PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 61 of 2023
Date of Order: 27.11.2024

Petition under Section 86 of the Electricity Act 2003 read with Article 17 of the Power Purchase Agreement, dated 01.09.2008 seeking compensation for Heat Rate Degradation, Increase in Auxiliary Power Consumption and Increase in Secondary Fuel Oil Consumption on account of Part Loading along with other consequential reliefs from the Respondent.

AND

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

...Petitioner

Versus

Punjab State Power Corporation Limited, through its Chief Engineer (PP&R), Shakti Vihar, Shed No. D-3, Patiala, Punjab-147001.

...Respondent

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

TSPL: Sh. Sourav Roy, Advocate (through V.C)

PSPCL: Sh. Anand K. Ganesan, Advocate (through V.C)
Ms. Harmohan Kaur, CE/ARR&TR, PSPCL

ORDER

1. The Petitioner (TSPL) has filed the present petition seeking adjudication of its dispute with the Respondent PSPCL regarding the issue of monetary compensation for Heat Rate Degradation and other performance parameters on account of the Part Loading, i.e.,

scheduling of electricity below its plant's normative availability of 80%. Submissions made in the petition are summarized as under:

1.1 TSPL owns and operates a 1980 MW (3x660 MW) coal-based Thermal Power Project (TPP) in Punjab, set up under Case 2 Scenario 4 of the Tariff-Based Competitive Bidding Guidelines issued under Section 63 of the Electricity Act, for supply of power to PSEB (now PSPCL).

1.2 That, in terms of the PPA dated 01.09.2008 signed between the parties, PSPCL is to pay Tariff for all of the Available Capacity up to the Contracted Capacity and Scheduled Energy and, TSPL is under an obligation to comply with the provisions of the applicable laws, including the laws relating to 'Availability', particularly, with respect to the provisions of the ABT and State Grid Code. However, the low scheduling of electricity by PSPCL have negative commercial implications for TSPL in terms of the increase in heat rate, secondary fuel oil consumption and auxiliary energy consumption thereby increasing the actual energy charges for which it is liable to be compensated by PSPCL.

1.3 That noting the implications of low scheduling, the CERC has incorporated a sub-Regulation 6.3B in the CERC (Indian Electricity Grid Code) 2010 vide its (Fourth Amendment) Regulations 2016 to provide for grant of compensation to TPPs on account of operation below the Normative Plant Availability. Whereon, certain other State Commissions like Maharashtra, Madhya Pradesh and Tamil Nadu have also introduced similar

provisions in their respective State Grid Codes to provide for entitlement/ grant of compensation on account of part loading/low scheduling. The said provisions have been also retained by the CERC in the IEGC 2023 notified with effect from 01.10.2023.

1.4 That as per Section 86 (1)(h), the State Grid Code should be consistent with the IEGC. The Hon'ble Supreme Court in *Central Power Distribution Co. Ltd. V. CERC & Ors.*, *(2007) 8 SCC 197*, while dealing with the interplay of Sections 79(1)(h) and 86(1)(h) has also held as under:

> "*18. Under Section 79(1)(h) the Central Commission has the power to specify Grid Code. It also provides that the function of the State Commission to specify State Grid Code under Section 86(1)(h) should be consistent with the Grid Code specified by the Central Commission and therefore the power of the State Commission is subservient to the power of the Central Commission. …..*"

1.5 Therefore, even in the absence of such provision for compensation on account of Part Loading in the State Grid Code doesn't prevent this Commission to grant such relief to TSPL. The Commission, vide its Order dated 19.04.2018 in Petition No. 05 of 2018, has granted such compensation to the similarly placed Thermal Power Generating Stations of PSPCL after recognizing the absence of any provision akin to Regulation 6.3B of the IEGC 2010 in the Punjab State Grid Code. Similarly, CERC vide Order dated 20.04.2023 in Petition No. 281/MP/2021, titled as MB Power (Madhya Pradesh) Limited vs. PTC India Limited, while interpreting Regulation 6.3B of the

Indian Electricity Grid Code, 2010, has also allowed a claim for payment of Part Loading compensation to a generator.

1.6 Accordingly, TSPL sent a letter dated 09.09.2023 along with an Invoice dated 09.09.2023 to PSPCL asking to pay a sum of Rs. 232,71,69,164/- towards the compensation on account of Part Loading of its project for the period between FY 2017-18 to FY 2020-21 and that a copy of the aforementioned letter and supporting invoice were also uploaded on the PRAAPTI Portal. But PSPCL returned the aforementioned Invoice on the PRAAPTI Portal vide returning note dated 21.09.2023 citing the decision of the Hon'ble APTEL in APL. No. 283 of 2015, titled as NPL vs PSPCL. TSPL re-uploaded the invoices on the PRAAPTI Portal on 26.09.2023 reiterating its demand for payment of the compensation on account of Part Loading, which was again rejected by PSPCL on 31.10.2023. PSPCL's remarks on the PRAAPTI Portal are reproduced below:

> "*Not admissible as per PPA. Hence not payable. Moreover, the claim is for the period FY 18-19 to FY 20-21 which is prior to the implementation of new LPS rules 2022. This payment is also not payable as per any order of any court of Law.*"

1.7 In view of the aforementioned facts, the Petitioner prays the Commission to:

"a) Admit the Petition.

b) Hold and declare that the Petitioner is entitled to payment of compensation on account of Part-Loading;

c) Direct the Respondent to:

(i) Make payment of Rs.133,13,75,711/- as compensation on account of

Part-Loading for the period between FY 17-18 to FY 20-21.

(ii) Make payment of Rs. 99,57,93,454/- as the carrying cost as on 09.09.2023 increasing till the date on which payment of compensation is made by the Respondent.

(iii) Make regular and timely payments against the compensation Invoices to be raised by the Petitioner on account of Part Loading for all future periods.

d) In the interim, direct the Respondent to release 75% of the total amount due for payment under the Compensation Invoices raised by the Petitioner on account of Part-Loading till date;

e) Grant any consequential reliefs in respect of the reliefs prayed for above and;

f) Pass such other and further order or orders as this Commission deems appropriate under the facts and circumstances of the present case."

2. While, PSPCL vide its affidavit dated 26.02.2024 objected to maintainability of the Petition submitting that the claim of the Petitioner is barred by limitation and also is no longer res integra having been rejected by this Commission and the Appellate Tribunal in case of a similarly placed project of NPL, TSPL vide its rejoinder dated 06.04.2024 submitted that the case judgments cited by PSPL cannot be made applicable to the present case as the facts and circumstances being pleaded here are materially different and also that its claim even for FY 2017-18 is not hopelessly barred in view of the Hon'ble Supreme Court Order dated 10.01.2022 in Suo-Moto CWP No. 03/2020.

3. On 03.07.2024, the Petition was taken up for hearing on admission. The Ld. Counsel for PSPCL submitted that, since the issue raised by

the Petitioner already stands decided by this Commission in case of M/s Nabha Power Limited and various orders of the Hon'ble APTEL, the instant petition needs to be dismissed at the stage of admission itself. Whereas, Ld. Counsel appearing for TSPL submitted that the issues being raised herein have not been dealt with or considered in detail in the cases cited by PSPCL. After hearing the parties and considering the fact that PSPCL is neither disputing the jurisdiction of the Commission nor the existence of a dispute between the parties, the Commission admitted the petition in order to examine the issues being raised in detail and pass appropriate orders and directed PSPCL to file its reply on merits within two weeks with a copy to TSPL who may file the rejoinder thereto, if any, within one week thereafter with a copy to PSPCL.

