

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

Petition No. 31 of 2023
alongwith IA No. 08 of 2023
Date of Order: 05.12.2023

Petition under Section 86 (1) (f) of the Electricity Act, 2003 seeking quashing of Punjab State Power Corporation Limited's imposition of penalty on GVK Power (Goindwal Sahib) Limited, In terms of Article 1.2.5 read with Article 1.2.1(iv) of Schedule 6 of the Amended and Restated Power Purchase Agreement dated 26.05.2009.

AND

In the matter of: GVK Power (Goindwal Sahib) Limited, Paigah House,
156-159 Sardar Patel Road, Secunderbad, 540003.

...Petitioner

Versus

Punjab State Power Corporation Limited (PSPCL), through
its CMD, PSEB Head Office, The Mall, Patiala, (Punjab).

...Respondent

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

Petitioner: Sh. Sh. Janmali Manikala, Advocate

PSPCL: Sh. Sh. Anand K Ganesan, Advocate

ORDER

1. The Petitioner (**GVK**) has filed the present petition disputing the notice/letter dated 17.05.2023 issued by Punjab State Power Corporation Limited (**PSPCL**) on account of GVK's failure to achieve availability of 75% during the FY 2022-23 alongwith an I.A No. 08 of

2023 for staying the operation of the said impugned notice. Submissions made in the petition are summarized below:

1.1 PSPCL has issued the impugned letter dated 17.05.2023 to GVK contending that:

- a) GVK had raised the Monthly Bill for April 2023, amounting to Rs.119 Crores, contrary to the terms of the PPA.
- b) In the said invoice, GVK has failed to include the penalty for alleged failure to achieve availability of 75% during FY 2022-23 amounting to Rs. 28.55 Crore.
- c) Accordingly, PSPCL would deduct this penalty amount from the amount payable to GVK in terms of the invoice for April 2023.

On 23.05.2023, GVK submitted its response to the ibid impugned notice to PSPCL disputing the same.

1.2 PSPCL cannot be permitted to take advantage of its own wrong i.e., failure to make payments to GVK as per the timelines in terms of the Amended and Restated PPA, and then seek to impose penalty for GVK's alleged failure to achieve 75% in FY 2022-23. PSPCL is obligated to release payments against monthly bills raised by GVK by the due date i.e., 30 days from the receipt of the monthly bills. Also, it is not entitled to set off/deduct amounts exceeding Rs. 13.5 crore in a Contract Year (except on account of deductions required by the Law). However, PSPCL has failed to fulfill its obligations by withholding amounts of the following amounts in violation of Articles 11.1, 11.3.1 and 11.3.2 of the PPA:

- a) PSPCL has withheld payments for the months of April and May 2020 citing Force Majeure due to the restriction imposed on account

of outbreak of Covid-19. It is yet to make payments of about Rs 94.47 Crore as on date in spite of revision of the SEAs by the SLDC in compliance of the Order dated 22.07.2022 passed by this Commission. GVK has filed Petition No. 1 of 2023 seeking directions to PSPCL to make payments towards these Monthly Bills which is pending adjudication before the Commission.

- b) Also, the payments of monthly bills of September and October 2021 amounting to Rs. 135,06,88,381/- and Rs. 126,73,02,339/- respectively was made after a delay of 29 days and 27 days respectively, after the due date.
- c) The Delay in payment of the due amounts had a cascading effect adversely impacting GVK's financials including working capital and has prevented GVK from procuring requisite amount of coal in FY 2022-23. Consequently the availability of the Project got hampered for the months of:

Sr. No.	Month	Availability
1.	April 2022	30.15%
2.	May 2022	52.69%
3.	June 2022	56.31%
4.	July 2022	55.50%
5.	August 2022	51.01%
6.	September 2022	45.52%
7.	October 2022	42.24%
8.	November 2022	43.41%
9.	December 2022	57.09%
10.	January 2023	65.44%
11.	February 2023	81.57%
12.	March 2023	76.12%

1.3 GVK's obligation to achieve Availability of 75% in a financial year was premised on 100% supply of coal from the Tokisud Captive Coal Block allocated to GVK before entering into the PPA. However, the allocation of the Tokisud Captive Coal Block to GVK was cancelled by the Hon'ble Supreme Court vide Judgment dated 24.08.2014 in *Manohar Lal Sharma v. the Principal Secretary & Ors.*, reported as (2014) 9 SCC 516 and the subsequent Order dated 24.09.2014 reported as (2014) 9 SCC 614 (**Coal Judgments**). It is submitted that:

- a) The cancellation of the Tokisud Captive Coal Block has been held to be an event of Force Majeure and Change in Law in terms of Articles 12 and 13 of the PPA by the Arbitral Tribunal in its Arbitral Award dated 10.04.2017. The cancellation of captive coal blocks in terms of the Coal Judgments has also been held to be a Change in Law event by Hon'ble Tribunal Judgment passed in Appeal No. 193 of 2017 titled *GMR Kamalanga Energy Limited v CERC & Ors.* It is pertinent to note that Article 12.7(a) of the PPA provides that no party shall be in breach of its obligations to the extent its performance was prevented / hindered on account of force majeure. Therefore, GVK is excused from its obligation of achieving average availability of 75% under Article 1.2.5 of Schedule 6 of the PPA.
- b) Consequently, GVK has been constrained to procure coal from alternate sources to meet the requirements of the Project. After cancellation of the Tokisud Captive Coal Block, with PSPCL's concurrence, GVK successfully participated in the first round of auction under the SHAKTI Scheme and has been allocated 1.7 MTPA of G11 grade coal from CCL in Jharkhand and 6300 TPA of

