THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 342 OF 2019 &
IA No. 731 OF 2019 & IA No. 2299 OF 2019

Dated: 16th July, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:-

Maharashtra State Electricity
Distribution Company Ltd.
Through Chief Engineer,
5th Floor, Prakashgadh, Plot No. G-9
Anant Kanekar Marg, Bandra (East)
Mumbai-700051

...**Appellant**

Versus

1. **Central Electricity Regulatory Commission**
   Through its Secretary,
   3rd & 4th Floor, Chanderlok Building,
   36, Janpath, New Delhi-110 001

2. **GMR Warora Energy Ltd.**
   (formerly EMCO Energy Ltd)
   Through its Managing Director
   701/704, 7th Floor, Naman Centre,
   A-Wing, Bandra-Kurla Complex, Bandra
   Mumbai-400051

3. Electricity Department
Union Territory of Dadra & Nagar Havli,
Vidyut Bhavan, Opposite Secretariat,
Silvassa,
Dadra and Nagar Haveli – 396230 … Respondents

Counsel for the Appellant(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Udit Gupta
Mr. Anup Jain

Counsel for the Respondent(s) : Mr. Amit Kapur **for R-2**

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan **for R-3**

JUDGMENT

(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)

1. This Appeal is directed against the legality and validity of the order dated 15.11.2018 (**"Impugned Order"**) passed by the Central Electricity Regulatory Commission (**"CERC"/"Central Commission"**) in Case No. 88/MP/2018 Original Petition was filed by the 2nd Respondent herein whereby the Central Commission considered the components sought by the 2nd Respondent i.e., Station Heat Rate (for short **"SHR"**), GCV on '*as received basis*', and late payment surcharge.

2. The facts, in brief are narrated here-in-below:

A. The Appellant – MSDCL issued Request for Proposal (for short **"RFP"**) for procurement of 2000 MW power as per SBD guidelines by MoP, GoI under case-I competitive bidding on 15.05.2009 and initiated the competitive bidding process for procurement of power on long term basis. The Petitioner submitted its bid on 07.08.2009 and emerged as one of the successful bidders with levelised tariff of 2.879/kWh.

B. On 17.03.2010, the Appellant and the 2nd Respondent executed a long term Power Purchase Agreement (for short **"PPA"**) for procurement of 200 MW of power. The cut-off date for consideration of the change in law events was 31.07.2009.

C. On 11.07.2012, Ministry of Environment, Forest and Climate Change (for short **"MoEF"**) issued a notification stipulating that all coal based thermal based plants are to use raw or blended or beneficiated coal with an ash content not exceeding 34% and gross calorific value not less than 4000 Kcal/kg.

D. On 22.02.2013 & 07.08.2013, the 2nd Respondent entered into coal supply agreements (FSA) with SECL.

E. On 13.01.2014, certain change in law events occurred which allegedly affected the project economics of the 2nd Respondent

on account of which a petition No.8/MP/2014 was filed by the 2nd Respondent before CERC seeking compensation for such change in law events occurring during the construction period and operating period.

F. On 01.02.2017, the CERC in petition No. 8/MP/2014 disallowed the change in law so sought namely, shortfall in linkage coal due to changes in NCDP, 2007 in the year 2013 and increase in busy season surcharge and development surcharge.

G. On 22.05.2017, the Central Government, through Ministry of Coal notified the scheme for Harnessing and Allocating Koyala Transparently in India (SHAKTI) Scheme stipulating that the existing LOA holders would be supplied only 75% of ACQ as against 100% of coal requirement.

H. On 14.11.2017, CERC issued public notification in Petition No. 244/MP/2016 wherein CERC has sought stakeholders' comments on measurement of GCV on as received basis.

I. On 14.02.2018, 2nd Respondent - **GMR Warora Energy Limited (for short "GWEL/GMR Warora"**) wrote to the Appellant herein (for short **"MSEDCL"**) regarding invoices submitted by GMR Warora for March 2014 to October 2017.

J. On 23.02.2018, in response to the letter dated 14.02.2018, the Appellant wrote to GMR Warora stating that certain discrepancies on the part of GMR Warora in issuing the bills were noticed. MSEDCL processed the bills after considering the following:

(i) Change in law calculation for total generation instead of Ex-bus contracted generation.

(ii) MSEDCL considered the GCV of linkage coal as per Coal invoices i.e. 4150 kcal/kg as mentioned in RfP.

(iii) MSEDCL considered SHR as 2211 Kcal/KWh submitted in Bid document, and

(iv) No consideration of development surcharge and busy season surcharge in change in law calculations as they were not approved by the CERC.

K. MERC passed the order in Case No.189/2013 and 140/2014 where in MERC determined these parameters as Station Heat Rate as Net SHR submitted in the Bid, or SHR and GCV as Middle value of the GCV range of the assured coal grade in LoA/FSA/MoU. On the basis of this order, MSEDCL recalculated

the change in law and deducted Rs.27.46 Cr from GMR invoices.

L. On 09.03.2018, Petition No. 88/MP/2018 was filed before the Commission against MSEDCL with the following prayers:

(a) Confirm that the following operational parameters which are imperative for calculation of compensation due to the Petitioner on account of change in law events are to be considered on actuals:

(i) Auxiliary Power Consumption

(ii) Station Heat Rate

(iii) Gross calorific Value

(b) Confirm that levy of Service Tax & Swachh Bharat Cess on coal transportation is on all components as per rail invoice.

(c) Release of amounts due to the Petitioner from Respondent No.1-MSEDCL in light of the Commission’s order dated 01.02.2017 in Petition No. 8/MP/2014.

M. On 14.08.2018, the 2nd Respondent herein being aggrieved by the order dated 01.02.2017 filed an appeal No. 111 of 2017 before this Tribunal whereby vide order dated 14.08.2018 the Tribunal remanded the matter back to CERC for re-examination.

Though the claim qua MoEF notification dated 11.07.2012 was included for reconsideration but the claim qua SHAKTI Scheme was not included.

N. On 29.08.2018, the 2nd Respondent herein in accordance with the order dated 14.08.2018 preferred a petition No. 284/MP/2018 U/s 79 of Electricity Act, 2003 (for short **"the Act"**) seeking compensation on account of number of change in law events.

O. On 29.10.2018, the Hon'ble Supreme Court in Civil Appeal No. 10188/2018 in the case of ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. Vs. Adani Power Rajasthan Ltd. & Anr.*** while adjudicating similar nature of matter wherein as an interim measure 70% of the compensation claimed amount was directed to be paid has been reduced to the 50% for the procurer therein.

P. On 15.11.2018, the Commission passed the impugned order.

3. According to Appellant, the applicability of the notification of MoEF dated 11.07.2012 depends upon certain condition and criteria's so laid down therein and the 2nd Respondent had nowhere pleaded fulfillment of such conditions and criteria to qualify for the applicability of the said notification

so as to claim the same as a change in law event. Further, no claim was made by the 2nd Respondent towards change in law allegedly said to have occurred on account of MoEF notification dated 11.07.2012 and also on account of introduction of Shakti scheme.

