

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

**Petition No.60 of 2013
Date of Order: 11.02.2014**

In the matter of: Petition under applicable provisions of Section 86 (1) (b & f) of Electricity Act, 2003 for approval of procurement of coal from alternate sources through competitive bidding process and approval of energy charges as per the Hon'ble APTEL Judgement dated August 21, 2013 in Interim Appeal No.226 of 2013 in Appeal No.56 of 2013 filed by Talwandi Sabo Power Limited - 3 x 660 MW Talwandi Sabo Thermal Power Project ("Project").

AND

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

Versus

Punjab State Power Corporation Limited through its Engineer-in-Chief (Thermal Designs), PSPCL, Shed No.T-2, Thermal Design Complex, Patiala-147001

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

ORDER

Talwandi Sabo Power Limited (TSPL), has filed this petition before the Punjab State Electricity Regulatory Commission (Commission) under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 (Act) for approval of procurement of coal from alternate sources through Competitive Bidding Process and approval of energy charges as per Hon'ble APTEL Judgement dated 21.08.2013 in Interlocutory Application No. 226 of 2013 in Appeal No.56 of 2013 filed by TSPL.

2. The petitioner has submitted that it is a company incorporated under the Companies Act, 1956, having its registered office at village Banawala, district Mansa, Punjab. TSPL was a Special Purpose Vehicle (SPV) set up by erstwhile Punjab State Electricity Board (PSEB) for developing the project. The entire shareholding was subsequently transferred to Sterlite Energy Limited (SEL) in terms of Bid Documents

after it was selected as the successful bidder. SEL, also a Company under the Companies Act is the promoter of the petitioner company and had participated in Case-2 tariff based competitive bidding process held by erstwhile PSEB for development of the project and emerged as successful bidder.

3. The petitioner has submitted the facts and circumstances giving rise to the present petition along with background of the case given below:

- i. The erstwhile PSEB intending to procure power through competitive bidding under section 63 of the Act and the “Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005” issued by the Ministry of Power, Govt. of India (Competitive Bidding Guidelines) invited bids under Case-2 to set up the project. In terms of the Competitive Bidding Guidelines, the PSEB incorporated TSPL (its wholly owned subsidiary), a Special Purpose Vehicle (SPV) to act as its authorised representative for carrying out pre-bid obligations on behalf of PSEB in relation to the project. Accordingly, TSPL acting as an authorised representative for PSEB and on behalf of PSEB issued Request for Qualification (RfQ) on 25.09.2007 and Request for Proposal (RfP) on 18.01.2008 for procurement of power on long term basis for this project in the range of 1800±10% MW.
- ii. PSEB in the RfP document specified the details regarding the status of arrangement of fuel in terms of Clause 1.4(B)(2) of the RfP wherein it ensured coal supply of 8.7 Million Tonne Per Annum (MTPA) having Gross Calorific Value (GCV) of 3900 kcal/kg and also specified that the long-term coal linkage had been sought for the project and that the Ministry of Coal, Government of India (GoI) had approved the issuance of Letter of Assurance(LoA) to meet the fuel requirement of the project. Further, the respondent in the RfP bid conference held on 08.05.2008 at Chandigarh (RfP Bid Conference), vide its presentation had assured the prospective bidders regarding the status of coal arrangements as on that date. It stated that Mahanadi Coalfields Limited (MCL) vide its letter dated 28.04.2008 (MCL Letter), has agreed to supply “E” Grade coal up to 5.00 Million Tonne (MT) during FY 2011-12 and 7.70 MT from FY 2012-13 onwards for the Project. The respondent also provided the specifications of Fuel during the RfP Bid Conference, which is Grade E with GCV in the range of 4500-4600 kcal/kg and ash content in the range of 33 - 34%. Thus, based on the specific representations and assurances by the respondent, SEL submitted its bid for setting up the project in order to supply entire power from the project to the Procurer (i.e., respondent herein) in terms of the competitive bid process. SEL

was selected as the successful bidder and accordingly on 04.07.2008, the respondent issued Letter of Intent (LoI) in favour of SEL calling upon it to acquire 100% shareholding in TSPL. Subsequently, a Share Purchase Agreement (SPA) to the same effect was executed on 01.09.2008. The Power Purchase Agreement (PPA) setting out the terms and conditions for construction, operation and maintenance of the project, sale of contracted capacity and supply of electricity by the petitioner/seller to the respondent/procurer was signed between the petitioner and the respondent on 01.09.2008. The respondent entered into a Memorandum of Understanding (MoU) with petitioner on 02.09.2008. In terms of Para 3 of the MoU, the respondent undertook the specific obligation to execute the Fuel Supply Agreement (FSA) with the fuel supplier and thereafter assign the same in favour of the petitioner. After the TSPL was acquired by the SEL, the MoU was entered into with the petitioner and LoA issued by MCL on 14.08.2008 was provided to the petitioner. Moreover, the LoA was also issued on 14.08.2008 much after the date of submission of financial bid i.e. 18.06.2008 by SEL and issuance of LoI dated 04.07.2008 to SEL by the respondent.

- iii. Upon receipt of the LoA, the petitioner noticed that the LoA arranged by the respondent through MCL for 7.72 MTPA of coal i.e. Annual Contracted Quantity (ACQ) was contradictory to the specifications of the coal as assured and mentioned in the MCL letter dated 28.04.2008 and other bid documents. Among others, the two major deviations in the terms of coal assurance were that the MCL reserved a right to provide Grade E/F coal for the project under the LoA as against the assured supply of Grade E coal only, as per MCL letter dated 28.04.2008. Further, as per LoA, MCL also has a right to provide coal through imported sources also as against the assured provision of domestic coal only. After the review of the LoA, the petitioner realized that the coal under the LoA is only meant for the project with 1800 MW capacity and not up to the ultimate capacity (1980 MW) of the project for which bid was invited by the respondent.
- iv. The petitioner, aggrieved by such turn of events, initiated correspondence with the respondent requesting it to fulfil its obligations to provide the coal of grade/quality and origin as specified/ represented during the pre-bid stage and also highlighted the detrimental impact of the terms and conditions of the Model Fuel Supply Agreement mandating usage of imported coal on the project as the project was designed to use domestic coal. It submitted that during such period MCL had been seeking execution of the FSA with the petitioner and had conveyed to the petitioner that in the event of failure to execute the FSA, it may consider to cancel the coal linkage. In reply to the issues raised by the petitioner

in the said correspondences, the respondent, absolving its obligation to provide coal linkage, had directed the petitioner to take up the matter with the concerned authorities and contended that it was only responsible for providing the coal linkage which it fulfilled by providing the LoA.

- v. The respondent filed the Petition No.11 of 2012 before this Commission on the limited issue of the signing of FSA.
- vi. During pendency of Petition No.11 of 2012, the petitioner filed a separate petition before the Commission (No.46 of 2012) seeking adjudication of the substantive rights and obligations of the parties under the Bidding Documents, the PPA and MoU read with Competitive Bidding Guidelines with respect to arrangement of adequate quantity of fuel for the project and related consequences thereof of any shortfall in supply of coal in terms of quantity/quality. In the said petition, TSPL submitted that the respondent is under an obligation to arrange adequate quantity of coal of grade/origin/quality as assured during the pre-bid stage on the basis of which the bid was submitted by SEL and that the respondent should be directed to take all steps in order to fulfil its aforesaid obligation. The petitioner also claimed that in the event, if there is any shortfall in supply of coal, the respondent should be made responsible for the same and the petitioner should not be made to suffer from any adverse implication arising out of such shortfall under the PPA. The main prayers made by petitioner in the above petition are as follows:

- (a) Direct the respondent to arrange (including transportation) adequate quantity of fuel (domestic coal) of the quality as represented and assured at the time of bidding up to the project site, for the life time of the project i.e. 25 years, so that the project can operate at its ultimate capacity of 1980 MW;
- (b) Direct the respondent to allow deemed generation benefits and to pay capacity charges and incentives thereon to the petitioner in case the project cannot operate at its ultimate capacity of 1980 MW due to shortfall in supply of fuel of the assured quality/grade/origin or non-availability of fuel for the project.