G6 grade coal from SECL Korea Rewa in Chhattisgarh. The said arrangement incorporated in the Supplementary PPA was approved by the Commission on 30.01.2018 in Petition No. 01 of 2018. However, the said coal under the SHAKTI Scheme is adequate only for achieving plant availability of 62% on normative basis.

c) Thereafter, GVK has made several attempts to procure coal from alternative sources including imported coal and also under the SHAKTI scheme. However, PSPCL has consistently refused to grant its concurrence for such procurement to meet its obligation under the PPA. Therefore, having prevented procurement of coal by GVK for the balance capacity, PSPCL cannot take advantage of its own wrong and allege default on the part of GVK for non-achievement of availability of 75% as per the PPA. In this regard, GVK places its reliance on various judgments passed by the Hon'ble Supreme Court of India wherein it was observed that where an obligation is cast on a party and if commits a breach of such obligation, it cannot be permitted to take advantage of such a situation.

1.4 Moreover, PSPCL has failed to demonstrate any actual loss caused on account of the alleged low availability of the project. It is a settled law that even if a provision of an agreement provides for penalty, the same has to be considered on account of the actual loss caused to the party and compensation/penalty has to be granted accordingly. In cases wherein provisions provide for penalty amounts to be imposed on account of breach of contract, mere claim of damages does not give

rise to liability until such liability is adjudicated and damages are assessed by a Court. However, PSPCL has not put forth any material or evidence to quantify the damages being claimed from GVK. In this regard, GVK has placed its reliance on the following judgments passed by the Hon'ble Supreme Court of India and has submitted that PSPCL is required to quantify and prove the loss it has incurred on account of the alleged non-availability of the Project:

- i) Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136.
- ii) Fateh Chand vs Balkishan Das, (1964) 1 SCR 515.
- iii) Maula Bux v. Union of India, 1969 (2) SCC 554.
- iv) Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (2003) 5 SCC 705 (Para 63-67).
- v) Construction and Design Services v. DDA, (2015) 14 SCC 263:

1.5 . Further, vide order dated 10.10.2022 passed by Hon'ble National Company Law Tribunal (NCLT), GVK has been admitted into the Corporate Insolvency Resolution Process (CIRP) under IBC. The PPA specifically recognizes the right of the lenders to substitute GVK as per the procedure detailed in Schedule 10 to the PPA. Given that the substitution process of GVK has been initiated by operation of law and is underway, PSPCL is restrained from taking any adverse action under Article 1.2.5 of Schedule 6 of the PPA. Any action of PSPCL which may jeopardize the CIRP or in any way diminish the value of the Project or adversely impact GVK's ability to continue as an ongoing concern is impermissible under law.

1.6 The Prayers in the petition are to:

- a) Quash the Impugned Notice dated 17.05.2023 issued by PSPCL on GVK.
- b) Direct PSPCL not to take any precipitative action against GVK in furtherance to the Impugned Notice dated 17.05.2022; and/or
- c) Pass any such other and further reliefs as the Commission deems just and proper in the nature and circumstances of the present case.

2. The Petition alongwith IA was taken up for hearing on 31.05.2023. After hearing the Ld. Counsel for both the parties, the petition was admitted vide order dated 01.06.2023 with the directions to the parties to complete the pleadings. In the interim, the operation of the impugned notice issued by PSPCL was stayed till the next date of hearing.

3. Reply/Submissions by PSPCL:

PSPCL filed its reply vide its affidavit/letter dated 27.06.2023, submitting as under:

3.1 A similar issue of GVK not being able to achieve the scheduled availability came before the Commission for the first time in Petition No. 45 of 2017 wherein GVK had challenged the issue of penalty for declaring availability below 75% during the FY 2016-17. In the said petition the Commission had upheld the levy of penalty by PSPCL vide order dated 21.05.2018. GVK has filed an appeal against the same which is pending adjudication but the said order has not been stayed by the Hon'ble Tribunal. For the second time,

the issue of GVK not being able to achieve the required availability for FY 2017-18 was raised in Petition No. 37 of 2018, whereon the Commission vide order dated 12.09.2019 again upheld the levy of penalty on account of non-achievement of the availability in terms of the PPA. GVK has challenged this order also before the Hon'ble Tribunal which is pending adjudication without any stay on the levy of the penalty on GVK.

3.2 PSPCL submitted that it is relevant to mention that the actual availability for the months in 2022-23 was as under:

Sr. No.	Month	Availability
1.	April 2022	30.15%
2.	May 2022	52.69%
3.	June 2022	56.31%
4.	July 2022	55.50%
5.	August 2022	51.01%
6.	September 2022	45.52%
7.	October 2022	42.24%
8.	November 2022	43.41%
9.	December 2022	57.09%
10.	January 2023	65.44%
11.	February 2023	81.57%
12.	March 2023	76.12%

The availability being to the extent as specified above is not and cannot be the subject matter of dispute. The only issue thereafter that arises is the consequence of this admitted factual position. It is also relevant to mention that the entire amount of Rs. 28.55 crores

was deducted and recovered by PSPCL on 22.05.2023. The said fact has not been brought out by GVK in the present petition.

