

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

**Petition No. 45 of 2017
Date of Order: 21.05.2018**

Present: Ms. Kusumjit Sidhu, Chairperson
Sh. S.S. Sarna, Member
Ms. Anjuli Chandra, Member

In the matter of: Petition under Section 86 (1) (f) and other applicable provisions of the Electricity Act, 2003 for adjudication of the disputes and for directions - Power Purchase Agreement for purchase of power from 2 x 250 MW Goindwal Sahib Thermal Power Plant at Goindwal Sahib, Punjab.

AND

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

.... Petitioner

Versus

Punjab State Power Corporation Limited, The Mall, Patiala.

.... Respondent

ORDER

This petition was filed by GVK Power (Goindwal Sahib) Limited (GVK) under Section 86 (1) (f) and other applicable provisions of the Electricity Act, 2003 for adjudication of the disputes and seeking quashing of Notice dated 29.06.2017 issued by PSPCL demanding a sum of Rs. 113,37,88,189/- as a penalty for having availability below 75% during the first contract year FY 2016-17 for its 2x270 MW Thermal Power Station located at

Goindwal Sahib, Punjab (Project) and to direct PSPCL not to take any coercive steps for recovery of the claimed amount till the matter is decided by the Commission.

2. At the outset, the Commission notes that in the petition, the capacity of the project is mentioned as 2x250 MW, whereas as per the Amended and Restated Power Purchase Agreement (PPA) signed between the parties on 26.05.2009, the capacity of the Project is 2x270 MW.

3. The submissions made by GVK in the petition, in brief, are as under:

- i) The Impugned Notice dated 29.06.2017 is contrary to the terms of the Amended and Restated PPA dated 26.05.2009 and there is no basis of demand in law and fact.
- ii) The Arbitral Tribunal, constituted by the Commission vide Order dated 12.08.2015, has in its Award dated 10.04.2017 (Arbitral Award) allowed GVK's claim that the cancellation of captive blocks and consequential non availability of fuel is a Force Majeure and Change in Law event. However, the Arbitral Tribunal has left the issue of molding of relief to the Commission.
- iii) Pending final adjudication and grant of relief to GVK in accordance with the Arbitral Award, the demand raised by PSPCL is premature and contrary to the terms of PPA. Once the non-availability of fuel has been held to be a Force Majeure event, GVK is relieved of its obligations to the extent that performance of obligations was affected by Force Majeure in terms of Article 12.7 of PPA.
- iv) GVK during the pendency of the Arbitral proceedings

commissioned Unit-I of the Project on 06.04.2016 and Unit-II on 16.04.2016. Thereafter, GVK initiated the process for procuring coal from alternate sources in the light of the cancellation of captive coal blocks.

- v) Pursuant to the same, GVK entered into a MoU with Metallurgical Resources AG Limited dated 19.11.2015 and ordered 65,000 MT (approx) of imported coal from South African mines on 06.03.2016 and also accordingly informed PSPCL of the same vide letter dated 10.03.2016.
- vi) On 15.03.2016, PSPCL indicated that it should be part of the coal procurement process and only after that can it provide its consent to GVK to use imported coal / coal from the open market. The stated stand of PSPCL was duly corroborated by its letter dated 03.05.2016.
- vii) Due to the above refusal of PSPCL, GVK was compelled to refuse the delivery of the said 65,000 MT of coal from South Africa and incurred huge loss on account of diversion charges for the same.
- viii) GVK vide letter dated 14.04.2016 informed PSPCL of the fact that CIL had issued the Notification for "Special forward E-auction for Power Producers (including CPPs) for 2016-17-Phase-I" and sought PSPCL's consent to participate in the auction.
- ix) On 03.05.2016, PSPCL responded to GVK's letter dated 14.04.2016 stating that the interim coal procurement process is required to be carried out in co-ordination with PSPCL as indicated in the meeting held on 15.03.2016 and that coal from alternate sources may be procured through tender in line with the methodology already adopted by PSPCL in the

case of other IPPs.

- x) Despite PSPCL's inaction, GVK proceeded in right earnest and participated in the e-auction conducted by CIL whereby GVK had successfully bid for 21 rakes of coal (84,000 MT). 78,000 MT of coal reached the Project site.
- xi) GVK also conducted an open tender process as per PSPCL's directions. However, since there was only one responsive bid, GVK cancelled the tender as per PSPCL's instructions recorded in the Minutes of Meeting dated 04.05.2016. Further another round of bidding was also conducted on 23.05.2016 in the presence of PSPCL officials.
- xii) On 09.06.2016, GVK informed PSPCL that CIL had issued the Notification for "Special Forward e-auction for Power Producers (including CPPs) for 2016-17-Phase-II" ("Second e-Auction").
- xiii) GVK participated in the Second e-Auction conducted by CIL and was allocated 4,00,000 MT of coal from Urimari, Karo, KD (old) mines of CCL. GVK informed PSPCL of the same by letters dated 16.06.2016 and 17.06.2016. However, no response was received from PSPCL.
- xiv) On 31.03.2017, despite PSPCL's inaction, GVK participated in the "Special Forward E-auction for Power Producers for 2016-17-Phase-VIII". Pursuant to the said auction, GVK was allotted 1,76,000 MT of coal from Magadh coal mine and 2,00,000 MT (50 rakes) of coal from Bachra coal mine of CCL. Currently, the Project is under operation and approximately 50823.7 MT of coal stock is available at site and balance coal is in transit.
- xv) 1,50,000 MT of coal was sanctioned for commissioning. GVK

procured this coal and completed commissioning of Unit-1 on 06.04.2016 and Unit-2 on 16.04.2016. PSPCL rejected procurement of 12,00,000 MT of coal sanctioned by the Standing Linkage Committee on account of high cost. Consequently, Ministry of Coal, GoI cancelled the allotment with effect from 30.06.2016.

- xvi) With regard to 39,00,000 MT of coal proposed to have been procured from South Africa, PSPCL informed GVK on 15.03.2016 that PSPCL is to be involved in any coal procurement process. Therefore, PSPCL has effectively misused its participation in the coal procurement process to raise hyper-technical and untenable objections obstructing delivery of the consignment of imported coal constraining GVK to refuse delivery.
- xvii) Thereafter, several attempts have been made to procure coal jointly. However, due to obstruction by PSPCL, GVK was unable to complete the procurement process. From the said actions of PSPCL it is evident that there is a concentrated attempt to foil procurement measures so as to avoid payment of capacity charges.
- xviii) PSPCL should not be permitted to benefit from its willful disregard of the Commission's Orders and it is a settled principle of law that no party should be permitted to benefit from its own wrong. That in the present case, non-availability of fuel has occurred due to PSPCL's refusal to allow GVK to procure coal from alternate sources.
- xix) The delays in procurement of coal have arisen on account of PSPCL's refusal to agree to amendment of the PPA and that PSPCL should not be permitted to benefit from its actions by

imposing penalties for shortfall of availability. As such, the impugned notice should be quashed.