4. On 26.07.24, PSPCL submitted its reply on merits, which is summarized as under:

4.1 The Petitioner (TSPL), selected under the Tariff Based Competitive Bidding Process under Section 63 of the Electricity Act 2003, has been generating and supplying the electricity to PSPCL since 2016. The parties are bound by the terms of the bidding documents and the PPA signed between the parties on 01.09.2008. TSPL is connected to the State Grid and is therefore governed by the provisions of the PSERC (Punjab State Grid Code) Regulations 2013 notified by this Commission. There has been no issue raised by TSPL on the scheduling of electricity or any compensation purportedly payable to TSPL for part load operations over the years. Suddenly, on 09.09.2023,

TSPL raised an invoice seeking to claim compensation amounting to Rs. 232.71 Crore for the period from FY 2017-18 to FY 2020-21 allegedly under Regulation 6.3B of the CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations 2016 for part load operations and had proceeded to arbitrarily upload the said invoice on the PRAAPTI portal. PSPCL returned the invoice on 21.09.2023 stating that Regulation 6.3B of the IEGC applies to the operation of Central Generating Stations and Inter State Generating Stations only.

4.2 That the very issue being raised herein by TSPL stands already dealt and rejected vide this Commission's Order dated 07.10.2015 in Petition No. 27 of 2015 filed by Nabha power Limited (NPL). The same has also attained finality upon being upheld by Hon'ble APTEL's Judgment dated 17.05.2018 (in Appeal No. 283 of 2015 filed by NPL) and the Hon'ble Supreme Court Judgment dated 28.09.2018 dismissing the Civil Appeal No. 9835 of 2018 filed by NPL against Hon'ble APTEL judgment.

4.3 That the present case also stands on an identical footing as the above-mentioned case of NPL. Even in the present case, there is no corresponding provision in the PPA dated 01.09.2008 which provides that TSPL is eligible for compensation on account of variation in scheduling of power by PSPCL. PSPCL is already paying TSPL the capacity charges for the capacity being declared and energy charges for the power being scheduled. Further, in TSPL's case also:

a) SHR is a bidding component along with capacity charges

quoted by TSPL for obtaining the project and therefore, TSPL would have factored in all the circumstances and contingencies at the time of bidding. It was a commercial decision of TSPL to quote the specific values along with the capacity charges and therefore, TSPL now cannot ask for compensation in terms of an increase in the said parameters.

b) That bidding terms and the PPA governs the rights and obligations of the parties, wherein, there is no provision which provides for such compensation as being claimed in the petition. TSPL cannot make any claims contrary to or de-hors the provisions of the PPA. The only consequence provided for operating at lower plant availability than the declared plant availability is the entitlement to the capacity charges based on the declared availability in terms of the PPA. In this regard, it is submitted that PSPCL is already paying TSPL the capacity charges for the capacity being declared and energy charges for the power being scheduled. The clauses of the PPA relevant to the respective rights and liabilities of the parties with regard to declaration of availability and scheduling are reproduced below:

"4.4 Right to Available Capacity and Scheduled Energy

4.4.1 Subject to other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurer and the Procurer shall have the exclusive right to purchase the entire Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the

Available Capacity and/or Scheduled Energy.

4.4.2 Notwithstanding Article 4.4.1, the Seller shall be permitted to sell power, being a part of the Available Capacity of the Power Station to third parties if:

(a) there is a part of Available Capacity which has not been Dispatched by the Procurer.

4.4.3 If the Procurer does not avail of power upto the Available Capacity provided by the Seller and the provisions of Article 4.4.2 have been complied with, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Procurer for such un-availed Available Capacity. In such a case, the sale realization in excess of Energy Charges shall be equally shared by the Seller with the Procurer. In the event, the Seller sells such Available Capacity to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller without obtaining the prior written consent of the Procurer, the Seller shall be liable to sell such Available Capacity to such entity at tariffs being not less than the Tariff payable by the Procurer. During this period, the Seller will also continue to receive the Capacity Charges from the Procurer. Upon the Procurer not availed of the Available Capacity, as envisaged under this Article, intimating to the Seller of its intention and willingness to avail of the part of the Available Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and said third party, commence supply of such capacity to the Procurer from the later of two (2) hours from receipt of notice in this regard from the Procurer or the time for commencement of supply specified in such notice."

c) In view of the above, it is clearly contemplated that there is no mandate to give any minimum schedule by PSPCL and there is full protection to TSPL to recover its capacity charges to the extent of the declared availability. Further, TSPL can also sell the unscheduled capacity to third parties subject to certain stipulations.

d) That the above provisions of the PPA represent the complete understanding of both parties with regard to the declaration of availability, scheduling and recovery of consequent charges as specified in Article 18.4 and 18.17 of the PPA reproduced below:

"18.4 Entirety

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

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

……..

18.17 No Consequential or Indirect Losses

The liability of the Seller and the Procurer shall be limited to that explicitly provided in this Agreement. Provided that notwithstanding anything contained in this Agreement, under no event shall the Procurer or the Seller claim from one another any indirect or consequential losses or damages."

e) That, apart from there being no clause in the PPA authorizing TSPL to claim such compensation, even by conduct over the last several years, TSPL has understood the PPA in likewise manner. Reliance in this regard is placed on the Hon'ble Supreme Court judgment in case of *"Transmission Corporation of Andhra Pradesh Limited and Ors. v. GMR Vemagiri Power Generation Limited and Anr., (2018) 3 SCC 716"*, holding as under :

> *"25. In the facts and circumstances of the present case, there can be no manner of doubt that the parties by their conduct and dealings right up to the institution of proceedings by the respondent before the Commission were clear in their understanding that RLNG was not to be included within the term "Natural Gas" under the PPA. The observations in Gedela Satchidananda Murthy[3] are considered apposite in the facts of the present case: (SCC pp. 688-89, para 32)*
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> > *"32.... "The principle on which Miss Rich relies is that formulated by Lord Denning, M.R. in Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. 14, QB at p. 121:*
> >
> > *"... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it-on the faith of which each of them to the knowledge of the other-acts and conducts their mutual affairs-they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not-or whether they were mistaken or not-or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.""*

f) Therefore, there is no basis at all for TSPL to raise any claim

for compensation by filing a belated petition in the year 2023 when both TSPL and PSPCL have been supplying and receiving the electricity from the COD i.e., 25.08.2016, and interpreting and applying the PPA without any compensation clause.

4.4 That the provisions of the Grid Code Regulations issued by MERC, MPERC and TNERC are not applicable to the projects established in the State of Punjab. It is relevant to state here that the Punjab State Grid Code, which regulates the Petitioners project, does not contain any provision for claiming compensation on account of low scheduling/Part Loading by a beneficiary. Further, TSPL's reliance placed on Regulation 6.3B of the IEGC introduced vide the 4th Amendment dated 06.04.2016 is misconceived as the said provisions are intended for operation of Central Generating Stations and Inter-State Generating Stations only**.** Admittedly, TSPL is neither a CGS nor an ISGS. Moreover, even Regulation 6.3B (4) of the said IEGC amendment Regulations states that in case of a generating station whose tariff is neither determined nor adopted by the Central Commission, the concerned generating company shall have to factor these provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule. Since there is no such provision factored in the PPA between TSPL and PSPCL, TSPL cannot maintain any such claim to get compensated beyond the scope of the PPA.

