Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 9 of 2021

Case of Maharashtra State Electricity Distribution Company Limited seeking review of Order passed by the Commission in Case No. 132 of 2020 dated 28 November, 2020

Coram
I.M.Bohari, Member
Mukesh Khullar, Member

Maharashtra State Electricity Distribution Company Ltd .... Petitioner
Vs
Adani Power Maharashtra Limited .... Respondent

Appearance
For Petitioner: - Shri. Anand Ganeshan (Adv.)
For Respondent: - Shri. Amit Kapoor (Sr. Adv.)

ORDER

Date:11 September, 2021

1. Maharashtra State Electricity Distribution Company Ltd (**MSEDCL**) has filed this Case on 30 January, 2021 seeking review of Order passed by the Commission in Case No. 132 of 2020 dated 28 November, 2020 under Section 94(1) (f) of the Electricity Act, 2003 (**EA, 2003**) read with Regulation 85 and Regulation 94 of (Conduct of business) regulations, 2004.

2. **MSEDCL's main prayers are as under**:

   a) *to admit the Petition as per the provisions of Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 85 (Review of Decisions, Directions and Orders) of MERC (Conduct of Business) Regulations, 2004; and*

   b) *to allow the review of order dated 28th November, 2020 in Case No. 132 of 2020, based on the grounds as raised; and*

   c) *condone the delay of 18 days in filing the accompanying review petition by MSEDCL seeking review order dated 28th November, 2020 in Case No. 132 of 2020;*

3. **MSEDCL in its Petition has stated as follows**:

3.1. The grant of relief to Adani Power Maharashtra Ltd (**APML**) vide impugned Order dated 28 November, 2020 is primarily based on the conclusion of the payment towards the hypothetical inland transportation cost is being made by APML to Adani Mundra (admittedly an Inter-Company transaction), as allegedly substantiated through an auditor certificate. Further such document was placed without giving any opportunity to MSEDCL qua rebuttal of it and therefore could not have been taken cognizance by the Commission and hence the present review petition.

3.2. It is well settled law of the land that written submissions cannot be considered as part of pleadings, as they are neither supported by an affidavit nor is a part as envisaged in the form of pleadings in Civil procedure code. Furthermore, at no given stage through written submissions, the parties can be allowed to better their respective case, which otherwise has not been put forth through their pleadings i.e., grounds for relief or in defence while objecting to such relief.

3.3. The Hon'ble Supreme Court in a recent judgment dated 3 November, 2020 in the case of *Biraji Vs. Surya Pratap* in C.A. No. 4883-4884 of 2017 has very categorically held that "*...It is fairly well settled that in absence of pleading, any amount of evidence will not help the party*".

3.4. Thus, cognisance has been taken of the auditor certificate, which was not part of the record of the case, to come to a conclusion that payment towards the alleged in-land transportation cost has been made through an inter-company transaction, which otherwise was not even the case as envisaged by APML in its petition seeking such relief and without putting the same for objection, is an error on the face of the record, requiring interference through the present review petition, as it goes to the root of the matter.

3.5. APL (Mundra) has not actually transported coal from Mundra to Tiroda, yet erroneously raised/recovered the transportation cost towards coal sold to APML (Tiroda). Such a practice is against the principles of accounting. Further claiming such a hypothetical cost as compensation is against the basic principle of restitution under Article 13 of the PPA.

3.6. The auditor's report submitted by APML on 6 November 2020 is merely a report of accounting entries made by APML with certain reservations without verifying the facts of the figures and its correctness. The auditors have not commented upon the correctness or appropriateness of the practice given in the understanding. In fact, the auditors have only extracted the figures for mere endorsement. The same is clear from following para from Auditor's report.

> *"Auditor's responsibility –*
>
> *The books of account of the Company for the financial year ended March 31, 2016 have been audited by another firm of Chartered Accountants, on which*

they have issued a qualified audit opinion vide their report dated May 03, 2016."

3.7. Auditors have mentioned about the qualified opinion in the report. It is not made clear what are the qualifications given by the statutory auditors and whether they have relevance with the accounting of deemed landed price of coal given in the report.

3.8. APL(Mundra) has not actually transported coal from Mundra to Tiroda yet raised/recovered the transportation cost towards coal sold to APML (Tiroda) on GCV equivalent basis which is completely incorrect. Since the transportation cost is not based on GCV of coal, rather it is based on distance, and such a practice is against the principles of accounting.

3.9. The landed cost of imported coal considered for such conversion itself is not supported by relevant documents such as FoB invoices, Ocean Freight Indices, Handling charges notifications from Major ports etc.

3.10. Through IPT policy, Adani has already accrued the savings in transportation cost and due to the directions of the Commission in addition will incur the benefit over and above, which is the ultimate and undue burden on the consumers.

3.11. The Commission after having come to the conclusion at Paragraph 20.12 that Adani Mundra without incurring any actual in-land transportation expenses towards IPT coal of Tiroda Plant has yet claimed such expenses on normative basis from APML, contrarily at Paragraph 20.7 held that APML has actually incurred additional expenses on normative in-land transportation cost and is eligible for considering the same in its computation for Change in Law compensation.

3.12. Merely a book entry in the audited accounts would not dislodge a finding of fact that the expenses are being claimed by Adani Mundra without incurring such expenses and therefore at one hand when the Commission concluded that it's a notional claim at Paragraph 20.12, then at Para 20.7 holding contrary of such claim being actually incurred and consequently making MSEDCL liable to pay for it, calls for an interference by the Commission under its powers of review of the impugned judgment and its findings.

3.13. Further the Commission has touched upon the issue of obligation to pass on the reciprocal benefit by Adani Mundra to MSEDCL by relegating MSEDCL to approach Central Electricity Regulatory Commission (**CERC**), while granting relief to APML by obligating MSEDCL to pay for the hypothetical in-land transportation cost, however despite fasting such an obligation, no finding has been rendered on the reciprocal benefits qua grant of such relief. Furthermore, the onus of recovery of wrongly paid charges should have been on APML, since they are the ones recovering the hypothetical payment in full without adjustment of the reciprocal benefits.

3.14. The Commission has directed to consider normative coal transportation from nearest sea-port (Dahej) to Tiroda in the impugned order. However, based on the table shown

by APML itself in its "Note of Hearing" dated 6 October, 2020 during the hearing, Dahej is not the nearest sea-port. On the contrary, it is the farthest amongst Hazira and Vizag as shown below:

Sr. No.	Name of Sea-Port	Distance in Kms from Tiroda Plant
1	Dahej	1001
2	Hazira	886
3	Vizag	750

3.15. Thus, from the bare perusal of the table as shown above, consideration of Dahej as the nearest sea-port, runs self-contrary not only to the records of the case but at the same time also contrary to the claim of APML as well. Therefore, taking cognizance of the fact at Paragraph 20.7 that cost as certified by Auditor of APML also includes normative transportation cost form nearest sea-port (Dahej) to Tiroda, is contrary to the fact that Dahej is the nearest sea-port.

3.16. The Commission vide Impugned Order in Paragraph 21.5(c) has observed that "..*till 5th October 2016, coal transfer did not cross ACQ of Tiroda Plant*". The same on the face of it runs contrary to the factual submissions placed by MSEDCL in its reply. Furthermore, the data as provided by APML in their rejoinder at Paragraph 47 had considered transfer of IPT coal against MoU. However, IPT policy allows transfer of coal against FSA only.

3.17. As per the notification, the IPT is allowed only against FSA and not allowed against any other arrangements such as coal blocks or MoU. However, APML vide letter dated 24 August, 2020 has informed that APML has transferred coal under IPT policy against MoU which is not at all allowed as per the IPT policy. APML had submitted table mentioning source wise coal quantum which is noted by the Commission at Para 5.28 of the Impugned Order dated 28 November, 2020.

3.18. The observation of the Commission that since certain clarifications and disputes were raised on some of the aspects of invoices raised by APML on 6 October, 2018 by MSEDCL, therefore the said invoice has not attained finality and is inconclusive, without referring the said inconclusiveness be attributable only for MSEDCL and not for APML, had by liberal interpretation kept open the issue on the inconclusiveness of the invoices from the side of the Generators as well. Furthermore, despite submitting of the invoices, merely because the procurer had raised certain disputes or clarifications, referring the present impugned order, it would be open for interpretation by the Generators to change the said invoice to their advantage even at a later date, merely because the same is inconclusive in terms of the PPA.

3.19. The said practice if adopted under the guise of the present order would set a bad precedent and would also eventually disturb the billing and payment modalities as agreed under the PPA, as a standard practice.

