

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

Petition No. 27 of 2015  
Date of Order: 07.10.2015

Present: Smt. Romila Dubey, Chairperson  
Shri Gurinder Jit Singh, Member

In the matter of: Petition under Section 86(1)(b) and 86(1)(f) of The Electricity Act, 2003 seeking recourse to meet the adverse impact on the Net Quoted Heat Rate (NQHR)/Station Heat Rate (SHR) for the 2x700 MW Rajpura Thermal Power Project (project) owned and operated by the petitioner caused due to consistent part load offtake by PSPCL (i.e. operation of plant at lower/varying load factor).

And

In the matter of: Nabha Power Limited, Aspire Tower, 4<sup>th</sup> floor, Plot No.55, Industrial and Business Park, Phase-1, Chandigarh-160002.

---- Petitioner

Versus

Punjab State Power Corporation Limited (PSPCL) through its Engineer-in-Chief, Thermal Designs, Shed No.T-2, Thermal Design Complex, Patiala-147001.

---- Respondent

**Order**

1. Nabha Power Limited (NPL) filed this petition under Section 86(1)(b) and 86(1)(f) of The Electricity Act, 2003 (Act) seeking recourse to meet the adverse impact on the Net Quoted Heat Rate

(NQHR)/Station Heat Rate (SHR) for the 2 x 700 MW Rajpura Thermal Power Project (project) owned and operated by NPL caused due to consistent part load offtake by PSPCL i.e. operation of plant at lower/varying load factor.

2. In the petition, NPL submitted as hereunder:

- i) NPL is a company set up initially by Punjab State Electricity Board as a Special Purpose Vehicle (SPV) for developing the 2x700 MW Rajpura Thermal Power Project at village Nalash, near Rajpura, District Patiala. The entire equity share-holding of NPL was subsequently acquired by L&T Power Development Limited, being the successful bidder for development of the project through NPL under a competitive bidding process held by PSEB. L&T Power Development Limited (LTPDL), a company incorporated under the Companies Act, 1956, participated in the competitive bidding under Case-2 of 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' issued on 19.01.2005 by Ministry of Power, Government of India and pursuant to being a successful bidder, took over SPV i.e. NPL. LTPDL was primarily involved in activities related to the project prior to taking over of NPL and interacted with PSEB on all issues.
- ii) NPL, acting as an authorized representative of PSEB, issued Request for Qualification (RfQ) and Request for Proposal (RfP) on 10.06.2009 for selection of a developer through tariff based competitive bidding process for procurement of power on long term basis from the project. Bids were invited under Section 63 of the Act and 'Guidelines for

Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' issued by Ministry of Power, Government of India. On being the successful bidder, LTPDL took over NPL by acquiring 100% shareholding. The PPA dated 18.01.2010 was signed between NPL, as Seller and PSEB, predecessor of PSPCL, as Procurer for supply of power from the project for a period of 25 years. In terms of the PPA, NPL set up the 2 x 700 MW project, both Unit-1 and Unit-2 having achieved commercial operation on 01.02.2014 and 10.07.2014 respectively.

- iii) The project was conceived during 2006-2007 to meet the long term power requirement of the State of Punjab which was facing acute shortage of power and was projected to face such shortage in the forthcoming years i.e. till 2016-17 (end of 12<sup>th</sup> five year plan) considering the steep increase in demand of power in Punjab. In this regard, the Orders dated 11.06.2007 and 09.01.2008 of the Commission in petition no. 9 of 2007 and 58 of 2007 respectively stated as hereunder:

Commission's Order dated 11.06.2007 in petition no. 9 of 2007:

*"..... The petitioner has stated that there is a long term requirement of additional power in the State of Punjab and PSEB intends to procure power through the competitive bidding route in accordance with the provisions of Section 63 of the Electricity Act, 2003 and the Guidelines dated 19.1.2005. For this purpose, it is planned to set up two Thermal Power Plants (TPP) each of 1200 MW capacity at the following places by developers identified through international competitive bidding:*

*i.Coal based TPP at Talwandi Sabo (Banwala) in Mansa District.*

*ii)Coal based TPP at Majhi near Nabha in Sangrur District.*

*The petitioner-company has been incorporated under the Companies Act, 1956 as a wholly owned company of PSEB to function as a Special Purpose Vehicle (SPV) for establishment of the 1200 MW (2x600) TPP at Majhi near Nabha, Distt. Sangrur.*

.....

*Submissions made on behalf of the petitioner have been considered. It is widely accepted that there is an acute shortage of power in Punjab and thus there is a long term requirement of additional power in the State. It is stated in Annexure 1 to the petition that the quantum of capacity/energy to be procured, will not exceed the projected additional demand forecast for the next three years. The National Electricity Policy aims to achieve the objective of fully meeting the demand for electricity by 2012 which would not be possible unless additional power is procured on a priority basis.*

Commission's Order dated 09.01.2008 in petition no. 58 of 2007:

*"The Commission had earlier allowed the Petitioner to contract capacity to the extent of 2400 MW based on 1200 MW each for the proposed power stations at Talwandi Sabo and Nabha. Thereafter in its Order dated 8.11.2007 in Petition No. 29 of 2007, the Commission had noted that the capacity of the project to be set up at Talwandi Sabo had been enhanced from 1200 MW to a contracted capacity in the range of 1620 MW – 1980 MW and had allowed the same. With the proposed capacity of 1200 MW of Nabha (now Rajpura), the total proposed capacity of the two power stations will get enhanced to 3000 MW which is 600 MW over and above what was earlier allowed by the Commission. As per the Guidelines, approval of the Commission is required to be sought if the quantum of energy to be procured exceeds the projected additional*

*demand forecast for next three years following the year of expected commencement of supply proposed to be procured. Such demand forecast shall be based on the latest available (at the time of issue of RFQ) Electric Power Survey (EPS) published by Central Electricity Authority (CEA). The National Electricity Policy aims to achieve the objective of fully meeting the demand for electricity by 2012. It further aims at overcoming energy and peaking shortages and ensuring availability of adequate spinning reserve. The instant power plant is likely to be commissioned in 2012-13 and accordingly the power requirement in 2015-16 has to be kept in mind. The 17th E.P.S. has projected an annual compounded increase of 8.75% in energy requirements during the period 2006-07 to 2011-12. Assuming the same rate of growth, the energy requirements in 2015-16 will be 15385 MW whereas the energy available from all present and future sources including the instant case will be 13847 MW. In the light of this deficit, the Commission approves contracting of a total capacity of 3100 MW, taking both the proposed power stations at Talwandi Sabo and Rajpura into account”.*

All the details regarding acute shortage of power submitted by PSPCL were considered by the Commission. It was clear that the entire power generated from this project will also not be sufficient to meet the expected demand of power in Punjab.

- iv) The business forecast provided by PSPCL in RfQ dated 10.06.2009 to the bidders clearly established that despite procurement of the entire power from this project, PSPCL would continue to face a very significant deficit as the required quantum of power will be significantly higher than the available quantum of power. Business forecast clearly indicated that the generation capacity needed was 14000

MW and the additional capacity required was 8000 MW. The total planned generation capacity during 11<sup>th</sup> Plan was only 6928.7 MW. The bidders were informed by PSPCL that considering the power deficit scenario, the entire capacity of the project will always be procured to the maximum extent.

- v) The Commission's Order granting approval for the quantum of capacity/energy to be procured by PSPCL as per the Competitive Bidding Guidelines, PSPCL's clear and unequivocal business forecast and the categorical representation of PSPCL in RfP for development of project with a minimum contracted capacity of 1080 MW and maximum of 1320 MW (revised to 1400 MW) and that the supercritical technology shall be used, it is clear that the project was envisaged to operate as base load power plant to meet requirement of PSPCL on long term basis. The DPR dated June 2008 provided with bid documents also mentioned 'Operation Philosophy for the Project as Base Load'.
- vi) In terms of the Central Electricity Authority (Technical Standards for Construction of Electrical plants and Electrical lines) Regulations, 2010 (CEA Regulations), '*Base Load Operation*' means operation at maximum continuous rating (MCR) or its high fraction and MCR in relation to coal or lignite based thermal generating units, means maximum continuous output at the generator terminals (net of any external excitation power) as guaranteed by the manufacturer at the rated parameters.

The aforesaid definition clearly establish that a plant meant for 'base load operation' is required to operate continuously at maximum continuous output.

vii) It is widely accepted and acknowledged that large size coal based power plant is considered for base load operation i.e. to operate at maximum load. The review of the definition of the 'Base Load Operation' read with definition of MCR in the CEA Regulations and the acknowledged treatment of a coal based power plant as a base load plant clearly establish that the project is meant to operate at maximum continuous rating to generate maximum continuous output at its terminals.

viii) Due to the following factors including PSPCL's unambiguous and binding representations:

- a) the definition of base load operation, MCR and the specific representation regarding operation philosophy of the project as a base load plant;
- b) the Commission vide its Orders dated 11.06.2007 and 09.01.2008 having approved the project to meet the acute shortfall of power in Punjab;
- c) PSEB in its petition having undertaken that the capacity addition would not exceed its additional demand projection;
- d) PSEB in its RfQ and RfP having clearly stated that the objective for the bid was to procure minimum 1080 MW and maximum 1320 MW of power and
- e) PSEB having made very clear stipulations in its 'Business Forecast' as part of RfQ to bidders that PSPCL would continue to face a very significant deficit as the required quantum of power will be significantly higher than the available quantum of power;

LTPDL as a bidder, while quoting the NQHR, prudently assumed that the plant will operate on full load at Normative

Availability level of 85% i.e. 85% of time when plant is available, it will operate at full load and structured its bid accordingly. Considering that the Normative Availability as per the PPA is 85%, LTPDL considered that for 15% of the time, the project may not be available/ready for generation on account of outages, shutdown etc. Therefore, in view of the above stated factors including PSPCL's specific representations, it was considered that the plant will be operating at full load for 85% of the time to meet the acute power shortfall of PSPCL.

- ix) The project was envisaged to be developed on the 'Supercritical Technology' as specified in the RfP and PPA. The relevant excerpts from the RfP and the PPA are as follows:

RfP

*"Supercritical Technology" shall mean technology with minimum steam parameters at steam turbine inlet as mentioned below:*

*Main steam pressure: 237 kg/cm<sup>2</sup>*

*Main steam temperature: 535°C*

*Reheat steam temperature: 565°C*

*1.3 The Bidder shall consider supercritical plant technology with minimum steam parameters, at turbine inlet as: Pressure: 237 kg/cm<sup>2</sup>, Main steam temperature: 535°C and Reheat steam temperature: 565°C."*

PPA

1.1 Definitions

*"Supercritical Technology" means technology with minimum steam parameters at steam turbine inlet as mentioned below:*

*Main steam pressure: 237 kg/cm<sup>2</sup>*

*Main steam pressure: 535°C*

*Reheat steam temperature: 565°C*

*“Unit” means one steam generator, steam turbine, generator and associated auxiliaries of the power station based on supercritical technology;*

*Schedule 5-Commissioning*

*1.1 Performance Test*

*(iv) Further, as a part of the Performance Test, the Unit shall be tested for compliance with parameters of Supercritical Technology.”*

- x) A supercritical plant is able to generate very high pressure and temperature which results into higher efficiency of such plants. As mentioned in the RfP and PPA, specific pressure and temperature were specified which are the main attributes of a supercritical plant. The plants which operate below the supercritical parameters function as sub-critical plants which are known to be lesser efficient in comparison to supercritical plants. Supercritical parameters in terms of temperature and pressure as specified in the RfP and PPA can only be achieved when a plant is operated continuously at higher Plant Load Factor (PLF). Thus, continuous operation at higher PLF is must for ensuring operation of a supercritical plant within supercritical parameters. In case a plant is operated at a lower PLF with varying load factor, the high pressure and temperature required for supercritical technology based performance cannot be maintained and plant operates at sub-critical parameters. It is clear from Central Electricity Regulatory Commission (CERC) norms of heat rate for subcritical and supercritical power plants that net heat rate of supercritical plants is 8.6% lower as

compared to subcritical plants, which clearly manifest the better efficiency of supercritical plants.

xi) The project is a supercritical plant which is able to achieve supercritical parameters i.e. high pressure and temperature only when it is operated at around 85% of its capacity or higher capacity. Below such PLF/capacity, plant/project operates at sub-critical parameters thereby losing advantages of the supercritical technology as the high pressure and temperature required for operating as a supercritical plant cannot be maintained with operation at lower PLF. With this the plant also loses the inherent advantages of a better SHR.

