

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

**Petition No. 01 of 2018  
Date of Order: 27.05.2019**

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

In the matter of: Petition under Section 86 (1) (f) and other provisions of the Electricity Act, 2003 along with the provisions under the Punjab State Electricity Regulatory Commission (Code of Business Conduct) Regulations, 2005 and amendments carried out thereto for carrying out amendments to the Amended and Restated Power Purchase Agreement dated 25.06.2009 of 2x270 MW Goindwal Sahib Coal Based 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**

The present petition has been filed by GVK Power (Goindwal Sahib) Limited (GVK), inter alia praying for Consequential relief

pursuant to the Arbitral Award dated 10.04.2017, Amendment of the PPA to incorporate suitable provisions for procurement of fuel and computation of fuel cost and Approval of the Commission for GVK to procure coal, provisionally allocated to it under the Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India ("Shakti 2017").

2. The submissions made by GVK, in brief, are as under:

2.1. GVK entered into an Amended and Restated Power Purchase Agreement (Restated PPA/PPA) on 26.05.2009 with Punjab State Electricity Board (predecessor in interest of Punjab State Power Corporation Limited, hereinafter referred to as PSPCL) for the supply power from GVK's 2x270 MW Project and was allocated the Tokisud Coal Block as a captive coal mine for the Project.

2.2. In terms of the Restated PPA, it had been contemplated that coal for the Project would be procured from the captive coal block at a cost not exceeding the cost of coal from PSPCL's Panchwara captive coal block.

2.3. On 24.08.2014, the Hon'ble Supreme Court passed judgment in the case of Manohar Lal Sharma vs the Principle Secretary & Ors. (hereinafter referred to as Coal Judgment) and subsequent Cancellation Order dated 24.09.2014 (hereinafter referred to as Cancellation Order). In terms of the Coal Judgment and the Cancellation Order, the allocation of the Captive Coal Blocks to GVK was cancelled.

2.4. On 11.05.2015, GVK filed the Petition no. 33 of 2015 seeking relief on account of Change in Law and Force Majeure

events i.e. the cancellation of GVK's Captive Coal Blocks pursuant to the ibid Coal Judgment and the Cancellation Order.

2.5. On 12.08.2015, the Commission passed an Order dated 12.08.2015 and directed that the disputes raised in the Petition no. 33 of 2015 and Petition no. 65 of 2013 be referred to Arbitration. The Commission vide Order dated 02.09.2015 constituted the Arbitral Tribunal for adjudication of disputes raised in Petition No. 33 of 2013 and Petition no. 65 of 2013. GVK in furtherance to the above orders filed Claim Petition no. 2 (corresponding to Petition no. 33 of 2015) before the Arbitral Tribunal whereby seeking the following reliefs:

- a. Declare that the cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Change in Law Event in terms of Article 13 of the PPA.
- b. Declare that the Promulgation of the Ordinance is a Change in Law event in terms of Article 13 of the PPA.
- c. Declare that the cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Force Majeure Event in terms of Article 12 of the PPA.
- d. Declare that the Promulgation of the Ordinance is a Force Majeure Event in terms of Article 12 of the PPA.
- e. Devise an alternate mechanism for the sourcing of Fuel in terms of the suggestions provided by the Petitioner

in Paragraph 109 to 115 above including necessary amendments to the Amended and Restated PPA.

- f. Grant consequential extension of SCOD till the issue of procurement of fuel is decided by this Hon'ble Commission.

2.6. The Arbitral Tribunal vide Order dated 10.04.2017 allowed claims (a) to (d) and (f) and decided the issues relating to "Change in law" and "Force Majeure" in favor of the Claimant viz., Cancellation of Coal Blocks pursuant to Coal Judgment and Order of the Hon'ble Supreme Court. The Arbitral Tribunal further held that subsequent Promulgation of Ordinance are "Change in law" events as well as "Force Majeure" events. Accordingly, the Claimant/Petitioner is entitled for extension of SCOD from date of Coal order till COD is actually achieved".

As regards the claim (e), the Arbitral Tribunal held that the Commission vide its Order 12.8.2015 has kept with itself the issue relating to alternate mechanism for sourcing fuel and did not refer the same to this Tribunal. Accordingly, the Tribunal did not grant any relief in respect of prayer (e) made in the Claim Petition.

2.7. GVK submitted that in the light of the Arbitral Award and to reflect the provisional allocation of long term coal linkage to the Project that certain provisions of the PPA are required to be amended. GVK in view of the above submissions prayed the Commission to allow the following amendments to be incorporated in the Restated PPA:

- a. Deletion of the reference made to the "Tokisud North Sub Block" and the "Saregarha Block", in the Recital of the PPA.
- b. Deletion of the definition of "Captive Coal Mines" under Article 1.1 of the PPA wherein reference is made to the "Tokisud North Sub Block".
- c. Definition of "Fuel" may be amended and read as "means primary fuel used to generate electricity namely, coal, including coal procured under SHAKTI scheme, domestic coal, imported coal or coal from any other source and/or combination of coal from one or more sources.
- d. Clause 1.2.3.2 "Source and Cost of Coal and Secondary Fuel" of Schedule – 6: "Tariff" of the Amended & Restated PPA.

2.8. GVK prayed for the following reliefs:

- a. Approval for the procurement of 1.70 MTPA coal from CCL and 6300 TPA of coal from SECL Korea Rewa under SHAKTI 2017;
- b. Amendment of the provisions of the PPA as detailed in Paragraph 29 of the Petition;
- c. Pass any such other and further reliefs as the Commission deems just and proper in the nature and circumstances of the present case.

3. The petition was fixed for admission on 24.01.2018. wherein during the hearing GVK submitted List of Dates/Event and PSPCL submitted Order dated 01.02.2016 passed by the Commission in

Petition no. 65 of 2013 and 33 of 2015 alongwith Ministry of Power directions dated 01.04.2018, Order dated 12.01.2018 passed by Uttar Pradesh Electricity Regulatory Commission in Petition no. 1278/2018 for approval of Supplementary PPA, Supplementary Agreement for long term coal linkage allocated under Shakti Scheme 2017, Documents submitted to Central Coalfields Limited by GVK on 19.01.2018, Documents submitted to South Eastern Coalfields Limited by GVK on 19.01.2018 and Intimation regarding COD and balance of life of plant for Coal Linkage under Shakti Scheme issued by CEA. GVK further sought approval for procurement of power under SHAKTI 2017 and submitted:-

- 3.1. That the coal procured under SHAKTI scheme is cheaper than the coal being procured from CIL through e-auctions and it shall be in the interest of the parties and the consumers in the State of Punjab if the procurement under SHAKTI 2017 is approved.
- 3.2. That the Uttar Pradesh Electricity Regulatory Commission (UERC) had approved the supplementary PPA to be executed between Lalit Power Generation Company Limited and UP Power Corporation Limited vide its Order dated 12.01.2018. The supplementary PPA was executed pursuant to Lalit Power Generation Company Limited being successful in the auction under SHAKTI 2017 and obtaining a long term coal linkage from various mines of CCL, SECL, NCL, MCL and ECL.
- 3.3. That PSPCL has already given its no objection to participation in the auction conducted under SHAKTI 2017. Moreover, since the discount bid by GVK is to be on the

gross billing, approval of the supplementary agreement and procurement of coal under SHAKTI 2017 would have no bearing on other disputes pending between the parties including deduction of amounts, inclusion of road transportation costs etc.

4. The Commission after hearing the parties, vide Order dated 30.01.2018, directed both GVK and PSPCL to hold an immediate meeting regarding the amendment in PPA dated 25.06.2009 and apprise the Commission along with the copy of minutes of meeting.

5. During the hearing, PSPCL in compliance to the directions of the Commission, filed signed copy of the minutes of the meeting held on 25.01.2018 with GVK, along with draft supplementary agreement for long term coal linkage allocated under the Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (2017- SHAKTI), duly initialed by both the parties. PSPCL submitted that the supplementary agreement has been approved by CMD, PSPCL and shall be signed by Director/Distribution, the designated authority for the purpose, latest by 01.02.2018.

The Commission noted that the supplementary agreement was for the sole and limited purpose of giving effect to the 2017-SHAKTI Scheme. The coal allocation under the said Scheme had been made to GVK on the basis of discount of two paise (Source 1) and one paisa (Source 2) offered by GVK in the coal auction, which the Commission found would be beneficial to the consumers of the State. Accordingly, the Commission vide Order dated 30.01.2018, approved the said supplementary agreement without prejudice to the rights and contentions of both the parties under

the Amended and Restated PPA dated 26.05.2009 and observed that it should be read as an integral part of the PPA. Both the parties were also directed to ensure strict adherence to the timelines stipulated in the 2017-SHAKTI Scheme. PSPCL was directed to file reply to the petition and GVK was directed to file rejoinder.