4.5 Further, the issue of interplay of Sections 79 (1)(h) and 86 (1)(h) of the Electricity Act 2003 and the issue of applicability of regulation 6.3B of the IEGC to State Generators also stand considered and decided by Hon'ble APTEL *vide* Judgment dated 22.08.2016 (*in Appeal No. 34 of 2016 -Jaiprakash Power Ventures Limited v. Madhya Pradesh Electricity Regulatory Commission and Ors).*

4.6 The Regulation 6.3B of the IEGC is not applicable in the State of Punjab. There is neither any adoption nor any amendment introduced by this Commission in the Punjab State Grid Code following the above or incorporating the above. There is also no automatic application of the IEGC or any of its amendments in the State of Punjab. It is further submitted that this Commission vide its Order dated 06.03.2019 while deciding the issue of IEGC compensation in Petition No. 68 of 2017 in the matter of GVK Power Limited (Goindwal Sahib) had held that in the absence of any provision in the Punjab State Grid Code, the said compensation is not payable. Relevant extract of the above-mentioned order is as under:

"10.13 IEGC Compensation

GVK has asked for compensation for backing down its generation on the direction of PSPCL on the basis of the provision in the CERC (Indian Electricity Grid Code) Regulations, 2010 (IEGC) as opposed to no provision on this account in the PSERC (Punjab State Grid Code) Regulations, 2013 (SGC). PSPCL's argument is that while the IEGC prevails in matters of inter-state transmission, in the case of intra-state generation, the State Grid Code would prevail. There is no provision in the State Grid Code for compensation to be

paid to generators when they are instructed by the SLDC to back down. The Commission agrees with PSPCL that in the absence of any provision in the SGC for such compensation, it is not payable."

4.7 That Section 73, Contract Act provides that compensation for loss or damage is required to be paid to the party to a contract who has suffered a breach of contract. Therefore, Section 73 principles cannot apply without there being any breach by PSPCL. It is further submitted that by seeking compensation on account of part loading, TSPL is in essence seeking to get compensated beyond the scope of the PPA. This is impermissible. It is submitted that a court cannot create contractual obligation and can only provide reliefs to parties to the contract for the remedies as already provided for in the said contract. It is submitted that PPA is a sacrosanct document and no interpretation averse to the *consensus ad idem* can be given to the PPA.

4.8 Further, reliance as placed by TSPL on the Tariff Order dated 19.04.2018 passed by this Commission in Petition No. 05 of 2018, is wrong and denied. It is submitted that in the said case, the Commission, while noting that Regulation 6.3B of IEGC has not yet been adopted by the Commission in its State Grid Code, has further observed that since PSPCL is managing its generation and distribution business and is responsible for operation of its plants as well as scheduling of power from its own generation plants, and therefore if there is any compensation due to the generation wing, the same shall be recoverable from its

distribution wing. Moreover, herein the rights and obligations of TSPL and PSPCL with respect to each other are only limited to the terms and conditions as mentioned in the PPA. It is reiterated that the PPA does not provide any provision with respect to the issue in dispute i.e., compensation on account of variation in scheduling of power by PSPCL.

4.9 Further, TSPLs plea that the Central Commission *vide* order dated 20.04.2023 in Petition No. 281/MP/2021, while interpreting Regulation 6.3B, has allowed a claim for payment of Part Loading compensation by a generator, is wrong and denied. In the said case the distribution company (UPPCL) did not dispute the compensation invoice and had only sought that the compensation to be payable after amendment to the PPA and approval of Uttar Pradesh Electricity Regulatory Commission. Relevant extract of the order dated 20.04.2023 is as under:

'15. In the Statement of Reasons (SOR) to the IEGC Fourth Amendment, the Commission has noted that in the cases where the tariff of the generating station is not being regulated by the Commission, the generating company shall be required to factor these provisions in the PPA for sale of power in order to claim compensation for operating at the technical minimum schedule.

……..

29. We also note that UPPCL has not disputed the compensation invoice but their contention is only limited to the point that compensation is payable only after the amendment of the PPA and approval of the UPERC. In this regard, it has been argued that the PPA has been amended by the MPERC with regard to the power supply made to MPPMCL and therefore, the Petitioner should approach UPERC for the amendment of PPA. In this regard, we have already

noted above jurisdiction of MPERC is on account of clause 5.2 of Tariff Policy, 2016 whereas jurisdiction of this Commission is on account of Section 79(1) (b) of the Electricity Act, 2003."

4.10 It is therefore submitted that TSPL' claim for compensation on account of Part Loading ought not to be allowed.

5. On 13.08.2024, the Petitioner submitted its rejoinder to the reply dated 25.07.2024 filed by PSPCL on merits of the Petition. The same is summarised as under:

5.1 The Petitioner's present project was developed under Scenario 4 of the Case 2 model in terms of the guidelines framed under Section 63 of the Electricity Act as applicable to the present case, i.e., 'the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005 (**Competitive Bidding Guidelines**), wherein bids were invited based on Capacity Charge and Net Quoted Heat Rate. The Request for Proposal dated 18.01.2008 (**RFP**) also stipulated that the Tariff to be quoted by the bidders would comprise of Capacity Charges and Quoted Heat Rate. Therefore, both Capacity Charges and SHR were considered while identifying the lowest bidder (L1)/ lowest levelized tariff. It is further submitted that the Respondents wanted the Petitioner's plant to operate as a base load plant. Therefore, SHR(efficiency) was quoted keeping in mind that it would be a base load plant. However, the Respondent, by persistently making the plant operate at part load, has altered the entire commercial bargain and caused loss to the Petitioner.

5.2 The Respondent's contention, that the only consequence of operating at lower plant load is the entitlement to Capacity Charges based on the Declared Availability, is completely erroneous. In relation to this, the Petitioner submits that the Competitive Bidding Guidelines at clause 4.1 provides that "…*a multi-part tariff structure featuring separate capacity and energy components of tariff shall ordinarily form the basis of bidding*". While Capacity Charge is paid for recovery of fixed costs, Energy Charge is for recovery of fuel costs. Therefore, the entitlement of capacity charges based on declared availability does not compensate the Petitioner/ Generator for adverse implications due to Part Loading.

5.3 That the Judgment of this Commission & APTEL in Nabha (Supra) would not apply to the facts of the present case for the following reasons:

a) That in Nabha (Supra), the claim for compensation on account of Part Loading was made prior to the insertion of Regulation 6.3B vide CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations dated 29.04.2016. Also, the ground pertaining to the consistency of the State Grid Code with the IEGC as required under Section 86(1)(h) of the Electricity Act was neither argued nor dealt with in Nabha (Supra).

b) That the claim for compensation on account of Part Loading was premised on the ground that the Part Loading Compensation has to be read as the implied term of the PPA and the invoking of regulatory powers of this Commission. No

such argument/prayer is advanced by the Petitioner in the present case.

c) Principles of Res-Judicata are inapplicable as the Petitioner was not a party to the Nabha case (supra).

5.4 Further, the decision of the Hon'ble APTEL in Jaiprakash (Supra) would not apply to the facts of the present case as therein also the claim for compensation on account of Part Loading was made prior to the insertion of Regulation 6.3B vide CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations 2016. Furthermore, unlike the present case, the Appellant in Jaiprakash (Supra) did not claim any part loading compensation on the basis of principles enshrined under Section 73 of the Contract Act. Moreover, the issue in Jaiprakash (Supra) was totally different as there the Hon'ble Commission and the Hon'ble APTEL were seized of a matter that involved a question as to how to determine the technical minimum with respect to installed/plant capacity or contracted capacity.

5.5 The Judgment in GVK (Goindwal Sahib) (Supra) would also not apply to the facts of the present case as the Petitioner therein did not claim any part loading compensation on the basis of principles enshrined under Section 73 of the Contract Act or on account of unjust enrichment.

