

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 20 of 2022
Alongwith IA No. 13 of 2022
Date of Order: 11.01.2023

Petition Under Section 86(1)(f) of the Electricity Act, 2003 read with Clause 1.10.1 of the Punjab State Grid Code as well as applicable provisions of the Power Purchase Agreement dated 01.09.2008 executed between the Petitioner and the Respondent Inter Alia seeking declaration that the non-availability of coal is due to failure of the Respondent No. 1 to fulfill its obligation to arrange adequate quantity and assured quality of coal; the findings and decision of the Respondent No. 3, as recorded in paragraph 1 of the minutes dated 22.12.2021 of the 26th Meeting held on 23.11.2021 are unlawful, arbitrary, bad in law; and consequential reliefs thereof

AND

In the matter of: Talwandi Sabo Power Limited, Village Banawala, Talwandi Sabo Road, Mansa, Punjab- 151302.

..Petitioner

Versus

1. Punjab State Power Corporation Limited, PSEB Head office, The Mall, Patiala, Punjab-147001.
2. Punjab State Load Despatch Centre, Ablowal, Patiala, Punjab-147001.
3. Commercial and Metering Committee, Chief Engineer/SLDC, Ablowal, Patiala, Punjab-147001.

....Respondents

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

Petitioner: Sh. Aniket Prason, Advocate

PSPCL: Ms.Poorva Saigal, Advocate

SLDC: Sh. VikasChatrath, Advocate

ORDER

1. Talwandi Sabo Power Limited (TSPL) is running a 1980 MW (3X660 MW) Thermal Power Plant at Talwandi Sabo, District Mansa, Punjab and has filed the present petition seeking consideration of deemed capacity for year 2021-22 corresponding to its technical availability of 75.74% and consequent payment of capacity charges to the tune of approx Rs. 143.65 crore along with late payment surcharge on thereof. The petitioner also filed IA Nos. 13 & 14 of 2022; seeking to restrain PSPCL from taking any coercive action in the matter and for urgent listing of the Petition, respectively.
2. On mentioning of the matter by the Ld. Counsel of the Petitioner during hearing of the petitions on 04.05.2022 the instant petition was fixed for hearing on admission on 05.05.2022 and I.A. No. 14 of 2022 stood disposed of accordingly. In a reference to the interim relief claimed by the petitioner for restraining PSPCL from taking any coercive action pending the petition, the Ld. Counsel for PSPCL submitted that PSPCL will not recover any penalty from the petitioner for availability below 75% till 31.05.2022. Further, in the hearing held on 31.05.2022, on reiteration by TSPL that PSPCL may be restrained from taking any coercive action against TSPL, PSPCL's counsel submitted that PSPCL has not issued any notice so far for the recovery and thus no coercive action is in the pipeline. These observations were recorded in the interim order of the Commission with reference to IA No. 13 of 2022.

3. Submissions of TSPL

TSPL has submitted that:

- 3.1 The bidding process of the project was conducted under Case 2 Scenario 4 of the competitive bidding guidelines. In terms of Clause 3.2(I) of the guidelines; PSPCL is responsible for fuel arrangement.

On 08.05.2008, a pre-bid conference with the bidders was held wherein it was informed that MCL by way of its letter dated 28.04.2008 has agreed to supply 7.70 MT Coal of E Grade (i.e., coal with GCV 4500-4600 kcal/kg and ash content of 33-34%). The same was further reiterated vide its email dated 12.06.2008. Based on the said assurance, the petitioner submitted its bid and was declared as successful bidder by way of Lol dated 04.07.2008 calling upon it to acquire 100% shareholding of the TSPL. Thereafter, TSPL and PSEB (now PSPCL) entered into a PPA dated 01.09.2008. In the meantime, MCL issued LoA dated 14.08.2008 to TSPL for supply of 7.72 MT of E/F grade coal, in place of the originally stated Grade E. Thus, there has been a misrepresentation by PSPCL in terms of the quantity and quality assured at the pre-bid stage. Post signing of PPA, the parties herein contested their rights and obligations concerning the execution of FSA and obligation related to procurement of coal for the project. Pursuant to the Commission's Order dated 27.09.2012 in petition no. 11 of 2012 and APTEL's interim Order dated 18.04.2013 in appeal no. 84 of 2013, a FSA dated 04.09.2013 was executed by TSPL with MCL, subject to outcome of the appeal, to firm up supply of ACQ of 7.72 MTPA coal required for generation. Despite the execution of FSA, due to the reason that the linkage with the quality of coal being supplied was only sufficient to ensure generation of around 54% of the contracted capacity, the project was bound to face continued shortfall of coal as inevitably there remains an inherent shortfall in supply of coal. The Commission vide its Order dated 11.02.2014 in petition 60 of 2013 appointed a "Standing Committee on TSPL project" to resolve day to day issues with regard to shortfall in coal. However, despite proactive steps being taken to ensure sufficient coal for optimum

generation of electricity from the project inter-alia in terms of constitution of the Standing Committee, the project continues to face shortfall in supply of coal.

3.2 APTEL, vide its judgment dated 07.04.2016 in Appeal nos. 56 & 84 of 2013, set aside the Commission Order in petition nos. 46 & 11 of 2012 and has held that PSPCL is under obligation to sign FSA with MCL and it cannot be absolved of its obligation to supply fuel to the appellant for its power generating station. PSPCL filed a Civil Appeal No. 4085-4086 of 2016 before Supreme Court challenging the said judgment. The Supreme Court vide its order dated 02.05.2016 admitted the appeal, but declined to grant stay of the operation of APTEL judgment dated 07.04.2016 and further observed that in context of the issue of short payment of dues by PSPCL under the PPA, the counsel of PSPCL has given an undertaking that PSPCL will pay the energy charges which include the fuel charges as per the PPA. The Civil Appeal is pending for adjudication, however the undertaking given by PSPCL continues, as recorded by Supreme Court in its order dated 12.07.2016. Thereafter, APTEL in its judgment dated 19.07.2021 in Appeal No. 220 & 317 of 2019 reaffirmed PSPCL's obligation of arranging adequate quantity & quality of coal as held earlier in judgment dated 07.04.2016 and directed PSPCL to make payment of deemed capacity charges to TSPL on the basis of technical availability declared by TSPL.

3.3 However, during the Contract Year 2021-22, even though the Project of the Petitioner was technically available to the tune of 75.74%, PSPCL failed to fulfill its obligation and the Petitioner suffered shortfall in supply of the required quantum of coal to operate the Plant corresponding to its technical availability. Even the steps taken by

TSPL to ensure adequate supply of coal, in the interest of the Project and the consumers of Punjab, could not materialize due to the following reasons, which were beyond the control of TSPL and are not attributable to TSPL:

- (a) Supply of substandard/low quality coal by MCL, and lesser materialization of the coal allocated to TSPL;
- (b) Failure of PSPCL and the Standing Committee on TSPL Project to grant timely approval for procurement of coal from alternate sources;
- (c) Shortage of Empty Rake Supplies from Indian Railways and Non-availability of coal rakes due to MoP's office memorandum dated 28.08.2021 constituting a Core Management Team for monitoring supply of coal to TPPs, whereby it was provided that coal supply to Thermal Power Plant having coal stock of more than 14 days' requirements, will be reduced/stopped for the next 7 days;

That the aforesaid events resulting in shortage /materialization of coal and thereby impacting the ability of TSPL to generate electricity were duly highlighted by TSPL to PSPCL/CIL/Railways from time to time, by way of various letters. The same were also duly acknowledged by PSPCL vide various letters issued to the concerned government authorities to try and ensure that the difficulties faced by TSPL on account of shortfall of coal can be resolved. Even the Government of Punjab intervened in the matter and issued letters dated 25.09 2021 and 23.02.2022 to various stakeholders urging them to ensure adequate coal supply for TSPL's Project. Thus, it is abundantly clear that all stakeholders, particularly PSPCL, were duly informed about the issues causing acute shortage of coal and impacting the ability of the Project to generate electricity to meet the demand in the State of

Punjab. However, PSPCL not only failed to fulfil its obligation to arrange adequate quantity and quality of coal but also did not grant permission to TSPL to arrange coal from alternate sources. Despite repeated requests from TSPL only three meetings of the 'Standing Committee on TSPL Project' were held during the Contract Year 2021-22 (i.e., on 06.09.2021, 29.12.2021, and 09.03.2022) and even during the said meetings, no approval was granted to TSPL for procurement of imported/alternate coal for the Contract Year 2021-22. It was only during the meeting of the Standing Committee on TSPL Project on 29.12.2021 that TSPL was inter alia allowed to float tender for 10 Lac ton of imported coal that too only for the purpose of rate discovery, with vague statements on approval for procurement of the same upon discovery of prices.

3.4 Due to the reason that the obligation to arrange adequate quantity and assured quality of coal was that of PSPCL, TSPL in its invoices for the relevant period (22 to 26.10.2021 and December 2021 to March 2022) claimed Capacity Charges for its technical availability, despite TSPL being constrained to declare lesser operational DC. However, PSLDC while preparing the SEAs for the said period disregarded the DC as declared by TSPL. Consequently, PSPCL, by taking advantage of its own failure to fulfill its obligation, has withheld payment of deemed capacity charges from the invoices raised by TSPL for the said period to the tune of approx. Rs. 143,65,70,535/- (Rupees One Hundred Forty Three Crores Sixty Five Lakhs Seventy Thousand Five Hundred Thirty Five Only).

3.5 TSPL vide its letters dated 10.01.2022, 07.02.2022 and 09.04.2022 objected to the SEAs issued by PSLDC for the period from December 2021 to March 2022 highlighting that PSLDC has failed to consider

the DC as declared by TSPL. TSPL vide the aforesaid letters duly informed PSLDC that in light of Hon'ble APTEL's judgments dated 07.04.2016 and 19.07.2021 respectively, it is PSPCL's obligation to arrange adequate quantity and assured quality of coal and any loss on account of less generation from the Project due to coal shortage is solely to the account of PSPCL. Accordingly, TSPL vide its aforesaid letters called upon PSLDC to upload the DC as declared by TSPL on its website and correct the SEA. However, PSLDC vide its letters dated 11.01.2022 and 13.04.2022 called upon TSPL to settle the issues regarding non-availability of coal with PSPCL and did not consider the DC as declared by TSPL.

3.6 That TSPL's Project was facing operational hurdles on account of one Unit of TSPL's Project which had to be shut down, due to which TSPL could only achieve availability of 75.74%. PSPCL vide its letters dated 29.07.2021, 20.08.2021, 12.08.2021 and 06.09.2021 requested TSPL to bring the 3rd Unit (i.e., Unit-1 of the Project) also into service to meet the power requirement of PSPCL.

3.7 That, despite TSPL taking all prudent steps and making Unit 1 of Project (which was facing high turbine vibration) ready for synchronization on 11.09.2021, PSLDC did not grant permission for synchronization of the same until 06.10.2021, resulting in Unit 1 remaining in Reserve Shut Down mode. Unit 1 of the Project was kept under Reserve Shut Down by PSPCL and PSLDC until 06.10.2021, under the garb of low coal stock available with TSPL which is nothing but a farce as the coal stock at the Project on 06.10.2021 was less than the coal stock at the Project on 12.09.2021. Despite the above and the categorical admission of PSLDC vide its email dated 12.09.2021, the Declared Capacity/Availability of the Project

considered and recorded by PSLDC was not in line with the DC/Availability declared by TSPL.

