

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

Date of Order: 01.02.2016

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

Petition No.65 of 2013

In the matter of: Petition under Section 86 (1) (a), (b) and (f) and other applicable provisions of the Electricity Act, 2003 for adjudication of the disputes and for directions - Power Purchase Agreement for purchase of power from 2 x 250 MW (+20%) Goindwal Sahib Thermal Power Plant at Goindwal Sahib, Punjab.

AND

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

-----Petitioner

Versus

Punjab State Power Corporation Limited, The Mall, Patiala

-----Respondent

Petition No.33 of 2015

In the matter of: Petition under Section 86 of the Electricity Act, 2003 and Articles 12, 13 and 17 of the Amended and Restated Power Purchase Agreement dated 26.05.2009 executed between GVK Power (Goindwal Sahib) Limited and Punjab State Power Corporation Limited (formerly known as Punjab State Electricity Board) for declaration of the occurrence of Change in Law and Force Majeure events.

AND

In the matter of: GVK Power (Goindwal Sahib) Limited, Paigah House, 156-159, Sardar Patel Road, Secunderabad-500003, Andhra Pradesh

----- Petitioner

Versus

Punjab State Power Corporation Limited, T-8, Thermal Design Complex, PSPCL, Patiala-147001, Punjab

-----Respondent

ORDER

The Commission decided to refer the disputes between GVK and PSPCL on the issue of extension in Scheduled Commercial Operation Date (SCOD) to arbitration and passed Order dated 12.08.2015 as under :-

“The Commission has perused the entire record filed by the petitioner and PSPCL in both the petitions i.e. 65 of 2013 and 33 of 2015 through petitions, replies, rejoinders and various submissions. The Commission notes that there remains a wide difference in the respective positions of the petitioner and PSPCL with regard to alleged Force-Majeure and Change-in-Law events, which according to the petitioner are Change-in-Law and / or Force-Majeure events and have caused delay in SCOD of the project and according to PSPCL these events are irrelevant and also are not ‘Change-in-Law’ and / or Force Majeure events. The issues can

be decided only after taking the evidence. In the view of the Commission, all the disputes arisen between the parties regarding alleged Force-Majeure Events and Change-in-Law events resulting in delay in SCOD can be better decided through Arbitration after taking evidence, documentary and oral. The Commission, therefore, decides to refer this dispute for arbitration. The Petitioner and PSPCL have agreed to propose names of three arbitrators each on or before 24.08.2015. The Petitioner and PSPCL are directed to file names of three arbitrators each alongwith their consents. The Commission further directs that two of the arbitrators out of three to be proposed by the parties shall be one from judicial and another from technical backgrounds i.e. Retired Supreme Court/High Court Judge and Retired Technical Member of APTEL, SERCs, CEA, CERC, Large Electricity Distribution / Generation Company etc.

The Commission notes that Project has come at the stage of commissioning and requires immediate arrangement of coal supply for commissioning and operation of the Project till an alternate permanent arrangement is made by the concerned authorities, which may take some time. As such this issue raised by the petitioner vide prayer (e) of Petition No.33 of 2015 is of urgent nature and needs to be decided by the Commission forthwith in the interest of the project. Therefore, the petitioner and PSPCL are directed to file

reply to following queries of the Commission by 24.08.2015:

- (i) Action(s) presently being taken by the petitioner for allotment of alternative coal mine / coal linkage by Ministry of Coal ?
- (ii) Status of re-bidding of Saregarah Coal Mine allotted as a supplementary captive coal block to the petitioner jointly with Arcelor Mittal Group in 45:55 ratio to meet the full coal requirement for its project?
- (iii) Premise on which the petitioner's claim that the plant is ready for commissioning rests?
- (iv) Efforts made by the petitioner to arrange commissioning coal from CEA?

The petition shall be taken up for further hearing on 26.08.2015 on the aspect of alternate arrangement of coal supply for the project and for considering the proposed names of Arbitrators for nomination for referring the disputes for Arbitration.

The stay granted vide Order dated 08.07.2015 on invocation and encashment of Bank Guarantee against Notices dated 14.05.2014 and 14.11.2014 in respect of delay in SCOD of the project and consequential liquidated damages is extended till the next date of hearing i.e. 26.08.2015.”

Accordingly the Commission referred the disputes and differences between GVK and PSPCL for arbitration to the Panel of three Arbitrators, namely :

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| 1. | Hon'ble Justice Deepak Verma,
Former Judge,
Supreme Court of India | Presiding
Arbitrator |
| 2. | Hon'ble Justice Mukul Mudgal,
Former Chief Justice,
High Court of Delhi | Arbitrator |
| 3. | Shri V.J.Talwar,
Former Technical Member,
Appellate Tribunal for Electricity | Arbitrator |

2. The Commission held common proceedings thereafter in these Petitions limited to the issue of devising the alternative mechanism for coal for the Project and the submissions of the parties with regard to this issue only are culled from the Petitions and are discussed briefly, hereunder.