4. Appellant further contends that the 2nd Respondent under the guise of remand order of this Tribunal expanded the scope of claim by including certain additional and new claims which were not envisaged by this Tribunal while remanding the matter back. The 2nd Respondent along with the petition had preferred an interlocutory application i.e. I.A. No.77/2018 seeking an interim direction to the extent of payment of the entire amount payable in respect of Busy Season Surcharge and Development Surcharge and 75% of the compensation amount claimed with respect to other claims.

5. MSEDCL contends that it is amply clear from the RFP clauses that the bidder (2nd Respondent) has the sole responsibility to consider availability of the inputs necessary for supply of power, all costs including capital and operating costs, statutory taxes, levies, duties at the plant location in the Quoted Tariff. The Bidder is also responsible to fix its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power.

6. The Appellant has filed the present Appeal raising the following facts in issue:

"Whether the 2nd Respondent herein is entitled to seek release of the compensation due on account of change in law events, particularly when such events itself is pending determination for being qualified as change in law before CERC in another proceeding, i.e. Petition No. 284/MP/2018?"

7. The Appellant has filed the present appeal raising the following issues:

"(a) Allow the present appeal and set aside the impugned order dated 15.11.2018.

(b) Confirmation that the following operational parameters which are imperative for calculation of compensation on account of change in law events, are to be considered:-

(i) Station Heat Rate (as per bid document);

(ii) Gross Calorific Value (Mid value as per invoice for domestic / linkage coal and coal 'as billed' for alternate coal)

(c) Pass such other order(s) as this Tribunal may deem just and proper."

8. The 2nd Respondent – GMR Warora Energy Ltd, has filed reply, in brief is as under:

9. 2nd Respondent contends that the Appeal is devoid of merit. The issue involved in the present appeal is whether operating parameters are to be considered on bid parameters or actual/normative basis. This issue has been settled by this Tribunal in judgment dated 13.11.2019 in Appeal No. 77 of 2016 and batch titled ***Sasan Power Ltd. v. CERC & Ors.*** (for short "***Sasan Judgment***"). The Tribunal has affirmed the position that - (a) Technical parameters such as SHR and GCV have to be considered on actuals/normative; (b) the view taken by CERC in the Impugned Order is correct; and (c) these parameters quoted in the bidding documents cannot be considered for deciding the coal requirement for calculating relief under change in law. The relevant portion of the ***Sasan*** Judgment are at Para 19.8.2, 19.8.3, 22.10.6 and 22.10.8.

10. 2nd Respondent further contends that the CERC has in its order dated 18.12.2019 passed in Petition No. 39/MP/2019 reaffirmed the findings in the

Impugned Order and held that unilateral deduction made by DNH from the invoices raised by GWEL on account of SHR, GCV was untenable.

11. According to 2nd Respondent, the contentions advanced by MSEDCL are – (i) SHR is to be considered as per SHR value submitted at the bid stage. (ii) Impact of change in law ought to be computed considering the middle value of the GCV range for domestic coal or GCV mentioned in the invoices in case of imported coal and not GCV on "as received" basis. (iii) Since the PPA between GWEL and MSEDCL is a Section 63 PPA, GWEL would have factored grade slippage during transportation in its bid. Accordingly, GCV on as received basis cannot be considered for computation of compensation. (iv) The CERC is the authority for determination of compensation and till such compensation is determined, MSEDCL cannot be compelled to make any payment towards alleged demand of compensation. Carrying cost is granted in cases of monies being denied at the appropriate time. There is no dispute on the fact that the amount payable only gets determined post decision of the appropriate commission. Thus, Carrying Cost cannot be granted.

12. According to 2nd Respondent, Petition No. 8/MP/2014 was filed by GWEL seeking adjustment of tariff on account of various change in law

events affecting the Project during the construction and operating period of the MSEDCL and DNH PPAs. On 01.02.2017, CERC passed order in Petition No. 8/MP/2014 allowing various change in law events. It is pertinent to mention here that the Appellant has not challenged the order dated 01.02.2017. Further, since the CERC did not specify the operational parameters for calculation of compensation due to GWEL on account of the allowed change in law events, MSEDCL had wrongfully deducted amounts from the invoices raised by GWEL. Accordingly, GWEL had filed Petition No. 88/MP/2018 before CERC seeking clarification regarding the operational parameters to be taken into account for computation of compensation.

13. According to the 2nd Respondent, CERC passed the Impugned Order holding that -

(a) Technical parameters such as SHR and GCV of coal as per the bidding documents cannot be considered for deciding the coal requirement for calculating relief under change in law.

(b) SHR given in the bid is under test conditions and may vary from actual SHR. Since the Commission has specified the SHR norms in

the 2014 Tariff Regulations after extensive stakeholders' consultation, it would be appropriate to take the SHR specified in the Regulations as a reference point. SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law.

(c) On account of grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on "as billed‟ basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on "as received‟ basis. Therefore, it will be appropriate if the GCV on "as received‟ basis is considered for computation of compensation for Change in law.

(d) In the present case, supplementary bills for the change in law events which were raised by GWEL were unilaterally deducted by MSEDCL. Thus, the principle of late payment surcharge envisaged in Articles 8.3.5 and 8.8.3 is applicable towards payment of the balance amounts by MSEDCL in respect of the relief under change in law.

14. 2nd Respondent contends that **compensation for change in law must restore GWEL to the same economic position.** In terms of Article 10.2 of the MSEDCL PPA, the purpose behind compensation for Change in Law is to restore the affected party to the same economic position had such Change in Law event not occurred. The said principle was confirmed by the Hon'ble Supreme Court in ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors***., (2019) 5 SCC 325 (for short **"*SC Carrying Cost Judgment*"**), The above position was also confirmed by the Hon'ble Supreme Court in ***Energy Watchdog v. CERC & Ors.*** reported as (2017) 14 SCC 80. In terms of the above, the term 'to restore' would be rendered redundant, if compensation fails to take into account actual expenditure and does not "restore" the party claiming Change in Law to same economic position, as if such change in law had not occurred.

15. They further contend that this Tribunal in terms of Judgment dated 20.11.2018 in Appeal No. 121 of 2018 titled ***Sasan Power Limited vs. CERC & Ors.*** *(Para 15.7)* has held that any mechanism which results in under-recovery/non-restoration of the affected party will be contrary to the provisions of the PPA. Accordingly, any compensation for Change in Law has to restore GWEL to the same economic position.

16. Regarding the issue of **SHR**, 2nd Respondent contends that the **SHR** submitted by GWEL at the time of bid was only for the limited purpose of ascertaining sufficiency of coal linkage. There is no bid SHR in the present case since it was a Case-1 project. The SHR submitted by GWEL was not considered for the purpose of bid evaluation. SHR is a concept in Case 2 PPAs such as Nabha where SHR is considered as part of Bid evaluation. In case of GWEL, SHR was not part of bid evaluation. The bid comprised solely of Capacity Charges and Energy Charges. Thus, SHR submitted at the time of bid was not a bid parameter as contended by MSEDCL.

17. 2nd Respondent further contends that compensation for Change in Law ought to restore GWEL to the same economic position. As submitted above, any mechanism which fails to restore GWEL to the same economic position will be contrary to the MSEDCL PPA, in terms of judgments of the Hon'ble Supreme Court and this Tribunal.