3.20. Vide impugned order on the issue of grant of compensation for change in law claims qua usage of alternate coals, the onus of opting for cheaper coal instead of usage of IPT coal was put upon MSEDCL instead of APML, whereas it's the obligation and the liability of the APML to avail the usage of the cheapest coal available and not the obligation of the procurer to determine cheaper coal, while considering the payment of the alternate coals so used.

3.21. It is pertinent to note that, APML has been using imported coal at its plant since beginning and APML had mentioned/considered use of imported coal in the bid itself. Therefore, the justification so rendered qua transfer of coal under IPT policy because otherwise the imported coal would have impacted the performance of the Plant due to the thermal stress is completely baseless and misleading plea.

3.22. APML has used significant amount of imported coal at Tiroda plant. The details of coal quantum and its GCV is as under:

Imported Coal Utilized at Tiroda				
Year	**2013-14**	**2014-15**	**2015-16**	**2016-17**
GCV	5007	5253	5427	4749
Quantity (MT)	10,37,814	23,79,546	18,45,883	20,000

3.23. Further imported coal is also available in wide and varied GCV range. From the submitted data, APML has itself used imported coal of having different GCVs ranging from 4456 kcal/kg at Mundra as shown in the table below:

GCV of Coal	Source	**2013-14**	**2014-15**	**2015-16**	**2016-17**
	Imported (Tiroda)	5007	5253	5427	4749
	Imported (Mundra)	5156	5077	4456	4574

3.24. Hence the submission of APML towards its justification of utilisation of Domestic coal as against imported coal due to issues of thermal stress is completely baseless and misleading and purely to gain the advantage of the arrangement /decision of IPT. Hence, the Commissions observation supporting the submissions of APML is running contrary to the facts.

3.25. There is delay in filing the instant petition on account of vetting and finalization of the instant petition through internal legal as well as technical team of the review petition Company considering the complexity involved and further, owing to the mandatory process of verification and approval of the finalised draft from the concerned board and requested the Commission to condone the same.

4. APML in its submission dated 22 February, 2021 has stated as follows:

4.1. The findings in the Impugned Order sought to be reviewed by MSEDCL are reasoned and do not suffer from any error apparent. MSEDCL has not given any cogent reasoning

as to why the assailed findings of the Commission are apparently erroneous, warranting a review. In the garb of this Review Petition, MSEDCL seeks to re-litigate well-reasoned findings of the Commission *qua* accounting of IPT coal utilized by APML to offset the non-availability of the originally envisaged coal as per the bids/PPAs.

4.2. MSEDCL had raised the issue regarding payments made by APML to Adani Mundra towards the inland transportation cost of coal. MSEDCL's submissions in this behalf were duly considered by the Commission while passing the Impugned Order.

4.3. The limited purpose of the auditors' certificate was only to establish that APML had claimed in-land transportation cost as part of its invoice dated 6 October 2018. This Commission duly considered the issues, examined the auditors' report and reached its conclusions/findings.

4.4. Review is not an Appeal in disguise and MSEDCL ought not re-open the issues already decided by filing a review petition, without fulfilling the pre-requisites for seeking such review This is contrary to the law as settled by the Hon'ble Supreme Court in its judgments in *Lily Thomas vs. Union of India (2000) 6 SCC 224, Kerala State Electricity Board vs. Hitech Electrothermics and Hydropower Ltd. (2005) 6 SCC 651*

4.5. The Commission in multiple cases has held review petitions as not maintainable, where a review petitioner tries to reopen and re-argue the case on merits. APML has relied on *M/s. Orange Maha Wind Energy Pvt. Ltd. vs. MSEDCL* in Case No. 177 of 2020 and MA No. 50 of 2020 dated 5 October, 2020 and Order dated 21 January, 2021 in *M/s Ghadge Patil Industries Limited Vs. MSEDCL* Case No. 196 of 2020

4.6. Without prejudice to APML's objections with respect to the maintainability of the present Review Petition, and for the convenience of Commission, APML is placing on record its specific submissions to counter the contentions raised by MSEDCL as follows:

a. On the contention of MSEDCL that the Commission has granted relief to APML towards inland transportation cost substantiated through an auditor certificate, APML submitted that the Commission has 'decided and dealt with' this issue in the Impugned Order. It is not open for MSEDCL to seek a review on this ground. APML annexed auditor report with its Written Submissions based on the Commission's directions. APML submitted and demonstrated that the invoice dated 6 October, 2018 does in fact cover transportation cost (in-land) and proposed to file an auditor report to demonstrate the same. MSEDCL was present during the hearings. No objections were raised at that stage, having had an opportunity to deal with rival contentions. Similar arguments were raised by MSEDCL in its Written Submissions which were duly considered by the Commission while passing the Order.

b. On the contention of MSEDCL that Adani Mundra has not actually transported coal from Mundra to Tiroda, yet erroneously raised/recovered the transportation cost towards coal sold to APML (Tiroda) which is against the principles of accounting,

APML stated that this issue was specifically brought to the notice of the Commission during the hearings and no objections were raised by MSEDCL. Accordingly, this issue has been 'decided and dealt with' by the Commission. Thus, not open for review. Further, since no violation of any particular principles of accounting has been demonstrated by MSEDCL in the Review Petition, the same ought to be dismissed in limine.

c. Further on account of contention of MSEDCL that the report submitted by APML is only endorsed by the auditor without verifying the facts of the figures and its correctness and not shown the qualifications given by the statutory and actual payment proofs; APML submitted that the limited purpose of the auditor certificate was to only provide a clarification that APML's invoice dated 6 October, 2018 included in-land transportation cost. In terms of Section 101 of the Indian Evidence Act, 1872 a party which asserts a fact must prove such fact. MSEDCL has failed to place on record any document/material to challenge the authenticity of the auditor certificates furnished by APML, wrongly casting aspersions on the veracity of auditor certificates.

d. MSEDCL contended that Inter-company payments/adjustments of hypothetical expenses between the Companies under the same Parent company cannot be regarded as actual expenses being incurred, more particularly when admittedly no transportation in actual having been incurred. Encouragement of this practice of claiming on hypothetical basis runs contrary to restitution principle which is embedded under Article 13 of the PPA and is entirely based on "actual" cost which is to be compensated. Through IPT policy Adani has already accrued the savings in transportation cost and due to the directions of the Commission in addition will incur the benefit over and above, which is the ultimate and undue burden on the consumers. APML submitted that the issue has been dealt and decided by the Commission and is not open for review.

e. MSEDCL contended that normative coal transportation from nearest sea-port (Dahej) to Tiroda is directed to be considered by the Commission in the impugned order. However, based on the table shown by APML itself in its "Note of Hearing" dated 6 October, 2020 during the hearing, Dahej is not the nearest sea-port. On the contrary, it is the farthest amongst Hazira and Vizag. APML submitted that the Commission rightly considered Dahej port since there were restrictions to use east coast ports for purposes of importing coal to APML's Tiroda Plant.

f. MSEDCL contended that the coal transfer did not cross ACQ of Tiroda Plant. The same on the face of it runs contrary to the factual submissions placed by MSEDCL. APML submitted that this argument was raised and considered by the Commission while returning a categorical finding in Para 21.5 (c) rejecting MSEDCL's contentions.

g. MSEDCL contended that submission of APML towards its justification of utilization of domestic coal as against imported coal due to issues of thermal stress is completely baseless and misleading and purely to gain the advantage of the arrangement /decision of IPT.APML submitted that the issue has been dealt by the Commission in the impugned Order and is not open for review.

5. MSEDCL in its additional submission dated 18 June, 2021 has stated as follows:-

5.1. The additional information is being placed before the Commission to highlight the concern of MSEDCL with respect to incorrect interpretation being given to the order by APML and requested Commission to clarify the same during adjudication of the review Petition.

5.2. The Commission in its Order in Case No 132 of 2020 dated 28 November, 2020 has directed as follows: -

> *"Inter Plant Transferred coal consumed at Tiroda shall be billed at cost of imported coal cost parity on GCV equivalence basis including normative in-land transportation cost from nearest sea-port (Dahej) to Tiroda."*

5.3. Prior to the Order dated 28 November, 2020, APML had been providing the data of coal used at Mundra every month till October 2020. However, while submitting the claims towards domestic coal shortfall for the month of November 2020 and onwards APML has not submitted the data of imported coal used at Mundra. MSEDCL vide mail dated 14 January, 2021 asked APML for requirement of data of coal used at Mundra as on 14 January, 2021. However, APML vide email dated 15 January, 2021 rejected to provide the same based on the *Para 19.8 of MERC order, IPT coal consumed at Tiroda needs to be accounted at rate of imported coal cost parity on GCV equivalence basis*.