- xx) PSPCL challenged the Commission's Order dated 01.02.2016 before Hon'ble APTEL by way of Appeal No. 68 and 69 of 2016. PSPCL also impugned the COD of the Project in the said Appeals. Once PSPCL challenged the COD, it is precluded from raising any demand or imposing any penalty on account of shortfall in availability. The issue of availability arises only after COD. Therefore, once PSPCL challenged the COD, it is precluded from imposing penalty on account of shortfall in availability.
- xxi) Since the issue of molding of relief and finalizing the methodology for procurement of coal is yet to be taken up by the Commission, it will be in the interest of justice to quash the Impugned Notice.
- xxii) GVK reserves its right to claim capacity charges during the period for which PSPCL prevented GVK from procuring coal from alternate sources. The submissions made herein are without prejudice to each other as well as GVK's rights and contentions in pending proceedings and in law.
- xxiii) GVK has a prima facie case in its favour. Grave prejudice would be caused to GVK if the Impugned Notice is not quashed pending final adjudication of the rights and interests of the parties.
- xxiv) GVK has prayed to:
 - i) Quash the Impugned Notice;
 - ii) Direct PSPCL to not take any coercive steps to recover amounts claimed in the Impugned Notice till such time this Petition is decided; and

- iii) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.

4. Vide e-mail dated 18.08.2017, GVK informed the Commission about the Order dated 11.08.2017 passed by Hon'ble High Court of Punjab and Haryana in CWP-17078-2017 (O & M) attaching the same alongwith. Hon'ble High Court of Punjab and Haryana vide the said Order dated 11.08.2017, disposed of CWP-17078-2017 (O & M) filed by GVK, as under:

“Mr. Sarin limits his prayer for decision of application pending before the Punjab State Electricity Regulatory Commission for interim relief. According to him, regulatory body has been constituted. Petitioner would be satisfied, in case, a direction is issued to the said Commission to decide the application for interim relief expeditiously.

Mr. Ganeshan has already put in appearance for the Corporation.

Mr. Atul Nanda, Advocate General, Punjab, is present in the court and on the asking of the court, he accepts notice. He submits that the regulatory body shall endeavour to decide the application for interim relief as expeditiously as possible, in any case, not later than one month.

In view of the statement made above, no further direction is necessary. Petition is disposed with liberty to the Commission to decide the application as per law in terms of statement made by the learned Advocate General, Punjab.”

In compliance of the aforementioned Order, notice was issued to the parties and the matter was fixed for hearing on 29.08.2017. Accordingly, vide Order dated 30.08.2017, after hearing both the parties, the petition was admitted and PSPCL was directed to file reply to the petition by 01.09.2017. The matter was fixed for hearing on 04.09.2017.

5. PSPCL, in compliance to the Commission's Order dated 30.08.2017, submitted its reply on the issue of interim relief sought by GVK, as under:

- i) There is already an interim arrangement agreed to between the parties wherein GVK submitted a proposal vide its letter dated 23.08.2017 addressed to PSPCL for accommodating and praying for deduction of 10% on a monthly basis till the decision of the Commission in the present petition;
- ii) Interim orders are not permissible in cases of adjustment of monetary claims and that there is no irreparable loss or injury when only monetary claims are taken into account;
- iii) The claim of PSPCL for an amount of about Rs.113 crore is on account of short supply of electricity for the year 2016-17 and the claim has been raised in terms of Clause 1.2.5 of Schedule 6 of the PPA entered into between the parties, which reads as follows:

“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 (is 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”.

From the above clause it is evident that the penalty amount is automatically payable and is not subject to proof of actual damage or loss nor is subject to any prior adjudication by any authority.

- iv) There is no dispute regarding the actual availability from the generating station of GVK being less than 75%. The actual

availability was only 4.07%. The dispute raised herein is that the availability fell due to non-availability of coal which is alleged to be either due to force majeure events or alleged action/inaction of PSPCL. The reasons herein are baseless as penalty amount is automatically payable in terms of clause 1.2.5 of Schedule 6 of PPA.

- v) The amount in terms of Clause 1.2.5 of Schedule 6 is liquidated in nature and is by way of reduction in Tariff payable for the year in question and not subject to any adjudication on the question of calculation and without getting into the actual loss or prejudice that is caused.
- vi) GVK's contention that the generation was inadequate due to non-availability of coal which is a force majeure event is also misconceived since GVK had sought specific direction from the Commission seeking permission to commission. The generating station and begin generation of electricity without having a firm coal supply agreement which was opposed by PSPCL on the ground that it cannot declare the COD of project without having a firm source of coal supply for the term of the PPA. The same was recorded in the order dated 01.02.2016 of the Commission reproduced hereunder:

"It has been averred by PSPCL that the Petitioner can not declare CoD of the Project without having a firm source of coal supply for the entire term of the PPA and that the power generated by the Project with the interim arrangement of coal will be treated as infirm power....."

- vii) GVK declared commercial operation of the generating station to begin generation of electricity based on interim arrangement of coal, which was allowed by the Commission.

- viii) In the present circumstances, it is now not open to GVK to claim that upon declaration of commercial operation of the generating station there was inadequate supply of electricity due to coal issues and therefore the clause 1.2.5 of Schedule 6 of the PPA should not be applied.
- ix) The reliance on the award of the Arbitral Tribunal is also entirely misconceived since the same was only in relation to whether there could be an extension of the Schedule Commercial Operation Date, which was adjudicated upon.
- x) The contention of GVK that PSPCL has prevented the procurement of coal is also baseless since as per the order passed by the Commission dated 01.02.2016 it was specifically directed that GVK will involve PSPCL in the interim procurement process because the cost of coal is to be passed on in the tariff to be payable ultimately by the consumers. However GVK did not involve PSPCL in the process for procurement.
- xi) GVK cannot seek benefit of its own default by claiming the payment of invoice without raising the invoice in terms of the PPA.
- xii) In light of above submissions, the petition is devoid of any merit.

6. PSPCL vide memo no. 5004 dated 04.09.2017 filed copy of judgment passed by Hon'ble Supreme Court of India in the case "Best Seller Retail (India) Pvt. Ltd. V/s Aditya Birla Nuvo Ltd. & Ors" (2012), holding that "injury that would be suffered by plaintiff on refusal of temporary injunction cannot be said to be irreparable".

7. Vide its Order dated 05.09.2017, in the hearing held on 04.09.2017, the Commission held that in view of the interim arrangement already agreed to by the parties, the Commission holds that the same shall continue without prejudice to the rights, claims and contentions of the parties in the main petition, till the same is finally decided by the Commission. PSPCL was directed to file reply to the main petition by 19.09.2017 with a copy to GVK. GVK was directed to file the rejoinder, if any, by 26.09.2017 with a copy to PSPCL. The next date for final hearing / arguments was fixed for 04.10.2017.

8. GVK filed an Application for directions and initiation of proceedings u/s 142 of the Electricity Act, 2003 seeking enforcement of the interim Order dated 05.09.2017 passed by the Commission. The same was taken on record as I.A. No. 30 of 2017. The submissions of GVK in the said I.A., in brief, is as hereunder:

a) PSPCL has made the following payments:-

- i) Rs.12,26,34,098/- on 29.08.2017 purportedly against the June bill; and
- ii) Rs. 66,84,21,221/- on 04.09.2017 purportedly against the July bill.

As against an aggregate amount of Rs. 100,70,74,671/- (after deducting Rs. 22,67,57,638/- from Rs. 123,38,32,309/-), PSPCL has paid only Rs. 79,10,55,319/- (overall deduction being Rs. 44,27,76,990/- instead of Rs. 22,67,57,638/-).

b) Along with the payment made on 04.09.2017, PSPCL submitted an attachment with the computation. However, PSPCL neither disputed the bills for June and July, 2017 nor

sought to withdraw its undertaking that it will abide by acceptance of the proposal made by GVK's letter dated 23.08.2017.