3.8 That TSPL vide its letters dated 16.10.2021 and 08.11.2021 requested PSLDC to act in accordance with the mandate of the Electricity Act and the Punjab Grid Code by correcting the final SEA for the months of September and October 2021, respectively, by recording the technical availability declared by TSPL as the Declared Capacity. However, PSLDC did not accede to TSPL's request and vide its letters dated 19.10.2021 and 09.11.2021 for the month of September and October, 2021 respectively, stated that issues with respect to non-availability of coal may be taken up with PSPCL and disputes with respect to SEA, if any, can be referred to the CMC. Accordingly, TSPL vide its letters dated 27.10.2021 and 13.11.2021 requested for scheduling a meeting of the CMC in order to resolve the aforesaid issue and ensure revision of the SEA for the months of September and October, 2021. A meeting of the CMC was held on 23.11.2021, wherein TSPL raised the issue of correction of the SEAs for September -October 2021; however, the CMC decided to not revise the SEAs.

3.9 TSPL vide letter dated 11.01.2022 objected to the CMC's decision to not revise the Final SEA for September-October 2021 and requested CMC to reconsider the detailed submissions made by TSPL and revise the SEA for September 2021 and October 2021 considering the availability declared by TSPL. Another meeting of the CMC was held on 27.01.2022 for reconsideration of revising the Final SEA for September-October 2021 to record the availability of Unit 1 of TSPL's Project as the declared capacity. However, not only did the CMC not accede to TSPL's lawful and legitimate request for revision of the SEA

in the said meeting, but also has not issue the minutes of the same despite the passage of over 3 months. The conduct of the Respondents in not fulfilling their respective obligations, including statutory ones, has resulted in grave loss and harm to TSPL.

3.10 TSPL referring to Article 4.3.1, 4.3.2, 4.4.1, 4.4.3, 11.2.2 of the PPA and clause 1.2.5 of Schedule 7 of the PPA as well as the provisions of Indian Electricity Grid Code Regulations 2010 and Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations 2013 in support of its submissions has stated that the fixed charges/capacity charges payable by PSPCL to TSPL correspond to the Declared Capacity of the Project. The concept of fixed charges is the cornerstone of availability-based tariff regime in India, whereby the generating station is entitled to reimbursement of fixed cost based on the Declared Capacity of the generating station. The above position has been laid down by the Hon'ble Central Electricity Regulatory Commission vide its order dated 04.01.2000 passed in Petition No. 2/1999.

3.11 TSPL has been regularly following up with PSPCL to arrange adequate quantity and assured quality of coal or grant approval to TSPL to procure alternate coal through the Standing Committee on TSPL Project. However, despite regular follow-ups, PSPCL has neither arranged the coal nor granted approval to TSPL for the same, particularly after withdrawal of the import substitution policy in November 2021. Further, even the coal supplied for the Project by MCL was substandard/low quality coal, resulting in lesser materialization of the coal allocated to TSPL. The same is also attributable to PSPCL, as in terms of the Hon'ble APTEL's judgments, it is PSPCL's obligation to ensure assured quality of fuel. The non-

availability of coal for reasons mentioned above is beyond the control of TSPL and the loss of DC and capacity arising out of the same is not attributable to TSPL.

3.12 That due to a nation-wide shortfall in supply of coal by CIL and its subsidiaries, MoP, vide its office memorandum dated 28.08.2021, directed CIL/its subsidiaries as well as Indian Railways to stop supply of coal to power plants having coal stock of more than 14 days. MoP failed to appreciate various factors which play a crucial role in calculating coal stock such as revival of Shut Down units, time taken for actual delivery of coal from the mine to the Project site, volatile nature of demand of power, etc. The aforesaid decision of the MoP resulted in TSPL facing acute shortage of coal to the extent that no coal rakes were dispatched to TSPL's Project from 30.08.2021 till 07.09.2021 and even after that only partial coal was supplied to TSPL. TSPL continued to face shortfall of coal even in the period from December 2021 to March 2022 due to various reasons beyond its control, including PSPCL/Standing Committee's failure to grant approval for procurement of alternate coal to meet the shortfall required for the Project. During the said period, i.e., from December 2021 to March 2022, TSPL continued to declare technical availability for the Project (particularly due to the reason that procurement of sufficient quality and quantity of coal is/was the obligation of PSPCL); however the same was not considered appropriately by the Respondents. During the Contract Year 2021-22, despite the Project being technically available to the tune of 75.74%, the PSLDC has recorded the DC of the Project only to the tune of 67.96%.

3.13 That declaration of Declared Capacity of the Project is independent of despatch instructions and requirement of power by PSPCL. Rather,

the same is the sole prerogative and statutory right of TSPL and PSLDC is obligated to consider and record the DC as declared by TSPL in its daily scheduling instructions as well as in the monthly SEA. Therefore, while daily despatch of power to PSPCL from TSPL may be zero, the daily DC ought to be considered as per TSPL's declaration. PSLDC, by not considering the DC and Cumulative Availability of the Project as declared by TSPL, has violated its statutory duty and acted contrary to the provisions of the Punjab Grid Code and the Electricity Act. PSLDC has been selective in its approach by not considering the DC of TSPL's Project on the pretext of low/ inadequate coal stock at TSPL's Project. It is a settled position that DC as declared by a Thermal Power Plant for its Unit under Reserve Shut Down (which is otherwise capable of operation and generating power) pursuant to the directions of SLDC or the Procurer ought to be considered by SLDC and capacity charges for such DC shall be paid considering deemed generation.

- 3.14 That, once TSPL has made an accurate disclosure of its DC/Availability in accordance with the PPA and Punjab Grid Code, PSLDC cannot represent this Availability as "zero". Under the provisions of the Electricity Act, the Punjab Grid Code, and the PPA, TSPL is duty bound to declare its Availability and PSLDC is duty bound to take the same on record to prepare the SEA. PSLDC is mandated to discharge the functions of planning, undertaking scheduling and dispatch, grid operations and coordination relating to intra-state transmission system; as such failure in issuing Dispatch Instruction or not considering the DC/ Availability lawfully provided by TSPL is in violation of applicable law.

3.15 That the Hon'ble APTEL vide its judgment dated 19.07.2021 has held that TSPL's obligation to operate the Project at its full capacity is interdependent and linked to the obligation of PSPCL to supply adequate quantity and assured quality of coal. The terms of agreement between the parties show that the fulfilment of obligation depends upon the mutual compliance of reciprocal commitments. Therefore, the failure of PSPCL to discharge its obligation, affects TSPL adversely and thus, becomes the basis of claim by TSPL for the losses suffered by it on account of such default and/or inaction by PSPCL. Therefore, the question of imposing any penalty upon TSPL for alleged availability below 75% does not arise. On the contrary, PSPCL is liable to make payment of the deemed capacity charges withheld by it by unlawfully and arbitrarily calculating the DC/Availability of the Project as 67.96%.

3.16 That the Commission and the Hon'ble APTEL have recognized the issue of perpetual shortfall of coal for the Project and accordingly, constituted the Standing Committee on TSPL Project to ensure timely resolution of the said issue, without resorting to intervention of the Commission time and again. However, even after the constitution of the Standing Committee on TSPL Project, TSPL has been constrained time and again to approach the Commission on one pretext or the other. Either the meetings of the Standing Committee on TSPL Project are not convened or the Standing Committee on TSPL Projects does not grant its approval for procurement of alternate coal. The same has rendered the mechanism formulated by the Hon'ble APTEL and the Commission meaningless. Accordingly, there is a requirement for the regulatory intervention of the

Commission to fill the lacunae in the practical implementation of the mechanism of the Standing Committee on TSPL Project.

3.17 TSPL has prayed to:

- (a) Hold and declare that the non-availability of coal impacting the Petitioner's Project is due to failure of the Respondent No. 1 to fulfill its obligation of procurement of coal and due to reasons not attributable to and beyond the reasonable control of the Petitioner;
- (b) Hold and declare that the findings and decision of the Respondent No. 3, i.e., Commercial & Metering Committee, as recorded in paragraph 1 of the minutes dated 22.12.2021 of the 26th Meeting held on 23.11.2021 are unlawful, arbitrary, bad in law, and violative of the Electricity Act and the Punjab State Electricity Regulatory Commission (Punjab State Grid Code) Regulations, 2013;
- (c) Consequently, direct the Respondent No. 2 to correct the State Energy Accounts of the Petitioner's Project for the Contract Year 2021-22 to reflect the technical availability of the Petitioner's Project as the Declared capacity;
- (d) Direct the Respondent No. 1 to pay deemed capacity charges to the Petitioner for the Contract Year 2021-22 to the tune of approx. Rs. 143,65,70,535/- (Rupees One Hundred Forty Three Crores Sixty Five Lakhs Seventy Thousand Five Hundred Thirty Five Only) as per the invoices raised by the Petitioner, corresponding to the technical availability of 75.74%, which amount has been unlawfully and arbitrarily withheld by the Respondent No. 1 without any legal basis, along with late payment surcharge in terms of the Power Purchase Agreement dated 01.09.2008;

- (e) Permanently restrain the Respondent No. 1 from imposing any penalty upon the Petitioner for the alleged shortfall in availability of the Project below 75% during the Contract Year 2021-22;
- (f) Direct the Respondent No. 1 to make payment of Deemed Capacity Charges to the Petitioner from Contract Year 2022-23 onwards for the term of the Power Purchase Agreement dated 01.09.2008, if the Petitioner is forced to Declare availability (DC) lower than technically available capacity on account of coal shortage from linked sources along with late payment surcharge in terms of the Power Purchase Agreement dated 01.09.2008;
- (g) Award cost of the present proceedings to the Petitioner and
- (h) Pass any such other and further reliefs as this Commission deems just and proper in nature and circumstances of the present case.

4.0 Submissions of PSPCL

PSPCL while denying the pleas made by TSPL, has submitted that:

- 4.1 TSPL has filed the present Petition to cover up the consequences of its failure to maintain the Availability during the Contract Year 2021-22 upto 75% and the compensation to be paid by TSPL to PSPCL to the extent of the Availability being less than 75%. The issue relates to the Availability of TSPL's Power Station for the Contract Year 2021-22 and the penalty if the availability is less than 75%. PSPCL is entitled to levy penalty in terms of Schedule 7 – Clause 1.2.5 of the PPA, if the Availability of TSPL in a Contract Year is less than 75%. The availability of TSPL for the Contract Year 2021-22 was 67.96% as under:-

Month	Month Wise Availability			Cumulative Availability		
	PSPCL	SLDC	TSPL	PSPCL	SLDC	TSPL
April, 2021	59.15%	59.15%	59.15%	59.15%	59.15%	59.15%
May, 2021	57.49%	57.49%	57.49%	58.31%	58.31%	58.31%
June, 2021	59.23%	59.23%	59.23%	58.61%	58.61%	58.61%
July, 2021	32.14%	32.14%	32.14%	51.89%	51.89%	49.57%
Aug, 2021	62.97%	62.97%	62.97%	54.13%	54.13%	54.13%
Sept, 2021	64.88%	64.88%	84.61%	55.89%	55.89%	59.13%
Oct, 2021	71.66%	71.66%	81.41%	58.18%	58.18%	62.36%
Nov, 2021	100.00%	100.00%	100.00%	63.32%	63.32%	66.98%
Dec, 2021	75.36%	75.36%	94.56%	64.68%	64.68%	70.09%
Jan, 2021	80.90%	80.90%	92.05%	66.32%	66.32%	72.32%
Feb, 2021	83.59%	83.59%	89.59%	67.77%	67.77%	73.77%
March, 2021	69.99%	69.99%	96.98%	67.96%	67.96%	75.74%

4.2 Since the beginning, TSPL was procuring the linkage coal from the domestic coal companies, arranging for its transportation to the Project Site, storing the coal in the stockyard of TSPL and using the coal for generation of electricity. TSPL has further been billing the PSPCL for Energy Charges in terms of Schedule 7 of the PPA, which is consistent with the directions of the Hon'ble Supreme Court in the Interim Order dated 02.05.2016 passed in CA 4085-4086 of 2016. TSPL failed to take appropriate steps for requisition of coal from the coal companies and maintain the required quantum of coal leading to a reduction in its availability and is liable to pay the penalty provided under the PPA. TSPL is liable to compensate PSPCL for the shortfall in generation and is not entitled for deemed capacity charges. The claim of TSPL that it is the responsibility of PSPCL to ensure adequate supply of fuel, based on the plea of the obligation to sign the FSA (subject matter of the Judgment dated 07.04.2016 passed by the Hon'ble Tribunal in Appeal No. 56 and 84 of 2013) has

no bearing on the present case. Even if the FSA is to be signed by PSPCL, the PPA provides for the FSA to be assigned forthwith to TSPL for all intents and purposes with the necessary implication of TSPL arranging the coal under the FSA on a day-to-day basis.