5.4. After passing of consequential orders on 10 December, 2020 in M.A. No. 53 of 2020 and M.A. No. 54 of 2020 in the matter of NCDP and SHAKTI, APML submitted differential invoice towards change in law claims (domestic coal shortfall) on 5 February 2021. MSEDCL vide its email dated 5 March, 2021 raised queries on the said invoice dated 5 February, 2021 regarding the cost of IPT coal, GCV of alternate coal used in lieu of IPT coal and also regarding other matters. In reply APML submitted that it has considered GCV of IPT coal in accordance with the Commission's Order and since imported coal was procured up to 2019-20, weighted average GCV of such coal procured has been considered for the period up to 2019-20. However, during FY 20-21, since APML has not procured imported coal for Tiroda, the GCV of last procured consignment has been considered which the best available reference GCV. APML has wrongly considered weighted average GCV and cost of imported coal used at Tiroda up to FY 19-20. Further, dehors the Order dated 28 November, 2020 for FY 2020-21, 5000 kcal/kg as reference GCV from the imported coal used at Tiroda was being considered by APML.

5.5. The formula used by APML is:

Cost of IPT coal to be accounted to Tiroda	=	Quantum of Actual IPT coal transferred to Tiroda	X	GCV of actual IPT coal transferred to Tiroda ---------- Wtd. Avg. GCV of imported coal used at Tiroda	X	Wtd. Avg. Cost of imported coal used at Tiroda	+	Normative In land transportation cost (Dahej to Tiroda) for Quantum of Actual IPT coal transferred to Tiroda

5.6. However, the order dated 28 November, 2020 contemplates the computation as below:

Cost of IPT coal to be accounted to Tiroda	=	Quantum of Actual IPT coal transferred to Tiroda	X	GCV of actual IPT coal transferred to Tiroda ---------- **Wtd. Avg. GCV of imported coal used at Mundra**	X	**Wtd. Avg. Cost of imported coal used at Mundra**	+	Normative In land transportation cost (Dahej to Tiroda) for **Quantum of coal used at Mundra Plant in lieu of IPT coal.**

5.7. APML has increased the claims of around Rs. 1700 Cr. vide invoice raised on 5 February, 2021 as compared to consecutive invoices raised in line with the invoice dated 6 October, 2018 till the month of December, 2020 with reference to the ruling in the Order that there would not be any increase in cost claimed by APML in invoice dated 6 October 2018. The details are as follows:

IPT Costs	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Landed costs of IPT coal as per invoice dated 06.10.2018 and consecutive invoices (Rs./tonne)	4479	4159	4158	3802	4591	5344	4880
Landed costs of IPT coal as per invoice dated 05.02.2021 (Rs./Tonne)	4684	4664	4916	5086	5642	6497	6102
Increase in landed costs of IPT coal (Rs./Tonne)	**205**	**505**	**758**	**1284**	**1051**	**1153**	**1222**
Weighted avg. Trans. Cost as per Auditors report dt. 06.11.20 submitted by APML (Rs./Tonne for thousand km)	0	0	922	0	0	0	931
Weighted avg. Trans. Cost as per invoice dated 05.02.21 submitted by APML (Rs./Tonne for thousand km)	1448	1611	1957	1849	1796	1934	2016
IPT Coal Quantity (MT)	310757	1773516	4545230	4355820	5335206	4921803	4724799
Increased claim submitted by APML dtd.05.02.2021 due to change in IPT costing in Rs. In Cr.	**6**	**90**	**344**	**559**	**561**	**567**	**577**
Impact on revised claim due to IPT cost increase in Rs. Cr.							**2705**

5.8. APML has submitted Auditor's certificates while submitting the Written Submissions on 6 November, 2020 in Case No. 132 of 2020, showing details of the IPT coal for year 2015-16 and for the year 2019-20. There is also change in the weighted average per

tonne transportation cost for 1000 km shown in the Auditor's Certificate as compared to the invoice 5 February, 2021, as follows:

Weighted Average Rs. per/tonne transportation cost (For 1000 km)		
	2015-16	2019-20
As per Auditor's Certificate (Derived from the certificate)	922	931
As per invoice dated 5 February, 2021	1957	2016

5.9. MSEDCL has requested that Commission may clarify the above issue in the Review Petition.

6. At the time of E- hearing held on 22 June, 2021:

6.1. Advocate of MSEDCL:

a. Advocate of MSEDCL reiterated the submission made in the Petition. He stated that the Commission without giving opportunity to MSEDCL to rebut on the auditor's certificate submitted by APML came to the conclusion that APML has incurred inland transportation cost. Further the auditor's certificate submitted by MSEDCL is just the certificate with arithmetical accuracy and having no statutory bindings. APML has not submitted the actual invoices for payment of coal to APL (Mundra). Change in Law principle is for restitution and the actual damages to be proved by the parties. Claims should not be approved on hypothetical basis.

b. The Commission in the impugned Order has erred in considering the transportation cost from Dahej port which is the farthest port from Tiroda and it should be from Vizag port which is the nearest port. APML in its notes of hearing dated 22 October, 2020 and also in additional submission dated 6 November, 2020 admitted the same.

c. APML contrary to the fact that the invoice dated 6 October 2018 became final, has raised its claims in subsequent invoices without substantiating the same which is contrary to the impugned Order.

d. MSEDCL has raised certain clarification issues due to contrary views of MSEDCL and APML in implementation of the impugned Order and requested the Commission to clarify the same. MSEDCL has pointed out that APML has increased the transportation cost in its invoice dated 5 February, 2021 in comparison with the invoice dated 6 October, 2018 which is treated as final invoice by the Commission.

6.2. Advocate of APML:

a. Advocate of APML reiterated the submission made in the Petition. He stated that all the issues raised by MSEDCL such as submission of auditor's certificate, savings incurred due to IPT transfer, Dahej as a nearest port were dealt with and addressed

by the Commission in the impugned Order and are not open for MSEDCL to re agitate the same under review proceedings. Review is not an Appeal in disguise.

b. He further stated that as per the admitted position of APML during hearing dated 22 October, 2020, invoice submitted on 6 October 2018 is inclusive of transportation cost. APML submitted the auditor's certificate as per directives of the Commission to demonstrate the same and MSEDCL was well knowing the directions of the Commission. In fact, if MSEDCL had difficulty, it would have objected to the same at the instant time and not afterwards through review proceedings.

c. He further stated that the additional submission made by MSEDCL for clarification of the impugned Order were not the part of the impugned Order and could not be the part of the Review proceedings.

6.3. The Commission directed APML to substantiate increase in the amount of transportation in the invoice dated 5 February, 2021

7. APML in its affidavit dated 8 July, 2021 has stated as follows:

7.1 APML has raised supplementary invoice dated 5 February, 2021 considering the consequential impact of the Orders passed by the Commission in MA No. 53 of 2020 in Case No. 189 of 2013 and in Case No 140 of 2014; in MA 54 of 2020 in Case No 290 of 2018 and APTEL Judgment dated 5 October, 2020 in Appeal No 340 and 354 of 2019. The invoice includes all consolidated consequential impacts of such judgments/orders which includes the impacts on account of the reliefs granted by APTEL in relation to SHR, GCV, and purely based on all the subsequent developments.

7.2 APML has implemented the commission's impugned Order to reflect Dahej as the only available port while calculating the in-land transportation cost of coal. The reason for providing the Dahej port is due to the embargo on utilizing eastern coast ports. Further as per the contention of MSEDCL if the transportation is considered from Vizag instead of Dahej, impact of the same would be to the tune of 381 Crores.

8. **MSEDCL in its additional submission dated 22 July, 2021 has stated as follows**:

8.1 The affidavit filed by APML dated 8 July 2021 has not brought clarity about unsubstantiated inflated claim of Rs.1000 Crs in transportation cost. Assuming even the consideration of change in Sea port is put for deliberations, the change in claim is of Rs. 300 Crs and the remaining amount of Rs 700 Crs completely unexplained. Further implementation of APTEL Judgment was having no impact on the "in land transportation cost" of the IPT Coal.

8.2 APML in Original Petition has submitted that landed cost of alternate coal remains constant and there will be no impact of APTEL's Judgment on the claims as submitted in Case No 132 of 2020. Pursuant to the APTEL's Order, there may be increase in coal

quantum due to change in operational parameters such as SHR, Aux. Consumption and GCV. The quantum of alternate coal utilized as per invoice dated 6 October 2018 is 18928.77 MMT and the same as per invoice dated 5 February, 2021 is 19387.42 MMT. The increase in alternate coal quantum including coal under IPT in invoice dated 5 February, 2021 as compared to the invoice dated 6 October 2018 is around 2%. Hence, assuming there can be increase in the claims due to increase in coal quantum however, the increase in claims of around 1000 Cr. is not justified as increase in quantum of alternate coal is 2% only.

