

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No. 11 of 2012
Date of Order: 27.09.2012**

In the matter of : Petition under Section 86(1)(b) of Electricity Act 2003 regarding signing of Fuel Supply Agreement with M/s Mahanadi Coalfields Limited in respect of 1980 MW Talwandi Sabo Thermal Power Project.

AND

In the matter of: Punjab State Power Corporation Limited, The Mall,
Patiala, Punjab

Versus

Talwandi Sabo Power Limited

Present: Smt.Romila Dubey, Chairperson
 Shri Virinder Singh, Member
 Shri Gurinderjit Singh, Member

ORDER

The petition has been filed by Punjab State Power Corporation Limited (PSPCL) under Section 86(1)(b) of Electricity Act, 2003 in the matter of Fuel Supply Agreement (FSA) to be entered into for Talwandi Sabo Thermal Power Limited. It has been submitted by PSPCL that erstwhile PSEB, the predecessor of PSPCL before unbundling, entered into a Power Purchase Agreement (PPA) dated 01.09.2008 with Talwandi Sabo Power Limited (TSPL), the respondent, whereunder the respondent had agreed to establish, operate, maintain, generate and supply power from the Power Project at village Banawala, District Mansa (Punjab) of 3x660 MW (1980 MW) capacity awarded under case-2 Competitive Bidding initiated by PSEB in accordance with Section 63 of the Electricity At, 2003 and after the approval of the Commission.

2. Regarding Fuel Supply Agreement, the relevant clauses have been reproduced in the petition as under:-

(i) Request for Proposal (RfP) Clause 2.1.3:

A Fuel Supply Agreement will be signed between the Procurer and the Fuel Supplier. The same agreement has a clause whereby the Procurer has a right to assign this agreement for a specific period, within the term of the Fuel Supply Agreement (FSA) to a third party. Accordingly, the FSA will be assigned to the Selected Bidder during the term of PPA.

- (ii) As per the Standard Bid Document (SBD) the definition clause of Fuel Supply Agreement in the draft Power Purchase Agreement (PPA) reads as under:

‘Fuel Supply Agreements⁶’ [as applicable] means the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for supply of the Fuel.

⁶This definition may be modified keeping in mind the entity responsible for fuel procurement/allocation of linkage viz. the Procurer or the Seller;

- (iii) As per the Power Purchase Agreement (PPA) signed with TSPL on 1.9.2008, definition clause at page-11 of the Fuel Supply Agreement reads as under:

‘Fuel Supply Agreements’ means the agreement(s) entered into between the Procurer and Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Procurer and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Procurer and the Fuel Supplier for the supply of the Fuel.

3 The petitioner has further stated that as per requirement of SBD guidelines, fuel linkage was arranged by the Procurer before the submission of RfP bids. M/s Mahanadi Coalfields Limited issued the Letter of Assurance (LoA) for 7.72MTPA of coal and Talwandi Sabo Power Limited was named as 'Assured' which at that time was SPV of the procurer, for development of the power project In the 2nd RfP Bidder's conference held on 8.5.2008 well before the submission of RfP bids, all the Bidders were informed regarding Coal agreement as under:-

"COAL ARRANGEMENTS

MCL vide letter dated 28.4.2008 has conveyed supply of 'E' Grade Coal – upto 5.00MT during 2011-12 and 7.70MT from 2012-13 onwards".

4. The petitioner has further submitted that as per the SBDs issued by Ministry of Power, the transfer of TSPL to M/s Sterlite Energy Ltd. was arrived at by means of a tri-partite Share Purchase Agreement (SPA) reached between the Punjab State Electricity Board, TSPL and Sterlite Energy Ltd., whereby all the shares of the TSPL were duly transferred to M/s Sterlite Energy Ltd. being successful bidder. It was specifically agreed in Clause 3.5(c) that "all other rights and obligations of the company shall be of the selected bidder." As such, once the Special Purpose Vehicle itself has been transferred to the successful bidder i.e. M/s Sterlite Energy Ltd, by means of transferring 100% shares, any agreement reached by the Special Purpose Vehicle will have to be necessarily binding on the successful bidder. M/s MCL had issued the letter of Assurance (LoA) in the name of SPV i.e. TSPL which had since been transferred to the successful bidder i.e. M/s Sterlite Energy Ltd. through share purchase Agreement, as such signing of the FSA is obligation on the part of Assured (TSPL) with the Assurer i.e. M/s MCL.