- vii. The Commission passed Order dated 24.12.2012 disposing of the aforesaid petition no. 46 of 2012 wherein the Commission had elaborated the aforementioned issues in detail and on the issue of fuel shortage has held as under :

“.....The Commission notes that at this point of time, MCL is assuring to supply 80% of the ACQ of coal. The petitioner’s apprehensions regarding not being able to operate the plant beyond a certain PLF are not entirely unfounded. A significant investment having been made by the developer in the project, the utility and the State Government have to, besides the

developer, take up the matter with the quarters concerned for allocation and supply of adequate quantity/quality/grade of coal for the generating station to run successfully as per PPA.

Conclusively, the Commission holds that LoA and PPA are to be treated as one document/contract and followed / operated in tandem. Thus, the Commission directs the petitioner to vigorously pursue the matter with all concerned Government authorities e.g. MCL, Coal India Ltd., Ministry of Coal, Ministry of Power and Central Electricity Authority etc. for maintaining the status quo with regard to quantity/quality/grade/origin for the coal committed as per the LoA as also for additional allocation of coal required for running the plant as per PPA. On its part, PSPCL will fully co-ordinate and co-operate with TSPL to pursue the matter at the highest level, with the State as well as Central Government to fulfil the assurance contained in the LoA. Similarly, PSPCL will also co-ordinate and co-operate with TSPL to pursue the matter for getting additional allocation of coal to run the plant as per PPA.

.....

As regards the prayer for allowing deemed generation benefits and payment of capacity charges and incentives there on to the petitioner in case the project cannot operate at its full capacity due to short fall in supply of fuel, the same would be as per terms of the PPA. The Commission is mandated to strive for maintaining a balance of the equities between the interest of the consumers, the distribution utility and the generators in the State. The Commission, therefore, holds that remedies to the issues raised in the petition are duly covered under various articles of the PPA, which is a comprehensive document, including the force majeure and change in law provisions. The petitioner is free to approach the competent authorities as per PPA having jurisdiction to adjudicate upon issue(s) at the appropriate time, as and when these arise.”

- viii. On the Order issued by the Commission in Petition No.46 of 2012, TSPL filed an Appeal with Hon'ble APTEL (Appeal No.56 of 2013) on 02.02.2013 with the following prayers:

“Relief Sought

- a. Set aside the Impugned Order passed by the learned Punjab State Electricity Regulatory Commission dated 24.12.2012 save as to the extent it allowed usage of imported coal supplied by MCL under the LoA/FSA;*
- b. Direct Respondent No.1 to make alternate arrangements for supply of coal for the Project, including coal procured through other sources like e-auction coal / coal from spot market / Imported coal from other sources, in the event CIL fails to meet its commitment to supply coal to the Project;*
- c. Direct Respondent No.1 to arrange (including transportation) adequate quantity of fuel (domestic coal) of the quality as represented and assured*

at the time of bidding, up to the Project site, for the life time of the project, i.e., 25 years, so that the Project can operate at its ultimate capacity of 1980 MW;

- d. Direct the Respondent No.1 to indemnify Appellant for any adverse implications arising due to variation in quality/grade/origin of coal assured to be supplied for the Project at the time of bidding;*
 - e. Declare that the Appellant is not responsible for any penal consequences and/or default under the PPA on account of shortfall in generation of power due to shortage of coal supply;*
 - f. Direct the Respondent No.1 to pay capacity charges for the shortfall in generation up to the Normative Availability by allowing deemed generation owing to the shortfall in the supply of coal which will prevent the Project from operating at its ultimate capacity of 1980 MW;*
 - g. Direct the Respondent No.1 to indemnify Appellant against any adverse consequences under the PPA on account of shortfall of coal resulting due to logistical bottlenecks related to transport of coal as the Respondent No.1 is responsible for executing FTSA to ensure transportation of coal to the Project site;*
 - h. Direct the Respondent No.1 to take all requisite steps to ensure that the FSA for Unit 3 which is expected to be commissioned well before 31.03.2015 is executed with MCL along with Unit 1 and 2 as per the current policies of the Ministry of Power, the Ministry of Coal and the CIL;*
 - i. Award cost in favour of the Appellant;”*
- ix. The proceedings in Appeal No.56 of 2013 at Hon’ble APTEL are in process.
- x. There have been other developments regarding supply of domestic coal, as Cabinet Committee on Economic Affairs (CCEA) taking into account the overall domestic availability and actual requirements of coal approved the mechanism for supply of coal to power producers on 21.06.2013. As per the above approval by CCEA, the Fuel Supply Agreements (FSA) have to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan and to meet the balance FSA obligations, Coal India Limited (CIL) may import coal and supply the same to the willing thermal power project on cost plus basis. The Thermal Power Projects may also import coal themselves. The Cabinet Committee also decided that the higher cost of imported coal is to be considered for pass through as per modalities suggested by the Central Commission. A letter dated 31.07.2013 of Ministry of Power, Government of India addressed to Central Electricity Regulatory Commission(CERC) inter alia provides as under:-

“2. after considering all aspects and the advice of CERC in this regard, Government has decided the following in June, 2013:

- i) *Taking into account the overall domestic availability and actual requirements, FSAs to be signed for domestic coal component for the levy of disincentive at the quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Plan.*
- ii) *To meet its balance FSA obligations, CIL may import coal and supply the same to the willing TPPs on cost plus basis. TPPs may also import coal themselves if they so opt.*
- iii) *Higher cost of imported coal to be considered for pass through as per modalities suggested by CERC.*

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4. *As per decision of the Government, the higher cost of import/market based e-auction coal be considered for being made a pass through on a case to case basis by CERC/SERC to the extent of shortfall in the quantity indicated in the LoA/ FSA and the CIL supply of domestic coal which would be minimum of 65%, 65%, 67% and 75% of LoA for the remaining four years of the 12th Plan for the already concluded PPAs based on tariff based competitive bidding.*

5. *The ERCs are advised to consider the request of individual power producers in this regard as per due process on a case to case basis in public interest. The Appropriate Commissions are requested to take immediate steps for the implementation of the above decision of the Government. ”*

- xi. It is observed from the above quoted extracts, the Government of India has approved that in order to reduce the impact of shortage of Domestic Coal Supply on the Thermal Power Plants (TPP), CIL can import coal and supply the same to the willing TPP on cost plus basis.

Further, to avoid shortage of coal supply, the Government of India also approved that alternatively TPPs may also opt for self procurement of coal.

- xii. The petitioner has executed the FSA with MCL for supply of Annual Contracted Quantity of 7.72 MTPA on 04.09.2013 and a copy of executed Fuel Supply Agreement (FSA) is enclosed with the petition. The petitioner has submitted that the FSA provides that MCL would be levied with penalties only if supplies are below the assured quantum of 80% of the ACQ as mentioned in the LoA and that this would include 65% domestic coal and 15% imported coal components for which a separate side agreement would have to be signed. As per FSA, if MCL supplies domestic coal of minimum 65% of Annual Contracted Quantity (ACQ), it shall not be liable for penalty till FY 2014-15 which will get changed to minimum

70% of ACQ in FY 2015-16 and minimum 75% of ACQ in FY 2016-17. As per clause 4.6.1 of FSA even in case of coal mix (Domestic + Imported coal), CIL has to pay penalty to the Procurer (TSPL) for delivery of coal below 80% of ACQ.