8.3 The affidavit under consideration, has further not placed the correct facts on record as sought, rather under the guise of justifying the increase in the subsequent invoices from the one dated 6 October, 2018 has only put forth the increase of differential amount if the point of sea port is changed from Dahej to Gangavaram/Vizag and thereby misleads to reflect that the alleged increase if any, is only to the tune of Rs. 381 Crs in the component of "in-land transportation cost" from the invoice dated 6 October 2018. Whereas the increase in the subsequent invoice had occasioned increase in the claims by almost around Rs. 1000 Crs, which remains unanswered.

8.4 No justification has been provided for the said difference and hence on account of existence of contrary data, no relief can be granted to APML for an hypothetical claim, more particularly by relying upon the alleged auditor's certificate, which does not by itself has found reliability in the affidavit under reply.

8.5 There is also contradiction in the IPT coal quantum as provided by APML in the affidavit under reply when being compared with the invoice dated 5 February, 2021. From the bare perusal of the data as submitted in the affidavit under reply and the invoice dated 5 February 2021, it is clear that in the invoice dated 5 February 2021, APML has considered quantum of 10.98 MMT for the FY from 2013-14 to FY 2016-17 where as in the affidavit APML has shown quantum of utilised 7.43 MMT, APML has considered landed cost of entire coal quantum available i.e. 10.98 MMT for the period 2013 to 2017.

8.6 If the review petition of MSEDCL is not considered in the right perspective and is not allowed, then MSEDCL would allegedly be made liable for payment of such inflated claims as raised in the subsequent invoice dated 5 February 2021 without there being any adjudication on the said inflated claims, despite raising the dispute herein.

Commission's Analysis and Ruling

9. APML had approached the Commission in Case No. 132 of 2020 for adjudication of dispute with MSEDCL relating to non-payment of certain costs towards utilisation of IPT coal at Tiroda Plant. The Commission has issued impugned Order dated 28 November, 2020 in that matter. Now, MSEDCL has filed the present Petition seeking review of that Order dated 28 November, 2020 primarily on the following grounds:

a. Allowance of Inland transportation is based on auditor's report without giving opportunity to MSEDCL to rebut the same.

b. Without consideration of saving accrued to APML due to use of IPT Coal and without actual transportation, relief is granted under restitution principle.

c. Consideration of the farthest seaport (Dahej) while allowing normative coal transportation cost

d. Observation that Transfer of coal under IPT policy did not cross ACQ of Tiroda plant is contrary to MSEDCL submission.

e. Inconclusiveness of the invoices is not open for APML for any change at a later date.

f. Onus of opting for cheaper coal is put upon MSEDCL instead of APML.

g. Argument of APML that imported coal would have impacted the performance of the Plant due to the thermal stress is completely baseless and misleading plea

10. Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004 governing review specifies as follows:

> *"Review of decisions, directions, and orders: 85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission…"*

Further, the Hon'ble Supreme Court in the matter of *Smt. Meera Bhanja vs Smt. Nirmala Kumari Choudhury on 16 November 19*95 has held as follows regarding review jurisdiction:

> *It is well-settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. In connection with, the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of AribamTuleshwar Sharma v. AribamPishak Sharma and Ors. , speaking through Chinnappa Reddy, J., has made the following pertinent observations :*

It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent mis-carriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. ***The power of review may exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits.*** *That would be the province of a Court of Appeal.* ***A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.***

Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. ***So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions.***

[emphasis added]

Thus, the ambit of review is limited, it cannot be an appeal in disguise, and this Petition is required to be evaluated accordingly.

11. MSEDCL has submitted that there is an inadvertent and unintentional delay of 18 days in filing the review petition due to mandatory process of verification and approval of the finalized draft from the Board and has therefore requested the Commission to condone the same. The Commission notes that as per conduct of Business Regulations, 2004, period of 45 days is stipulated for filing petition seeking review. However, considering difficulties cited by MSEDCL, the Commission condones the delay in filling the review Petition.

12. APML has contended that the issues raised by MSEDCL in the present review Petition have already been addressed by the Commission in its Order in Case No 132 of 2020 and that there is no apparent error or omission as sought to be contended by MSEDCL which requires exercise of review jurisdiction by the Commission. APML has further contended that, MSEDCL in the guise of the present proceedings is seeking a rehearing of the proceedings which is impermissible under the review jurisdiction and the petition is therefore not maintainable.

13. Considering the submissions made by both the parties and their respective arguments at the time of hearing, the Commission deals with the issues raised by MSEDCL in the present Order in the following paragraphs.

14. Issue A: - Allowance of Inland transportation is based on auditor's report without giving opportunity to MSEDCL to rebut the same

Issue B: - Without consideration of saving accrued to APML due to use of IPT Coal and without actual transportation, relief is granted under restitution principle.

14.1. As both issues are inter-related, the Commission is addressing them in combined manner as under.

14.2. MSEDCL contends that without giving it opportunity to rebut, the Commission has allowed APML's claim of hypothetical inland transportation primarily based on the premise of Auditor's certificate. Said auditor certificate was submitted for the first time through the Written Submissions and was never communicated to MSEDCL by the APML in any of meetings held prior to filing of petition in original matter. It is well settled law that a party is not entitled to improve its case through written arguments; moreover, the Courts should not take cognizance of documents, which are not part of original records, but are put forth through written submissions. The auditor's report submitted by APML on 6 November, 2020 was merely a report of accounting entries made by APML with certain reservations without verifying the facts of the figures and its correctness. Further despite acknowledging the fact that Adani Mundra without incurring such expenses has claimed it on normative basis from APML, the Commission has allowed inland transportation based on Auditor's certificate which is contrary to its observations in Para 20.7. Such a practice is against the principles of accounting. Further claiming such a hypothetical cost as compensation is against the basic principle of restitution under Change in Law provisions of PPA.

14.3. APML objects to the contention of MSEDCL saying that APML has submitted the certificate as allowed by the Commission during the hearing dated 22 October, 2020 for demonstrating that the invoice submitted on 6 October, 2018 is inclusive of transportation cost. MSEDCL was well aware of the directions of the Commission. In fact, if MSEDCL had difficulty, it could have raised the same at that time and not afterwards through review proceedings. APML states that the Commission has decided and dealt with the issue in the Impugned Order and it is not open for MSEDCL to seek review on this ground. Review is not an Appeal in disguise.

14.4. The Commission notes that in the Impugned Order dated 28 November, 2020 it has addressed these issues in detail. Relevant extract of the Order is reproduced below:

"20.1. Having ruled that IPT coal consumed at Tiroda needs to be accounted at the rate of imported coal cost parity on GCV equivalence basis, now issue to be decided

is whether in-land transportation cost on such imported coal is to be allowed on normative basis.

20.2. APML has fairly stated that imported coal is consumed at Mundra and hence has not actually been transported to Tiroda plant. ***However, normative transportation cost from nearest sea-port (Dahej) to Tiroda has been included in the cost of imported coal for arriving at landed cost of alternate coal at Tiroda Plant****. As per APML, it is settled legal position that transportation cost needs to be allowed while computing Change in Law computation.*

20.3. ***MSEDCL has opposed such contention and has stated that APML is trying to seek compensation under Change in Law on hypothetical grounds without incurring such expenses. MSEDCL has stated that this is against the principles of Change in Law which require actual increase / decrease in expenses which then can be compensated to restitute the affected party to the same economic position****.*

20.4. APML has clarified that Adani Mundra has billed it for imported coal by adding normative transportation cost and it has accounted the same in its Accounts. Therefore, APML has actually incurred such expenses and it is eligible for Change in Law compensation for the same.