LTPDL had based its bid on minimum supercritical range as specified in the RfP whereas in reality the plant is consistently being run on sub-critical parameters causing heavy financial losses to NPL and as such also endangering the equipment. This being a Case 2 scenario 4 based project, the bidder was required to only bid for the capacity charges and SHR.

xii) Based on the terms and conditions of DPR, RfP and PPA, PSPCL unequivocally specified to the bidders that the project was to be set up on supercritical technology as a base load plant. In view of the above background with clear specifications and representations, PSPCL invited the bidders to quote the Capacity Charges (escalable and non-escalable) (i.e. fixed cost component of the plant) and the NQHR/Net Station Heat Rate (NSHR) (i.e., efficiency of the project).

xiii) SHR of a power plant indicates the amount of heat energy required by such plant (i.e. the entire equipments comprising of boiler, pumps, feeders for cooling water etc.) to produce 1 (one) unit of power/electrical energy. SHR is a measure of how efficiently a power plant converts the heat energy contained in the fuel into electrical energy. Such efficiency of a thermal generating unit in converting heat into electrical energy is greatly dependent on the level at which the plant is being loaded or operated (generally referred to as plant load factor). The SHR of a plant varies inversely with its PLF i.e. the efficiency of a plant to convert heat energy increases significantly thereby lowering SHR, when the plant is being operated at higher load levels.

xiv) At the time of submissions of bids, the following representation made by PSPCL, played a very important and significant role on the basis of which LTPDL quoted the NQHR/SHR of 2268 kCal/kWh:

- a) the project will operate as a base load plant which means that it will operate at maximum continuous rating to generate maximum continuous output at its terminals;
- b) the plant being based on supercritical technology will operate at full load at normative level of 85% so that the project operates within the supercritical parameters to achieve the benefits associated with such technology;
- c) PSPCL will have the power demand requirement to support evacuation of the entire power generated by the project at maximum capacity and in any event, not lesser than power generated at full load at normative level of 85%; and
- d) the developer of the project has a right under the PPA to recover complete capital cost if its plant is in state of

readiness to operate at Normative Availability of 85% as specified in the PPA.

xv) LTPDL, while bidding, quoted the NQHR/NSHR for the project based on PSPCL's representations which essentially meant that the project will be allowed to operate at optimum/maximum level and in any case not below the normative level of 85% with full load so as to ensure that the project operates as a base load plant within supercritical technology parameters. NPL has borne the risks associated with SHR only to the extent that it cannot claim adverse implication on SHR on the basis of normal wear and tear of the plant and machinery during the terms of the PPA. NPL is responsible to bear the risk efficiency of the boiler(s), turbine(s) and generator(s) so far as the project is allowed to operate at optimum/maximum capacity as a base load plant so that it still performs within the supercritical parameters. However, in any event, NPL cannot be made to bear the risks associated with adverse implications on SHR on account of PSPCL constantly making the project operate at part load with varying load factor i.e., subcritical levels thereby changing the basic nature of the project which is based on the supercritical technology. Clause 2.7.1.4(1) of the RfP specifically provides that 'No adjustment shall be provided for heat rate degradation' which clearly indicates that NPL as the developer of the project was responsible to maintain constant SHR with respect to quality of plant (i.e. boiler, turbine, generator) over the term of the project and no degradation of SHR on account of this factor could be allowed to the developer. However, the losses associated

with adverse implications on SHR on account of operation of the plant on part load at varying loading conditions cannot be borne by the developer.

xvi) LTPDL and its parent company acted on the basis of PSPCL's specific and binding representations and assurances accordingly, quoted NQHR/SHR of 2268 kCal/kWh. Therefore, PSPCL at this stage is estopped from backtracking on its representations and assurances in terms of the 'doctrine of promissory estoppel'. NPL is responsible to maintain the NSHR of 2268 kCal/kWh only if PSPCL fulfils its representations. In other words, if the project is allowed to operate at the normative level of 85% or a higher level with full load, it will be NPL's responsibility to maintain the NQHR of 2268 kCal/kWh. Since PSPCL is not being able to make good its representations primarily leading to non-operation of the plant at least at the normative level of 85% with full load, NPL cannot be held responsible to ensure the NQHR of 2268 kCal/kWh or face the losses associated with adverse implications on SHR due to operation of the plant at part load with varying load factor.

xvii) NPL legitimately expected on the basis of PSPCL's representations that PSPCL will schedule and despatch power from the plant in a manner which will ensure the operation of the plant at least at the normative level of 85% with full load. Therefore, PSPCL at this stage, cannot be allowed to act contrary to the 'legitimate expectations' of NPL which are completely and entirely based on its representations and assurances.

xviii) The project was scheduled by PSPCL to be operated at low loads during most of the time in the last year and that too with frequent load variations. Only for few months on account of paddy season, PSPCL scheduled operation of the plant at full load. Due to such low load operation and variation in the daily despatch instructions by PSPCL, NPL is suffering on account of efficiency loss due to adverse implications on the NQHR/SHR. Since the month of April, 2014, the project has been scheduled to operate at an average PLF of approximately 60% with minimum PLF as low as 43.41%. SHR of the project increases to more than 2500 kCal/kWh when the project operates at a PLF of around 50%. This in itself shows that the SHR of the project significantly increases if it is made to operate at lower PLF with varying load. In other words, the project is using higher quantum of coal to generate same amount of energy which it could have generated with lower quantum of coal with lower SHR. As NPL's claim is based on the adverse implication on SHR due to operation of the plant at part load with varying load factor, NPL has set out above the relevant details for the months when the project was made to operate on part load with varying load factors.

xix) The International Energy Agency (IEA) in its 'Report on Power Generation from Coal, 2010', showed the increased SHR at different levels of despatch. With despatch above 85% of installed capacity, SHR does not increase. With despatch at 80% to 40% of installed capacity the SHR increases in the range of 1.3% to 6.7% for supercritical turbine and 2.16% to 13.8% for subcritical turbine. Pursuant

to this, Ministry of Power in the new Standard Bidding Documents (SBD) for case-2/UMPP projects, has specified increase in SHR for despatch below normative loading factor of 85%. The relevant provision in the SBD specifies the increase in SHR for supercritical turbine ranging from 1.25% to 25% for PLF spectrum starting from 75-84.99% upto 'below 5%'. For subcritical turbine also, the increase in SHR has been specified ranging from 2.25% to 50% for same PLF spectrum.

xx) The operation of project at part load with varying load factors has adverse impact on the two major attributes of the supercritical technology based power plant i.e. pressure and temperature and that effectively a plant running at lower PLFs does not operate within the parameters of a supercritical technology and for all practical purpose is a subcritical plant. It is reiterated that in order to operate as a supercritical technology based plant, it is required that the plant is operated continuously at higher PLF so that the high pressure and high temperature as specified for the supercritical technology can be generated and maintained. Therefore, continuous and uninterrupted operation at higher PLF around 85% or more are pre-requisites for operation of supercritical technology based plant of NPL. Due to operation at lower PLF of around 54.11%, the plant operates at subcritical levels and therefore, requires higher SHR for generation of power.

xxi) SHR of a plant varies inversely with its PLF. It is a technical impossibility to achieve a lower SHR when there is a lack of matching higher PLF. It is impossible to achieve the SHR

quoted for the purpose of bidding in absence of a consistent load within the supercritical range. The operating principle of inverse relationship between SHR and PLF cannot and should not be avoided as NPL has clearly shown from actual data that due to lower scheduling of power by PSPCL, the plant has been operated on lower PLF in last one year which has inevitably resulted into increase in SHR.

xxii) The increase in SHR leads to higher consumption of coal for generation of power. Since the payment of energy charges in the PPA is based on the following formula where PSPCL uses the fixed quoted SHR for the purpose of calculation of energy charges, and does not take into account the actual increased SHR, NPL is paid on the basis of actual quoted SHR and thus, the cost of excess coal required to generate the power is not eventually passed on to PSPCL.

$$MEP_m = AEO_m \times MEP_n$$

Where:

AEO<sub>m</sub> is the Scheduled Energy during the Month m (in kWh)  
Monthly Energy Charges

$$MEP_n = \frac{NHR_n \times F^{COAL}_n}{PCV_n}$$

where,

NHR<sub>n</sub> is the Net Heat Rate for the Contract Year in which month “m” occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month “m” occurs as provided in Schedule 11;

F<sup>Coal</sup><sub>n</sub> is the 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 “n” (expressed in ₹/MT in case of domestic coal)

$PCV_n$  is the weighted average gross calorific value of coal most recently delivered to the Project before the beginning of the month “n” expressed in kCal/kg.

The adverse implications on SHR due to operation of the project at lower PLF has already caused NPL a loss equivalent to ₹ 70 crore in last one year.

xxiii) NPL cannot be made to bear the adverse financial consequences associated with operation of plant at higher SHR due to PSPCL allowing operation of the plant at part load with varying load factor despite making specific representations at the time of bidding by stipulating base load power requirement and supercritical parameters. The extent of risk taken by LTPDL at the time of bidding was to ensure constant SHR with respect to quality of plant (i.e. boiler, turbine, generator) over the term of the project. However, adverse implications on SHR on account of PSPCL not scheduling power from the project equivalent to at least normative level of 85% with full load could not have been envisaged at the time of bidding since PSPCL made specific representations to the extent that the project was to be set up on supercritical technology as a base load plant which would be allowed to operate at optimum/maximum level and in any case not below the normative level of 85% with full load so as to ensure that full capacity charges is recovered by the developer.

xxiv) NPL vide its letter dated 23.01.2015 to PSPCL raised the issue of adverse impact on heat rate due to operation of the

project at low loads. NPL did not receive any reply from PSPCL on this issue. Pursuant to this, NPL vide its letter dated 09.04.2015 again raised this issue and stated in its letter that in absence of PSPCL's response to its aforesaid letter dated 23.01.2015 and continued operation of the project at low loads, it is constrained to approach the Commission for resolution of dispute and for remedial action. Since PSPCL is continuing to schedule and despatch power from the project at lower load/PLF leading to recurring financial losses to the project due to adverse implications on the SHR, NPL is constrained to approach the Commission for resolution of dispute which the parties have not been able to resolve amicably.

xxv) It is reiterated that in any event, and specifically on the basis of the doctrine of 'promissory estoppel' and 'legitimate expectation', NPL cannot be made to bear the risks associated with adverse implications on SHR on account of PSPCL allowing the project to operate at part/low load with varying load factor. On the basis of the principle of restitution, so as to bring back NPL to the same economic position if the project would have operated on the NQHR/SHR due to its operation on full load at normative level of 85%, the Commission may direct PSPCL to compensate NPL for the financial losses associated with operation of the plant on part load with varying load factor causing an increase in SHR. The operation of the project on part load with varying load factor is completely based on PSPCL's instructions and directions and such operation in any manner is not at all attributable to NPL and therefore,

NPL should not be made to bear the adverse consequences arising out and/or pursuant to such operation.

xxvi) PSPCL has erred in its assessment of the growth in level of demand for power in the State of Punjab. The benefits of having a supercritical technology based plant is completely being lost since such plant is being made by PSPCL to operate at sub-critical level as a subcritical plant. The entire efficiency return of a supercritical plant which in effect is costlier than a subcritical plant is obliterated in the present case due to its operation at lower load. It would be onerous to make NPL to suffer the adverse consequences for such a blatant error of judgment on the part of PSPCL.

xxvii) It is prayed to the Commission to:

- a) Direct PSPCL to make good the monetary losses already suffered by NPL on account of adverse implications on SHR due to operation of the project at lower PLF during the period from April, 2014 till the filing of the petition.
- b) Direct PSPCL to prospectively continue scheduling and despatching power from the project at least equivalent to the load/PLF adequate to allow operation of project within supercritical parameters as specified in the RfP and the PPA.
- c) In alternative to prayer (b), direct PSPCL to compensate NPL for further losses due to operation of plant on part load with varying load factor on the basis of principle of restitution.
- d) Grant such order, further relief(s) in the facts and circumstances of the case as the Commission may deem just and equitable in favour of NPL.