3. GVK Power (Goindwal Sahib) Limited (GVK), a generating company, entered into a Power Purchase Agreement on 17.04.2000 with erstwhile Punjab State Electricity Board (PSEB), now succeeded by Punjab State Power Corporation Limited (PSPCL) with effect from 16.04.2000, for sale of the entire capacity from a coal fired Thermal Plant (2x270 MW) at Goindwal Sahib (Project). Ministry of Coal, Government of India, allocated the Tokisud (North) Coal Block to GVK for captive use for the project on 28.11.2001 which was confirmed on 07.01.2002. GVK applied for allocation of a coal mine at Saregareh on 03.01.2007 for additional requirement of coal for the project, which was allocated by the Coal Ministry on 09.01.2008. The Commission passed Order in Petition No. 4 of 2007 approving the capital cost

of ₹2622.487 crore. The Commission passed Order dated 06.03.2009 in Petition No. 3 of 2007 approving the Restated Power Purchase Agreement, directing some modification to be made as under:-

- “(a) Modify PPA in line with the standard bidding documents issued under Section 63 of the Act.
- (b) Regarding, the coal price, GVK alongwith PSPCL should initiate a competitive bidding for developing and operating the Tokisud Coal Block and any lower cost emanating as a result of the exercise shall form part of the mining agreement and shall be adopted for the purposes of working out the variable fuel charges. “

GVK filed Appeal No. 70 of 2009 against the Order dated 06.03.2009 of the Commission before Hon'ble APTEL and Hon'ble APTEL vide Order dated 08.04.2009 allowed to execute the Amended PPA as per Order of the Commission without prejudice to the rights and contentions of GVK. Accordingly GVK entered into the Restated PPA dated 26.05.2009 with the erstwhile PSEB for the supply of power from GVK 2x270 MW Project at Goindwal Sahib conceptualized as a captive coal mine based Project. The recital of the Restated PPA provides as under:-

“Whereas the Project has been since allotted the Tokisud North Sub Block as a captive coal mine and a Part of Saregareh Block in the State of Jharkhand for the supply of coal to the Project.”

4. The petitioner, GVK, received the Mine Opening permission for the Tokisud Coal Block from the Coal Controller on 07.06.2012.

5. GVK filed Petition No. 65 of 2013 under Section 86 (1) (a), (b) and (f) and other applicable provisions of the Electricity Act, 2003 for adjudication of the disputes and for directions for extension of the Scheduled Commercial Date (SCOD) with the following prayers:-

- (a) direct 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; and
- (b) pass any such further order or orders as this Commission may deem just and proper in the circumstances of the case.

The Commission found that the alleged Force-Majeure events submitted by GVK in justification of extension of SCOD in the petition had not ended at the time of filing of the petition. Therefore, the petitioner, was directed to apprise the Commission the date on which the alleged Force-Majeure events ceased to exist. Accordingly the petition remained pending for admission before the Commission for considerable

time. It was submitted during hearing on 15.07.2014 that all the Force Majeure Events have ended on 09.07.2014 and petition was mature for admission, which was admitted for hearing vide Order dated 29.09.2014. During the pendency of this petition, GVK filed on 11.05.2015, an Application dated 09.05.2015 for placing on record subsequent events and submitted that the petition No. 65 of 2013 was filed on 10.12.2013 seeking extension of SCOD of the Project on account of certain Force-Majeure and change in law events and the petitioner had prayed for extension of SCOD for Unit 1 from 20.05.2013 to 10.04.2015 and extension of SCOD for Unit 2 from 20.11.2013 to 10.10.2015. It was submitted that the project was ready for commissioning. Certain events have occurred after 01.08.2014 which have further delayed the SCOD, and are summed in the succeeding paras.

6. GVK submitted in its Application dated 09.05.2015 that Hon'ble Supreme Court had held in its Judgment dated 25.08.2014 in W.P. (CrI.) 120 of 2012 (Coal Judgment) 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. (CrI.) 120 of 2012 (Cancellation Order), cancelling 204 coal blocks allocation including the Tokisud North Coal Block and Saregareh Coal Block allocated to GVK for the Project. Considering that the Tokisud Coal Block was at advanced stage of development, the same was included

in the category of mines where the allottees were permitted to retain the mine upto 31.03.2015.

7. Government of India notified on 21.10.2014 the Coal Mines (Special Provisions) Ordinance No. 5 of 2014 setting out the modalities for re-allocation of Coal Blocks. The Government of India promulgated the Coal Mines (Special Provisions) Second Ordinance, 2014 on 26.12.2014 to give continuity to the First Ordinance. Tokisud North Coal Block and Saregareh Coal Block are at Sr. No. 64 and Sr. No. 51 of Schedule-1 respectively. The Ordinance stipulated following 2 modes of allocation :

- (a) In terms of Section 4 of the Ordinance, coal mines set out in Schedule-1 including Tokisud North Coal Block and Saregareh Coal Block may be put up for auction.
- (b) In terms of Section 5, the Central Government may allocate a Schedule-1 coal mine to :
 - i) Government Company
 - ii) Corporation which is not a Joint Venture with a private company or
 - iii) Company which has been awarded a power project on the basis of competitive bids for tariff. The Coal Mines (Special Provisions) Act was notified on 30.03.2015 repeating the Coal Mines (Special Provisions) Second Ordinance. All provisions of the Act are identical to the Ordinance.

8. GVK communicated to PSPCL on 07.11.2014 requesting PSPCL to apply to the Central Government for allocation of the Tokisud North Coal Block to PSPCL which may be used to supply coal to the Project.