6. PSPCL in compliance to the above Order submitted its reply to the Petition. The submissions made therein are summarized, in brief, as under:

6.1. That to the extent of the coal allocation under the SHAKTI Scheme, the parties have executed an Amendment Agreement dated 01.02.2018 which has been approved by the Commission vide Order dated 30.01.2018. Therefore, to the extent of the amendment in the PPA required coal allocation for GVK, the parties have already agreed to and amended the PPA.

6.2. That for any further amendment to the PPA, the same can be made only with the consent of both parties as per the Article 18.1 of the PPA and therefore the directions sought for by GVK for amendment of the PPA as a mandate are misconceived and are liable to be rejected. GVK has no vested right to seek amendment of the PPA without the consent of the contracting party to the PPA.

6.3. That the Hon'ble Supreme Court in the case of Tata Power Company Limited vs. Reliance Energy Company Limited, (2009) has already settled the position that directions cannot be sought for or issued to create a contract between a generating company and a licensee. It is only the contract



that is entered into that can be approved by the Commission.

6.4. That GVK has sought to raise issues on the requirement of amendment of the PPA in view of other disputes and differences between the parties, including in regard to the implication of the cancellation of coal blocks allotted to GVK. The said disputes, differences and implications thereof cannot be subject matter of the present petition and any such amendment can be only with the consent of both parties.

6.5. That the parties are governed by the terms and conditions of the PPA as in existence and if the parties are entitled to any relief under the terms of the PPA, the same is subject to the adjudication by the Commission. The amendment of the PPA is however for the purpose of varying the rights and obligations of the parties, which can be achieved only with the consent of both the parties and not unilaterally.

7. During the hearing, held on 09.05.2018, GVK filed a compilation of the following:

- i. The Commission's Order dated 30.01.2018 passed in Petition no. 01 of 2018;
- ii. Supplementary Agreement for long term coal linkage allocated under Shakti Scheme 2017 dated 01.02.2018 executed by and between PSPCL and GVK;
- iii. Hon'ble Supreme Court's decision in Board of Control for Children in India vs. Kochi Cricket Private Limited and etc., 2018;
- iv. The Commission's Order dated 28.03.2018 passed in Petition no. 54 of 2017.

GVK further reiterating the submissions made in the Petition, compilation, list of dates and annexures to the Petition referred to the excerpts of Coal Judgment, Cancellation Order, Order dated 12.08.2015 passed by the Commission in Petition no. 33 of 2015, issues framed and findings by the Arbitral Tribunal in the Arbitral Award dated 10.04.2017; further submitted as under:

- a. That the Award dated 10.04.2017 has been challenged before the Commercial Court, Patiala by way of Arbitration Application No. 122 of 2017 by PSPCL. That in terms of Section 36 of the Arbitration Act (as amended with effect from 23.10.2015), there is no automatic stay on the enforcement of an Arbitral Award, hence, the Arbitral Awards are in force and have not been stayed. It is the legal duty of the Commission to give effect to/implement the Arbitral Awards. This position of law has been settled by the Hon'ble Supreme Court of India in Board of Control for Cricket in India vs Kochi Cricket Pvt. Ltd and etc. ("BCCI Case") 2018 where the Hon'ble Supreme Court has deprecated the concept of automatic stay on arbitral awards by virtue of simply filing a petition under Section 34 of the Arbitration Act 1996, (prior to the 2015 Amendment) and has stressed on enforcement/giving effect to arbitral awards.
- b. That in light of the Arbitral Award dated 10.04.2017 read with the Arbitration and Conciliation (Amendment) Act 2016 as interpreted by the Hon'ble Supreme Court in the BCCI Case, the Commission ought to allow amendment of the PPA to provide for procurement of coal from alternate sources and the method for computation of energy charge and in view of

the foregoing, the Commission is obliged in law for amendment of the PPA in terms of the present Petition being:

- i. References of Tokisud North Sub Block must be deleted since the same is unavailable to GVK.
  - ii. Source of coal must be revised to reflect the allocation of coal under Shakti 2017 as well as alternate sources.
  - iii. GVK is to be compensated for the landed cost of coal received at the Plant including road/rail transportation and other costs on actuals.
- c. With respect to PSPCL's contention that GVK has no vested right to seek amendment of the PPA without consent of the other party is incorrect. The present Petition pertains to consequential relief in terms of the Arbitral Award dated 10.04.201 and the Commission has the power to enforce the Arbitral Award dated 10.04.2017 and mould a suitable relief in terms of Section 86(1)(a) and (b) of the Electricity Act, 2003 read with Section 36 of the Arbitration and Conciliation Act and Articles 12 and 13 of the PPA.
- d. That PSPCL's reliance on the case of Tata Power Company Limited vs Reliance Energy Company Limited (2009) is misplaced. In the said case, the issue before the Hon'ble Supreme Court of India, inter-alia was whether the State Commission could exercise regulatory power to issue directions to a generating company to allocate available energy generated between two distribution companies. The Hon'ble Supreme Court held that a State Commission cannot

issue directions to a generating company as to which distribution licensee/consumer it may sell power since generation stood deregulated. The facts in the case of Tata Power Company Limited vs Reliance Energy Company Limited are wholly inapplicable in the present case since the present Petition invoked adjudicatory (not regulatory powers) powers and at present seeks enforcement of Arbitral Award.

- e. That the present case pertains to amendment of the PPA as a consequence of the Arbitral Award as well as to grant relief to GVK on account of change in law and force majeure events and the Commission has the power to determine the relief (including by way of amendment of the PPA) to reflect the changed methodology for procurement of fuel and determination of fixed cost/energy charges.
- f. That PSPCL's contention, there cannot be a mandate or direction sought for amendment of the PPA is misplaced and denied. The proposed amendments of the PPA are consequential relief in view of the findings of the Arbitral Tribunal declaring that the de-allocation of the Captive Coal Block is an event of Force Majeure and Change in Law.

The Commission after hearing the matter partly fixed the petition for hearing on 18.07.2018.

- 8. During the hearing on 18.07.2018, the Commission observed that clause 'a' of the prayer made by GVK, has been exhausted vide Order dated 30.01.2018 providing the arrangement of fuel as per SHAKTI Scheme, 2017. GVK submitted that the coal arrangement under SHAKTI Scheme is sufficient only for 62% of the total coal requirement for the project. GVK agreed that they

would approach the Commission afresh after making necessary long term arrangements for the remaining 38% coal requirement. On the issue of energy charges to be paid by PSPCL to GVK based upon the coal supplied under SHAKTI Scheme, PSPCL submitted that payment is being made as per clause-5 of the supplementary agreement dated 01.02.2018 in reply to which GVK informed that the same is at variance with the payment terms envisaged under SHAKTI Scheme, 2017.

9. The Commission thereafter vide Order dated 19.07.2018, directed both PSPCL and GVK to file their respective submissions by 01.08.2018 giving reasons and circumstances under which they have mutually agreed to the payment terms as captured in the supplementary agreement dated 01.02.2018. Further, both GVK and PSPCL were directed to file their reply to the contentions of the other party by 08.08.2018.

GVK in compliance to the above Order of the Commission, filed its submissions. GVK reiterating the submissions made earlier, further submitted as under:

9.1. That GVK was provisionally allocated 1.7 MTPA of G11 grade coal from CCL in Jharkhand and 6300 TPA of G6 grade coal from SECL Korea Rewa in Chhattisgarh pursuant to which SECL Korea Rewa and CCL issued LOIs to GVK declaring GVK as provisional successful bidder for the award of coal. The deadline for submission of the amended power purchase agreement as well as the approval of the Commission was to be filed by the 45<sup>th</sup> day from issuance of the Lol i.e. 04.02.2018. Thereafter, GVK filed the present Petition seeking approval for the procurement of coal under

Shakti 2017 as well as amendment of the Restated PPA executed between GVK and PSPCL.

9.2. With regards to computation of energy charges, GVK submitted that the same are to be computed on the basis of PSERC Tariff Regulations and that PSPCL was computing the energy charges payable to GVK on the basis of the interim arrangement put in place by the Commission's Order dated 01.02.2016 passed in Petition no. 33 of 2015 and Petition no. 65 of 2013 for coal received under Shakti 2017. Further, during the hearing on 18.07.2018, it was contended by PSPCL that the payments for supply of power shall be as per Article 5 of the Supplementary PPA.

