kWh during the period from COD to 11.2.2013. The Commission does not find a reason to disallow this allowance.

On the basis of the above the one time allowance of Rs.499.58 crores as per details given below would stand.

**Compensation for recovery of the past losses** (from COD to the date of notice of termination i.e. 11th February 2013):

|  |  |  |  |
| --- | --- | --- | --- |
| S No | Elements | LAPL Request (RsCrores)\* | As determined by the Committee and approved by the Commission(RsCrores) |
| 1 | Under recovery of fixed charges | 401.31 | 401.31 |
| 2 | Under recovery of Variable Charges | 81.66 | 77.46 |
| 3 | Compensation for Higher Secondary Oil Consumption | 26.01 | 20.81 |
| **Total** | **508.98** | **499.58** |

**Compensation from 12 February 2013 onwards**

The committee has considered certain compensations mainly with a view to enabling LAPL to continue operating the plant with better financial conditions from the point of view of sustainability. Having established that change in NCDP is ‘change in law’ and non-setting up of ‘Payment Security Mechanism’ as Force Majeure, we now proceeds to examine whether these elements of compensation, as recommended by the Committee, are admissible to LAPL after 12 February 2013 also. Obviously they would be admissible if ‘Change in Law’ and Force Majeure events keep impacting LAPL even after 12.02.2013 and would be applicable only till such events last.

**Compensation for Higher Interest Cost**

LAPL had furnished the data regarding the rise in the interest rate after COD because of which the liability for interest payment on the debt has considerably increased. The amount allowed under this head was computed at Rs.0.069 per kW/hon a levelized basis for the PPA duration. The Committee has examined the matter in detail and has observed that LAPL being a competitive bidding project had envisaged to get the project refinanced after COD but due to downgrading of their credit rating on account of non- availability of payment security mechanism, non opening of LC, delayed payments and lower plant availability due to coal related issues, it could not avail the refinancing facility and instead, their interest rate were increased. This forced LAPL to bear the exorbitant interest charged by REC. The detailed reading of Expert Committee report and the report of E&Y, the consultant to the Committee, it is abundantly clear that the dislodgement of basic premise (payment security mechanism, opening of LC & delayed payment of bills) made the project unviable inasmuch as the bidder(LAPL) could not proceed to convert their loan in cheaper finance.

Here the doctrine of frustration and fundamental dislodgement of premise is clearly established which impacted them even beyond 12 February, 2013, on account of change of NCDP. Therefore the Commission allows the additional tariff of Rs. 0.069 per Kwh on a levelized basis for the term of the PPA. However, the Commission puts a rider to this allowance. In the present context when the interest rates are falling, the lending institutions including REC are lowering their interest rates; therefore, this additional tariff would be re-determined on the basis of actual interest paid by LAPL on yearly basis over and above the interest rate of 10.99% i.e. the interest rate in the beginning as per the common loan agreement. Both LAPL and UPPCL must make best efforts to get the loan refinanced so as to reduce the interest burden. In case the interest rate falls below 10.99%, then the benefit arising out of it shall be passed on to UPPCL.

**Interest on Working Capital**

The RFP/PPA had envisaged the coal cost and its escalation at Rs.1045 per MT and 4% per annum respectively. However, in the actual practice, the cost has increased substantially due to deviations from the bid conditions as provided in the RFP. Accordingly, compensation becomes due on this account.

The Committee has recommended Rs.0.062 per kW/h on a levelized basis for the duration of the PPA subject to annual trueing up. When we have recognized the use of imported coal and outstanding receivable beyond two months the increase in working capital and interest thereon cannot be denied. Therefore, this allowance would stay.

**Secondary Oil Consumption**

The Change in Law due to NCDP has been established which has affected LAPL’s operations badly. The situation will continue till the coal supply position under NCDP is normalized so that LAPL may generate upto the normative capacity. Hence, the Commission finds it appropriate to allow additional consumption of secondary oil till the coal supply position is normalized.