- 4.3 That on 04.09.2013, TSPL signed the Fuel Supply Agreement with MCL in pursuance of the order dated 18.04.2013 of the Hon'ble Tribunal in Appeal No. 84 of 2013. Since then, TSPL has been requisitioning the coal from MCL in terms of the said FSA. Further, in the Civil Appeal bearing No(s). 4085-4086/2016 filed by PSPCL against the Judgment dated 07.04.2016 passed by Hon'ble Tribunal in Appeal No. 56 and 84 of 2013, the Hon'ble Supreme Court has passed the following order on 02.05.2016:

“Admit.

The learned counsel appearing for the appellant has submitted that the appellant is ready and willing to pay the energy charges, which would also include fuel charges, as per the Power Purchase Agreement. The energy charges shall be paid accordingly....”

- 4.4 That from beginning till date, the responsibility of PSPCL is to make payment for the energy charges incurred by TSPL as per the terms of the PPA. PSPCL cannot requisition coal on behalf of TSPL, nor can it ensure the availability of coal from Coal India Limited/MCL. The coal is being procured in terms of the FSA dated 04.09.2013 between TSPL and Coal India Limited. A bare perusal of the FSA dated 04.09.2013 clearly shows that the parties involved are TSPL and MCL only, and that any consequence of lapse in building up stock on the part of Generator i.e., TSPL should not be passed on the beneficiaries i.e., the consumer at large. Accordingly, the failure on the part of TSPL to make the necessary arrangement to procure coal from MCL as per the FSA constitutes a default on the part of TSPL.

- 4.5 That in terms of the PPA dated 01.09.2008, TSPL is required to take prudent and reasonable steps to avoid the shortage of coal and ensure availability to the extent of 80% (Normative Availability) and not less than 75% in any case. If reasonable due diligence had been undertaken by TSPL at the opportune time to build up the coal stock, then the shortage of coal in the instant case would never have occurred.
- 4.6 That no information has been furnished regarding the payments made by TSPL to Coal India and the mitigating steps (if any) taken by TSPL vis-à-vis Coal India to build up the coal stock. There is no material furnished by the TSPL as to the quantum of the coal requisitioned by TSPL, namely, whether TSPL sought the entire contracted quantum under the FSA and whether there was a refusal by coal companies to make available to entire quantum of requisitioned coal. There is also no pleading by TSPL in regard to the penalty demanded for such inability of Coal Company to make available the full quantum of requisitioned coal as per the FSA. It is TSPL, which is setting up the plea of the Coal Companies having not made available the entire quantum of coal and therefore, the burden of establishing the same with sufficient and satisfactory evidence/documentation is on TSPL.
- 4.7 That for the most of the period from April to September 2021, only one Unit (except intermittently 2 Units) of TSPL were operating. TSPL, therefore, had sufficient means to build up the coal stock until September 2021. TSPL has chosen not to procure adequate stock of coal, obviously with the intention of not incurring the payment of coal to build up adequate stock of coal in the relevant period. If the claim of TSPL is that there has been a shortfall in the delivery of coal by Coal India/MCL as against the coal requisitioned by TSPL then the details of the requisitioning etc. and the compensation paid to TSPL by MCL/CIL

are required to be furnished, which TSPL has failed to do. TSPL cannot simpliciter seek to pass on the burden of shortfall in coal on a purported breach by PSPCL without undertaking prudent utility practices. In this regard, the relevant provision from the FSA dated 04.09.2013, *inter-alia*, reads as under:

“4.6 Compensation for short delivery/lifting

4.6.1 If for a Year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect to that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting, as the case may be ("Failed Quantity") in terms of the following

.....

12.3.3 Compensation for short supply/lifting, as calculated in accordance with Clause 4.6, shall be payable by the defaulting Party to the other Party within a period of ninety (90) days from the date of receipt of claim failing which it will attract interest in terms of Clause 13.”

- 4.8 TSPL has consistently failed to maintain the coal stock of 30 days as a prudent utility and as mandated by the Central Electricity Authority (CEA) Guidelines dated 08.11.2017. On 26.11.2021/ 27.11.2021, the Ministry of Power issued the Revised Coal Stocking Norms and evolved a system of penalty for the Generating Stations, which were not maintaining the coal quantity as per the requisite norms. Accordingly, if TSPL had defaulted in maintaining the requisite coal stock then automatically it would be relegated to the least priority in terms of rake allotment and supply of coal thereby affecting its ability to procure the coal required for maintaining the normative availability. The CEA, vide its letter dated 13.12.2021, has again advised the Generating

Companies to build up coal stock in their Power Plants by giving a sufficient procurement program to CIL and make payments for coal value/Railway freight on a regular basis so as to maintain generation and also to avoid getting penalized. Further, the Ministry of Power, in its Circular dated 26.03.2022, has duly recognized that “....the Gencos (sellers) are bound to maintain adequate fuel stocks and offer availability as per the PPA”. This letter also emphasizes the need to take actions on priority basis to enhance the supply of domestic coal, including timely unloading of coal from railway rakes and payment of bills of coal companies in due time.

- 4.9 That TSPL is located at a distance of 1606 Kms from the MCL mine and therefore, in terms of the CEA Guidelines, is required to maintain a coal stock of 30 days. Had the Guidelines been adhered to and TSPL had built up the requisite stock then it would not have been affected by the purported shortage of coal and the effect of the same would have stood mitigated to a large extent. TSPL has not placed on record any details/justifications for the steps taken by it to build up the coal stock during the Financial Year 2021-2022. Whereas, PSPCL has repeatedly called upon TSPL to build up the requisite coal stock as per the CEA guidelines dated 08.11.2017 as well as the Ministry of Power Norms dated 27.11.2021 vide numerous communications addressed to TSPL and particularly letters dated 15.12.2021, 05.01.2022 and 05.04.2022. Therefore, a default on the part of TSPL, namely the non-maintenance of the requisite coal stock, led to a decline in its grading and consequently TSPL has consistently been in the red zone as per the CEA/MoP Grading Norms. Further, the inference of the decision dated 19.07.2021 in Appeal No. 317 of 2019 before APTEL is that TSPL was

within its rights to requisition sufficient coal (alternate or otherwise) well in advance in order to maximize its availability.

4.10 TSPL was allowed to participate in e-auction of domestic coal in which it secured 4.4 Lacs MT of coal from NCL on 18.01.2022. However, TSPL till date has failed to materialize the same and is yet to deposit the requisite amount for this quantity to the Coal Company. PSPCL had further clarified that the TSPL request dated 12.03.2022 for additional siding for materialization of NCL coal was also allowed by PSPCL. Therefore, there have been considerable lapses on the part of TSPL in lifting the coal allocated via e-auction.

TSPL's contention that in the Standing Committee Meetings held during the FY 2021-2022, no approval was granted for procurement of Imported/alternate coal is misconceived. There were multiple opportunities given to TSPL to procure coal from alternate sources. In the meeting held on 29.12.2021, TSPL was allowed to float tender for 10 lac Ton of Imported coal for price discovery. The Committee vide its Meeting dated 09.03.2022 was further pleased to increase the maximum capping limit upto 2.25 Rs/Million cal from 1.85 Rs/Million cal at the request of TSPL. No sincere efforts were made by TSPL to ensure adequate coal stock as it failed to lift the full allocated quantity of coal under the import substitution scheme from CCL in the months of September and October, 2021. The 20,000 MT of quantity offered by PSPCL under the flexible scheme in November-21 was not fully availed by TSPL. PSPCL had also offered 1.03. Lakh MT coal from Magadh mine of CCL through RCR mode to TSPL under the flexible utilization policy in the month of November, 2021. Thus, PSPCL has made all efforts to facilitate adequate coal stock at TSPL's plant, however TSPL failed to materialise the coal already allocated to it and did not avail the

alternate arrangements under the flexible utilization policy or e-auction coal.

4.11 That TSPL had raised the issue of non-consideration of availability of its Unit-I in the State Energy Accounts (SEA) for the months of September and October 2021 before the CMC. CMC, after holistically considering the extenuating circumstances including the conduct of TSPL and non-compliance with the CEA Guidelines, rendered a decision on 23.11.2021, holding that the SEA cannot be revised. TSPL was unable to generate the requisite electricity during the peak paddy season, on account of which PSPCL had to resort to scheduling much more expensive power from the Power Exchange.

4.12 That there has not been any discriminatory treatment insofar as TSPL is concerned. Unlike the other Generating Stations in the State of Punjab which regularly supplied power during the paddy season, only one (or intermittently two) Units of TSPL were operating up until September, 2021. This provided sufficient opportunity to TSPL to build up its coal stock. However, at the beginning of September 2021 (even when one of its Units had been under shutdown due to turbine outage since 04.07.2021), TSPL only had enough stock for 8 days. By the time Unit 1 was sought to be synchronized on 11.09.2021, the coal stock was sufficient only for 4.2 days i.e. far below the threshold criteria of 30 days. Without prejudice to the rights and contentions, even assuming but not admitting that the availability during the intervening period between 12.09.2021 to 06.10.2021 is to be considered, the cumulative Availability over the Contract Year 2021-22 would still be less than 75%, namely 70.11% entitling PSPCL to levy a penalty of Rs 23,51,38,090/- in terms of Clause 1.2.5 – Schedule 7 of the PPA.

4.13 That TSPL has wrongly attributed a majority of the shortfall due to the MoP directions dated 28.08.2021 which restricted the supply of coal to Thermal Power Stations having a coal stock of more than 14 days. For the months for which TSPL is claiming a higher DC i.e. from September 2021 to March 2021, TSPL never had coal stock for more than 14 days (barring a short period at the beginning of September 2021) despite repeated requests by PSPCL. Infact, the Daily Coal Stock Report specifically recognizes that coal supply was being regulated until 10.09.2021, but has since resumed. Therefore, TSPL cannot claim to be affected by the MoP direction dated 28.08.2021.