9.3. That the energy charges payable to GVK are as per the provisions of the Restated PPA and the relevant Orders of the Commission. Further, the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation, Transmission and Wheeling Supply Tariff) Regulations, 2014 ("PSERC Tariff Regulations") contemplates reimbursement of cost of coal on actual basis. In terms of Paragraph 1.1 of Schedule 6 of the Restated PPA, the tariff will be determined by the Commission. The tariff is to be determined by the Commission in terms of Section 61, 62 and 64 of the Electricity Act, 2003 and that it is a settled law that Regulation under Section 178 or Section 181 of the Electricity Act, 2003 as the case maybe, would override contracts entered into between regulated entities as held by the Constitutional Bench of the Hon'ble Supreme Court in the

case of PTC India vs CERC & Ors. Accordingly, the Commission is required to consider the CIL notified price of coal for determining energy charges for GVK. GVK in view of the above submissions prayed that the Commission is required to determine the energy charges payable by PSPCL to GVK for supply of power in terms of the Punjab State Electricity Regulatory Commission Tariff Regulations as mandated by Regulation 2(b) of the said Regulations.

9.4. In terms of Regulation 37.1 and 37.2 of the Punjab State Electricity Regulatory Commission Tariff Regulations, energy charges are to be computed by the Commission on the basis of the landed cost of primary fuel i.e. actual cost. Regulation 39 provides that energy charges for thermal generating stations shall cover primary fuel cost and secondary fuel cost. Regulation 40, inter-alia provides that landed cost of fuel would include transportation cost by rail/road or any other means. Accordingly, the Commission is required to consider the price of coal as notified by CIL as primary fuel cost incurred by GVK along with the cost of transportation for determination of energy charges.

9.5. GVK on the issue of legal sanctity of Shakti 2017, submitted as under:

- i. That the terms and conditions for allocation of coal under Shakti 2017, specified in the Policy Guidelines issued by Ministry of Coal and Scheme Document including, stipulating that the price payable for the coal allocated by successful bidders are binding and have

the force of law.

ii. That the Policy Guideline issued by the Ministry of Coal has been approved by the Cabinet Committee on Economic Affairs on 17.05.2018 govern the allocation of coal. It is settled law that the policy decisions taken by an empowered group of ministers have the force of law if there is no legislation made by the Parliament occupying the field as held:

a. By the Hon'ble Supreme Court in the case of Reliance Natural Resources Ltd vs Reliance Industries (2010) provides as under:

“ .....  
286. *The Empowered Group of Ministers framed a utilization policy and also approved the price formula/basis submitted by RIL. It was constituted pursuant to Business Rules framed under Article 77(3) and its decisions are treated as the decisions of the Cabinet itself. It is a policy decision of the Government and has force of law since the field is not occupied by any legislation made by the Parliament. It is needless to state that under Article 73 of the Constitution the powers of the Union executive do extend to matters upon which the Parliament is competent to legislate and are not confined to matters over which the legislation has been passed already.....*”

b. The Hon'ble Appellate Tribunal for Electricity (APTEL)



in its judgment dated 23.03.2015 in Appeal No. 90 of 2014 titled Sasan Power Ltd vs Central Electricity Regulatory Commission & Ors at Paragraphs 42, 43. held that the decision of a Cabinet Committee creating two categories of diesel consumers and withdrawal of subsidy for bulk consumers has force of law and would amount to change in law.

c. The Hon'ble Supreme Court of India in its judgment dated 11.04.2017 titled Energy Watchdog vs CERC & Ors has held that the changes to the National Coal Distribution Policy as approved by the Cabinet Committee on Economic Affairs for supply of coal for 4 years of 12th Plan which was communicated to the CERC vide letter dated 31.07.2013 as well as stated in Clause 1.6 at paragraphs 57, 58 of the Tariff Policy dated 28.01.2016 has the force of law.

iii. That in terms of Clause (B)(ii) of Policy Guideline, CIL/SCCL may grant coal linkage on notified price on auction basis. This position has been recorded at Clause 2.1.2 of the Scheme Document as well. Further, in terms of:

1. Clause 5.3.2 of the Scheme Document, the cost of coal supplied under SHAKTI 2017 will be as per the Notified Price of CIL.
2. Clause 5.4. of Scheme Document, the successful bidder under Shakti 2017 would be entitled to receive payment for generation of power on the basis of the

notified price of the declared grade of the consignment by CCL/SCCL;

- f. GVK in view of the foregoing, submitted that Article 5 of the Supplementary PPA would have to be read in consonance with provisions of the Scheme Document and Policy Guidelines, which have force of law as well as the PSERC Tariff Regulations. Article 5 cannot be read to mean that PSPCL is only required to pay energy charges on the basis of the interim arrangement put in place by way of the Commission's Order dated 01.02.2016 and that GVK ought to be paid energy charges taking into account the Notified Price of Coal including all costs incurred for transportation of the same to the Project including but not limited to the GCV on ADB basis and other components as specified under the PSERC Tariff Regulations.

10. PSPCL in compliance to the Commission's Order dated 18.07.2018 filed submissions, which are as under:

- 10.1. PSPCL stated that the charges to be paid under the Shakti Scheme coal allocation was based on the issue raised by GVK that the actual cost of procurement of coal under the SHAKTI Scheme is to be paid by PSPCL and at the outset, the present issue sought to be raised by GVK is misconceived and does not even arise in the present case. That the only prayer of GVK in the present case is seeking directions for amendment of the PPA between the parties.

10.2. That GVK had filed the present Petition before the Commission seeking directions for amendment of the PPA on various issues, including on removal of capping of coal and the sources of coal in the PPA. The amendments were also sought for the coal allocation under the SHAKTI Scheme to be included in the PPA wherein GVK submitted that no direction can be issued for amendment of the PPA. Further, PSPCL submitted that save and except the amendments to the extent of including the coal allocation under SHAKTI Scheme and the discount to be passed on in the tariff by GVK, no other amendments are acceptable to PSPCL.

10.3. That to incorporate the discount available in the tariff for the coal allocation under the SHAKTI Scheme, PSPCL and GVK had entered into a Supplementary Agreement dated 01.02.2018. Therefore, there is no basis for GVK to claim any higher charges on account of the allocation of SHAKTI Scheme and the execution of the Supplemental PPA. The existing rights and obligations of the parties including the coal cost to be paid was to be adjudicated by the Commission under the terms of the PPA and not de-hors the same. The PPA was based on the allocation of certain coal blocks and also capping of the coal cost. It is for this purpose that the Supplementary Agreement specifically captured that the allocation of coal under the SHAKTI Scheme would not by itself entitle GVK to claim any higher charges from PSPCL. The purpose of the Agreement was to pass on the discount in the tariff to PSPCL under the SHAKTI Scheme and for no other purpose.

10.4. That the only issue pursuant to the Supplementary Agreement is for passing on the discount in the applicable tariff. The applicable tariff itself cannot be amended pursuant to the Supplementary PPA. The Commission has already given a framework for the applicable tariff in the order dated 01.02.2016, which is applicable till date. This was on the basis of providing a framework for supply of power, when the coal blocks as envisaged in the PPA was not present. The said framework is applicable as on date wherein the tariff payable is determined.

11. During the hearing on the 31.10.2018, the counsel for GVK reiterating the submissions made earlier, submitted the copies of the judgment of the Hon'ble Supreme Court of India dated 11.04.2017 in the case of Energy Watchdog vs CERC & Ors. passed in Civil Appeal Nos. 5399-400 of 2016 and judgment dated 15.03.2010 in case of PTC India Ltd. vs CERC passed in Civil Appeal Nos. 3902 of 2006 in support of their claim and contentions made in the petition. The submissions in brief are as under:

11.1. That since the Arbitral Tribunal has held that cancellation of the Tokisud Captive Coal Block is an event of change in law, GVK is entitled to relief on account of the same in terms of Article 13 of the Restated and Amended PPA. Accordingly, GVK is entitled to energy charges for coal procured from alternate sources on actual basis alongwith transportation costs so as to restore it to the same economic position as if event of change in law did not take place.

11.2. That the Commission vide its Order dated 19.07.2018 has noted that coal supplied under Shakti 2017 is sufficient for

only 62% of the total coal requirement of the Project and GVK would approach the Commission afresh for amendment of the Restated and amended PPA after making long term arrangements for the remaining 38% coal requirement. It is noteworthy that Arbitral Tribunal has held that in light of the cancellation of the Pachhwara and Tokisud Coal Blocks, the Restated and Amended PPA is to be amended since (i) there is no provision for procurement of coal from sources other than the Tokisud Captive Coal Block and (ii) the ceiling of fuel cost would not hold good under the changed circumstances. Therefore, the amendment of the Restated and amended PPA ought not to be predicted upon whether GVK has tied up coal for 62% PLF or 100% PLF. The amendment of the Restated and Amended PPA is required to be carried out in terms of the findings of the Arbitral Tribunal.