- c) PSPCL has deducted amounts arbitrarily in violation of the terms of the interim Order since the Interim Order limits the deduction to only Rs.11,33,78,819/- per monthly bill.
- d) GVK prayed as under:
 - i) Direct PSPCL to comply with the Interim Order and pay the balance amount against the bills for the months of June and July, 2017;
 - ii) Restrain PSPCL from deducting amounts in excess of Rs. 11,33,78,819/- from future month bills;
 - iii) Initiate action against PSPCL under Section 142 of the Electricity Act, 2003 for non-compliance of the interim Order.

9. PSPCL was directed vide communication dated 18.09.2017 to file reply to the said I.A. filed by GVK by 25.09.2017 with copy to GVK and GVK was to file rejoinder, if any, by 03.10.2017 with copy to PSPCL. The I.A. was fixed for hearing on 11.10.2017 alongwith the petition.

10. PSPCL filed para-wise reply to the petition vide letter no. 5163/TR-5/868 dated 27.09.2017, received on 03.10.2017. The submissions, in brief, are as under:

- i) The demand raised by PSPCL for a sum of Rs.113,37,88,189/- is strictly in accordance with the PPA dated 26.05.2009 for purchase of power from the 2x270 MW Thermal Power Station of GVK located at Goindwal Sahib, Punjab.
- ii) GVK has misconceived that the penalty claimed in the

impugned notice is being sought for the period prior to the COD pleading the non-availability of coal prior to COD as defence. The present claim is for the post COD period and the same is duly payable by the petitioner in terms of the clause 1.2.5 of Schedule 6 of the PPA dated. 26.05.2009 since the actual availability of the plant was only 4.707% as against minimum requirement of 75% for FY 2016-17. There is no dispute that the actual availability of the generating station of GVK was less than 75% during FY 2016-17.

- iii) The penalty as stated above was to be included in the computation of the monthly bills in terms of clause 1.2.1 of Schedule 6 of the PPA. The petitioner failed to raise the bill for the first month of the Contract year i.e (April 2017) in terms of clause 1.2.1 (iv). In these circumstances, PSPCL raised the Impugned Notice dated 29.06.2017 asking GVK to pay the said amount.
- iv) The penalty amount is automatically payable and is not subject to proof of actual damages or loss nor is subject to any prior adjudication and is liable immediately upon the year in question is over when the actual availability is less than 75%.
- v) The amount in terms of Clause 1.2.5 of Schedule 6 is liquidated in nature and is not subject to any adjudication on the question of calculation. The said amount is primarily for the purpose that PSPCL is required to procure power from various sources to meet the demand in the state and inadequate generation by the generator would result in PSPCL having to procure electricity from other sources. The said amount is provided in a liquidated form without getting

into the actual loss or prejudice that is caused. The amount is by way of reduction in tariff payable for the year in question.

- vi) The contention of GVK that the generation was inadequate due to non-availability of coal which is a force majeure condition or for reasons not attributed to GVK is misconceived since GVK had sought specific direction from the Commission seeking permission to commission the generating station and begin generation of electricity without having a firm coal supply agreement. The Arbitral Tribunal was only dealing with the issue whether the non-availability of firm source, cancellation of coal block would entitle GVK to postpone the COD of the generating station.
- vii) The Arbitral Tribunal has granted relief to GVK by holding that the Scheduled COD should be postponed till the date of actual COD on account of cancellation of the coal block therefore, GVK was not required to declare COD and could postpone the COD till such time the coal source was available without payment of any liquidated damages to PSPCL.
- viii) Despite having full knowledge of the position of coal availability, GVK sought to declare COD based on interim arrangement of coal. The said proposal of GVK was objected by PSPCL on the specific ground that GVK cannot declare COD of the project without having a firm source of coal supplied for the term of the PPA. The same was recorded in the order dated 01.02.2016 of the Commission wherein it was observed by the Commission that GVK should extend its full co-operation to PSPCL if PSPCL desires to participate in

the interim coal procurement process and that GVK should keep PSPCL abreast of all developments made with regard to the interim procurement of coal and the bidding process involved in it.

- ix) As against the above contention of PSPCL, GVK declared commercial operation of the generating station to begin generation of electricity based on interim arrangement of coal, which was allowed by the Commission subject to the concurrence of PSPCL in the interim coal procurement process. GVK took the conscious decision to proceed with the COD of the project and cannot take the position that the generation is not possible due to non-availability of coal. There is no change in the factual or legal position since when GVK took the decision to declare the COD and therefore there cannot be any force majeure event.
- x) The Commission gave permission to commission the project without a firm source of coal supply on the request of GVK in its petition. Accordingly, now it is not open to GVK to claim upon declaration of commercial operation of the generating station that there was inadequate supply of electricity due to coal issues and therefore the clause 1.2.5 of Schedule 6 of the PPA should not apply. The said contention of GVK does not hold ground as the present claim is being made with respect to the post COD period for which GVK cannot plead non-availability of coal.
- xi) The reliance of GVK on the Award of the Arbitral Tribunal is entirely misconceived since the proceedings before the Arbitral Tribunal was only in relation to whether there could be an extension of the Scheduled COD, which was

adjudicated upon.

- xii) The contention of GVK that PSPCL has prevented the procurement of coal is baseless and misconceived firstly because the order dated 01.02.2016 of the Commission specifically states that PSPCL if it desires can participate in the coal procurement process of GVK and GVK shall extend cooperation. Hence, any allegation that PSPCL is not concerned with the process of coal procurement is completely misplaced. Secondly, because the cost of coal is to be passed on in the tariff to be payable ultimately by the consumers and in any event it is the obligation of GVK to ensure that the procurement of coal is done in the most competitive manner.
- xiii) Further, the contention of GVK in the meeting on 15.03.2016 that it was required to return coal it had ordered is contrary to the facts on record since the same can be established by the fact that GVK had procured coal from other sources in the year without any approval from PSPCL. GVK did not off-take the coal as shipped for its own reasons, possibly on account of non-availability of funds and the same is in no way attributable to PSPCL.
- xiv) The said meeting dated 15.03.2016 was only for the purpose of future procurement process to be followed. The reference to the meeting is in the letter dated 03.05.2016 which was in reply to the letter dated 14.04.2016 of GVK. GVK had proposed to participate in the e-auction by its letter dated 14.04.2016 to which PSPCL had responded that the procurement be done through the same process as is in the case of other IPPs in the State.