5.6 That the Respondent herein has itself availed the benefit of compensation on account of Part Loading before this Commission in Petition No. 05 of 2018. Therein, the compensation on account of Part Loading was granted to the Respondent sans any

provision in the Punjab State Grid Code and it is very clear that the Respondent had itself relied upon Regulation 6.3B of the CERC IEGC Regulations 2010. It is further pertinent to mention that the concerned generating station of the Respondent in the aforementioned judgment were also not 'Inter State Generating Stations' (ISGS) or a Central Generating Stations (CGS). Therefore, the objection of the Respondent regarding the applicability of Regulation 6.3B of the IEGC only to ISGS is of no consequence. That principle cannot change now merely because the Petitioner is different in a subsequent case. The Hon'ble Supreme Court in *Mumbai International Airport (P) Ltd. v. Golden Chariot Airport, (2010) 10 SCC 422,* has held that a party cannot approbate and reprobate its stand before a judicial forum and the Commission is also bound to follow its earlier precedent of allowing compensation for Part Loading even in the absence of a provision in the Punjab State Grid Code.

5.7 That, apart from the application of Section 86 (1)(h) of the Act, the Petitioner also relies upon the following:

a) Regulation 1.13 of the Punjab State Grid Code states that the same is consistent with the IEGC and in case of any conflict, IEGC would prevail over the Punjab State Grid Code:

> *"**1.13 Compatibility with Indian Electricity Grid Code***
>
> *This State Grid Code is consistent/ compatible with the IEGC. However, in matters relating to inter-State transmission, if any provisions of the State Electricity Grid Code are inconsistent with the provisions of the IEGC, then the provisions of IEGC as approved by CERC shall prevail."*

b) The Hon'ble APTEL, in *Indian Captive Power Producers Association vs. GERC, 2020 SCC OnLine APTEL 16*, has held that the State Electricity Commission cannot keep a closed eye on the regulatory developments brought out by the Ld. CERC and other State Commissions. Further, the Hon'ble APTEL has also held that the principles and methodologies of the Ld. CERC carry a strong persuasive value. The relevant portion of the aforementioned decision is quoted below:

"69. Further, the Appellant has also brought to our notice that the Central Commission, as well as various State Commissions such as Rajasthan, Punjab, West Bengal, Andhra Pradesh, Bihar, Delhi U.P., Maharashtra etc. have brought in amendments to their Open Access Regulations, in order to align them with the dynamic nature of the Open Access Market.

70. It would thus be evident that the Central Commission, as well as the various State Commissions are in fact, carrying out amendments in their respective Open Access Regulations, for the purpose of market development as provided under Section 66 of the Act, as well as for introducing reforms. The Respondent Commission cannot keep a closed eye to the regulatory developments brought out by the CERC, and other State Commissions, for the purpose of creating conducive environment for development of the power market. .....

71. As a matter of fact, that Respondent Commission is not bound by the Regulations/amendment brought out by the Central Commission and other State Regulatory Commissions but the principles and methodologies of the Central Commission carry a strong persuasive value in terms of Section 61 of the Electricity Act. In the present Appeal, the Appellant is only contending that the Respondent Commission should

consider the principles and methodologies adopted by the Central Commission and bring out requisite amendments in its Open Access Regulations, 2011 applying its own prudence and keeping in mind Section 66 of the Act which requires the Appropriate Commission to endeavour to promote the development of a market (including trading) in power."

In view of the above, this Commission is also enjoined with a statutory duty of keeping the State Grid Code consistent with the IEGC. Therefore, any inconsistency between the Punjab State Grid Code and the IEGC (irrespective of the nature of inconsistency) ought to be resolved by resorting to provisions of the IEGC.

5.8 Even Regulation 6.3 B (4) of the IEGC makes it clear that even if the tariff is neither determined nor adopted by the Central Commission, even for such generating companies, compensation on account of Part Loading shall have to be factored into provisions of such PPAs for sale of power. Therefore even if the tariff were adopted by this Commission, as is the case here, such a provision of compensation has to be factored in and given effect to while interpreting the PPA in question.

5.9 The Petitioner is entitled to compensation for loss caused by the Respondent either as damages under Section 73 of the Indian Contract Act, 1872 ("**Contract Act**") or on account of principles of Restitution as the Respondent is being unjustly enriched**:**

a) That at the time of bidding, the Respondent invited the bidders to quote the Capacity Charges (i.e., fixed cost component of the plant) and the NQHR/Net Station Heat Rate**/**SHR (i.e., the

efficiency of the Project) as part of competitive bidding mechanism. Based on those parameters, the Petitioner was selected as the successful bidder. The Petitioner herein quoted NQHR/NSHR of 2400 kCal/kWh. It is Petitioner's case that any adverse impact on the quoted NQHR/NSHR of 2400 kCal/kWh due to the Part Load operation of the generating station would amount to a breach of the said PPA by the Respondent and the Petitioner herein would be entitled to recover compensation for loss suffered on account of Part Loading under Section 73 of the Contract Act as it is a loss suffered directly due to breach/ conduct of Respondent.

b) That while the PPA grants TSPL the right to sell electricity to third parties, this right is explicitly subject to instructions from PSPCL, as stated in Article 4.3.2 of the PPA. Despite TSPL's proposals to sell power to third parties in 2016, PSPCL's failure to respond negates any claim that TSPL could exercise this right independently.

c) That, in any case, any clause within the PPA which restricts the right of the Petitioner to claim the compensation on account of Part Loading would be violative of Section 23 of the Contract Act, therefore, the Respondent's contention that the right to claim damages under the law is barred as only amounts payable under Schedule 7& 11 of the PPA is payable, is untenable in law. The Hon'ble Delhi High Court in *Simplex Concrete Piles (India) Ltd. vs. Union of India, 2010 SCC OnLine Del 821*, has held that contractual clauses which bar

and disentitle a party from claiming damages, which it is entitled to claim by virtue of Sections 55 and 73 of the Contract Act, are void by virtue of Section 23 of the Contract Act.

d) Thus, the Petitioner has an independent right, distinct from the right emanating from the IEGC, under Section 73 of the Contract Act to claim damages on account of conduct which is attributable to the Respondent in the present case, i.e., low scheduling and consequent Part Load operation of the generation station, independent of there being any contractual clause enabling or restricting such compensation.

e) The Petitioner has already pleaded in the preceding portion of this Rejoinder that there is a direct correlation between the RFP, the Bidding Guidelines and the PPA. The criteria used to identify a successful bidder is SHR (Quoted Heat Rate); and moreover, the Energy Charges is being paid based on this Quoted Heat Rate, yet, the SHR increases due to the operation of the Project at a lower load, which is attributable to the Respondent. As a result, additional coal is consumed to operate the Project to generate the same amount of energy for which the Petitioner is not paid (for such an additional quantum of coal). The Respondent/ its predecessor invited bids on the solemn promise that the efficiency quoted in the bid would be ensured. It would be one matter if the SHR had increased due to the fault of the Petitioner. However, that is not the case. The Respondent has acted in disregard to that solemn promise by contributing unilaterally to the increase in SHR, while it

continues to pay Energy Charges based on SHR of 2400 kcal/Kwh. This is nothing but a breach by the Respondent for which the Petitioner has to be compensated.

f) Therefore, if not by way of damages, the Petitioner is entitled to compensation by way of restitution as the Respondent is being unjustly enriched, which is also an independent basis for making claim for compensation on account of part loading. While Schedule 7 of the PPA provides for payment of Energy Charges based on Quoted SHR, in reality, the SHR is increasing and is higher than the Quoted SHR as a result of Part Loading. The Respondent is paying based on SHR @ 2400 kcal/kWh, yet the Petitioner has to burn more coal than otherwise necessary as the SHR is higher than 2400 kcal/kWh. The Respondent is thus getting unjustly enriched as it is paying lesser Energy Charges than the actual expenditure being incurred by the Petitioner.

g) That the Respondent has not made any submissions on the Petitioner's right to compensation by way of restitution as the Respondent is being unjustly enriched as it is not paying for the sums the Petitioner is expending at its behest.