5. The submissions of PSLDC and Commercial and Metering Committee

PSLDC and CMC jointly filed their reply to the petition on 22.07.2022, submitting that:

5.1 Unit No. 1 of TSPL was under prolonged shutdown due to high turbine vibrations w.e.f. 04.07.2021 and communication was received from TSPL, vide e-mail at 20:46 hrs dated 11.09.2021 that the boiler light-up of Unit-1 will tentatively be done at 23:00 hrs on 11.09.2021. PSPCL vide letter numbers 619/20/ISB-468.Vol-13 dated 11.09.2021 & 250-254 dated 30.09.2021, objected to the synchronization of Unit No.1 and questioned TSPL's declared capacity due to its recent unsatisfactory performance, depleted coal stock at TSPL & requisite power arrangements already made for the season by PSPCL. However, the unit was synchronized at 14:49 hrs on 06.10.2021. As the consent for light up (considering prolonged outage of U-1) was not taken by TSPL and because of the dispute between PSPCL and TSPL, DC declared by TSPL was not considered from 12.09.2021 to 06.10.2021 while preparing the State Energy Accounts for September

& October 2021. The same was communicated to TSPL vide Punjab SLDC memo no. 528/T-510-A dated 14.09.2021.

- 5.2 That the matter of Declared Capacity of Unit No. 1 of TSPL w.e.f. 12.09.2021 to 06.10.2021 was discussed in the CMC meetings. CMC in its 26th meeting held on 23.11.2021 (minutes issued vide MOM dated 22.12.2021), considering the conduct of TSPL, the uncertainty of power generation from TSPL units and violation of CEA Coal stocking norms, decided not to revise SEAs.
- 5.3 PSLDC and CMC are acting as per prevalent law including the provisions of the Grid Code & Electricity Act and the petition filed by TSPL is liable to be dismissed. As per the request of TSPL to reconsider its submission to revise its State Energy Accounts for September and October 2021 (12.09.2021 to 06.10.2021), CMC in its 27th meeting held on 27.01.2022 decided to defer the case for deliberation in the next meeting. CMC in its 28th meeting held on 09.06.2022 (minutes issued vide MOM dated 20.06.2022) deliberated and decided that since the matter is sub-judice (under adjudication of PSERC), the decision shall be taken subsequently as per the orders of PSERC.
- 5.4 That due to coal shortage, TSPL mentioned a part of DC/full DC of its units (w.e.f. 22.10.2021 to 26.10.2021, 03.12.2021 to 15.12.2021, 07.01.2022 to 16.01.2022, 05.02.2022 to 08.02.2022, 10.02.2022 to 11.02.2022, 07.03.2022 to 22.03.2022 & 24.03.2022 to 31.03.2022) in Force Majeure column while declaring its DC.
- 5.5 That definition of Declared Capacity mentioned in Regulation 3.20 of PSERC Tariff Regulations 2019 is self-explicit, therefore, any construction of interpretation sought to be done by the petitioner cannot sustain. It is clear from the definition that Generating Station

can declare capacity to the extent of fuel actually available and not otherwise. Accordingly, Punjab SLDC considered Declared Capacity to the extent the Generator (TSPL) was actually capable of generating power (including the fuel/coal availability) during the period of 22.10.2021-26.10.2021 and December 2021 – March 2022 while preparing the State Energy Accounts. The assumptions and presumptions sought to be drawn by the petitioner are misplaced.

5.6 Unit No.1 of TSPL was under prolonged shutdown due to high turbine vibrations. Upon receipt of communication from TSPL that boiler light-up of Unit No.1 will tentatively be done at 23:00 hrs on 11.09.2021, an advisory was issued to PSPCL regarding the proposed light-up of the boiler and for consideration of DC after the synchronization of Unit No.1. SLDC never assured TSPL that full DC for Unit No.1 shall be payable as was being claimed by TSPL.

6.0 Rejoinder filed by TSPL

TSPL filed its rejoinder to the reply filed by PSPCL, PSLDC and CMC reiterating its earlier submissions. TSPL denied the contentions and allegations made by the respondents in their replies. It has been further submitted that it is no longer res integra that the obligation to arrange adequate quantity and assured quality of coal for the project rests with PSPCL. PSLDC has filed its reply without appreciating its statutory obligations and duties. The action of PSLDC has already been depreciated by the Hon'ble High Court of Punjab & Haryana vide its judgment dated 04.07.2022 in CWP No. 7519 of 2020 (O&M) titled as Talwandi Sabo Power Limited vs. Union of India and Ors. PSLDC has arbitrarily and unlawfully refused to record the availability of Unit-I of the project in the final SEA issued by it for the months of September and October 2021. As per standard practices, TSPL vide email dated

11.09.2021 communicated to PSLDC about the tentative timing of the light up of Unit No.1. However PSLDC, overlooking its duties as per the Electricity Act 2003 and Punjab State Electricity Commission (Punjab State Grid Code) Regulation 2013, did not provide the necessary code for synchronization of Unit No. 1. Accordingly, after achieving requisite technical parameters, Unit No. 1 was boxed up/kept under reserve shut down as per the instructions received from PSLDC, which were clearly issued at the behest of the PSPCL. Once, the petitioner has made an accurate disclosure of its DC/availability in accordance with the PPA and the Punjab Grid Code, PSLDC is to record it as such and cannot deviate from its statutory duty in this regard. The said view has already been upheld by the Hon'ble Punjab and Haryana High Court vide its judgment dated 04.07.2022. Thus, the conduct of the respondents is contrary to the provisions of the applicable law. Moreover, PSLDC and CMC are statutorily obligated to act independently and not at the behest of PSPCL. Moreover, relying upon the judgment dated 04.07.2022 passed by the Hon'ble Punjab and Haryana High Court; the Commission has disposed of the Petition No. 15 of 2020 titled as GVK Power Limited vs. PSLDC and Ors. Thus, PSLDC cannot be allowed to shirk away from performing its statutory duty of recording the DC as declared by the petitioner.

7.0 TSPL submitted an additional affidavit dated 07.10.2022, reiterating its earlier submissions and further submitting that:

7.1 PSPCL is passing on the burden of its default on TSPL. That the Hon'ble Supreme Court in *Sikkim Subba Associates vs. State of Sikkim* (2001) 5 SCC 629 has held that in a contractual arrangement where the fulfillment of obligations depends upon the mutual performance of reciprocal promises, a party who fails

to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming damages for breach or non-performance by the other party. Further, it is pertinent to note that Hon'ble Supreme Court in *Timblolrmaos Ltd. v. Jorge Anibal Matos Sequeira*, (1977) 3 SCC 474 has held that a party cannot claim damages for breach of contract if he contributed to the breach.

7.2 That the Commission *vide* its Order dated 08.09.2022 has effectively held that pending final decision in the appeals filed by the parties before Hon'ble APTEL and Hon'ble Supreme Court, respectively, (i) presently, the coal is being procured by TSPL; (ii) PSPCL's obligation qua the same is only with respect to payment of energy charges (including fuel charges) to the Petitioner; and (iii) thus, conclusively, it is the responsibility of TSPL to stock adequate fuel as per norms to keep the Plant running. The Order dated 08.09.2022 is *per incuriam* insofar as it fails to consider the unambiguous and categorical observations made by the Hon'ble APTEL in the Judgements dated 07.04.2016 and 19.07.2021 qua the obligation of PSPCL to arrange adequate quantity and assured quality of coal for the Project. More specifically the emphasis is on the judgment dated 19.07.2021 which has been issued by the Hon'ble APTEL taking into consideration all the material facts including the fact of pendency of Civil Appeal Nos. 4085-86 of 2016 against the Hon'ble APTEL's judgment dated 07.04.2016 and Appeal No. 331 of 2016 against the Commission's Orders dated 06.09.2016 and 08.09.2016. Moreover, if the said finding of the Commission is to be accepted and TSPL is to be held liable on account of it arranging the coal

for the Project then the same effectively renders the findings of the Hon'ble APTEL nugatory and there was no reason for PSPCL to have filed an appeal being aggrieved with the findings of the Hon'ble APTEL.

7.3 TSPL has filed an appeal against the said Order dated 08.09.2022 before the Hon'ble APTEL on 14.09.2022. On 23.09.2022, Hon'ble APTEL has restrained PSPCL from taking any coercive action including in the nature of making unilateral deduction of tariff amounts from the monthly tariff due and payable till the matter arising out of the interim application (IA no. 1480 of 2022) comes back before the Court.

8. Reply of PSLDC and CMC to the Rejoinder by TSPL

PSLDC and CMC, while reiterating the earlier submissions, further submitted that:

8.1 The main grievance raised by the Petitioner against SLDC and CMC is that the declared capacity of Petitioner's project for the Contract Year 2021-22 has not been properly assessed and that the findings and decision of the CMC as recorded in Para No. 1 of the 26th Minutes of the Meeting dated 22.12.2021, are bad in law. The primary grievance which is sought to be raised and redressed by the petitioner was also raised in Petition No. 69 of 2021 and the same was dismissed by the Commission vide order dated 08.09.2022. As such the issue cannot be reagitated in the present petition.

8.2 The decision dated 04.07.2022 passed by the Hon'ble High Court and the decision dated 22.07.2022 passed by the Commission are a matter of record and the interpretation sought to be given by the petitioner is wrong and denied being incorrect, since the said

decisions are based upon its own peculiar facts and circumstances and would not apply to the case in hand.

9. In the hearing held on 30.11.2022, Ld. Counsel of the parties argued the matter based on the submissions made by them earlier in the case. Further, it was submitted that:

9.1 Submissions by PSPCL:

a) The correspondences sent by PSPCL to various agencies were only sent on a best endeavor basis and cannot in any manner be construed as an admission of the shortfall in supply of coal or relieve TSPL of its obligation of the commercial arrangement between itself and Coal India.

b) Admittedly sufficient quantum of coal was available from MCL under each quarter for TSPL to build the requisite coal stock. This was so not only in the months from April to August 2021 when on account of non-functioning of the some of the generating units the declared availability was low but more importantly when the accumulated coal stock enabled TSPL to declare availability to the extent of 100% in November, 2021. PSPL has accounted for such availability at 100% while the PLF was only 60.53% i.e., 40% more. For the subsequent months also as against the actual availability of 75.36%, 80.90%, 83.59%, the actual PLF was only 62.65%, 60.93% and 62.62%. These clearly establish that there was no shortage of coal available if TSPL had acted prudently to acquire all the quantum of coal which was available under the FSA.

c) Reference is also made to letter dated 25.10.2022 sent by MCL to TSPL, stating as under:

"2. Less order booking leading to low coal stock and loss in generation: During FY 21-22, when most of the power houses were reeling under low coal stock

situation and scrambling to arrange for coal from all available sources. M/s TSPL did not even bother to book around 1.54 million tes of coal from MCL against their linkage.”

It is in the above context PSPCL had submitted that TSPL has not placed on record the relevant material, in regard to requisitioning, offer, allotment, supply with the break-up of offer made through rail mode, offer made through road, etc., by MCL. These details are relevant for considering the issue of shortage of coal claimed by TSPL. Since TSPL has not furnished the same despite specific plea raised by PSPCL, the Hon'ble Commission may be pleased to draw adverse inference in terms of Section 114 (g) of the Indian Evidence Act, 1872 namely that had TSPL provided the details, the same would have shown TSPL's claim to be wrong.