- xv) The position of PSPCL was that the coal procurement ought to be done in a transparent manner and as per the procedure followed by the other independent power plants, namely, Talwandi Sabo Power Ltd. (TSPL) and Nabha Power Ltd. (NPL).
- xvi) The Commission has already put in place a detailed mechanism for procurement of alternate coal by TSPL and NPL. PSPCL had communicated to GVK vide letter dated 03.05.2016 that the coal may be procured in terms of process of procurement followed for other IPPs i.e. NPL and TSPL. The said procedure as prescribed by the Commission has also been upheld by the Hon'ble Tribunal which has issued directions in the case of Nabha Power Ltd. & Anr. V/s PSPCL & Anr. in Appeal no. 68 of 2013 for procurement of coal from alternate sources in case of shortage of coal.
- xvii) The lack of bonafide in the contentions of GVK is evident by the fact that for the coal procured and electricity generated by GVK, PSPCL has paid tariff in terms of the Order of the Commission. PSPCL has not taken the plea that no tariff would be payable as the coal procurement is not proper.
- xviii) In these circumstances, the attempt of GVK to attribute the non-availability of coal to PSPCL is not justified.
- xix) GVK cannot now seek a benefit of its own default by claiming the payment of the invoice without raising the invoice in terms of the PPA. It is due to the failure of GVK to include the penalty in terms of clause 1.2.5 of Schedule 6 in the first month's invoice that PSPCL was constrained to raise the demand vide notice dated 29.06.2017;
- xx) GVK failed to raise invoice in terms of PPA, it is not open to it

to claim payment of full invoice raised or that there ought to be no deduction from the invoice. Otherwise, it would result in the position that GVK is free to raise any invoice for any amount and there can be no deduction or set off against the same. The rights and obligations of the parties are governed by the PPA.

- xxi) The Impugned Notice is not contrary in terms of the PPA. The said notice is in accordance with clause 1.2.5 and clause 1.2.1 of Schedule 6 of the PPA. The Arbitral Award did not support the case of GVK. The Arbitral proceedings were for the period prior to COD.
- xxii) GVK started alternative coal procurement process after the order dated 01.02.2016 passed by the Commission. Wherein GVK was directed to involve PSPCL in the procurement process. Thereafter GVK imported coal from South African mines which was returned by GVK unilaterally. PSPCL did not direct GVK to return the said coal. GVK procured coal from other sources without any approval of PSPCL and it cannot be the contention that PSPCL prevented the procurement of coal. PSPCL paid the tariff as per the order of the Commission.
- xxiii) In case the COD is not declared, GVK will not be entitled to tariff under the PPA. Therefore, GVK cannot take the position that it is entitled to tariff under the PPA after the COD, but the penalty for short supply of electricity is not applicable till the time the proceedings before the Hon'ble Tribunal are concluded. As of date, the declaration of COD stands and the consequences of the same are to be applied to the present case. The extension of SCOD is not relevant

to this matter as the amount claimed in the Impugned Notice is pertaining to the period after the COD on 06.04.2016 and 16.04.2016 for Unit-I and Unit-II respectively. The present claim has been raised without prejudice to the outcome of the Appeal No. 68 and 69 of 2016 in case there is any effect of the same. Without prejudice to the rights of PSPCL in the said appeals, in the present petition PSPCL is not precluded from claiming the amounts in terms of Clause 1.2.5 of Schedule 6 to the PPA on account of shortfall of availability post COD claimed by GVK.

- xxiv) Even on merits, the contention of the petitioner that there cannot be any recovery by PSPCL without Article 11.3.2 of the PPA is misplaced. The issue is on the tariff that is payable to GVK to be raised in terms of Schedule 6 of the PPA. Article 11.1 specifically provides that the monthly tariff payment shall be determined in accordance with Schedule 6 of the PPA.
- xxv) It was an obligation of GVK to include penalty amount in the Monthly Tariff Payment as per Article 1.2.5 of which the Petitioner was well aware and still failed to comply with the same and did not raise the matter in the bill for April 2017.
- xxvi) There is no applicability of Article 11.3.2 to the issue raised in the present petition as the claim made in the Impugned Notice is not a deduction from the Monthly Bill but should have been part of the Monthly Bill itself.
- xxvii) In the event the contention of the Petitioner is accepted it would result in a situation wherein the petitioner can raise any bill de-hors the provisions of the PPA whereas PSPCL shall have to pay the entire amount and can only deduct

13.50 crore for one year and that too subject to the acceptance of the Petitioner. This cannot be the position.

- xxviii) Article 13.3.2 applies only if the monthly bill is in terms of the PPA and there are deductions to be made by PSPCL. Article 11.3.2 can have no application to a case wherein the bill itself is not in accordance with the PPA.
- xxix) PSPCL correctly paid an amount of 12.26 crore as against the claimed amount of the petitioner of 35.98 crore.
- xxx) The contention of GVK that the penalty is to be included in the first monthly bill of next contract year and PSPCL is deducting it for subsequent months is entirely misconceived. Firstly, the implication of the Clause 1.2.1 of Schedule 6 of the PPA is that the whole penalty amount for relevant year is to be included in the first monthly bill of the next contract year. Further, the contention of GVK would be applicable if the entire amount is paid for by GVK in the first month. If the Petitioner does not pay the amount as per the PPA, the amount is automatically recoverable over the period in which the said amount can actually be recovered by PSPCL. GVK cannot default in payment of the amount as per the PPA and then claim that PSPCL cannot recover it over a period of few months.

11. GVK filed a rejoinder dated 10.10.2017 to the reply filed by PSPCL submitting as under:

- i) PSPCL cannot unilaterally set off amounts contrary to the terms of the PPA.
- ii) The contention of PSPCL that it had raised the demand since the petitioner did not include the contract year penalty

in the monthly bill for first contract year is erroneous because PSPCL had already raised the bill even prior to the Monthly bill being issued and that the Petitioner had already disputed the amount claimed by PSPCL.

- iii) Once any amount is disputed by any party in terms of the PPA, there cannot be any set off/deduction by PSPCL in a unilateral manner and the same has to be done in accordance with Article 11.3.2 of the PPA and cannot be more than Rs. 13.50 crore in a contract year after following the terms of the PPA.
- iv) PSPCL paid only Rs. 79.10 crore against total amount of Rs. 123.70 crore towards monthly bills for June and July, 2017 i.e. overall deductions made by PSPCL being Rs. 44.27 crore against the interim Order of the Commission dated 05.09.2017 which permitted PSPCL to deduct the amounts only to the extent as agreed by the parties i.e. Rs. 11.32 crore per month.
- v) In terms of Section 50 of the Contract Act, if the contract provides for something to be done in a particular manner, then that act can be done only in a particular manner and no other manner. The judgment of the Hon'ble APTEL in Talwandi Sabo Power Limited V/s PSPCL and Others, MANU/ET/0072/2016 is relied upon in this regard.
- vi) PSPCL has not disputed the monthly bills and cannot withhold / deduct amounts of undisputed bills. A bill dispute notice in terms of Article 11.6 of the PPA is mandatory. In the Hon'ble Supreme Court of India Judgment in the case of Tamil Nadu Generation and Distribution Corporation Ltd. V/s PPN Power Generating Company Pvt. Ltd.(2014) 11 SCC 53

wherein it was upheld that deduction from monthly bills without adjudication on the same is illegal.