9. GVK wrote to PSPCL on 17.11.2014 that :

- (a) Keeping the power plant idle until coal is made available, would lead to an increase in the fixed cost component on account of IDC which would be about ₹386 crore.
- (b) An amount of ₹59 crore will be saved per annum by using imported coal instead of tapering linkage from CIL.

On above basis PSPCL was requested to allow the usage of Imported Coal. PSPCL was further informed vide letter dated 31.12.2014 that MoC has released the bidding schedule for the auction of Coal Blocks including Tokisud North Coal Block and GVK intends to bid for the same.

10. The petitioner informed the respondent vide letter dated 20.02.2015 that the petitioner has lost the bid for Tokisud Coal Block and as a consequence of which the project is left without any coal linkage in terms of clause 1.2.3.2 of Schedule 6 of the PPA and due to occurrence of a Change-in-Law Event in terms of Article 13 of the PPA, the terms and conditions of the source of coal needs to be re-negotiated and amended.

11. The petitioner further informed the respondent vide letter dated 18.03.2015 that the tariff depends upon the landed cost of coal, the coal price as indicated by CIL, a Government of India undertaking was to be considered and requested respondent to give consent to procure coal from the Western Coal Fields at the rate of ₹7050/MT. PSPCL was also informed vide letter dated 03.04.2015 that the Vesting Order for Tokisud Coal Block has been issued in favour of Essar Power M.P. Limited along with all assets and this is a Force-Majeure and Change-in-Law Event.

12. PSPCL stated in its letter dated 01.04.2015 that the contractual obligation to arrange for the supply of coal for the Project, whether from an identified source in terms of PPA or any other source is the sole responsibility of GVK and same can not be passed on to PSPCL. PSPCL further stated that in terms of Schedule 6 of the PPA, the cost of coal delivered for the Project shall not exceed the cost 'as prevailing' in the Pachwara Coal Block. Even if it is no longer held by PSPCL, the price of Pachwara Coal Block 'as existing' at that point of time would be applicable to the coal procured from alternate source.

13. The petitioner again wrote on 08.04.2015 to the respondent that the capping cost with the Pachwara Coal Block was based on the coal availability from Tokisud Coal Block since it was identified source of fuel in terms of the PPA. As such, the cost of coal is beyond the control of the petitioner and therefore will be as per CIL notification. PPA shall have to be amended suitably. PSPCL replied vide letter dated 30.04.2015 stating that cancellation of Tokisud Coal Block and promulgation of the Ordinance does not

constitute Change-in-Law. It was further stated that the Change-in-Law Event can only result in adjustment of tariff and not the amendment of PPA. PSPCL further conveyed that coal cost for the Project is capped at maximum of coal cost of Pachwara Coal Block and no where in PPA provision for upward revision exists.

14. GVK further submitted in the Application dated 11.05.2015 that petitioner has filed another petition with the following relief :

- “(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;
- (f) Grant consequential extension of SCOD till the issue of procurement of fuel is decided by this Hon’ble Commission.”

15. Apart from Petition No. 65 of 2013 and Application dated 11.05.2015 in Petition No. 65 of 2013, pending before the Commission, GVK filed another Petition being Petition No. 33 of 2015 also on 11.05.2015. In this Petition, GVK made prayers for relief enumerated in the proceeding paragraph submitting that cancellation of Tokisud Coal Block is Change-in-Law Event in terms of Article 13 of the PPA and that Project having left without any coal linkage as the result of this cancellation, alternate arrangement of coal is absolutely urgent keeping in view that the Project has reached the stage of completion and is due for commissioning in near future. Since the dispute regarding extension in SCOD due to alleged Force Majeure and Change-in-Law Events has already been referred for arbitration vide common decision / Order dated 12.08.2015 passed by the Commission in Petition No. 65 of 2013 and this petition, the Commission is only concerned with prayer (e) viz.

“Devise an alternate mechanism for the sourcing of Fuel including necessary amendments to the Amended and Restated PPA”.

The submissions made by the petitioner only with this regards have been re-counted.

16. GVK has submitted that

(1) The fuel supply arrangement i.e. supply of coal from Tokisud Coal Block, the captive mine allocated to the Project as per PPA, is no more in existence and on account of non-availability of fuel from the identified source, the petitioner is unable to commission the plant and generate power. Non-availability of fuel falls within the force-majeure in terms of Article 12 of PPA. The

petitioner is entitled to relief devising a mechanism for fuel and for pass through of the cost of fuel from an alternate source. The petitioner submitted extensively regarding powers and jurisdiction under the law of the Commission with regard to the relief sought by the petitioner within the meaning of term 'Regulate' in Section 86 of the Electricity Act, 2003. The petitioner submitted that under Section 86 of the Act and Article 12 and 13 of the Amended and Re-stated PPA, the Commission has the power and jurisdiction to mould appropriate relief to restore the petitioner to the same economic position as if the Change-in-Law and force-majeure events had not concerned.

17. GVK submitted that it is evaluating various options for procurement of fuel since its plant is ready for commissioning. The petitioner submitted following alternatives for consideration of the Commission :

- A. Use of Imported Coal, which has the following advantages :
- (a) Imported Coal is cheaper than e-auction coal.
 - (b) Imported coal supply is reliable which can not be ensured with e-auction coal.
 - (c) Ash content is less in imported coal which results in less ash generation.
 - (d) Imported coal has High GCV value reduces the transport cost per GCV and results in saving to PSPCL.
 - (e) Imported coal usage will reduce the quantum of emissions when compared to e-auction coal.