11.3. That the entire case is that coal cost is a pass through (in terms of the Restated and Amended PPA and the Punjab State Electricity Regulatory Commission Tariff Regulations 2014) subject to capping of costs qua Pachhwara Coal Block. Once the underlying basis of the Restated and Amended PPA has been eroded due to cancellation of the Tokisud Captive Coal Block (held to be a force majeure and change in law event) GVK is entitled to fuel cost pass through. Hence, the amendment of the Restated and Amended PPA is consequential relief for the event of change in law.

11.4. That GVK has not agreed to lower energy charges in terms of the Supplementary PPA and the Commission has to

decide GVK's entitlement to coal cost pass through in light of the Arbitral Award dated 10.04.2017, Article 12 and 13 of the Restated and Amended PPA.

11.5. That Clause 5 of the Supplementary PPA states that the factum of the Supplementary PPA will not entitle GVK to higher energy charges. However, GVK's claim is premised on the Arbitral Award dated 10.04.2017 and the terms of the Restated and Amended PPA.

11.6. That neither the Restated and Amended PPA nor any past orders of the Commission require change in law compensation only when 100% of the coal requirement for the project has been tied up and that GVK is entitled to landed cost (irrespective of the source) so that it is restored to the same economic position as if change in law did not take place.

11.7. That the amendment of the Restated and Amended PPA is only for grant of consequential relief for change in law events. Any delay in adjudication of the same would lead to further adverse economic impact on GVK which is contrary to law.

The Commission after hearing the parties and submissions made therein, vide Order 02.11.2018, directed PSPCL to file written submissions with reference to the said judgments regarding prayer (b) of the petition for amendment in the provisions of the PPA and GVK was directed to submit reply to the submissions filed by PSPCL as above, if any.

12. In compliance to the Commission's Order dated 31.10.2018, PSPCL filed its submissions on 28.11.2018. The submissions made therein are summarized as under:

12.1. That as far as prayer (b) of the petition is concerned, GVK never approached PSPCL for consideration of the said amendments before filing the present petition and it is a settled principle of law that a party cannot be mandated to amend the terms of the contract.

12.2. That a contract can be amended only by consensus ad idem between the parties and the parties agreeing to such amendments. There cannot be a mandate sought for unilateral amendment of the PPA.

12.3. That GVK has sought to rely on the judgment of the Hon'ble Supreme Court in the case of Energy Watchdog vs CERC & Ors. (2017) to contend that the Commission has the regulatory powers to direct the amendments of the PPA. The said judgment merely deals with the regulatory powers of the Commission in the absence of Central Government guidelines under Section 63 of the Electricity Act, 2003 which is not the issue in the present case.

12.4. That the issue of sanctity of the PPA arising in the present has been settled by the Hon'ble Supreme Court in a more recent judgment in the case of GUVNL vs Solar Semiconductor Power Co. Ltd. (2017), wherein it has been held that the terms of the PPA are by agreement between the parties and there cannot be any direction or force on the parties to the PPA to vary the terms of the contract. This judgment is subsequent to the decision in case of Energy

Watchdog and has settled the law on the issue whether there can be any direction or mandate to amend the terms of the PPA and in terms of the foregoing, it is amply clear that PSPCL cannot be directed to amend the terms of the PPA which has been duly approved by the Commission.

12.5. That further in case of Tata Power Company Ltd. vs. Reliance Energy Limited (2009), the Hon'ble Supreme Court has held that the Regulatory Commission cannot create a contract between the parties.

12.6. That the issue of seeking actual coal cost under the Shakti Scheme sought to be raised by GVK to be paid needs to be considered in terms of the PPA as existing between the parties.

12.7. That in relation to the Shakti Scheme coal, the parties had already executed a Supplementary PPA dated 01.02.2018 and this was pursuant to the bid placed by GVK for allocation of coal block. The bids were based on the discount to be offered by GVK on the existing tariff to the procurers in the PPA. GVK participated in the said Scheme and applied for coal linkage by offering discount on the tariff. To incorporate the discount available in the tariff for the coal allocation under the Shakti Scheme, the parties entered into the above Supplementary PPA which provided as under:

*"..... 1  
. The seller shall provide the Year-on year Discount from the tariff in the monthly bills as described in aforesaid paragraph 'G' of this agreement.*

*4. This agreement is limited to procurement of coal under Shakti 2017 and is without prejudice to the rights and*



*contentions of GVK and PSPCL in pending proceedings. The parties expressly reserve their rights in this regard.*

*5. The execution of this Agreement is only for capturing the discount available to PSPCL in the tariff for allocation of the coal linkage to GVK and shall in no manner be construed as recognition or acceptance by PSPCL of any higher fixed charges or higher energy charges than as applicable and payable to GVK under the provisions of the PPA and the relevant Orders of the Hon'ble PSERC.....”.*

Therefore, there is no basis for GVK to claim any higher charges on account of the allocation of Shakti Scheme and the execution of the Supplemental PPA. The existing rights and obligations of the parties including the coal cost to be paid are to be adjudicated by the Commission under the terms of the PPA and not de-hors the same. The PPA was based on the allocation of certain coal blocks and also capping of the coal cost.

12.8. That the only issue pursuant to the Supplementary PPA is for passing on the discount in the applicable tariff. The applicable tariff itself cannot be amended pursuant to the Supplementary PPA. The Commission has already given a framework for the applicable tariff in the order dated 01.02/2016 which is applicable till date and the said framework is applicable as on date wherein the tariff payable is determined. GVK is seeking to challenge the said Order dated 01.02.2016 in the present petition which cannot be permitted.

12.9. That in the case of PTC India Ltd. vs. CERC & Ors (2014) the contention of the GVK was that it is entitled to actual cost

in terms of the Regulations and therefore the PPA is to be ignored is misconceived.

12.10. That it was not open to GVK to generate supply electricity from other sources without the approval of the Commission. In the circumstances, while approving the generation of electricity using coal other than those approved, the Commission vide Order dated 01.02.2016 laid down certain conditions based on which the energy charges are to be paid. Even the Arbitral Award relied on by GVK acknowledges that the PPA does not have any provision for alternate fuel and that the PPA would have to be modified to include procurement of coal for the project from the sources other than the identified sources.

12.11. That the very fact of GVK seeking amendment to the PPA to claim higher energy charges itself establishes that the PPA as present does not entitle GVK to claim the charges presently claimed.

13. GVK in compliance to the Order dated 31.10.2018, filed Written Submissions praying for carrying out necessary amendments to be incorporated in the Amended and Restated PPA dated 25.06.2009. GVK reiterating the submissions made earlier, further submitted as under:

13.1. With respect to the amendment of PPA pursuant to the Arbitral Award dated 10.04.2017, GVK while reiterating the list of events that occurred, issues considered and findings of the Arbitral tribunal in its Award, submitted that :

- a. The consequential relief in terms of the Arbitral Award dated 10.04.2017 is to be granted by the Commission

by specifying the energy charge formulae to be applicable and any relief granted by the Commission would fall under the Article 12(7) and Article 13.2 of the Restated and Amended PPA.

That from the reading of the Articles it is clear that the Commission has the power to grant relief in the form of compensation and this is also in line with the Orders passed by Central Electricity Regulatory Commission (CERC) dated 03.02.2016 in Petition No. 79/MP/2013 (para 55,56) wherein the tariff under Section 63 PPA was modified for granting compensation for change in law and Order dated 31.05.2018 in Petition No. 97/MP/2017 (Para 46) pursuant to the judgment of the Hon'ble Supreme Court in the Energy Watchdog vs CERC & Ors. 2017.

Further, such grant of compensation will in effect amend/modify the Amended and Restated PPA because the formula for determination of energy charges will stand modified.

13.2. With regards to whether the Commission has regulatory powers to make suitable amendments to the Restated and Amended PPA, GVK submitted that:

- a. The Commission's regulatory powers under Section 86(1) (b) of the Electricity Act, 2003 are wide and accordingly, the Commission may direct suitable amendment of the Restated and Amended PPA. GVK also stated that the Energy Watchdog Judgment categorically recognizes the regulatory powers of the Ld. CERC under Section 79 (1) (b).