- xiii. Thus as per the FSA, MCL may not supply the quantity of domestic coal to operate the plant at normative availability as mentioned in the PPA. Under such circumstances, in case MCL does not supply the domestic coal for operating the plant as per PPA, the shortfall in delivery of coal will cause shortage of coal for the petitioner, which in turn will affect the availability and thus viability of the Plant. Also, the balance coal to be arranged from other sources may lead to technical and operational issues which are yet to be ascertained and hence are not being covered in the petition. Thus TSPL is taking advance action for procurement of coal from alternate sources to meet the anticipated shortfall from the linked sources of coal.
- xiv. Considering the above developments, the petitioner filed an Interlocutory Application No.226 of 2013 in Appeal No.56 of 2013 with the Hon'ble APTEL wherein the petitioner after citing various issues, as discussed above, has submitted that procurement of balance coal need to be initiated as soon as possible as it is a time consuming process. The relevant extract from the said Interlocutory Application No.226 of 2013 is as under:

“4. In this regard, it is respectfully submitted that it is not possible to arrange procurement of balance coal at a short notice as the process involved is time consuming, and therefore it is imperative that the process is put in place quite well in advance in order to protect the rights of the Applicant in case it were to succeed in the present appeal. In this regard, it is also to be noted that arrangement of balance coal from different sources (including domestic and imported coal) may take a lead time of approximately 9-10 months for the Project as it would involve the time spent in conducting the tender process, carrying out route survey for transport of balance coal, arranging logistics, related statutory clearances/ approvals, setting up loading-unloading facilities; testing of coal for the usability, finalization of contract etc. For this reason, it is high time and utmost urgent that the decision to proceed with the tender process to arrange balance coal is taken at this very stage to ensure timely arrangement to meet the shortfall that the Project would face.”

The prayers made by the petitioner in the Interlocutory Application No. 226 of 2013 are as under:

- “ a) *Direct the Respondent No.1 to proceed with arrangement of balance coal through competitive bidding for procurement from alternate sources so as*

to meet the shortfall in supply of coal for the Project without prejudice to the inter se claims of the parties in the accompanying appeal;

- b) In the alternative, if the respondent is not inclined to carry out the tender process as mentioned in prayer (a) above, then allow the applicant to proceed with arrangement of balance coal through competitive bidding for procurement from alternate sources so as to meet the shortfall in supply of coal for the Project without prejudice to the inter se claims of the parties in the accompanying appeal;*
- c) Pass such further order or orders as this Hon'ble Tribunal may deem just and proper in the circumstances of the case."*

xv. The Hon'ble APTEL has issued an Order dated 21.08.2013, in Interlocutory Application No.226 of 2013 in Appeal No.56 of 2013 and has held as under:

".....

7. We find that in the impugned order dated 31.12.2012; the following observations have been made by the State Commission:

"The Commission notes that at this point of time, MCL is assuring to supply 80% of the ACQ of coal. The petitioner's apprehensions regarding not being able to operate the plant beyond a certain PLF are not entirely unfounded. A significant investment having been made by the developer in the Project, the respondent and the State Government have to, besides the developer, take up the matter with the quarters concerned for allocation and supply of adequate quantity/quality/grade of coal for generating station to run successfully as per PPA."

Thus, the State Commission has recognised the problem of shortfall in supply of coal from the linked source.

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9. We agree with the Learned Sr. Counsel for the Appellants that advance action is required to be taken to meet the expected shortfall in availability of coal from the linked domestic sources during the pendency of these Appeals as tendering process for import of coal takes time. We, therefore, directed both the parties to suggest the safeguards to be followed by the Appellants in procurement process and supply of imported coal. Accordingly, both the parties filed their affidavits giving their suggestions. We have heard their submissions also.

10. On going through those suggestions and having considered the submissions, we find that the balance of convenience lies in favour of the Applicants / Appellants to take advance action for procurement of coal from alternate sources to meet the anticipated shortfall from the linked sources of coal in order to operate the power plant as per the PPA.

11. Learned counsel for the Appellants assured that no 'take or pay' liability on account of their contracts with suppliers of alternative sources of coal would be passed on to PSPCL. Further, the Appellants also undertake to receive the entire quantity of coal offered for supply by

CIL/subsidiaries of CIL, including imported coal and not to put any restrictions on supply from the linked sources.”

The Hon'ble APTEL in its Order dated 21.08.2013 also permitted the petitioner to initiate the Competitive Bidding Process for procurement of coal to meet the shortfall in linked coal and issued following directions:

“12. After considering the submissions of both the parties, we feel that suitable interim directions may be issued pending disposal of the above Appeals. Those are following:

- (A) The Appellants may undertake a transparent competitive bidding process for procurement of imported coal or coal from alternative domestic sources for their projects to meet the expected shortfall in supply from linked sources in order to operate the power plant as per the terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of first unit of the project on coal subject to the following conditions:*
 - (i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL (R-1).*
 - (ii) The Appellant will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.*
 - (iii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.*
 - (iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.*
 - (v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law as expeditiously as possible but not later than 60 days from the date of filing of the application:*
- (B) We want to make it clear that the above interim order is to enable the Appellants to take advance action for procurement of coal from alternative sources and this will not give any right to the*

Appellants to raise any charges over and above that admissible to them as per the terms and conditions of the PPA. The actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.

(C) The above Interim Order is without prejudice to the inter-se claims of the parties in these appeals”

4. The petitioner has submitted that in accordance with the directions issued by Hon'ble APTEL in its Order dated 21.08.2013, it has undertaken the transparent Competitive Bidding Process for procurement of 4 lakh tonne Non-coking Steam Coal from alternate sources. TSPL has further submitted that it initiated the Competitive Bidding Process for procurement of 4 lakh tonne Non-coking Steam Coal by issuing the advertisement in All India edition of Economic Times on September 20, 2013. A copy of advertisement published in Economic Times has been annexed with the petition. The petitioner has also annexed the copy of Bid Document with the petition and has submitted that the technical bids submitted by the bidders (five parties) were opened in the presence of authorised representative of PSPCL on October 15, 2013. The petitioner has further submitted that the bids submitted by the bidders were evaluated with respect to the conditions stipulated in the Bid Document. The bids of only three bidders qualified technically with respect to the qualification requirement stipulated in the Bid Document. Thereafter, the price bids of the technically qualified bidders were opened in the presence of PSPCL representatives and interested bidders on 21.10.2013. The technical and price bids opened on 15.10.2013 & 21.10.2013 respectively were signed by the PSPCL's representatives during bid opening.

5. The petitioner has submitted that it has complied with all the conditions specified by the Hon'ble APTEL in the bidding process undertaken by it and has submitted that Unit-1 is likely to achieve Commercial Operation on 15.01.2014 and if sufficient quantum of coal is not arranged in a timely manner for the project, the viability of the project will be severely affected leading to massive losses in the first year of the operations. The petitioner has also submitted that out of anticipated shortfall of around 7.0 lakh tonnes for one Unit itself, it has advertised for only 4.0 lakh tonnes of alternate coal and flexibility of changing the schedule in receiving coal from alternate sources has already been built into the Bid Document and has prayed to the Commission to grant approval for procurement of coal from alternate sources through Competitive Bidding Process carried out and allow it to compute energy charges based on weighted average actual landed cost and weighted average actual GCV of the coal delivered to the project including the coal procured from alternate sources.

6. The petition was taken up for admission on 10.12.2013. After scrutiny of the petition, the Commission made following observations vide Order dated 11.12.2013:-

- i. No calculations have been given in the petition for the tendered quantity of 4 lakh tonne coal to be procured through the tender process.
- ii. The petitioner has annexed Bid Documents Annexure '7' with the petition but has made no mention of the specific terms and conditions and modalities for passing through the cost of coal procured from alternate sources for taking approval of the Commission in line with Common Order dated 21.08.2013 passed by Hon'ble APTEL in I.A.No.226 in Appeal No.56 of 2013, I.A. No.227 in Appeal No.68 of 2013 and I.A. No.130 of 2013 in Appeal No.84 of 2013.

7. The petitioner submitted during hearing that above information shall be filed by 13.12.2013 by way of additional submissions. Accordingly the Commission decided that the petition shall be taken up for admission on 17.12.2013.

8. In compliance to the observations of the Commission in Order dated 11.12.2013, TSPL filed amendment to the petition on 13.12.2013. The Commission heard the matter on 17.12.2013. Petition was admitted and vide its Order dated 17.12.2013, the Commission directed PSPCL to file reply by 26.12.2013 along with suggestions regarding terms and conditions that may be imposed on the petitioner for procurement of coal and modalities for passing through the cost of coal procured from alternate sources. The date of hearing was fixed for 27.12.2013.