18. According to 2nd Respondent, MSEDCL has erroneously contended that the Impugned Order incorrectly relied on the judgment dated 12.09.2014 passed by this Tribunal in Appeal No. 288 of 2013 titled ***Wardha Power Co. Ltd. v. Reliance Infrastructure Ltd. & Ors.*** (for short **"*Wardha Judgment*"**) since the said decision was rendered in respect of claims

which related to taxes and had no co-relation with change in law events under consideration in Petition 88/MP/2018. The CERC has correctly relied upon the ***Wardha Judgment*** wherein this Tribunal has underscored the objective of compensation for Change in Law which is to restore the affected party to the same economic position. In terms of the ***Wardha Judgment***, the Tribunal held that (a) Escalable index/indexing of cost is not applicable in case of change in law wherein the impact of change in law is to be determined on an actual basis, and (b) Consideration of bid parameters may not lead to the correct compensation under Change in Law (the relevant portion of the ***Wardha Judgment*** is at Para 24 and 26). Without prejudice to the fact that the Order dated 01.02.2017 allowed change in law events including increase in taxes, it is submitted that the principle set out in the ***Wardha Judgment*** is applicable to all change in law claims.

19. 2nd Respondent further contends that the principle laid down in the Impugned Order has been approved and upheld by this Tribunal in the ***Sasan*** Judgment. Moreover, this Tribunal has in the ***Sasan*** Judgment relied on the Impugned Order. Accordingly, MSEDCL's reliance on the MERC ***Rattan India*** Order, MERC ***Adani*** Order and CERC ***D.B. Order*** is erroneous. Further, MSEDCL's reliance on judgment dated 13.04.2018

passed by this Tribunal in Appeal 210 of 2017 (for short "***Adani Carrying Cost Judgment***") is misplaced as the finding qua SHR of this Tribunal was predicated on Adani's claim for compensation on the said SHR which was submitted before the Gujarat Electricity Regulatory Commission and accepted by Adani. In the present case, GWEL has not relied on bid parameters.

20. Pertaining to the issue of ***GCV***, 2nd Respondent contends that the underlying principle of the Change in Law provision under the MSEDCL PPA is to determine the consequence of change in law and to compensate the affected party such that it is restored to the same economic position as if such change in law had not occurred. The impact of change in law has to be considered taking into account actual expenditure incurred by GWEL. In order to compute actual expenditure, the GCV ought to be considered on as received basis. This mid-range GCV formulation being adopted by MSEDCL has no basis.

21. They further contend that GWEL is seeking compensation for the amount actually paid. The mechanism proposed by MSEDCL by referencing GCV to the average GCV as given in the LOA/FSA has no basis and is

contrary to the principle behind compensation for a Change in Law event and thus, contrary to the provisions of the PPA. Moreover, it is also contrary to the ***Wardha Judgment*** of this Tribunal.

22. According to 2nd Respondent, there is loss of GCV from the point of "as received" to the point of "as fired". The CERC Tariff Regulations 2019-2024 provide for 85 kcal adjustment and provides for GCV on as received basis. Thus, in order to restore GWEL to the same economic position, GCV ought to be taken on "as received" basis. MSEDCL's contention that calculation of GCV on As-Received Basis would violate MoEF Notification dated 11.07.2012 (**"*MoEF Notification*"**) is erroneous. It is submitted that the MoEF Notification relied upon by MSEDCL dated 11.07.2012 was a draft Notification. The said Notification was notified by MoEF on 02.01.2014. The MoEF Notification dated 02.01.2014 does not contain any stipulation regarding GCV. Accordingly, MSEDCL's contention is erroneous and ought to be rejected.

23. 2nd Respondent further contends that MSEDCL's contention that any quality/quantity issue regarding supply of coal is a contractual matter to be resolved between GWEL and SECL is erroneous. When this Tribunal has

allowed an event as Change in Law, GWEL is entitled to compensation for Change in Law under the MSEDCL PPA for restoration to the same economic position.

24. They further contend that GWEL is not seeking compensation for grade slippage. The compensation is limited to impact of change in law which ought to be on actuals.

25. Pertaining to the issue of **Late Payment Surcharge,** 2nd Respondent contends that the Impugned Order held that GWEL is entitled to Late Payment Surcharge. However, Late Payment Surcharge is different from carrying cost which was never claimed by GWEL in Petition No. 88/MP/2018. Under Article 8.3.3 of the MSEDCL PPA, MSEDCL can only adjust/set-off the following amounts:

(a) Deductions that are required by Law; and

(b) Amounts claimed by the Procurer from the Seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller, and not disputed by the Seller within thirty (30) days of receipt of the said Invoice. Such deduction or set-off can be made to the extent of the amounts not disputed.

26. In terms of the above, MSEDCL can only deduct the amounts that are either backed by Law or are claimed by MSEDCL, vide an Invoice duly acknowledged and not disputed by GWEL. Since MSEDCL had made unilateral deductions from GWEL's invoices, CERC held that GWEL was entitled to Late Payment Surcharge in terms of Article 8.3.5 and 8.8.3 of the MSEDCL PPA. Further as per Article 10.3.4 of the PPA, the decision of the appropriate Commission i.e. CERC with reference to Change in law compensation is final and binding on both the parties. There is no provision in the PPA which enables MSEDCL to deduct the amount unilaterally. Therefore, the MSEDCL is liable to pay the entire amount deducted along with late payment surcharge subject to outcome of the present appeal. However, if the present appeal is decided against GWEL, then MSEDCL is entitled to claim the amount separately through a Supplementary Bill as per the provisions of the article 8.3.3 (ii).

27. 2nd Respondent further contends that the claims in Petition No. 284/MP/2018 have no bearing on the Impugned Order inasmuch as the Impugned Order clarified operational parameters to be considered for computing compensation vis-à-vis allowed claims in Order dated 01.02.2017. GWEL had filed Appeal No. 111 of 2017 before this Tribunal

challenging the disallowance of certain change in law claims by CERC in Order dated 01.02.2017. On 14.08.2018, this Tribunal partly allowed Appeal No. 111 of 2017 and remanded the allowed claims to CERC. Petition No. 284/MP/2018 was the remand petition filed by GWEL pursuant to the judgment dated 14.08.2018. Moreover, the said petition has already been decided by CERC vide order dated 16.05.2019. Accordingly, MSEDCL's contention that MSEDCL is not liable to make payment when the issue of compensation is pending for consideration in Petition No. 284/MP/2018, is baseless.

28. They further contend that even with regard to carrying cost, the position has been settled by the Hon'ble Supreme Court in the ***SC Carrying Cost Judgment*** holding that the change in law clause is a restitutionary clause which provides for carrying cost. Further, MSEDCL's contentions that MSEDCL PPA does not specifically provide for carrying cost and payment is due only after determination by the appropriate Commission have been specifically rejected by the Hon'ble Supreme Court in the ***SC Carrying Cost Judgment***.

29. We have heard oral arguments of the learned counsel for the parties and we have also gone through the written submissions. The written submission of the appellant in brief, is as under:

30. According to Appellant, the Appeal, inter alia raises following aspects with regard to the considerations for compensating the Change in Law claims of the 2nd Respondent - GMR Warora namely:

(i) Operational Parameters to be considered to arrive at coal quantum required for generating 1 unit of electricity, namely:

(a) Station Heat Rate (SHR); and

(b) Gross Calorific Value (GCV).