5.10 In the light of the submissions made hereinabove, the Petitioner reiterates all its prayers as submitted in the Petition filed before this Commission.

6. The Petition was listed on 16.10.2024 for arguments. The Ld. Counsel appearing for the parties argued the matter mainly on the basis of their written submissions. On the issue of the doctrine of

unjust enrichment raised by the Petitioner, the Ld. Counsel of PSPCL submitted that it is generally applicable in a Tax Regime and not in contracts and as such has no application to the dispute in this case. Moreover, there is no wrongful benefit to PSPCL as alleged by the Petitioner. After hearing the parties, the Order was reserved with the observation that the parties may file written arguments, if any, within one week. PSPCL and TSPL submitted their respective written submissions on 28.10.2024 and 29.10.2024, in line with their earlier submissions and oral arguments.

7. Analysis and Decision of the Commission

The Commission has examined the submissions and arguments thereon by the parties. The Petitioner (TSPL) is seeking payment/ entitlement of monetary compensation on account of part-loading/ low scheduling by the Respondent (PSPCL). TSPL's plea is that the SHR of 2400 Kcal/Kwh was quoted considering it to be a Base Load plant. However, the Respondent PSPCL, by making the plant operate at part load, has altered the commercial bargain and caused loss to the Petitioner as the SHR/consumption of fuel increases due to the operation of the Project at a lower load, for which it needs to be compensated.

On the contrary, PSPCL's contention is that there is no provision in the PPA dated 01.09.2008 which provides that TSPL is eligible for compensation on account of variation in scheduling of power by PSPCL. TSPL cannot make any claims de-hors the provisions of the PPA. It was further submitted that the quoted SHR is a bidding parameter and one of the primary considerations for selection of the

lowest bidder and therefore is sacrosanct and is not open to variation. It was further added that issue raised herein by the Petitioner is no longer res integra having been rejected by this Commission and the Appellate Tribunal in the case of a similarly placed project of Nabha power Limited (NPL) in Petition No. 27 of 2015 which has also attained finality at the level of Hon'ble APTEL and the Hon'ble Supreme Court. The Petitioner has however, contended that the said decision cannot be made applicable in the present case as the facts and circumstances being pleaded here are materially different. The Commission examines the contrary and divergent submissions as under:

7.1 Issue of Limitation:

While, PSPCL vide its reply dated 26.02.2024 has contended that the claims of the Petitioner are barred by limitation, TSPL's plea is that the three-year limitation period for its claim for FY 2017-18 would have originally come to an end on 01.04.2021. However, in view of the waiver allowed by the Hon'ble Supreme Court Order dated 10.01.2022 in Suo Motu Civil Writ Petition (C) No. 03/2020 allowed for the Covid period, the balance period of limitation (381 days) between 15.03.2020 to 28.02.2022 would become available to the Petitioner with effect from 01.03.2022, extending the limitation period to 17.03.2023. Since the demand was made by the Petitioner on 09.09.2023, therefore, its claim for compensation on account of Part Loading for FY 2017-18 is also not hopelessly barred by limitation as alleged by the Respondent. TSPL further submitted that there is 'sufficient cause' to condone the delay in terms of Section 5 of the Limitation Act in the present case as

the Petition could only be filed after the data over a span of time is analyzed by the Petitioner.

The Commission observes that, as admitted by the Petitioner itself, its claim for FY 2017-18 is barred by Limitation even after accounting for the waiver granted by the the Hon'ble Supreme Court for the Covid period. Further, the Commission also refers to Section 5 of the Limitation Act 1963 cited by the Petitioner, which reads as under:

> *"**5. Extension of prescribed period in certain cases.—**Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."*

As is evident, condonation of the delay is permissible if an applicant satisfies the court that he had sufficient cause for not preferring the appeal within such period. The Commission observes that simply submitting that it was in process of analysing the data over a span of time to file the petition is not sufficient nor convincing in view of the fact that its first unit was commissioned way back in July 2014, giving the Petitioner more than adequate time and data for analysis.

7.2 Nabha Power Limited (NPL's) case:

The Commission refers to its Order dated 07.10.2015 in Petition No. 27 of 2015 filed by NPL, as under:

> *"**Findings and Decision***
>
> *The Commission after careful consideration of the submissions made by both the parties finds that SHR was the bidding component along with the capacity charges quoted by NPL. It is fair to assume that NPL would have factored in all*

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

Further, Hon'ble APTEL vides its Judgment dated 17.05.2018 in Appeal No. 283 of 2015 filed by NPL, while upholding the above Order of the Commission, has observed as under:

*"**Issue No. A***

9.1 The Appellant has submitted that the energy charges being paid under the PPA in terms of Article 1.2.3 of the Schedule 7, based on the fixed SHR i.e. 2268 Kcal/Kwh. However, in reality, the SHR is more on account of operation of the project at a low/varying load. The Appellant has further contended that the SHR increases when a plant is made to operate at a lower load. It is clear from the review of the CERC in the Fourth Grid Code Amendment Regulations, 2010 dated 29.04.2016 by way of which, the Central Commission has provided the extent of the increase in the SHR in terms of the percentage at different load levels. The Appellant has also brought out that the basic underline principal of the PPA read with the DPR, RFQ and RFP is that PSPCL must ensure that such operating conditions are made available to the Appellant which can ensure operation of the Project as a Base Load Plant within the 'Supercritical Parameters'. To support its contention, the Appellant has quoted the definitions of Base Load Plant from the Reports/Regulations of CEA.

……..

Our Findings

9.8 We have considered the submissions of the learned counsel appearing for the Appellant and also the learned counsel appearing for the Respondent on this issue and also perused the decisions of various judgments cited by the parties. It is a fact that the reference power plant was envisaged to be a Base Load Station and to have technical parameters of 'Supercritical Plant'. As per definition contained in the CEA Regulations, 2010 for technical standards for construction of electrical plants and lines, the 'Base Load Operation' means operation at maximum continuous rating (MCR) or its high fraction and the MCR means maximum continuous output at the generator terminals as guaranteed by the manufacturer at the rated parameters. In fact, in an ideal situation, the Base Load Plants

having 'Supercritical Parameters' should be facilitated to operate at MCR or its high fraction and at the same time, such plants should be capable of operating at technical minimum limit with specified ramping up or ramping down. Admittedly, the operation of such plants at low load or at varying load would result into higher SHR than the rated one. It is the case of the Appellant for which it is seeking compensation though not specifically stipulated in the PPA agreed to between the Appellant and the Respondent. We note that Appellant is not aggrieved for violation of any provision of the PPA and seeks ways and means to get compensated by the implied terms beyond the ambit of the PPA. It is also relevant to note that the competitive bidding was concluded primarily based on the quoted Station Heat Rate being the sole important element among the other parameters envisaged through the bidding documents. While PPA is a binding document for the parties and cannot be subjected for re-defining by any of the parties merely on account of subsequent development like in this case with specific reference to increase in SHR due to low load operation of the plant.