9. The petitioner in the additional submissions has submitted that the bidding process for procurement of alternate coal has been carried out by complying with the directions issued by Hon'ble APTEL for undertaking the Competitive Bidding Process and that the details of compliance to the directions issued by Hon'ble APTEL for undertaking the Competitive Bidding Process have already been elaborated in paragraphs 35 to 49 of the petition. The petitioner has requested the Commission to approve the terms and conditions of procurement of alternate coal at a price discovered through the Competitive Bidding Process. TSPL has further submitted that detailed terms and conditions for procurement of alternate coal are as specified in the bid document issued for procurement of alternate coal and in the replies to the queries raised by the bidder which are enclosed at Pages 126 to 197 of the petition and has requested the Commission to approve the terms and conditions for procurement of alternate coal enclosed at pages 126 to 197 of the petition.

10. TSPL has submitted that Schedule 7 of the executed PPA between the petitioner and the respondent provides for the computation of the energy charges for the power

procured by the respondent. As per Schedule 7 of the PPA, the Monthly Energy Charges are determined on the basis of the weighted average actual landed cost of coal to the Seller, including purchasing, transporting and unloading. Further, as per provisions of PPA, the Calorific Value to be considered for computation of energy charges is weighted average gross calorific value of the coal most recently delivered to the project before the beginning of the billing month expressed in kcal/kg. TSPL has requested to allow it to compute the energy charges by considering the weighted average actual landed cost of procurement of coal including coal procured from alternate sources and weighted average gross calorific value of the coal including coal procured from alternate sources and have further requested the Commission to approve the modalities for passing through the cost of the coal procured from alternative sources to PSPCL by allowing the petitioner to compute the energy charges in accordance with the provisions of PPA.

11. TSPL has submitted that it has executed a Fuel Supply Agreement (FSA) with Mahanadi Coalfields Limited (MCL) on September 4, 2013 and as per the FSA, the Annual Contracted Quantity (ACQ) of coal to be supplied by MCL is 7.72 MTPA. As per the FSA, MCL would be levied with penalties only if supplies are below the assured quantum of 80% of the ACQ. This 80% of the ACQ would include 65% domestic coal and 15% imported coal. Further, if MCL supplies domestic coal of minimum 65% of Annual Contracted Quantity (ACQ), it shall not be liable for penalty till FY 2014-15 which will get changed to minimum 70% of ACQ in FY 2015-16 and minimum 75% of ACQ in FY 2016-17. Further, as per Clause 2.10 of the FSA, there is a Build-up Period of 6 months commencing on the First Delivery Date and in case Coal India Limited (CIL) decides at its sole discretion to import, Build-up Period shall be extended for a further period of six months for commencing supply of imported coal. The FSA stipulates that during the Build-Up Period any compensation arising on account of short supply shall not be payable. TSPL has submitted that considering these provisions of FSA and assuming that MCL will supply 80% of the ACQ, the petitioner has estimated the additional coal requirement to operate the Unit-1 at Contracted Capacity of 613.8 MW for four months as given in Table hereunder:-

Additional Coal Requirement

Sr.No.	Description	Unit	Value
A	Coal Requirement for Unit 1		
1.	Unit 1 Contracted Capacity	MW	613.8
2.	Energy Corresponding to Contracted Capacity/month	MU (Million kWh)	448.1
3.	Net Heat Rate as per PPA	Kcal/kWh	2400
4.	Heat Contribution from Secondary Fuel	Kcal/kWh	10
5.	Heat Requirement from coal	Kcal/kWh	2390
6.	Total Heat Required from coal	Million Kcal	1075378
7.	GCV of Raw Coal (Domestic Coal)	kcal/kg	3400
8.	Total Domestic Coal Requirement	MT/ month	0.316
B	Likely Coal Availability from MCL		
1.	Total Linkage Coal as per FSA (ACQ)	MT/annum	7.72
2.	Linkage Coal (ACQ) for Unit 1	MT/annum	2.57
3.	Domestic Coal - 65% of ACQ for Unit 1 (as per FSA)	MT/annum	1.67
4.	Imported Coal-15% of ACQ for Unit 1	MT/annum	0.39
5.	Likely Coal Available for Unit 1	MT/annum	2.06
6.	Likely Coal Available for Unit 1 per month	MT/month	0.172
C	Coal Shortage and Additional Coal		
1.	Coal Shortage per month	MT/ month	0.145
2.	GCV of Coal from Alternate Sources	kcal/kg	4600
3.	Coal Required from alternate sources per month.	MT/ month	0.107
4.	Coal Required from alternate source for four months	MT	0.428

12. TSPL has submitted that as observed from the table above, the additional coal requirement to operate the Unit-1 for first four months works out to 0.428 MT against which it has invited bids for procurement of 0.4 MT of additional coal at this stage and as the entire process of conducting Competitive Bidding Process for procurement of additional coal including approval of same takes around 4 to 5 months, the petitioner invited bids for procurement of additional coal to meet the shortfall of coal for four months.

TSPL has made following prayer to the Commission:

- a. Admit the petition;
- b. Grant Approval for procurement of coal from alternate sources through Competitive Bidding Process carried out by the petitioner;
- c. Grant Approval to the terms and conditions for procurement of coal from alternate sources as specified in bid document issued for procurement of alternate coal and in the replies to the queries raised by the bidders which are enclosed at Pages 126 to 199 of the petition;
- d. Approve the landed price and calorific value for procurement of 0.2 MT alternate coal from L-1 bidder i.e., M/s Mohit Minerals Pvt. Ltd., New Delhi and 0.2 MT alternate coal from L-2 bidder i.e. M/s Adani Enterprises Ltd., as submitted in Para 34 of the petition.
- e. Allow the petitioner to procure the additional coal (if required and in accordance with the terms and conditions of bid document – Clause 3(iv) of Volume III-page 150 of the petition) in excess of 0.4 MT, from the agencies selected to supply 0.4 MT of coal on the same terms and conditions as approved by the Commission.
- f. Approve the modalities for passing through the cost of coal procured from alternative sources to PSPCL by allowing the petitioner to compute the energy charges based on following in accordance with the provisions of PPA :
 - i. F^{coal}_n is the weighted average actual cost to the seller of purchasing, transporting and unloading the coal most recently supplied to and at the project before the beginning of the month “m” (expressed in Rs./Tonne in case of coal)
 - ii. PCV_n is the weighted average gross calorific value of the coal most recently delivered to the project before the beginning of the month “m” expressed in kcal/kg.
 - iii. “Coal” as mentioned above meaning coal procured from linkage sources and alternate sources.

- g. Allow the petitioner to procure additional coal in future from alternate sources, through Competitive Bidding Process in the manner and the modalities for passing through the cost of coal as approved by the Commission in its Order on this petition;
- h. Pass such other Orders/directions as this Commission may deem fit and proper in the facts and circumstances of the case;
- i. Condone any inadvertent omissions/errors or shortcomings in the petition;
- j. Allow additions / changes / amendments to the petition at a future date;
- k. Dispose of the present petition expeditiously.

13. PSPCL filed written submissions on 26.12.2013 and has submitted that the petitioner has made various averments and allegations in regard to the rights and obligations of the parties for procurement of coal, the quantum of coal which was promised in the bidding process for award of the project to the petitioner etc., which are wrong and misconceived. All these aspects have been dealt with by the Commission in various proceedings & Orders and these are not matters in issue in the present case. PSPCL has further submitted that the Commission may ignore the various allegations made by the petitioner and present proceedings be restricted to consideration of the approval for procurement of coal from alternate sources as per the specific directions and conditions set forth in the Hon'ble APTEL's Order dated 21.08.2013 passed in IA No.226 of 2013 filed in Appeal No.56 of 2013. PSPCL further submitted that in terms of the above Order dated 21.08.2013, the Competitive Bidding Process conducted by the petitioner is only to enable the petitioner to take advance action for procurement of coal from alternative sources and cannot give rise to any right to the petitioner to any charges over and above that is admissible in terms of the PPA and before the petitioner effects actual procurement of coal from alternative sources, namely, from the sources selected under the above Competitive Bidding Process, the petitioner is required to establish to the satisfaction of the Commission that the coal is not available from any other sources at a cheaper or economical rate and the terms & conditions. These include exploration of the possibility of getting coal from Coal India Limited and/or its subsidiaries through e-auction and coal availability from other avenues both domestic and imported as per the terms and conditions specified by the Hon'ble APTEL in the Order dated 21.08.2013.

