

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 23 of 2024
Date of Order: 12.12.2024

Petition under Section 86 of Electricity Act, 2003 read with the Power Purchase Agreement dated 18.01.2010 inter alia seeking direction to the Respondent to make payment of the unlawfully withheld amount of Rs. 18.81 Crore claimed by the Petitioner in its invoices since March 2021 towards Unloading Charges and applicable late payment surcharge in terms of the PPA read with the LPS Rules 2022.

In the matter of: Nabha Power Limited, P.O. Box No -28, Near Nalash,
Rajpura-140401, Punjab

... Petitioner

Versus

Punjab State Power Corporation Limited, PSEB
Head Office, The Mall, Patiala-147001, Punjab

.... Respondent

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

ORDER

1. The Petitioner (NPL) has filed the present petition seeking adjudication of its dispute with the Respondent (PSPCL) on the issue of unloading charges with the prayers to:

“a) Hold and declare that NPL is entitled to claim from PSPCL the actual costs incurred by it towards unloading of coal at the Project site as part of the Monthly Energy Charges formula in terms of Clause 1.2.3 of Schedule 7 of the PPA dated 18.01.2010;

b) Direct PSPCL to make payment of Rs.18.81 Cr unlawfully withheld by it from the monthly bills raised by NPL for the period from March

2021 to January 2024 as part of unloading charges, along with applicable late payment surcharge from the due date of the respective bills till the date of actual payment by PSPCL in terms of the PPA dated 18.01.2010;

- c) Direct PSPCL to stop withholding amounts claimed by NPL towards unloading of coal at the Project site from the Monthly Bills raised by NPL and make payment of the same in the future Monthly Bills;
- d) Direct PSPCL to reimburse the legal, administrative and any other costs incurred by NPL in filing and pursuing the instant petition;
- e) Pass such other or further order(s) as this Hon'ble Commission may deem just and equitable in favour of NPL, in the facts and circumstances of the present proceedings.”

2. The submissions made by NPL in the petition are summarized as under:

2.1 That NPL, having set-up a Thermal Power Project of 1400 MW capacity (2X700 MW) in Punjab under 'Case 2 Scenario 4' of the 'Competitive Bidding Guidelines 2005' issued by the Ministry of Power (GOI), is supplying power to the distribution Licensees PSPCL in terms of the PPA dated 18.01.2010. That the provision 'Monthly Energy Charge' payable by PSPCL in terms of the Clause 1.2.3 of Schedule 7 of the PPA, are reproduced below:

“1.2.3 Monthly Energy Charges

The Monthly Energy Charges for Month “m” shall be calculated as under:

$$MEP_m = AEO_m \times MEP_n$$

Where:

AEO_m is the Scheduled Energy during the month m (in kWh)

Monthly Energy Charges

$$MEP_n = \frac{NHR_n \times F^{COAL}_n}{PCV_n}$$

where,

NHR_n is the Net Heat Rate for the Contract Year in which month “m” occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month “m” occurs, as provided in Schedule11.

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 month “m” (expressed in Rs./MT in case of domestic coal)

PCV_n is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month “m” expressed in kcal/kg.”

[Emphasis Supplied]

As such, the weighted average actual cost (F^{COAL}_n) is inclusive of cost of unloading of coal at the Project and therefore the intent and effect of the PPA has always been to pass through the cost of unloading of coal at the Project site at actuals as part of the monthly energy charges.

2.2 That, the Hon’ble Supreme Court in its judgment dated 05.10.2017 in Civil Appeal No. 179 of 2017 titled *NPL vs. PSPCL* has also interpreted the above provision, to hold that the definition of F^{COAL}_n is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site. Therefore, it is no longer *res integra* that the definition of F^{COAL}_n is inclusive of the charges incurred

towards unloading of coal at the Project site on actuals.

2.3 Accordingly, even this Commission vide its Order dated 06.05.2019 has allowed similar cost components as part of unloading charges to TSPL, which has attained finality. The relevant extract of the Commission's Order dated 06.05.2019 is reproduced below:

“11.0 Observations, Findings and Decision of the Commission

Hon'ble APTEL in its Judgment and Order dated 03.07.2017 in Appeal No. 36 of 2016 & IA No. 91 of 2016 impugning Commission's Order dated 23.11.2015 in petition no. 31 of 2014 held as under:

“..... The Impugned Order dated 23.11.2015 passed by the State Commission is hereby remanded to the State Commission for deciding cost components related to unloading of coal at the project site of TSPL & allowing the same in coal cost and for allowing Railway (Transportation) shunting charges under coal transportation cost to the Appellant.”

.....

The Commission's decision on each of the aforementioned cost components is as under:

Expenses for diesel consumed by the Loco for coal rake movement till unloading

.....