3. The petition was taken up for admission on 29.04.2015. The Commission vide its Order dated 30.04.2015 decided to seek comments of PSPCL on admissibility of the petition before its admission. PSPCL was directed to file its comments by 15.05.2015 with a copy to NPL. The next date for admission was fixed as 19.05.2015. During hearing on 19.05.2015, PSPCL submitted that it shall file its comments in the reply on merits. The petition was admitted and PSPCL was directed to file its reply by 09.06.2015 with a copy to NPL. The next date of hearing was fixed as 16.06.2015.

4. PSPCL filed its reply dated 12.06.2015 on 15.06.2015 and submitted as under:

- i) The petition is misconceived, lacks cause of action and is contrary to the provisions of the PPA and is liable to be dismissed.
- ii) NPL is seeking to indirectly wriggle out of the obligations under the PPA and vary the terms and conditions of the PPA entered into between the parties. NPL has not mentioned any provision of the PPA under which such variation in SHR as is being made by NPL can be claimed.
- iii) Pursuant to a competitive bidding process under Section 63 of the Act as approved by the Commission, PPA was signed between PSPCL and NPL. The bidding process being under Case-2 as per the Government of India Guidelines, the bidders had to quote the capacity charges and the SHR.
- iv) LTPDL participated in the bidding process and quoted the capacity charges and the Net Station Heat Rate of 2268 kCal/kWh. The terms and conditions of the PPA were part of

the bidding documents and made known to all the bidders. As per the RfP, it was for the bidders to quote the tariff after taking into account their commercial consideration. The tariff was not based on actual costs and expenses, but a quoted bid tariff. The quoted tariff and the quoted heat rate is sacrosanct and subject to adjustment if any in terms of the provisions of the PPA and the bid documents. There is no avenue for any amendment in the tariff de-hors the provisions of the PPA. The participation of LTPDL in the bidding process was on this basis and after fully accepting the terms and conditions of the bidding documents including the PPA. This is also recognised in Schedule 7 of the PPA which reads as under:

“.....

*1.2.2 Monthly Capacity Charge Payment*

*The Monthly Capacity Charge Payment for any Month m in a Contract Year n shall be calculated as below:*

*If CAA ≥ NA,  $FC_m = \sum j (NA \times AFC_{yn} \times CC \times L) - \sum C(m-1)$*

*Else:*

*$FC_m = \sum j (AFC_{yn} \times AA \times CC \times L) - \sum C(M-1)$*

*Where:*

*$\sum j$  is the summation of all the relevant values separately for each settlement period from the start of the contract year in which Month “m” occurs upto and including Month “m”*

*$FC_m$  is the Capacity Charge payment for the Month m (in Rupees)*

*$AFC_{yn}$  is the Capacity Charge and is sum of a) Payable Escalable Capacity Charges  $AEFC_{yn}$  and b) Payable Non-Escalable Capacity Charges  $ANEF_{Cyn}$  for the month in which the relevant settlement period occurs in the Contract Year n (in Rs per kWh) and computed as mentioned hereunder:*

*AEFCyn is the Payable Escalable Capacity Charges for month in which the relevant settlement period occurs in the Current Year “n”, expressed in Rupees/kWh and is equal to the Quoted Escalable Capacity Charges as provided in Schedule 11 for the first Contract Year and for subsequent Contract Years duly escalated by the following formula:*

$$AEFCyn = QAEFCyn * p/q$$

*Where,*

*QAEFCyn is the Quoted Escalable Capacity Charges (in Rs./kWh) in the first Contract year as per Schedule 11.*

*p is the Escalation Index as per Schedule 9 at the beginning of the Month in which the relevant settlement period occurs. (expressed as a number)*

*q is the Escalation Index as per Schedule 9 applicable as at the beginning of the first Contract Year mentioned in Schedule 11 (expressed as a number)*

*ANFCyn is the payable Non Escalable Capacity Charges for the month in which the relevant settlement period occurs, expressed in Rupees/kWh and is equal to the Quoted Non Escalable Capacity Charges for the Contract Year in which such month occurs, as provided in Schedule 11.*

*CAA is the cumulative Availability, as per state energy account, from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m”;*

*AA is the Availability, as per state energy account, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period);*

*CC is the Contracted Capacity in the relevant Settlement Period (expressed in kW);*

*L is the number of minutes in relevant Settlement Period, as divided by total number of minutes in one hour, (expressed as hours);*

*NA Normative Availability;*

$\Sigma C(m-1)$  is the cumulative Capacity Charge payable from the first day of the Contract Year “n” in which month “m” occurs upto and including Month “m-1” but not including month “m”, (in Rupees);

Provided, no Capacity Charges shall be paid for the Settlement Period during which the SLDC has not allowed the operation of the Power Station due to Sellers failure to operate it as per the provisions of Grid Code.

### 1.2.3 Monthly Energy Charges

The Monthly Energy Charges for Month ‘m’ shall be calculated as under:

$$MEP_m = AEOM \times MEP_n$$

Where

AEOM is the Scheduled Energy during the Month m (in kWh)

Monthly Energy Charges

$$MEP_n = \frac{NHR_n \times F^{COAL}_n}{PCV_n}$$

where,

NHR<sub>n</sub> is the Net Heat Rate for the Contract Year in which month “m” occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month “m” occurs as provided in Schedule 11.

F<sup>Coal</sup><sub>n</sub> is the 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 month “m” (expressed in Rs./MT in case of domestic coal)

PCV<sub>n</sub> is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month “m” expressed in kcal/kg.

.....

### 1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year

In case the Availability for a Contract Year is less than 75%, the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh)

*for all months in the Contract Year applied on the energy (in kwh) corresponding to the difference between 75% and Availability during such Contract Year.”*

- v) Upon the quoted tariff including the quoted heat rate being the most competitive and being selected as the successful bidder, LTPDL took over the ownership and control of NPL.
- vi) The PPA was entered into between the parties which governs the rights and obligations of the parties. The PPA is on the same terms as was made available as a part of the bidding documents. Any claim made by NPL has to necessarily be in terms of the PPA and it is not open to NPL to make any general claim which is not provided for in the PPA.
- vii) PPA does not mandate that PSPCL will necessarily have to off-take the entire electricity made available by NPL. It is open to PSPCL to schedule and off-take electricity to the extent of its requirement, the only consequence being that NPL is entitled to the capacity charges for the electricity declared available in terms of the PPA.
- viii) Having being made aware of the provisions of the PPA and the consequences for lower off-take of electricity by PSPCL, it is not open to NPL to now claim that it should be entitled to any relief over and above what is provided for in the PPA.
- ix) In fact, this issue was raised at the time of seeking clarification by the bidders. In reply to the query of the bidders that *‘the incentive payment and penalty for lower availability should be decided in line with contemporary CERC regulation norms (may be aligned to the new tariff regulations 2009-14 notified by CERC)’*, the clarification

provided by the procurer was '*may please follow PPA, this is as per SBD*'.

x) Particularly when one of the bidding criteria was SHR, it was open to the bidders to quote the SHR as per their commercial decision taking into account all the circumstances and contingencies. Any variation in the SHR below the quoted SHR would be to the benefit of bidders and NPL. Any variation on the higher side would be to the account of the bidder (now NPL) and it is not open to make a claim against PSPCL merely because it is commercially inconvenient at this stage.

xi) It is reiterated that there can be no variation in the bidder's terms and conditions after the PPA has been entered into pursuant to the selection of the successful bidder. It is for this reason that NPL has not even identified any particular provision in the PPA under which the present claim is sought to be made, because there is no such provision under which benefit can be claimed by NPL. On the other hand, the consequences of lower scheduling are provided for in the PPA, namely, payment of capacity charges in terms of the PPA. There is no such consequence of variation in the SHR provided for in the PPA. The quoted SHR is fixed and cannot be varied merely because it is commercially inconvenient to NPL.

xii) The claim of NPL is contrary to the provisions of the PPA, there is no provisions in the PPA which is shown to have been invoked and the present petition is misconceived which does not deserve admission.

xiii) Bidding terms and conditions or the PPA do not provide compulsory off-take of electricity by PSPCL at all points of time or that it was a condition of the bid or the PPA that PSPCL would not off-take electricity below a particular level. The power plant was envisaged by PSPCL based on its long term requirements to meet the projected demand of the consumers in the State of Punjab. It is stated that the bidding terms including the PPA which solely govern the rights and obligations of the parties provide in no uncertain terms of the Station Heat Rate being fixed, which was one of the components to be quoted by the bidders. The only consequence of lower off-take of electricity is payment of capacity charges to the level declared available in terms of the PPA. It is wrong and denied that it was informed to the bidders that at all points of time the entire capacity from the power plant would be off-taken by PSPCL. The generating station was envisaged to meet the long term requirements of the State as projected over 25 years. The PPA provides for the consequences of lower off-take in the form of payment of capacity charges, which is being fully complied with by PSPCL. The capacity charges and SHR were to be quoted by the bidders based on their commercial decision and the consequences of lower off-take of electricity was well made known to the bidders. Merely because PSPCL is not fully off-taking the electricity does not in any manner give any right to NPL to claim any variation in the bidding terms and conditions or the provisions of the PPA, as it is commercially inconvenient to NPL at this stage. PSPCL is duly paying the

capacity charges in terms of the PPA if the schedule given is less than declared availability.

xiv) It is reiterated that it was never the obligation of PSPCL to off-take the electricity declared by the generating station. If otherwise, there was no purpose in having a two part tariff and the concept of scheduling despatch etc. It could have simply been provided for a single part tariff with a must run status. The very concept of a base load station is that it is in a position to operate at full capacity if required and is not subject to variations on the basis of water available for hydro stations etc. Base load station does not mean a must run station, which are completely different concepts. The generating station of NPL is not required to operate at maximum continuous rating at all stages or that base load generators always operate at maximum capacity. The purpose of base load is to meet the demand, without being subject to other vagaries such as availability of wind, solar energy for such renewable generators and also hydro availability for hydro stations which may not be able to operate when required. It is denied that in terms of the definition as per the CEA Regulations and the acknowledged treatment of coal generators, the project is meant to operate at full or maximum continuous rating.

xv) In terms of the definition of base load generation or the representations in the bidding process, NPL is not entitled to seek variation in the quoted SHR where the capacity scheduled is less than the declared availability. PSPCL never undertook to schedule entire capacity declared by NPL or that the demand would in no case be less than the

availability. The projections were made based on the data then available and for the long term view of 25 years to meet the demand in the State. NPL is not entitled to claim compensation from PSPCL for non-off take of electricity, in terms of the Order dated 11.06.2007 and 09.01.2008 of the Commission, apart from the consequences provided for in the PPA. It is denied that PSPCL was to procure minimum of 1080 MW, which is being interpreted by NPL to mean that the scheduled electricity off-taken should never be lower than 1080 MW. The 1080 MW was the capacity to be procured, the capacity of the generating station to be established. It is not linked to declaration of availability and the capacity to be scheduled. LTPDL wrongly assumed that as per the bidding terms and conditions including the PPA, the capacity scheduled and off-taken would always be as declared and not less and that in case the capacity off-taken was less, NPL would be entitled to compensation other than those provided for in the PPA. It was never assumed that the generating station would function at 85% PLF. The commercial assumption by the bidder is not to the knowledge of PSPCL. Nor was such an assumption a condition in the bid or the bid submission by LTPDL. The rights and obligations of the parties are governed strictly in terms of the PPA and unless there is a specific clause in the PPA under which the claim of NPL is maintainable, merely claiming hardship and commercial inconvenience is not a ground for maintaining the present petition.

