BEFORE THE HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA

Review Petition No. 6 of 2023
IA No. 11 of 2023

Date of Hearing	**:**	**08.09.2023**
Date of Order	**:**	**11.09.2023**

IN THE MATTER OF:
Review Petition under Section 94 (1) (f) of Electricity Act, 2003 ("Act") read with Regulation 57 of Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2019 seeking review of the Order dated 14.11.2022 in PRO-57/2022 passed by this Hon'ble Commission.

Petitioner (Review Applicant)
Haryana Power Generation Corporation Limited (HPGCL)

Respondent
Haryana Power Purchase Centre, Panchkula (HPPC)

Present on behalf of the Petitioner
1. Shri Tabrez Malawat, Advocate

Quorum

Shri R.K. Pachnanda	**Chairman**
Shri Naresh Sardana	**Member**

ORDER

Brief Background of the case

1. The present petition has been filed by Haryana Power Generation Corporation Limited (HPGCL) seeking review of order dated 14.11.2022 (Petition no. 57 of 2022) with HPPC (representing UHBVNL and DHBVNL) as the respondent.

2. **The petitioner (HPGCL) has submitted as under: -**

Limitation Period:

2.1 That the present review petition has been filed with a delay of 175 days, with a prayer for condonation of delay.

2.2 That the delay was neither deliberate nor intentional but was on account of various uncontrollable factors, as detailed below: -

a) That the impugned order was uploaded on the website on 14.11.2022, and after undertaking the analysis of the same, the relevant team within the applicant company dealing with the present matter had on 18.11.2022 apprised the appropriate management and technical team with respect to the contents and implications of the impugned order in order to decide and deliberate upon the appropriate way forward.

b) That there were various rounds of meetings held between the management and other relevant personnel of the applicant company for conducting internal discussions and deliberations with respect to the issues arising from the impugned order and the appropriate legal recourse to be taken in order to rectify the same. Accordingly, a preliminary analysis of the impugned order was formulated and for purpose of taking a view on the same, matter was forwarded on 19.11.2022 to the Government of Haryana for way forward guidance and its approval.

c) That there were various around of discussions within the Government of Haryana from 19.11.2022 to 29.05.2023. After thorough and detailed discussion amongst the various senior officials of the Government of Haryana, on 02.05.2023, it was decided to seek legal opinion on the issues arising from the operation of the impugned order, in order to take an informed decision on the appropriate way forward. Accordingly, such legal opinion was received on 11.05.2023 suggesting that the applicant company may approach this Hon'ble Commission seeking review of the impugned order to the extent of the highlighted issues in the said legal opinion.

d) That the aforesaid legal opinion received from the LR/HPU was circulated among the members of the senior management for individual appraisal and comments. It is a matter of fact that the legal opinion required the approval of each individual member of the senior management of the Government of Haryana before any actionable steps could be taken by the applicant. As such, on 29.05.2023, worthy ACS, Energy, Government of Haryana while taking note of the legal opinion, accented to the way forward provided in the legal opinion for filing a review petition before this Hon'ble Commission.

e) That consequent to the aforesaid, the applicant took the necessary steps to identify and engage the appropriate legal counsel for taking the necessary steps forward. The legal counsel was accordingly engaged on 05.06.2023 and a preliminary draft of the review petition was accordingly sought by the applicant. As such, the first draft of the review petition was circulated by the office of the legal counsel on 11.06.2023 for comments and modifications.

f) That consequent to receipt of the preliminary draft, the same was reviewed and deliberated upon by various levels of the management of the applicant company. As such, there was a delay caused due to the time taken in reviewing and receiving comments from various upper-level management personnel of the applicant.

g) That on 12.06.2023, after receiving the comments, the same was communicated to the legal counsel for undertaking appropriate revisions in the draft of the review petition. As per the comments, revised draft was sent back to the applicant company on 13.06.2023 for review and finalization. Subsequently, the draft was reviewed once

again and final deliberations were held between the management of the applicant company and its legal counsel regarding various finer technical details and submissions. Such deliberations were concluded by 15.06.2023.

h) That thereafter, after receiving instruction on the final draft, the legal counsel of the applicant commenced taking the steps towards finalization of the petition and necessary preparations for filing of the same before this Hon'ble Commission. Accordingly, the applicant has filed the present review petition with a delay of 175 days.