5. PSPCL has also submitted that :

- (i) As per PPA 'Fuel means primary fuel used to generate electricity namely domestic coal'.

- (ii) The parties had also entered into a Memorandum of Understanding (MoU) dated 2.9.2008 inter alia in regard to the Fuel Supply Agreement to be signed and the necessity of the bidder to fulfill the conditions precedent for signing the Fuel Supply Agreement.
- (iii) In the Letter of Assurance dated 14.08.2008 for coal, TSPL being the Assured requested Ministry of Power to sign the Fuel Supply Agreement vide letter No./TSPL/MoP/LOA/13 dated 30.07.2012.
- (iv) TSPL informed PSPCL vide No.TSPL/PSEB/234 dated October 5, 2011 that Coal India Limited's subsidiaries have circulated Format of Memorandum of Understanding (MOU) and Model FSA with the following changes:-
 - (a) As per Model FSA clause 4.3 under heading 'Source of Supply' the Coal India Limited's subsidiary will arrange for the imported coal for the balance quantity to be supplied at prevailing imported coal prices;
 - (b) As per clause No.2.0 of the Model FSA under heading period of Agreement, the FSA will be only for 5 years at present subject to further renewal as against 25 years being the total tenure of PPA.
- (v) The draft MOU issued by MCL vide their Notification No.MCL/SBP /GM/S&M/NOTICE/NCDP-FSA/2009 / 4612 dated 15.1.2009 reveals as under:-

“that as per Fuel Supply Agreement (FSA) for new consumers coming through Letter of Assurance (LOA) route, commencement of coal supplies are dependent on fulfillment of certain conditions precedent both by Purchaser and Seller. In respect of Seller condition precedents also include tying up arrangement for import of coal. However, import of coal has still not been tied-up, but yet consumers want that their coal supplies should be commenced after execution of FSA.

To take care of the relevant clauses in the FSA and decision to supply part quantity from indigenous coal and part from imported coal, such consumers need to sign Memorandum of Understanding MoU).....”

As per the draft MoU clause No.6(vii):

“Quantum of supply of indigenous coal under the Agreement dated..... shall be at the sole discretion of Seller from time to time but shall not exceed 50% of Assured Coal Quantity (ACQ) in any case.

- (vi) PSPCL has been representing that if FSA with change mentioned in para 4 (iv) and 4 (v) is not signed, the coal linkage of 7.72 MTPA may be cancelled and no coal may be provided for the project by MCL. PSPCL has further stated that TSPL has agreed to sign the Fuel Supply Agreement with Coal India Limited's subsidiary on the offered terms subject to the condition that PSPCL gives its consent to the TSPL for signing FSA.
- (vii) The element of imported coal has implications on cost of generation but the PPA clearly provide for determination of energy charges based on domestic coal. In view of sub-article 1.2.3 of schedule 7 under heading 'Tariff' of the PPA, the Monthly Energy Charges are directly hiked with weighted average actual cost to the seller of purchasing , transporting and unloading the coal most recently supplied to and at the project before the beginning of the month (expressed in Rs./MT in case of domestic coal).
- (viii) The petitioner submits that in the facts and circumstances mentioned above, it s becoming expedient to take a decision on the signing of the Fuel Supply Agreement by the Respondent with the Coal India Limited Subsidiaries in the context of fuel requirements of the project. The Respondent has been seeking the above consent from the Applicant before signing the Fuel Supply Agreement with the Coal India Limited's subsidiary. PSPCL has submitted that such consent even if given without prejudice to the rights and obligations of PSPCL it would require the consent of PSERC in view of the issue connected with source and quantity of Fuel.

6. PSPCL has prayed as under:-

- (a) initiate a proceeding on the aspect of signing of the Fuel Supply Agreement by the Respondent with the Coal Companies for sourcing of the coal requirements for the Power Project of Talwandi Sabo Power Limited for generation and supply of electricity to the Applicant;
- (b) pass such direction as considered appropriate in regard to the signing of the Fuel Supply Agreement by the Respondent with the Coal Companies; and
- (c) pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.
- (d) issue suitable directions to replace the word "Procurer" with "Seller" in the definition of "Fuel Supply Agreement" under Sub-Article 1.1 of the Power Purchase Agreement.

7. The petition was admitted after hearing the petitioner on 13.03.2012 and Talwandi Sabo Power Limited, the respondent, was directed to file reply by 10.04.2012 and the petitioner was directed vide Order dated 19.03.2012 to submit the detail of implications on the cost of generation in case changes in the FSA was made as per Model FSA and draft MoU circulated by Coal India Limited's subsidiaries and also in line with the latest policy of Government of India, Ministry of Coals and Mines.