(ii) Late Payment Surcharge.

31. The primary issue of operational parameters i.e., SHR & GCV has already been decided by this Tribunal against the Appellant in another matter i.e., Appeal No. 182 of 2019 titled as "***Adani Power Maharashtra Limited vs Central Electricity Regulatory Commission & Ors***." vide judgment dated 14.09.2020, which thereupon was also followed by this Tribunal while delivering another judgment dated 11.03.2021 on this issue in Appeal No. 353 of 2019 titled as "***MSEDCL vs CERC & Ors.***" amongst the present contesting parties i.e., Appellant and 2nd Respondent herein with

regard to the same PPA, as in the present case. Hence, the present appeal on the issue of operational parameter can be disposed off as being covered by reserving the right of the Appellant to assail the findings on the issue before Hon'ble Supreme Court of India.

32. On the issue of "Late Payment Surcharge", the Appellant contends that the case of the 2nd Respondent herein before the CERC was that they had raised a supplementary bills amounting to Rs. 134.74 Crores till October, 2017 against which MSEDCL has computed Rs. 107.28 Crores and only paid an amount of Rs. 87.81 Crores deducting Rs. 19.47 Crores towards Fuel Adjustment Charges (for short **"FAC"**). Accordingly, it was prayed that MSEDCL may be directed to remit the balance amounts along with late payment surcharges applicable under MSEDCL PPA.

33. The CERC vide impugned order at Paragraph No. 36 held that "*…principle of late payment surcharge as envisaged in Articles 8.3.5 and 8.8.3 is applicable towards payment of the balance amounts by MSEDCL in respect of the relief under change in law.*" Pursuant to the impugned order, the Appellant DISCOM had already released the retained amount as well as has also paid more than 50% of the change in law claims of the 2nd Respondent.

34. Considering the balance of convenience amongst the parties and the totality of facts of the case vis-à-vis the liability of 'Late Payment Surcharge' upon the Appellant-DISCOM in order to do complete justice and to reduce the said liability of the Appellant, it is prayed for relying upon the recent judgment of the Hon'ble Supreme Court of India being rendered in the case of ***Jaipur Vidyut Vitaran Nigam Ltd. & Ors. Vs. Adani Power Rajasthan Limited & Anr.*** *[reported as 2020 SCC OnLine SC 697]* that payment of 2 percent in excess of the applicable SBAR per annum with monthly computation would be on higher side. Therefore it is prayed to issue appropriate directions to pay interest/late payment surcharge as per applicable Base Rate/MCLR for the relevant years, which should not exceed 9 per cent per annum. It is also prayed that instead of monthly compounding, the interest be compounded per annum, with pass through mechanism.

35. The Appellant further contends that sanctity of bid parameters - determination of quantum of coal based thereon for computation of change in law claims should be based on bid disclosed parameters. The 2nd Respondent has been selected under a competitive bidding process as per Section 63 of the Act for long term supply of electricity to MSEDCL. The

sanctity of such bidding process is sacrosanct for the entire duration of the PPA and needs to be adhered to. The risk and reward of bidding with the quoted tariff and the underlying parameters is necessarily to the account of the selected bidder. Accordingly, the parameters disclosed in the bid given for computation of coal quantum required are equally applicable for considering the computation for the effect of change in law claims.

36. They further contend that the Request for Proposal (for short **"RFP"**) issued inviting the bid specifically requires such computation to be given with the parameters applicable in terms of Clause 5 and 2.1.2.2 B of RFP. The bid with the computation of Coal, the parameters etc., were left to the discretion of and to be decided by GMR Warora itself while giving the quoted tariff, which would be operative during the entire duration of the PPA. As per the RFP clauses that the bidder (i.e., the 2nd Respondent herein) has the sole responsibility to consider availability of the inputs necessary for supply of power such as all costs including capital and operating costs, O&M cost, statutory taxes, levies, duties at the plant location, risk premiums etc., and all such other input financial parameters and technology and parameters like SHR and Auxiliary consumption, location, type of fuel like gas or coal (imported or Domestic etc.) and its specifications like Gross

Calorific Value (GCV), transit losses, stacking losses etc., water and such all other input operational parameters for quoting of the tariff in bidding. The bidding documents had given bidder complete flexibility to quote escalable or non-escalable parameters for all the tariff components/Charges such as variable charges, fixed charges, transportation and handling charges. Accordingly, bidder including the 2nd Respondent had quoted the tariff considering all the above parameters.

37. Further, regarding consideration of operational parameters, nowhere in the competitive bidding guidelines/documents, it is provided that any parameters of Central or State Commission shall be considered as a reference for estimation and quoting of tariff. On the contrary, it is the Generator who has the absolute flexibility to choose the technology, fuel and such other inputs and the selected bidders had to take the risk as well as the reward of deciding on the quoted tariff.

38. According to Appellant, the Bidder is responsible to fix its price, taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. GMR has submitted the bid based on the above, which is the essence of any competitive bid process. Hence the parameters submitted during the

bidding process are to be strictly considered for calculation of impact. The Change in Law calculation cannot be based on the parameters beneficial to the 2nd Respondent ignoring the bid assumed parameters. Further, there cannot be any claim on increase in input cost, due to change in input operational/quality parameter etc., when the bidder is required to quote the tariff, considering all the inputs with provided flexibility.

39. The Appellant further contends that GMR is seeking the impact of change in law through increase in tariff and therefore, the same quantum of coal as would be applicable without the change in law impact, should be considered for change in law impact. The said quantum cannot be different for the financial implications. If the quantum of coal computation as per the bid is **X,** then for change in law impact it cannot be **1.2 times X**. The methodology to compensate for change in law events as to the quantum of coal used cannot be different; namely it becomes actual quantum or quantum determined with reference to Tariff Regulations notified for determination of tariff under Section 62 of the Act instead of bid given parameters.

40. Regarding SHR issue, according to Appellant, SHR is the efficiency parameter and any operational negligence may deteriorate the SHR value

which increases the coal consumption, hence paying for such additional coal on the basis of higher SHR (deteriorated) indirectly will promote payment towards inefficiency of the 2nd Respondent. The payment of the inefficiency of Generator is ultimately passed on to the consumers of MSEDCL which is injustice. Therefore, the Commission in its order in Case No. 154 of 2013 dated 03.04.2018 and 189 of 2013 dated 07.03.2018 has rightly held that for computation of shortfall, the SHR should be the Net SHR as submitted in the Bid, or SHR norms specified for new thermal Generating Stations in applicable MERC MYT Regulations, whichever is superior.

41. The Appellant further contends that the principle of restitution cannot mean or interpreted in a manner so as to allow the 2nd Respondent to recover unreasonable and imprudent costs, more particularly at the cost of burdening the end consumers. Additionally, it is also important to take into consideration that the 2nd Respondent cannot be allowed to take advantage of the restitution principle in such a manner, which would alter the terms upon which the bid is rested, merely so as to gain an undue commercial advantage for themselves under the guise of restitution at the cost of increasing the tariff for end consumers.