2.3 That this Hon'ble Commission has on previous occasions condoned inadvertent delays in complying with the prescribed limitation period for filing of review petitions by taking a liberal approach for advancing the cause of justice [HERC/RA-16 of 2019; HERC/RA-03 of 2019; HERC/RA-04 of 2012; HERC/RA-08 of 2012; HERC/RA-11 of 2013; HERC/RA-30 of 2013].

GROUNDS:

2.4 That the Ministry of Power, Government of India, vide various orders dated 07.12.2021, 28.04.2022, 13.05.2022, 18.05.2022 had highlighted the post covid surge in demand for electricity throughout the country and the consequential need for the thermal power plants to maximize their generation capacities in order to meet the demand. As a natural consequence, the state governments and electricity commissions were directed to ensure that the state generating companies operating on domestic coal were mandatorily importing and blending imported coal at the rate of 10% in order to maximize their generation capacity.

2.5 That the generating companies, including the petitioner herein, were also directed to ensure the 10 % blending of imported coal. It may also be noted that the said orders of the Ministry of Power provided for various sanctions, such as reduction in coal allocation from domestic sources and increase in percentage of imported coal which need to be blended along with the domestic coal in event of non-compliance.

2.6 That the binding orders of the Ministry of Power for the mandatory import and blending of coal qualified as a "Change in Law" event and uncontrollable factors as per the relevant statutory provisions and accordingly, the review petitioner was at liberty to initiate the procurement and blending of imported coal and consequently recover the cost incurred through appropriate methods without seeking approval of this Hon'ble Commission. Despite the same, this Hon'ble Commission directed the review petitioner to seek approval by way of appropriate petition in order to continue blending the imported coal and to recover the necessary costs.

2.7 That pursuant to the above, the review petitioner preferred a petition seeking approval for blending of imported coal, declaration of the orders of the Ministry of Power as a "Change in Law" event and provide necessary consequential reliefs in lieu of the adverse financial impact upon the review petitioner. However, vide the impugned order, this Hon'ble Commission failed to recognise the aforesaid orders of the Ministry of Power as a "Change in Law" event.

2.8 That in view of above, present review petition has been filed seeking review of the impugned order and directions of this Hon'ble Commission in the interest of justice and equity, *inter alia*, on the following grounds: -

a) That this Hon'ble Commission accorded an erroneous and misplaced interpretation of the MoP orders dated 28.04.2022, 13.05.2022 and 18.05.2022 by wrongly relying upon the MoP letter dated 26.05.2022 and opining that "*the said notifications are not binding on the State Gencos, since the directions under Section 11 of the Electricity Act, 2003 dated 26.05.2022 was issued to the generating companies having domestic coal based plants supplying electricity under Section 63 of the Electricity Act, 2003*." By according such interpretation, this Hon'ble Commission has grossly disregarded the fact that the MoP letters dated 28.04.2022, 13.05.2022 and 18.05.2022 were binding directions to all the state Gencos and IPPs operating on domestic coal with regards to mandatory blending of imported coal and had further laid down the penalties that would become applicable upon such generating plants in the event of non-compliance with such express and binding directions.

b) That MoP letter dated 26.05.2022 was issued in continuation of the earlier orders to notify the methodology put in place for the recovery of costs incurred for blending of imported coal specifically for domestic coal-based generating plants supplying electricity under Section 63 of the Act. However, nothing contained in the said letter could be interpreted to mean that the express and binding directions issued by the earlier orders would cease to be applicable on generating stations that were not supplying electricity under Section 63. The letter dated 26.05.2022 merely notified a specific methodology for the generating plants supplying power under Section 63, but the mandate to blend imported coal as notified by the MoP vide its earlier orders continued to be applicable and binding upon all the generating plants operating on domestic coal, regardless of whether such plants were supplying electricity under Section 62 or 63 of the Act.

c) That the recall of the MoP letter dated 26.05.2022, vide its subsequent letter dated 11.08.2022 did not affect the review petitioner, who continued to be bound by the directions of the MoP vide its earlier orders to mandatorily blend a specified quantum of imported coal for maximizing generation capacity without putting undue stress on

the domestic coal stock in order to match the increased power demand in the state of Haryana.