20.5. In this regard, the Commission notes that beside issue of normative transportation cost, MSEDCL has mainly objected to APML's communication dated 4 January 2019, wherein it has revised and increased compensation claim submitted vide invoice dated 6 October 2018. MSEDCL has contended that on account of CERC Order on IPT Coal, APML has tried to revise its claim upward. ***However, during the hearing and through subsequent submissions, APML has stated that invoice dated 6 October 2018 is final and it considered IPT Coal cost as imported coal on GCV equivalence basis plus normative transportation cost. APML has submitted Auditor's Certificate dated 6 November 2020 for FY 2015-16, to demonstrate that IPT Coal cost claimed in invoice dated 6 October 2018 is inclusive of normative transportation cost and such expenses have been booked in Audited Accounts of APML for FY 2015-16. Although, MSEDCL has objected to the submission of such Auditor's certificate at fag end of the current proceedings, the Commission notes that such certificate only demonstrates that normative transportation cost was part of invoice dated 6 October 2018 which eliminates need of raising additional claim for the same. Hence, in the opinion of the Commission such Auditor's Certificate does not prejudice interest of MSEDCL. Therefore, the Commission concludes that invoice dated 6 October 2018 has billed IPT coal on imported coal plus normative transportation cost basis and APML will not be claiming additional cost towards IPT coal for the years included in that invoice.***

20.6. On the issue of allowing normative transportation cost, the Commission notes that provision of PPA dated 8 September 2008 dealing with relief on account of Change in Law event states as follows:

"As a result of Change in Law, the compensation for any increase/decrease in revenue or cost to the Seller shall be determined by the Maharashtra State Electricity Regulatory Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law and effective from date specified in 13.4.1."

Similar provision exists in other PPAs signed between APML and MSEDCL. In terms of the above stated provision of PPA, compensation under Change in Law is to be determined for any increase / decrease in revenue or cost. Hence, such increase / decrease in cost must be actual.

20.7. In present case, Adani Mundra and APML are two separate legal entities, although they are wholly owned subsidiaries of the same parent company. Being eligible, they have opted for inter-pant transfer of coal as allowed by Coal India's letter dated 19 June 2013 and 5 October 2016. Further as per CERC Order dated 31 May 2018, domestic coal consumed at Tiroda under IPT Scheme is commercially accounted for at Mundra. Hence, as a corollary, vice versa imported coal consumed at Mundra is accounted for IPT coal consumed at Tiroda. ***Accordingly, Adani Mundra has billed APML for imported coal on GCV equivalence basis. Such cost as certified by Auditor also includes normative transportation cost form nearest sea-port (Dahej) to Tiroda. APML has paid such expenses and booked it in its Audited Accounts. Therefore, it can be concluded that APML has actually incurred additional expenses on normative in-land transportation cost and is eligible for considering the same in its computation for Change in Law compensation.*** *The issue raised by MSEDCL whether Adani Mundra has actually incurred such expenses and is eligible to bill APML on normative basis is separately discussed in para 20.12 to 20.14 below.*

……

20.10. Above method of allowing landed cost of alternate coal has never been challenged by any party and hence has attained finality. In terms of the above stated methodology, landed cost of imported coal at Tiroda includes in-land transportation cost. However, comparison of actual landed cost with these benchmarks for FoB, Ocean Freight, Port handling Charges and Freight Rates of Railways is possible only if APML procures imported coal and actually pays expenses on each of such item. Then only, invoice for each of such expenses would be available for scrutiny. But in the present matter, Adani Mundra has billed APML on lumpsum/attributable basis and hence invoice for each of expenses head which forms constituents of landed cost of imported coal are not available. Under these circumstances only option available is to compare such lumpsum billed cost with sum total of benchmark costs of all individual items. As inland transportation is part of constituent of landed cost of imported coal and has been claimed by Adani Mundra, same needs to be added in benchmark cost while comparing lumpsum/attributable cost claimed by Adani Mundra. ***Hence, the Commission rules that in-land transportation on normative basis (from nearest sea port to Tiroda) is allowed to include in landed cost of***

imported coal which is to be used in lieu of IPT coal consumed at Tiroda. Even after allowing inclusion of normative in-land transportation cost, as confirmed by APML, there would not be any increase in cost claimed in invoice dated 6 October 2018 and hence MSEDCL's main contention that APML through email dated 4 January 2019 has sought revision in invoice on account of IPT coal will get addressed.

20.11. ***Above stated ruling of the Commission is based on premise that on raising bill by Adani Mundra, APML has paid the bill and accounted the same in its commercial accounts and hence has actually incurred such expenses****. Therefore, APML is eligible for including such normative transportation cost in landed cost of IPT Coal (imported coal) so as to claim Change in Law compensation. Accordingly, as ruled in Order dated 7 March 2018, change in law compensation would be incremental cost incurred by APML for sourcing alternate coal due to coal supply shortfall i.e. difference between landed cost of alternate coal and landed cost of FSA/MoU coal.*

20.12. However, at the same time, the Commission notes that Adani Mundra without incurring such expenses has claimed it on normative basis from APML. MSEDCL has also contended that Adani Mundra has saved on transportation of domestic coal due to IPT scheme as coal which was to be transported from SECL and MCL mines upto Mundra has been transported till Tiroda only. MSEDCL has requested to pass on such saving accrued by Adani on account of IPT Scheme to MSEDCL and thereby to consumers. APML has opposed such request and has contended that IPT scheme was not Change in Law event but it is prudent decision of the APML to participate in IPT scheme. Hence, it is not eligible for transfer of benefit accrued due to IPT policy.

20.13. ***The Commission notes that on account of CERC Order dated 31 May 2018 directing accounting of IPT coal to original plant i.e. Adani Mundra, all alleged saving i.e. saving in transportation expense on domestic coal under FSA and billing APML on the basis of normative inland transportation cost without actually incurring such expense, has accrued to Adani Mundra. It is admitted fact that Adani Mundra being inter-state generating plant, it is regulated by CERC. Hence, this Commission does not have any jurisdiction to go into details of benefits accrued by Adani Mundra.*** *In fact, on similar prayer of Haryana Utilities to consider IPT policy as Change in Law event and allow passthrough of saving in transportation cost accrued by Adani to consumers, CERC in its Order dated 8 July 2019 has ruled as follows:*

> *"28. We have considered the submissions of the Respondents for treating IPT Policy of Coal India Ltd. as change in law and its request for sharing of benefits accrued to the Petitioner on account of IPT. In Petition No. 97/MP/2017 and the instant Petition, we have given directions as to how IPT coal has to be considered for the purpose of calculation of coal shortfall as well for taxes and duties. Consideration of the IPT Policy of Coal India Ltd. as a change in law*

event has not been discussed by the Commission in its previous orders. We note that transfer of coal by the Petitioner under IPT Policy also affects other generating stations (that are consuming the IPT coal) and other distribution companies (who are supplied power by the generating stations that have used IPT coal). Since, they are not parties to the present Petition, we do not find it appropriate to deal with the issue in the present Petition."[emphasis added]

20.14. ***In view of above settled position, the Commission notes that MSEDCL is at liberty to approach CERC for claiming passthrough of benefit accrued by Adani Mundra due to Inter Plant Transfer of coal to consumers****."*

[**emphasis added**]

14.5. From the above excerpts from the impugned order, it is observed that issues raised in present review Petition have already been raised during original proceeding and the Commission in its impugned Order as reproduced above has addressed all such contentions of MSEDCL by giving reasons.

14.6. Issue of MSEDCL's objection on submission of Auditor's Certificate at fag end of the proceeding in the form of written submissions has also been addressed in the impugned Order. As stated in impugned Order, purpose of Auditor's Certificate is limited to state that normative transportation cost is already included in APML's invoice dated 6 October, 2018.

14.7. On the issue of not considering saving accrued due to use of IPT Coal, the Commission in impugned Order as reproduced above, has clearly stated that use of IPT coal must have accrued benefit to Adani Mundra. However, as Adani Mundra is being regulated by the CERC, the Commission advised MSEDCL to approach CERC for claiming share of such benefit.

14.8. Such reasoned order cannot be ground for review. MSEDCL through this review Petition is reiterating arguments made in original proceeding which cannot be allowed under review jurisdiction. Review cannot be appeal in disguise. Hence, review sought on these issues needs to be rejected.

15. Issue C:- Consideration of the farthest seaport (Dahej) for allowing normative coal transportation cost

15.1. MSEDCL contends that the Commission in the impugned Order erred in granting inland transportation cost from the farthest port 'Dahej' and not from the nearest port Vizag. APML in its notes of arguments dated 6 October, 2020 submitted in original proceeding has clearly stated that Vizag (750 km) is the nearest port to Tiroda in comparison with other ports namely Hazira (886 km) and Dahej (1001 km).

15.2. APML in this regard has stated that the Commission has correctly applied his mind to allow inland transportation cost from 'Dahej' Port considering the restriction of transportation from the east coast ports.

15.3. The Commission notes that in its impugned Order while allowing normative transportation cost from the nearest seaport to Tiroda, it has recognised 'Dahej' as nearest port. The relevant extract of the ruling is as below:

> *2. Inter Plant Transferred coal consumed at Tiroda shall be billed at cost of imported coal cost parity on GCV equivalence basis* ***including normative in-land transportation cost from nearest sea-port (Dahej) to Tiroda****. While doing that, any Change in Law relating to taxes and duties paid earlier needs to be adjusted so as to ensure that there is no over or under recovery of Change in Law compensation.*

The Commission also notes that in other part of the impugned Order including while referring to submissions made by APML, the Commission has referred 'Dahej' as a nearest port to Tiroda.