PSPCL has also submitted that the Competitive Bidding Process held by the petitioner for procurement of coal from alternative sources from the domestic market can at this stage be only an advance action undertaken by the petitioner. The petitioner need to file appropriate petition before the Commission specifying other efforts made including procurement of coal through e-auction at a better and economical rate. PSPCL has

further submitted that the nominee of the respondent had participated in the bid opening and except the above, it is for the petitioner to establish to the satisfaction of the Commission about the terms and conditions for the arrangements made by the petitioner as an advance arrangement for procurement of coal, if it becomes necessary at the relevant time and further that the coal is not available from any other alternative source at the relevant time of procurement on more economical terms. The Commission will have to examine the price of coal available through alternative process at the relevant time of actual procurement of coal. PSPCL also submitted that the petitioner will not have a right to insist on finalizing any arrangements pursuant to the Competitive Bidding Process held or otherwise fasten any liability on the respondent in regard to the terms and conditions for procurement of coal under the Competitive Bidding Process without satisfying the Commission on various other aspects.

PSPCL has further submitted that in the facts and circumstances mentioned above, the petitioner may be called upon to establish each of the stipulations contained in the Order dated 21.08.2013 passed by the Hon'ble Appellate Tribunal for Electricity in IA No. 226 in Appeal No. 56 of 2013 and IA No.130 in Appeal No. 84 of 2013 including but not limited to e-auction conducted by Coal India Limited and/or its subsidiaries at a better rate and more economical terms. The respondent reserves the right to make appropriate submissions in regard to the materials that may be placed by the petitioner in terms of the Order dated 21.08.2013 passed by the Hon'ble APTEL at the appropriate stage. PSPCL has also submitted that save as expressly stated in the affidavit, each and every averments and allegations made by the petitioner is denied and that many of the aspects contained in the petition are not relevant at this stage when the Commission is considering the matter in pursuance to the Order dated 21.08.2013 passed by the Tribunal. The respondent reserves the right to deal with the specific averments made by the petitioner, if any, at the appropriate stage.

14. After hearing the petitioner and respondent, the Commission vide its Order dated 27.12.2013 constituted a Committee comprising of Secretary/Power, GoP as Chairman of the Committee along with C.M.D./PSPCL and C.E.O./TSPL as Members and directed that the committee shall file its report by 08.01.2014 on the following:

- (i) The annual requirement of coal as per PPA.
- (ii) The annual availability of coal keeping in view the Letter of Allocation and the latest policy guidelines by the Ministry of Power.
- (iii) The shortfall in supply of coal by CIL on realistic basis for first year of operation, keeping in view the commissioning of all the three units.

- (iv) Whether the shortfall worked out by TSPL in the petition pertains to meet coal requirement for 80% 'Availability' of plant at delivery point or beyond that.
- (v) Whether each of the stipulations contained in the Order dated 21.08.2013 passed by Hon'ble APTEL while allowing advance arrangement for procurement of additional coal by the Company have been met with by TSPL.
- (vi) As per Hon'ble APTEL Order dated 21.08.2013 should not TSPL have explored the option of getting coal from Coal India Limited and / or its subsidiaries through e-auction and coal availability from other avenues both domestic and imported at a cheaper or economical rate and terms & conditions.
- (vii) Genuineness and reasonability of price of coal discovered through this bidding process.
- (viii) To suggest the terms and conditions which need to be imposed by the Commission for procurement of coal through this bidding process, in addition to those imposed by Hon'ble APTEL.
- (ix) Modalities to regulate the supply of this coal.
- (x) Extent of coal quantity up to which cost of coal to be procured through the bidding process can be a pass through in terms of PPA.
- (xi) Any other issue which the Committee considers relevant to the petition.

15. The petitioner in its rejoinder dated 03.01.2014 has submitted para wise reply to the reply of PSPCL dated 26.12.2013 and has submitted that the issues related to the rights and obligations of the parties for procurement of coal and quantum of coal which was promised in the bidding process for award of the Project are sub-judice before the Hon'ble APTEL in Appeal No.56 of 2013 and the proceedings in the said appeal are in process. The petitioner submitted that the Commission may approve the procurement of coal from alternate sources as per the specific directions and conditions set forth in the Order dated 21.08.2013 passed by Hon'ble APTEL in IA No. 226 of 2013 filed in Appeal No.56 of 2013.

The petitioner submitted that it has taken advance actions for procurement of coal from alternative sources by conducting competitive bidding as per conditions / observations laid down by Hon'ble APTEL in its Order dated 21.08.2013 and that each condition stipulated by the Hon'ble APTEL and its compliance by the petitioner has already been submitted by the petitioner in the petition.

The petitioner further submitted that Hon'ble APTEL in its Order dated 21.08.2013 has already taken cognizance of coal shortfall and stipulated a mechanism for meeting coal shortfall during the pendency of Appeal No.56 of 2013. The petitioner

also submitted that while exploring the options of procurement of coal through alternate sources, it had also explored the option of procurement through e-auction and that the procurement of alternate coal through e-auction may have “take or pay obligations” and also issues related to “grade slippage” etc. hence considering all these aspects the petitioner was of the view that the Competitive Bidding Process carried out by the petitioner as per conditions mentioned in APTEL’s Order is most viable option for procurement of alternate coal.

The petitioner submitted that it has maintained that it will always prefer to procure complete quantity of coal supplied by MCL and it would prefer coal supplied by MCL over the coal directly arranged by it from alternative sources and in order to ensure this, it has also included specific clause in its Bid Document which specifies that TSPL reserves the right to change the delivery schedule of coal.

The petitioner has also submitted that the averment by respondent regarding satisfying the Commission for arrangement of coal at the “relevant time” etc. is not relevant and has already been settled by the Hon’ble APTEL in its Order. The petitioner further submitted that as the Hon’ble APTEL in its Order has taken cognizance of coal shortfall and allowed the petitioner to undertake competitive bidding process for procurement of alternate coal during the pendency of Appeal No.56 of 2013 therefore, whenever the coal supplied by MCL is available for TSPL, the petitioner would accept the whole quantity of coal and would accordingly reduce the quantity to be procured from alternate sources, however, it cannot agree with the contention of the respondent that the petitioner should establish before the Commission at relevant time that coal is not available from any other alternative sources at a cheaper rate than that procured through competitive bidding as it believes that coal is available through either e-auction route or the competitive bidding route and as far as petitioner is concerned, most competitive rates are discovered through an open, transparent & Competitive Bidding Process.

The petitioner has submitted that the respondent be directed to explain what it means by “*The petitioner would not have a right..... without satisfying the Commission on various other aspects*” as it is not clearly understood what the respondent means by “*various other aspects*”.

The petitioner has submitted that it reiterates, as already submitted in the petition dated 28.11.2013 that it has complied with the conditions stipulated by the Hon’ble APTEL in the Order dated 21.08.2013. However, as stated in the previous paras, it would be unfair to put further conditions before the petitioner to mandate the petitioner to establish that the coal procured through competitive bidding shall be cheaper than any other source like e-auctioning as no such condition has been stipulated by the Hon’ble APTEL in its Order dated 21.08.2013 for procurement of alternate coal.

16. The petitioner in its letter dated 09.01.2014, on behalf of the Committee constituted by the Commission in its Order dated 27.12.2013, requested the Commission for an extension of two weeks' time to file its report.