- b. The Hon'ble Supreme Court by way of its Order dated 29.10.2018 in M.A Nos. 2705-2706 in Energy Watchdog case has permitted Adani Power Ltd. and Coastal Gujarat Power Ltd. to approach CERC for approval of proposed amendments to the PPAs pursuant to the recommendations of the High Committee Report chaired by Justice R.K Agrawal.
- c. The Hon'ble Tribunal for Electricity in its judgment dated 20.11.2018 in Appeal No. 121 of 2015 titled Sasan Power Ltd. vs CERC & Ors. has held that the provisions of the PPA relating to compensation for change in law events during construction period are to be reopened since the formula provided in the said provisions does not fully compensate SPL contrary to the economic restoration principle provided in the PPA.
- d. The Hon'ble Supreme Court of India in the case of All India Power Engineer Federation vs Sason Power Ltd. (2017) held that the appropriate regulatory Commission can revise tariff payable under Section 62 and Section 63 of the Electricity Act, 2003.  
Further, the power of an Electricity Regulatory Commission to relook and revise tariff has been upheld by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd vs Tarini Infrastructure Ltd (2016).
- e. That in view of the above observations of the Hon'ble Supreme Court and the Hon'ble Appellate Tribunal, it is evident that:

1. Tariff is determined by the appropriate commission in exercise of regulatory power.
  2. The tariff fixed/approved/determined may be revised by appropriate commission and would not require consent of the parties.
  3. The appropriate commission may exercise such power to revise the tariff in light of the changed facts and circumstances.
- f. The Commission, in the matter of Everest Power Ltd. vs PSPCL and Anr. in Petition No. 34 of 2011 vide Order dated 17.08.2012 had considered the issue of reopening and renegotiating the terms of the power supply agreement.
- g. The aforementioned findings have been upheld by the Hon'ble Appellate Tribunal for Electricity (APTEL) in its judgment dated 11.10.2018 in Appeal No, 194 of 2016 titled PSPCL vs Everest Power Ltd at paragraph 20.27. In view of the above, the Commission has exercised its powers to re-open a PPA and re-determine tariff.
- h. The reliance of PSPCL on the judgment of the Hon'ble Supreme Court in the case of GUVNL vs Solar Semiconductor Power Co. Ltd. (2017) (hereinafter referred to as Solar Semiconductor Case) to contend that there cannot be any direction or force on the parties of the PPA to vary the terms of the PPA is misplaced and that the Hon'ble Supreme Court's observations in Solar semiconductor Case were in the

context of extension of the control period, which were contrary to the terms of the PPA.

- i. The Hon'ble Supreme Court of India in the Solar Semiconductor Case has recognized the Statutory powers of the regulatory commission in determining/revising tariff.
- j. PSCL's reliance on the case of Tata Power Company Ltd. vs. Reliance Energy Ltd. (2009) to state that the regulatory commission cannot create a contract is misplaced and it is GVK's case that the consequential relief here to be granted is within the framework of the Restated and Amended PPA.
- k. The Commission has the power to enforce the Arbitral award dated 10.04.2017 and mould suitable relief in terms of Section 86(1)(a) and (b) of the Electricity Act, 2003 read with Section 36 of the Arbitration and Conciliation Act and Articles 12 and 13 of the PPA and the relief claimed in the present petition is only on account of GVK's claim for change in law and force majeure being allowed by the arbitral Tribunal.
- l. PPSCL is relying on the Order dated 01.02.2016 which puts in place an interim arrangement. With regards to the same, GVK submitted that:
  - i. The interim order also modifies the provisions of the Restated and Amended PPA in so far as it sets out a formula/mechanism for fuel cost different from what is provided in the Restated and Amended PPA.

- ii. When this Commission has power to direct such change as an interim measure (which is accepted and uncontested by PSPCL), PSPCL is stopped from contending that the Commission does not have power to grant relief.
- iii. Order dated 01.02.2016 is an interim/pro-term measure which can be modified/made final in light of the Arbitral award dated 10.04.2017 as well as the powers of the Commission under Section 86(1)(b) read with section 94 of the Electricity Act, 2003.

13.3. With regards to Energy Charges payable to GVK for coal supplied under Shakti 2017, GVK submitted that:

- a. That it is an admitted position that PSPCL is computing the energy charges payable to GVK on the basis of the interim arrangement put in place by the Commission vide Order dated 01.02.2016 in Petition no. 33 of 2015 and Petition no. 65 of 2013 for coal received under the Shakti 2017. PSPCL has contended that the payments for such supply of power shall be as per Article 5 of the Supplementary PPA, which PSPCL had interpreted to imply that GVK would not be entitled to any higher energy charges under the provisions of the PPA and the relevant orders of the Commission.
- b. The energy charges payable to GVK are as per the provisions of the Restated PPA and relevant orders of the Commission. However, Article 5 cannot be read to mean that PSPCL is only required to pay energy charges on the basis of the interim arrangement put in

place by way of the Commission's Order dated 01.02.2016 even for coal that has been supplied under the Shakti Scheme 2017. In view of the above, the Commission can modify/make final the interim arrangement which has been put in place by way of Order dated 01.02.2016.

- c. Article 5 provides that the execution of the Supplementary PPA is only for capturing the discount available to PSPCL in the tariff allocation of the coal linkage to GVK. Now that GVK has long-term source of coal, the tariff for the same ought to be determined in terms of the applicable regulations and conditions as applicable to GVK since the Order dated 01.02.2016 is no longer germane for the purpose of coal received under the Shakti Scheme 2017. In any event, the Supplementary Agreement only captures the discount and does not restrict the Commission's power to determine the tariff for coal received under Shakti 2017.
- d. GVK's prayer is not premised on execution of the supplementary PPA rather it is premised on the Arbitral Award dated 10.04.2017, Article 12 and Article 13 of the Restated and Amended PPA which provides economic restitution. Since procurement of coal under Shakti 2017 is on account of cancellation of captive coal blocks, GVK is entitled to landed cost of coal procured from alternate sources including coal under Shakti 2017 and such an order would be in line with Scheme documents for Shakti 2017.



e. The tariff is to be determined by the Commission in terms of Section 61, 62 and 64 of the Electricity Act, 2003 and it is a settled law that Regulations under Section 178 or Section 181 of the Electricity Act, 2003 as the case may be, would override contracts entered into between regulated entities as held by the Hon'ble Supreme Court of India in the case of PTC India vs CERC & Ors.

13.4. GVK in this context submitted that the PSERC Tariff Regulations came into force on 01.01.2017 and Regulation 8.3 of the PSERC Tariff Regulations provides for controllable, normative and uncontrollable items of Annual Revenue Requirement. The variation on account of uncontrollable items shall be treated as a pass-through subject to the validation and approval by the Commission. Further, pursuant to the coming into force of the PSERC Tariff Regulations, the energy charges payable to GVK ought to be determined by the Commission in terms of Regulation 37, 39 and 40 of the PSERC Tariff Regulations. Also in terms of Regulation 37.1 and 37.2 of the PSERC Tariff Regulations, energy charges are to be computed on the basis of the landed cost of primary fuel i.e. actual cost. That Regulation 39 provides energy charges for thermal generating stations shall cover primary fuel cost and secondary fuel cost and Regulation 40 provides that energy charges are to be computed as per Regulation 30(8) of CERC's Tariff Regulations 2014, Regulation 30(8) of CERC's Tariff Regulations 2014 provides that landed cost of fuel shall include price of fuel corresponding to grade and quality of

fuel (inclusive of royalty, taxes and duties as applicable, transportation costs by rail/road or any other means) for computation of energy charges. Accordingly, the Commission is required to consider the price of coal as notified by CIL as primary fuel cost incurred by GVK along with the cost of transportation (by rail and road) for determination of energy charges payable to GVK.

13.5. That the Order dated 01.02.2016 will be applicable for determining energy charges for coal supplied under Shakti 2017 and the interim arrangement put in place in terms of Order dated 01.02.2016 was temporary in nature and would not be applicable once a long term source of coal has been tied up by GVK. Furthermore, the tariff payable would have to be determined in terms of the Tariff Regulations 2014 as per the law laid down by the Hon'ble Supreme Court in the PTC Judgment.

13.6. GVK denied the contention of PPSCL that GVK had never approached for discussions on amending the Restated and Amended PPA, stated it to be wrong and further submitted that it had made numerous requests to PPSCL for considering amendments to the Restated and Amended PPA in the light of the cancellation of the Tokisud Captive Coal block. Furthermore, GVK had also filed a copy of the proposed amendments to the Restated and Amended PPA in the present Petition. That in any event, GVK is to be paid landed cost of coal with or without any amendment to the Restated and Amended PPA, as provided under the PSERC Tariff Regulations.

14. GVK further filed additional submissions wherein it was submitted that the PPA between a generating company and a distribution licensee is a statutory contract under the Electricity Act, 2003 and the regulations made thereunder. In order to substantiate its claim GVK referred to the following excerpt from Hon'ble APTEL's judgment dated 16.12.2011 passed in Appeal no. 82 of 2011:

“.....  
135. On going through these decisions cited by both, we are of the view that this proposition projected by the Noida Power is not tenable in view of the fact that the power procurement pursuant to the statutory framework constitutes a statutory contract in terms of the pre-approved and finalized PPA governed by the provisions of the Act as well as guidelines. These are specific clauses which require certain acts have to be performed mandatorily making the contract statutory.”