3.3 Regarding the issue of payments it is submitted that:

- a) Regarding the issue of payments for April and May 2020, GVK has already filed Petition No.1 of 2023 before the Commission which is pending adjudication. Without prejudice to its rights, PSPCL can only make payment in line with the directions of this Commission. In any event, the said issue is wholly irrelevant to the issue of availability for the year 2022-23.
- b) Further, the bills for the months of Sept. and Oct., 2021 cited by GVK were fully cleared by PSPCL, well before the expiry of the year 2021-22. It is incomprehensible as to how the short availability for the year 2022-23 could be claimed as a consequence of payments due for Sept & Oct 2021 which have, in fact, already been paid to GVK. The short availability penalty for FY 2021-22 has been fully accepted by GVK in terms of the PPA. In fact, the Project was under shutdown for nine days even prior to the due date of payment of the bills for September 2021, inspite of payment for the month of August having been made in time.
- c) Therefore, delayed payment (if at all) cannot be the reason for the failure on the GVK to declare adequate availability. In fact GVK was unable to procure coal due to its own failure. Reliance as placed by GVK, on the delays by PSPCL in making payments

is denied as the same are not applicable to the facts of the present case.

3.4 PSPCL has not prevented performance of GVK's obligations. GVK is attempting to indulge in a self-serving interpretation of the Orders of the Commission which clearly state that it is the obligation of GVK to arrange for long term coal linkage. In the Order dated 01.02.2016, the Commission had directed the GVK to make efforts for arranging long term sources of coal for the entire term of the PPA. Accordingly, GVK had participated in e-auction under the SHAKTI scheme and had secured coal availability to operate its plant at 62% PLF. Since, the auction avenue under the SHAKTI scheme had been exhausted by GVK at that time; the Commission had directed GVK to explore other options for meeting the requirement of balance coal on a long term basis. It is submitted that:

- a) In the case of SHAKTI allocation of coal in the year 2018, GVK had approached the Commission and PSPCL had also signed a supplementary PPA for the said purpose. This itself was on the premise that there needs to be a specific amendment to the PPA for the purpose of allocation. There is no vested right that GVK can claim for amendment of the terms of the PPA, and upon PSPCL not agreeing to the same, GVK cannot claim that the existing rights and obligations of the PPA including penalty for short availability should not be enforced.

- b) It cannot be the case of GVK that PSPCL is bound to accept and give its consent to the procurement of costlier coal which is detrimental to the interest of the consumers in the State. The PPA with GVK was in fact premised on the availability of coal at a very economical price being linked to the landed cost of coal from the Pachwara coal mine. The Commission has, in any case, given a directive for ensuring arrangement for the procurement of the balance coal and the price to be considered for the same, which has been fully accepted by GVK.
- c) The reliance placed by GVK on the communications *inter se* parties is also irrelevant since the communications are subsequent to the period in issue. In fact, the availability of the power plant of GVK for the months of January, February and March, 2023 has been 65.44%, 81.57% and 76.12% respectively i.e., it remained more than 75% for two out of three months. The lower availability was in fact for the previous months, which were not in any manner affected by the issue now sought to be raised. Therefore, the contention of GVK that PSPCL's refusal to grant its concurrence for such procurement has prevented GVK from procuring the requisite coal is misleading and liable to be rejected.
- d) In fact, GVK is confusing the coal availability with declared availability of the plant for the year. The declared availability of the plant is based on the available coal stock and its ability to generate with such available coal. In case of lower demand in the State and the plant being not scheduled, the generator can

declare higher/full availability. This occurred in the years 2019-20 and 2020-21, when the PLF was about 28% and 27% respectively. Based on the very same coal arrangement, the generator had then, on various occasions, declared availability of 100%, as shown below:

Month	PAF		PLF	
	Monthly	Cumulative	Monthly	Cumulative
Apr-19	89%	89%	52%	52%
May-19	100%	94%	8%	29%
Jun-19	100%	96%	57%	38%
Jul-19	100%	97%	59%	44%
Aug-19	100%	98%	50%	45%
Sep-19	100%	98%	56%	47%
Oct-19	100%	98%	23%	43%
Nov-19	100%	99%	0%	38%
Dec-19	100%	99%	10%	35%
Jan-20	100%	99%	17%	33%
Feb-20	100%	99%	0%	30%
Mar-20	100%	99%	0%	28%
Apr-20	100%	100%	0%	0%
May-20	100%	100%	0%	0%
Jun-20	100%	100%	42%	14%
Jul-20	96%	99%	67%	27%
Aug-20	100%	99%	52%	32%
Sep-20	96%	99%	60%	37%
Oct-20	57%	93%	21%	35%
Nov-20	27%	85%	4%	31%
Dec-20	100%	86%	0%	27%
Jan-21	99%	88%	11%	26%
Feb-21	96%	88%	4%	24%
Mar-21	100%	89%	62%	27%

e) Therefore, even with the existing coal arrangement, GVK would have had sufficient coal to declare much higher availability.