- vii) Clause 1.2.5 of Schedule 6 cannot override the PPA provisions since it only sets out the method for determination of tariff payments. The substantive provisions relating to billing and payment are governed by Article 11 in term of which there can be no set off/adjustments of disputed amounts.
- viii) In terms of Article 1.2.12 of the PPA the provisions have been interpreted harmoniously in order to give effect to each provision and if PSPCL is permitted to set off amounts contrary to Article 11.3.2 (ii) it will render the instant article redundant.
- ix) PSPCL's contention that the issue before the Arbitral Tribunal was only limited to extension in the SCOD of the project is wrong and denied. The tribunal allowed the petitioner's claim that the cancellation of captive coal blocks and consequential non-availability of fuel is a Force Majeure and Change in Law event.
- x) PSPCL obstructed every attempt to procure coal. As a consequence even after declaration of COD, GVK was unable to supply power and PSPCL cannot benefit out of its own wrong doing.
- xi) In the event the Commission adjudges that COD was wrongly declared by GVK, the question of shortfall in availability does not arise.
- xii) PSPCL's contention that GVK has sought to make additional submissions on the issues not covered in the pleadings in the hearing on 04.09.2017 is wrong. The submission of GVK

pertain to subsequent developments in the present petition including the wrongful and unilateral deduction of amounts from the monthly tariff bills raised by GVK.

- xiii) PSPCL's contention that amounts can be recovered outside the terms of Article 11.3.2 of the PPA is wrong and denied. There is no obligation to include disputed amounts in the monthly bills.
- xiv) Since the PPA bars set off / deductions of disputed amounts from monthly bills, PSPCL is required to follow dispute resolution process in order to recover the amounts.
- xv) PSPCL has violated the terms of Article 11.6.9 of the PPA which obligates PSPCL to make the payment despite dispute regarding an invoice.
- xvi) It is prayed to quash the Impugned Notice issued by PSPCL.

12. In the hearing held on 11.10.2017 PSPCL sought time for filing reply to I.A. no. 30 of 2017 which was allowed by the Commission vide its Order dated 13.10.2017 and further directed PSPCL to file its reply to the I.A. giving complete details regarding the deductions made from the monthly bills raised by the petitioner by 23.10.2017 with copy to GVK. GVK was directed to file rejoinder if any by 30.10.2017 with copy to PSPCL. The matter was adjourned to 08.11.2017 for hearing/arguments.

13. GVK filed submissions during hearing on 11.10.2017 giving date wise events and reiterated the submissions made in its rejoinder filed earlier thereby praying that PSPCL may be directed to remit the full monthly bills and restrained from further deductions.

14. PSPCL filed reply to I.A. dated 18.10.2017 on 24.10.2017 and submitted as under:

- i) The basic premise on which the present application is filed that PSPCL is deducting amounts in excess of 10% (Rs. 11,33,78,819/-) of the amount payable under Article 1.2.5 of Schedule 6 to the PPA contrary to the interim order of the Commission, is baseless and wrong.
- ii) The petitioner has not placed the facts before the Commission, namely the heads towards which the amounts have not been paid by PSPCL to the Petitioner, despite being fully aware of the details of payments made by PSPCL. In fact, prior to each and every payment of invoice, a statement of accounts is sent by PSPCL to the Petitioner;
- iii) The allegations made by the Petitioner in the interim application are unfortunate and evidences the lack of bona fide in the conduct of the Petitioner.
- iv) The claim for the amount under Article 1.2.5 of Schedule 6 of the PPA (termed as penalty amount) has been reduced only to the extent of 10% for the bills paid by PSPCL.
- v) The present Petition filed is limited to the aspect of amounts which the Petitioner is liable to pay under Article 1.2.5 Schedule 6 to the PPA as claimed by PSPCL and not on any other issue.
- vi) Despite the present petition being pending before the Commission, GVK had approached Hon'ble High Court of Punjab and Haryana in CWP No. 17078 of 2017 seeking directions for the total bill to be paid by PSPCL without deducting any amounts towards the claim under Article 1.2.5

of Schedule 6 to the PPA. By order dated 04.08.2017, Hon'ble High Court of Punjab and Haryana specifically rejected the interim prayer made by the Petitioner as well as did not grant any interim relief to GVK.

- vii) In the said circumstances, it was open to PSPCL to recover the entire amount (or to the extent possible) under Article 1.2.5 Schedule 6 to the PPA in the first invoice itself. However based on the representation made by the Petitioner in its communication dated 23.08.2017 and considering the difficulties as claimed by the Petitioner and also considering the request of the Petitioner for deducting only 10% of the amount in each monthly invoice, PSPCL acted in a bona fide manner and accepted the proposal to deduct only 10% in each monthly invoice. The above establishes the bona fide of PSPCL in not recovering the entire amount at one go.
- viii) Even on merits the amounts not paid by PSPCL are primarily due to incorrect billing by GVK. For instance GVK has sought to bill capacity charges on its own basis, contrary to the capacity charges as approved by the Commission as of date. The energy charges is also sought to be billed by GVK on its own basis, which however, has been admitted by PSPCL only to the extent as approved by the Commission in the order dated 01.02.2016 passed in Petition No. 65 of 2013.
- ix) Further, the bills with regard to road transportation, testing charges, liasioning charges and handling charges etc were not payable by PSPCL. Similarly, water charges not approved by the Commission are not payable.
- x) The difference in the bills raised and the payments made are primarily due to incorrect billing made by Petitioner and

amounts incorrectly shown as being payable. The reliance by the Petitioner on Article 11.3 of the PPA and particularly Article 11.3.2 to contend that a maximum of only Rs. 13.5 crore for the year can be deducted or set off is also misplaced.

- xi) The aforementioned clause is for payments required to be made under this Agreement and for any deductions are set of to be made by PSPCL against the bills duly raised by GVK. The said clause presupposes proper bills raised by GVK and the amounts being payable under the Agreement against which there are other claims of PSPCL.
- xii) The aforementioned clause however does not result in a situation wherein GVK is entitled to raise any bill and the entire amount is to be paid by PSPCL subject to a maximum deduction of only 13.5 crore a year. The interpretation sought to be placed by GVK would result in a situation wherein GVK can say raise bills for Rs. 1000 crore month on month and PSPCL has to pay the entire amount subject to a maximum deduction of Rs.13.5 crore for the whole year. This is a perverse interpretation sought to be placed by GVK and is liable to be rejected.

15. GVK filed its rejoinder to PSPCL's reply to the I.A. on 06.11.2017 and submitted as under:

- i) PSPCL has defaulted on its acceptance of GVK's conditional offer made vide letter dated 23.08.2017 which was confirmed by the Commission's Interim Order.
- ii) PSPCL has willfully not complied with the Interim Order and deducted amounts arbitrarily from the bills for the months of

June and July, 2017 despite having undertaken to pay these bills by only deducting Rs. 11.33 crore per monthly bill as agreed. The Commission had specifically recorded PSPCL's submissions that it had accepted GVK's offer made vide letter dated 23.08.2017 and passed the Interim Order holding as under:

“In view of the interim arrangement as above already agreed to by the parties, the Commission holds that the same shall continue without prejudice to the rights, claims and contentions of the parties in the main petition, till the same is finally decided by the Commission.”

- iii) The offer vide letter dated 23.08.2017 is no longer in effect and PSPCL ought to be directed to pay the entire amount of monthly bills without any deduction.
- iv) PSPCL has not fulfilled the terms of the conditional interim arrangement that it had agreed to and as such is not entitled to make any deductions.
- v) The conditional offer submitted vide GVK's letter dated 23.08.2017 now stands withdrawn in light of PSPCL's actions in violation of the said proposal as well as the Interim Order.
- vi) PSPCL's contention that the Hon'ble High Court of Punjab and Haryana had specifically rejected GVK's interim prayer seeking directions that the total bill be paid by PSPCL without any deductions, in CWP 17078 of 2017, is wrong and denied.
- vii) In terms of Article 11.6.1 of the PPA, the monthly bills for June and July, 2017 raised by GVK are conclusive since PSPCL has not raised any dispute within 30 days of receiving the said bills. Merely issuing a note detailing the

deductions being made does not amount to disputing a bill. Article 11 specifies the process to be followed while disputing a monthly bill. This is a mandatory process. Since PSPCL has not disputed the bills, it is required to pay the monthly bills.