d) That this Hon'ble Commission has erred in failing to classify the express and binding directions of the MoP vide its letters dated 07.12.2021, 28.04.2022, 13.05.2022 and 18.05.2022 as a Change in Law event and grant consequential reliefs to the review petitioner. The Regulation 3.20 of the HERC MYT Regulations 2019 read with the definition provided under the PPA, provides that the mandatory directions upon the review petitioner to ensure importing and blending of such coal as per the stipulated quantity in order to maximize generation capacity were statutorily binding upon the review petitioner. The PPA defines "Law" as any directive, order or notification issued by a competent legal authority and a Change in Law event would include the enactment or promulgation of any such new law pursuant to the execution of the PPA. Accordingly, the review petitioner was under a statutory obligation to comply with the aforesaid directions as the same were binding upon it.

e) That once the Hon'ble Commission has arrived at the conclusion that review petitioner need to be compensated for the blending of the coal as a natural corollary of the same, it becomes incumbent and extension of the said relief to hold and declare that MoP Orders are Change in Law event.

f) That this Hon'ble Commission, while failing to declare the MoP directives as a Change in Law event and providing consequential reliefs to the review petitioner has acted in contravention of the law laid down by the Hon'ble Supreme Court vide the following precedents: -

i) The Hon'ble Supreme Court in the matter of ***Energy Watchdog v. Central Electricity Regulatory Commission*** [2017 (14) SCC 80] while dealing with a letter dated 31.07.2013 issued by the MoP to the Central Commission categorically held that such letter being in the nature of a direction / order to the Central Commission would constitute a statutory document being issued under Section 3 of the Act and accordingly possess the force of law.

"***56****. However, insofar as the applicability of Clause 13 to a change in Indian law is concerned, the respondents are on firm ground. It will be seen that under Clause 13.1.1 if there is a change in any consent, approval or license available or obtained for the project, otherwise than for the default of the seller, which results in any change in any cost of the business of selling electricity, then the said seller will be governed under Clause 13.1.1.* ***It is clear from a reading of the Resolution dated 21-06-2013, which resulted in the letter of 31-7-2013, issued by the Ministry of Power, that the earlier coal distribution policy contained in the letter dated 18-3-2017 stands modified as the***

Government has now approved a revised arrangement for supply of coal. It has been decided that, seeing the overall domestic availability and the likely requirement of power projects, the power projects will only be entitled to a certain percentage of what was earlier allowable*. This being the case, on 31-7-2013, the following letter, which is set out in extenso states as follows:*

57. Both the letter dated 31-7-2013 and the revised Tariff Policy are statutory documents being issued under Section 3 of the Act and have the force of law. *This being so, it is clear that so far as the procurement of Indian coal is concerned, to the extent that the supply from Coal India and other Indian sources is cut down, the PPA read with these documents provides in Clause 13.2 that while determining the consequences of change in law, parties shall have due regard to the principle that the purpose of compensating the party affected by such change in law is to restore, through monthly tariff payments, the affected party to the economic position as if such change in law has not occurred. Further, for the operation period of the PPA, compensation for any increase/decrease in cost to the seller shall be determined and be effective from such date as decided by the Central Electricity Regulatory Commission.* ***This being the case, we are of the view that though change in Indonesian Law would not qualify as a change in law under the guidelines read with the PPA, change in Indian law certainly would****."*

ii) Further, in the matter of ***Jaipur Vidyut Vitran Nigam Limited v. Adani Power Rajasthan Limited*** [2020 SCC Online SC 697], the Hon'ble Supreme Court while relying upon the ratio of the Energy Watchdog (*supra*) matter reiterated that a change in the policy with respect to the methodology of obtaining coal as determined in the existing PPA by way of a directive or order of the competent authority would classify as a Change in Law event and would entail consequential reliefs to be provided to the affected parties. [***paras 59 – 60***]

iii) The Hon'ble Supreme Court, in the matter of ***Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited*** [2023 SCC Online SC 233], had dealt with the issue of acquiring alternative sources of fuel in order to meet the shortfall in supply of domestic linkage coal mandated by a letter / order / directive issued by a competent governmental authority. In such case, the Hon'ble Apex Court was of the view that a claim from the appellant therein for compensatory framework was valid considering the fact that the directives issued for procuring alternative fuel sources. It was further opined that the state commission or the distribution companies were