That since the Restated and Amended PAP is a statutory contract, it is subject to the regulatory jurisdiction of the Commission for its entire term. Accordingly, the Commission may amend the terms of the Restated and Amended PPA in exercise of its regulatory powers.

15. The petition was taken up for hearing on 11.12.2018 wherein it emerged after hearing the parties that certain issues could be discussed and amicably settled by the parties itself. The Commission vide order dated 14.12.2018 advised GVK and PSPCL to convene a meeting within 15 days for amicable settlement of such issues that can be settled mutually and submit

a report thereon by 09.01.2019. The petition was fixed for hearing on 30.01.2019.

16. PSPCL vide Memo dated 09.01.2019 and GVK vide letter dated 09.01.2018 informed that in compliance to the Commission's Order dated 14.12.2018, a meeting of the Committee constituted by PSPCL was held with representatives of GVK on 08.01.2019, however the Committee could not reach at any conclusion. PSPCL as well as representative of GVK decided to hold one more meeting to make a final view point. Later, PSPCL vide Memo no. 5575 dated 12.02.2019 informed the Commission that pursuant to the meeting held on 08.01.2019 and after detailed deliberations of the Committee with GVK, it was decided that GVK will review the matter again and submit draft Amendments proposed to be carried out in the PPA. The draft Amendments submitted by GVK was discussed in the meeting of the Committee held on 12.02.2019 wherein after discussing the matter with the representatives of GVK the Committee recommended that PSPCL may not accept the further amendments sought by GVK in the present Petition. The necessary amendments made in the Amended and Restated PPA dated 26.05.2009 which were mutually agreed by PSPCL and GVK in meeting dated 25.01.2018 and approved by the Commission vide its Order dated 30.01.2018, had already been incorporated by signing a Supplementary PPA on 01.02.2018. Thereafter, amicable consensus between PSPCL and GVK could not be reached.

17. The Commission after hearing the parties on 05.04.2019 directed PSPCL to file the written submissions by 08.04.2019 and

reserved the petition for orders. However, PSPCL has not filed any written submissions in compliance to the said Order.

### **18. Commission's Observations, Findings and Decision**

The Commission has carefully gone through the petition, reply of PSPCL, pleadings, documents filed and submissions made by both the parties.

The Hon'ble Supreme Court of India had, in its Judgment dated 25.08.2014 in W.P. (Crl.) 120 of 2012 (Coal Judgment), held that the entire allocation of coal blocks / mines from 14.07.1993 in 36 meetings of the Screening Committee and allocations made through the Government dispensation route suffers from arbitrariness and legal flaws and are therefore illegal. The Hon'ble Supreme Court passed a consequential de-allocation Order dated 24.09.2014 in W.P. (Crl.) 120 of 2012 (Cancellation Order), cancelling 204 coal blocks allocation including the Tokisud North Coal Block and Saregarha Coal Block (jointly allocated to GVK and Arcelor Mittal) for the Project.

Consequently, GVK filed petition no. 33 of 2015 before the Commission seeking to (a) declare that the Cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Change in Law Event in terms of Article 13 of the PPA, (b) declare that the Promulgation of the Ordinance is a Change in Law event in terms of Article 13 of the PPA, (c) declare that the Cancellation of the Coal Blocks pursuant to the judgment of the Hon'ble Supreme Court dated 25.08.2014 and Order dated 24.09.2014 is Force Majeure Event in terms of Article 12 of the PPA, (d) declare that the promulgation of the Ordinance is a Force Majeure Event in

terms of Article 12 of the PPA, (e) devise an alternate mechanism for the sourcing of Fuel including necessary amendments to the Amended and Restated PPA and (f) grant consequential extension of SCOD till the issue of procurement of fuel is decided by the Commission. GVK had earlier filed petition no. 65 of 2013 wherein it prayed for the extension of the SCOD for completion and commercial operation of the project for a period of 9 months in the case of Unit -1 and for a further period of 6 months for Unit - 2 to be calculated from the closure of the Force Majeure events namely, approval of railway drawings both in regard to Power project and in regard to coal mine siding and the availability of the land to enter upon and commence mining operations. The Commission, in its Order dated 12.08.2015 common to petition no. 65 of 2013 and petition no. 33 of 2015, decided to refer all the prayers in the said petitions for Arbitration except the issue raised by GVK vide aforesaid prayer (e) of petition no. 33 of 2015 viz. procurement of fuel, which the Commission felt was of urgent nature and required to be decided by it.

Consequently, the Commission in its Common Order dated 01.02.2016 in petition no. 65 of 2013 and petition no. 33 of 2015 decided as under:

*“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 cooperation 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. The Commission further holds that the above decision will not in any way affect or prejudice the arbitration proceedings and / or decision in the arbitration proceedings.”*

GVK filed petition no. 68 of 2017 raising disputes in respect of the following issues:

1. Capacity Charges and Auxiliary Consumption;
2. Cost of coal, Surface Transport at mine end & Handling charges;
3. Gross Calorific Value (GCV);
4. Testing charges;
5. Transit & handling losses;
6. Water charges;
7. IEGC compensation;
8. Unscheduled Interchange (UI) charges;
9. Difference in Scheduled Energy and
10. Rebate on amount paid and interest on amount withheld.

The Commission vide Order dated 06.03.2019 in petition no. 68 of 2017 decided all the aforesaid issues. GVK has filed an Appeal (D.F.R. No. 1917/2019) against the said Order which is sub-judice before the Hon'ble APTEL.

During pendency of Petition no. 68 of 2017, GVK filed the instant petition no.01 of 2018 with the prayer as mentioned in the preceding para(s).

**Procurement of 1.70 MTPA coal from CCL and 6300 TPA of coal from SECL Korea Rewa under SHAKTI 2017**

The Commission in its Interim Order dated 30.01.2018 in the instant petition while dealing with the prayer (a) of the petitioner held as under:

*“The Commission, after taking cognizance of the submissions made by the petitioner in its communication dated 12.01.2018 for early hearing in respect of 2017-SHAKTI Scheme, heard the petition on 24.01.2018 and after admitting the same, directed the parties to hold an immediate meeting regarding the amendment in PPA dated 26.05.2009 and apprise the Commission along with the copy of the minutes of the meeting. The next date of hearing was fixed*



as 30.01.2018.

*In compliance of the said directions, PSPCL today filed signed copy of the minutes of the meeting held on 25.01.2018 with the petitioner, along with draft supplementary agreement for long term coal linkage allocated under the Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (2017-SHAKTI), duly initialed by both the parties. PSPCL submitted that the supplementary agreement has been approved by CMD, PSPCL and shall be signed by Director/Distribution, the designated authority for the purpose, latest by 01.02.2018 FN. It was further informed by PSPCL that ex post-facto approval of the Board of Directors shall be obtained subsequently.*

*The Commission notes that this supplementary agreement is for the sole and limited purpose of giving effect to the 2017-SHAKTI Scheme. The coal allocation under the said Scheme has been made to the petitioner on the basis of discount of two paise (Source 1) and one paise (Source 2) offered by the petitioner in the coal auction, which the Commission finds will be beneficial to the consumers of the State. Accordingly, the Commission approves the said supplementary agreement without prejudice to the rights and contentions of both the parties under the Amended and Restated PPA dated 26.05.2009 and shall be read as an integral part of the PPA. Both the parties will ensure strict adherence to the timelines stipulated in the 2017-SHAKTI Scheme.*

.....”

Consequent to the Commission’s interim Order dated 30.01.2018, GVK and PSPCL signed ‘Supplementary Agreement. for long term coal linkage allocated under SHAKTI Scheme, 2017’ on 01.02.2018. The Clause 5 of the said Supplementary Agreement provides as under:

“ .....

5. The execution of this Agreement is only for capturing the

*discount available to PSPCL in the tariff for allocation of the coal linkage to GVK and shall in no manner be construed as recognition or acceptance by PSPCL of any higher fixed charges or higher energy charges than as applicable and payable to GVK under the provisions of the PPA and the relevant Orders of the Hon'ble PSERC.*

.....”

During the pendency of petition no. 68 of 2017, the Commission in its interim Order dated 11.06.2018 in the said petition with respect to coal received under SHAKTI scheme held as under:

“.....  
A supplementary agreement for long term coal linkage allocated under SHAKTI Scheme has been signed by GVK and PSPCL as per Commission's Order dated 30.01.2018 in Petition no. 01 of 2018. In respect of the coal received under the SHAKTI Scheme, the energy charges shall be payable as per the actual cost of coal received under the said scheme including the actual transportation charges paid to Indian Railways and surface transportation charges at the mine end, if not included in the original cost of coal. GVK shall give discount on the gross amount of the bill in terms of clause G of the 'Supplementary Agreement for long term coal linkage allocated under SHAKTI Scheme 2017'. This discount shall be computed with reference to Scheduled Generation from Linkage Coal supplied under SHAKTI Scheme.”