3.5 It is denied that the threshold of average availability of 75% was premised on 100% supply of coal from the Tokisud Captive Coal block. It is submitted that:

a) The decision related to the cancellation of coal block pertains to an earlier point of time in 2014. Thereafter, being fully aware of the situation of coal availability, GVK choose to declare COD based on the interim arrangement of coal. The said submission on the part of GVK is in the teeth of the Order dated 01.02.2016 passed by this Commission in Petition Nos. 65 of 2013 and 33 of 2015 as well as Order dated 27.05.2019 passed in Petition No. 01 of 2018. It is relevant to note that these two Orders were passed much after the said deallocation of coal blocks.

b) The arbitral award sought to be relied by GVK has no applicability to the present case. The Arbitral Tribunal was dealing with the limited issue of whether the non-availability of a firm coal source and cancellation of coal block would entitle GVK to postpone the COD of the generating station. In fact, the Arbitral Tribunal had granted relief to GVK by holding that, “the Claimant/Petitioner is entitled for extension of SCOD from date of Coal Order till COD is actually achieved”. Thus, GVK was not even required to declare its COD and could have postponed the COD till such time a firm coal source was available, without payment of any liquidated damages to PSPCL. Being fully

aware of the situation of coal availability, GVK still chose to declare COD based on the interim arrangement of coal.

- c) The Order dated 01.02.2016 passed by the Commission settled the rights and obligations of the parties, including the tariff to be paid for the coal procured. This Order binds GVK. It is submitted that GVK proceeded to declare commercial operation of its project to begin generation of the electricity based on the arrangement of the SHAKTI coal, which was allowed by this Commission in the order dated 01.02.2016. GVK after deciding to proceed with the COD cannot now take the position that the generation is not possible due to non-availability of coal. Thus, GVK is barred from raising the plea of *force majeure*. The issue of coal non-availability cannot now be used to avoid the applicability of the provisions of the PPA.
- d) In view thereof, the cancellation of coal block which happened at an earlier point in time in 2014 cannot now be termed as the reason by GVK for not able to achieve the availability in terms of the PPA.

3.6 The imposition of penalty under Article 1.2.5 read with Article 1.2.1 (iv) of Schedule 6 is not conditional upon demonstration of loss. The issue is of adjustment in tariff and the consequence of the availability being less than 75% for a year is that the capacity charges for the said year are to be reduced in term of the said Article(s). The monthly invoice for the tariff is mandated to include this amount, which itself establishes that it is in the nature of tariff

adjustment. It is not a special compensation or damages to be paid subject to loss being an established, as is sought to be contended. It is for this reason that the monthly invoice for April 2023 issued by GVK was required to be raised by accounting for this amount in terms of Article 1.2.5 read with Article 1.2.1 (iv) of Schedule 6, which GVK failed to do. The Commission has also, in the past years, approved such tariff adjustment and recovery.

3.7 It is denied by PSPCL that since GVK is undergoing CIRP therefore PSPCL is barred from levying penalty in terms of Article 1.2.5 read with 1.2.1 (iv) of Schedule 6 of the amended PPA. PSPCL is not in any manner jeopardizing or derailing the CIRP or is in any way diminishing the value of the Project. PSPCL has submitted that there is no merit in the present petition which is liable to be dismissed.

4. In the hearing held on 19.07.2023, the Ld. Counsel for PSPCL reiterated its submission that the impugned notice has been acted upon and the amount stands recovered by PSPCL on 22.05.2023 i.e. prior to the Interim Order dated 01.06.2023, which was not stated by GVK in its petition. After hearing the parties, the Commission, while observing that it would be pointless to further extend the stay Order dated 01.06.2023 in view of the recovery already affected, directed the parties to maintain the status-quo till the next date of hearing.

5. Rejoinder filed by the Petitioner:

GVK filed its rejoinder to the reply filed by PSPCL reiterating the contentions earlier taken in the petition. It was further submitted that:

5.1 GVK, being a thermal power plant, requires adequate cash flow for each month to maintain sufficient coal stock and effectively run its Project at full capacity. Thus, when PSPCL, which is the only revenue source for GVK, does not make payments of monthly bills, contrary to the provisions of the PPA, it becomes financially impossible for GVK to maintain adequate coal stock and sustain operations. GVK also cited Hon'ble APTEL Judgments dated 11.07.2014 in Appeal No. 181 of 2023 titled *Raghu Rama Renewable Energy Ltd. v. TANGEDCO and Lalitpur Power Generation Company Limited v. UPERC & Ors.*, 2020 SCC On Line APTEL 82.

5.2 That PSPCL cannot be allowed to decline consent / concurrence to GVK for procurement of requisite quantity of coal to meet its obligations, and in the same breath, contend that GVK has not fulfilled its obligation of achieving minimum Average Availability. PSPCL's concurrence was required in terms of Appendix-II and Schedule I of the Request for Submission of Expression of Interest dated 23.09.2022 to participate in the SHAKTI scheme auction round 5. PSPCL's contention that GVK has not challenged denial of consent by PSPCL before the Commission is incorrect. In its letter dated 23.05.2023 to PSPCL, which was issued in response to the Impugned Notice dated 17.05.2023, GVK has clearly stated that PSPCL cannot deny its consent and at the same time contend that GVK has not achieved 75% availability during FY 2022-23. Further, the factum of PSPCL's denial/refusal to provide its consent vide letter dated 10.10.2022, has also been brought to the

Commission's attention by GVK in Petition No. 14 of 2023, which was filed on 03.03.2023.