Considering the submissions of TSPL and PSPCL, the Commission is of the considered opinion that the TSPL Loco operations for movement of coal rakes from the interchange point located within the project premises upto the unloading point at the wagon tippers and back, are part of the unloading

process in terms of the remand Order of Hon'ble APTEL. **Accordingly, the Commission allows the diesel expenses for the purpose as a cost component for unloading of coal at project site.**

....., PSPCL shall carry out due diligence by deputing its personnel at the project to work out the diesel consumption and the applicable rate of diesel in consultation and consensus with TSPL within a period of three months. These expenses shall be included in the coal cost to be considered in the calculations for monthly energy charges under clause 1.2.3 of Schedule 7 of the PPA. For the past period, TSPL shall revise the monthly bills from the COD of the respective units to claim these charges as part of the coal cost in the calculations for monthly energy charges.

Manpower expenses for operating the Loco

.....
 Considering the submissions of TSPL, PSPCL and the Commission's decision above that TSPL Loco operations for movement of coal rakes from the interchange point located within the project premises upto the unloading point at the wagon tippers and back, are part of the unloading process in terms of the remand Order of Hon'ble APTEL and allowance of the diesel expenses for the purpose as a cost component for unloading of coal at project site, **it is logical to allow the manpower expenses also for the said locomotive operations to the extent used for unloading of coal, as a cost component for unloading of coal. Hence, the Commission allows the same.**

PSPCL shall depute its personnel to carry out due diligence at site and work out the manpower requirement and wages/salary in consultation and consensus with

TSPL with in a period of three months. These expenses shall be included in the coal cost to be considered in the calculations for monthly energy charges under clause 1.2.3 of Schedule 7 of the PPA. For the past period, TSPL shall revise the monthly bills from the COD of the respective units to claim these charges as part of coal cost in the calculations for monthly energy charges.

Manpower expenses for Wagon Tippler

....., the Commission is of the considered opinion that the operation of wagon tippler(s) is a part of unloading activity of coal at the project site in terms of the remand Order of Hon'ble APTEL and, therefore, the manpower expenses for the operation of wagon tippler(s) is a valid cost component for unloading of coal at project site and hence allows the same.

PSPCL shall carry out due diligence at the project and work out the manpower requirement for wagon tippler(s) operations and salary/wages in consultation and consensus with TSPL within a period of three months.

These expenses shall be included in the coal cost to be considered in the calculations for monthly energy charges under clause 1.2.3 of Schedule 7 of the PPA. For the past period, TSPL shall revise the monthly bills from the COD of the respective units to claim these charges as part of coal cost in the calculations for monthly energy charges.

Electricity expenses for Wagon Tippler operation

.....

Considering the submissions of TSPL and PSPCL, the Commission is of the opinion that since wagon tippler operation has been held as a part of the unloading of coal at project site in terms of the remand Order of Hon'ble

APTEL, the charges for the electricity consumed would need to be considered as a cost component of unloading of coal at project site,.... To measure the electricity consumption, TSPL shall install meter(s) forthwith at each of the wagon tippler which would be tested and sealed by PSPCL. TSPL may also affix its own meter seal if it so desires. TSPL shall be paid the electricity charges as per the meter reading at the tariff at which TSPL is/would be supplying electricity to PSPCL. These expenses shall be included in the coal cost to be considered in the calculations for monthly energy charges under clause 1.2.3 of Schedule 7 of the PPA. For the past period, the electricity consumed shall be calculated on pro-rata basis and paid for by PSPCL to TSPL at the tariff rate for that particular month. TSPL shall revise the monthly bills from the COD of the respective units to claim these charges as part of coal cost in the calculations for monthly energy charges.

Manpower charges for manual unloading of coal from bulge wagon(s), sticky coal unloading and boulder removal

.....

The Commission has considered the submissions of both the parties. Perusal of the data submitted by TSPL reveals that the charges for manual unloading including boulder removal and bulge wagon & sticky coal unloading are almost 1.76 times the charges for the manpower required for wagon tippler operations. This appears unrealistic. The activity of manual unloading of coal, sticky coal unloading and boulder removal etc. should normally be a miniscule percentage of the main activity of unloading of coal through wagon tipplers. Moreover, as per the data submitted by TSPL, no such charges have

been incurred by TSPL in the months from June 2015 to December 2015 and also from February 2016 to March 2016. **Therefore, the Commission is not inclined to approve this apparently sporadic activity of manual operations of unloading claimed by TSPL in addition to regular unloading of coal through wagon tippler(s) as a cost component for unloading of coal, in terms of the instant remand Order. However, to be just and fair, the Commission directs PSPCL to deploy its personnel to observe and quantify the percentage of this activity vis-a-vis regular unloading of coal through wagon tipplers as also the manpower requirements for the same, if any, for which TSPL shall co-operate and provide the requisite support to PSPCL. This shall be carried out over a reasonable time frame of six months to one year and the parties shall settle the issue amicably, failing which, TSPL may approach the Commission in this regard in case it so desires.**