- viii) In terms of Article 11.3.1 of the PPA, PSPCL is obligated to pay the monthly bill within 30 days of receipt of the same. Further, as per Article 11.3.2 of the PPA, PSPCL is allowed to make the deductions which are required under law or an undisputed amount. In order to dispute an amount. Article 11.6.1 obligates parties to raise the issue within 30 days of receiving the bill. Since PSPCL has failed to challenge the monthly bills within the time prescribed for the same, PSPCL is obligated to pay the same in accordance with Article 11.3.1 of the PPA.
- ix) PSPCL's contention that GVK has raised the monthly bills for June and July, 2017 incorrectly (on account of differences in capacity charges, energy charges and applicability of water charges etc.) does not hold merit at this stage since the opportunity to challenge the said bills was available to PSPCL. However, PSPCL failed to raise any dispute regarding the bills in terms of the PPA. Therefore, PSPCL is contractually obliged to pay the bills.
- x) PSPCL did not communicate that it is disputing the amounts mentioned in the monthly bills or proposes to make deductions. Therefore, the deductions so made are contrary to the PPA and the Commission's Interim Order.
- xi) PSPCL's contention that GVK has suppressed facts regarding the deductions made by PSPCL is denied. PSPCL

has never raised a dispute regarding these amounts that were deducted. The bills have become conclusive. The statements of account/bill payment details sent by PSPCL do not qualify as a 'Bill Dispute Notice' in terms of Article 11.6.2 of the PPA. Accordingly, the bills for June and July 2017 do not amount to a disputed bill in terms of Article 11.6.1 of the PPA. In any event, in terms of Article 11.3.2 of the PPA, PSPCL cannot deduct more than Rs. 13.5 crore in a Contract Year.

- xii) GVK prayed that the relief which was sought for in the Interim Application be allowed.

16. After hearing the parties on 08.11.2017 the Commission passed an Order dated 10.11.2017 whereby after considering the averments of the parties, the Commission was of the view that since the Order dated 01.02.2016 passed by the Commission in Petition No. 65 of 2013 and Petition No. 33 of 2015 has been challenged by PSPCL by way of Appeal No. 68 and Appeal No. 69 of 2016 and is pending before Hon'ble APTEL, the Order to be passed in these Appeals may have bearing on the subject matter in the present petition. As such the Commission considered it appropriate to await for the Order of Hon'ble APTEL. Thus, the matter was adjourned to 24.01.2018. During hearing GVK filed submissions reiterating its earlier submissions.

17. The Commission after hearing the parties on 24.01.2018, reserved the Order in the petition vide Order dated 01.02.2018. GVK sought time to substantiate its claim of non co-operation by PSPCL with regard to procurement of coal and interpretation of Article 11 of the PPA. PSPCL sought time to file written

submissions / arguments in the petition. Both parties were allowed to submit their respective documents / submissions within one week.

GVK and PSPCL filed their respective submissions on 26.02.2018 and 07.03.2018 respectively reiterating their submissions already submitted by them.

OBSERVATIONS AND FINDINGS OF THE COMMISSION

18. The Commission has carefully gone through the petition and application, replies thereto by PSPCL, rejoinders to the replies by the petitioner, other submissions and written arguments filed by the parties. In the petition the petitioner has prayed to:

- a. Quash the Impugned Notice.
- b. Direct PSPCL not to take any coercive steps to recover the amount claimed in the Impugned Notice till such time this petition is decided.

Subsequent to the interim Order dated 05.09.2017 in this petition; the petitioner filed an application (I.A. No. 30 of 2017) for directions and initiation of proceedings under Section 142 of the Electricity Act, 2003 and prayed as under:

- a. Direct PSPCL to comply with the interim order and pay the balance amount against the bills for the months of June and July, 2017;
- b. Restrain PSPCL from deducting amounts in excess of Rs.11,33,78,819/- from future month bills;
- c. Initiate action against PSPCL under section 142 of the Electricity Act, 2003 for non-compliance of the interim order

Considering the submissions of the parties as brought out in

the foregoing paragraphs, the findings and decision of the Commission on issues raised in the petition are as follows:

GVK's submissions

- a. GVK submitted that PSPCL vide notice dated 29.06.2017 has demanded an amount of Rs.113.37 crore as penalty for having availability below 75% during the first contract year i.e. FY 2016-17, which is contrary to the terms of amended and restated PPA dated 26.05.2009. GVK further submitted that it was unable to declare availability as a direct consequence of a force majeure event i.e. cancellation of coal blocks and PSPCL preventing GVK from procuring coal. GVK contended that PSPCL's contention that non-availability of coal is not a valid defence for the period post declaration of COD is misplaced since non-availability of coal has already been adjudged as a force majeure event.
- b. PSPCL's contentions that it issued the demand notice claiming a sum of Rs.113.37 crore because GVK did not include the contract year penalty in the monthly bill is erroneous. GVK submitted that PSPCL issued the notice dated 29.06.2017 whereas GVK raised monthly bill for the period 01.06.2017 to 30.06.2017 on 05.07.2017. PSPCL has not disputed the monthly bill on the basis that the amount claimed by PSPCL has not been included in the said bill. As such in terms of Article 11.6.1 of the PPA, the monthly bills are taken as conclusive and have to be paid. In terms of Article 11.3.1 of the PPA, PSPCL is obligated to pay the monthly bill within 30 days of receipt of the same. Further, bill dispute notice in terms of Article 11.6 of

the PPA is mandatory. The statement of account / bill payment details sent by PSPCL does not qualify as a 'Bill Dispute Notice' in terms of Article 11.6.2 of the PPA. The penalty amount claimed in the notice has been disputed by GVK vide letters dated 05.07.2017 & 28.07.2017. In order to dispute an amount, Article 11.6.1 obligates parties to raise the issue within 30 days of receiving the bill. Since PSPCL has failed to challenge the monthly bills within the time prescribed for the same, PSPCL is obligated to pay the same in accordance with Article 11.3.1 of the PPA. GVK contended that as per Article 11.3.2 of the PPA, the only deductions PSPCL is allowed to make is as required under law or an undisputed amount. GVK further contended that, the total amount that can be deducted / set off is Rs.13.50 crore in a contract year as per Article 11.3.2 of PPA. The claim of Rs. 113.37 crore, being a separate, the same cannot be set off against the monthly bills by PSPCL.

- c. GVK submitted that PSPCL has deducted the amount of Rs. 44.28 crore instead of Rs. 22.674 crore permitted vide Commission's interim Order dated 05.09.2017, against the monthly bill for June, 2017 of Rs. 35.98 crore and July, 2017 of Rs. 87.40 crore. PSPCL's contention that GVK has raised the monthly bills for June and July, 2017 incorrectly on account of differences in capacity charges, energy charges and applicability of water charges etc. in furtherance of different issues which are not in contention in the present petition, does not hold merit at this stage since the opportunity to challenge the said bills was

available to PSPCL. However, PSPCL failed to raise any dispute regarding the bills in terms of the PPA. Therefore, PSPCL is contractually obliged to pay the bills.