- 5.3 PSPCL's contention that the availability of coal ought not to be linked to the declared availability of the Project is misplaced and denied. It is submitted that the coal under the Shakti Scheme is sufficient for only 62% Plant Load Factor ("**PLF**"). Accordingly, the project can only achieve commensurate availability in a financial year.
- 5.4 PSPCL's contention that the penalty imposed on GVK is in the nature of tariff adjustment and is not subject to loss being established is incorrect and has no basis under law. It is a settled law that even if a provision/clause of an agreement provides for penalty, the same has to be considered on account of the actual loss caused to the party and compensation/penalty is to be granted accordingly. The alleged mode of recovery of such penalty, be it through lump sum payment of adjustment in the tariff, cannot alleviate the party claiming such penalty from proving actual loss.
- 5.5 GVK further submitted that, pertinently, GVK's obligation to achieve 75% Availability during a Contract Year was hindered on account of cancellation of captive coal block and the consequent non-availability of fuel. PSPCL's reliance on the Commission's order dated 01.02.2016 passed in Petition Nos. 65 of 2013 & 33 of 2015 and Order dated 27.5.2019 passed in Petition No. 01 of 2018 to contend that GVK's obligations were not premised on 100% supply of coal from the captive coal block, is misplaced. In fact, the Orders

dated 01.02.2016 and 27.05.2019 recognize that pursuant to cancellation of the captive coal block, GVK's Project was left with no firm linkage of coal and interim arrangements had to be made for operations of the Project. The said order further recognizes that coal supply is not adequate to ensure 100% normative generation at the Project.

5.6 Further, PSPCL's contention that GVK is undergoing CIRP has no bearing on the issue involved in the petition is also incorrect. It is submitted that any action of PSPCL which may jeopardize / derail the CIRP or in any way diminish the value of the Project or adversely impact GVK's ability to continue as an ongoing concern is impermissible under law as it would be contrary to the legislative intent of "Value Maximisation" under the IBC. It is submitted that since PSPCL's claim for penalty for FY 2022-23 pertains to a period prior to commencement of CIRP (i.e., from April 2022 till commencement of CIRP on 10.10.2022), the only recourse available to PSPCL is under CIRP. PSPCL cannot circumvent the CIRP process to recover any dues or claims relating to any alleged default on part of GVK prior to the initiation of CIRP. Accordingly, the levy as well as deduction of penalty by PSPCL from GVK's monthly bills is against the provisions of IBC. In this regard GVK has cited the judgment passed by the Hon'ble Supreme Court in 2023 SCC online SC 842, wherein it is held that Section 238 of IBC overrides the provision of the electricity act and during CIRP, even a secured creditor is not permitted to realize its dues from the corporate debtor (i.e. GVK in the present case). The claims of the

creditor are disbursed only in terms of the 'waterfall mechanism' provided under Section 53 of the IBC.

6. After hearing both the parties, Order was reserved vide order dated 31.08.2023 with the liberty to file written submissions in the matter. Both the parties filed the same in line with their earlier submissions which was taken on record.

7. Observations and Decision of the Commission

The Commission has examined the submissions and counter submissions made by the parties. The subject of this dispute is the notice/letter dated 17.05.2023 issued by PSPCL to the Petitioner (GVK) stating that the monthly invoice submitted for April 2023 is not in terms of Article 1.2.5 read with Article 1.2.1 (iv) under Schedule 6 of the PPA as it has failed to include the penalty amount for non-achievement of plant availability of 75% during FY 2022-23. The Commission observes that the provisions of the PPA and the Availability figures of the Petitioner's project for FY 2022-23 are not in dispute. The issues raised by the Petitioner are as under:

- a) GVK has been prevented from performance of its obligation due to:
 - (i) The force majeure/Change in Law event of cancellation of its Captive Coal Block;
 - (i) PSPCL's non-grant of concurrence for arranging the balance requirement of coal;
 - (ii) PSPCL failing to fulfill its obligations under the PPA by withholding the payment of monthly bills;

- b) PSPCL has not demonstrated actual loss incurred on account of alleged shortfall in the availability;
- c) GVK is undergoing CIRP.

The Commission examines the above issues raised by the Petitioner as under:

7.1 Cancellation of the Captive Coal Block:

The Petitioner's plea is that its obligations under the PPA were premised on 100% supply of coal from the Tokisud Captive Coal Block allocated to it before entering into the PPA. However, the said allocation was cancelled by the Hon'ble Supreme Court in 2014 and the same has been held to be an event of Force Majeure and Change in Law in terms of Articles 12 and 13 of the PPA by the Arbitral Tribunal in its Arbitral Award dated 10.04.2017. As the PPA provides that no party shall be in breach of its obligations to the extent its performance was prevented/ hindered on account of a force majeure, therefore the Petitioner is excused from its obligation of achieving the mandated availability and consequent penalty under the PPA.