42. MSEDCL further contends that this Tribunal has rightly held in its Judgment dated 13.04.2018 in the matter of ***Adani Power Ltd. Vs. Gujarat Urja Vikas Nigam Ltd. (GUVNL) in Appeal No.210 of 2017*** **and** ***IA No.05 of 2018*** that in Case - I bidding process it is the bidder who is the sole Judge and has the discretion in the formulation of its bid including SHR and he takes the responsibility for seeking/incorporating all the inputs in the bids for supply of power.

43. Appellant further contends that CERC had also ignored its own order dated 19.12.2017 passed in the matter of ***D.B. Power Limited Vs. PTC India Ltd. & Ors.*** in Petition No.101/MP/2017 wherein, it was categorically observed that SHR should be as per bid for the purposes of computation of coal consumption. Further, the CERC in its order in Petition No. 1/MP/2017 dated 16.03.2018 has also considered the bid SHR as a parameter to estimate the Specific coal consumption.

44. Further, the State Commission (MERC) in its order in Case No. 154 of 2013 dated 03.04.2018 and 189 of 2013 dated 07.03.2018 has rightly held that *"Station Heat Rate: Net SHR as submitted in the Bid, or SHR and Auxiliary Consumption norms specified for new thermal Generating*

Stations in MERC MYT Regulations, 2011, ***whichever is superior****."* However, the 2nd Respondent has incorrectly pleaded that SHR is not the biddable parameter. SHR is one of parameter for estimation of Specific coal consumption and it is the relevant factor to determine energy charge to be submitted in the bid. Accordingly, the 2nd Respondent received coal linkage considering calculation based on bid SHR only.

45. According to Appellant, the Central Commission in its order dated 25.04.2018 in Petition No. 239/MP/2017 in the matter of ***NTPC Tamil Nadu Energy Company Ltd.*** seeking the relaxation in operating norms for heat rate from 2351.25 Kcal/Kwh to 2375.22 Kcal/Kwh for 2014-19 has not allowed relaxation in heat rate norms. It is stated further that Generating Station with better O & M practices can achieve the specified heat rate norms and the heat rate norms have been prescribed after consideration of the recommendation of CEA and extensive consultations with stakeholders. Even the CERC has considered the bid assumed parameters for computation of change in law events in numerous cases including ***Sasan Power Ltd.*** (Petition No. 153/MP/2015 dated 19.02.2016), ***Costal Gujarat Power Ltd.*** (Petition No. 157/MP/2015 dated 17.03.2017 read with 22/RP/2017 dated 31.10.2017) and ***Adani***

Power Ltd (challenged before this Tribunal and upheld in Appeal No. 210 of 2017 dated 13.04.2018).

46. According to Appellant, if the 2nd Respondent is unable to meet its bid parameters qua net SHR, then the same is owing to their own inefficiency in power generation on quoted rather assured net SHR parameters. The parameter referred to in the impugned order is completely impermissible as the same would affect in a manner to alter/change the terms of the PPA, which is beyond the adjudicatory powers of the Commission.

47. Appellant further contends that the net SHR has been submitted by the 2nd Respondent itself for computation of quantum of coal required while submitting its bid to the Appellant. It is incorrect to state that the 2nd Respondent did not bid on the basis of the SHR and therefore, now it is not open for the 2nd Respondent to claim that the said SHR has no relevance and should be completely ignored. In other words, the efficiency of generation of power through coal (reference to SHR) was duly factored by the 2nd Respondent during quoting the tariff for a PPA of next 25 years, upon taking into due consideration all possible eventualities at its maximum level of occurrence, both of present and of future. Thus,

after undertaking such an exercise, the 2nd Respondent cannot be permitted to blow hot and cold at the same time, so as to be permitted to vary from his own decision, merely because at a later point of time, the 2nd Respondent allegedly realizes his miscalculation of SHR.

48. Regarding GCV computation issue, the Appellant contends that Gross Calorific Value (GCV) should not be “On Actuals”. The claim of GCV computation to be made on “as received basis,” is a patently erroneous claim. The alleged making of such claim by GMR is broadly based on -

(i) the mid-range of GCV is a notional GCV and artificially determines the required quantity of coal and therefore, will lead to non-recovery of actual additional expenditure incurred for procurement of required quantum of coal; and;

(ii) GCV specified by CIL is on Air Dried Basis (ADB), whereas GCV used for computation of Energy Charge is always on “As Received Basis (ARB)”.

(iii) The real purpose behind raising the above claims is to recover the grade slippage in the coal grade actually supplied as against the coal grade billed by the Coal Company and all the losses in

the heat value of the coal during the time period when the coal is taken delivery from the coal mines and transported to the Power Plant and unloading at the Power Plant site.

49. According to Appellant, the reference for GCV of domestic coal supply by CIL is of the assured coal grade in LoA/FSA/MoU and therefore, owing to the shortfall, the said reference for alternate coal must be the middle value of the GCV range of CIL or as per GCV mentioned on the invoices in case of imported coal. Hence, impact of Change in Law must be computed considering the middle value of the GCV range for domestic coal or as GCV mentioned on the invoices in case of imported coal.

50. Appellant further contends that as per RFP clauses 2.6 and 2.4.2 (B) (xi) the bidder i.e., the 2nd Respondent herein has the sole responsibility to deal with possibilities of availability of the inputs necessary for supply of power including fuel and its parameters like GCV, transportation, the losses during transportation, degradation of GCV during transportation, stacking etc., while quoting the tariff in bidding process. All such possibilities of non-availability of inputs or the cost thereof was required to be factored in the quoted tariff and the risk and reward of deciding on the quoted tariff are entirely to the account of the selected bidder. Hence, considering all the

inputs, the 2nd Respondent has submitted/quoted the tariff. Evaluation of GCV on the air-dried basis by Coal Company was well known/existing even prior to bidding and applicant was aware of it. Accordingly, as per provision of RFP, the 2nd Respondent considered and evaluated the GCV on as received basis and also factored in quoted tariff.

51. According to Appellant, the 2nd Respondent is having FSA with SECL (Coal Company). According to FSA, a specific grade of coal that is GCV range and quantum is allocated to the 2nd Respondent. In view of the above, any quality/quantity issues are necessarily to be resolved under FSA provision of penalty mechanism, which is a contractual document between the 2nd Respondent and SECL. It is the responsibility of SECL to supply the specific grade of coal to the 2nd Respondent as per the contractual obligation under FSA and equally it is the responsibility of the 2nd Respondent to confirm the grade of coal received. Further, in case of any quality issue of coal received, the 2nd Respondent has to pursue the matter with SECL under the provisions of FSA for the compensation or otherwise.

52. They further contend that as per terms and condition of FSA, any deviation in economic position i.e., financial loss/gain are restituted by SECL. However, PPA and FSA are altogether different contract. Therefore,

the Appellant governed by PPA cannot be intended to restitute the 2nd Respondent for a contractual breach under FSA, of which it is not a party.