- (f) Imported coal GCV will be guaranteed whereas e-auction coal will be supplied on declared GCV basis and it is not realistic.

B. Supply of Coal from Pachwara Coal Block

GVK submitted that PSPCL has been re-allocated Pachwara Coal Block. PSPCL is obliged to supply fuel from the Pachwara Coal Block in light of undertaking dated 16.10.2007 given by the respondent to IDBI, the lead banker. In fact the petitioner had applied for captive coal mine as per the suggestions made by erstwhile PSEB and left out the available long term coal linkage from ECL.

18. GVK further submitted that if the petitioner is not provided with alternate source of fuel, the viability of the Project would come under jeopardy and the Project would face the risk of becoming a Non-Performing Asset (NPA). The petitioner had already incurred an expenditure of ₹4033 crore as on 31.03.2015 on the Project and about ₹349.47 crore towards development of Tokisud Coal Block as on 31.10.2014. If the Project of installed capacity of 2x270 MW remains stranded, it will be detrimental not only to the petitioner Investors and Lenders but would also cause losses to the State of Punjab. In view of above submissions, the alternate arrangement / mechanism for sourcing of fuel needs to be approved by the Commission. The Petition No. 33 of 2015 was admitted vide Order dated 20.05.2015. The petitioner was directed to file detailed submission within seven days about suitability / capability of the Boiler(s) installed at the Project to use / burn the imported coal and to supply a copy of the same directly to PSPCL to enable it to comment on the same in its reply to the petition.

PSPCL was directed to file reply to the petition by 16.06.2015 and supply a copy of the same directly to the petitioner.

19. The petitioner filed Affidavit dated 22.06.2015 for placing on record the additional information. The petitioner submitted the following additional information :

- (A) Reasons for use of imported coal.
- (B) Technical Specifications of the Boiler and ability to use 100% imported coal.
- (C) Procurement Process for imported coal.

The petitioner gave reasons for use of imported coal submitting that it has become necessary to source coal from alternate source on account of cancellation of Tokisud Block allocated to the Project, repeating the events that led to its cancellation and effects thereof. The petitioner also stated that use of imported coal is cost effective and submitted details of coal from other sources comparing the same with the cost of imported coal for the purpose. It was further submitted that domestic coal is not available in the open market and e-auction coal is costlier than imported coal.

The petitioner informed that BHEL, the supplier of BTG equipment for the plant, has certified vide letter dated 17.04.2015 that 100% imported coal can be used continuously in the Boiler.

The petitioner also submitted that the imported coal shall be procured by inviting tenders from the leading Coal Trading Companies in India initially for 1st year of operation.

20. PSPCL submitted reply on 07.07.2015. With regard to the prayer of the petitioner in respect of alternative source of coal for the Project, the Respondent, PSPCL, submitted that the capping on the price of coal at the cost of existing Pachwara Coal Block is not only for Tokisud North Coal Block but is also to be applicable to any other Block allocated to the Project. Since the obligation to arrange Coal Block for the Project is sole contractual obligation of the petitioner, therefore, there is no requirement to devise any fuel charge mechanism. The respondent reiterated that the intent, extent, scope and application of Change in Law is well defined in the Amended and Re-stated PPA and its effect is to be given through monthly tariff adjustments, whether the supply of coal is from an identified source or from an alternate source, to arrange the same is sole obligation of the petitioner. The petitioner may procure coal from an alternate source at a cost which does not exceed the then existing cost of Pachwara Coal mines. Any additional cost is to be absorbed by the petitioner. PSPCL submitted further that in view of the express contractual conditions in the PPA, there is no occasion for invocation of power of the Commission to regulate under Section 86 of the Act, to devise a mechanism to overcome the Change-in-Law / Force Majeure Events, when it is the petitioner who is required to arrange the fuel from an alternate source. No question of any 're-adjustment' in the terms of Amended and Re-stated PPA arise. The plea of the petitioner that coal from Pachwara Coal Block is also not tenable. The petitioner is basing this plea on the 'undertaking' earlier given by erstwhile PSEB in year 2007. PSPCL submitted that the same was prior to the execution of Amended and Restated PPA by the parties in year 2009. There was no mutual understanding agreed

to or recorded in the said PPA. PSPCL prayed in reply to dismiss the petition.

21. As already brought out, the Commission had referred the disputes with regard to extension in SCOD to the arbitration vide its Order dated 12.08.2015 passed in Petition No. 65 of 2013 and Petition No. 33 of 2015, but in the same Order had held that the issue of arrangement of coal from alternate source is of urgent nature as the Project has come to the commissioning stage and needs to be decided by the Commission forthwith in the interest of the Project. Accordingly PSPCL and GVK were directed vide *ibid* Order to file reply by 26.08.2015 to the following queries of the Commission in this respect :

- (i) Actions presently being taken by the petitioner for allotment of alternative coal mine / coal linkage for the Project by Ministry of Coal, GOI ?
- (ii) Status of Re-bidding of Saregreh Coal Mine allocated as a supplementary captive coal Block to the petitioner jointly with Arcelor Mittal Group in the ratio of 45:55, to meet full requirement of coal for the Project ?
- (iii) Premise on which the petitioner's claim that the plant is ready for commissioning rests ?
- (iv) Efforts made by the petitioner to arrange commissioning coal from CEA ?