- d) TSPL has relied upon the Order dated 11.02.2014 in Petition No. 60 of 2013, of this Commission to substantiate its claim of shortfall of coal in the FY 2021-2022. It is relevant to note that the same Order imposes an obligation upon TSPL to requisition coal regularly from MCL as per the FSA which, admittedly, TSPL has failed to do for the aforementioned reasons. The primary intent for the constitution of the Standing Committee on TSPL project was to avoid unnecessary litigation and for smooth operation of the plant, and cannot in any manner be construed as a blanket Order to absolve the Generating Companies from their obligation to requisition coal in all the upcoming years.
- e) TSPL has wrongly alleged failure on part of PSPCL to make timely payments, even though various discounts over and above the PPA have been offered by TSPL. In this regard it is submitted that PSPCL has made timely payments in terms of the relevant Regulations and

the Orders/Judgements of various forums. Furthermore, with respect to the over and above PPA discounts, that in terms of the PPA, PSPCL is entitled to certain percentages of rebate in case of advance payment. However, the same is at the discretion of PSPCL. TSPL cannot seek to interpret the advance payment provision as an obligation on part of PSPCL. Moreover, TSPL has not created any special accommodation for PSPCL, as rebates are already provided for and agreed to between the parties to the PPA. The payment of monthly bills are to be made within 30 days of the receipt of the bill in terms of the PPA and any advance payment is to attract a rebate and is solely at the discretion of PSPCL. As regards the alleged payment in terms of the Order dated 19.07.2021 in Appeal No. 317 of 2019, it is submitted that an Appeal is pending before the Hon'ble Supreme Court bearing Civil Appeal No. 5012-5013 of 2021. That the Hon'ble Supreme Court *vide* its Order dated 12.09.2022, has issued notice in the said matter. Thus, a valid Civil Appeal against the disputed amount, in terms of the Order dated 19.07.2021, is pending before the Hon'ble Supreme Court. The disputed amount payable is subject to the pending adjudication and Decision of the Hon'ble Supreme Court.

9.2 Submissions by PSLDC:

- a) Regarding DC w.e.f. 12.09.2021 upto 06.10.2021, it is submitted that due to very low coal stock with TSPL, there was a threat of blackout and even the stoppage of its two running units. After the synchronization of unit No.1 on 06.10.2021, TSPL itself reduced its Declared Capacity by boxing up the unit No.1 at 00:45 hrs on 09.10.2021(within approx. 2 ½ days) quoting the low coal stock as reason. The power availability from TSPL was uncertain and TSPL's

projections, based upon its precarious coal stock position, were false. Even, if TSPL had been allowed to synchronize its unit No.1 on 12.09.2021, the same could not have operated for more than 3 days along with other 2 units.

b) Due to coal shortage, TSPL mentioned a part DC/full DC of its units (for 22.10.2021 to 26.10.2021, 03.12.2021 to 15.12.2021, 07.01.2022 to 16.01.2022, 05.02.2022 to 08.02.2022, 10.02.2022, 11.02.2022, 07.03.2022 to 22.03.2022 and 24.03.2022 to 31.03.2022) in the Force Majeure column while declaring its DC. It is submitted that the issue of DC in case of fuel shortage stands considered and decided by the Commission in Petition No. 69 of 2021.

c) It is denied that Punjab SLDC acted at the behest of PSPCL as alleged by TSPL. Punjab SLDC had been acting as per the factual and legal position, especially the provisions of Grid Code & Electricity Act. If the case of the Petitioner is taken to be true then the answering Respondent being a load dispatch centre would be rendered redundant and become an office only to receive papers just like a post office/letter box. The law makers have specifically assigned a statutory role to Punjab SLDC and there has been no breach of it performing the said duty.

9.3 Submissions by the Petitioner:

a) It is a matter of record that the availability of Petitioner's Project from April-August 2021 is not disputed between the parties. In fact, the Petitioner did build up coal stock during the period from April-August 2021, which is substantiated by the fact that at the beginning of August 2021, TSPL had coal stock equivalent to approx. 40 days.

However, during the month of August 2021, for reasons beyond the control of the Petitioner as explained in earlier pleadings and submissions, there was an overarching shortfall in coal which led to depletion of the built-up coal stock at the Project site. Further, the availability of the Project during the month of November 2021 was due to the fact that all Units of the Project were operational during the said period and adequate quantum of coal was available with TSPL in order for it to declare availability on day ahead basis during the said period.

- b) PSPCL has conspicuously failed to address the Petitioner's submission that the Hon'ble APTEL vide its Judgment dated 19.07.2021 has categorically held that it is PSPCL's obligation to ensure adequate quality and assured quality of coal for the Project and in case of PSPCL's failure to fulfil the said obligation, TSPL is entitled to payment of deemed capacity charges based on the technical availability of the Project.
- c) PSPCL has also sought to contend that the Petitioner has allegedly failed to provide details of requisitioning of coal or demand penalty from coal companies for short supply in an attempt to mislead the Commission and evade its liabilities towards the Petitioner. In any case, the Petitioner has been providing all the coal invoices, monthly coal requisition letters along with copies of all relevant communications made with MCL qua coal procurement and other documents pertaining to coal received at the Project site to PSPCL on monthly basis.
- d) PSPCL has relied upon certain correspondences to allege that the shortfall in coal was a result of Petitioner's alleged failure to maintain requisite coal stock as per the CEA norms. It is submitted that TSPL

was being erroneously graded under the 'Red Zone' in the Daily Coal Reports by CEA based on coal stock data. However, pursuant to the objections raised by TSPL, in view of the inherent shortfall in coal linkage quantum for TSPL Project, CEA has corrected its mistake and has regraded TSPL to 'Green Zone' from 'Red Zone' in terms of the exceptions provided under Clause-7 of the Revised Coal Stocking Norms. It is reiterated that during the relevant period post issuance of the Revised Coal Stocking Norms dated 26.11.2021, there was no impact on TSPL on account of being graded under the 'red category' either in terms of supply of coal and/or allocation of rakes. In any case, due to overarching shortfall of domestic coal, majority of thermal power projects situated across India were not in compliance of the coal stock requirements as per the CEA norms. Further, during the relevant period, the availability of coal was not contingent on adhering or non-adhering to the revised coal stocking norms of the MoP.

e) With respect to the issue of non-lifting of coal:

- (i) Insofar as relating to any alleged low level of lifting in January 2022, the Petitioner was allocated 5,40,000 MT of coal till March 2022 against which the Petitioner lifted 100% of coal.
- (ii) Insofar as relating to the alleged failure of the Petitioner to materialize domestic coal to the tune of 4.4 Lakh MT allocated by NCL, it is submitted that the Petitioner vide its letter dated 11.05.2022 duly clarified that the reason that the e-spot auction coal of 4.4 Lakh MT could not be materialized was due to pendency of indents at all Railways goods shed, which is evident from the fact that the Petitioner received only 23,771 MT of coal despite making payment for 2,95,000 MT of coal.

- (iii) Further, it is submitted that the shortage in lifting of coal under the import substitution scheme from CCL was due to various reasons none of which are attributable to the Petitioner, including particularly non-availability of Rakes by Railways. It is reiterated and reaffirmed that the entire quantity of coal provided by PSPCL under the Flexi Scheme was fully lifted by the Petitioner.
- (iv) In response to the contents of the paragraph in so far as alleging that PSPCL offered 1.03 Lakh MT of coal from Magadh mine, it humbly submitted that the Petitioner never received any such offer from PSPCL.
- (v) Regarding MCL's letter dated 25.10.2022, has been submitted that TSPL responded to the same on 11.11.2022 stating that it has *inter alia* booked approximately 6.705 MMT of coal from MCL and other CIL Subsidiaries (under import substitution scheme) against ACQ of 7.720 MMT of coal and hence, MCL's claim that TSPL did not bother to book around 1.54 MMT seems to be made around incorrect facts.
- (vi) Furthermore, it is a matter of record that even if any approval for procurement of imported coal would have been granted by PSPCL in the meeting held on 29.12.2021 or 09.03.2022 (though the same is vehemently denied), then too the coal would only have been materialized at the Project site during Contract Year 2022-23 and not during Contract Year 2021-22.
- f) Further, PSPCL's reliance upon the pendency of Civil Appeal No. 5012-5013 of 2021 before the Hon'ble Supreme Court to evade applicability of the said judgment as well as its liability to make payments due thereunder is untenable in view of PSPCL's own submission wherein it has been alleged that pendency of an Appeal or a stay granted by the appellate court cannot by any stretch of

- imagination mean that the decision appealed against has become non-est.
- g) With respect to the conduct of PSLDC in not permitting the Petitioner to synchronize Unit 1 of the Project from 12.09.2022 to 06.10.2022 and not considering the availability of the same, it is submitted that PSPCL and PSLDC have categorically admitted that the permission for synchronization of Unit 1 was withheld because PSPCL had tied up power commensurate to its requirement from alternate sources and thus, PSPCL did not have the demand to procure power from the Petitioner's Project. In light of the said admission, the present dispute is categorically covered by the judgment of the Hon'ble High Court of Punjab and Haryana dated 04.07.2022 in CWP No. 7519 of 2020 (O&M) titled *Talwandi Sabo Power Limited vs. Union of India & Ors.*, wherein the Hon'ble High Court has deprecated the conduct of the Respondents in restraining Petitioner from declaring availability due to demand shortfall and not accounting for such declaration of availability in the State Energy Accounts.
- h) In addition to the above, with respect to PSPCL's contentions regarding lack of any provision entitling the Petitioner to claim capacity charges on the basis of technical availability, it has been submitted that the said concept has been acknowledged and ratified by the Hon'ble Tribunal vide its Judgment dated 19.07.2021 which, in the absence of any stay by the Hon'ble Supreme Court, is not only binding on the parties herein but also this Commission.
- i) In context to PSPCL's contention that the Petitioner has wrongly attributed a majority of the shortfall to be due to the MOP directions dated 28.08.2021, it is submitted that the said MoP directions were issued in order to alleviate the impact of the prevailing and

continuing shortfall in supply of domestic coal. It cannot be anyone's case that there was no shortfall in supply of domestic coal prior to 29.08.2021. Rather, it was due to the prolonged and overarching shortfall in supply of domestic coal that MoP took a drastic step to regulate supply of domestic coal with effect from 29.08.2021. Even the withdrawal of the said regulation was gradual. Even from 07.09.2021 Petitioner was not allowed to lift the required quantum of 8-9 rakes of coal per day. This is evident from the fact that the reason for critical/super-critical coal stock, at the Petitioner's Project site recorded in CEA's daily coal stock report was shown due to regulation of coal supply till 28.09.2021.

j) In addition to the above and without prejudice to Petitioner's contention that this Commission's order dated 08.09.2022 is distinguishable from the present case as well as *per incuriam*, it is vehemently denied that this Commission's order dated 08.09.2022 can be relied upon even though the same has been effectively stayed by the Hon'ble Tribunal. In the case of Shree Chamundi (supra.), the Hon'ble Supreme Court was concerned with the effect of an interim order staying the operation of the order under challenge. In the said context, the Hon'ble Supreme Court in the case of Shree Chamundi (supra.) held that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence. Even otherwise, as per the decision of the Hon'ble Supreme Court, this Commission's order dated 08.09.2022 is not operative from the date of the stay granted by the Hon'ble Tribunal. It cannot be anyone's case that an order, which is not operative, is a binding precedent.