53. Appellant further contends that CERC while considering the issue of GCV had also failed to appreciate the prevailing parameters being followed by the Appellant in pursuance of the various decisions so rendered by the MERC, wherein for domestic coal, it has been categorically time and again held that middle value of GCV range of assured coal grade in LoA/FSA/MoU is to be considered while considering the impact of change in law event. The MERC had rendered the said finding in Case No.154 and 189/2013 and thereafter, again in Petition No.102/2016. Thus, the impugned order as it stands today have adopted an altogether different and alien approach than the one which has been consistently so followed as a norm by the DISCOMs. Moreover, no finding has been rendered by the CERC from deviating from the standard parameters, more particularly in the light of the fact that the GCV, if calculated at 'as received basis' (3800 Kcal/kg), the same admittedly would be in complete violation of Notification dated 11.07.2012 of MoEF, which prescribes of GCV to be not less than 4000 Kcal/kg. The issuance of Notification dated 11.07.2012 by MoEF and the

impact thereof has been claimed as a change in law event and the CERC, while passing the impugned order, had itself contravened the same.

54. Appellant further contends that the 2nd Respondent is not entitled to claim coal cost at GCV on 'as received' GCV in place of GCV 'on invoice' (Mid value of range of allocated Grade on invoice). Further, when the coal company determines the quantum of coal required for the power project based on the GCV as mentioned in the FSA, there is no reason for such compensation to be different in the present case. Hence, the impact of Change in Law must be computed considering the Middle value of the GCV range for domestic coal or as GCV mentioned on the invoices in case of imported coal.

55. *Per contra,* 2nd Respondent – GMR Warora filed its written submission stating as under:

Issue: OPERATIONAL PARAMETERS (SHR & GCV)

56. The 2nd Respondent contends that the impugned order at Para 29 & 30 states that "*this Tribunal in judgement dated 12.9.2014 in Appeal No. 288 of 2013* ***Wardha Power Co. Ltd. vs Reliance Infra. Ltd. & Anr.*** *has ruled that compensation under Change in Law cannot be correlated with the price*

of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the bid documents for establishing the coal requirement. The technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law". In this regard, according to 2nd Respondent, the issues raised by the Appellant in the present Appeal are covered by the following Judgments of this Tribunal:-

(a) Judgment dated 13.11.2019 in Appeal No. 77 of 2016 and batch titled ***Sasan Power Ltd. vs. CERC & Ors.*** (for short **"Sasan Judgment"**) ***Para 19.8.2, 19.8.3, 22.10.6 and 22.10.7.*** In this Judgment, the Tribunal relied on the Impugned Order in the present Appeal to arrive at its findings

(b) Judgment dated 14.09.2020 in Appeal No. 182 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.*** (for short **"Adani 182 Judgment"**) ***Para 7.2, 7.5 to 7.8, 7.14.***

(c) Judgment dated 28.09.2020 in Appeal No. 155 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.*** (for short **"Adani 155 Judgment"**) ***Para 12.***

(d) Judgment dated 03.11.2020 in Appeal No. 168 of 2019 titled ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. vs. Adani Power (Mundra) Ltd.*** (for short **"Adani 168 Judgment"**) ***at Para 7.12.***

(e) Judgment dated 13.11.2020 in Appeal 264 of 2018 titled ***Rattan India Power Ltd. vs. MERC & Ors.*** (for short **"Rattan India Judgment"**) ***at Para 27.***

<u>Issue: COMPUTATION OF COAL TO BE ON 'AS RECEIVED BASIS'.</u>

57. 2nd Respondent further contends that the impugned order at Para 32 states that "*in case of GCV, the Respondent has submitted that it should be mid value of GCV band which should be applied on GCV measured on 'as billed' basis. In our view, on account of the grade slippage of the coal supplied by CIL, it would not be appropriate to consider GCV on 'as billed' basis. In the 2014 Tariff Regulations of the Commission, the measurement of GCV has been specified as on 'as received' basis. Therefore, it will be appropriate if the GCV on 'as received' basis is considered for computation of compensation for Change in law*." In this regard, according to 2nd Respondent, the issue is covered by the following Judgments of this Tribunal:-

(a) Judgment dated 14.09.2020 in Appeal No. 182 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.***, Para 8.3 to 8.9.

(b) Judgment dated 13.11.2020 in Appeal 264 of 2018 titled ***Rattan India Power Ltd. vs. MERC & Ors.***, Para 30 & 31.

(c) Judgment dated 28.09.2020 in Appeal No. 155 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.***, Para 12.

Issue: Carrying Cost/Late Payment Surcharge

58. According to 2nd Respondent, the other finding challenged by MSEDCL is that CERC held that GWEL is entitled to Late Payment Surcharge in terms of Article 8.3.5 and 8.8.3 of the MSEDCL PPA since MSEDCL unilaterally deducted amounts from the invoices raised by GWEL contrary to the terms of the PPA. It is pertinent to note that Late Payment Surcharge (for short **"LPS"**) is different from carrying cost which was never claimed by GWEL in Petition No. 88/MP/2018. GWEL is eligible to charge LPS after it has raised the invoices and carrying cost is applicable for the period from the date of impact Change in Law is commenced and the date of invoice. This is in accordance with the provisions of the PPA that GWEL would be put to same economic position as before, as if no Change in Law

event had occurred. Further, the issue of carrying cost raised by MSEDCL in the captioned Appeal has also been settled by the Hon'ble Supreme Court in light of the Judgment in ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors.*** reported as (2019) 5 SCC 325 (for short **"Adani Carrying Cost Judgment"**).

59. In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

"**Whether the Impugned Order warrants interference?"**

ANALYSIS & DISCUSSION

60. By virtue of the impugned order which is under challenge before us, the Respondent Commission has opined the following:

(a) Technical parameters such as Station Heat Rate (SHR) and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law.

(b) SHR of 2355 kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is

lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law.

(c) GCV is to be considered on "as received" basis for computation of compensation for Change in law.

61. Before the CERC, the 2nd Respondent generator raised several issues and the Appellant herein who was the Respondent before the Commission also questioned the jurisdiction of the CERC to entertain the Petition filed by the 2nd Respondent generator. So far as jurisdiction of the CERC, the 2nd Respondent opined that it has jurisdiction to entertain the matter by referring to Judgment of this Tribunal in the case of ***Wardha Power*** and other Judgments including the Judgment of the Hon'ble Apex Court in ***Energy Watchdog*** case.

62. The issue of jurisdiction pertaining to regulating the tariff of the project, is no more *res integra*. By virtue of Section 79 (1) (b) read with Section 79 (1) (f) of the Electricity Act of 2003, the CERC was right in opining that it has jurisdiction to entertain the matter in the case of composite scheme where it involves interstate supply, transmission or wheeling of electricity. Therefore, we are of the opinion, Respondent CERC had jurisdiction to entertain the

matter. The Respondent generator also claimed busy season charge and development surcharge which was entertained and allowed by the Respondent Commission. However, the Appellant has not challenged said findings on the above claims allowed by the Commission.

63. The issues pertaining to Auxiliary Power Consumption (APC), Station Heat Rate (SHR) and Gross Calorific Value (GCV) were also part of the claims made by the Respondent GWEL i.e., they are entitled to recover those claim on allowed items based on actual coal consumed corresponding to scheduled generation and the same is to be accounted at the end of the year and must be reconciled with the actual payment made with the books of accounts. The Respondent Generator who was the petitioner relied upon the order dated 01.02.2017 passed by the Respondent Commission in Petition No. 8/MP/2014 which reads as under:

> *"121. …To approach the Commission every year for computation and allowance of compensation for such Change in Law is a time consuming process which results in time lag between the amount paid by Seller and actual reimbursement by the Procurers. Accordingly, the following mechanism prescribed to be adopted for payment of compensation due to Change in Law events allowed and summarized as under in terms of Article 10.3.2 of the PPA in the subsequent years of the contracted period:*

(a) Monthly change in law compensation payment shall be effective from the date of commencement of supply of electricity to the respondents or from the date of Change in Law, whichever is later.