9.9 We agree with the submissions of the PSPCL as well as the findings of the State Commission that once competitive bidding is concluded and PPA signed, the rights and obligations of both the parties get crystallized through PPA and it emerges to be a binding instrument for the parties. The operation of supercritical base load station at part load or varying load and resultant increase in SHR has been acknowledged at various Government Forums and accordingly, the earlier technical standards, grid code and Competitive Bidding Guidelines have been amended with a specific consideration of allowing increase in SHR on account of reduction in MCR due to part load operation. While these changes would apply to future projects, the same cannot be applied to old plants decided on earlier parameters of the bid documents. ***We, therefore, opine that the***

claim of NPL arising out of higher SHR is beyond the periphery of concluded PPA and the provisions of PPA are being scrupulously implemented by PSPCL. Hence, we do not find any rationale in re-opening or re-interpreting the provisions enshrined under the PPA.

Issue No. 2

9.10 The Appellant has contended that it is suffering losses on account of reasons not attributable to it but is solely on account of the Respondent No. 1 failing to meet its unequivocal representations made at the stage of bidding. Thus, a remedy can be fashioned by a Sector Regulator i.e. State Commission which is required to take care of the losses of the Appellant and protect the interests of generator and procurer in an equitable manner. However, the State Commission has failed on this account without redressal of the Appellant's problem. The Appellant has brought out that the State Commission while exercising regulatory jurisdiction has statutory powers to regulate the tariff of a project and such powers extend beyond the adoption of tariff. The Appellant has further submitted that irrespective of whether exercise of its inherent powers under the Act, can definitely provide recourse to the Appellant as the SHR of the project is getting adversely impacted on account of the Respondent No.1. In this regard, the Appellant has placed reliance on the judgment of the Energy Watchdog vs. Central Electricity Regulatory Commission and Ors. etc. (2017) 14 SCC 80 (Energy Watchdog Matter).

……..

Our Findings

9.14 While taking note of the arguments and submissions of the Appellant and the Respondent and also, findings of various judgments of the Apex Court and this Tribunal, we find that the PPA entered into by the parties is a statutory and binding instrument which crystallises the rights and obligations of the involved parties. Accordingly, the same would need to

be interpreted in the spirit of agreed terms and cannot be defined or derived in its "implied term". The Hon'ble Supreme Court in GUVNL case (2017) has also held that PPAs are binding and cannot be varied by the Regulatory Commission. ***Thus, it is clear that the State Commission by the exercise of its regulatory powers cannot fashion a relief for the Appellant (NPL) which is not stipulated in the concluded PPA between the parties.***

Issue No. 3

9.15 The Appellant has claimed that the Respondent No. 1 made representation on the plant having to be developed as a Base Load Plant which would be operated on Supercritical Parameters. As such, it amounts to an obligation on the part of the PSPCL to provide operating conditions to ensure operation of the plant according to the desired technical parameters. Therefore, it amounts to breach of an obligation by the Respondent No. 1 and it is responsible to compensate the losses being incurred by the Appellant.

……

Our Findings:

9.20 We have carefully evaluated the rival contentions of both the parties and note that there is no breach of obligations by any of the parties as far as the provisions made out in the concluded PPA are concerned. The Appellant has not indicated anyone provision under the PPA which is being violated by the Respondent. The findings and decisions contained in various judgments cited by the parties clearly hold that the PPA being the binding and statutory instrument, both the parties have to honor the same in true spirit and should not search a way to wriggle out any of the agreed provisions under the PPA for taking benefit beyond the ambit of the PPA. ***In fact, the provisions contained in the agreed PPA, would need to be interpreted in its real terms and not in any implied form as being***

claimed by the Appellant. It is, thus, amply clear that there does not appear a case for invoking doctrine of promissory estoppels by the Appellant."

As is evident, vide its above judgment, Hon'ble APTEL, after acknowledging the NPL's plea that the reference power plant was envisaged to be a Base Load Station, operation of which at low load or at varying load would result into higher SHR than the rated one has, however, noted that the competitive bidding was concluded primarily based on the quoted Station Heat Rate being the sole important element among the other parameters envisaged through the bidding documents and has held that PPA is a binding document for the parties and cannot be subjected for re-defining by any of the parties merely on account of subsequent development like in this case with specific reference to increase in SHR due to low load operation of the plant.

The Commission notes that the case of the Petitioner herein is also precisely the same. It is also pleading that the energy charges being paid under the PPA are based on the fixed SHR (of 2400 Kcal/Kwh) quoted by it, considering it to be a Base Load Plant. However, the actual SHR/consumption of fuel is coming out to be higher on account of the Part Loading/low-scheduling of electricity by PSPCL. TSPL is therefore seeking payment/entitlement for compensation without citing any provision for the same in the PPA. Accordingly, TSPL's said pleas being no different or distinct from that of NPL in the above quoted case, stand disposed of in terms of the above Orders of the Commission/Hon'ble APTEL.

Further, the Commission also examines the other pleas made by the Petitioner in the following part of this Order.

7.3 Provisions of Regulation 6.3B of the IEGC:

The Petitioner's plea is that herein its claim for compensation on account of Part Loading is based on the provisions of Regulation 6.3B of the IEGC notified on 29.04.2016 and the mandated consistency of the State Grid Code (SGC) with the IEGC, as required under Section 86(1)(h) of the Electricity Act as well as the SGC, which was not the case in the Nabha case (Supra).

Whereas the Respondent's contention is that in the absence of any such provision in the Punjab State Grid Code, the said compensation is not payable, as held by the Commission in its Order dated 06.03.2019 in Petition No. 68 of 2017 while deciding the issue of IEGC compensation in the matter of GVK Power Limited (Goindwal Sahib). Moreover, Clause 4 of Regulation 6.3B itself states that in case of a generating station whose tariff is neither determined nor adopted by the Central Commission, the concerned generating company shall have to factor these provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule. Since there is no such provision factored in the PPA between TSPL and PSPCL, TSPL cannot maintain any such claim to get compensated beyond the scope of the PPA.

The Commission refers to Regulation 6.3B of the CERC (IEGC) (4th Amendment) Regulations2016, which reads as under:

*"**6.3B Technical Minimum Schedule for operation of Central Generating***

Stations and Inter-State Generating Stations

1. *The technical minimum for operation in respect of a unit or units of a Central Generating Station or inter-State Generating Station shall be 55% of MCR loading or installed capacity of the unit of at generating station.*
2. *The CGS or ISGS may be directed by concerned RLDC to operate its unit(s) at or above the technical minimum but below the normative plant availability factor on account of grid security or due to the fewer schedules given by the beneficiaries.*
3. *Where the CGS or ISGS, whose tariff is either determined or adopted by the Commission, is directed by the concerned RLDC to operate below normative plant availability factor but at or above technical minimum, the CGS or ISGS may be compensated depending on the average unit loading .....*
4. *In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum schedule.*
5. *The generating company shall keep the record of the emission levels from the plant due to part load operation and submit a report for each year to the Commission by 31" May of the year.*

.....”

a) As is evident from the heading as well as the contents of the impugned Regulation 6.3B of the IEGC reproduced above, it is intended to cover the operation of Central Generating Stations (CGS) and Inter-State Generating Stations (ISGS) only and not the intra-State projects as is the case of the Petitioner herein i.e., TSPL. Furthermore, the same issue, whether the

provisions of Regulation 6.3B of the IEGC stated specifically for CGS and ISGS are also applicable on the intra-State Generating Entities considering the mandate that the State Grid Code should be consistent with the IEGC, also stands answered by Hon'ble APTEL's Judgment dated 22.08.2016 (*in Appeal No. 34 of 2016 -Jaiprakash Power Ventures Limited v. Madhya Pradesh Electricity Regulatory Commission and Ors), as under*:

"e) On the Issue ... related to Technical Minimum, we observe as follows:

i. ..Clause 6.3 (B) of the IEGC provides on the aspect of Technical Minimum as under:

…….

ii. As per the IEGC itself, the Technical Minimum in the case of entities other than the Central Sector Generating Units and Inter State Generating Stations have to be in accordance with the PPA entered into between the parties.