On the other hand, it was contended by PSPCL that the cancellation of coal block in 2014 cannot be cited now as a reason for not achieving the availability in terms of the PPA. The Arbitral Tribunal was dealing with the limited issue of whether the non-availability of firm coal source and cancellation of coal block would entitle GVK to extend the COD of the project. In fact, the Arbitral Tribunal has granted relief to GVK by holding that "the Claimant/Petitioner is entitled for extension of SCOD from date of Coal Order till COD is actually achieved". Accordingly,

GVK was allowed to postpone the COD till such time a firm coal source was available. However, being fully aware of the situation of coal availability, GVK proceeded to declare commercial operation of its project to begin generation based on an interim arrangement of coal, which was allowed by this Commission vide Order dated 01.02.2016. Therefore, now GVK cannot raise the plea of force majeure and the issue of coal non-availability to avoid the applicability of the provisions of the PPA.

The Commission observes that there are no two opinions on the issue that cancellation of the Petitioner's initially allocated Captive Coal Block pursuant to the Judgment of the Hon'ble Supreme Court in 2014 was an event of Force Majeure in terms of the PPA and accordingly the Petitioner was allowed an extension of SCOD till COD was actually achieved. However, the said force majeure would cease the moment coal become available to the Petitioner's project from alternate source(s). Considering the Petitioner's submission, that it had arranged the coal required for commissioning the project and to run it at 85% PLF for 2 to 2.5 years as an interim arrangement, the Commission vide Order dated 01.02.2016 (common to Petition Nos. 65 of 2013 and 33 of 2015) allowed the Petitioner to declare the CoD of the Project, with directions to make efforts to arrange long term source of coal for the entire term of the PPA. Pursuant to the same, the Petitioner declared the commissioning of its Units #1 and #2 on 06.04.2016 and 16.04.2016 respectively. Thereafter, vide Order dated 27.05.2019 in Petition No. 01 of 2018, the Commission allowed the Petitioner's proposal to have a long-term coal linkage under the SHAKTI Scheme,

sufficient to meet its generation requirement corresponding to an annual PLF of 62% as per its own admission. Therefore, the Petitioner's plea of force majeure on account of cancellation of its initially allocated captive mine w.r.t. to its obligation to achieve the mandated availability needs to be viewed in the present context of having an existing long term linkage corresponding to its coal requirement of 62% PLF on annual basis under the Shakti Scheme.

The Commission notes PSPCL's submission that in the given circumstance of consistent low scheduling from its plant, the Petitioner was able to declare availability of even 100% in FY 2019-20 and FY 2020-21, based on the same coal arrangement, was not contested by the Petitioner. The Commission is also aware of the fact that in case of consistent lower scheduling from any plant and resultant lower fuel consumption, the coal stocks should get accumulated enabling declaration of a higher availability by the generator without requiring to procure additional coal corresponding to the said declared capacity. The Commission refers to the Plant Availability Factor and Actual Plant Load Factor during the past few years as under:

FY	PAF (%)	PLF (%)
2019-20	99	28
2020-21	89	27
2021-22	66	39
2022-23	55	45

The above data illustrates that for the year 2019-20 and 2020-21, in view of the scheduling corresponding to the PLF of 28% and 27%, the

Petitioner was able to declare the PAF of about 99% and 89% respectively i.e., much higher than its Normative Availability without requiring to procure/utilize fully the existing coal tie-up corresponding to the 62% PLF on annual basis under the Shakti Scheme linkage. Similarly, for the year 2021-22 and 2022-23 also, the Petitioner was required to procure the coal corresponding to the PLF of only 39% and 45% respectively, despite having an arrangement of 62% PLF on annual basis.

Therefore, the Commission is of the view that the Petitioner, having an existing long term arrangement of coal linkage under the Shakti Scheme to meet its generation requirement of 62% PLF on annual basis, can seek to claim benefit under force majeure only when it is mandated/directed to generate electricity in excess of 62% PLF on cumulative basis.

Thus, in the given case of consistent low scheduling of generation from its plant corresponding to a cumulative PLF of only 45% during the impugned period of FY 2022-23, when the Petitioner was not even required to fully procure/utilize the coal available with it under the Shakti Coal linkage allowed by the Commission vide Order dated 27.05.2019 in Petition No. 01 of 2018, the Petitioner's plea that it is excused from its obligation of achieving the mandated availability and payment of consequent penalty under the PPA for the impugned period of FY 2022-23 on account of cancellation of its initially allocated captive coal block in 2014 cannot be sustained.

7.2 Whether PSPCL has prevented performance of GVK's obligations by refusing to grant consent for procuring the balance coal:

The Petitioner's plea is that after cancellation of its allocated Captive Coal Block, GVK was constrained to procure coal from alternate sources. However, with PSPCL's concurrence, it successfully participated in the first round of auction under the SHAKTI Scheme and has been allocated coal sufficient to meet only 62% of its annual requirement. Thereafter, GVK has made several attempts to procure the balance requirement of coal; however PSPCL refused to grant its concurrence preventing performance of GVK's obligations under the PPA.

Whereas, PSPCL submitted that the declaration of plant availability is based on its coal stock and capability to generate. In case of consistent lower scheduling from the plant, the generator can accumulate the coal stock and declare higher availability with even lesser Qty of coal. This had happened in 2019-20 and 2020-21 wherein, based on the very same coal arrangement, the generator had on various occasions declared even full availability of 100%. PSPCL also submitted that the consent for participation in the auction was sought by GVK on 27.09.2022, which was denied by PSPCL on 10.10.2022. Even if GVK had participated in the bidding process thereafter, the procurement of coal would not have been possible in FY 2022-23. Moreover, the availability of the plant for the months of January, February and March' 2023 has been 65.44%, 81.57% and 76.12% respectively i.e., it remained more than 75%. The lower availability was in fact for the previous months, which were not in any

manner affected by the issue of PSPCL's not agreeing to the procurement of costly coal as per the plea of the Petitioner.