xvi)The requirement to use supercritical technology does not give any cause of action for the present claim to be

maintainable, particularly when the bidding terms and conditions including the PPA specifically provide that no adjustment for heat rate deterioration shall be allowed. Further, the tariff for energy charges is to be calculated strictly based on the quoted heat rate, without reference to the actual heat rate whether lower or higher. Thus, when the RfP and the PPA specifically provide for no variation in the Station Heat Rate and the computation of tariff to be made strictly in terms of the quoted Heat Rate without any adjustment to actuals, the question of NPL claiming any hardship or commercial inconvenience does not arise. Further, the perversity in the claim of NPL is evident from the very fact that while NPL is claiming hardship on the Heat Rate parameter, NPL has not even disclosed the actual heat rate achieved.

xvii) It is incorrect that supercritical parameters can be achieved only at maximum continuous rating and that by providing for supercritical technology, it was a condition that the plant would always operate at the maximum continuous rating and there can be no off-take less than the capacity declared available. The Regulations of the Central Electricity Regulatory Commission (CERC) are irrelevant as the present project is based on a competitive bidding process under Section 63 wherein the Regulations have no application. It is further stated that even under the Regulations of CERC, no adjustment for SHR is provided when the electricity off-taken is less than the capacity declared available and the only consequence is for payment of capacity charges. It is denied that when the plant operates

at less than 85% PLF, the project does not operate based on supercritical technology and operates at subcritical parameters as alleged. It is wrong and also irrelevant as to the actual Station Heat Rate, when the only relevant criteria is the quoted heat rate. The perversity in the claim is also evident from the fact that the claims are made on a vague basis without any reference to the actual figures, the actual heat rate, the losses if any etc. The assumptions of the bidders are irrelevant and the only relevant criteria is the bidding terms and conditions and the provisions of the PPA, based on which the present petition is not maintainable.

xviii) It is denied that the unequivocal undertaking and representation of PSPCL was that the power plant would never operate at less than the capacity declared available. It is wrong that the nature of the plant being based on supercritical technology would change when the schedule given is less than the capacity declared available. It is also wrong that the power plant being a base load generating station would require that it be treated as a must run generator. It is wrong that there is any impact on the heat rate on account of schedule being given lower than the capacity declared available. NPL is not entitled to any variation in the Station Heat Rate on account of lower schedule being given. PSPCL did not undertake to off-take not less than 85% of full load to enable the project to operate on supercritical parameters. It is incorrect to claim that the provisions in the RfP and the PPA for no adjustment in the heat rate relates only to normal wear and tear and not to a situation where the schedule given is less than the capacity

declared available. PSPCL is paying the full capacity charges to the extent of the capacity declared available in terms of the PPA. The claim of NPL is contrary to the terms and conditions of the bidding documents including the PPA and is liable to be rejected. NPL is only seeking to wriggle out of its contractual obligations and seek variation thereof because of commercial inconvenience, which is not permissible. It is denied that the doctrine of promissory estoppels applies to the present case or that there was any promise made as alleged by NPL. The parties are strictly governed by the bidding terms and conditions and the provisions of the PPA. There is no obligation on PSPCL to compulsorily offtake the entire electricity made available to ensure that the PLF is at 85%.

xix) It is denied that there can be any loss in Station Heat Rate as claimed by NPL on account of the plant being operated at lower PLF. The bidding documents and PPA specifically prohibit any variation in the Heat Rate, the only consequence of operating at lower PLF is the entitlement to capacity charges based on the declared availability in terms of the PPA. It is reiterated that the heat rate is the commercial decision of the bidder at the time of bidding and it was for the bidder to arrange its affairs. It is denied that the report of the International Energy Agency relied upon by NPL has any application to the present case or represents the correct picture. It is further denied that there can be variation to the terms of the PPA based on the report of the IEA as relied upon by NPL. In fact, even the Regulations of the CERC or the Commission do not permit any variation in the SHR for

variation in the PLF. Thus, even the Regulations which are applicable for Section 62, tariff determination based on cost plus basis does not provide for any variation in SHR, the question of NPL claiming the same in a competitive bidding PPA does not arise. The revision in the Standard Bidding Documents has no relevance to the present case. On the other hand, the revision in the Standard Bidding Documents non-suits NPL as NPL is seeking to claim the benefit of the revised Standard Bidding Documents, which is impermissible.

xx) It is denied that the nature of the generating station will change from supercritical technology to subcritical technology. It is also denied that PSPCL is required to schedule and off-take electricity to full capacity in terms of the PPA or that PSPCL is required to compensate NPL for the alleged losses as claimed in the petition.

xxi) It is denied that the SHR would vary widely based on variation in the PLF as alleged. It is also denied that it is a technical impossibility to achieve a lower SHR when there is lack of matching high PLF. NPL is basing its claim on general and vague allegations instead of the provisions of the PPA. The rights and obligations of the parties are governed solely by the terms of the PPA and cannot be avoided or varied merely because of commercial inconvenience. It is denied that NPL has even established the variation in the SHR as sought to be alleged. PSPCL is paying the tariff calculated strictly in terms of the PPA. It is denied that there has been a loss of ₹ 70 crore as claimed by NPL. It is reiterated that there can be no adjustment or

variation in the quoted SHR, whether it is to the benefit of NPL or not. There was no representation of PSPCL that the plant would operate on full load or that it was a condition in the PPA. It is denied that the SHR risk of the bidder is only to the extent of machine wear and tear and not for variation due to any other reason including the reasons claimed in the petition. It is wrong that the operation of the plant at lower levels could not be envisaged or that the alleged risks of variation in SHR on account of lower SHR cannot be taken by the bidder. The contents of the communications dated 23.01.2015 and 09.04.2015 of NPL are misconceived and without any merit. In fact, in the communication dated 23.01.2015, NPL had itself admitted that the loss in the SHR is non-recoverable. The doctrine of promissory estoppels or legitimate expectation has no application to the present case. On the other hand, LTPDL having participated in the bidding process with full knowledge of the terms and conditions, is at this stage, estopped from seeking any variation of the said terms and conditions or maintaining any claim contrary to the provisions of the PPA. It is denied that the principles of restitution have any application in the present case, particularly when NPL has failed to even mention the provisions in the PPA under which the present petition is maintainable. The only financial impact in terms of the PPA for the plant operating at lower PLF is that NPL is entitled to the fixed charges based on the capacity declared available as per the PPA. There can be no other consequence. It is denied that the supercritical nature of the technology is lost as alleged.

xxii) The prayers contained in the petition are misconceived and wrong. There is no cause of action, the present petition is not maintainable and is liable to be dismissed with exemplary costs.

5. During hearing on 16.06.2015, NPL sought time to file rejoinder to the reply of PSPCL. The Commission vide Order dated 17.06.2015 directed NPL to file the rejoinder by 07.07.2015 and supply a copy to PSPCL directly. The next date of hearing was fixed as 14.07.2015. However, NPL vide letter dated 07.07.2015 sought time till 07.08.2015 for filing the rejoinder. The Commission vide Order dated 15.07.2015 directed NPL to file the same by 04.08.2015 and serve a copy directly to PSPCL. The next date of hearing was fixed as 11.08.2015.

6. NPL filed rejoinder vide its letter dated 05.08.2015 to the reply filed by PSPCL dated 12.06.2015. In the rejoinder, NPL reiterated its earlier submissions and further submitted as under:

- i) In terms of Article 17.3.1 of the PPA, any dispute between the parties is to be referred to the Appropriate Commission for adjudication. Therefore, NPL is completely within its right in terms of the PPA to raise a claim in relation to the adverse implication on the quoted SHR due to operation of the plant at lower load/PLF.
- ii) The Commission is mandated to discharge the functions set out in Section 86 of the Act, including adjudication of disputes between licensees and a generating company under Section 86(1)(f) of the Act. Further, in terms of the decision of Hon'ble Supreme Court in GUVNL Vs Essar Power Ltd. reported as (2008) 4 SCC 755 at para 56 and 60,

the Commission is the appropriate forum to adjudicate such a dispute. The Commission while exercising its regulatory powers, is required to take all appropriate steps to ensure that the following objectives are fulfilled:

- a) achievement of commercial viability of electricity sector while making sure fair pricing and quality of supply;
- b) that consumers interest are safeguarded and at the same time, recovery of the cost of electricity is done in a reasonable manner; and
- c) the tariff is reflective of the real cost of generation.

Therefore, irrespective of the fact whether the PPA envisages a provision dealing with revision of the SHR or not, the Commission in exercise of its regulatory power under the Act can definitely provide a recourse to NPL as the SHR of the plant is getting adversely impacted on account of PSPCL's failure to ensure that the project operates as a base load plant and within supercritical technology parameters which PSPCL has specifically bid out for. The adverse impact on SHR is being caused on account of reasons which are beyond the control of NPL. Therefore, even if it is assumed for the sake of arguments that the present PPA does not envisage any provision for revision of the SHR, that cannot be an embargo on exercise of the overarching regulatory power of the Commission.

- iii) PSPCL's contention that the PPA does not have any provision dealing with revision of SHR or the fact the PPA provides that the quoted SHR will be used for calculation of energy charges, it is respectfully submitted that conspicuous absence of any such provision very clearly establishes that it

was never envisaged that the project will not operate as a supercritical plant but will operate as a subcritical plant. There is no provision either in the PPA or the RfP which states that the plant despite being based on supercritical technology is meant to operate on a consistent basis as a subcritical plant. So the basic framework always envisaged that so far the plant is allowed to get operating circumstances to operate as a supercritical plant, NPL will have to be responsible to maintain the SHR quoted by it. However, the moment this essential part of the bargain is not being maintained by PSPCL, NPL cannot be held responsible for still maintaining the quoted SHR.

- iv) PSPCL has completely failed to appreciate that a Case-2 power project is not conceived on the basis of power requirement of a State over a period of 25 years. On the contrary, the approval process of setting up a project on a Case-2 basis in a particular State is based on additional demand forecast for next three years following the year of expected commencement. PSPCL has erred in its assessment of the growth in level of demand for power in the State of Punjab and in hindsight is completely unjustified in its capacity additions and that too large size plants based on the supercritical technology.
- v) PSPCL has completely failed to appreciate that the adverse impact on the SHR on account of operation due to lower PLF/load due to part off-take of power by it entails adverse implication on the energy charges component of the tariff and the same cannot be compensated by way of payment of the capacity charges. Since, the payment of energy charges

in the PPA is based on fixed quoted SHR, and does not take into account the actual increased SHR, NPL is paid on the basis of quoted SHR and thus, the cost of excess coal required to generate the power is not eventually passed on to PSPCL and the same is being borne by NPL.

vi) Under the framework of the bidding documents including the present PPA, NPL shall keep the upside on account of having an SHR lower than the quoted SHR or bear the downside on account of having an SHR higher than the quoted SHR provided such a change in the SHR vis-a-vis the quoted SHR is on account of its own in-efficiency and for the parameters under its control. The main reason and objective for having such a framework is to incentivise the generator to achieve better efficiency by way of achieving lower SHR than the quoted SHR.

vii) Clause 2.7.1.4(1) of the RfP specifically provides that

*'No adjustment shall be provided for heat rate degradation'.*

It is significant to state that heat rate degradation envisaged here is on account of causes such as wear and tear of equipment, performance efficiency of the equipment etc. There is no need to have a specific provision under the PPA either stating that PSPCL is mandated to off-take entire power from the project or that the SHR will be revised in case entire power is not off-taken by PSPCL. This aspect is already taken care by way of specifying that the project is required to be developed and operated based on the supercritical technology and parameters as specified in the bidding documents i.e., RfP and the PPA.