8. PSPCL filed affidavit in compliance with the Order dated 19.03.2012 of the Commission and stated that as per PPA dated 01.09.2008 signed between applicant / petitioner and respondent, the fuel envisaged was domestic coal. As per Letter of Assurance dated 14.08.2008 the Mahanadi Coalfields Limited (MCL) had given a linkage of 7.72 MTPA of coal for the Project and all bidders were informed of 7.70 MTPA coal linkage prior to the submission of bids. PSPCL further submitted at this stage it was not possible to estimate the impact in tariff of use of imported coal in the power project of the respondent. PSPCL stated in the affidavit that Monthly Energy Charges are directly linked to the weighted average cost which includes the cost of transportation and unloading of coal in terms of clause 1.2.3 of schedule 7 of the PPA and formula provided

therein. PPA signed with TSPL, however carry the following definition of the Fuel.

‘Fuel means primary fuel, used to generate electricity, namely domestic coal’.

PSPCL stated that actual impact on tariff would be known only at the time of supply of electricity by the respondent, using the fuel supplied for the project. Consequences of termination of coal linkage due to non-signing of FSA, may be much more.

9. TSPL filed reply to the petition vide No.TSPL/PSEB/300 dated April 16, 2012 and submitted that :

- (i) As per bid documents and PPA the supply of coal for the entire project was obligation of the procurer i.e. PSPCL and thus prayers are contrary to the same. There was attempt on the part of PSPCL to modify the obligations in the manner prayed for after expiry of more than 3 (three) years from the date of SPA (Share Purchase Agreement), PPA and the MoU.

- (ii) Pursuant to competitive bidding under Case 2, Sterlite Energy Limited (SEL) was successful bidder as intimated by the applicant vide Letter of Intent dated July 4, 2008. SEL executed a Share Purchase Agreement (SPA) dated September 1, 2008 wherein SEL purchased the entire share capital of the respondent (TSPL) from the Applicant/PSEB (now PSPCL) along with project site and clearance obtained by the respondent for the project. PPA was signed on 1st September, 2008 and as per clause 1.1 of PPA, it was reiterated that onus of providing fuel for the Project would be on procurer and ‘Fuel to be the domestic coal. The Applicant/petitioner entered into MoU dated 2nd September 2008, wherein Applicant specifically vide clause 3 undertake to sign FSA with the fuel supplier.

- (iii) The terms and conditions of the Model FSA now proposed to be executed by MCL deviates from the conditions assured by MCL letter dated April 28, 2008. The Model FSA provides that MCL would assure only 50% of Annual Contracted Quantity (ACQ) with take or pay liability which include imported coal. The term of Model FSA is limited to a period of 5 years only. The respondent had been bringing the detrimental impacts of the terms and conditions of Model FSA / MoU on the Project and had been requesting the Applicant / PSPCL to fulfill its obligations to provide assured supply of high quality coal for the Project. C.E. (Thermal Design) PSPCL vide letter dated November 27,2009 reiterated that FSA shall be signed between Applicant/ PSPCL and MCL. TSPL has also mentioned its letters dated December 12, 2009, July 30, 2010 and September 21, 2010 to highlight efforts made by TSPL to sort out the issues related to FSA. The respondent/TSPL received letter dated 22.10.2010 from Applicant/ PSPCL, intimating that TSPL ought to take up the matter at its own level with Ministry of Coal for additional quantum of coal linkage and stick to provisions of PPA in respect of remaining issues.
- (iv) The respondent received a letter dated 7.9.2011 from MCL requiring the respondent to execute the Model FSA on or before 30.09.2011 and it was verbally conveyed to TSPL that in the event of failure to execute FSA, MCL may consider to cancel the coal linkage. The respondents conveyed its concerns through letters dated November 29, 2011, December 19, 2011 and February 17, 2012.

10. The respondent has prayed that the Commission may :
- (a) Pass appropriate orders to the effect that the prayers as sought by the Applicant are not maintainable;
 - (b) Direct the Applicant to make available and arrange the fuel required for ultimate capacity and the entire term of the PPA and of the quality as assured before the bid date in compliance with the Applicant's obligations;

- (c) Pass appropriate orders with respect to upward tariff revision for the Project keeping in view the additional costs to be incurred by the Respondent in view of change in quality of coal to be provided in terms of the FSA;
- (d) Pass appropriate orders to the Applicant for payment of capacity charges and incentives thereon in case of non-availability of coal for the Project.
- (e) Direct the Applicant to take into consideration the request of the Respondent pertaining to extension of timelines for the Project on account of factors including delayed and hindered progress of the Project on account of uncertainty of adequate coal availability of the Project; and
- (f) Pass such other order or orders as this Commission may deem just and proper in the circumstances of the case.