The Commission agrees with the Petitioner that with an existing linkage of coal under SHAKTI Scheme sufficient to meet only 62% PLF on annual basis, it would also need to have an arrangement to meet the balance requirement of coal so as to be able to generate electricity corresponding to its normative PLF. However, as discussed in the preceding point under para 7.1, in the prevailing circumstances of low scheduling corresponding to a cumulative PLF of only 45% during the impugned period of FY 2022-23, the availability of already allocated Shakti Coal linkage to meet its generation requirement of cumulative PLF of 62% was sufficient to meet the Petitioner's obligations of the mandated availability under the PPA, without requiring any additional coal from other sources.

Thus, in the present case of consistent low scheduling from its plant when the existing arrangement of coal available under the already approved Shakti coal linkage was more than sufficient to meet its scheduling requirement, the Petitioner's plea that PSPCL's refusal to grant consent for arrangement of additional coal had prevented it from the optimum performance of its obligation to achieve the mandated Availability during the impugned period of FY 2022-23 cannot be sustained.

7.3 Whether PSPCL has prevented performance of GVK's obligations by failing to fulfill its obligations under the PPA by withholding

payment of monthly bills for April & May 2020 and September & October 2021:

The Petitioner's plea is that PSPCL's action of withholding the payments of April and May 2020 as well as the respective delay of 29 days and 27 in the payments of monthly bills of September and October 2021 has adversely impacted its financials including working capital, preventing GVK from procuring requisite amount of coal to achieve the mandated plant availability in FY 2022-23.

Whereas, PSPCL's contention is that the issue of payments for the months of April and May 2020 was pending adjudication before the Commission. However, the bills for the months of September and October 2021 cited by GVK were cleared well before the expiry of the year 2021-22. PSPCL further submitted that the dispute/delay over the invoices of two months in 2020/2021 cannot be a ground for short availability in 2022-23, more particularly when the short availability penalty in terms of the PPA stands accepted by GVK for the year 2021-22.

The Commission observes that the dispute regarding the issue of capacity charges for the months of April and May 2020, on account of force majeure Notice issued by PSPCL citing lockdown imposed due to the outbreak of Covid-19 pandemic, was under adjudication before the Commission in Petition Nos. 15 of 2020 and 01 of 2023. Whereon, the Commission vide Orders dated 22.07.2022 and 05.09.2023 respectively has directed the SLDC to revise the State Energy Account (SEA) and PSPCL to accordingly pay the capacity charges to the

Petitioner along with applicable Late Payment Surcharge. However, the Commission also notes that the Petitioner was able to declare the plant availability in excess of 89% for the FY 2020-21. Thus, it cannot be accepted that the issue cited above could have had an adverse impact on the Petitioner's plant availability in FY 2022-23.

As regards the issue of delay in payments of September and October 2021 by 29 days and 27 days respectively, the Commission notes that PSPCL's submission that the short availability penalty in terms of the PPA already stand accepted by the Petitioner for the year 2021-22. Further, as discussed in the preceding paras, the Petitioner was required to procure the coal to the extent of generation requirement of only about 27%, 39% and 45% in FY 2020-21, FY 2021-22 and FY 2022-23 respectively. Moreover, no default in payment has been cited by the Petitioner for the impugned period of FY 2022-23.

The Commission also refers to Hon'ble APTELS judgments cited by the Petitioner, which read as under:

(a) Hon'ble APTEL Judgment dated 11.07.2014 in Appeal No. 181 of 2023 titled Raghu Rama Renewable Energy Ltd. v. TANGEDCO:

"41. Summary of our findings:

..... Appellant despite non-payment of any money kept its promise and supplied the contracted power for four months from June to September 2011 by arranging own finances or taking loans. Several requests by the Appellant for payment elaborating financial difficulties in arranging fuel did not elicit even a reply from TANGEDCO. When the payment was made belatedly by TANGEDCO at its own whims and fancy no surcharge for delayed payment was made.

Payment for supplies made during the period November 2011 to March 2012 was made on 2.8.2012 well after the conclusion of the EPA, in lump sum after a delay of 4 to 9 months, after deducting the penalty for short supply without paying delayed payment surcharge. Even after the impugned order dated 4.6.2013 by the State Commission directing payment of interest for the delayed payment as per the EPA, the same has not been paid so far by TANGEDCO. The Appellant was also constrained in seeking termination of the contract as directions of the State Government u/s 11(1) to the generators in the State to supply to the State Grid were in vogue. We feel that in the circumstances of the case, TANGEDCO is not entitled to claim compensation for short supply of power when it had failed to perform its own reciprocal promise and creating circumstances leading to non-fulfillment of obligation of maintaining contracted supply on the part of the Appellant.”

(b) **Lalitpur Power Generation Co. Ltd. v. UPERC & Ors. 2020 SCC OnLine APTEL 82:**

“Summary of Findings:

.....