The Committee has expressed a view that there is no absolute assurance of coal supply in adequate quantity from the source envisaged in RFP/PPA for Anpara C Project,LAPL would ultimately need to organize coal supply form different sources with due approvals. In spiteof the best efforts, one could make in this direction to get uniform quality of coal supply, the variations in the quality of coal received from different sources is bound to happen as in case of other power projects in the country.

In view of the above the Committee has allowed additional oil to the tune of 0.3 ml/kWh. The Committee has allowed Rs.0.024 per kWh on a levelized basis for the duration of the PPA. Hence, the Commission is of the view that this allowance would be admissible to LAPL from the date of 12.2.2013 until the coal position is normalized for running the plant. Once CIL is able to arrange desired quantity of coal to run the plant, the additional allowance for oil will stand withdrawn.

Now the compensation approved for the period from 12 Feb 2013 onwards will be as under:

**Compensation in terms of Additional Tariff from 12th February 2013 onwards**

***(Levelized for PPA duration)***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| S No | Elements | LAPL Request(Rs/kWh) | As determined by the Committee (Rs/kWh) | Allowed under the current order  |
| 1. | Interest on Loan | 0.069 | 0.069 | 0.069 |
| 2. | Interest on Working Capital | 0.062 | 0.062 | 0.062 |
| 3. | O&M Expense  | 0.079 | 0 | 0.000 |
| 04. | Secondary Fuel Consumption | 0.078 | 0.024 | 0.024 |
| **Total** | 0.288 | 0.155 | 0.155 |

The Committee in its addendum has made certain recommendations regarding increase in interest during construction (IDC), increase due to variation in foreign exchange and increase in capital cost due to other reasons. Levelized tariff of Rs.0.075 per kWh has been recommended for the duration of the PPA. The Commission has re-examined this allowance as under:

**Increase in interest during construction:**

Sum of Rs.282.56 crores was allowed by way of levelized tariff. But in view of the Hon’ble Supreme Court judgement dated 11.4.17 the Commission found that any increase in interest during construction period is not on account of any Change in Law or Force Majeure Condition. The developer of the project has to himself assume this responsibility and any increase in financial burden on this account is not admissible post bid.

**Increase due to variation in Foreign Exchange**

On the basis of the Committee’s recommendations, the Commission had allowed a sum of Rs.282 crore under this head by way levelised tariff. On re-examination of this issue the Commission finds that clause 4.3 of the Competitive Bidding Guidelines issued by Govt. of India specifically mention that the foreign exchange risks, if any shall be borne by the supplier. And only the foreign exchange variation would be permitted in the payment of energy charges. The amount allowed earlier related to increase in the cost of capex on account of foreign exchange variation would not be admissible.

**Increase in Capital Cost**

On the basis of recommendation of Committee, Rs.55.30 crore was allowed by the Commission by way of levelized tariff of Rs. 0.007 for the duration of PPA. On this issue the Article 14 of the PPA provides as under:

“If directly due to one or more Changes in Law:

1. the Seller’s revenue or costs directly attributable to the Project are increased or decreased by not less than fifty (50) lakh Rupees in a Contract Year; or
2. the Seller is required to undertake capital expenditure directly attributable to the Project of not less than fifty (50) lakh Rupees in order to perform its obligations or exercise its rights pursuant to this Agreement, then this Article 14 shall apply.

The Committee scrutinized all the related items pertaining to increase in the project cost as presented by LAPL. As per the detailed deliberations made in Para 3.2.(i) & (ii) of the addendum report of the Committee, the Committee’s considered view is only to allow the cost incurred towards installation of wharf wall, railway siding at Kakari for the purpose of tariff compensation. Accordingly the cost implications of Rs. 55.30 crore as authenticated by M/S. E&Y are considered justifiable. The tariff implication on the same works out to be Rs. 0.007 per KWh for the term of the PPA. The Commission allows this additional tariff as per the recommendation of the Expert Committee.

With decisions as above in main petitions, the Review petitions filed in respect of the main petitions become in fructuous.

The Petitions are decided in terms of above findings.

(Suresh Kumar Agarwal) (Desh Deepak Verma)

 Member Chairman

Place: Lucknow

Dated:16.08.2017