17. The Commission in its Order dated 10.01.2014 directed the Committee to file its report by 20.01.2014. The Commission also directed TSPL to submit complete copy of FSA by 13.01.2014 as it was observed that copy of FSA annexed with the petition is incomplete.

18. The Commission heard the petitioner and respondents on 21.01.2014 and in its Order of even date observed that the Committee has not filed its report inspite of extension granted as per request of the committee. The Commission directed the Committee to file its report by 27.01.2014. The Commission also noted that TSPL was directed vide Order dated 10.01.2014 to file complete FSA. Although TSPL filed FSA signed with Mahanadi Coalfields Limited (MCL) on 04.09.2013 but Schedule VII of the FSA was found missing and the Commission directed TSPL to file the same latest by 22.01.2014. The Commission also observed in the aforementioned Order that perusal of the FSA indicates that as per clause 2.10, the coal quantity to be supplied by MCL and to be off-taken by TSPL during the Build-up Period is 77.2 lakh tonnes and the supply of coal is to start after the Power Plant is ready to start lighting up the boiler(s), to be confirmed by the Purchaser to the Seller in writing with documentary evidence. The Commission further observed that as per clause 4.1 of the FSA, the Annual Contracted Quantity (ACQ) of coal agreed to be supplied by MCL and undertaken to be purchased by the TSPL is also 77.2 lakh tonnes from the MCL's mines and/or from import. Also, as regards supply of imported coal, TSPL has signed the Tripartite Side Agreement with Coal India Limited (CIL) & MCL on 30.09.2013 in terms of clause 4.3.1 of the FSA. In view of the above, it is inferred that (i) MCL is liable to supply the same quantity of coal from its mines and/or from import as ACQ during the Build-up Period also and (ii) the supply of coal shall start from the confirmation of readiness of the Power Plant to start lighting up the boiler(s). In the light of above, the Commission directed TSPL to reconcile its submissions and the prayer in the petition and PSPCL to submit its comments. The Commission held that TSPL needs to prove with the support of documentary evidence that MCL would be supplying coal quantity less than that provided in the FSA during Build-up Period and shall also submit the coal supply schedule from MCL during the Build-up Period. TSPL would also submit the date when the Power Plant was ready for lighting up the boiler(s) and the date on which the same was confirmed to MCL authorities in terms of clause 2.10.1 of the FSA. TSPL shall also submit the details of

quantity, GCV and landed price of the coal received or as soon as it is received at the project from MCL. TSPL was directed to file its response to above queries by 29.01.2014 and confirm the COD of all the three Units of the project.

19. Secretary/Power, Government of Punjab submitted Report of the Committee on 27.01.2014 which is enclosed as Annexure-1. The Committee has given its comments on few issues while in many, it has evaded from offering any comments. Main issues chosen by the Committee for offering its comments are as under:

- a. The Committee on the issue of 'annual requirement of coal as per PPA' has submitted that the PPA does not have a figure for annual requirement of coal and the requirement of coal for power generation would depend on the Heat Rate, Gross Calorific Value of the coal and Plant Load Factor or actual energy generated. The Committee has submitted that as only heat rate, contracted capacity and normative availability have been mentioned in PPA and there is no mention of GCV, therefore actual annual requirement of coal cannot be depicted at this stage without certain presumptions. The Committee has further submitted that the Fuel Supply Agreement signed by TSPL with MCL specifies grades of coal G8 to G13. GCV corresponding to these grades as per CIL notification falls in the range of 5200 to 3400 kcal/kg and the annual requirement of coal for normative availability of 80% at the middle of GCV range works out to 7.17 Million Tonnes.
- b. The Committee on the issue of 'annual availability of coal keeping in view the Letter of Allocation and the latest policy guidelines by Ministry of Power' has submitted that the Letter of Allocation issued by MCL to TSPL is for 7.72 MTPA of coal and the Annual Contracted Capacity (ACQ) in the FSA signed by TSPL is also 7.72 MTPA and as the FSA has trigger level of 80% for levy of disincentive and 90% for levy of incentive, it can be speculated that annual availability of coal would be more than 6.176 MTPA.
- c. On the issue of 'shortfall in supply of coal by CIL on realistic basis for first year of operation', the Committee has submitted that shortfall in supply 'on realistic basis' cannot be predicted at this stage as the shortfall if any, would be known only after TSPL achieves CoD of its units, quantity and quality of coal supplied by MCL and energy generated in the first year etc. The Committee has further submitted that TSPL has not so far given firm dates of CoD of its three units but have indicated

CoD of 1st unit on 31.01.2014, 2nd unit on 01.11.2014 and 3rd unit on 01.12.2014 and based on this, the requirement of coal for 1st year of operation for 80% normative availability works out to 3.40 million tonnes. The Committee has submitted that assuming domestic linkage coal supply at 65% of ACQ in the first year, shortfall could be 1.03 MTPA which at this stage is estimation based on number of assumptions and trigger levels of penal provisions of FSA.

20. TSPL filed reply to queries of the Commission in compliance with Order dated 21.01.2014, which was received on 30.01.2014. TSPL has submitted that as directed by the Commission, it has submitted Schedule VII of the FSA on 21.01.2014. TSPL has submitted that Unit-1 of its project was ready for lighting up on 24.09.2013 and it informed MCL about the readiness of the power plant for lighting up the boiler(s) vide its letter dated 27.09.2013 and requested MCL to grant it Build-up Period Coal for starting the operations. TSPL vide its letter dated 20.11.2013 submitted Independent Engineer Certificate regarding readiness of plant along with other relevant documents to MCL for release of one lakh tonne of commissioning coal. TSPL has further submitted that reply from MCL regarding coal to be supplied during Build-up as well as for commissioning is still awaited for which matter is being pursued with MCL. TSPL has also submitted that MCL has not yet provided any schedule of coal supply during Build-up Period and it has requested MCL vide letter dated 25.01.2014 to advise the quantum of coal which shall be supplied by MCL during Build-up Period. TSPL has submitted that Coal Supply Schedule shall be supplied to the Commission, upon receipt of the same from MCL.

TSPL has quoted an article published in the newspaper 'The Telegraph' on 22.12.2013, in which it has been mentioned that the tender floated by CIL for import of coal failed to attract a single participant. TSPL has submitted that considering the provisions of FSA and above aspect, it is assumed that MCL may supply 65% of the ACQ in the 1st year and the estimated shortfall of coal for 1st year works out to be around 1.03 MT and the same level of shortfall has been indicated by the Committee constituted by the Commission in its report. TSPL has also quoted a report on Electricity Generation by Central Electricity Authority (CEA) for the period April to September 2013, in which it has been mentioned that during FY 2013-14, the anticipated gap between the requirement and availability of domestic coal was anticipated to be 70 million tonnes.

TSPL has submitted that at 100% of ACQ of coal availability as per FSA, the plant will operate at around 85% PLF, with 80% of ACQ of coal availability the estimated PLF works out to be around 68% and at 65% of ACQ of coal availability the estimated PLF works out to be around 55%.

TSPL has submitted that till date it has not received any coal for the project at site from MCL. It will provide the information regarding quantity, GCV and landed price of coal received at the project from MCL, as soon as it is received.

TSPL has submitted that expected CoD of the three Units of its project is 31.01.2014, 1.11.2014 and 01.12.2014.

21. After hearing TSPL and PSPCL at length on 31.01.2014, the hearing of petition was closed. However, as requested, TSPL was allowed time up to 03.02.2014 to enable it to file copy of the communication from MCL, if any. Order was reserved vide Commission's Order dated 03.02.2014.

The Commission notes that TSPL has not made any submissions by the due date.