……

iv. The Appellant has contended that the IEGC is required to be followed by all concerned including the generating units which are only Intra State Generating Entities and not merely by the Central Sector Generating Units and Inter State Generating Stations. It has also been contended that in terms of Section 86(1)(h) of the Electricity Act 2003 that the Grid Code to be notified by the State Commission is to be consistent with the Grid Code notified by the Central Commission. There is no dispute on the scope of the applicability of the Indian Energy Grid Code to the State Generating Units. The IEGC would apply to all entities connected to the Grid irrespective of whether they are connected to the Inter State Grid or the Intra State Grid. Both the Inter State and Intra State Grid are

integrated. Respondent No. 3, MP Discoms and other entities in the State of Madhya Pradesh connected to the integrated Grid are required to follow the IEGC. The issue is not on the applicability of IEGC to the Intra State Entities such as Respondent No. 3, MP Discoms and the Appellant's Generating Units. The issue is whether within the scope of IEGC as notified by the Central Government and amended from time to time, is there any requirement for the generating units other than the Central Sector Generating Units and Inter State Generating Stations to implement Technical Minimum and more, particularly, is there any requirement under the IEGC or any other Regulation for a State Entity such as Respondent No. 3 acting on behalf of MP Discoms to schedule power to the extent of the Technical Minimum qua the installed capacity, when Respondent No. 3 had contracted not for the entire capacity but only part of the capacity.

v. In the absence of any mandatory provision either under the IEGC notified by the Central Commission or the State Grid Code notified by the State Commission or under any other statutory Regulation, the obligation of Respondent No. 3 to schedule power is traceable only to the PPA executed between Respondent No. 3 and the Appellant. Clause 6.3B(4) of the IEGC also affirms the above in respect of the generating stations other than the Central Sector Generating Stations and Inter State Generating Stations.

……..

viii. As per IEGC 2016, in order to claim compensation because of lower schedule, provision under Clause 6.3 B (4) provides that "In case of a generating station whose tariff is neither determined nor adopted by the Commission, the concerned generating company shall have to factor the above provisions in the PPAs entered into by it for sale of power in order to claim compensations for operating at the technical minimum

schedule".

ix. In view of above in the absence of any statutory requirement or PPA conditions mandating the Respondent No. 3 to schedule minimum quantum of power from the generating unit of the Appellant, the Respondent No. 3 cannot be compelled to schedule at near constant load or the quantum of power to reach the Technical Minimum …."

Notwithstanding the Petitioner's submission that their claim for compensation on account of Part Loading was made prior to the insertion of Regulation 6.3B in the IEGC, the Commission notes Hon'ble APTEL's observation on the scope of said provisions of the IEGC. On the issue of whether there is any requirement for the generating units, other than the Central Sector Generating Units and Inter State Generating Stations, to implement Technical Minimum, Hon'ble APTEL has held that in the absence of any mandatory provision either under the IEGC notified by the Central Commission or the State Grid Code notified by the State Commission or under any other statutory Regulation, the obligation to schedule power is traceable only to the PPA executed between the parties. This is also affirmed by Clause 6.3B (4) of the IEGC which is completely relevant to the present petition filed by TSPL.

b) The Petitioner has cited Clause 4 of Regulation 6.3B to claim that the provision of such compensation has to be factored in and given effect to while interpreting the PPA. It was pleaded that since the Petitioner's tariff has been adopted by this Commission thus, there was no need of specific clauses in the PPA for claiming such compensation. However, Hon'ble

APTEL's Order reproduced below clearly demolishes such claims by TSPL.

> *"e)ii. As per the IEGC itself, the Technical Minimum in the case of entities other than the Central Sector Generating Units and Inter State Generating Stations have to be in accordance with the PPA entered into between the parties."*

c) The Commission also refers to Hon'ble APTEL's Order *(in Indian Captive Power Producers Association vs. GERC, 2020 SCC OnLine APTEL 16),* cited by the Petitioner. Therein, while observing that the Respondent Commission cannot keep a closed eye to the regulatory developments brought out by the CERC and other State Commissions for the purpose of creating a conducive environment for development of the power market, has only concluded that:

> *"71. . As a matter of fact, that Respondent Commission is not bound by the Regulations/amendment brought out by the Central Commission and other State Regulatory Commissions but the principles and methodologies of the Central Commission carry a strong persuasive value in terms of Section 61 of the Electricity Act."*

d) The Commission, in its Order dated 06.03.2019, while deciding the issue of IEGC compensation in Petition No. 68 of 2017 in the matter of GVK Power Limited (Goindwal Sahib) has also held that in the absence of any such provision in the Punjab State Grid Code, the said compensation is not payable.

7.4 It is also the Petitioner's plea that even the absence of such provision for compensation on account of Part Loading in the State Grid Code doesn't prevent this Commission from granting such

relief to TSPL. It has placed its reliance on this Commission's Order dated 19.04.2018 in Petition No. 05 of 2018 and the CERC Order dated 20.04.2023 in Petition No. 281/MP/2021 titled as MB Power (Madhya Pradesh) Limited vs PTC India Limited. The Commission examines the same as under:

a) The Commission refers to its Order dated 19.04.2018 in Petition No. 05 of 2018, the relevant part of which is reproduced below:

> **"*2.4 PSPCL'S Own Generation***
>
> ***2.4.1 Thermal Generation:***
>
> ***……..***
>
> ***Auxiliary Consumption**:*
>
> *PSPCL submitted that it has striven hard to achieve the normative auxiliary consumption approved by the Commission. However, the actual auxiliary consumption is slightly higher than that of approved by the Commission for all the three Generating Stations. PSPCL has submitted the actual auxiliary consumption of GNDTP, GGSSTP and GHTP as 11.16%, 9.66% and 8.87% respectively. ……*
>
> *……*
>
> ***Commission's Analysis**:*
>
> *The Commission observes as under:*
>
> *……..*
>
> *c) Regarding reference to regulation 6.3B of CERC (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 in its submissions and request for approval of relaxed norms, the Commission notes that the referred CERC amendment is an amendment in the Indian Electricity Grid Code Regulations, and not in Tariff Regulations, and the same has not been yet adopted by PSERC in its State Grid Code. The*

Commission further observes that, Proviso (ii) to Regulation provides that "the compensation so computed shall be borne by the entity that has caused the plant to be operated at schedule lower than corresponding to Normative Plant Availability Factor up to technical minimum based on the compensation mechanism finalized by the RPCs". As PSPCL is managing both the businesses, of generation and distribution in the State, as such, PSPCL itself is responsible for operation of its plants as well as scheduling of power from its own generation plants. Accordingly, compensation (due, if any) to generation wing shall be recoverable from its distribution wing.