10. Observations and the decision of the Commission

The Commission has examined the submissions and arguments thereon by the parties. The petitioner TSPL is pleading for consideration of deemed capacity for year 2021-22 corresponding to its technical availability of 75.74% and consequent payment of capacity charges to the tune of approx Rs. 143.65 crore along with late payment surcharge thereof. The respondent PSPCL, while denying the submissions made by TSPL, has contended that the present petition has been filed by the Petitioner to cover up the consequences of its failure to maintain Plant Availability up to 75% during the Contract Year 2021-22 and the consequent compensation payable to the extent of the Availability being less than 75% under the PPA.

The Petitioner's claim is based on the plea that:

- i) The non-availability of coal impacting TSPL's project is due to failure of PSPCL to fulfil its obligation of procurement of coal and reasons not attributable to and beyond the reasonable control of TSPL;
- ii) The findings and decision of the Commercial & Metering Committee (CMC) recorded in para 1 of the minutes dated 22.12.2021 of the 26th meeting held on 23.11.2021 are unlawful, arbitrary, bad in law, violative of the Electricity Act and PSERC (Punjab State Grid Code) Regulations, 2013.

The observations and the decision of the Commission on the issues raised by the Petitioner are as under:

10.1 Issue of the obligation of procurement of coal:

The Petitioner's plea is that as per Clause 2.1.3 of the RFP, the FSA was to be signed between PSPCL and fuel supplier. However, FSA

dated 04.09.2013 was executed by the petitioner with the coal company MCL, pursuant to APTEL's interim Order dated 18.04.2013 in appeal no. 84 of 2013, subject to outcome of the appeal. Thereafter, APTEL, vide its final judgment dated 07.04.2016, has held that PSPCL is under obligation to sign FSA with MCL. However, PSPCL filed a Civil Appeal No. 4085-4086 of 2016 before the Hon'ble Supreme Court challenging the said judgment. In the meantime, PSPCL's obligation to supply coal has been reaffirmed vide APTEL's judgment dated 19.07.2021.

On the other hand, PSPCL has contended that the obligation to sign FSA as per APTEL's Judgment dated 07.04.2016 has no bearing on the matter. Even if the FSA is to be signed by PSPCL, the same is to be assigned to TSPL for all intents and purposes with the inferred implication of TSPL arranging the coal under the FSA on a day-to-day basis. Since the beginning, TSPL is procuring the linkage coal from MCL i.e. requisitioning the coal from Coal Company, taking delivery of coal and arranging for its transportation to the project site. TSPL has further been billing the PSPCL for Energy Charges in terms of Schedule 7 of the PPA, which is consistent with the directions of the Hon'ble Supreme Court in its Interim Order dated 02.05.2016 passed in CA 4085-4086 of 2016. The issue of obligation to requisition/procure coal has been settled by the Commission in its recent Order dated 08.09.2022 in Petition 69 of 2021.

a) The Commission observes that, the pleadings made herein on the issue of obligation to procure the coal are similar to those made earlier in Petition No. 69 of 2021, wherein the Commission, after examining the matter in detail, has held that pending the final decision in the appeals filed by the parties in Hon'ble APTEL and the Hon'ble Supreme Court, the

responsibility to operate the FSA and stock adequate fuel as per norms to keep the plant running is of TSPL. PSPCL is to pay the Monthly Energy Charges for the units of electricity supplied in terms of the PPA. The relevant extract of the said Order reads as under:

“7.1.....The Commission notes that the issue of obligation under the PPA with regard to the coal has been a subject of dispute between the parties since the beginning of the project. The Commission refers to the developments in the same as under:

(i) Hon’ble APTEL judgment dated 07.04.2016 (in Appeal Nos. 56 & 84 of 2013), wherein it was held as under:

“13. In view of the above discussion and analysis of the provisions of law including guidelines issued by the Government of India, RFP’s request for proposal, Power Purchase Agreement (PPA) and Memorandum of Understanding, we clearly hold that the Respondent No. 1, PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited and the Procurer cannot be absolved of its obligation to supply fuel to the Appellant/Petitioner for its power generating station and further to sign the Fuel Supply Agreement with the coal supplier.

.....

15. Both these Appeals being Appeal No. 56 of 2013 and Appeal No. 84 of 2013 are hereby allowed and Impugned Orders dated 27.09.2012 and 24.12.2012 impugned therein are hereby set aside. The State Commission is directed to pass the consequential order in the light of our above noted observations within three months from today under intimation to this Tribunal.”

(ii) Further, the Hon’ble Supreme Court vide interim Order dated 02.05.2016 in the Civil Appeal Nos. 4085-86 of 2016 filed by PSPCL (Appellant) against the above APTEL Order, ordered as under:

“Admit

The learned counsel appearing for the appellant has submitted that the appellant is ready and willing to pay the energy charges, which would also include fuel charges, as per the Power Purchase Agreement. The energy charges shall be paid accordingly.”

Thereafter, the Hon’ble Supreme Court vide interim Order dated 12.07.2016, observed that the pendency of the appeals shall not stand in the way of the State Commission proceeding with the matter as per the remand.

(iii) Accordingly, the Commission proceeded to comply with Hon’ble APTEL Order dated 07.04.2016. The Commission in Orders dated 06.09.2016 and 08.09.2016 (Petitions 11 & 46 of 2012) has dealt the issue as under:

“III.

*..... **The Hon’ble APTEL has clearly held that “PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited”. Considering the same, the Commission directs PSPCL to approach Mahanadi Coalfields Limited (MCL) within 7 days of the date of issue of this Order and sign the FSA forthwith with MCL in substitution of the earlier FSA dated 04.09.2013 signed by TSPL.***

The Commission notes that as assignment of the FSA by PSPCL to the successful bidder was provided in the RfP, therefore the bidders including Sterlite Energy Limited (the successful bidder which acquired the SPV TSPL) had the knowledge that the FSA would be assigned to the selected bidder during the term of the PPA. TSPL gave its consent for the assignment of the FSA to it by PSPCL by signing the MoU with PSPCL on 02.09.2008 i.e. following day of signing of the PPA on 01.09.2008 wherein it was expressly provided that the FSA shall be signed by PSEB (now

PSPCL) with the coal company and PSEB shall thereafter assign the same in favour of TSPL.

In view of above, the Commission holds that assignment of the FSA by PSPCL to TSPL after signing the same with MCL will be in consonance with the Bidding Documents, PPA, MoU and the law of the land laid by Hon'ble Supreme Court of India.

IV.

Considering the above, the Commission holds that after assignment of the FSA including FTA by PSPCL to TSPL, TSPL shall operate the same for purchasing the coal from the Mine, transporting the same through Indian Railways to the Project and unload the coal at the Project site and PSPCL shall pay the Monthly Energy Charges for the units of electricity supplied in terms of the PPA.

V.

Accordingly, the Commission holds that TSPL shall pursue with Ministry of Coal, MCFL (MCL) and other relevant departments for the Fuel (Coal) for smooth and timely operation of the Project duly assisted by PSPCL in this regard, for which PSPCL shall extend full co-operation to TSPL.

In the eventuality of established shortage in availability of coal for the Project, the Commission shall, on being so approached, pass appropriate Order at appropriate stage after considering the reasons."

The above Order of the Commission has also been challenged by TSPL before Hon'ble APTEL through Appeal no. 331 of 2016. However, no stay has been granted by Hon'ble APTEL and thus it continues to be operational.

Thus, the position emerging as on date is that PSPCL was mandated to sign the FSA (including FTA) with MCL and assign the same to TSPL. TSPL is to operate the same for purchasing the coal from the mine, transporting the same through Indian Railways to the Project site, unload and use it for generating power. PSPCL is to pay the Monthly Energy Charges for the units of electricity supplied in terms of the PPA. In the eventuality of an established shortage in availability of coal for the Project, the Commission can be approached for appropriate orders at the appropriate stage after considering the reasons.

The Commission observes, that pending final decision in the appeals filed by the parties in Hon'ble APTEL and the Hon'ble Supreme Court, presently, the coal is being procured by TSPL in terms of Fuel Supply Agreement dated 04.09.2013 executed between TSPL and MCL. PSPCL pays the energy charges, which also include fuel charges, as per the Power Purchase Agreement and as per the mandate issued by the Hon'ble Supreme Court vide interim Order dated 02.05.2016 in the Civil Appeal Nos. 4085-86 of 2016. Thus, conclusively it is the responsibility of TSPL to stock adequate fuel as per norms to keep the plant running."

- b) As regards the Petitioner's argument that it has filed an appeal against the above said Order of the Commission before Hon'ble APTEL whereupon PSPCL has been restrained from taking any coercive action till the matter comes back before that Court, the Commission refers to the Hon'ble Supreme Court judgment in *Shree Chamundi Mopeds Ltd. -v- Church of South India Trust Assn. (1992) 3 SCC 1*, wherein it has been observed as under:

"...While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the

restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence.”

Thus, Hon’ble APTEL’s interim directions restraining PSPCL from taking any coercive action in the matter does not imply that the said Order has been wiped out from existence.

10.2 Issue of short supply of linkage coal for the Project:

a) Misrepresentation by PSPCL at the pre-bid stage:

The Petitioner’s plea is that the bidding process of the project was conducted under Case 2 Scenario 4 of the Competitive Bidding Guidelines and in terms of the same PSCL was responsible for arranging the fuel linkage. Accordingly, it bid for the project based on the information supplied by PSEB (now PSPCL) in the pre-bid conference that MCL by way of its letter dated 28.04.2008 has agreed to supply 7.70 MT Coal of E Grade (i.e., coal with GCV 4500-4600 kcal/kg). However, the LoA dated 14.08.2008 issued by MCL is for supply of 7.72 MT of E/F grade coal, in place of the originally stated Grade E. Thus, there has been a misrepresentation by PSPCL in terms of the quantity and quality assured at the pre-bid stage. And, despite the execution of the FSA by the petitioner with MCL to firm up supply of ACQ of 7.72 MTPA coal of E/F Grade, the linkage with the quality of coal being supplied is only sufficient to ensure generation of around 54% of the contracted capacity and there remains an inherent shortfall in supply of coal for the project. The issue has also been acknowledged by PSPCL and the State

Government by writing to the concerned agencies from time to time. Also, the Commission, vide Order dated 11.02.2014 in Petition No. 60 of 2013, has appointed the "standing committee on TSPL Project" to determine additional coal required to meet the shortfall in linkage coal from the Fuel Supplier i.e. MCL.

Whereas, PSPCL has contended that the correspondences sent to various agencies were only on a best endeavor basis and the same cannot in any manner be construed as an admission of the shortfall in supply of coal or relieve TSPL of its obligation. Further, in the Commission's Order dated 11.02.2014 in Petition No. 60 of 2013, the primary intent for the constitution of the Standing Committee on TSPL project was to avoid unnecessary litigation and for smooth operation of the plant, the same cannot be construed as a blanket order to absolve the Generating Company from its obligation to requisition coal in all the future years.

The Commission refers to the Order dated 11.02.2014 in Petition No. 60 of 2013, wherein it has been observed as under:

"29. The annual coal requirement for TSPL's project having contracted capacity of 1841.4 MW (3×613.8 MW), Normative Availability as 80%, Net Station Heat Rate as 2400 kcal/kWh as per PPA and Coal GCV 4300 kcal/kg as per FSA, works out to 72.02 lakh tonne per annum. The actual requirement may be lesser than 72.02 lakh tonnes after discounting for oil used as secondary fuel. The Committee constituted by the Commission vide its Order dated 27.12.2013 in its report dated 27.01.2014 has worked out the annual coal requirement for TSPL's project as 71.7 lakh tonnes per annum.