11. During hearing on 17.04.2012, PSPCL submitted that it intended to revise its petition in view of the revision of Govt. of India policy to assure supply of domestic coal upto 80%. PSPCL was directed to revise its petition and also calculate the financial implication of revised policy i.e. use of imported coal to the extent of 20% and Talwandi Sabo Power Limited (TSPL) was directed to check and confirm suitability of their plant equipment for using blended coal with imported component upto 20% vide Order dated 23.04.2012. PSPCL filed rejoinder to the reply of TSPL vide C.E./ARR & TR letter dated 18.05.2012 and summed up its response in its concluding para as under:

“In view of the preliminary reply, reply to facts and reply to the matter on merits, the prayer made by the Respondent is baseless, wrong and is denied. The Applicant reiterates the contents of the Application and the prayers made therein. Further, the prayer of the Respondent to the effect that the Applicant is to arrange for the fuel for the entire capacity of the generating station and for the life of the PPA on the alleged quality assured are baseless, wrong and denied. The prayer for upward revision in tariff is also baseless and denied. There can not in any case

be any impact on tariff on account of fuel at this stage when the project has not even been completed and there is no generation of electricity. Further, the prayers of the Respondent with regard to capacity charges and incentives are baseless and denied. The entire objective of the Respondent is only to cover up its own defaults and seek extension of time for project completion and for this purpose is making such prayers before the Commission. This is a clear abuse of process of court. There is no basis for claiming extension of project completion schedule on account of fuel supply. This itself establishes the fact the Respondent is seeking to misguide the proceedings before the Commission to cover up its own defaults.”

TSPL filed reply to the affidavit of PSPCL (dated 10.04.2012) vide its No.TSPL/PSEB/313 dated May 18, 2012. TSPL submitted interalia that it was in the process of technically evaluating the impact of usage of imported coal upto 20% in its equipment / facilities which were primarily designed on the basis of usage of domestic coal.

12. During hearing on 22.05.2012, PSPCL requested for more time to obtain letter / circular of Govt. of India confirming policy decision assuring supply of domestic coal upto 80% and then to file revised petition within three weeks.

13. PSPCL filed additional submissions vide C.E/ARR & TR No.5566/TR-5/510 dated 11.7.2012 and submitted that the petitioner was to submit revised petition but there appears to be no need to pursue the matter with the Ministry of Coal of Govt. of India and Coal companies for pre-poning the supply of coal from the dates consistent with commercial operation schedule as provided in PPA. PSPCL also submitted that it has become necessary to decide on the extent to which Model Fuel Supply Agreement should be agreed to. The consequences of not signing the FSA may result in the coal linkage being lost for the project. In such circumstances, without prejudice to the interse rights and

contentions of the respective parties, there may be serious implications on PSPCL getting power supplied from the project on account of fuel being not available. On the other hand, signing of the Model FSA would have financial / commercial implications on the purchase of electricity.

14. TSPL filed reply vide TSPL/PSEB/357 dated 24.08.2012 to the additional submissions dated 11.07.2012 filed by PSPCL. TSPL reiterated its stated position vide its earlier submission which need not be repeated. PSPCL filed additional submissions dated 07.09.2012 vide C.E./ARR & TR memo No.5767/TR-5/510 dated 07.09.2012 wherein it submitted that the Commission may :

- (a) take on record the representation by the Petitioner that the execution of the Fuel Supply Agreement as may be finalized by the Ministry of Coal be signed by the Respondent with MCL.
- (b) in terms of the agreement between the parties as evidenced by the Request for Proposal, Power Purchase Agreement, Memorandum of Understanding dated 2.9.2008, letter dated 23.12.2009 and 4.10.2010, the Respondent Talwandi Sabo Power Limited be directed to execute the Fuel Supply Agreement with MCL/Coal Companies of Coal India Limited as per the terms and conditions proposed by them in accordance with the Government of India's decision for supply of fuel for the project;
- (c) direct the Respondent Talwandi Sabo Power Limited to arrange for the requisite quantum of coal and for generation and supply of power from the project in terms of the Power Purchase Agreement entered into between the parties; and
- (d) pass such further Order or Orders as this Commission may deem just and proper in the circumstances of the case.