15.4. However, as stated by MSEDCL, 'Dahej' is the farthest port for Tiroda Plant. The Commission notes that in its Petition in original proceeding in Case No. 132 of 2020, APML has stated about transportation cost as follows:

> *"36. In fact, MSEDCL in its letter dated 01.03.2019 has specifically acknowledged that IPT coal, which is actually utilized at Tiroda TPS is to be accounted at Mundra TPS. For calculation of change in law compensation, MSEDCL conceded that such calculation shall be made considering the imported coal utilized at Mundra TPS.* ***In view thereof, APML in its claims has considered the landed cost of imported coal at Tiroda TPS for IPT coal. Predominantly, the imported coal used at Tiroda TPS is Indonesian coal which comes to Dahej or Hazira or Vizag ports through sea and is then transported to Tiroda TPS through Indian Railways. Accordingly, APML has considered cost of imported coal up to sea port plus railway transportation cost from sea port to Tiroda TPS as landed cost of IPT coal.*** *The rationale behind such a claim is that in the absence of IPT coal from Mundra TPS, APML would have procured imported coal for Tiroda TPS and in-land transportation cost would have been payable on such imported coal."*

Thus, in its original petition, APML mentioned that imported coal used at Tiroda came to Dahej or Hazira or Vizag port and then transported to Tiroda through Rail. Accordingly, APML has considered transportation cost from seaport to Tiroda. However, which seaport (Dahej or Hazira or Vizag) was considered for claiming inland transportation was not clear in that Petition. APML has provided clarity on this aspect in subsequent submissions in that matter. APML in its notes for hearing dated 6 October, 2020 and written submission dated 6 November, 2020 filed in original proceeding in Case No. 132 of 2020 has stated that it has considered the transportation

cost in the invoice dated 6 October, 2018 from 'Vizag Port' which is nearest port to Tiroda Plant. Relevant extract of the submission is as follows:

Notes for hearing dated 6 October , 2020:

*4.7. APML in its claims [invoice dated 06.10.2018 (**@pgs. 451-505**)] has considered the landed cost of imported coal at Tiroda TPS for IPT coal, in terms of this Ld. Commission's NCDP order (**@pgs. 260-366**). **APML has considered cost of imported coal up to sea port (Vizag) plus railway transportation cost from sea port to Tiroda TPS as landed cost of IPT coal.***

*4.8. The rationale behind such a claim is that in the absence of IPT coal, APML would have procured imported coal for Tiroda TPS and in-land transportation cost would have been payable on such imported coal. **In fact, APML is seeking a much lower cost from MSEDCL qua transportation costs which ought to be considered as a prudent utility practice followed by APML** to provide reliable power to MSEDCL.*

Written Submission dated 6 November, 2020:

*"28. APML in its claims [invoice dated 06.10.2018 (**@pgs. 451-505**)] has considered the landed cost of imported coal at Tiroda TPS for IPT coal in terms of this Ld. Commission's NCDP order. Predominantly, the imported coal used at Tiroda TPS is Indonesian coal which comes to Dahej or Hazira or Vizag ports through sea and is then transported to Tiroda TPS through Indian Railways. **Accordingly, APML has considered cost of imported coal up to Vizag sea port (nearest port to Tiroda TPS) plus railway transportation cost from Vizag sea port to Tiroda TPS as landed cost of IPT coal."***

Thus, through its subsequent submissions in the original matter as reproduced above, APML had confirmed that inland transportation cost in the invoice dated 6 October, 2018 is considered from Vizag seaport which is nearest seaport to the Tiroda. In the same submission, APML has mentioned Sea Port and the same is substantiated in the pleadings that the coal was imported through ports other than Vizag also whenever there was a restriction on usage of Vizag port. APML had justified it by stating that *'APML is seeking a much lower cost from MSEDCL qua transportation cost'*.

15.5. Use of 'Vizag Port' as nearest port by APML in its invoice dated 6 October, 2018 has become more evident from APML's submission in present matter in reply to the Commission's query seeking breakup of components which led to increase in invoice dated 6 October, 2018. APML in its reply dated 8 July, 2021 stated that post issuance of impugned Order, it has revised invoice by using 'Dahej Port' as nearest port instead of 'Vizag Port' which led to increase in invoice dated 6 October, 2018 by Rs 381 crore.

15.6. However, APML in its reply to present review Petition has contended that the Commission has correctly considered 'Dahej Port' as nearest port after considering

difficulties as highlighted by APML in its original Petition for importing coal from east costs (Vizag Port). In this regard, the Commission notes that such difficulty in use of east coast seaports were highlighted to justify use of domestic coal under IPT scheme. Relevant part of impugned Order summarising APML's submission is reproduced below:

> *"5.5 There is no dispute that the usage of alternate coal must be done keeping in mind that there is lowest possible impact on the end consumers. IPT scheme was opted to ensure availability of full contracted capacity to MSEDCL keeping in view the consumers' interest and it conforms to the said mandate.* ***In this context it is also very important to inform that the IPT scheme has been opted by the APML mainly to overcome the technical constraints in operating the power plant with higher blend of imported coal and also to overcome the logistic constraints in the transportation of imported coal from east coast to Tiroda TPS. The generating Units of APML's Tiroda TPS are designed to operate with domestic coal. However, as the APML was forced to use more imported coal due to acute shortage in supply of linkage coal the equipment is subjected to heavy thermal stress and resulting frequent failures****. The sustained use of higher blend of imported coal would have caused serious damage to the Boiler and other main equipment.* ***The APML also faced huge difficulty even in making available imported coal to Tiroda TPS due to inadequate availability of railway rakes/wagons. In addition, there are also restrictions in vogue at that time to use east coast ports which are the nearest ports to Tiroda TPS. In view of the aforesaid reasons the APML had to opt for IPT coal to ensure uninterrupted and reliable supply to the state of Maharashtra*** *to the extent of the full contracted capacity under the PPAs.*

Considering above reasons, the Commission in impugned Order has recognised that use of IPT coal was prudent decision for reliable operation of Tiroda plant. Relevant part of impugned Order is reproduced below:

> *19.6. The Commission notes that APML in its submission has justified use of domestic coal under IPT scheme for reliable operation of its plant which is designed for operating the domestic plants. In case APML would have not opted for IPT coal, then in view of domestic coal shortfall prevailing at that point of time, imported coal would have been the only option. As per table shown above, use of imported coal instead of IPT coal would have not made any saving in cost but would have adversely impacted the performance of the plant due to thermal stress. Also domestic coal available in open market was limited and almost at equal rate as that of IPT coal. Therefore, in the opinion of the Commission, use of domestic coal under IPT scheme is prudent decision of the APML for reliable operation of its Tiroda plant. In fact as observed in subsequent part of the Order, if rate quoted for IPT coal in invoice dated 6 October 2018 is considered as final, then IPT coal may turnout to be cheaper than imported coal.*

Thus, difficulties in use of east coast ports highlighted by APML is to justify prudency of its decision to use domestic coal under IPT scheme, instead of use of higher quantity of imported coal which may have resulted into thermal stress on Tiroda plant.

15.7. As against APML's claim that the Commission in impugned Order has consciously considered 'Dahej Port' as nearest port to Tiroda plant, the Commission did not find any ruling in the impugned order justifying use of 'Dahej Port' as nearest port even though it is farthest port to Tiroda plant in terms of actual distance.

15.8. Further use of 'Dahej Port' as nearest port for computation of normative transportation cost has led to increase in invoice dated 6 October, 2018 which is against fundamental understanding that normative transportation cost is already included in invoice dated 6 October, 2018.

15.9. In view of the above, use of 'Dahej Port' as the nearest port to Tiroda Plant in impugned Order should be treated as typographical error. Same needs to be corrected by using 'Vizag Port' as nearest port whenever it was available and Dahej Port when Vizag port was not available due to restrictions by Railways.

16. Issue D: - Observation that Transfer of coal under IPT policy did not cross ACQ of Tiroda plant is contrary to MSEDCL submission.

16.1. MSEDCL contends that the Commission has erred in concluding that the transfer of IPT coal did not cross ACQ of Tiroda plant. On the face of records, it runs contrary to the factual submissions placed by MSEDCL in their reply. APML in their rejoinder had considered transfer of IPT coal against MoU. However, IPT policy allows transfer of coal against FSA only and not allowed against any other arrangements such as coal blocks or MoU.