(b) Increase in royalty on coal, clean energy cess, excise duty on coal and service tax on transportation of coal and Swachh Bharat Cess shall be computed based on coal consumed corresponding to scheduled generation and shall be payable by the beneficiaries on pro-rata based on their respective share in the scheduled generation. If the actual generation is less than scheduled generation, it will be restricted to actual generation.

(c) At the end of the year, the Petitioner shall reconcile the actual payment made towards change in law with the books of accounts duly audited and certified by statutory auditor and adjustment shall be made based on the energy scheduled by MSEDCL and ED DNH during the year. The reconciliation statement duly certified by the Auditor shall be kept in possession by the Petitioner so that same could be produced on demand from Procurers/ beneficiaries."

64 So far as Auxiliary Power Consumption (APC) is concerned, since the Appellant MSEDCL started making payments based on actual APC, the Petitioner generator did not seek adjudication of the said issue on merits.

65. The other main controversial issues in the above Appeal are whether the operating parameters i.e., SHR and GCV are to be considered as

specified in the bid or actual/normative basis.

66. This Tribunal had occasion to deal with such issues in Appeal No. 77 of 2016 and Appeal No. 182 of 2019 which were disposed of on 13.11.2019 and 14.09.2020 respectively. As a matter of fact, the Appellant MSEDCL itself agreed in Appeal No. 264 of 2018 in the case of ***Rattan India Power Ltd. vs. MERC & Ors.*** that the controversy of operating parameters were settled in the light of the Judgment dated 14.09.2020 in the case of ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.*** The Tribunal in this case (***Adani Power Maharashtra***) opined as under:

> *"7.6 We have also seen that the judgment of this Tribunal in Wardha Power was relied upon by the CERC in its order in GMR Warora Energy Limited v. MSEDCL (Petition No. 88/MP/2018) wherein the current Respondent No. 2 was a party. The CERC came to the following conclusion:*
>
> > *"29. The submissions regarding SHR and GCV have been considered. The APTEL in its judgement dated 12.9.2014 in Appeal No. 288 of 2013 (M/s Wardha Power Company Limited Vs. Reliance Infrastructure Limited &anr) has ruled that compensation under Change in Law cannot be correlated with the price of coal computed from the energy charge and the technical parameters like the Heat Rate and gross GCV of coal given in the*

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

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

30. In the light of the above observations, the technical parameters such as Heat Rate and GCV of coal as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. Therefore, the submissions of the Respondent, MSEDCL to

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

31. In the present case, the Petitioner has considered SHR of 2355 kcal/kWh whereas, the Respondent MSEDCL has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. It is pertinent to mention that the CERC norms applicable for the period 2009-14 and 2014-19 do not provide the norms for 300 MW units, but provide for a degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211 x 1.065) and 2310 kcal/kWh (2211 x 1.045) for the period 2009-14 and 2014-19 respectively. Accordingly, we direct that the SHR of 2355

kcal/kWh during the period 2009-14 and 2310 kcal/kwh during the period 2014-19 or the actual SHR whichever is lower, shall be considered for calculating the coal consumption for the purpose of compensation under change in law. The Petitioner and the Respondent MSEDCL are directed to carry out reconciliation on account of these claims annually."

...

7.8 The CERC's findings in GMR Warora case (88/MP/2018) has already been accepted by this Tribunal in Sasan Power case. Moreover, this Tribunal has reiterated the principle that change in law compensation for shortfall in supply of domestic coal has to be determined by reference to the operating parameters specified in the relevant tariff regulations…"

67. From the above paragraph, it is seen that while disposing of the issue of operational parameters in Appeal No. 182, this Tribunal confirmed findings of the Commission in the present impugned order.

68. It is seen that by linking compensation on the ground of change in law so far as SHR mentioned in the documents will not put back or restitute the affected party to the same economic position as if change in law event had not occurred. Therefore, the MERC was justified to allow change in law compensation on the basis of SHR specified in the MERC MYT Regulations

of 2011 or the actual SHR whichever is lower. Apparently, the project of the 2nd Respondent generator is a case-1 project and the SHR referred to by MSEDCL does not form part of the bid. This is so because it is case-1 project. If SHR was pointed out, it would be only for the limited purpose of ascertaining coal linkage. We also refer to Judgment dated 28.09.2020 in Appeal 155 of 2019 and so also Judgment dated 03.11.2020 in Appeal 168 of 2019 by this Tribunal and the two Judgments referred to above.

69. It is seen that the 2nd Respondent GWEL has considered SHR of 2355 kcal/kWh whereas the Appellant has considered the Design Heat Rate of 2211 kcal/kWh as submitted in the RFP. The CERC norms applicable for the period between 2009-14 and 2014-19 do not provide the norms for 300 MW unit. However, it had made a provision for degradation factor of 6.5% and 4.5% respectively towards Heat Rate over and above the Design Heat Rate. As the Design Heat Rate is 2211 kcal/kWh, the gross Heat Rate works out to 2355 kcal/kWh (2211 x 1.065) and 2310 kcal/kWh (2211 x 1.045) for the period 2009-14 and 2014-19 respectively. Therefore, the Commission was justified in opining that SHR of 2355 kcl/kWh for the period between 2009-14 and 2310 kcal/kWh during the period 2014-19 or the actual SHR whichever is lower just and proper to be considered for

calculating the coal consumption for the purpose of compensation under change in law.

70. The Respondent Commission has opined as stated above in a proper manner. We do not find any good ground to interfere with the same. We also refer to the Judgments of the Tribunal that computation of coal to be on 'as received basis'. The relevant portions of the Judgments stated above read as under:

(a) Judgment dated 14.09.2020 in Appeal No. 182 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors***., Para 8.3 to 8.9 read as under:

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

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

> *"22.10.4 We have perused the rulings in various judgments of this Tribunal relied upon by the Respondent/SPL to note that compensation for Change in Law event is to be paid on the basis of actuals in line with the provisions of Article 13 of the PPA which requires the affected party to be restored to the same economic position as if such Change in Law event had not occurred.*
>
> *……*
>
> *22.10.6 It is also relevant to note from another Order of the Central Commission dated 15.11.2018 in Petition No. 88/MP/2018 in the case of GMR Warora Energy Limited vs. MSEDCL &Anr., wherein CERC has observed that SHR given in the bid is under test conditions and may vary from actual SHR. Therefore, it would only be correct to take the SHR specified in the Regulations as a reference point instead of other parameters, given that the SHR as per the bidding document cannot be considered for deciding the coal requirement for the purpose of calculating the relief under Change in law. 22.10.7 In the light of above, we are of the opinion that the technical parameters such as SHR and GCV quoted in the bidding documents cannot be considered for deciding the coal requirement for the purpose of calculating relief under Change in Law. Accordingly, we hold that the Central Commission has analyzed this issue in detail and passed the impugned Order in a judicious manner. Hence, any interference by this Tribunal is not called for."*

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

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

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

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

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

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

this Tribunal has already rejected the reverse computation of coal price from the quoted energy charge in the bid since the coal price so calculated will not be equal to the actual price of coal and therefore, compensation for Change in Law computed on such price of coal will not restore the economic position of the Seller to the same level as if such Change in Law has not occurred. Therefore, the GCV as received shall be the appropriate basis to assess the quantum of shortfall in domestic coal and calculate the Change in law compensation accordingly.