22. GVK filed reply to the queries by way of Affidavit dated 24.08.2015. The Commission noted that the Project was allotted 1.5 Lac tonne of coal for carpeting and trial run, out of which 73,747 tonne allocated from CCL has been stated to have been

lifted and stacked at Barakana railway siding since July 2014. The remaining quantity of 75,000 tonne coal allocation has been shifted from BCCL to CCL as per the request of the petitioner. The Commission observed that this quantity of coal was sufficient to commission the Project and achieve COD, had this coal had been transported to the Project site, which has not been done so far. GVK was asked to explain why this could not be done.

During hearing on 26.08.2015, GVK submitted that it was allocated 12 Lac tonne of coal by Standing Linkage Committee(LT). Western Coal Fields Limited on 08.12.2014 has offered 5 Lac tonne at the rate of ₹3310 per tonne at Collery end. However, PSPCL did not accept this proposal on the ground that it was contrary to the terms of PPA. GVK also annexed a copy of DO letter dated 26.06.2015 from Hon'ble Chief Minister of Punjab to Hon'ble Minister of State (1/C) Power, Coal, New and Renewable Energy, Government of India for allotting permanent coal linkage of 2.5 million tonne per annum to make the plant operational and that it has already been ensured through PPA that benefits of coal cost will be fully passed to the consumers of Punjab. Hon'ble Chief Minister, has further requested that 0.75 Lac tonne of coal from BCCL and 5.0 Lac tonne from WCL allotted to the company (GVK), may be shifted to CCL which will reduce the cost of coal. GVK also filed a copy of Ref. No. CIL/S&M/Ministry/391 dated August 2/3, 2015 that based upon the request of Hon'ble Chief Minister, competent authority at CIL approved the transfer of remaining quantity of 75,000 tonne from BCCL to CCL. Subsequent to SLC (LT) meeting held on 12.03.2015, MOC vide their OM No. 23011/19/2015-CPD dated 30.06.2015 for coal supplies for power projects beyond 30.06.2015 has directed that

coal supply may be continued on MoU best efforts basis on the same terms and conditions as at that time till 31.03.2016 or until a policy is formulated, whichever is earlier, for plants having long term PPAs and that were already commissioned or to be commissioned during 2015-16.

During course of arguments on 26.08.2015, it transpired that GVK has already submitted a proposal to PSPCL vide Ref.GPGSL/PSPCL/65/2015 dated 24th August, 2015, suggesting certain amendments in PPA dated 26.05.2009 with regard to fuel related issues, copy of which was filed by GVK after the hearing. In view of this development, the Commission suggested that GVK and PSPCL should hold meetings and decide these issues including amendment in PPA expeditiously. The parties were directed to submit status of the matter by 24.09.2015. The hearing of the petition was next scheduled for 29.09.2015. The hearing fixed for 29.09.2015 was re-scheduled for 06.10.2015 and the parties were intimated accordingly vide No. PSERC/Reg./6063/66 dated 09.09.2015. GVK filed affidavit dated 28.09.2015 and submitted status of the proposed amendments to be made in the PPA and also the latest information about the subsequent events in respect of coal arrangements for the Project. PSPCL, on the other hand, submitted vide No. 5693 dated 05.10.2015 that PSPCL has constituted a Committee to deliberate the issues of alternate coal arrangement proposed by GVK vide letter dated 24.08.2015. The Committee deliberated the issue on 28.08.2015 and 10.09.2015 and also discussed the same with GVK on 15.09.2015 and 16.09.2015. GVK has submitted a fresh draft of PPA with proposed amendments. PSPCL was examining the issue and obtaining legal opinion of Advocate General, Punjab on the

same. The parties sought further time to submit the proposal to the Commission. The Commission directed PSPCL and GVK vide Order dated 07.10.2015 to expedite to conclude the process of amendments to PPA and file a joint submission by 28.10.2015. Petitions were fixed for further hearing on 10.11.2015. GVK filed submissions dated 10.11.2015 during hearing submitting detail of events occurred subsequent to 06.10.2015, the date of last hearing, and enclosed with it the correspondence exchanged between GVK and PSPCL. No concrete proposal was submitted as directed by the Commission in earlier orders. The parties were accordingly directed vide Order dated 13.11.2015 to negotiate the terms of coal supply for the plant and submit a proposal by 26.11.2015. PSPCL filed additional submissions dated 04.12.2015, gist of which as per para No. (9) and (10) is reproduced hereunder:-

- “9. That the statements made in the aforesaid letter dated 6.11.2015 are also not tenable and do not reflect the correct factual position. Firstly and as stated above, the relief of carrying out amendments in the existing Amendment and Restated PPA is a consequential relief prayed with the main relief of declaration of occurrence of force majeure/change in law events and can not be granted by this Hon’ble Commission till arbitration proceedings are pending. Having referred the disputes to arbitration, any proceedings for grant of consequential relief would tantamount to parallel proceedings before this Hon’ble Commission, which

is impermissible. Further, various proposals/suggestions given by the Petitioner regarding arrangement of fuel supplies on interim basis, adoption of Coal India prices and suggested amendments in the Amended and Restated PPA dated 26.5.2009 have been deliberated in the meetings held between the Petitioner and the Respondent pursuant to oral directions of this Hon'ble Commission; however, no commitment in this regard has been made by the Respondent and nothing has been finalized because the Petitioner has not intimated any source of power procurement, whether on interim or on long-term basis. It is only thereafter, the Petitioner has been requested to intimate the firm source of coal.