- viii) It is denied that SHR of the project is to remain fixed in all circumstances even if PSPCL is in default of not ensuring operating circumstances where the project can operate as a base load plant within the supercritical parameters. PSPCL cannot be made to gain out of its own default and as a natural corollary, NPL cannot be made to suffer on account of PSPCL's default, PSPCL having specified that it requires supercritical plant which needs to operate within specified parameters, is required to provide such operating circumstances involving continuous operation at higher PLF which are prerequisite for such operation. It is denied that the SHR has to be purely quoted on the basis of the commercial decision of LTPDL and had to do nothing with the projection of acute power shortage provided by PSPCL as part of the RfQ and even to the Commission based on which the approval was granted by the Commission on 09.01.2008 vide its Order in Petition No. 58 of 2007. Since NPL is suffering financial losses on account of PSPCL's default, all the necessary and appropriate steps are required to be taken in exercise of regulatory powers by the Commission to provide resolution to such a situation.
- ix) It is further specifically denied that NPL contended that the present project is to be treated as a must run plant. A must run plant is generally not subjected to merit order despatch principles and are required to operate at all point in time. PSPCL is unnecessarily and deliberately creating a wrong legal assertion on part of NPL which it has never contended.
- x) It is denied that there is no impact on the heat rate on account of schedule being given lower than capacity

declared available i.e., lower PLF. It is again denied that operation of the plant at lower PLF with varying load has no implication whatsoever on the specification of the supercritical technology. The mandate of no variation in the SHR as provided in Clause 2.7.1.4(1) of RfP, restricts NPL to the extent of not claiming variation in SHR which is caused on account of normal wear and tear of the machines/equipments over a period of 25 years. However, the said clause cannot be taken as a defence by PSPCL to safeguard itself for not providing operating circumstances which are pre-requisite for maintaining supercritical nature and thus, the lower quoted SHR.

xi) PSPCL is affixing out of context meaning to the term 'non-recoverable' in the letter dated 23.01.2015 of NPL addressed to PSPCL. NPL has clearly mentioned that in the context of the present formula used for payment of energy charges, the losses suffered on account of adverse impact on the SHR is non-recoverable and therefore, PSPCL has to take appropriate actions to remedy the situation.

7. During hearing on 11.08.2015, the Commission heard the arguments on behalf of NPL. PSPCL requested to argue the case on the next date of hearing, being not prepared for the same due to late receipt of the rejoinder of NPL. The Commission vide Order dated 12.08.2015 decided to further hear the arguments on behalf of NPL and PSPCL on next date of hearing on 08.09.2015.

8. During hearing on 08.09.2015, the counsel for NPL filed extracts from the following judgments on the wide nature of regulatory power in support of the arguments:

- i) Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited and Others (2009) 6 SCC 235.

“ .....

*43. The concept of regulatory jurisdiction provides for revisit of the tariff. It is now a well-settled principle of law that a subordinate legislation validly made becomes a part of the Act and should be read as such.”*

- ii) Cellular Operators Assn. of India v. Union of India (2003) 3 SCC 186.

“ .....

*Succinctly stated the jurisdiction of the tribunal is not circumscribed in any manner whatsoever.”*

- iii) V.S. Rice and Oil Mills v. State of A.P. (1964) 7 SCR 456.

“ .....

*The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices.....”*

- iv) Deepak Theatre v. State of Punjab, 1992 Supp (1) SCC 684.

“ .....

*Therefore, the power to regulate a particular business or calling implies the power to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary to conduct the business in a proper and orderly manner. It also includes the authority to prescribe the reasonable rules, regulations or conditions subject to which the business may be permitted or conducted. A conjoint reading of Section 5, Section 9, Rule 4 and condition 4-A gives, therefore, the power to the licensing authority to classify seats and prescribe rates of admission into the cinema theatre.”*

- v) State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505.

“ .....

52. ....

*In this case the grant of permission is part of or incidental to the statutory power to regulate orderly development of the “Development Area” under the Act under regulatory laws. The power to regulate with the obligations and functions that go with and are incidental to it, are not spent or exhausted with the grant of permission. The power of regulation which stretches beyond the mere grant of permission, takes within its sweep the power, in appropriate cases, to revoke or cancel the permission as incidental or supplemental to the power to grant. Otherwise the plenitude of the power to regulate would be whittled down or even frustrated.*

*53. It is erroneous to equate the powers under Section 14 and 15 of the Act with judicial power which, in the absence of express provisions, could not enable the review of a judicial order after its exercise on the principle of functus officio.....”*

- vi) Hotel & Restaurant Assn. v. Star India (P) Ltd. (2006) 13 SCC 753.

“ .....

*56. The role of a regulator may be varied. A regulation may provide for cost, supply of service on non-discriminatory basis, the mode and manner of supply making provisions for fair competition providing for a level playing field, protection of consumers’ interest, prevention of monopoly.*

.....

*While making the regulations, several factors are, thus required to be taken into account. The interest of one of the players in the field would not be taken into consideration throwing the interest of others to the wind.”*

- vii) K Ramanathan v. State of Tamil Nadu (1985) 2 SCC 116.

*“The word ‘regulation’ can not have any rigid or inflexible meaning as to exclude prohibition. The word regulate is difficult to define as having any precise meaning. It is a word*

*of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its application to a particular state of facts, some courts giving to the term a some what restricted and others giving to it a liberal construction. The different shades of meaning are brought out in Corpus Juris Secundum Vol 76 at p 611:*

.....

*the power to regulate carries with it full power over the things, subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involves the adoption of a rule or guiding principle to be followed or the making of a rule with respect to the subject to be regulated.....”*

viii) Coastal Gujarat Power Limited Vs. Gujarat Urja Vikas Nigam Limited & Others, Petition No.159/MP/2012, CERC order dated 15.04.2013.

*“81.....It has been held by the Hon’ble Supreme Court in a catena of judgments that the power to ‘regulate’ confers plenary power over the subject matter of regulation.....*

*82..... the Commission has the plenary power to regulate the tariff of the generating stations, which fall under its jurisdiction which shall extend beyond the determination of tariff, keeping in view the objects of the Act to promote competition, encourage investment in electricity sector and protect consumer interest. The power to regulate tariff will also extend to the tariff determined through the competitive bidding. Therefore, if the situation so demands, the Commission can fashion a relief even in case of the tariff of the generating stations, which have been discovered through the competitive bidding, by providing for suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act.”*

9. On 08.09.2015, the Commission heard the arguments on behalf of NPL and PSPCL at length. The Commission vide its Order of even date directed the parties to file written submissions

by 15.09.2015. Hearing in the matter was closed. Order was reserved.

10. In compliance to the Commission's Order dated 08.09.2015, PSPCL submitted the written arguments dated 16.09.2015 wherein while reiterating its earlier submissions, it submitted as under:

- i) NPL filed the petition under Section 86(1)(b) and Section 86(1)(f) of the Act seeking recourse to meet the adverse impact on the quoted tariff/station heat rate due to part load offtake of electricity by PSPCL. NPL is seeking to avoid the obligations under the PPA dated 18.01.2010 entered into with PSPCL and seek additional tariff. NPL is only seeking to indirectly wriggle out of the obligations under the PPA and vary the terms and conditions of the PPA entered into between the parties. NPL has not mentioned any provision of the PPA which permit such variation/claim as is being claimed in the petition.

In the rejoinder, NPL submitted that the claim made in the petition is for invocation of the regulatory jurisdiction of the Commission to reopen PPAs and increase the tariff to the generators so that the generators do not suffer any unnecessary loss. In the rejoinder, NPL admitted the following:

- a) There is no provision in the PPA which provides for the remedy of adjustment in the SHR on account of higher or lower Plant Load Factor.
- b) In terms of the framework of the bidding documents, the upside or downside of the actual SHR as against the quoted SHR is to the account of NPL. This is however

sought to be clarified that it is so only on account of efficiency or inefficiency of NPL and not when PSPCL does not schedule the entire electricity made available by it.

- ii) In the circumstances, the petition is to be adjudicated in the above background, namely whether there is any right for the Petitioner to seek reopening of the terms of the PPA.
- iii) The PPA was entered into between the parties pursuant to a competitive bidding process under Section 63 of the Act. The bidding process being under Case-2 as per the Government of India Guidelines, the bidders had to quote the capacity charges and the Station Heat Rate. LTPDL quoted Net Station Heat Rate of 2268 kCal/kWh. The terms and conditions of the PPA were part of the bidding documents and made known to all the bidders. The RfQ, inter-alia, provided as under:

*“2.7.1.4 The Bidder shall inter-alia take into account the following while preparing and submitting the Financial Bid:-*

*1. The Bidder shall quote the Quoted Escalable Capacity Charge and Quoted Non-Escalable Capacity Charges. The Bidder shall also quote the Net Quoted Heat Rate (kCal/kWh). No Adjustment shall be provided for heat rate degradation. In case of Quoted Escalable Capacity Charges, the Bidder shall quote charges only for the first Contract Year after Scheduled COD of first Unit.*

.....

*3. The Quoted Tariff in Format I of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating costs, statutory taxes, duties, levies while quoting such tariff. Availability of inputs necessary for generation of power should be ensured by the Seller at the Project Site*

*and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff.”*

- iv) Accordingly, it was for the bidders to quote the tariff after taking into account their commercial consideration. The tariff was not based on actual costs and expenses, but a quoted bid tariff. The quoted tariff and the quoted Heat Rate are sacrosanct and subject to adjustment, if any, only in terms of the provisions of the PPA and the bid documents. There is no avenue for any amendment in the tariff de-hors the provisions of the PPA. The participation of LTPDL in the bidding process was on this basis and after fully accepting the terms and conditions of the bidding documents including the PPA.
- v) Upon the quoted tariff including the Quoted Heat Rate being the most competitive and being selected as the successful bidder, LTPDL took over the ownership and control of NPL. The PPA was entered into between the parties which governs the rights and obligations of the parties which was on the same terms as made available as a part of the bidding documents.
- vi) The PPA does not mandate that PSPCL will necessarily offtake the entire electricity made available by NPL. PSPCL can schedule and offtake electricity to the extent of its requirement, the only consequence being that NPL is entitled to the capacity charges for the electricity declared available in terms of the PPA. The PPA provides for the capacity charges to be paid by PSPCL provided the availability is

declared by NPL upto 85% on an annual basis. For any availability declared above, NPL is entitled to an incentive.

vii) With regard to energy charges, the PPA specifically provides that the Quoted Net Station Heat Rate shall be used for computation. In this regard, the PPA inter-alia, provides as under:

*“7. Schedule 7: Tariff*

*1.1 General*

- i. The method of determination of Tariff Payments for any Contract year during the Term of Agreement shall be in accordance with this Schedule.*
- ii. The Tariff shall be paid in two parts comprising of Capacity and Energy Charge.*
- iii. For the purpose of payments, the Tariff will be quoted Tariff, escalated as provided in this Schedule 7 for the applicable Contract Year as per Schedule 11.*
- iv. The full capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond 85% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by Seller as provided in this Schedule.*

*1.2 Monthly Tariff Payment*

*1.2.1 Components of Monthly Tariff Payment*

*The Monthly Bill for any Month in a Contract Year shall consist of the following:*

- i. Monthly Capacity Charge Payment in accordance with Article 1.2.2 below;*
- ii. Monthly Energy Charge for Scheduled Energy in accordance with Article 1.2.3 below;*

.....

*1.2.3. Monthly Energy Charges*

*The Monthly Energy Charges for Month “m” shall be calculated as under:*

$$MEP_m = AEO_m \times MEP_n$$

*Where:*

*AEO<sub>m</sub> is the Scheduled Energy during the Month m (in kWh)*

*Monthly Energy Charges*

$$MEP_n = \frac{NHR_n \times F^{COAL}_n}{PCV_n}$$

*Where,*

*NHR<sub>n</sub> is the Net Heat Rate for the Contract Year in which month “m” occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month “m” occurs, as provided in Schedule 11. ....”*

viii)PSPCL is acting strictly in terms of the PPA without any deviation. However, NPL in the petition is seeking to change the provision of the payment of energy charges, by using the actual Station Heat Rate for computation rather than the quoted Station Heat Rate. The terms and conditions of an agreement, particularly entered into pursuant to a competitive bidding process under Section 63 of the Act cannot be changed or amended. Reliance is placed on the following decisions:

- a) Har Shankar v. Excise & Taxation Commr., (1975) 1 SCC 737 (Constitutional Bench)

“ .....

16. ....The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved.....

.....On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into

*existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits. The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions can not by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force.”*

b) State of Haryana v. Jage Ram (1980) 3 SCC 599

“16. ....