- d. GVK contended that Clause 1.2.5 of Schedule 6 i.e. Contract year penalty for availability below 75% during the Contract Year, cannot override the PPA provisions. Schedule 6 only sets out the method for determination of tariff payments. The substantive provisions relating to billing and payment are governed by Article 11 in terms of which there can be no set off / adjustments of disputed amounts.
- e. GVK submitted that the offer made by it vide letter dated 23.08.2017 was a conditional offer which required PSPCL to pay bills for the months of June and July 2017 together. The only deduction agreed to by GVK was a sum of Rs. 11.33 crore per monthly bill. PSPCL has deducted amounts of Rs. 22.67 crore in excess of the permitted sum of Rs. 11.33 crore per monthly bill. GVK further submitted that the conditional offer made vide letter dated 23.08.2017 now stands withdrawn in light of PSPCL's actions in violation of the said proposal as well as Commission's Interim Order and PSPCL be directed to pay the entire amount of monthly bills without any deduction. GVK submitted that, accordingly, it requested to the Commission to take necessary steps against PSPCL as per Section 142 of the Electricity Act, 2003.
- f. GVK submitted that PSPCL has challenged the Commission's Order dated 01.02.2016 in petition no. 33 of 2015 and petition no. 65 of 2013 before Hon'ble APTEL

by way of Appeal No. 68 and 69 of 2016, impugning the COD of the project. Since PSPCL has challenged the COD, it is precluded from imposing any penalty on account of shortfall in availability. In the event that Hon'ble APTEL adjudges that COD was wrongly declared by GVK, the question of shortfall in availability does not arise.

- g. GVK submitted that it was unable to procure coal on account of actions of PSPCL. In terms of Commission's Order dated 01.02.2016 in petition no. 33 of 2015 and petition no. 65 of 2013, GVK was permitted to procure coal for the interim period from alternate sources till the Commission decides the final method of procuring coal. Pursuant to the said Order, GVK made several attempts for procuring coal, starting by placing order for imported coal from South Africa on 10.03.2016. However, PSPCL prevented GVK from procuring coal by repeatedly interfering in the procurement process and refused to accept supply of power unless PSPCL was involved in the procurement process. As a result, GVK cancelled the Order for imported coal from South Africa. GVK also conducted an open tender. However, GVK had to cancel the tender as per PSPCL's instructions, since there was only one responsive bid and one conditional bid.

PSPCL's submissions

- a. PSPCL submitted that the actual availability of the plant was only 4.707% as against minimum 75% required for FY 2016-17. The demand has been raised in terms of Clause 1.2.5 of Schedule 6 of the PPA. It is the misconception of

GVK that the penalty claimed in the impugned notice dated 29.06.2017 is being sought for the period prior to the COD as GVK has pleaded the non-availability of coal prior to COD as the defence to the said claim. The present claim is for the post COD period. PSPCL further submitted that as GVK failed to raise the bill for the first month of the next contract year i.e. April, 2017 in terms of clause 1.2.1(iv) of the PPA, PSPCL issued notice dated 29.06.2017 requesting GVK to pay the said amount. The penalty amount is automatically payable and is not subject to proof of actual damages or loss, prior adjudication and is liable to be paid immediately upon the year in question is over when the actual availability is less than 75%.

- b. PSPCL submitted that GVK has contended that the generation was inadequate due to non-availability of coal which is a force majeure condition or it was for reasons not attributable to GVK. PSPCL contended that GVK had sought the specific direction from the Commission seeking permission to commission the generating station and begin generation of electricity without having a firm coal supply agreement. The Arbitral Tribunal was only dealing with the issue whether the non-availability of firm source, cancellation of coal block would entitle GVK to postpone the COD of the generating station. The Arbitral Tribunal granted relief to GVK by holding that the Scheduled COD should be postponed till the date of actual COD on account of cancellation of the coal block. Therefore, GVK was not required to declare COD and could postpone the COD till such time the coal source was available, without payment

of any liquidated damages to PSPCL. The proposal of GVK to declare COD of the project without having a firm source of coal supply was objected by PSPCL. PSPCL contended that after declaration of COD, now GVK cannot claim that there was inadequate supply of electricity due to coal issues.

- c. PSPCL submitted that the Commission's Order dated 01.02.2016 in petition no. 33 of 2015 and petition no. 65 of 2013 states that PSPCL, if it so desires, can participate in the coal procurement process of GVK. PSPCL contended that GVK did not accept the coal shipped from South Africa for its own reasons, possibly on account of non-availability of funds. GVK has procured coal from other sources in the year without any approval from PSPCL. It is wrong that no coal is procured unless specifically approved by PSPCL. PSPCL in the meeting held on 15.03.2016 did not direct that the ship be returned. The said meeting was only for the purpose of future procurement process to be followed. The only position of PSPCL was that the coal procurement should be in a transparent manner and as per the same procedure followed by other IPPs.
- d. PSPCL submitted that it has paid the tariff for the electricity generated in terms of the Commission's Order dated 01.02.2016 in petition no. 33 of 2015 and petition no. 65 of 2013 and has not taken the position that no tariff would be payable as the coal procurement is not proper.
- e. PSPCL submitted that GVK cannot take the plea that it is entitled to tariff under the PPA after the COD, but the penalty for short supply of electricity is not applicable till

the time the proceedings before Hon'ble APTEL are concluded. PSPCL further submitted that the present claim is raised without prejudice to the outcome of Appeal No. 68 and 69 of 2016.

The Commission in its order dated 01.02.2016 common to petition no. 65 of 2013 and petition no. 33 of 2015 held that

“

The Commission is of the considered opinion that under the circumstances, arrangement of coal for a period of 2 to 2.5 years as an interim measure made by the petitioner is sufficient for the time being. The Commission is of the view that the petitioner may declare the CoD of the Project, if it otherwise meets with and satisfies the terms & conditions of the PPA and qualifies in terms of the State Grid Code, Indian Electricity Grid Code and other statutory requirements. In the meanwhile, the petitioner is directed to make sincere and concerted efforts to arrange long term source of coal for the entire term of the PPA and keep PSPCL informed of the developments in this regard at reasonable intervals. As regards the cost to be allowed for the interim coal arranged by the petitioner, the Commission is of the view that in the PPA the same was not to exceed the cost of coal sourced by PSPCL from its captive Pachhawara Coal Block. PSPCL in its letter dated 20.01.2016 has proposed the energy charges for power to be supplied by the Project with the interim arrangement of coal as the minimum landed cost of coal being received by thermal power plants of PSPCL from Coal India Ltd. As per the information available with the Commission, even though the Pachhawara Coal Block has been re-allotted to PSPCL, the same is yet to become operational. Accordingly, the Commission holds that the petitioner shall be paid, the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month, alongwith

the actual transportation charges paid by the petitioner to the Indian railways for transporting the coal to the Project from the port / mine in case of imported / domestic coal as the case may be or the actual cost of coal procured by the petitioner, whichever is less. PSPCL may, if it so desires, participate in their interim coal procurement process undertaken by the petitioner who shall extend full co-operation in this regard to PSPCL.