30. The Commission finds that the coal supply as per the FSA is adequately provided for full normative requirement of the project. As such, under normal

circumstances, there is no likelihood of short supply of coal as per the ACQ provided in the FSA.”

.....

36(x) As a measure for smooth operation of the plant and to avoid unnecessary litigation, the Commission appoints a Committee comprising of Secretary, Power/Govt. of Punjab, CMD/PSPCL and COO/TSPL as ‘Standing Committee on TSPL Project’ to resolve day to day issues. The said Standing Committee shall also be the final authority to determine the additional cost of coal from alternative sources/imported coal procured by TSPL to meet the shortages in coal supplied by CIL or its subsidiaries.”

As is evident, the Commission, based on its assessment and relying on the report submitted by the Standing Committee comprising of Secretary/Power, CMD/PSPCL and CEO/TSPL, has held that the coal supply as per the FSA is adequately provided for full normative requirement of the project. The constitution of the Standing Committee was to enable smooth operation of the plant by resolving day to day issues and to avoid unnecessary litigation between the parties. However, to cover any unforeseen exigency of shortfall in coal, the Committee’s scope was also extended to cover determination of the additional cost of coal from alternative sources/imported coal procured by TSPL to meet the shortage in coal supplied by CIL or its subsidiaries.

The Commission also notes the Petitioner submission that its bid was based on the information supplied in the pre-bid conference that MCL by way of its letter dated 28.04.2008 has agreed to supply 7.70 MT Coal of E Grade (i.e., coal with GCV 4500-4600 kcal/kg), It is clear that TSPL has consciously chosen to bid and install a 1980

MW project, against the permissible tendered contract capacity in the range of 1620 to 1980 MW, stated in the RfP. It is implicit that TSPL assessed that the coal availability would be sufficient to achieve the normative requirement of the bid capacity. The Commission also refers to the Letter of Assurance (LoA) dated 14.08.2008 issued by MCL, indicating the assurance to supply, as per the normative requirement of the plant, E Grade coal, which shall be subject to review and assessment by MCL of the actual coal requirement as well as the incremental availability of coal, with the footnote that *“In case shortage of E grade, F grade coal will be supplied from any source to meet the requirement”*.

The Commission is of the view that the Letter issued by MCL was the basis of information provided by PSPCL at the pre-bid stage and cannot be construed to be misrepresentation by any stretch of the imagination. It was a simple statement of information and assurance available to it. Thus, the plea by the Petitioner that there is an inherent shortfall in linkage coal for the Project, purportedly due to misrepresentation by PSPCL at the pre-bid stage is not sustainable.

b) Supply of substandard/low quality coal by MCL and lesser materialization of the coal allocated to TSPL:

The Petitioner has pleaded the shortfall in the coal during the period is due to supply of substandard/low quality and lesser materialization of the coal allocated to TSPL.

Whereas, PSPCL has contended that TSPL cannot simpliciter seek to pass on the burden of shortfall in coal on a purported breach by PSPCL without undertaking prudent utility practices. In fact, the

Petitioner was submitting grossly inadequate coal supply programme/ rake programme as indents for supply of coal from MCL vis-a-vis the linkage provided to TSPL as per the FSA. PSPCL also submitted on record MCL's letter dated 25.10.2022, addressed to TSPL, pointing out as under:

“2. Less order booking leading to low coal stock and loss in generation:

During FY 21-22, when most of the power houses were reeling under low coal stock situation and scrambling to arrange for coal from all available sources, M/s TSPL did not even bother to book around 1.54 million tes of coal from MCL against their linkage.”

Moreover, if the claim of TSPL is that there has been a shortfall in the delivery of coal by Coal India/MCL, as against the coal requisitioned by TSPL, then the details of whether TSPL sought the entire contracted quantum under the FSA and whether there was a refusal by coal companies to make available quantum of the requisitioned coal has to be brought on record to establish this assertion. If so, whether the compensation has been demanded and received for such inability of the coal company to make available the full quantum of requisitioned coal as per the FSA is also required to be furnished.

The Commission observes that, the provision of compensation for short delivery by the coal company exists in the FSA. Though the Petitioner submitted that it has been providing the coal invoices, monthly coal requisition letters along with copies of relevant communications made with MCL qua coal procurement and other documents pertaining to coal received at the Project site to PSPCL on a monthly basis, it has failed to furnish any evidence of demanding or availing the compensation for short supply by the MCL

as per the provisions of FSA. Further, the Petitioner has submitted that it responded to MCL's letter dated 25.10.2022 stating that it has *inter alia* booked approximately 6.705 MMT of coal from MCL and other CIL Subsidiaries (under import substitution scheme) against ACQ of 7.720 MMT of coal and hence MCL's claim that TSPL did not bother to book around 1.54 MMT seems to be made around incorrect facts.

Thus, from TSPL's own admission of its response to MCL's letter dated 25.10.2022 as paraphrased above, it is established that there indeed was short booking of coal by TSPL from MCL to the tune of about 1.015 MMT. The Commission is of the view that the issue of materialization and/or quality of coal supply by MCL was required to be taken up as per the provisions of the FSA; the Petitioner did not furnish any specific document or proof to show that it had taken the necessary steps as per FSA as pointed out by the respondent. Thus, the plea of the Petitioner made in this regard is not maintainable.

c) Issue of non-grant of permission to arrange coal from alternate sources:

The Petitioner has submitted that, the Commission's Order dated 08.09.2022 mentions as part of its analysis section that, in the said case, there were no documents on record to show that the Petitioner had approached PSPCL to seek sourcing of coal from alternate sources. In the present case, the petitioner has continuously sought permission to arrange coal from alternate sources from PSPCL and the 'Standing Committee on TSPL Project', citing issues of low quality/ lesser materialization of coal by MCL, shortage of rake

supply and overarching nationwide scarcity of coal. The same were acknowledged by PSPCL by way of writing various letters to the concerned government authorities to resolve the difficulties faced by TSPL on account of shortfall of coal. Even the Government of Punjab intervened in the matter and issued letters dated 25.09.2021 and 23.02.2022 to various stakeholders to ensure adequate coal supply for TSPL's Project. However, PSPCL and the Standing Committee did not grant permission to TSPL to arrange coal from alternate sources during the Contract Year 2021-22.

PSPCL has rebutted that the correspondence done by PSPCL and the Pb. Govt. was on best endeavor basis and cannot in any manner be construed as an admission of the shortfall in supply of coal or relieve TSPL of its obligation of the commercial arrangement between itself and Coal India. In fact, the Petitioner was responsible for submitting inadequate coal indents/supply programme/ rake programme from MCL vis-a-vis the linkage provided as per the FSA. PSPCL, through various letters, requested the Petitioner for lifting of the allocated coal. Also, multiple opportunities were given to TSPL to procure coal from alternate sources. However, no sincere efforts were made by TSPL to ensure adequate coal stock. It failed to lift the full allocated quantity of coal under the import substitution scheme from CCL in the months of September and October, 2021. The 20,000 MT of quantity offered by PSPCL under the flexible scheme in November, 2021 was not fully availed by TSPL. PSPCL had also offered 1.03 Lakh MT coal from Magadh mine of CCL through RCR mode to TSPL under the flexible utilization policy in the month of November, 2021. Also, TSPL was allowed to participate in e-auction of domestic coal in which it secured 4.4 Lacs MT of coal from NCL

on 18.01.2022. Further, the Standing Committee in the meeting held on 29.12.2021, allowed TSPL to float a tender for 10 lac Tons of Imported coal for price discovery. The decision regarding use and procurement of this coal was to be taken by the Standing Committee after discovery of prices. However, no follow-up action seems to have been taken by TSPL. Thus, PSPCL has made efforts to facilitate coal supply from various sources, though, TSPL failed to materialise the coal already allocated to it nor availed the alternate arrangements under the flexible utilization policy or through e-auction. PSPCL also submitted CCL/MCL letters addressed to TSPL, stating as under:

CCL letter dated 25.01.2022:

“...it is to inform you that for the month of January 2022, M/s TSPL has booked only 108000 tes of coal till date against allocation of 180000 tes under Road mode which is below par.”

MCL letter dated 25.10.2022:

“2. Less order booking leading to low coal stock and loss in generation:

During FY 21-22, when most of the power houses were reeling under low coal stock situation and scrambling to arrange for coal from all available sources, M/s TSPL did not even bother to book around 1.54 million tes of coal from MCL against their linkage.”

The Commission observes that while the Petitioner has made submissions to counter some of the PSPCL’s contentions regarding the Petitioner’s failure to lift the coal arranged by PSPCL, it emerges that PSPCL indeed had allowed/facilitated the Petitioner to lift coal from alternate sources. The Commission also refers to the Minutes of the Standing Committee’s meeting held on 29.12.2021, which reads as under:

“TSPL vide letter dated 17.12.2021 ...has requested as under:-

- I. TSPL may be allowed to procure and use 3.40 Lakh MT of imported coal (5000 GAR) for the period Jan-22 to Mar-22 and 11.64 Lac Ton of imported coal (5000 GAR) to build up its coal stock for peak paddy season of 2022-23 i.e. from Apr-22 to Sep-22 at rates discovered through a competitive bid process.
- II. TSPL further requested for approval for e-auction to be procured by TSPL to substitute import coal requirements and continuous plant operation.

.....
Accordingly, a meeting of the Standing Committee was convened on 29th December, 2021 at PSPCL guest house Chandigarh to discuss the request of TSPL.

CEO/TSPL stated that the coal position is anticipated to remain critical in the next fiscal year also and requested that TSPL be allowed to procure 10 lac ton imported coal keeping in view next Paddy Season requirements.

.....
The Standing Committee after deliberations approved as under:-

1. TSPL is allowed to float tender for 10 Lac Ton of imported coal for the purpose of rate discovery only. However, decision regarding use and procurement of this coal by TSPL shall be taken by the Standing Committee after the discovery of prices of the imported coal....
2.
3. Keeping in view the current high cost of imported coal (about 2.2 Rs/Million cal), TSPL will also explore the option to procure e-auction coal offered by CIL to substitute imported coal requirements.....”

As is evident, though the Petitioner’s request was initially for 3.40 LT and 11.64 LT of imported coal for FY 2021-22 and FY

2022-23 respectively, it restricted the same to 10 LT for the oncoming paddy season of 2022-23 in the meeting. The same was approved by the Committee with directions to first discover the rate for the same. Thus, the plea of the Petitioner that non-availability/shortage of coal was due to non-grant of permission to TSPL to arrange coal from alternate sources during the Contract Year 2021-22, is not sustainable.

d) Financial working capital issues for the Petitioner:

The Petitioner pleaded that PSPCL in a deliberate manner created financial working capital issues for the Petitioner by denying it due payments in terms of Hon'ble APTEL Judgment dated 19.07.2021. Thus, TSPL had to provide additional discounts over and above PPA to get payments for its monthly bills so that the payments so received could be used for paying for coal and other consumables.

In response, PSPCL's contention is that in terms of Article 11.3.5 of the PPA, PSPCL is entitled to a certain percentages of rebate in case of advance payment. However, the use of such prepayment mode is at the discretion of PSPCL. TSPL cannot interpret the same as an obligation on part of PSPCL. As regards the payment in terms of the APTEL Order dated 19.07.2021 in Appeal No. 317 of 2019, an appeal against this Order is pending before the Hon'ble Supreme Court as Civil Appeal No. 5012-5013 of 2021. The disputed amount payable is subject to the pending adjudication and decision of the Hon'ble Supreme Court.