*They entered into a contract with the State authorities with the full knowledge of conditions which they had to carry out in the conduct of their business, on which they had willingly and voluntarily embarked. The occurrence of a commercial difficulty, inconvenience or hardship in the performance of those conditions, like the sale of liquor being less in summer than in winter, can provide no justification for not complying with the terms of the contract which they had accepted with open eyes. ....*

18. .... We hold accordingly that the High Court was in error in entertaining the writ petitions for the purpose of examining whether the respondents could avoid their contractual liability by challenging the Rules under which the bids offered by them were accepted and under which they became entitled to conduct their business. It can not ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.”

c) Excise Commr. v. Issac Peter, (1994) 4 SCC 104

*“21.....It is not a case where any essential term of contract was kept back or kept undisclosed. The Government had placed all their cards on the table, if we can use that expression. If the licensees offered their bids with their eyes open in the above circumstances they can not blame anyone else for the loss, if any, sustained by them, nor are they entitled to say that licence fee should be reduced proportionate to the actual supplies made.....”*

*23. Maybe these are cases where the licensees took a calculated risk. Maybe they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts - which may be called executory contracts - there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit.....”*

*He may incur loss. Such contracts do not imply a warranty- or a guarantee-of profit to the contractor. It is a business for him-profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licensees.*

*.....*  
*26. .... We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the*

*laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.”*

- d) *Puravankara Projects Ltd. v. Hotel Venus International, (2007) 10 SCC 33*

*“26. Certain decisions of this Court are relevant .....It was held that the conditions can not be changed. The relevant paragraphs are 24, 30 and 31. They read as follows: (SCC pp. 467& 470-71)*

*24. .... It can not be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid,*

*adherence to the instructions can not be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided.*

.....

*31. ....The mode of execution of the work of the project should also ensure that the public interest is best served. Tenders are invited on the basis of competitive bidding for execution of the work of the project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors.”*

- e) Yazdani International (P) Ltd. v. Auroglobal Comtrade (P) Ltd., (2014) 2 SCC 657

*“52. ....Firstly, the appellant acquired the licence knowing fully well the terms and conditions subject to which the licence is offered by the Board. So they can not take the benefit of the offer and renounce the corresponding obligation.....”*

- f) Sasan Power Limited v CERC & Ors (Judgment dated 23/03/2015 in Appeal No. 90 of 2014)

*“44. Another important submission of the contesting Respondents which appeals to us must be mentioned. At the time of submission of the bid, the Appellant was very much*

*aware of the Gazette Notifications issued by Gol dismantling APM. The move towards market determined prices was known to the Appellant. It was clear that APM as the legal mechanism of pricing diesel no longer subsisted and the pricing of diesel would be governed by market determined factors. Dismantling of APM occurred much prior to the cut-off date. The Appellant cannot be heard to say that the possibility of rise in prices of diesel was not present in its mind. The Appellant could not have submitted the bid on the assumption that the Gol would continue to control the prices. It is also not the case of the Appellant that the Appellant had a long term Fuel Supply Agreement with OMCs at a subsidized price of diesel and the decision of the Cabinet Committee on Political and Economic Affairs dated 17/01/2013 had affected the price of diesel. The legal position as on the cut-off date for submission of bids by the Appellant was that APM had been dismantled by Gol notification dated 28/3/2002. There was no assurance to the Appellant from the Gol or the OMCs that the Gol would continue to control the diesel price and free market mechanism would not be introduced. APM was never re-introduced. The Appellant had full liberty to quote an escalable component keeping in view the diesel price variation at the time of submission of bid or include the same in the nonescalable cost quoted for different years of contract period. The Appellant decided to quote non-escalable component of energy charges for the entire project term of 25 years. This was a commercial decision taken by the Appellant. The Appellant cannot now make any claim for compensation on the ground of change in law which had occurred much prior to the cut-off date when APM was dismantled. Competitive bidding process cannot be allowed to be set at naught by such method."*

- g) *M/s JSW Energy Ltd v. Maharashtra State Electricity Distribution Co. Ltd & Anr 2013 ELR (APTEL) 343*

*"42. This can be viewed from yet another angle. Admittedly, the Appellant was declared as a successful bidder after competitive bidding process. As indicated above, the Environmental clearance dated 17.5.2007 contemplated installation of FGD at a later stage with inclusion of cost for all Environmental measures in the project cost. If the claim of*

*the Appellant is to be accepted, then it would defeat the sanctity of the competitive bidding process. Not only that, the other bidders who had participated in the bidding would also be pre-judicially affected. In fact, the Appellant after ignoring the relevant conditions referred to in the Environmental clearance relating to the inclusion of project cost has allegedly submitted the bids without FGD cost, getting into the zone of consideration in the bidding process having been bidder L-3 and thereafter revising the project cost. Due to this, the entire bidding process and the interest of other bidders get vitiated.*

*43. Even the mandate contained in Clause 13 of the PPA relating to the change in law clearly stipulates that the change in law can be taken into consideration only in respect of occurrence of events after the cut-off date which is 7 days prior to the dead line. In the present case, the cut-off date is 14.2.2008. In a Regulatory regime, the sanctity of the PPA and the representation and warranties made by the parties in entering into such agreements have to be given due consideration. The claim of the Appellant cannot be permitted to vitiate the bidding process and to pre-judicially affect other bidders."*

h) Punjab State Power Corpn Ltd. v. Nabha Power Ltd & Others, Appeals No. 75, 76 and 164 of 2014 dated 10.04.2015, considering the present PPA between the parties, the Hon'ble Tribunal has held the same to be statutory and binding:

*"..... The PPA is a statutory agreement between the parties and the same is a binding contract and the fact that the Appellant Talwandi Sabo Power Ltd has not disputed any of the terms of the PPA hence the Appellant is liable to pay various charges specified in the Tariff Schedule of large industrial consumers approved by the Commission ....."*

ix) The Hon'ble Tribunal has in the case of Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission &

Others, 2012 ELR (APTEL) 182 held that the role under section 63 is very limited, namely, either reject the bidding process if it is not transparent or otherwise adopt the tariff. There can be no amendment in the tariff or the terms and conditions governing the same.

- x) NPL has only sought to rely on the decision of the Central Commission in the case of *Coastal Gujarat Power Limited* and *Adani Power Limited* to contend that the Commission can reopen competitive bidding tariff. It is submitted that firstly the above decisions being of a coordinate authority are not binding on the Commission. Further that the said decisions have not been given effect to and there is a stay order passed pursuant to the undertaking given before the Hon'ble Supreme Court. The generators are not being paid any tariff over and above the tariff provided for in the PPAs. The matter is also pending before the full bench of the Hon'ble Appellate Tribunal whether the decisions are correct or not.
- xi) PSPCL submitted that there can be no claim for additional tariff merely because the commercial decision of the petitioner was not correct. The above quoted decisions of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal settle the position that there cannot be any amendment to agreements entered into pursuant to a competitive bidding process.
- xii) On the merits, the principal case of NPL is as under:
  - a) There was a specific representation and undertaking by PSPCL that the generating station would run at full capacity, which undertaking is breached by PSPCL;

b) The generating station being of super-critical technology and being a base load station, the entire electricity is necessarily to be procured by PSPCL.

Both the above grounds are misconceived. Firstly, there is no provision either in the bidding documents or the PPA that the generating station would run at full capacity all the time. On the other hand, the PPA specifically provides for the consequence of lower PLF, namely, that the capacity charges would be paid as per the availability declared.

xiii) The very provision of two-part tariff and payment of capacity charges based on availability declared, establishes the case of PSPCL of there being no obligation on the part of PSPCL to offtake the entire electricity made available by NPL. The very provision for a consequence of lower offtake implies that it is open to PSPCL to offtake the quantum of electricity as is necessary to meet the demand in the State at any particular point of time. Otherwise the PPA would have simply provided for a single part tariff or specifically provided that the entire electricity would be off taken by PSPCL.

xiv) PSPCL procures electricity from various generators and follows the merit order principles while scheduling electricity. The contention of NPL, if accepted, would result in a situation where all the generators would be entitled to make a similar claim.

xv) The reliance of NPL on the Orders dated 09.01.2008 and 11.06.2007 of the Commission to contend that there was a specific representation of the generating station being required to meet the immediate and continuous demand is misconceived. The said Orders deals with only the projection

at such point of time that there was an acute shortage of electricity in the State and there is a long term requirement for additional power for which the generating station was required. Long-term requirement is for a period of 25 years. It is also recorded in the said Orders that additional power is required to meet peaking shortages and ensure availability of adequate spinning reserve. This supports PSPCL rather than NPL. Having peaking shortage and the requirement to keep spinning reserves or requiring electricity on long term basis does not mean that the electricity to the full capacity of the generating stations is required at all points of time. It is for this reason that neither the bidding documents nor the PPA provides for the entire electricity made available to be off taken at all points of time.

xvi) The PPA and its Article 18.4 provides that the Agreement and the Schedules are the final expression of the Agreement between the parties and are intended as complete and exclusive statement of the terms of the agreement. Article 18.4, inter-alia, reads as under:

*“18.4 Entirety*

*18.4.1 This Agreement and the Schedules are intended by the Parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their agreement.*

*18.4.2 Except as provided in this Agreement, all prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement or the sale or purchase of Electrical Output and Contracted Capacity under this Agreement to the Procurer by the Seller shall stand superseded and abrogated.”*

xvii) In the circumstances, it is not open to NPL to rely on any alleged previous understandings between the parties except what is as provided in the PPA to make a claim against PSPCL. NPL can not claim that since there was an expectation of higher demand in the State as was previously understood by the bidders, the specific provisions of the PPA need to be reopened and that additional obligations need to be imposed on PSPCL.

xviii) Station Heat Rate was one of the bidding criteria and it was open to the bidders to quote the Station Heat Rate as per their commercial decision taking into account all the circumstances and contingencies. Any variation in the Station Heat Rate below the quoted Station Heat Rate would be to the benefit of bidders. Similarly, any variation on the higher side would be to the account of the bidder including NPL and it is not open to make a claim against PSPCL merely because it is commercially inconvenient at this stage.

xix) NPL has not identified any particular provision in the PPA under which the present claim is sought to be made, because there is no such provision under which benefit can be claimed by it. On the other hand, the consequence of lower scheduling is provided for in the PPA i.e payment of capacity charges in terms of the PPA. There is no such consequence of variation in the Station Heat Rate provided for in the PPA.

xx) The other contention of NPL that the generating station being required to be based on supercritical technology and as a base load generating station, it is necessarily required to operate at full capacity and high PLF is also misconceived.

Merely because the generating station operates at a lower PLF does not change the nature of the technology from being supercritical technology to subcritical technology. Supercritical technology requires high-pressure and high-temperature to be maintained which does not change merely because the generating station is operating at part load. There is no such provision in the PPA based on which NPL can make a claim against PSPCL.

xxi) A base load generating station is a generating station which is capable of being run on a continuous basis and can supply electricity at any point of time during the day. In contrast, a peaking station is capable of being run only for certain hours during the day and not on a continuous basis. The purpose of a peaking station is to provide electricity during peak hours when it is required to the maximum whereas a base load generating station, apart from meeting peak load, also meets the long term requirement and sustained demand on a continuous basis. The contention of NPL is that the base load generating station is to be equated with must-run station, where the entire electricity made available by the generator should be procured, is misconceived.

xxii) NPL has further contended that PSPCL should compensate NPL because of default due to incorrect predictions made by it for the projected demand in the State. It is submitted that the projections are always made on estimate basis and do not provide a legal right to NPL to make any claim against PSPCL. The parties are governed by the rights and obligations provided in the PPA, wherein it is specifically provided that PSPCL shall have the absolute right to offtake

as much electricity from the generating station as is required and the only consequence of giving a lower schedule is that PSPCL is required to pay the capacity charges to the extent of the availability declared. There can be no additional obligation being placed on PSPCL at the stage, contrary to the specific provisions of the PPA.

xxiii) If the contention of NPL is to be accepted that there is loss of SHR in actual operations, the same would apply to PSPCL as well and it would be open to PSPCL to contend that payment of capacity charges is resulting in adverse impact on the consumer tariff and therefore the PPA should be reopened and capacity charges should not be paid to NPL.

xxiv) During the period when NPL is able to maintain a lower SHR, the benefits are not passed on to PSPCL and the consumers. NPL is only seeking to make unjust enrichment of claiming higher tariff and higher SHR during the time when NPL is not able to maintain a lower SHR while keeping the benefits of the lower SHR as compared to the quoted SHR.

xxv) The only relevant aspect for payment of energy charges is the Quoted SHR and it is irrelevant whether the actual SHR is higher or lower for the purposes of operation of the PPA and the rights and obligations of the parties. NPL is bound by the terms and conditions of the PPA and cannot make a claim contrary thereto.