15. The petitioner and respondent argued the case on 11.9.2012 at length and emphasized the urgency to execute the FSA with Coal India Limited's subsidiary (MCL) without taking into account and without prejudice to the rights and obligations of the parties under the Power Purchase Agreement dated 01.09.2008 at this stage. After hearing the arguments of PSPCL and TSPL, the Commission decided to close further hearing of the petition and directed PSPCL and TSPL to file written arguments within two days vide Order dated 13.09.2012.

16. TSPL filed brief submissions vide TSPL/PSEB/372 dated 14.09.2012 wherein it was submitted by TSPL that TSPL had not received copy of the additional submissions dated 07.09.2012 filed by PSPCL and therefore had no opportunity to rebut the same. TSPL submitted that either the petition be decided without taking into account the additional submissions dated 07.09.2012 filed by PSPCL or an opportunity be granted to TSPL to file an affidavit in reply to the same.

17. TSPL was informed vide No.PSERC/Reg./5985/86 dated 20.09.2012 to file affidavit in reply to the additional submissions dated 07.09.2012 filed by PSPCL, enclosing copy of the same with letter referred to above. TSPL has filed the affidavit vide TSPL/PSEB/377 dated September 25, 2012 in response to letter No.PSERC/Reg./5985/86 dated 20.09.2012. The same has been taken on record and has been duly considered by the Commission before deciding this petition.

18. After going through the petition, reply, additional submissions, rejoinders and written submissions filed by the petitioner and the respondent and hearing the arguments put-forth by the parties, the Commission with regard to the prayer of the petitioner, give its findings as under:

The petitioner has prayed as under:

- (i) initiate a proceeding on the aspect of signing of the Fuel Supply Agreement by the respondent with the coal companies for sourcing of the coal requirements for the power project of Talwandi Sabo Power Limited for generation and supply of electricity to the applicant;
- (ii) pass such direction as considered appropriate in regard to the signing of the Fuel Supply Agreement by the respondent with the coal companies; and
- (iii) pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.
- (iv) issue suitable directions to replace the word “Procurer” with “Seller” in the definition of ‘Fuel Supply Agreement’ under Sub-Article 1.1 of the Power Purchase Agreement.

19. The Commission notes that Punjab State Electricity Board (PSEB now Punjab State Power Corporation Limited; PSPCL) in September 2007, through a special purpose vehicle (SPV) in the name of Talwandi Sabo Power Limited(TSPL), a wholly owned company of the then PSEB as on that date, initiated the competitive bidding process for procurement of power (1800 MW \pm 10%) under the ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees’ dated 19.1.2005 issued by Ministry of Power, Government of India (Guidelines). The Commission notes further that the competitive bids were invited by the petitioner under case-2 bidding where the Project site stands identified and fuel allocation provided, in this case as per scenario 4 of the RfP i.e. where fuel linkage has been provided by the procurer. The respondent, in its submission dated 4.6.2012, submitted that the Request for Qualification (RfQ) was issued by the petitioner on 25.9.2007 and the Request for Proposal (RfP) on 18.1.2008. The pre-bid conference was held by the petitioner on 8.5.2008. The last date for bid submission was 18.6.2008. The respondent has further submitted that Letter of Intent (LOI) was issued to the successful bidder Sterlite Energy Limited (SEL) on 4.7.2008. Further on 1.9.2008, the Share Purchase Agreement (SPA) was signed wherein one hundred percent (100%) shareholding of the

SPV TSPL was purchased by SEL thereby the same becoming a wholly owned subsidiary of SEL. Simultaneously on the same day i.e. 1.9.2008, the Power Purchase Agreement (PPA) was also signed (Annexure 'A' of petition) between TSPL, as a wholly owned company of SEL (as on 1.9.2008) with the then PSEB. To clarify the matter, it is brought out that the SPV TSPL which was incorporated by the then PSEB for initiating the competitive bidding process for procurement of power was transferred to the successful bidder SEL by way of the SPA whereby one hundred percent (100%) shares of TSPL were purchased by SEL on 1.9.2008 and then, the PPA was signed by TSPL, as a wholly owned company of SEL (as on 1.9.2008) with the then PSEB. Rightly so, in the PPA, the then PSEB has been referred to as the Procurer and TSPL as the Seller.