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

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

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

"25. The MoP letter dated 31.7.2013 and the Revised Tariff Policy have

been held by the Hon'ble Supreme Court as having the force of law and read in context with the Article 13 of the PPAs, constitute Change in Law. Accordingly, this Commission has been directed by the Hon'ble Supreme Court to consider the case of the Petitioner afresh and grant relief as admissible under the PPAs. Therefore, the shortfall in the supply of coal by CIL or its subsidiaries vis-a-vis the quantum indicated in the LOAs/FSAs to be made up through import and/or market based imported coal and the expenditure on that account shall be permitted to be recovered as compensation under the provisions of Change in Law in terms of the PPAs. 33. According to Prayas, change in law is applicable only for the shortage of supply up to 65%, 65%, 67% and 75% of the ACQ during the years 2013-14, 2014- 15, 2015-16 and 2016-17 respectively and actual supply of coal lower than these percentages is the subject matter of commercial contract with MCL under the FSA for which the Petitioner needs to seek compensation from MCL and the Procurers should not be burdened with such extra cost. In our view, the contention of Prayas is not correct. As per para 4.6 of the FSA, MCL is liable to paycompensation for the "failed quantity" (i.e. shortfall in supply of coal below 80% of the ACQ) at the rate of 0.01% calculated on the basis of the single average of base price as per schedule III of the FSA. Moreover, this provision is applicable after a period of three years from the date of signing of the FSA. In other words, the Petitioner is not entitled for compensation till 8.6.2015 (FSA being signed on 9.6.2012). Therefore, the compensation payable under the FSA for supply of coal for capacity lower than 65%, 65%, 67% and 75% for the years 2013-14, 2014-15, 2015-16 and 2016-17 respectively of the ACQ is too meagre to meet the expenditure for procurement of coal from alternate sources or through import……. ….

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

shortfall in supply of domestic coal with reference to the ACQ quantum under the FSA needs to be considered

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

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

Our Findings:-

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

(b) Judgment dated 13.11.2020 in Appeal 264 of 2018 titled ***Rattan India Power Ltd. vs. MERC & Ors.***, Para 30 & 31 read as under.

"30. The appellant, in contrast, pleaded in the appeal referring to

GMR Order of CERC and Sasan Judgment of this tribunal (both mentioned above) affirming that that GCV has to be taken on 'As Received Basis' for computation of compensation for Change in Law, the contention of MSEDCL for adopting middle value GCV Range having been rejected.

31. Reliance is now placed by the appellant on the ruling of coordinate bench rendered on 14.09.2020 in APML case, whereby in the context of parameters or reference values for determining Change in Law compensation, the foremost principle settled is that the generator has suffered due to a change in policy of the GoI and as per the provisions of the PPAs, it (the generator) is entitled to be restored to the same economic position as if the Change in Law had not occurred, the restitutive principle deserving to be adhered to in its true spirit. The principle that the reference GCV for the purposes of change in law compensation is to be the actual GCV as settled by Sasan Judgment (supra) and GMR Order (supra) has been reiterated. It has been observed that there is no guidance in the PPAs or in the Bidding Guidelines as to the reference GCV that should be applied in case of change in law claims in Case 1 bid projects where SHR or GCV is not a bid parameter. It is noted that the overarching principle for change in law compensation is that the generating company should not be left in a worse economic position."

(c) Judgment dated 28.09.2020 in Appeal No. 155 of 2019 titled ***Adani Power Maharashtra Ltd. vs. MSEDCL & Ors.***, Para 12 reads as under.

> *"12. <u>Issue No. 3:-</u>*
>
> *We have dealt with these two issues (3 (a) & 3 (b)) in great detail vide our judgment dated 14.09.2020 in Appeal No. 182 of 2019 and these are common issues in the batch of appeals involving the same PPAs. Therefore, for the detailed reasons given in Appeal No. 182 of 2019, we set aside the Impugned Order on the above issues and hold that the change in law compensation shall be calculated on the basis of the SHR specified in the MERC MYT Regulations, 2011 or the actual SHR achieved by APML, whichever is lower. Similarly, in order to restore the affected party APML to the same economic position, change in law compensation shall be computed and paid by reference to the actual GCV of coal as received at the plant site."*

71. So far as carrying cost/late payment surcharge is concerned, this issue is also no more a *res integra*. The Judgment in ***Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power Ltd. & Ors***. [(2019) 5 SCC 325] is finally settled by the Hon'ble Supreme Court. That apart, it is seen that in terms of provisions of PPA, the GWEL (generator) would be put to or restore to same economic position as before, as if no change in law event

had occurred. It is seen that the Appellant MSEDCL unilaterally deducted amounts from the invoices raised by GWEL which was contrary to the terms of PPA.

72. Late payment surcharge is different from carrying cost which was never claimed by the Respondent GWEL in the petition no. 88/MP/2018 in which impugned order came to be passed. It is seen that from the supplementary bills raised by 2nd respondent GWEL, MSEDCL has reduced the amounts that too by fuel adjustment. There cannot be unilateral deduction of amounts especially if the bills raised by the 2nd Respondent GWEL were not disputed. This is evident from the provisions of PPA pertaining to late payment surcharge, i.e., Article 8.3.5 and 8.8.3 of the PPA which reads as under:

> *"8.3.5 In the event of delay in payment of monthly bills by any procures beyond its due date, a late payment surcharge shall be payable by such procures to the seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill."*
>
> *8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable*

in the same terms applicable to the Monthly Bill in Article 8.3.5."

73. From the above it is clear that as defined, on 30th day after a monthly bill or supplementary bill was received and acknowledged by the procurers, the above clauses referred to late payment surcharge in case of delay in payment of monthly bills by the procurer beyond the due date comes into play. Apparently, by way of supplementary bill, the claim for change in law was raised when procurer delays the payment by not making the payment within the due date, the GWEL is entitled to late payment surcharge. Therefore, in the light of above clauses, the 2nd Respondent GWEL is entitled for late payment surcharge/carrying cost on the balance amounts which were either withheld or not paid from the day it becomes payable.

74. In the light of above discussion and reasoning, we are of the opinion that none of the grounds raised by the Appellant are tenable. Accordingly the appeal fails. Hence, the Appeal is dismissed.

75. We direct the Appellant to make payment of the amounts due to the Respondent GWEL which were deducted in respect of the claims (or withheld by the Appellant) forthwith along with late payment surcharge in terms of Article 8.3.5 and 8.8.3 of the PPA.

76. IAs which are pending, if any are disposed of accordingly.

77. No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the **16th day of July, 2021**.

(Ravindra Kumar Verma) **Technical Member**	**(Justice Manjula Chellur)** **Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

tpd