16.2. The Commission has dealt with the issue in the Impugned Order. Relevant extract of the impugned Order is reproduced below:

21.5. Commercial settlement of IPT of coal more than allowed by M/s CIL:

a. MSEDCL has stated that till 5 October 2016, IPT of coal is limited to ACQ of transferee plant. But APML has transferred coal more than ACQ of Tiroda plant. Such higher amount of coal shall not be treated as IPT coal

b. APML has provided details to demonstrated that IPT of coal never cross ACQ of Tiroda plant till 5 Oct 2016. But after relaxation of such celling, IPT of coal crosses ACQ. Details submitted by APML in this regard are tabulated in para 5.28 above. APML stated that these details are submitted to MSEDCL vide letter dated 24 August 2020.

c. In this regard, the Commission notes that details of coal transferred under IPT scheme as summarised at para 5.28 above clearly demonstrated that till 5 October 2016, coal transfer did not cross ACQ of Tiroda plant. From 6 October 2016, as ceiling of ACQ has been removed by Coal India, transfer of coal crosses ACQ of plant. Same is in accordance with IPT scheme of Coal India. Hence, there is no merit in the contention of MSEDCL.

Para 5.28 of impugned Order referred in above para 'c' is reproduced below:

"5.28 Total coal lifted including IPT during the years 2014-15. 2015-16 & 2016-17 (upto Sept.'16) is within 4.91 MMT which is the ACQ under the FSA between Coal India Ltd. & APML. The IPT scheme was amended on 05.10.2016 and allowed IPT coal beyond ACQ of transferee plant. Therefore, the total quantity of coal lifted including IPT exceeds FSA quantum of 4.91 MMT and which is in accordance with the IPT scheme by Coal India Ltd. the details of which are given as below:

FY	***FSA with Coal India subsidiary***	***ACQ***	***Receipt Qty***	***IPT (FSA - FSA)***	***Total Lifting***	***% Lifting w.r.t. ACQ***
2013-14	*SECL - 1180 MW*	*49,10,000*	*37,30,643*	*3,83,554*	*41,14,197*	*83.79%*
2014-15		*49,10,000*	*39,41,482*	*5,81,803*	*45,23,285*	*92.12%*
2015-16		*49,10,000*	*39,63,326*	*6,37,006*	*46,00,332*	*93.69%*
2016-17 (Upto Sep16)		*23,07,700*	*21,70,371*	*1,18,561*	*22,88,932*	*99.18%*
2016-17 (Sep16 – Mar17)		*26,02,300*	*23,66,759*	*33,57,309*	*57,24,068*	*219.96%*
2017-18		*49,10,000*	*34,64,180*	*53,35,206*	*87,99,386*	*179.21%*
2018-19		*49,10,000*	*37,38,835*	*49,21,803*	*86,60,637*	*176.39%*
2018-19	*SECL -Shakti (Korba)*	*20,00,000*	*14,00,173*	-	*14,00,173*	*70.01%*
2018-19	*SECL -Shakti (Korea Rewa)*	*5,00,000*	*3,55,643*	-	*3,55,643*	*71.13%*
2018-19	*MCL -Shakti*	*6,00,000*	*5,67,630*	-	*5,67,630*	*94.61%*
2018-19	*WCL Shakti*	*27,46,000*	*24,73,131*	-	*24,73,131*	*90.06%*

16.3. From the above part of impugned Order, it is clear that transfer of coal under IPT was within ACQ of FSA for 1180 MW till 5 October 2016. Post September 2016, IPT policy itself allows transfer of coal beyond ACQ.

16.4. MSEDCL also contends that under the column heading 'IPT (FSA-FSA)', APML has considered coal under IPT against MoU also and hence percentage computed in last column is not correct. In this regard, the Commission notes that percentage is computed with reference to ACQ under FSA and actual coal received under IPT. Even if, alleged coal against MoU is excluded from column 'IPT (FSA-FSA)', it will reduce the percentage in last column and hence would be within prescribed limit of IPT Policy, beside the fact that coal India has issued such coal under IPT scheme and hence needs to be considered as IPT coal only. Hence, there is no error in the impugned Order on this aspect.

17. Issue E:- Inconclusiveness of the invoices not open for APML for any change at a later date.

17.1. MSEDCL contends that the observation of the Commission that since certain clarifications and disputes were raised by MSEDCL on some aspects of the invoices raised by APML on 6 October, 2018, therefore the said invoice has not attained finality and is inconclusive, without referring the said inconclusiveness be attributable only for MSEDCL and not for APML, had by liberal interpretation kept open the issue on the inconclusiveness of the invoices from the side of the Generators as well. It would be open for interpretation by the Generators to change the said invoice to their advantage even at a later date, merely because the same is inconclusive in terms of the PPA. This would set a bad precedent and would also eventually disturb the billing and payment modalities as agreed under the PPA, as a standard practice.

17.2. The Commission has dealt with the issue in detail in the Impugned Order. Relevant extract of the same is as below:

"17.4. In the present case, it is admitted fact that MSEDCL has not issued any 'Bill Dispute Notice' within 30 days of receipt of invoice dated 6 October 2018. However, it is also a fact that the said invoice was not a regular bill but it covered Change in Law compensation towards shortfall in coal supply for the period of FY 2013-14 to FY 2016-17. It is also important to note that post issuance of Order dated 7 March 2018 which allowed APML to raise claim for shortfall in coal supply, APML itself has taken 7 months to raise invoice.

17.5. Further, post issuance of invoice dated 6 October 2018, MSEDCL has been in continuous communication with APML for scrutiny of the claim raised. Above, chronology of event clearly establishes that within a month from date of invoice (6 October 2018), MSEDCL on 3 November 2018 sought coal data and other necessary documents for processing/scrutiny of invoice. Thereafter several correspondence and meetings between parties establishes the fact that they are continuously in discussion and exchanging data for computing compensation amount. In fact, said correspondence is still continued post filing of present Petition for adjudication of dispute.

17.6. In view of the above factual circumstances, in the opinion of the Commission, it would be unfair to treat invoice dated 6 October 2018 as conclusive just because MSEDCL has not issued 'Bill Dispute Notice' under relevant provisions of the PPAs.

17.7. As the parties through joint meeting are trying to resolve the differences and through this case, Commission is approached to resolve dispute relating to transportation cost on IPT coal, treating invoice dated 6 October 2018 as conclusive will make infructuous all these ongoing efforts of both parties. Hence, the Commission rules that invoice dated 6 October 2018 need not be treated as

conclusive under Article 11.6.1 or 8.6.1 of the relevant PPAs. Said invoice would be subject to change based on ruling on disputed issues in the present matter.

20.10 ***Even after allowing inclusion of normative in-land transportation cost, as confirmed by APML, there would not be any increase in cost claimed in invoice dated 6 October 2018 and hence MSEDCL's main contention that APML through email dated 4 January 2019 has sought revision in invoice on account of IPT coal will get addressed****."*

Thus, the Commission has observed that MSEDCL at the time of pleadings of original Petition raised the question about the conclusiveness of the invoice dated 6 October, 2018 as per APML's contention. The Commission after observing the chronology and continuous efforts and communication between parties to resolve dispute, concluded that though the notice of dispute has not been served by MSEDCL as per provisions under PPA, the invoice could not be treated as conclusive. At the same time, the Commission also noted APML's submission that normative in-land transportation cost is already included in invoice dated 6 October 2018 and hence issue of revising said invoice would not arise.

17.3. After making such clear observations on APML's invoice dated 6 October, 2018, it is not correct to seek review and again seek same direction/declaration to the effect that invoice dated 6 October, 2018 is final and conclusive. Hence, review sought on this aspect is needs to be rejected.

17.4. However, the Commission also notes the fact that post issuance of impugned Order, APML has revised said invoice on account of ruling in impugned Order and subsequent APTEL judgments. This is creating dispute between parties and delaying process of quantification and payment of claimed amount. To avoid such dispute, APML can treat invoice dated 6 October, 2018 as base and any impact of subsequent Order can be raised through another supplementary bill with detailed computation and justifications. Such approach will maintain the sanctity of invoice dated 6 October, 2018 and enable APML to raise differential impact of subsequent Order from any judicial forum. This approach will be in the interest of both parties and will assist in early quantification of claimed amount. The Commission directs both the parties to take action accordingly subject to judicial pronouncements on any contentious issue for which supplementary bill if required could be raised.

18. **Issue F:- Onus of opting for cheaper coal was put upon MSEDCL instead of APML**.