20. Further, a Memorandum of Understanding (MOU) was signed between the then PSEB and TSPL on 2.9.2008 (Annexure D-1 of the respondent's reply dated 16.4.2012).

21. At the bidding stage, the petitioner had intimated to the prospective bidders about the fuel linkage for the project on the basis of letter dated 28.4.2008 (Annexure B-2 of respondent's reply dated 16.4.2012) of Mahanadi Coalfields Limited (MCL) wherein it was intimated that it is possible to supply upto 5.00 million tonnes coal ('E' Grade) during 2011-12 and 7.70 Million tonnes of coal ('E' Grade) from 2012-13 onwards from mines of Basundhara Coalfield, as communicated by Ministry of Coal, Govt. of India.

22. The Commission notes that the Letter of Assurance (LOA) no. MCL/GM/S&M/LOA/TalwandiSabo/F- /2008/2047 dated 14.8.2008 (Annexure D-2 of respondent's reply dated 16.4.2012) was issued by MCL wherein the following points are noteworthy:

- i) The LOA was addressed to the Chairman-cum-Managing Director, Talwandi Sabo Power Limited (CMD TSPL).
- ii) Talwandi Sabo Power Limited has been referred to as "the Assured".

- iii) The LOA mentioned that MCL, referred to as “the Assurer”, provisionally assures that it would endeavour to supply coal to the Assured (subject to the terms & conditions provided therein) in consideration of the request of the CMD TSPL for issuance of LOA requiring 7.72 Million tonnes per annum (mtpa) of E/F Grade coal for its 1800 MW Power Plant (to be) located at Talwandi Sabo referred to as “the Plant”.
- iv) Under Clause 1 ‘Scope of Assurance’, sub-clause 1.1 ‘Quantity, Grade and Source of coal’ of the LOA, it has been mentioned that “Subject to the Assured fulfilling its obligations in accordance with Clause 2 to the satisfaction of the Assurer within the period of the validity of this LOA and the signing of the Fuel Supply Agreement (FSA) within three (3) months thereafter, the Assurer shall endeavour to supply, as per the normative requirement of the Plant, E* Grade(s) coal to the Assured, which shall be subject to review and assessment by the Assurer of the actual coal requirement of the Assured as well as the incremental availability of coal from the mines of the Assurer and of imported coal. It is expressly clarified that in the event that the incremental coal supplies available with the Assurer (after meeting out the commitments already made) is less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and the balance quantity of coal requirement shall be met through imported coal available with the Seller, which too shall be distributed on pro-rata basis.”

**In case shortage of E grade coal, F grade coal will be supplied from any source to meet the requirement.*

- v) Under Clause 2 ‘Fulfillment of Assured’s obligations’ sub-clause 2.1 ‘Time-bound achievement of milestones’ it is mentioned that “ The Assured shall undertake to complete all the activities, as mentioned in Annexure 1 to this LOA, within twenty four (24) months from the date of issue of LOA and each activity within the time-period mentioned against it unless such completion is affected due to any Force Majeure event provided that such Force Majeure event shall not include inability

or failure to obtain financing for the Plant or failure to comply with the existing rules and regulations with respect to statutory clearances applicable to the Plant or any such event resulting from the negligence, omission or default by the 'Assured', and the Assured notifies in writing within seven (7) days of occurrence of any such Force Majeure event along with documentary evidence of the same."

- vi) Further, under sub-clause 2.2 'Reporting Requirement' it is mentioned that " The Assured shall submit the status of each activity/milestone including the documentary evidence in relation to such status within the time-period as mentioned in Annexure 1."
- vii) Under Clause 3.4 'Encashment of Commitment Guarantee' sub- clause 3.4.2 'Failure to sign the FSA' it is mentioned that "The Assurer shall have the right to encash the CG in the event of failure by the Assured to sign the FSA within three (3) months from the expiry of validity of the LOA or the satisfactory achievement of all the milestones, as shown in Annexue 1, whichever is earlier. It is also clarified to the Assured that the percentage of annual contracted quantity fixed with respect to Take or Pay obligations in the FSA may be reviewed by the Seller in the light of its coal availability and coal commitments, and amended on year-to-year basis during the term of the FSA."
- viii) Under Clause 4 'Validity of the LOA' it is mentioned that "The LOA shall remain valid for a period of twenty four (24) months from the date of issue of this LOA unless extended for three (3) months in accordance with Clause 3.5 hereof, and shall stand annulled upon expiry of such period."
- ix) Under Clause 5 'Assignment of the LOA' it is mentioned that " The assured shall not, without the express prior written consent of the Assurer, assign to any third person the LOA, or any right, benefit, obligation or interest therein or thereunder."