10. That vide letter dated 20.11.2015, the Petitioner has forwarded to the Respondent a Memorandum of Understanding (MoU) dated 19.11.2015, which was stated to have been entered into for procurement of 2.4mmts imported coal on an annualized basis for a period of 2 years from January, 2016. The MoU states that the parties "can have" a detailed sales and purchase contract for coal as per the draft shared in the past. The Petitioner has thus reached an in-principle understanding with the coal supplier for importing coal for a period of 2 years for supply to the project and a detailed sales and purchase contract for the same is yet to be executed. Further, the MoU suggests only an interim source of fuel

supply and the Petitioner is yet to intimate a firm source of supply for the entire period of Amended and Restated PPA for carrying out any amendments therein. The Petitioner has itself stated in its letter dated 6.11.2015 that various measures taken by it for procuring fuel for the project are under consideration of the appropriate authorities and are awaiting approvals in due course of time. That being so and without prejudice to the submissions made hereinabove, no question of carrying out any amendments in the Amended and Restated PPA can at all arise.”

The Commission heard the arguments of the parties on 07.12.2015 on the issue of interim arrangement for coal supply for the project, till the long term supply of coal for the Project is finalized in due course of time. After hearing the parties, the Commission directed the parties vide Order dated 08.12.2015 that an interim arrangement for coal supply be worked out through mutual discussions, which can be implemented for a period till the final arrangement of coal supply is made for the Project. The proposal be submitted by GVK to PSPCL within a time of a week and the parties to meet, thereafter, to finalize the same within another week. Mutually agreed proposal be submitted to the Commission by 29.12.2015. GVK filed Affidavit dated 30.12.2015 for placing on record the events subsequent to the Order dated 08.12.2015. GVK submitted :

- “2. On 15.12.2015, GVK wrote to PSPCL setting out all details of alternate sources of coal available and requested PSPCL to consider the quantities of coal from alternate sources that are available at present so as to enable the petitioner to generate power from the power plant. It may be noted that GVK highlighted the urgency for convening a meeting and finalizing the interim arrangement, given that the proposal had to be submitted before this Hon’ble Commission by 29.12.2015. A copy of the letter dated 08.12.2015 is annexed hereto and marked as Annexure A-1.
3. It is respectfully submitted that no reply has been received from PSPCL to the letter dated 15.12.2015 issued by GVK.
4. Over phone, GVK was given to understand that PSPCL requires a draft agreement for the use of alternate sources of fuel. On 21.12.2015, GVK forwarded a copy of the draft agreement and requested PSPCL to convene a meeting, to finalise the interim arrangement for use of alternate source of fuel. It may be noted that GVK highlighted the urgency for convening a meeting and finalising the interim arrangement, given that the proposal had to be submitted before this Hon’ble Commission by 29.12.2015. A copy of the letter dated 21.12.2015 from GVK to PSPCL along with the draft agreement for use of alternate source of fuel is annexed hereto and marked as Annexure A-2.

5. It is respectfully submitted that despite GVK forwarding a copy of the draft agreement as early as 21.12.2015, no reply has been received from PSPCL till date.
6. In this regard, it is respectfully submitted that GVK has made all efforts to finalise the interim arrangement for use of alternate source of Coal with PSPCL and submit the proposal before this Hon'ble Commission by 29.12.2015. However, till date, PSPCL has not replied to any of GVK's letters / proposals, GVK has provided details of 52.50 Lakh MT of Coal arranged for the Project along with details of cost of Coal."

PSPCL, on the other hand, submitted vide memo dated 04.01.2016 as under:

"In this context, it is intimated that the draft of interim coal arrangement has been received in PSPCL on 22.12.2015 through e-mail. The same was sent to PSPCL Advocate for advice / comments on the same day through e-mail. The subject cited issue is under active consideration of PSPCL and shall take some more time."

During hearing on 05.01.2016, PSPCL submitted that the matter was on the agenda of the meeting of BoD of PSPCL scheduled for 06.01.2016 and the decision of BoD on draft agreement submitted by GVK shall be conveyed to GVK, thereafter, keeping in view the urgency of the matter, the Commission directed PSPCL to convey the decision of BoD of PSPCL on the draft agreement / proposal dated 21.12.2015 of

GVK within three days to GVK i.e. by 09.01.2016 positively and thereafter, sort out the differences, if any, within a week and file the proposal to the Commission before next date of hearing on 21.01.2016.