11. As directed by the Commission in its Order dated 08.09.2015 to file the written submissions by 15.09.2015, NPL filed the written submissions dated 19.09.2015 wherein while reiterating its earlier submissions submitted as under:

- i) The present petition has been filed to seek recourse against the significant monetary losses being faced by NPL on account of the Net Quoted Heat Rate (NQHR)/ Station Heat Rate (SHR) for the project being adversely affected due to part load offtake by PSPCL i.e. operation of plant at lower and varying load factor.
- ii) PSPCL clearly and unambiguously made the following representations:
  - a) The Detailed Project Report dated June 2008 (DPR) issued by PSPCL clearly specified that the operation philosophy of the project is that of a base load plant. This read with definition of Base Load Operation and Maximum Continuous Rating in the Central Electricity Authority's (Technical Standards for Construction of Electrical plants and Electrical lines) Regulations, 2010 clearly acknowledge that the project being a base load plant was meant to operate at maximum continuous rating to generate maximum continuous output at its terminals.
  - b) The Commission, on the basis of the PSPCL's petition no. 9 of 2007 and petition no. 58 of 2007, wherein it undertook that the capacity addition by way of this project would not exceed its additional demand projection in view of the acute power shortage being faced in the state of Punjab, vide its Orders dated 11.06.2007 and 09.01.2008, approved setting up of the project to meet the acute shortfall of power in Punjab.
  - c) In its 'Business Forecast' as part of the RfQ to bidders, PSPCL made clear stipulations that it would continue to face significant deficit of power as the required quantum

of power will be significantly higher than the available quantum of power and that additional capacity required was 8000 MW to meet capacity requirement of 14000 MW.

- d) PSPCL in its RfQ and RfP stated that the objective for the bid was to procure minimum contracted capacity of 1080 MW and maximum 1320 MW of power.
  - e) PSPCL specified in the RfP and PPA that the project was to be developed on supercritical technology and the requirements of temperature and pressure for setting up such a project were specified by PSPCL in the RfP and PPA. As per the PPA, NPL was required to demonstrate supercritical technology attributes during the performance test of the project. NPL has a right under the PPA to recover complete capital cost if its plant is ready to operate at Normative Availability of 85% as specified in the PPA.
- iii) On the basis of aforementioned specific and unambiguous representations of PSPCL, LTPDL at the time of bidding assumed that (a) the project will operate as a base load plant and the quantum and nature of load will be such that the project will operate at maximum continuous rating to generate maximum continuous output to provide steady flow of power to meet PSPCL's consistent demand (b) the plant being based on supercritical technology will operate at full load at normative level of 85% so that it operates within the supercritical parameters to achieve the benefits associated with such technology and (c) PSPCL will have the power demand requirement to support evacuation of the entire

power generated by the project at maximum capacity and in any event, not lesser than power generated at full load at normative level of 85%.

- iv) LTPDL quoted the NQHR/NSHR for the project on the premise that PSPCL shall ensure such operating circumstances that the project operates as a base load plant with supercritical parameters.
- v) The project operated at around 50 to 60% PLF during the period of operation since 01.02.2014 with minimum PLF as low as 43.41% due to less offtake by PSPCL. On account of operation at such low PLF that too with varying load factors, the SHR of the project has been adversely impacted and NPL is unable to achieve the quoted SHR of 2268 kCal/kWh.

The SHR of the project increases to more than 2500 kCal/kWh when it operates at a PLF of around 50%. NPL is not claiming for such period where the Plant operated with in supercritical parameters/at higher PLF. NPL's case is based on premise of adverse implication on SHR due to operation of the Plant at low/part load.

- vi) Increase in SHR leads to higher consumption of coal for generation of power meaning thereby that the project is using more coal to generate same amount of energy which it could have generated with lesser quantum of coal with lower SHR. As the payment of energy charges in the PPA is based on the formula with quoted SHR, PSPCL uses the same for the purpose of calculation of energy charges. It does not take into account the actual increased SHR and thus the cost of excess coal required to generate the power is not paid for. Accordingly, NPL is continuously bearing the consequences

of PSPCL's default in not providing such operating circumstances which can ensure operation of the project as a base load plant within supercritical parameters.

vii) The Commission has power to grant the reliefs in terms of the PPA in terms of Article 17.3.1 of the PPA, wherein any dispute between the parties is to be referred to the Commission for adjudication. Therefore, NPL is within its right in terms of the PPA to raise a claim in relation to the adverse implication on the quoted SHR due to operation of the project at lower load/PLF.

viii) Without prejudice to the submission made at para (vii) above, if it is assumed for the sake of arguments that there is no provision in the PPA to grant relief in the present case, even then the Commission while exercising regulatory jurisdiction has plenary powers to regulate the tariff of the project, which fall under its jurisdiction and such powers extend beyond the determination of tariff. The Commission while exercising its power to 'regulate' is required to take all appropriate steps to ensure that the objectives as envisaged in the Act, Tariff Policy 2006 and the Competitive Bidding Guidelines are fulfilled i.e

- a) commercial viability of electricity sector while making sure fair pricing and quality of supply;
- b) consumers' interest are safeguarded and at the same time, recovery of the cost of electricity is done in a reasonable manner; and
- c) the tariff is reflective of the real cost of generation.

Therefore, irrespective of the fact whether the PPA envisages a provision dealing with revision of the SHR or

not, the Commission, in exercise of its regulatory power under the Act, can provide relief to NPL as the SHR of the project is getting adversely impacted on account of PSPCL's failure to ensure that the project operates as a base load plant and within supercritical technology parameters.

- ix) As per the case laws submitted by NPL on the wide nature of regulatory power of the Commission, it is established that the power to regulate tariff also extends to the tariff determined through the competitive bidding. If the situation so demands as in the present case, the Commission can fashion a relief irrespective of the fact that the tariff for the project has been discovered through the competitive bidding, by way of providing suitable adjustment in tariff while retaining the sanctity of competitive bidding under Section 63 of the Act.
- x) There is no provision either in the PPA or the RfP which states that the project despite being based on supercritical technology is meant to operate on a consistent basis as a subcritical plant. The basic framework always envisaged that the project with supercritical technology/ parameters will be allowed to operate in such circumstances so as to maintain the SHR quoted by NPL. However, since this essential part of the contract is not being maintained by PSPCL, NPL cannot be held responsible for maintaining the quoted SHR.
- xi) The Commission, while carrying out adjudication of a dispute between generating company and a distribution licensee, conducts itself in terms of PSERC (Conduct of Business) Regulations, 2005 wherein Regulation 69(1) specifically provides that nothing in these regulations shall be deemed to limit or otherwise affect the inherent power of the

Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.

- xii) On the basis of the Hon'ble APTEL's judgment in Sunkon Energy Pvt. Ltd. v. GERC and Ors. (Appeal No. 96 of 2012) submitted in the hearing on 08.09.2015, it is clear that the Commission can exercise its inherent power where a situation so demands. In the present case, PSPCL made some clear and unambiguous representations on the basis of which the project was set up to operate as a base load plant with supercritical parameters. However, for no default of NPL and for reasons absolutely beyond its control, the project is being continuously operated at low load/PLF causing immense adverse impact on the SHR of the project causing significant financial losses to NPL. The facts and circumstances involved in the petition are such that warrant exercise of inherent power by the Commission to meet the ends of justice as NPL is suffering losses on account of PSPCL's default.
- xiii) The claim of NPL is not for payment towards idle capacity but is on the issue of under recovery of fuel costs on account of lower load/PLF. That PSPCL is making payment towards capacity charges based on plant availability is anyway its obligation under the PPA however, the same is neither intended nor can it cover the losses suffered by NPL on account of adverse impact on the SHR due to operation at lower load/PLF.
- xiv) The capacity charge constituent of the tariff covers the components such as return on equity, interest on loan

capital, depreciation, interest on working capital and operation and maintenance expenses. It is not meant to cover the adverse implication or under recovery in the fuel cost which is a part of the energy charges that gets impacted on account of adverse implications on the SHR of the plant. The capacity charge component is not meant to compensate the financial implications of the adverse implications on the SHR being faced by NPL that leads to non-recovery of actual energy charges.

xv) Under scenario 4 of the Case-2 bidding, where a linkage is provided by the procurer for the purpose of fuel supply to the power project, the bidder/developer is not responsible vis-à-vis the price of fuel as it is a complete pass through on actual cost of delivered coal. In the present case NPL is not getting paid the actual cost of the coal that it incurs to generate power on account of the increase in SHR due to operation at lower load/PLF.

xvi) With reference to the recently concluded bid for allocation of coal mines to power companies pursuant to the Hon'ble Supreme Court of India Judgments and Orders dated 25.08.2014 and 24.09.2014 in Writ Petition (C.) Nos. 463, 515, 283 of 2012 and Writ Petition (CRL.) No.120 of 2012, the Ministry of Power as well as the Ministry of coal have clarified that the components of energy charges cannot be loaded towards the capacity charge component. This does not support the contention of PSPCL that LTPDL was required to load the adverse implications on the energy charges associated with increase in SHR due to operation on low/part load towards the capacity charge component.

xvii) Under the framework of the bidding documents including the PPA, NPL is to keep the upside i.e. benefits on account of having an SHR lower than the quoted SHR on account of its efficiency or bear the downside i.e. losses on account of having an SHR higher than the quoted SHR provided such a change in the SHR vis-à-vis the quoted SHR is on account of NPL's own in-efficiency and for things under its control so as to incentivize the generator to achieve better fuel efficiency by way of achieving lower SHR than the quoted SHR.

However, PSPCL can not argue that in case the SHR goes higher than the quoted SHR on account of it not procuring sufficient quantum of power and the plant does not operate as a supercritical plant, even then NPL should bear the risk of such an increase in the SHR.

Clause 2.7.1.4(1) of the RfP specifically provides that '*No adjustment shall be provided for heat rate degradation*'. The heat rate degradation envisaged here is on account of causes such as wear and tear of equipment, performance efficiency of the equipment etc. and not on account of operation of the plant on part load at varying loading conditions caused by PSPCL. The aforesaid provision is not meant to cover such situations.

xviii) PSPCL has contended that the PPA does not mandate off-take of entire power made available by NPL. There is no need to have a specific provision under the PPA either stating that PSPCL is mandated to off-take entire power from the project or that the SHR will be revised in case entire power is not off-taken. This aspect is already taken care by way of specifying that the project is required to be developed

and operated as a 'base load plant' on the supercritical technology and parameters as specified in the bidding documents i.e., RfP and the PPA. NPL was required to set up and carry out performance test that the plant is a supercritical plant.

xix)NPL in the petition has nowhere contended that the project is to be treated as a 'must run plant' as alleged by PSPCL. Base load plants run at all times through the year except in the case of repairs or scheduled maintenance. Whereas a 'must run plant' is such a plant which is generally not subjected to 'merit order dispatch' principles and are required to operate at all point in time. If the project was to operate at around 50% PLF on regular basis as in the instant case, a plant of half the size would have sufficed. PSPCL erred in its assessment of the growth in demand for power in the State and the capacity additions of large size plants based on the supercritical technology in hindsight appear unjustified.

xx)The sale of power to a third party under Article 4.4.2 read with Article 4.4.3 of the PPA is meant only to cover certain exigencies where PSPCL is unable to procure power due to some temporary issues. However, sale of power to a third party on a continuous basis is not contemplated under the terms of the PPA considering the project was set up under Case-2 model for exclusively meeting the power requirements of PSPCL. NPL has to restart the supply within 2 hours from the time of getting a notice from PSPCL which reinforces the premise that this entire arrangement is envisaged as a stop gap arrangement for sale of power to

third parties on account of exigencies and not continuously on long term.

Also third party sale of power from the project in and around Punjab is not viable as the tariff at which the power is currently being sold to PSPCL is higher in comparison to tariff at which power generally available in the market. In case it was possible to sell power to third party at the current tariff, PSPCL, being allowed to undertake trading by virtue of being a distribution licensee, would have procured the power from NPL and sold the same in the market to make profit.