18.1. MSEDCL contends that the Commission in the impugned Order has put onus of opting for cheaper coal instead of usage of IPT coal upon MSEDCL instead of APML, whereas it is the obligation and the liability of the APML to avail the usage of the cheapest coal available and not the obligation of the procurer to determine cheaper coal, while considering the payment of the alternate coals so used. In terms of the PPA it is the obligation of the Generator to satisfy the Procurer about adopting the prudent practice

while opting for a particular alternate coal being the cheapest available coal at the relevant point in time, not the onus of the Procurer to look for the cheapest coal option.

18.2. The Commission has dealt with the issue in detail in the Impugned Order. Relevant extract of the same is as below:

> *20.15. Having ruled as above the Commission notes that although APML now has FSA for full capacity of the plant, it is still using coal under inter plant transfer. As imported coal causes thermal stress to its generating plant and the IPT coal is relatively costlier than other domestic coal sources (availability of which in recent years have increased substantially), it would not be prudent to continue use of IPT coal as an alternate coal if it is increasing cost of generation for Maharashtra consumers.* ***A balance has to be struck between making power available and the cost of the power that needs to be most economical. APML shall take all efforts to get maximum coal against FSA for Tiroda plant and if there is any shortfall, same shall be met through cheapest available source. After exhausting all efforts to source cheaper domestic coal, which shall be demonstrated transparently to the MSEDCL, APML may opt for IPT coal. In that situation also, recently the Ministry of Coal, Govt. of India, vide its OM dated 5 June 2020 addressed to CMDs of CIL and SCCL has laid down 'Methodology for rationalization of coal linkages / swapping of coal' which is applicable to private sector also and includes swapping of domestic as well as imported coal. Similar to IPT scheme, this coal swapping also envisages no changes in commercial terms of FSA and existing FSA holder will continue to pay for coal transfer under arrangement.*** *However, main differentiating factor is that this methodology of coal swapping mandates saving in transportation cost to be passed on to the respective Discom.* ***Provisions of PPAs require, APML to undertake prudent utility practices****. Opting for swapping of coal under methodology detailed in the aforementioned OM dated 5 June 2020 would save some expenses which can be transferred to end consumer. Therefore, the Commission directs APML to participate in swapping of coal and transfer saving to be accrued (which will be scrutinized and monitored by the Committee appointed by the Govt. of India) to consumers. APML shall complete this process within 6 months from the date of this Order, failing which any use of IPT coal would deemed to be commercially accounted at highest (but lower than IPT coal) domestic coal cost.*

Thus, the Commission in its detailed ruling has directed APML to take efforts for getting maximum coal under FSA and exercise its options for the shortfall if any through the cheapest available source notwithstanding APTEL Judgment dated 28 September, 2020 in Appeal No. 116 and 115 of 2019, wherein it is ruled that it is not required for APML to provide advance intimation / prior consent of MSEDCL for procuring IPT coal.

18.3. Thus, contrary to contentions of MSEDCL, the Commission has clearly put the onus of availing cheapest possible coal on APML. Hence, no review is warranted on this aspect.

19. Issue G:-Argument of APML that imported coal would have impacted the performance of the Plant due to the thermal stress is completely baseless and misleading plea

19.1. MSEDCL contends that APML has been using imported coal at its plant since beginning and APML had mentioned/considered use of imported coal in the bid itself. Therefore, the justification so rendered qua transfer of coal under IPT policy, because otherwise the imported coal would have impacted the performance of the Plant due to the thermal stress is completely baseless and misleading.

19.2. The Commission has dealt with the issue in detail in the Impugned Order. Relevant extract of the same is as below:

> *19.6. The Commission notes that APML in its submission has justified use of domestic coal under IPT scheme for reliable operation of its plant which is designed for operating the domestic plants. In case APML would have not opted for IPT coal, then in view of domestic coal shortfall prevailing at that point of time, imported coal would have been the only option.* ***As per table shown above, use of imported coal instead of IPT coal would have not made any saving in cost but would have adversely impacted the performance of the plant due to thermal stress****. Also domestic coal available in open market was limited and almost at equal rate as that of IPT coal.* ***Therefore, in the opinion of the Commission, use of domestic coal under IPT scheme is prudent decision of the APML for reliable operation of its Tiroda plant.*** *In fact as observed in subsequent part of the Order, if rate quoted for IPT coal in invoice dated 6 October 2018 is considered as final, then IPT coal may turnout to be cheaper than imported coal.*

Thus, in the impugned Order, the Commission has not only relied on issue of thermal stress but also analysed cost of various alternate sources of coal and then concluded that APML's decision of use of IPT coal was a prudent decision.

19.3. Thus, even if MSEDCL's contention that use of imported coal would not have created any thermal stress in Tiroda Plant is considered, then also on cost basis, the Commission in impugned order has found that use of IPT coal at that point of time was a prudent decision. Hence, review is not warranted on this aspect of the impugned Order.

20. The Commission notes that MSEDCL vide submission dated 18 June, 2021 has raised additional issues in computing change in law compensation and requested to clarify the same. APML has opposed such request of MSEDCL for clarification on these issues in review Petition and suggested that MSEDCL could file separate Petition for the same.

21. The Commission notes that the clarifications sought by MSEDCL are not the part of Original Petition. Review Petition itself has a limited scope and the clarifications sought by MSEDCL do not fall under review jurisdiction. APML has not filed its submission on these issues on the ground that such issues cannot be adjudicated in review

proceedings. In the absence of APML's submission, effective adjudication would not be possible on issues of dispute. Further, these issues seem to have arisen post issuance of impugned Order and hence needs to be adjudicated afresh under adjudicatory proceedings. Therefore, the Commission is not inclined to address the other clarifications sought by MSEDCL in present proceeding.

22. Notwithstanding above, the Commission is reproducing relevant part of its impugned Order dated 28 November, 2020 dealing with commercial accounting of the coal as below:

"19.7. The Commission also notes that CERC in its Order dated 31 May 2018 has ruled that under IPT scheme, for all commercial purposes, coal under FSA needs to be accounted for in the account of original plant and accordingly has ruled that domestic coal consumed at Tiroda plant under IPT scheme needs to be accounted at original plant i.e. Mundra plant. This decision of the CERC is based on Coal India's IPT scheme dated 19 June 2013 and 5 October 2016, ***hence this Commission does not find any reasons for deviating from the findings of the CERC on this aspect. Accordingly, once coal consumed at Tiroda is commercially accounted at Mundra Plant, then its obvious corollary is that coal consumed at Mundra Plant needs to be commercially accounted at Tiroda plant. As imported coal has been consumed at Mundra Plant, same needs to be commercially accounted for Domestic coal consumed at Tiroda plant under IPT scheme on GCV equivalence basis****. Same has been agreed between APML and MSEDCL as recorded in MSEDCL's letter dated 11 March 2020 for determining tentative impact of CERC Order dated 31 May 2018 as follows:*

……..

In the opinion of the Commission this is only possible option in this matter otherwise due to CERC Order, Mundra Plant would have to account for coal more than that has been consumed by it (i.e. actual imported coal consumed + commercial accounting of domestic coal consumed at Tiroda TPS under IPT Scheme)."

As per above ruling in the impugned Order, imported coal consumed at Mundra needs to be commercially accounted at Tiroda for IPT coal on GCV equivalence basis. Accordingly, APML needs to share details of imported coal consumed at Mundra with MSEDCL. Further, the Commission also likes to highlight its following observation in the impugned Order:

"22. Having ruled as above, the Commission notes that almost 2 years have lapsed from the submission of invoice dated 6 October 2018, but MSEDCL is still scrutinising the claims. Although, the Commission is aware of quantum of data to be scrutinised and availability of information from APML takes time, but it is difficult to justify period of 2 years taken for scrutiny process. ***MSEDCL and APML need to take joint effort to complete such scrutiny process at the earliest****. Recently Hon'ble APTEL has also issued judgments on computational issues on which APML has filed appeals.* ***Any further delay in scrutiny process is not in the interest of both parties. Therefore, the***

Commission directs APML to provide all required data to MSEDCL within a month from issuance of this Order and MSEDCL to complete the scrutiny of claim within 2 months thereafter.”

In view of above directives in the impugned Order, MSEDCL and APML need to sit together for reducing difference of opinion, discrepancies, data/document requirement etc. so that further delay in quantification of claims could be avoided.

23. Hence, the following Order.

ORDER

1. **Case No 9 of 2021 is partially allowed.**

2. **Adani Power Maharashtra Ltd is directed to consider the normative inland transportation cost from the applicable port as per para 15.9 above in respect of IPT coal for claim computation.**

Sd/-	**Sd/-**
(Mukesh Khullar)	**(I.M. Bohari)**
Member	**Member**