The Commission, therefore, decided to retain the normative auxiliary consumption for GNDTP at 11.00% as discussed above and for GGSSTP & GHTP at 8.50% & 8.50% respectively, in line with CERC Tariff Regulations, at the levels already approved in the Tariff Order for FY 2016-17…"

As is evident, in the above referred Order, the Commission has decided to retain the normative parameters and has not allowed any relief to the Thermal Power Stations of PSPCL. Therefore, the Petitioner's plea that the Commission had allowed the compensation on account of Part Loading even in the absence of any provision for same in the State Grid Code is not correct. In fact, the Commission, after holding that the amendment in the IEGC has not been yet adopted by PSERC in its State Grid Code, has referred to Proviso (ii) to the Regulation 6.3B specifying that *"the compensation so computed shall be borne by the entity that has caused the plant to be operated at schedule lower than corresponding to Normative Plant Availability Factor up to technical minimum based on the*

compensation mechanism finalized by the RPCs", to observe that, since PSPCL is managing both the businesses of generation and distribution in the State it itself is responsible for operation of its plants as well as scheduling of power from its own generation plants, the compensation to generation wing **(due, if any i.e., even after adoption of the IEGC provisions)** shall be recoverable from its distribution wing. The facts of the case between PSPCL's internal generation plants and TSPL's PPA are also distinct and different.

b) Further, reliance placed by the Petitioner on the CERC Order dated 20.04.2023 in Petition No. 281/MP/2021 (MB Power Madhya Pradesh Limited vs PTC India Limited) is also misplaced. Firstly, the Petitioner therein is an ISGS having Composite Scheme. Secondly, the Respondent therein (i.e., the distribution company UPPCL) without disputing the compensation has only sought that the compensation be made payable only after an amendment to the PPA and the requisite approval of Uttar Pradesh Electricity Regulatory Commission, as is evident from the following extract of the Order:

> *"26. ….that subsequent to adoption of tariff by UPERC vide its Order dated 24.6.2014 in Petition No. 911 of 2013 under the UP PPA dated 18.1.2014, the Petitioner started supplying power to more than one State from 20.05.2015 (Unit-1 COD) onwards and hence the Petitioner's Project constituted Composite Scheme. By virtue of the Petitioner's Project falling under Composite Scheme, this Commission has the necessary jurisdiction to adjudicate upon matters between the Petitioner and UPPCL……..*

…….

29. We also note that UPPCL has not disputed the compensation invoice but their contention is only limited to the point that compensation is payable ***only after the amendment of the PPA and approval of the UPERC. ….****"*

7.5 TSPL has further submitted that, apart from the IEGC, it has an independent right to claim damages/compensation under Section 73 of the Contract Act or Principle of Restitution on account any adverse impact on the quoted SHR of 2400 kCal/kWh due to the conduct of PSPCL in terms of low scheduling.

a) The Commission refer to the provisions of Section 73 of the Indian Contract Act 1872, which reads as under:

*"**73. Compensation for loss or damage caused by breach of contract**— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

As is evident, Section 73 of the Contract Act provides for entitlement of compensation for loss/damage caused by breach of a contract. However, the Petitioner could not cite any provision under the PPA which is being violated by the Respondent. In fact, the provisions of the PPA do not contain any mandate on the Respondent to schedule a specific quantum of electricity, though it provides for payment of fixed

charges for any unscheduled available capacity within the contracted capacity. Thus, the impugned claim is beyond the periphery of the concluded PPA i.e., it has not arisen out of any breach of obligations as far as the provisions made out in the concluded PPA is concerned.

b) On the issue of the Petitioner's plea for consideration of impugned compensation on the Principle of Restitution, PSPCL's contention is that it cannot be said to be unjustly enriched as alleged by the Petitioner. The Commission notes that the Petitioner project is a bid project whose tariff is payable as per the performance parameters quoted in its bid and not on actuals. Also, it is not the case of the Petitioner that PSPCL is not fulfilling its part of the obligation of payments for the power availed, including the capacity charges for unscheduled declared capacity in terms of the PPA/contract entered into between the parties.

Also, as held in the case of similarly bid project of NPL vide its Order dated 07.10.2015 in Petition No. 27 of 2015 which has also attained finality before Hon'ble APTEL and the Hon'ble Supreme Court, the SHR was the bidding component along with the capacity charges for allocation of the impugned project. As opined in these orders, it is fair to assume that all circumstances and contingencies would have been factored in while making the bid as it was a commercial decision of the Petitioner to quote a specific value of SHR along with the capacity charges. The same is also evident from the fact that the quoted SHR of 2400 kcal/kWh of the Petitioner's project is

much higher than the SHR of 2268 kcal/kWh of the similarly placed project of NPL. Having been successful in the competitive bidding process on the basis of the quoted SHR, it is not open to the Petitioner to now seek a change in its bid parameters to claim the purported restitution beyond the scope of the provisions agreed to in the PPA.

c) On the issue of the Petitioner's plea that it has been rendered remedy less, the Commission notes that in addition to the provision in the PPA for payment of capacity charges for capacity declared available by the Petitioner and not procured by PSPCL, there also exists a provision in the PPA entitling the Petitioner to sell such un-availed capacity to any person without losing its right to receive the capacity charges for same from PSPCL. This is an enabling provision in the PPA for the Petitioner to maintain its quoted SHR. The Commission refers to the said provisions of the PPA, reproduced below:

"*4.4.2 Notwithstanding Article 4.4.1, the Seller shall be permitted to sell power, being a part of the Available Capacity of the Power Station to third parties if:*

(a) there is a part of Available Capacity which has not been Dispatched by the Procurer.

4.4.3 If the Procurer does not avail of power upto the Available Capacity provided by the Seller and the provisions of Article 4.4.2 have been complied with, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Procurer for such un-availed Available Capacity. In such a case, the sale realization in excess of Energy

Charges shall be equally shared by the Seller with the Procurer. In the event, the Seller sells such Available Capacity to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller without obtaining the prior written consent of the Procurer, the Seller shall be liable to sell such Available Capacity to such entity at tariffs being not less than the Tariff payable by the Procurer. During this period, the Seller will also continue to receive the Capacity Charges from the Procurer. Upon the Procurer not availed of the Available Capacity, as envisaged under this Article, intimating to the Seller of its intention and willingness to avail of the part of the Available Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and said third party, commence supply of such capacity to the Procurer from the later of two (2) hours from receipt of notice in this regard from the Procurer or the time for commencement of supply specified in such notice."

As is evident, the PPA does not mandate the requirement of PSPCL's approval/response to sell the unscheduled power as is being projected by the Petitioner. The consent of PSPCL is mandated only in case the Seller intends to sell such un-requisitioned available capacity to its shareholders or any direct or indirect affiliate of the Seller/shareholders of the Seller at tariffs less than the Tariff payable by the Procurer.

Therefore, the Petitioner's plea that PSPCL's failure to respond to TSPL's proposals to sell power to third parties in 2016 negates any claim that TSPL could exercise this right independently is misconceived. Thus, the Petitioner's plea that it has been rendered remedy less is also misplaced.

d) It has already been held in the case of similarly bid project of NPL, vide the Commission's Order dated 07.10.2015 in Petition No. 27 of 2015 which has also attained finality before the Hon'ble APTEL and the Hon'ble Supreme Court, that having been successful in the competitive bidding process on the basis of the quoted SHR, it is not open to claim compensation on account of any adverse impact on SHR due to PSPCL not procuring the capacity declared available, especially when there is no provision in the bidding documents including the PPA for the same. The Commission also takes note of and agrees with PSPCL's submission that the provisions of the PPA represent the complete understanding of both parties with regards to the declaration of availability, scheduling and recovery of consequent charges in terms of Article 18.4 and 18.17 of the PPA as reproduced below:

"18.4 Entirety

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

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

……..

18.17 No Consequential or Indirect Losses

The liability of the Seller and the Procurer shall be limited to that explicitly provided in this Agreement. Provided that notwithstanding

anything contained in this Agreement, under no event shall the Procurer or the Seller claim from one another any indirect or consequential losses or damages."

Accordingly, the Commission finds no reason to allow any relief which is not in terms of the PPA entered into between the parties.

The Petition is thus dismissed.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 27.11.2024