23. The Commission further notes the following contents in the various documents/submissions:

- i) In the MOU dated 2.9.2008 (Annexure D-1 of respondent's reply dated 16.4.2012) signed between the Procurer, the then PSEB (now PSPCL; petitioner) and the Seller, TSPL (respondent), under Clause 3, it is mentioned as under:

“The Fuel Supply Agreement ‘FSA’ shall be signed by PSEB with the coal company within six months from the date of finalization of the Model FSA, at the request of TSPL, subject to the condition that TSPL shall achieve all milestones/ benchmark(s) as stipulated in the Letter of Assurance dated 28 April, 2008 issued by Mahanadi Coal Fields Limited and FSA, and PSEB shall thereafter assign the same in favour of TSPL.”

- ii) As per the petition, in the RfP (Annexure B of the petition), clauses 2.1.3 and 2.1.3A reads as under:

“2.1.3 A Fuel Supply Agreement will be signed between the Procurer and the Fuel Supplier. The same agreement has a clause whereby the Procurer has a right to assign this agreement for a specific period, within the term of the Fuel Supply Agreement (“FSA”) to a third party. Accordingly, the FSA will be assigned to the Selected Bidder during the term of the PPA.

2.1.3A Once the FSA as per 2.1.3 has been assigned to the Seller, any penalty for not procuring the minimum guaranteed fuel shall be born by:

- a) The Procurer, if the availability of the Seller's generating plant has been more than the minimum offtake guaranteed by the Procurer; and
- b) The Seller, if the availability of Seller generating Plant has been less than the minimum availability guaranteed by the Seller.”

- iii) In the PPA (Annexure A of the petition), the definition of FSA read as under:

“Fuel Supply Agreements means the agreement(s) entered into between the Procurer and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Procurer and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Procurer and the Fuel Supplier for the supply of Fuel.”

- iv) In the Model FSA (enclosed with Annexure-F of the petition), under Clause 19.0 ‘Miscellaneous’ sub-clause 7 ‘Assignment’ reads as under:
“The Purchaser shall not, without the express prior written consent of the Seller, assign to any third party this Agreement or any part thereof, or any right, benefit, obligation or interest therein or thereunder ”

- v) In the petition it has been submitted that as per the definition clause in the draft Power Purchase Agreement of the Standard Bidding Documents, the definition of FSA is as under:

“Fuel Supply Agreements⁶ [as applicable] means the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for the supply of the Fuel.”

⁶*This definition may be modified keeping in mind the entity responsible for fuel procurement/allocation of linkage viz. the Procurer or the Seller;*

24. The Commission notes that the petitioner in its letter addressed to the respondent bearing memo no. 582/DPT-63 dated 23.12.2009(Annexure-H of the respondent’s reply dated 16.4.2012/Annexure-A of petitioner’s submission

dated 7.9.2012) assigned the FSA to the respondent stating that the same should be entered into between TSPL and MCL. The Commission further notes that the petitioner, in its petition, has stated that the respondent being the Assured requested the Ministry of Power to sign the FSA vide letter no. TSPL/MoP/LoA/13 dated 30.7.2010. Further, the petitioner in its submission dated 7.9.2012 (memo no. 5767/TR-5/510) has furnished as Annexure-B, a copy of letter bearing no. TSPL/MCL/LoA/14 dated 4.10.2010 written by the respondent addressed to General Manager (Sales & Marketing), MCL wherein bringing out various references regarding the status of milestones (as per the LOA) having already been achieved and timely reporting of all the 6, 12, 18 & 24 months milestones and enlisting the same, stated that "In view of the above, we are ready to sign Fuel Supply Agreement (FSA) with Mahanadi Coalfields Ltd. (MCL) immediately. Kindly let us know any convenient day before the due date (as per the LOA) for signing of the FSA with MCL." Also, the Commission notes that MCL vide letter 1685 dated 7.9.2011 addressed to TSPL (Annexure-L of the respondent's reply dated 16.4.2012) reiterated its earlier invitation for signing the FSA. Moreover, PSPCL in its submission dated 7.9.2012 submitted that Coal India Ltd., by its letter dated 29.5.2012 (Annexure-C) informed the coal companies including MCL on the modification of signing the FSA with regard to it having included the projects having long term PPA with distribution companies and have commissioned or would get commissioned after 31.9.2009 and on or before 31.3.2015 (instead of 31.12.2011 earlier).