not in a position to contradict the express directions and stand taken by the government and accordingly allowed for the pass through of costs incurred due to such Change in Law event. [***paras 132, 136***]

iv) A similar factual and legal issue as above was dealt with by the Hon'ble Supreme Court in the matter of ***GMR Warora Energy Limited v. Central Electricity Regulatory Commission*** [2023 SCC Online SC 464]. It was held that a notification issued by the Ministry of Environment and Forest mandating power projects to use beneficiated coal with ash content lower than 34% would amount to Change in Law. The Hon'ble Supreme Court categorically held that a Change in Law is an instrumentality of the state. Reliance was also placed upon the aforesaid ratio in the matter of MSEDCL v. AMPL (*supra*) as well as Energy Watchdog (*supra*).

"***MoEF Notification on Coal Quality***

107. *Insofar as MoEF notification on coal quality is concerned, the MoEF, vide notification dated 2nd January 2014, i.e., subsequent to the particular cut-off date, i.e., 1st June 2012, has mandated power projects to use beneficiated coal with as content lower than 34%. The draft notification of MoEF dated 11th July 2012 culminated into the final Notification dated 2nd January 2014. By no stretch of imagination, can it be said that MoEF is not an instrumentality of the State.*

108*. By the said Notification, MoEF has mandated power projects to use beneficiated coal with ash content lower than 34%. Admittedly, prior to the cut-off date, the same was not a requirement.* ***It is thus clear that the said Notifications dated 11th July 2012 and 2nd January 2014 would amount to "Change in Law". As such, no fault can be found with the finding of the learned APTEL that the same would amount to 'Change in Law'****.*

Shortfall in Linkage Coal due to Change in NCDP

109. *Insofar as shortfall in linkage coal due to changes in the NCDP issued by the Ministry of Coal ("MOC" for short) is concerned, the issue is no more res integra. This Court in the case of Energy Watchdog (supra) so also in Adani Rajasthan case (supra) and recently in MSEDCL v. APML (supra) has held that the change in NCDP would amount to 'Change in Law'.*

Evacuation Facility Charges (EFC)

112. *Undisputedly, EFC was imposed by CIL vide its Circular dated 19th December 2017.*

113. *As already discussed hereinabove, CIL is an instrumentality of the State. It is thus clear that, on the cut-off date, there was no requirement of EFC,*

which has been brought into effect only on 19th December 2017. ***As such, the circular of CIL dated 19th December 2017 would also amount to 'Change in Law'****.*

114. *As discussed hereinabove, it is also not in dispute that EFC has been paid by the generators while paying the base price, other charges and statutory charges at the time of delivery of coal. As such, no interference would be warranted with the said finding.*"

v) The Hon'ble Appellate Tribunal for Electricity ("APTEL") in the matter of ***Rattan India Power Limited v. Maharashtra Electricity Regulatory Commission*** [Appeal No. 118 of 2021], while placing reliance upon the ratio of the Hon'ble Apex Court in Energy Watchdog (*supra*) and in the matter of ***Kusum Ingots & Alloys v. Union of India*** [(2004) 6 SCC 254] held as follows:

"***9.*** *It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law.* ***In Energy Watchdog & Ors. (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the "force of law"****. Similarly, in Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as "law".* ***That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77 (3) of the Constitution of India was accepted by this tribunal in GMR Kamalanga Energy Ltd. (supra)***"

g) That this Hon'ble Commission ought to have considered that the MoP, being a governmental instrumentality and being a statutory authority within the meaning of the Act and otherwise, its allied regulations as well as the PPA had passed a directive / order / notification which was binding upon all thermal power Gencos to blend imported coal as per the stipulated quantum in order to meet the increased power demand across the country. As such, the review petitioner was statutorily bound to follow the directions of the MoP letters dated 07.12.2021, 28.04.2022, 13.05.2022 and 18.05.2022. Accordingly, the review petitioner took the necessary steps to effectuate compliance with the aforesaid directions by way of acquiring the necessary approvals of the SCPP and the SHPPC as well as sufficiently apprise and coordinate with HPPC to discuss and finalize the mode and modality of raising the necessary FPA bills in lieu of such imported coal. Further, the review petitioner placed purchase orders upon