12. The Commission has carefully gone through the petition, reply, rejoinder, other submissions by the parties and written submissions/arguments. The observations, findings and decision of the Commission are discussed in the following paragraphs:-

### **Observations**

The Commission notes that NPL is aggrieved on the issue that PSPCL is consistently procuring power from the project at a lower (around 50%) and varying load factor out of the power being offered by NPL to PSPCL since 01.02.2014, except during four months of high demand period during paddy season. NPL has stated that as a result of lower and varying scheduling of power by PSPCL, the SHR of the project gets adversely affected thereby leading to higher consumption of fuel resulting in higher energy charges (₹/kWh). In the formula for calculating energy charges, SHR is to be taken as the net quoted heat rate i.e 2268 kCal/kWh quoted by NPL at the time of bidding. NPL claims that this has resulted in monetary losses to it which need to be compensated by PSPCL. It is the contention of NPL that energy charges need to be

calculated on the basis of actual (higher) station heat rate being achieved by the generating station as the same is getting adversely impacted due to default on the part of PSPCL in regularly procuring less power than being offered to it by NPL.

NPL has stated that the bids were invited by PSPCL on the basis of demand survey, according to which the capacity proposed to be installed was not more than the demand, for setting up base load plant with supercritical technology. As interpreted by NPL, this specification implies that PSPCL shall necessarily procure all power offered to it by NPL regularly so as to run the generating station with supercritical parameters, which requires the station to operate at higher pressure and temperature than what is required for the subcritical plants. As per CERC heat rate norms, the net heat rate of supercritical plants is 8.6% lower as compared to subcritical plants. NPL has also stated that due to less scheduling of power by PSPCL, the project is unable to achieve supercritical parameters leading to the same running as a subcritical plant and thereby adversely impacting the SHR.

It is the case of NPL that having demonstrated supercritical attributes during performance testing of the project, it has the right under the PPA to recover complete capital cost of the project if its plant is capable to operate at normative availability of 85% as specified in the PPA. In reply to PSPCL's contention that as per RfP provision, that no adjustment is to be provided for heat rate degradation, NPL has submitted that it is only applicable with regard to degradation of the quality of the generating plant due to wear and tear over the life of the project and not for the losses due to adverse implications on SHR on account of operation of the plant on part load and at varying loading conditions.

NPL has further submitted that pursuant to the IEA's 2010 report on power generation from coal, Ministry of Power in the new Standard Bidding Documents for case-2/UMPP projects has provided for compensation on account of variation in SHR for despatches below normative loading factor of 85%. NPL has contended that in order to operate the plant on supercritical parameters, it is a pre-requisite that the plant operates continuously at higher PLF so that high pressure and temperature can be generated and maintained, due to inverse relationship between PLF and SHR. NPL has stated that it raised the issue with PSPCL vide letter dated 23.01.2015 stating that NPL is suffering on account of efficiency loss in terms of deterioration in heat rate which is non-recoverable, to which PSPCL did not respond. In reply to PSPCL's contention that there is no specific provision in the PPA for compensation due to variation in SHR, NPL has submitted that the Commission in exercise of its inherent power allow the petition for meeting the ends of justice. NPL has prayed for direction to PSPCL to

- (i) make good monetary loss suffered by it on account of adverse implications on SHR due to operation of the project at lower PLF for the period April 2014 till filing of petition and
- (ii) prospectively procure power from the project atleast equivalent to the load/PLF adequate to allow operation of the project with supercritical parameters or in the alternative pay compensation.

The Commission further notes that in reply, PSPCL has denied all the contentions of NPL and submitted that NPL is indirectly seeking to avoid its obligations under the PPA. PSPCL

has stated that NPL has not brought out any specific provision of the PPA under which it is incumbent upon PSPCL to procure all power offered to it by NPL to maintain PLF at/above 85% or with regard to maintaining the supercritical parameters of the plant or with regard to maintaining SHR quoted by NPL at the time of bidding.

PSPCL has submitted that as envisaged under the Bidding Guidelines, 2005 of Govt. of India for procurement of power by distribution licensees under Case-2, the bidders were required to quote the capacity charges and the SHR. The terms & conditions of the PPA were part of the bidding documents and the quotation of the capacity charges and SHR of 2268 kCal/kWh was the commercial decision of NPL. The quoted tariff and quoted heat rate are sacrosanct subject to adjustment, if any, as per the terms of the PPA and the bid documents. As SHR was one of the bidding criteria, it was open to the bidders to quote the same taking into account all circumstances and contingencies. The power project was envisaged by PSPCL based on its long term requirement to meet the projected demand of consumers in the State of Punjab.

PSPCL has contended that the PPA does not mandate it to schedule the entire electricity made available to it by NPL, the only consequence of not doing so is that NPL is entitled to capacity charges for the electricity declared available in terms of the PPA. PSPCL has submitted that it is duly paying the capacity charges in terms of the PPA even if the capacity procured is less than declared availability. PSPCL has further contended that there was no purpose in having a two part tariff and the concept of scheduling/despatch etc. and single part tariff with must run status would have sufficed otherwise.

PSPCL has submitted that the concept of base load station is that power plant is in a position to operate at full capacity, if required, and is not dependent upon inputs/vagaries e.g water, wind or solar availability for respective hydro, wind or solar plants, non-availability of which may affect the operation of such plants in case of necessity. The bid invitation by PSPCL of minimum 1080 MW and maximum 1320 MW capacity generating station to be established is being misinterpreted by NPL to mean that the same would be the minimum scheduled capacity. PSPCL has further submitted that requirement to use supercritical technology does not give any cause of action to NPL in the present case particularly when the bidding terms & conditions including the PPA provide that no adjustment for heat rate degradation shall be allowed.

With regard to NPL's claim that the provisions in the bidding documents that no adjustment for heat rate degradation shall be allowed is applicable in case the efficiency/SHR of the plant is adversely affected due to wear and tear, PSPCL has submitted that it is nowhere so qualified in the bidding documents. NPL has not even disclosed the actual heat rate achieved. PSPCL has contended that the CERC regulations have no relevance in the present case as the project has been set up under the competitive bidding process carried out under section 63 of the Act. Even under the said CERC regulations, no adjustment for SHR is provided if electricity scheduled is less than the capacity declared available and the only consequence is for payment of capacity charges.

It is the case of PSPCL that even in the regulations which provide for tariff determination on cost plus basis under section 62 of the Act, there is no provision for compensation for any variation

in SHR. PSPCL has submitted that it does not agree to NPL's claim that it is technically impossible to achieve a lower SHR when there is lack of high PLF. PSPCL has further submitted that if the contention of NPL is accepted that there is loss of SHR in actual operations, the same would apply to PSPCL as well and it would be open to PSPCL to contend that payment of capacity charges is resulting in adverse impact on the consumer tariff and therefore the PPA be reopened and capacity charges should not be paid to NPL. During the period when NPL is able to maintain a lower SHR, the benefits are not passed on to PSPCL and the consumers.

As per PSPCL, NPL has submitted in the rejoinder that there is no provision in the PPA which provides for the remedy of adjustment in the SHR on account of higher or lower PLF and that the claim made in the petition is for invocation of the regulatory jurisdiction of the Commission to reopen PPA and increase the tariff to the generator. PSPCL has submitted that

- i) the prayers in the petition are misconceived and there is no cause of action;
- ii) the present petition is not maintainable and liable to be dismissed.

### **Findings and Decision**

**The Commission after careful consideration of the submissions made by both the parties finds that SHR was the bidding component along with the capacity charges quoted by NPL. It is fair to assume that NPL would have factored in all the circumstances and contingencies at the time of bidding. It was a commercial decision of NPL to quote a specific value of SHR along with the capacity charges. Having been successful in the competitive bidding process on the**

basis of the quoted SHR, it is not open to NPL to claim compensation on account of adverse impact on SHR due to PSPCL not procuring the capacity declared available by NPL, especially when there is no provision in the bidding documents including the PPA for such an eventuality. The Commission notes that there is a specific provision in the PPA for payment of capacity charges in case PSPCL does not procure the capacity declared available by NPL and PSPCL has been complying with the said clause and paying the capacity charges for capacity declared available by NPL and not procured by it. The Commission further notes that there is a provision in the PPA wherein NPL is entitled to sell such available capacity not procured by PSPCL to any person without losing the right to receive the capacity charges from PSPCL for such unavailed available capacity, by equally sharing with PSPCL the sale realization in excess of energy charges. This is an enabling provision in the PPA for NPL to maintain its quoted SHR. On the other hand, the Commission finds that there is no provision in the PPA for the consequential impact on SHR in case of PSPCL not procuring capacity declared available by NPL. Accordingly, the Commission finds no reason to allow any relief to NPL as prayed in the petition and holds that the petition fails with regard to compensation on account of capacity declared available by NPL and not procured by PSPCL keeping in view that there is no provision in PPA for the same.

With regard to the NPL's contention that the revised bidding documents for construction and operation of Case-2 power generation projects/UMPPs (issued on 23.09.2013)

**provide for monetary compensation due to variation in SHR on account of capacity declared available by the seller but not procured by the procurer, the Commission holds that the same are not applicable as the bidding in the instant case was carried out under the 2005 Bidding Guidelines of the Govt. of India for procurement of power under Case-2 by distribution licensees and applying new parameters notified subsequent to the successful conclusion of bidding process, which may be beneficial to NPL, would vitiate the competitive bidding process and shall be prejudicial to the interests of other bidders who participated in the bidding at that time.**

**However, considering that NPL has requested the Commission that irrespective of the fact whether the PPA envisages a provision dealing with revision of the SHR or not, the Commission in exercise of its regulatory powers under the Act can provide a recourse to NPL and also under PSERC (Conduct of Business) Regulations, 2005, use its inherent powers to make such Orders as may be necessary for meeting the ends of justice, the Commission has briefly gone through the relevant provisions in the revised SBD PPA. The Commission has noticed a few major differences in the tariff design e.g**

- (i) the tariff is to be quoted in the revised bidding process as fixed charge and fuel charge as compared to fixed (capacity) charge and SHR in the case of present petition;**
- (ii) SHR is to be taken as 2300 kCal/kWh for bidding purpose as compared to SHR required to be quoted by bidders in the instant case;**

- (iii) for each subsequent accounting year from the year in which the CoD is declared, the fixed charge is to be determined by decreasing the fixed charge for the immediately preceding accounting year by 2% as compared to capacity (fixed) charge quoted with separate non-escalable and escalable components for each accounting year for the entire contract period of 25 years as envisaged in the PPA in the instant case;**
- (iv) the SHR is to be computed on daily basis and its impact calculated on quarterly basis to be accounted for in the tariff as against no provision for variation in SHR to be considered in instant petition;**
- (v) no fixed charges to be paid by procurer to seller in case the capacity declared by seller is not procured by procurer and is sold to a third party as against capacity charges payable by procurer to seller in such a case, as in the instant petition, etc.**

**Accordingly, the Commission undoubtedly infers that the tariff design in the revised SBD PPA for payment to the seller for supply of electricity to the procurer is conceptually different and further concludes that it is not possible to apply the same in the instant petition by selectively picking up a single component of variation in SHR and ignoring other provisions, as suggested by NPL. Even otherwise, as brought out above, it is not legally correct to apply provisions notified subsequent to the successful conclusion of the competitive bidding process carried out under different bidding guidelines, as in the instant case. This would tantamount to vitiating the competitive bidding process and shall be**

**prejudicial to the interests of the other bidders who participated in the competitive bidding process. Considering the above, the Commission holds that there is no merit in the petition and the prayer(s) of NPL for direction to PSPCL**

- (i) to make good the monetary loss suffered by it on account of adverse implications on SHR due to operation of the project at lower PLF for the period April 2014 upto the filing of the petition; and**
- (ii) to prospectively procure power from the project atleast equivalent to the load/PLF adequate to allow operation of the project with supercritical parameters or in the alternative to pay compensation, can not be granted.**

**The petition is dismissed.**

Sd/-

**(Gurinder Jit Singh)  
Member**

Sd/-

**(Romila Dubey)  
Chairperson**

Chandigarh

Dated: 07.10.2015