PSPCL filed memo No. 5378 dated 20.01.2016 and submitted as under:

- “1. The interim Agreement will be independent of the Amended & Restated PPA dated 26.05.2009.
2. As GVK has not submitted any proposal regarding permanent source of coal for the entire term of 25 years available therefore, any Power generation & supply by way of interim Arrangement can not be linked to Scheduled Commercial Operation Date as proposed by GVK.
3. Pending the arbitration proceedings regarding SCOD and in the absence of Coal supply arrangement for entire term of the PPA, power supplied by GVK Power Project shall be considered as infirm power.
4. For determining Energy Charges for Power supply by GVK, minimum landed cost of CIL coal being received by Thermal Power Plants of the PSPCL shall be considered.

On the above lines, a letter (copy enclosed) has been sent to M/s GVK Power (Goindwal Sahib) Limited to give reply / consent to the above observations of PSPCL.”

GVK filed submissions dated 21.01.2016 in response to PSPCL submissions dated 20.01.2016.

After hearing the arguments on behalf of parties at length on 21.01.2016, the Commission decided to close the hearing of the case vide Order dated 22.01.2016. Order was reserved.

23. The Commission has carefully gone into the submissions of the petitioner (GVK) and respondent (PSPCL) with regard to issue of interim arrangement of supply of coal for the Project keeping in view the prayer (e) of Petition No. 33 of 2015 i.e.

“(e) Devise an alternate mechanism for the sourcing of Fuel in terms of suggestions provided by the petitioner in paragraphs 109 to 115 above including necessary amendments to the Amended and Re-stated PPA.”

and observation, findings and decision of the Commission in this respect is given in the succeeding paragraphs.

24. Observations of Commission

24.1 Observations:

i) As per the PPA dated 26.05.2009 signed between the then PSEB (now PSPCL) and GVK, the coal for the Project was to be sourced from captive coal block at Tokisud North and any other block allocated to the Project. The fuel charges linked to the coal cost based on the quantity and quality of coal delivered at the Project were not to exceed the cost as prevailing in the Pachhawara captive coal mine of PSEB (now PSPCL).

- ii) As per the PPA, the Scheduled Commercial Operation Date (CoD) of the Project was thirty six (36) months from the date of financial closure for the first Generating Unit and six (6) months from the CoD of the first Unit for the second Generating Unit. The financial closure of the Project took place on 21.05.2010 and accordingly the CoD for Unit-1 and Unit-2 was required to occur on 20.05.2013 and 20.11.2013 respectively.
- iii) Hon'ble Supreme Court of India in W.P. (CrI.) 120 of 2012 in the case of Manohar Lal Sharma vs. The Principal Secretary & Ors. [(2014) 9 SCC 516] on 25.08.2014 held that the entire allocation of coal blocks/mines made by the Screening Committee from 14.07.1993 in 36 meetings and allocations made through the Government dispensation route suffer from arbitrariness and legal flaws and were found to be illegal. Hon'ble Supreme Court of India specifically held that there was no fault on the part of the prior allottees and it was the Government/Screening Committee that was responsible for such illegality.
- iv) On 24.09.2014, Hon'ble Supreme Court of India passed a consequential de-allocation Order cancelling allocation of 204 coal blocks and all the captive coal blocks, including the Tokisud North Coal Block and supplementary Saregarah Captive Coal Block (jointly with Arcelor Mittal Group in 45:55 ratio) allocated to the Project. The cancellation order allowed mining till 31.03.2015.
- v) Govt. of India (GoI) notified the Coal Mines (Special Provisions) Ordinance No.5/2014 (First Ordinance) on 21.10.2014, setting out the modalities for re-allocation of coal blocks cancelled by the Hon'ble Supreme Court of India. On 26.12.2014, GoI

promulgated the Coal Mines (Special Provisions) Second Ordinance, 2014 (Ordinance) to give continuity to the First Ordinance effective 21.10.2014. Repealing the Ordinance, Govt. of India notified the Coal Mines (Special Provisions) Act, 2015 on 30.03.2015 in the Official Gazette.

- vi) The petitioner participated in the bidding process for Tokisud Coal Block and Amelia North Coal Block conducted by Ministry of Coal. The bidding process was concluded on 18.02.2015 and Essar Power M.P. Ltd. was declared as the successful bidder and the Vesting Order issued in its favour. Ministry of Coal is yet to conduct the bidding process for the re-allotment of the Saregarah Coal Block.
- vii) Having been unsuccessful in the bidding process for re-allocation of the Tokisud Coal Block, the petitioner applied to the Ministry of Coal, Ministry of Power, Central Electricity Authority and Govt. of Punjab to provide long term coal linkage to the Project, which is ready for commissioning. Unit-1 and Unit-2 of the Project were synchronized to the grid on oil on 06.07.2013 and 04.03.2014 respectively.
- viii) The petitioner proposed an alternative mechanism for fuel source by way of use of imported coal stating that domestic coal is not available in the open market. Petitioner stated that imported coal has high GCV, less ash content, is cheaper than e-auction coal and its supply is guaranteed.
- ix) The Project was allotted 1.5 lakh tonnes of coal for carpeting and trial run, out of which 73,747 tonnes was lifted by the petitioner. The petitioner requested Coal India Ltd. to shift the balance 75000 tonnes of coal allocation to Central Coal Fields

Ltd. from Bharat Coking Coal Ltd. being more suitable, which was done and first instalment of 25000 tonnes out of the same was allocated. In addition, the petitioner was allocated 12 lakh tonnes of coal by the Standing Linkage Committee (LT) pursuant to its meeting dated 27.06.2014. Out of this, 5 lakh tonnes have been offered by Western Coal Fields on 08.12.2014.