M/s Mohit Minerals for sourcing the specified quantum of imported coal. Therefore, it is made clear from the fact and circumstances as well as the aforesaid judicial precedents laid down by the Hon'ble Apex Court that the MoP letters constitute a Change in Law event and accordingly, the review petitioner is entitled to receive consequential reliefs in lieu of the same.

h) That the MoP, vide its letter dated 18.05.2022, had categorically laid down the penalties that would be imposed upon the thermal power Gencos for non-compliance with its earlier orders regarding mandatory blending of stipulated quantum of imported coal. Notably, had the review petitioner not taken proactive steps to ensure prompt compliance with such orders, as per MoP letter dated 18.05.2022, the review petitioner would be constrained to blend a higher quantum of imported coal as a penalty. Such an event would have been ultimately detrimental to the overall domestic coal stock and would further increase the total cost incurred towards importing and blending of such coal, consequently increasing the burden upon the end consumer by way of higher tariff. Therefore, it is clear that such alteration in cost to be incurred by the thermal power Gencos in the state of Haryana owing to the operation of the MoP directives qualifies as an 'uncontrollable' item within the meaning of Regulation 8.3.8 of the HERC MYT Regulations 2019. Considering the same, this Hon'ble Commission ought to appreciate the prompt and timely steps taken by the review petitioner to avoid incurring penalties and unnecessarily increasing the overall cost incurred and accordingly pass through the actual expenses borne by its thermal power plants towards blending of imported coal as a Change in Law event.

2.9 The following prayers have been made: -

i) Review/modify the order dated 14.11.2022 passed by this Hon'ble Commission in PRO-57/2022 in light of the submissions made in the present review petition and accordingly, declare and hold that directions dated 07.12.2021, 28.04.2022, 13.05.2022 and 18.05.2022 issued by the Ministry of Power, Government of India are change in law events; and

ii) Pass any other such order as this Hon'ble Commission may deem fit in the facts and circumstances of the present case.

Proceedings in the Case

3. The case was heard on 08.09.2023, wherein Shri Tabrez Malawat, the learned counsel appearing on behalf of petitioner, mainly reiterated the contents of the review petition, which for the sake of brevity has not been reproduced again.

Commission's Order

4. The Commission has heard the arguments as well as perused the written submissions placed on record by the petitioner.

5. The Commission has perused the judgements filed by the petitioner and observes that the Hon'ble Appellate Tribunal for Electricity ("APTEL") in the matter of ***Rattan India Power Limited v. Maharashtra Electricity Regulatory Commission*** [Appeal No. 118 of 2021], while placing reliance upon the ratio of the Hon'ble Apex Court in Energy Watchdog (*supra*) and in the matter of ***Kusum Ingots & Alloys v. Union of India*** [(2004) 6 SCC 254] held as follows:

"***9.*** *It is incorrect to argue that to be covered as a change in law event under such contractual clauses as quoted earlier, the instrument whereby the law is claimed to have undergone a change must have been published in official gazette to have the force of law.* ***In Energy Watchdog & Ors. (supra), for illustration, even a letter of the Ministry of Power in the Government of India was accepted as an instrument having the "force of law"****. Similarly, in Kusum Ingots & Alloys v. Union of India (2004) 6 SCC 254 executive instructions without any statutory backing were also considered as "law".* ***That Coal India is Government instrumentality and the notifications, circulars, etc. issued by it have a force of law under Regulation 77 (3) of the Constitution of India was accepted by this tribunal in GMR Kamalanga Energy Ltd. (supra)***".

6. In view of the above judgement, the Commission has considered it appropriate to review/modify its impugned order dated 14.11.2022 (Petition no. 57/2022) to hold that directions dated 07.12.2021, 28.04.2022, 13.05.2022 and 18.05.2022 issued by the Ministry of Power, Government of India are change in law events.

7. The present petition is disposed of as such.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 11.09.2023.

Date: 11.09.2023	(Naresh Sardana)	(R.K. Pachnanda)
Place: Panchkula	Member	Chairman