The said interim Order was challenged by PSPCL in Appeal No. 187 of 2018 before the Hon'ble APTEL which came up for hearing on 16.07.2018. On 20.08.2018, GVK filed IA No. 09 of 2018 in the present petition praying to direct PSPCL to comply with the said Order dated 11.06.2018. The Commission vide interim Order dated 28.09.2018 decided to partially modify/amend the

interim Order dated 11.06.2018 to the extent of deletion of above quoted para. Thereafter, this interim Order of 28.09.2018 has been also challenged by GVK before Hon'ble APTEL on 04.10.2018 in Appeal No. 286 of 2018.

The new Coal Allocation Policy for Power Sector, 2017–SHAKTI, the Govt. of India, Ministry of Coal, notification no. 23011/15/2016-CPD/CLD dated 22.05.2017, in Clause (B)(ii) provides as under:

“(B) .....  
(i) .....  
(ii) *CIL/SCCL may grant coal linkages on notified price on auction basis for power producers/IPP's having already concluded long term PPAs (both under section 62 and section 63 of the Electricity Act, 2003) based on domestic coal.....*  
.....”

Consequently, Coal India Ltd. (CIL), on 16.08.2017, issued the 'Scheme Document for Auction of Coal Linkages to IPPs having already concluded Long Term PPAs'. In the said Scheme, with regard to payment of price of coal, it has been provided as under:

“ .....  
*1.1.45 “Notified Price” shall mean the price of the relevant grade(s) of coal notified by CIL and/or its subsidiaries and as specified in Annexure VII*  
.....

**5.3 Periodic Payments by the Successful Bidder(s)**

*5.3.1 In addition to the payments specified in this Scheme Document, the Successful Bidder shall be required to make periodic payments for the coal supplied under the FSA on the basis of the following formula:*

*{Notified Price multiplied by [the Allocated Quantity supplied*

*under the FSA}}.*

*5.3.2 The Notified Price shall be payable in the manner contemplated in Clause 5.3.1 above, during the tenure of the FSA.*

*5.3.3 The Successful Bidder shall also be inter alia liable to pay the following pursuant to the FSA:*

*5.3.3.1 all royalties, taxes, duties, cesses and such statutory levies due to the State Government, Central Government and/or to any other statutory authority in connection with the supply, dispatch or delivery of the specified grade of coal; and*

*5.3.3.2 sizing charges, transportation charges up to the relevant delivery point, loading charges and such other charges as may be specified in the FSA.*

*5.4 Periodic Payments to the Successful Bidder*

*5.4.1 The Successful Bidder shall be entitled to receive payment from the DISCOM for generation of power pursuant to the Amended PPA in accordance with the following methodology:*

*5.4.1.1 Billing shall be done on the basis of Notified Price of the declared grade of the consignment.*

*5.4.1.2 The year-on-year discount (as provided by the Successful Bidder in accordance with Clause 3.6.6) shall be adjusted from the gross amount of the bill at the time of billing, i.e., the original bill shall be raised as per the terms and conditions of the Concluded PPA or the Amended PPA, as the case may be and the discount would be reduced from the gross amount of the bill.”*

GVK submitted that CEA approved a coal quantity of 2.4703 MTPA for the Project based on G-13 grade of coal. GVK further submitted that pursuant to the e-auction conducted under SHAKTI 2017 by CIL on 11.09.2017 and 12.09.2017, it was provisionally allocated 1.7 MTPA of G11 grade coal from CCL in

Jharkhand and 6300 TPA of G6 grade coal from SECL Korea Rewa in Chhattisgarh which will be sufficient to operate the plant at a PLF of about 62%. The Commission notes that the aforesaid coalfields are covered in the price notification dated 08.01.2018 issued by Coal India Ltd.

The Commission further notes that the coal cost as per the bill of the CIL or its subsidiaries supplying coal to PSPCL comprises of Basic Price, loading charges, Weighment charges, Sizing/Beneficiation charges, Surface Transport charges, Evacuation charges, Management Fee, Royalty, DMFT, Contribution to NMET @ 2%, Road/RE cess, Bazar/MADA/PWD, AMBH Cess, Total taxable Value of Goods, SGST, CGST, IGST, GST (Compensation to state) etc. Similarly, the bill of CIL or its subsidiaries supplying coal to GVK under SHAKTI Scheme comprises of Basic Price, Transportation charges, Payloader Loading Charges, Service charges, Sizing/Beneficiation charges, Admin charges, Royalty, NMET 2% Royalty, DMFT 30% of Royalty, Total value of goods, Discount (if any), Total taxable value of goods or services, SGST, CGST, IGST, GST Compensation Cess etc.

**The Commission observes that the basic price of coal in case of coal supplied to PSPCL and GVK by Coal India Ltd. or its subsidiaries would be as per the notified price. The charges other than the basic price levied in the bills of the coal company are statutory in nature or necessarily required to be paid as part of the coal cost to the coal company without which coal would not be delivered at the delivery point at the mine by the coal company.**

**Considering the above, the Commission is of the**

opinion that the basic price of the coal and other charges/costs included in the coal bills of the coal company have to be compulsorily paid in full by the procurer of coal who incidentally has no control over it, be it PSPCL or GVK. Therefore, the Commission holds that in respect of the coal received under the SHAKTI Scheme, the coal cost for the purpose of calculating the monthly energy charges shall be the cost of coal as per the bill raised by the coal company including all the statutory charges/taxes/duties/cess, surface transportation (upto the delivery point located within the mine) etc. billed in the coal bill issued by the coal company to GVK. Further, the actual transportation charges paid to Indian Railways shall be considered for calculating the monthly energy charges. As regards the surface transportation charges (external), in case the railway siding is away from the delivery point of coal located within the mine [upto which the surface transportation charges (internal) are included in the bill of the coal company], the Commission has already decided the same in its Order dated 06.03.2019 in petition no. 68 of 2017. The relevant extract of the same is quoted as under:

“10.8 Surface Transport at Mine End & Handling Charges (External STC)

*10.8.1 In terms of the Commission’s Order dated 01.02.2016 common to petition no. 65 of 2013 and 33 of 2015, the actual transportation charges paid by the petitioner to the Indian railways for transporting the coal from the mine to the Project are payable. The Order dated 01.02.2016 has been quoted by both GVK and PSPCL. GVK has argued that some surface transportation of coal is necessitated for many*

reasons between the delivery point at the mine end and the Railway loading station. These reasons include transportation of coal to the washery and then to the Railway Station and sometimes because the available rail head is far off or due to non availability of rakes at the nearest rail head and also to ensure early lifting of coal. GVK also stated that it has arranged for this transportation and handling through a competitive bidding process.

10.8.2 PSPCL has alleged that this insistence on surface transportation at the mine end is GVK's attempt to seek an amendment in the 01.02.2016 Order without actually having filed an appeal or a review. PSPCL has also stated that Coal India Ltd. and its subsidiaries bill the thermal stations for the cost of surface transportation of coal to the washeries and then to the rail head at a flat rate for slabs upto 20 km and thereafter on actual cost. PSPCL found the rates being paid by GVK as inconsistent and exorbitant and not reflecting actual charges in terms of deductions for shortages etc. PSPCL in fact has questioned the very bidding process by which GVK has arrived at these rates, as also the need for GVK to arrange its own surface transportation from rail heads other than those arranged by Coal India Ltd. Given the limitation in the 01.02.2016 Order, PSPCL is of the view that it cannot pay Surface Transportation charges to GVK.

10.8.3 The Commission has been made aware of instructions issued by Coal India Ltd. and its subsidiaries stating therein that there are flat rates charged for various distances upto 20 km of surface transport from the mines to the rail head. The instructions also state that actual costs are charged beyond 20 km. Distances would vary depending on the rail head/siding where the coal is loaded and as and when the coal is taken to the washeries. GVK has pleaded that for reasons of efficiency and faster handling it has engaged its own handlers and road transporters to move the coal from the mine to the rail head and asked for separate surface transportation charges.