274. Issue No. 2: We hold that the second Respondent (UPPCL) has not paid the outstanding amounts to the Appellant in accordance with the terms of the PPA and the Regulations. We dismiss the concept of average payments introduced by R2 to justify its default of non-payment. We further observe that the outstanding of the Appellant remained substantial during most of the period in financial year 2017-18. ...

275. Issue No. 3: Having established a clear correlation between delayed payments and coal shortage, we hold that the Appellant has actually suffered losses solely due to the non-payment of its outstanding dues in time by R-2. As a

result, the applicant was not able to procure sufficient coal to declare full Capacity in spite of its generating units being technically available.”

As is evident, in the first case judgement cited above, the payments were made well after the conclusion of the EPA and that too without paying the delayed payment surcharge. The applicable delayed payment surcharge was not paid even after an Order by the State Commission. The provision of surcharge for the delay in payments is to meet/compensate the generator's funding costs for such additional working capital requirements, if any. In the second case, the outstanding of the Appellant remained substantial during most of the period in the relevant financial year establishing a clear correlation between the delayed payments and coal shortage.

However, these citations do not have a bearing on the present case since the facts of the present case are different. There is no issue of default in the monthly payments/Late Payment Surcharge for the impugned period of FY 2022-23. Nor has any correlation been established by the Petitioner between any delayed payments with any coal shortage during the impugned period of FY 2022-23.

In light of the above analysis, the Commission is of the view that the Petitioner's plea that PSPCL's action of withholding payments of April & May in 2020 and a delay of 29 days & 27 days in the monthly payments for September & October in 2021 respectively has prevented GVK from performing its obligations under the PPA during the impugned period of FY 2022-23, cannot be sustained.

7.4 PSPCL has not demonstrated actual loss incurred on account of alleged shortfall in availability:

The Petitioner's plea is that PSPCL is required to quantify and prove the loss it has incurred on account of the alleged non-availability of the Project. It was pleaded that it is a settled law that when a provision of an agreement provides for penalty, the same has to be considered on account of the actual loss caused to the party and compensation/penalty is to be granted accordingly. On the other hand, PSPCL contended that the imposition of penalty under Article 1.2.5 read with Article 1.2.1 (iv) of Schedule 6 is not conditional upon demonstration of loss. The PPA mandates that the monthly invoice for the tariff would include this amount, which establishes that it is in the nature of an adjustment in the tariff i.e. the payable capacity charges. The Commission, in the past years, has also approved such tariff adjustment and recovery.

The Commission notes the judgments cited by the Petitioner in support of its contention on ascertaining of the reasonableness of compensation which can be established and claimed by PSPCL. The Commission observes that the very judgments cited by the Petitioner GVK also state that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and that the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

The Commission also refers to the provisions of Article 1.2.1(iv) and Article 1.2.5 of Schedule 6 of the PPA, which read as under:

“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:

.....

iv. Penalty Payment determined in accordance with Article 1.2.5 below (applicable on annual basis and included only in the Monthly Tariff Payment for the first month of the next Contract Year);

.....

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.”

As is evident, the contractual provisions of the PPA mandates “adjustment of penalty for the availability below 75% during the Contract Year, at the rate of 20% of the simple average Capacity Charge on the difference between 75% and Availability during such Contract Year (i.e. on pro-rata basis). Since, the parties have entered into the contract with open eyes and provided for the compensation/penalty by way of adjustment in the payable tariff in proportion to the shortfall in achievement of the plant availability, which is also in line with the standard bidding guidelines issued by the Govt.

of India, the same is thus a binding contract based on defined parameters mutually accepted/agreed by the parties.

The Commission also notes that the electricity market being dynamic and volatile in nature, it would not be possible to calculate or establish an exact loss or damage suffered due to the breach of contract. It was also provided in the PPA/ contract that such penalty is to be included in the Monthly Tariff Payment for the first month of the next Contract Year. Thus, the Commission holds that this plea raised by the Petitioner is entirely irrelevant.

In view of the above, the Commission relies only upon the clear and unambiguous terms of agreement as stipulated in the PPA in such event of shortfall in the mandated plant availability.

7.5 Issue of GVK undergoing CIRP:

GVK's plea is that since it is undergoing CIRP as per the NCLT Order dated 10.10.2022 any action of PSPCL which may jeopardize the CIRP or in any way diminish the value of the Project is impermissible under law. It has been also pleaded that the Section 238 of IBC overrides the provision of the Electricity Act and during the CIRP even a secured creditor is not permitted to realize its dues from the corporate debtor (i.e. GVK in the present case).

However, PSPCL has contended that PSPCL is not jeopardizing or derailing the CIRP process and it is within its right to levy penalty in terms of under Article 1.2.5 read with Article 1.2.1 (iv) of Schedule 6 of the PPA.

The Commission is of the view that rights and obligations go together. Since the Petitioner continues to exercise its right to supply electricity and obtain the tariff and payments of its bills for same as per the provisions of the PPA, it is also mandated to fulfil its obligations agreed to under the same PPA. In case of failure to do so, it has to accept the penalty/deductions in its bills as per the provisions of the Agreement. Thus, the plea of the Petitioner is not tenable.

The prayers of the petitioner are thus disallowed. PSPCL is well within its rights enshrined in the PPA, to impose the penalty and claim compensation for the non-fulfillment of its obligations by the Petitioner. The petition and IA are disposed of in terms of the above analysis and observations.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 05.12.2023