Commission's findings and decision:

22. Hon'ble APTEL, in its Order dated 21.08.2013 in Interlocutory Application Nos. 226 of 2013 in Appeal No. 56 of 2013 & 130 of 2013 in Appeal No.84 of 2013 filed by TSPL and 227 of 2013 in Appeal No.68 of 2013 filed by NPL, issued interim directions pending disposal of the Appeals. The same in brief are as under:

(a) Appellants may undertake a transparent competitive bidding process for procurement of imported coal or coal from alternative domestic sources for its project to meet the expected shortfall in supply from linked sources in order to operate the power plant as per the terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of the first Unit of the project on coal subject to the following conditions:

- (i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL.
- (ii) The Appellants will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.
- (iii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of its obligations to third parties under the contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.
- (iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.

- (v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law.

(b) Hon'ble APTEL further clarified that this interim order is to enable the Appellants to take advance action for procurement of coal from alternative sources and this will not give any right to the Appellants to raise any charges over and above that admissible to them as per the terms and conditions of the PPA and the actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.

23. The Commission further notes that the aforementioned interim directions were issued by the Hon'ble APTEL after considering the following:

- (a) The Cabinet Committee on Economic Affairs (CCEA) on 21.06.2013, taking into account the overall domestic availability and actual requirements of coal, decided that Fuel Supply Agreements (FSAs) have to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan and to meet the balance FSA obligations, Coal India Limited (CIL) may import coal and supply the same to the willing thermal power projects on cost plus basis. The thermal power projects may also import coal themselves. It also decided that higher cost of imported coal is to be considered for pass through as per modalities suggested by the Central Commission.
- (b) Submission by PSPCL that it is not responsible for arranging the coal for the Appellants' project.
- (c) State Commission's observations in its Order dated 31.12.2012 (Petition No. 56 of 2012 filed by NPL) that at this point of time, as the coal supply company is assuring to supply 80% of ACQ of the coal, the petitioner's apprehensions regarding not being able to operate the plant beyond a certain PLF are not entirely unfounded.

The Commission notes that it had made similar observations as in sub-para (c) above in its Order dated 24.12 2012 in Petition no. 46 of 2012 filed by TSPL.

24. As per submissions in this petition, TSPL undertook the competitive bidding process for procurement of 4 lakh tonnes coal against anticipated shortfall of 7 lakh tonnes approximately as claimed by TSPL for Unit-1 and stated that the same was carried out by complying with the directions issued by Hon'ble APTEL. It has been submitted that the technical as well as price bids were opened in the presence of

PSPCL's representative(s). Out of the five bids received, only three bidders qualified after technical evaluation and price bids of only these three qualified bidders were opened. The Commission notes that the technical and price bids opened on 15.10.2013 & 21.10.2013 respectively were signed by the PSPCL's representatives during bid opening.

25. As already mentioned, PSPCL in reply to the petition has submitted that the competitive bidding process conducted by TSPL is to enable it to take advance action for procurement of coal from alternative sources and cannot give any right to TSPL to any charges over and above that is admissible in terms of PPA. PSPCL has further submitted that TSPL needs to make all efforts to obtain coal from the linked mines and also from alternative sources at the most economical rate and preferred terms and file another petition before the Commission specifying other efforts made including procurement of coal through e-auction at a better and economical rate. The petitioner will not have a right to insist on finalizing any arrangements pursuant to the competitive bidding process held or otherwise fasten any liability on PSPCL in regard to the terms and conditions for procurement of coal under this process without satisfying the Commission on various other aspects.

26. The Committee constituted by the Commission vide its Order dated 27.12.2013 for submitting report on various points as brought out in Para 14 above, has submitted that the Committee does not have a role to play in a matter before the Commission in which TSPL is the petitioner and PSPCL is the respondent. It has been further submitted that as per the orders of the Hon'ble APTEL, it is the responsibility of the Commission to decide the matter as per specific directions and conditions set forth by Hon'ble APTEL and as per provisions of the PPA. However, in deference to the Commission's Order and considering that the Punjab Government owns 100% share holding of PSPCL, the Committee has given the report stating it to be without prejudice to the provisions of the PPA, rights, contentions and submissions made by both the parties before the Commission. The report in brief is as under:

- (a) The annual requirement of coal considering GCV of coal as per FSA and the project parameters i.e. normative availability, Contracted capacity and Net Station Heat Rate as per PPA, is 71.7 lakh tonnes.
- (b) The annual quantity of coal to be supplied by MCL to TSPL as per LoA and FSA is 77.2 lakh tonnes. The FSA has trigger level of 80% for levy of disincentive and 90% for levy of incentive. Therefore, it is speculated that annual availability of coal could be more than 61.76 lakh tonnes.

- (c) TSPL has indicated CoD of Unit-1 on 31.01.2014, Unit-2 on 01.11.2014 and Unit-3 on 01.12.2014. Accordingly, the requirement of coal for first year of operation of the power plant is 34 lakh tonnes. Assuming domestic linkage coal supply at 65% of the ACQ in the first year, shortfall would be 10.3 lakh tonnes. This shortfall is based on number of assumptions and trigger levels of penal provisions of FSA.

On the remaining points, the Committee's report is evasive stating that it is for the Commission to determine/decide the issues and reiterated that the report is without prejudice to the provisions of the PPA and submissions made by PSPCL and TSPL. The Committee should have appreciated that as per the Act, the Commission is not mandated to approve procurement/price of material and it was for PSPCL and the Generator to decide the procurement matters being signatories to PPA.

27. The Commission notes that as on the date of Hon'ble APTEL's Order dated 21.08.2013 in the IA, the Fuel Supply Agreement (FSA) had not been signed between TSPL and Mahanadi Coalfields Limited (MCL). The same was signed a few days later on 04.09.2013. TSPL confirmed acceptance of supply of 15% ACQ of coal through import by MCL by exercising Option-A in Schedule-VII of the FSA and also signed the Tripartite Side Agreement for supply of imported coal with Coal India Limited (CIL) & MCL on 30.09.2013 in terms of clause 4.3.1 of the FSA.

28. As per clause 4.1 of the FSA, the Annual Contracted Quantity (ACQ) of coal agreed to be supplied by MCL and undertaken to be purchased by the TSPL is 77.2 lakh tonnes from the MCL's mines and/or from import. As per Schedule-III, coal to be supplied under the FSA would be of E/F Grade, as mentioned in the Letter of Assurance on UHV (Useful Heat Value) basis, with corresponding Grades in terms of equivalent GCV (Gross Calorific Value) G8 to G13. In another petition filed by TSPL, it was seen that in the Letter of Assurance (LoA) dated 14.08.2008 issued by MCL, the quantity and Grade of coal assured to be supplied is 77.2 lakh tonnes per annum of E Grade with footnote that in case of shortage of E Grade coal, F Grade coal will be supplied. In view of these facts, it is inferred that the quantity and GCV of the coal contracted to be supplied by MCL to TSPL in the FSA is the same as assured in the LoA.

29. As per price notifications issued by CIL from time to time, the GCV range of G8 Grade coal is 4900 to 5200 kcal/kg and for G13 Grade coal, the GCV range is 3400 to 3700 kcal/kg. The average GCV for supply of coal of Grade G8 to G13 works out to 4300 kcal/kg. The annual coal requirement for TSPL's project having contracted capacity of 1841.4 MW (3x613.8 MW), Normative Availability as 80%, Net Station Heat Rate as

2400 kcal/kWh as per PPA and Coal GCV 4300 kcal/kg as per FSA, works out to 72.02 lakh tonne per annum. The actual requirement may be lesser than 72.02 lakh tonnes after discounting for oil used as secondary fuel. The Committee constituted by the Commission vide its Order dated 27.12.2013 in its report dated 27.01.2014 has worked out the annual coal requirement for TSPL's project as 71.7 lakh tonnes per annum.

30. The Commission finds that the coal supply as per the FSA is adequately provided for full normative requirement of the project. As such, under normal circumstances, there is no likelihood of short supply of coal as per the ACQ provided in the FSA.