25. Considering the above, it is seen that as per the LOA, TSPL is 'the Assured' and the LOA further brings out that the FSA shall be signed by the Assured with MCL. The Commission notes that in the PPA, the definition of FSA provides for the document to be signed by the Procurer with the Fuel Supplier. The Commission also notes that in the MOU dated 2.9.2008 under Clause 3, it is provided that the FSA shall be signed by the then PSEB (Procurer) with the coal company within six months from the date of finalization of the model FSA, at the request of TSPL, subject to the condition that TSPL shall achieve all milestones/benchmark(s) as stipulated in the LOA issued by MCL and FSA and PSEB shall thereafter assign the same in favour

of TSPL. The Commission notes that the FSA was assigned by the petitioner to the respondent vide its letter dated 23.12.2009 and the respondent vide its letter dated 4.10.2010 informed its readiness to MCL for signing the FSA and in turn MCL invited TSPL vide its letter dated 7.9.2011 for signing the FSA. The Commission is of the considered opinion that the petitioner has no authorization to sign the FSA, it being not the Assured in terms of the LOA and FSA. Moreover, as per the provisions in the LOA and FSA brought out above, assignment of these documents is not allowed without the prior written express consent of MCL. As the petitioner could not have signed the FSA, it being not the Assured, assignment of the same to the respondent vide letter dated 23.12.2009 was a step in the right direction and in the interest of all the stakeholders and provided a remedy to the anomalous situation. Further, as brought out above, the respondent also vide its letter dated 4.10.2010, confirmed the completion of all the prescribed milestones within the specified timeframe to MCL and in the same letter expressed its readiness to sign the FSA requesting for any convenient day before the due date as per the LOA and MCL invited TSPL at least twice for signing the FSA. Given the current scenario of shortage of power in the State, the Commission considers it of utmost importance and in the interest of all the stakeholders viz. the generator, the procurer and the consumers, that the Project is commissioned in time. In the circumstances, the Commission directs the respondent to sign the FSA with MCL immediately. The consequences for any further delay in the matter shall be to his account. Simultaneously, the petitioner is directed to extend full co-operation to the respondent with regard to the signing of the FSA. The issue got unnecessarily confused due to provisions in the i) RfP regarding signing of the FSA by the Procurer and assignment of the same by the Procurer to the Seller, ii) PPA regarding signing of the FSA by the Procurer and iii) MOU dated 2.9.2008 regarding signing the FSA by the Procurer and assigning the same in favour of TSPL. In view of the Commission, the aforementioned provisions were in fact not required as the SPV TSPL, the Assured in terms of LOA/FSA, in any case, was to be transferred to the successful bidder beforehand for signing of the PPA, as the Seller, with the Procurer in terms of the Guidelines/Bidding documents.

26. The Commission advises TSPL to vigorously pursue the matter with all concerned Government authorities e.g. MCL, Coal India Ltd., Ministry of Coal, Ministry of Power and Central Electricity Authority etc. for maintaining the status quo with respect to quantity/quality/grade/origin of coal committed as per the LOA. On its part PSPCL should co-ordinate with TSPL and pursue the matter, even at highest level, with the State /Central Govt.

27 The Commission would like to point out that the respondent appears to have a few other concerns and apprehensions, which have been brought out in its reply to the petition and various subsequent submissions. The Commission opines that these do not fall within the ambit of the decision with regard to the prayer made in this petition, which is for seeking suitable direction(s) for signing of the FSA. Incidentally, the respondent has already conveyed its willingness to MCL to sign the FSA and in turn MCL has invited TSPL for signing the same. Accordingly, other concern(s), if any, should not become an impediment in the course of signing of the FSA. In the opinion of the Commission, the petitioner has no role qua the FSA and MCL and the FSA is required to be signed between TSPL and MCL which for the present is one of the critical links in the chain for timely execution of the Project. In case the respondent has grievance(s) and remedy for the same is not available under the PPA or possibly can not be resolved amicably between the parties mutually and falls within the statutory competency of the Commission, it is free to file a separate petition under the relevant provisions in the Electricity Act, 2003 at appropriate stage.

Accordingly, TSPL is directed to sign the FSA with MCL without prejudice to all the rights and contentions of the parties under the Power Purchase Agreement dated 1st September, 2008.

The petition is disposed of accordingly.

Sd/-
(Gurinderjit Singh)
Member

Sd/-
(Virinder Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 27.09.2012