- x) The petitioner submitted a proposal to PSPCL vide letter dated 24.08.2015 suggesting certain amendments in PPA with regard to fuel related issues in view of the cancellation of the captive coal block for the Project. PSPCL constituted a committee to deliberate the issue of alternate coal arrangement proposed by the petitioner. It was held by the Commission that both the parties should hold meetings and decide these issues including amendment in PPA expeditiously and file a joint submission in this regard for consideration of the Commission.
- xi) The petitioner forwarded to PSPCL, a Memorandum of Understanding (MoU) entered into as a measure of in-principle understanding with the coal supplier for procurement of 2.4 million tonnes of imported coal on an annualised basis for a period of two years from January, 2016. PSPCL took the stand that this is an interim source of fuel supply and the petitioner is yet to intimate a firm source of supply for the entire period of the PPA and therefore carrying out any amendment in the PPA is not possible.
- xii) The Commission directed that an interim arrangement for coal supply be worked out through mutual discussion between the parties which can be implemented for a period till the final

arrangement of coal is made for the Project. The petitioner was, in the meanwhile, directed to make sincere and concerted efforts to firm up long term source of coal supply for the Project. Awaiting PSPCL's response, the petitioner provided details of 52.50 lakh tonnes of coal arranged for the Project along with details of cost.

xiii)PSPCL vide letter dated 20.01.2016 intimated the Commission as under:

“1.The Interim Arrangement will be independent of the Amended & Restated PPA dated 26.05.2009.

2.As GVK has not submitted any proposal regarding permanent source of coal for the entire term of 25 years available therefore, any Power generation & supply by way of Interim Arrangement can not be linked to Scheduled Commercial Operation Date as proposed by GVK.

3. Pending the arbitration proceedings regarding SCOD and in the absence of Coal supply arrangement for entire term of the PPA, power supplied by GVK Power Project shall be considered as infirm power.

4. For determining Energy Charges for Power supply by GVK, minimum landed cost of CIL coal being received by Thermal Power Plants of the PSPCL shall be considered.”

xiv)The petitioner vide filings dated 21.01.2016 submitted that PSPCL can not take an untenable plea that duration or term of fuel supply arrangement is a condition precedent to PSPCL agreeing to a proposal of a *pro tem* arrangement. Since PSPCL has indicated a price cap on the fuel cost, the source of fuel or

term of fuel supply arrangement has no bearing. The petitioner further submitted that the process of commissioning of the Project is governed by the applicable statutory, regulatory and contractual frame work such as The Electricity Act, 2003, Rules & Regulations, PPA et.al. and there is no bar on the petitioner for commissioning the Project. The petitioner contended that declaration of CoD is not contingent upon having a permanent source of fuel and reiterated that 52.50 lakh tonnes (approx.) of coal is available which is sufficient to meet the CoD requirements and generate power from the Project at a PLF of 85% for a continuous period of 2 to 2.5 years. The petitioner submitted that it has issued the preliminary notice for the CoD proposed to be held on 31.01.2016 and PSPCL has not raised any objection in this regard. The petitioner further submitted that the proposal of PSPCL to treat power generated by the Project with the aforementioned interim arrangement of coal as infirm power is contrary to law. The petitioner citing CERC Order dated 22.02.2014 in petition no. 74/MP/2013 contended that the term infirm power has been defined in the Tariff Regulations, 2009 as electricity injected into the grid prior to the commercial operation of the Project and is by its very nature unscheduled. The petitioner further contended that State Grid Code Regulations of PSERC and Indian Electricity Grid Code Regulations also do not provide for scheduling of infirm power and if so permitted would violate IEGC since the State Grid Code has to be consistent with IEGC as per section 86(1)(h) of The Electricity Act, 2003.

25. Findings and decision of Commission

Considering the observations above, the Commission notes that both the identified sources of coal for the Project stands cancelled by the judgment of Hon'ble Supreme Court of India. Out of the two allotted mines, the Tokisud North Coal Block stands re-bid by the Govt. of India and allotted to Essar Power M.P. Ltd. The petitioner was unsuccessful in the re-bidding of the said mine. The bidding for the other mine has not been carried out so far. The petitioner has applied for long term coal linkage to the concerned authorities. The petitioner has also arranged coal required for commissioning the Project and to run it at 85% PLF for 2 to 2.5 years from domestic and imported sources as an interim arrangement. As per the petitioner, the Project was slated for declaration of CoD on 31.01.2016, for which preliminary notice stands sent to PSPCL.

It has been averred by PSPCL that the petitioner can not declare CoD of the Project without having a firm source of coal supply for the entire term of the PPA and that the power generated by the Project with the interim arrangement of coal will be treated as infirm power. PSPCL has also submitted that no amendment to the PPA can be signed unless a firm source of fuel/coal for the entire term of the PPA is arranged by the petitioner. The parties have been unable to sort out the matter with respect to finalizing the interim arrangement of coal for the Project.

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

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

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

The petitions are disposed of in terms of above.

Sd/-

**(Gurinder Jit Singh)
Member**

Sd/-

**(Romila Dubey)
Chairperson**

**Chandigarh
Dated: 01.02.2016**