10.8.4 Bharat Coking Coal Limited vide Ref. No. BCCL/M&S/SA/17/927 dated 29.03.2018 issued price notification no. 105 regarding revised surface transportation charges (STC) effecting from 01.10.2017 as under: "BCCL Board in its 340th Meeting held at Koyla Bhawan, Dhanbad on 23rd March, 2018 vide Item No. 340.51 approved the revised Surface Transportation charges applicable on sale of Raw Coal w.e.f 01/10/2017 as amended below: As recommended by the Audit Committee, Board after deliberation approved the Revised transportation Charges on sale of Raw Coal of BCCL as under w.e.f. 01.10.2017:

Lead Distance in Km	Recommended rate of STC (in Rs./Te)
0-3	23.00
3-10	60.00
10-20	159.00
More than 20	As per Actual Expenditure.

10.8.5 In view of Coal India Ltd. or its subsidiaries instructions regarding rates of surface transportation charges on raw coal, which are amended from time to time, there actually appears to be no need for GVK to pay at different rates for external surface transportation at the mine end from pick up/delivery point to railway siding. Even if GVK has done so, it would have to be limited to what Coal India would have charged in its bills for that same distance. The information placed by GVK before the Commission with regard to rates does appear inconsistent as stated by PSPCL. It is understood that in case of supply of coal to PSPCL by Coal India Ltd. or its subsidiaries, mostly the railway siding is available at the pickup/delivery point of the coal mine and there is no requirement for external surface transport. In a few cases, where external surface transport is required, the same is also billed by the coal company in the coal bill. It is in this background that the Order dated 01.02.2016 provided for payment of only rail transportation charges. As per PSERC Tariff Regulations, 2014, landed



*cost of coal is to be allowed which would include surface transportation also, of course subject to prudence check.*

*10.8.6 In view of the above, the Commission decides that in case GVK resorts to surface transport from pick up/delivery point at the mine end to railway siding on its own, it would be limited to surface transport up to the nearest railway siding and at the rates prescribed by BCCL or its subsidiaries upto 20 kms and for the distances beyond 20 kms at actuals (as provided in the notification above) as would have been billed by these coal agencies for the same nearest rail head. In such cases, the bill issued by the coal company for the coal would not include external surface transport costs. Such separate bill for the external surface transportation shall be supported by documentary evidence where the coal company has charged the rate for external surface transport as per actuals for distances beyond 20 kms in the most recent past.”*

*10.8.7.....*

***The Commission now decides that the external surface transportation charges for coal received/to be received by GVK under SHAKTI Scheme shall also be payable as per directions detailed in the foregoing paras.***

**As such, the surface transportation charges (external), if applicable, shall be considered in the coal cost while calculating the monthly energy charges. Consequently, the Commission’s Order dated 01.02.2016 shall stand modified for the coal supplied under SHAKTI 2017 scheme for the GVK project.**

**However, as regards the coal received by GVK from sources other than the coal received under SHAKTI scheme, the payment of energy charges shall continue to be made by PSPCL to GVK in terms of the Amended and Restated PPA**

and relevant Orders of the Commission in this regard i.e. Order dated 01.02.2016 common to petition no. 65 of 2013 & 33 of 2015 and Order dated 06.03.2019 in petition no. 68 of 2017.

### **Amendment to the PPA**

GVK has prayed to allow the amendments to the Amended and Restated PPA relating to (i) deletion of reference to the "*Tokisud North Sub Block*" and the "*Saregarha Block*" in the recital of the PPA, (ii) deletion of the definition of "Captive Coal Mines" under Article 1.1 of the PPA wherein reference is made to the "*Tokisud North Sub Block*", (iii) definition of "Fuel" to be amended and read as "means primary fuel used to generate electricity namely, coal, including coal procured under SHAKTI scheme, domestic coal, imported coal or coal from any other source and/or combination of coal from one or more sources, (iv) amendment of clause 1.2.3.2 "Source and Cost of Coal and Secondary Fuel" of Schedule – 6: "Tariff" of the Amended & Restated PPA and (v) amendment of clause 1.2.8 titled "Penalty and rights relating to minimum guaranteed quantity of fuel" of Schedule 6 of the PPA, as detailed in this Order above.

**The Commission notes that CEA approved the coal quantity of 2.4703 MTPA for the Project of G13 grade of coal for participating in the long term coal linkage auction under SHAKTI 2017. Against this coal requirement, an allocation of 1.7 MTPA of G11 grade coal from CCL in Jharkhand and 6300 TPA of G6 grade coal from SECL Korea Rewa in Chhattisgarh under SHAKTI Scheme has been arranged and a supplementary PPA signed with PSPCL on 01.02.2018 after**

approval of the Commission for procurement of coal under SHAKTI 2017 Scheme on 30.01.2018. The long term coal linkage arranged under SHAKTI Scheme would be sufficient to operate the plant at a PLF of about 62% as per submissions made by GVK. The Commission observes that in its Order dated 01.02.2016 in petition no. 33 of 2015 wherein GVK made its submissions that it has arrangement of coal for 2 to 2.5 years and that it be allowed to declare COD of the project, the Commission expressed the view therein 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 said Order GVK was directed by the Commission to 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 the near future. A period of more than 3 years has elapsed since then. Apparently, GVK has not been making sincere efforts for long term arrangements of coal for the full capacity of the project. This is in clear derogation of the Commission's Order dated 01.02.2016. GVK is again directed to make all out efforts to arrange long term linkage of coal for the project for the term of the PPA.

In the hearing on 18.07.2018, GVK agreed that they would approach the Commission afresh after making necessary long term arrangements for the remaining 38% coal requirement as mentioned in the interim Order dated 19.07.2018. Further, in the interim Order dated 14.12.2018 for the hearing held on 11.12.2018, it is recorded that after hearing the parties, it emerges

that certain issues can be discussed and amicably settled by the parties itself. GVK and PSPCL were directed to convene a meeting within 15 days for amicable settlement of such issues and submit report, thereon, by 09.01.2019. However, PSPCL vide its letter dated 12.02.2019 informed that the draft amendment to the PPA submitted by GVK was discussed in the meeting held on 12.02.2019 but amicable consensus between PSPCL and GVK could not be reached.

**GVK has referred to various case laws to emphasize that the Commission has the regulatory powers to direct the amendment of the PPA as also that the appropriate Regulatory Commission can relook and revise tariff payable under section 62 and section 63 of the Electricity Act, 2003. Similarly, PSPCL has also referred to various cases wherein it has been held that the terms of the PPA are to be made mutually by agreement between the parties and there cannot be any direction to, the parties to vary the terms of the contract. Also, that the Regulatory Commissions cannot create a contract between the parties.**

**It has been provided under Article 18.1 of the Amended and Restated PPA that this Agreement may only be amended or supplemented by a written agreement between the parties and after duly obtaining the approval of the Appropriate Commission, where necessary.**

**The Commission notes that PSPCL's response to the amendments to the PPA proposed by GVK is not affirmative. The Commission further notes that in the said amendments proposed by GVK, the first two amendments relate to deletion of reference to the "Tokisud North Sub Block" and the**

**“Saregarha Block” in the recital of the PPA and deletion of the definition of “Captive Coal Mines” under Article 1.1 of the PPA wherein reference is made to the “Tokisud North Sub Block”. The Commission is of the opinion that as the said mines stand cancelled by Hon’ble Supreme Court of India, these do not exist any longer with reference to the GVK project. While their presence in the PPA no longer has any validity, there is nothing with which to replace their mention in the PPA other than SHAKTI coal allocated for project which is stated to be sufficient for achieving only 62% PLF. As regards the third proposed amendment for amending the definition of “Fuel”, the Commission finds the same to be too open ended and unfeasible till the balance coal from the sources other than the coal under SHAKTI scheme already allocated, is arranged by GVK on long term basis for the term of the PPA. Similar would be the case for the proposed amendments of clauses 1.2.3.2 and 1.2.8 of Schedule 6 of the PPA. The PPA cannot remain open ended with regard to the firm linkage of coal for the balance 38% requirement of coal for the project.**

**As such, for the present, unless both the parties come to the Commission in terms of Article 18.1 of the PPA, the distinctive decisions of the Commission as brought out in the foregoing paras with regard to SHAKTI coal and balance coal shall be applicable. Once the balance coal requirement is arranged on long term basis by GVK, both the parties are free to approach the Commission for approval of the amendment of the PPA, if necessary, in term of Article 18.1 of the PPA. If otherwise, the aggrieved party is free to approach the Commission at the appropriate time.**

The Commission holds that the amendments in the PPA proposed by GVK are open ended and appear impractical unless the balance 38% coal is arranged on long term basis by GVK and till then the existing PPA, supplementary agreement and relevant Orders of the Commission would remain applicable.

The petition is disposed of in terms of the above.

Sd/-  
(Anjuli Chandra)  
Member

Sd/-  
(S.S. Sarna)  
Member

Sd/-  
(Kusumjit Sidhu)  
Chairperson

Chandigarh  
Dated: 27.05.2019