31. Further, as per clause 2.10 of FSA, the coal quantity to be supplied by MCL and its off-take by TSPL during the Build-up Period is 77.2 lakh tonnes. The supply of coal is to start after the power plant is ready to start lighting up the boiler(s), to be confirmed by TSPL to MCL in writing with documentary evidence. The Commission notes that the quantum of coal to be supplied as per FSA in the Build-up Period, which is 12 months from First Delivery Date is the same i.e. 77.2 lakh tonnes as the ACQ. Also, the supply of coal is to start after TSPL's power plant is ready to start lighting up the boiler(s) to be confirmed by TSPL to MCL. In view of these facts, the Commission vide its Order dated 21.01.2014 expressed that TSPL needs to prove with the support of documentary evidence that MCL would be supplying coal quantity less than that provided in the FSA during Build-up Period and submit the coal supply schedule of MCL for the Build-up Period. Also TSPL was asked to submit the date on which the power plant was ready for lighting up the boiler(s) and the date on which the same was confirmed by TSPL to MCL in terms of clause 2.10 of the FSA. TSPL was also asked to submit the details of quantity, GCV and landed price of coal received or as soon as the same is received at the project from MCL.

32. The Commission notes that in compliance with Order dated 21.01.2014 of the Commission, TSPL filed reply on 30.01.2014. TSPL has submitted as under:

- (i) Unit-1 of its project was ready for lighting up on 24.09.2013. MCL was informed about the same vide its letter dated 27.09.2013 with the request to grant the Build-up Period Coal for starting the operations.
- (ii) Vide its letter dated 20.11.2013, TSPL submitted the Independent Engineer Certificate regarding readiness of plant along with other relevant documents to MCL and requested for release of one lakh tonnes of commissioning coal.
- (iii) TSPL has again requested MCL, vide its letter dated 25.01.2014 to intimate the quantum of coal which shall be supplied by MCL to TSPL during the Build-up Period.

- (iv) Reply from MCL regarding coal to be supplied during Build-up Period as well as for commissioning is still awaited for which matter is being pursued with MCL.
- (v) MCL has not yet provided any schedule of coal supply during Build-up Period.
- (vi) TSPL has not received any coal for the project at site from MCL till date. Accordingly, the information regarding quantity, GCV and landed price of coal received at the project from MCL shall be submitted as soon as it is received.
- (vii) The expected CoD of the three Units of the project is 31.01.2014, 01.11.2014 and 01.12.2014.

33. Considering the provisions in the FSA i.e. ACQ as 77.2 lakh tonnes per annum, same quantum of coal to be supplied by MCL to TSPL during Build-up Period and option by TSPL agreeing for supply of 15% imported coal by MCL, it cannot be inferred that there would be any short supply of coal by MCL during the Build-up Period. As per TSPL's estimate of anticipated short supply of 7 lakh tonnes for Unit-1, it has invited bids only for 4 lakh tonnes of coal from alternative sources even though Unit-2 is scheduled for commissioning after four months of the commissioning of Unit-1 and Unit-3 after another four months of commissioning of Unit-2 as per PPA, meaning thereby that all the three Units are scheduled to be commissioned within a span of eight months. Even as per the Committee's report, all the three Units are likely to be commissioned within a span of ten months. The Committee, assuming domestic linkage coal supply at 65% of ACQ, has stated that the shortfall of coal supply from coal linkage could be 10.3 lakh tonnes and further stated that at this stage it is purely speculative based on number of assumptions and also based on trigger levels of penal provisions as per FSA and the actual availability could be more as FSA does not indicate any sub limit other than ACQ. The Commission notes that the Committee, which included the COO of TSPL, has not been able to make exact assessment of the shortfall in supply of coal by MCL. As such, TSPL's action for procuring coal from alternative sources is based only on apprehensions and the assessment with regard to quantum of short supply of coal by MCL during the 12 months/Build-up Period is speculative.

34. From the foregoing it appears that TSPL may not need to procure coal from alternative sources since (i) the FSA has been signed for 100% of ACQ and quantum & Grade of coal is the same as in LoA, (ii) the quantum of the supply of coal during the Build-up Period is the same as the ACQ and the supply is to start from readiness of the power plant for lighting up of the boiler(s), (iii) MCL has not confirmed any shortfall of coal supply during Build-up Period and (iv) TSPL's action to procure coal from alternative sources is based on apprehensions and is speculative in nature.

35. However, Hon'ble APTEL, considering the submissions made in the IA that FSAs have to be signed for domestic coal quantity of 65%, 65%, 67% and 75% of Annual Contracted Quantity (ACQ) for the remaining four years of the 12th Five Year Plan, to meet the expected shortfall in supply of coal from linked sources in order to operate the power plant as per the terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of Unit-1 of the project on coal, allowed TSPL to take advance action for procurement of coal from alternative sources by undertaking a transparent competitive bidding process. Further, Hon'ble APTEL in Para 12(B) of its Order dated 21.08.2013 has held that this will not give any right to TSPL to raise any charges over and above those admissible to it as per the terms and conditions of the PPA and that the actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by this Commission.

36. Although under the Act, the Commission is not mandated to approve procurement of material yet taking a holistic view and considering that the competitive bidding process has been overseen by PSPCL and its representatives signed the technical and price bids opened on 15.10.2013 & 21.10.2013 respectively during bid opening, the Commission approves the competitive bidding process undertaken by TSPL for procurement of coal from alternative sources to operate the power plant as per terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of Unit-1 of the project on coal subject to the following terms & conditions and modalities for passing through cost of this coal:

- (i) TSPL shall requisition the coal regularly from MCL as per clause 4.5 'Scheduled Quantity' of the FSA.
- (ii) TSPL will give preference to the coal supplied by MCL over coal to be directly arranged by it from alternative sources and will not put any restrictions on supply of coal from MCL and accept the entire quantity of coal offered for supply from MCL.
- (iii) TSPL will not use the coal supply from the alternative sources unless warranted by the exigencies of short supply of coal by MCL in terms of the FSA, that too on 'Minimal Usage' basis.
- (iv) TSPL will daily upload on its website, the inventory of coal received from MCL as well as alternative sources. The same shall, source-wise, include quantity requisitioned, quantity received, quantity used, balance quantity and quantity of coal from alternative sources used as a percentage of coal from MCL, on daily basis.
- (v) The coal consumption/stock position will be monitored fortnightly by Chief Engineer/Fuel, PSPCL Patiala from the information available on TSPL website for review by PSPCL management. For the purpose, the officer so appointed

may also visit the power plant, at least once a month and TSPL shall provide access to the coal stockyard and relevant record to him.

- (vi) Joint sampling and testing of coal 'as received' and 'as fired' shall be conducted and certified by TSPL and PSPCL. For this purpose, a PSPCL team shall be permanently posted at TSPL premises.
- (vii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of TSPL's obligations to suppliers under the contracts entered into by it for procurement of coal from alternative sources will be passed on to PSPCL.
- (viii) Coal from alternative sources/imported coal shall be procured by TSPL at lowest price(s) arrived at through its tender overseen and signed by PSPCL on 15.10.2013 & 21.10.2013. Taxes and duties shall be payable/pass through as applicable.
- (ix) As decided by Hon'ble APTEL in Para 12(B) of its Order dated 21.08.2013, this procurement of coal from alternative sources, as an advance action, will not give any right to TSPL to raise any charges over and above those admissible to it as per the terms and conditions of the PPA. The Commission has held in its Order dated 24.12.2012 in Petition No.46 of 2012 that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. Now FSA has followed the LoA and both FSA as well as LoA provide a window for supply of imported coal.

Thus the cost of imported coal/coal procured from alternative sources would be a pass through in terms of LoA/FSA/PPA.

- (x) As a measure for smooth operation of the plant and to avoid unnecessary litigation, the Commission appoints a Committee comprising of Secretary, Power/Govt. of Punjab, CMD/PSPCL and COO/TSPL as 'Standing Committee on TSPL Project' to resolve day to day issues. The said Standing Committee shall also be the final authority to determine the additional cost of coal from alternative sources/imported coal procured by TSPL to meet the shortages in coal supplied by CIL or its subsidiaries.

The petition is disposed of as above.

Sd/-
(Gurinder Jit Singh)
Member

Sd/-
(Virinder Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 11.02.2014

[Click here for Annexure-1](#)