The Commission holds that this arrangement is purely temporary and the petitioner will arrange the long term linkage of coal at the earliest or successfully bid for a mine in the bidding to be conducted by Govt. of India in near future and keep PSPCL abreast of the latest developments in this regard from time to time.....”

As per the above order GVK had arrangements of coal for a period of 2 to 2.5 years. GVK ordered 65000 MT of imported coal from South African Mines on 06.03.2016 and informed PSPCL of the same vide letter dated 10.03.2016. The intimation to PSPCL regarding procurement of 65000 MT of imported coal was only for information and record and nowhere in the aforesaid letter was it mentioned that the same was for approval. Further GVK stated that PSPCL compelled it to refuse the delivery of the said 65000 MT of coal. There is nothing on record to show that PSPCL told GVK to refuse the consignment. In any case, this 65000 MT of coal would only have been sufficient to run the plant for approximately 10 days.

Also the copy of the bill of lading for the imported coal submitted by GVK carried no stamp or the amount paid on it. The Commission notes that GVK has not submitted any documentary evidence regarding reasons for return of the imported coal by GVK or losses incurred due to diversion charges claimed to have been

paid by it.

GVK submitted that it informed PSPCL vide letter dated 14.04.2016 that CIL had issued the Notification for 'Special forward E-auction for Power Producers (including CPPs) for 2016-17 Phase-I' and sought PSPCLs consent to participate in the auction. However, PSPCL vide letter dated 03.05.2016 intimated that the coal from alternative sources may be procured through open press tender in line with the methodology already adopted by PSPCL in the case of IPPs in Punjab i.e. NPL and TSPL. GVK stated that despite PSPCL's inaction it participated in the E-auction conducted by CIL and successfully bid for 84000 MT Coal. GVK submitted that it also conducted an open tender process as per PSPCL's directions. The same was cancelled as only one responsive bid was received. GVK further submitted that it informed PSPCL on 09.06.2016 that CIL had issued the Notification 'Special forward E-auction for Power Producers (including CPPs) for 2016-17 Phase-II'. GVK participated in the same and was allocated 4 lakh MT of coal. PSPCL was informed of the same but no response of PSPCL was received. Further, GVK participated in 'Special forward E-auction for Power Producers (including CPPs) for 2016-17 Phase-VIII' and it was allotted 1.76 lakh MT coal. GVK submitted that PSPCL rejected the procurement of 12 lakh MT of coal sanctioned by the Standing Linkage Committee on account of high cost and consequently Ministry of Coal cancelled the allotment. A plain reading of the Order dated 01.02.2016 shows that PSPCL would have been at advantage since the cost of the coal was capped at the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Limited and its subsidiaries in the

particular month or the actual cost of coal procured by GVK, whichever is less. Therefore, if the cost of coal sanctioned by Standing Linkage Committee was higher, it would in any case have been capped as per Order dated 01.02.2016. PSPCL's insistence on open tender was to ensure the consumers interest.

The Commission notes that PSPCL has submitted that GVK declared commercial operation of the generating station based on interim arrangement of coal allowed by the Commission. The interim arrangement of coal for 2 to 2.5 years was assured by GVK. PSPCL contended that it is now not open to GVK to claim after declaration of COD that there was inadequate generation of power due to coal issues. PSPCL further submitted that the contention of GVK that PSPCL has prevented the procurement of coal is also baseless since as per the Commission's order dated 01.02.2016, it was specifically directed that GVK will involve PSPCL in the interim procurement process because the cost of coal is to be passed on in tariff to be payable ultimately by the consumers. PSPCL contended that the attempt of GVK to attribute the non-availability of coal to PSPCL is not justified.

The Commission in its Order dated 01.02.2016 in petition no. 33 of 2015 and petition no. 65 of 2013 held that arrangement of coal for a period of 2 to 2.5 years as an interim measure made by GVK is sufficient for the time being and held that GVK may declare the COD of the Project. The Unit-1 and Unit-2 of the project achieved COD on 06.04.2016 and 16.04.2016 i.e. in the very first month of FY 2016-17. No Order was given by the Commission to interfere with the coal supply of 2.5 years arranged by GVK. Thus, there was no reason for

GVK to not take delivery of any coal already ordered. The Commission notes that GVK has also not submitted any sufficient documentary evidence regarding PSPCL not allowing it to take delivery.

GVK has also made efforts to procure coal from other sources and participated in E-auctions without the involvement of PSPCL and has succeeded in procuring the same. Therefore, the Commission holds that the plea made by GVK that it could not procure the coal due to actions of PSPCL is not tenable.

The Commission holds that GVK was not successful in arranging the coal due to which the Availability of the plant was only a meagre 4.707 % during FY 2016-17.

Considering the submissions and contentions of GVK and PSPCL, the Commission notes that Article 1.2.5 of Schedule-6 of the Amended and Restated PPA dated 26.05.2009 related to Contract Year Penalty for Availability below 75% during the Contract Year provides that 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. The Commission further notes that Article 1.2.1 of Schedule-6 provides that penalty payment determined in accordance with Article 1.2.5 above is applicable on annual basis and was to be included only in the Monthly Tariff Payment for the first month of the next Contract Year. Accordingly, GVK was required to include the penalty

amount due to Availability below 75% during the Contract Year 2016-17, in the bill raised for the month of April, 2017. The Commission observes that GVK didn't raise the bill for the tariff payment for the months of April and May, 2017. Therefore, PSPCL issued notice dated 29.06.2017 to GVK to recover the penalty on account of Availability below 75% during the Contract Year 2016-17. Thereafter, GVK raised monthly bill for the period 01.06.2017 to 30.06.2017 on 05.07.2017.

In view of the above, the Commission decides that the penalty imposed by PSPCL on GVK on account of Availability below 75 % during the Contract Year 2016-17 is payable in terms of the PPA.

The Commission notes that after the Punjab and Haryana High Court had given the Order of 11.08.2017, GVK submitted a proposal vide its letter dated 23.08.2017 to PSPCL to consider deduction of Rs.11.337 crore (10% of the penalty amount) per month with regard to recovery of the penalty amount of Rs.113.37 crore levied by PSPCL. PSPCL accepted the said proposal subject to final adjudication of this petition by the Commission. The proposal of GVK to discontinue this deduction due to PSPCL's non-payment of its monthly dues in full is not acceptable since there were no conditions attached to the offer made by GVK. In view of the interim arrangement as above already agreed to by the parties and allowed by the Commission in its interim Order dated 05.09.2017 in this petition, the Commission holds that the same shall continue till recovery of the said penalty by PSPCL in terms of the PPA.

The Commission further notes that the petitioner has raised additional issues in IA No. 30 of 2017 which were not raised in the petition and the same relate to deduction of amount in excess of Rs. 11,33,78,819/- from the monthly bills submitted by the petitioner. The Commission notes that the petitioner has filed a separate petition no. 68 of 2017 wherein the issue of unilateral deductions by PSPCL from monthly bills has been raised by GVK. The Commission shall decide the same separately on merits. Therefore, the Commission does not allow this prayer of the petitioner in this IA.

The petition and application is disposed of in terms of the above.

Sd/-
(Anjuli Chandra)
Member

Sd/-
(S.S. Sarna)
Member

Sd/-
(Kusumjit Sidhu)
Chairperson

Chandigarh
Dated: 21.05.2018