The Commission agrees with PSPCL's contention that the advance payment of monthly bills is its discretion and TSPL cannot seek to interpret the same as an obligation on part of

PSPCL, as is evident from Article 11.3.5 of the PPA, which reads as under:

“11.3 Payment of Monthly Bills

11.3.1 *The Procurer shall pay the amount payable under Monthly Bill on the Due Date to such account of the Seller, as shall have been previously notified by the Seller to Procurer*

.....

11.3.4 *In the event of delay in payment of a Monthly Bill by any Procurer beyond its Due Date month billing, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay.*

11.3.5 *For payment of any Bill before Due Date, the following rebate shall be paid by the Seller to the Procurer in the following manner.*

- a) *Provisional Bill will be raised by the Seller on the last Business day of the Month Rebate shall be payable at the rate of two point two five percent (2.25%) of the amount (which shall be the full amount due under the Provisional Bill) credited to Seller's account on first day of the Month and rebate amount shall reduce at the rate of zero point zero five percent (0.05%) for each day, upto fifth (5th) day of the Month.*
- b) *Applicable rate of rebate at (a) above shall be based on the date on which payment has been actually credited to the Seller's account. Any delay in transfer of money to the Seller's account, on account*

of public holiday, bank holiday or any other reasons shall be to the account of the Procurer.

- c) *Two percent (2%) rebate for credit to Sellers account made within one (1) Day of the presentation of Monthly Bill for the Month for which the Provisional Bill was raised earlier.*
- d) *For credit to Seller's account made on other days the rebate on Monthly Bill shall be as under:*

<i>Number of days before Due Date of Monthly Bill</i>	<i>Rates of rebate applicable</i>
<i>29</i>	<i>Two percent (2.00%)</i>
<i>Each day thereafter upto the Due Date</i>	<i>2% less [0.033% x {29 less number of days before Due Date when the payment is made by the Procurer}]</i>

.....”**Thus, the Petitioner’s plea that PSPCL created financial working capital issues for the Petitioner in a deliberate manner is not maintainable.**

10.3 Issue of the Declared Capacity (DC)

The Petitioner is pleading that the declaration of Capacity of the Project is its sole prerogative and statutory right and PSLDC is obligated to consider and record the DC as declared by it in the daily scheduling instructions as well as in the monthly SEA. The said view has also been upheld by the Hon’ble High Court of Punjab and Haryana vide its Judgement dated 04.07.2022 in CWP No. 7519 of 2020 (O&M). Moreover, relying upon the said judgment dated 04.07.2022 the Commission has disposed of the Petition No. 15 of 2020 titled as GVK Power Limited vs. PSLDC and Ors. Thus, PSLDC cannot be allowed to shirk away from performing its statutory duty of recording the DC as

declared by the petitioner. However, PSLDC disregarded the DC declared by TSPL while preparing the SEAs for December, 2021 to March 2022 on the pretext of low/ inadequate coal stock at TSPL's Project. The Petitioner also cited APTEL's Judgment dated 19.07.2021 in the matter.

Respondents PSPCL and the PSLDC have contended that the Generating Station can only declare capacity to the extent of the fuel actually available and as per their ability to generate. Accordingly, PSLDC considered DC to the extent TSPL was actually capable of generating power while preparing SEAs. The issue of DC was also raised by the Petitioner in its Petition No. 69 of 2021 and the same has been dismissed vide PSERC Order dated 08.09.2022. As such, the issue cannot be re-agitated in the present petition.

(i) The Commission observes that, the issue of DC raised herein is similar to that raised earlier in Petition No. 69 of 2021, wherein the Commission, after examining the matter in detail has observed that the Generators are mandated to declare their plant capabilities faithfully based on machine and fuel/water availability. The relevant extract of the said Order reads as under:

"7.3(b).....

(iv) Hon'ble Pb. & Haryana High Court Order dated 04.07.2022 in CWP Nos. 7519 of 2020 and 7715 of 2020, filed by TSPL and NPL, has observed as under:

"[49]. Declared Capacity means the capability of the generating station to deliver ex-bus electricity in MW declared by such generating station in

relation to any period of the day or whole of the day, duly taking into account the availability of fuel.

.....

[78]. ...Under Regulations 11.3.10, 11.3.12 and 11.3.13 of the Punjab Grid Code and Article 8.3 of the Power Purchase Agreements, the petitioners are duty bound to correctly declare their availability/declared capacity every day corresponding to their capabilities to generate electricity. PSLDC in turn is duty bound to consider the declared capacity and prepare the SEA accordingly. PSLDC cannot deviate from its statutory obligations in this regard.”

Thus, the Commission is of the view that, the Generators are mandated to declare their plant capabilities faithfully based on machine and fuel/water availability.”

(ii) As regards the Petitioner submission that, relying upon the said judgment dated 04.07.2022 the Commission has also disposed of the Petition No. 15 of 2020 titled as GVK vs. PSLDC, the Commission observes that the issue involved therein was the non-consideration of declared capacity due to force-majeure notices issued by PSPCL citing covid-outbreak and reduced demand and not of the availability of coal stock. Further, in respect of the Petitioner’s reliance on Hon’ble APTEL Judgment dated 19.07.2021, it is observed that in the said judgment, allowing the Petitioner’s claim of deemed capacity charges between September 2016 to May 2017 and October 2017 till 2018, the issue dealt with was related to the shortage of linked coal coupled with the inaction of the PSPCL to give approval for procuring coal from other CIL mines and coal offered by CIL through RCR mode resulting in continuous shortage of coal for running the plant. As is evident from the observations made in the foregoing paras, the petitioner’s plea in the present case

citing similar pleas of shortage of linked coal coupled with the alleged inaction of PSPCL to give approval for procuring coal from other sources could not be sustained.

Accordingly, the petitioner's claim that PSLDC should have allowed capacity declared by it, without it having sufficient fuel to generate the declared power is not sustainable. It cannot choose to arbitrarily declare capacity as it finds suitable and profitable without having available at hand or securing the means to actually generate the declared capacity.

10.4 Availability of TSPL's Unit-1 from 12.09.2021 to 06.10.2021:

On this issue, the Petitioner's plea is that despite being available to generate and supply power from 12.09.2021, its Unit 1 was not permitted to synchronize until 06.10.2021 on the pretext of low coal stock available with TSPL. The same is a charade, as coal stock at project site on 06.10.2021 was even less than the coal stock on 12.09.2021. Moreover, other plants running in Punjab were also having a similar stock position. PSLDC, acting at behest of PSPCL, refused to record the availability of the unit in the final SEA issued by it for the months of September and October 2021. On being approached, even the CMC did not grant any relief to the Petitioner. The Petitioner also pleaded that PSPCL and PSLDC have admitted that the permission for synchronization of Unit 1 was withheld because PSPCL had tied up power commensurate to its requirement from alternate sources. Thus PSPCL did not have adequate residual demand to procure power from Petitioner's Project. That the present dispute is categorically covered by the judgment of the Hon'ble High Court of Punjab and Haryana dated

04.07.2022 in CWP No. 7519 of 2020 (O&M) titled Talwandi Sabo Power Limited vs. Union of India & Ors.,

The Respondents SLDC and the CMC have submitted that Unit 1 of TSPL was under prolonged shutdown due to high turbine vibrations w.e.f 04.07.2021. A communication was received from TSPL vide e-mail dated 11.09.2021 that the boiler light-up of Unit 1 will tentatively be done on 11.09.2021. However, PSPCL, citing TSPL's inability to generate power during the peak demand period objected to synchronization of Unit 1 and questioned TSPL's declared capacity due to its recent unsatisfactory performance and depleted coal stock. Consequently, a dispute arose between the procurer PSPCL and the seller TSPL which was required to be resolved by both parties. Due to very low coal stock with TSPL, there was an apprehension of blackout and the potential risk of stoppage of its two running units. However, TSPL's claim was taken at face value and the unit was synchronized on 06.10.2021. After its synchronization, TSPL itself boxed up the unit on 09.10.2021 quoting low coal stock as the reason. The power availability from TSPL was thus proved to be uncertain and TSPL's projections based upon precarious coal stock position were established as false. Even if TSPL had been allowed to synchronize its Unit on 12.09.2021, the same could not have operated for more than 3 days along with the other 2 units. Since, the consent for light-up of Unit 1 was not taken by TSPL, DC declared by TSPL under reserve shutdown from 12.09.2021 to 06.10.2021 was not considered while preparing the SEAs. On the request of TSPL, the matter was discussed in the CMC meetings and considering the conduct of TSPL, the uncertainty of power generation from TSPL units and violation of coal stocking norms, it was decided not to revise the SEAs. Further, on the request of TSPL for review, the

CMC in the meeting held on 09.06.2022 recorded that since the matter is sub-judice with the Commission, the decision shall be taken subsequently as per the Orders of the Commission.

The Commission has already held in the foregoing para that the Petitioner's claim of considering and allowing capacity declared by it, without having sufficient fuel to generate the declared power is not sustainable.

Even the Hon'ble High Court Orders dated 04.07.2022, relevant extract reproduced earlier, records clearly that the "Declared Capacity means the capability of the generating station ... duly taking into account the availability of fuel" and "the petitioners are duty bound to correctly declare their availability/declared capacity every day corresponding to their capabilities to generate electricity". This is exactly what this Commission has also inferred and directed.

The Commission also notes that the PSLDC is assigned with the role of maintaining the Grid and is responsible for optimum scheduling and despatch of electricity within a State. Further, the State Grid Code Regulations specifies as under:

"11.3 General

The following specific points would be taken into consideration while preparing and finalising the schedules:

.....

11.3.4 The State Load Despatch Centre is responsible for coordinating the scheduling of a generating station within the State, real-time monitoring of the station's operation, checking that there is no gaming (gaming is an intentional mis-

declaration of a parameter related to commercial mechanism in vogue, in order to make an undue commercial gain) in its availability declaration,”

Thus, keeping in view the CEA coal stocking norms vis-à-vis the stock position of the plant, PSLDC’s action of not giving permission to the Petitioner to bring on bar its third unit (Unit-1) with continuously depleting stock of coal and having only about 4 days of coal stock at its disposal, apprehending tripping of even its already running units in the event of exhausting its coal stock, leading to a total blackout of station cannot be faulted.

However, the PSLDC seems to have erred subsequently in permitting the same to be synchronized on 06.10.2021, when its coal stock got further depleted to the level of just 2 days. PSLDC’s earlier decision not to allow synchronization was reinforced since TSPL was forced to shut the unit on 09.10.2021 on further depletion of coal stock to about 1.2 days. The Petitioner’s contention that other plants running in Punjab were also having a similar stock position and hence they were singled out has not been substantiated by citing any instance when a unit has been allowed to light up from a cold start-up while having such a precarious coal stock position as was the case of the Petitioner. The Commission is of the view that even if such was the case, one wrong cannot justify another and be cited to claim the right to repeat the same.

The Commission also feels that it is necessary to issue a reminder and an advisory to the SLDC. The PSLDC has a defined independent role and obligations under the law. It has to act independently on defined parameters as laid down under the

Electricity Act and IEGC/State Grid Code Regulations. It should endeavor to meticulously follow its mandate and obligations.

In light of the detailed analysis, observations and decisions of the Commission above, the prayers of the petitioner are disallowed. The petition and IA are disposed of in terms of the above Order.

Sd/-

(Paramjeet Singh)

Member

Chandigarh

Dated: 11.01.2023

Sd/-

(Viswajeet Khanna)

Chairperson