Diesel expenses for bulge wagon/sticky coal unloading

..... Perusal of the data submitted by TSPL reveals that the charges for diesel expenses for bulge wagon/sticky coal unloading are more than 13% of the diesel expenses for TSPL loco operations for unloading of coal through wagon tippler(s). This appears unrealistic and, therefore, **the Commission is not inclined to allow these charges as a cost component of unloading of coal, in terms of the instant remand Order of Hon'ble APTEL. This issue of bulge wagons is real and the same has to be tackled as and when it occurs to avoid a hold up in the unloading. PSPCL also has to deal with it in its own thermal plants. As such, the Commission directs PSPCL to deploy its personnel to observe, study**

and quantify the diesel consumption, if any, for bulge wagon/sticky coal removal operations vis-a-vis regular unloading of coal through wagon tippers, for which TSPL shall co-operate and provide the requisite support to PSPCL. This shall be carried out over a reasonable time frame of six months to one year and the parties shall settle the issue amicably failing which, TSPL may approach the Commission in this regard in case it so desires.

TSPL is directed to take up the matter regarding bulge wagons with the Railways so as to minimise their inclusion in the rakes.

.....

..... TSPL in its submissions has intimated an expenditure of around Rs. 14.17 crore incurred on these four cost components from December, 2014 to January, 2019.

However, as PSPCL is likely to take time upto three months to complete the due diligence, as allowed by the Commission hereinbefore, the Commission finds it appropriate to allow an amount of Rs. Seven (7) crore provisionally on this account to TSPL which shall be paid by PSPCL forthwith. This amount shall be trued-up/adjusted in the payments to be made by PSPCL to TSPL on the revision of the bills for the past period on this account by TSPL.”

2.4 Accordingly, NPL, first vide its letter dated 27.10.2020 and then vide letters dated 08.12.2020 and 22.01.2021, called upon PSPCL to include the cost components related to unloading of coal at the Project site, while computing and certifying the cost of coal billed to PSPCL in accordance with the Commission's Order dated 06.05.2019 and highlighted that both TSPL and

NPL are similarly placed and the interpretation of the Commission in the Order dated 06.05.2019 is squarely applicable. But PSPCL did not consider the cost related to unloading of coal and, on 07.05.2021, PSPCL arbitrarily denied NPL's claim by alleging that the same is not tenable since NPL has not raised similar issue towards unloading charges and cannot claim the benefit of the order passed in case of TSPL.

2.5 That vide letter dated 07.07.2023, NPL again requested PSPCL to not deduct the unloading charges of coal (submitted by NPL as 'Bill Details 3' in all Monthly Bills) while certifying the Monthly Bills and pay the past dues along with applicable late payment surcharge. However, PSPCL is continuing to deduct unloading charges from the Monthly Bills raised by NPL till date.

2.6 Though NPL has been billing PSPCL for unloading charges since 2016, NPL is only claiming unloading charges for the period from March 2021 through the present Petition as per the cost components allowed by this Commission vide its Order dated 06.05.2019. The breakup of 18.81 Crore payable from March 2021 to January 2024 along with applicable LPS is as follows:

Sr. No.	Component	Amount (Cr.)
1.	Diesel Purchasing Cost for Locomotives	2.5
2.	Manpower Expenses for Operating the Loco	5.65
3.	Manpower and Machinery for Handling of Boulders* In Wagon Tippers	6.76
4.	Electricity Expenses for Wagon Tippler Operations	1.47
5.	Manpower Expenses for Wagon Tippler Operations	2.43
TOTAL		18.81

**Boulder means and includes Oversize, Lumpy and Wet Coal.*

2.7 That the terms of TSPL's PPA are similar to the terms of NPL's PPA. Therefore, the Commission Order dated 06.05.2019, which has attained finality, is also required to be considered for NPL in light of the settled principles of judicial propriety and discipline. However, PSPCL has been disputing to pay the unloading charges in the monthly energy bills qua NPL which is unbecoming of a State Instrumentality. PSPCL is taking contradictory stand with respect to the same issue and is inviting unwarranted litigations

2.8 That, in addition to above, PSPCL is also liable to pay LPS to NPL on the amounts unlawfully withheld by it towards unloading charges from the monthly bills in terms of Article 11.3.4 of the PPA, read with the LPS Rules 2022.

3. The matter was taken up for hearing on admission on 19.07.2024. The Commission after hearing the Ld. Counsel for the parties admitted the Petition with directions that PSPCL shall file its reply with a copy to NPL and NPL to file its Rejoinder, if any, within one week thereafter with a copy to PSPCL.
4. On 20.08.2024, PSPCL filed its reply to the Petition, which is summarised as under:
 - 4.1 NPL vide letters dated 27.10.2020, 08.12.2020, and 22.01.2021 had unilaterally asked PSPCL to include unloading charges of coal while computing the cost of coal in terms of the Monthly Bills. That, on 07.05.2021, PSPCL replied to NPL stating that since NPL had not raised the issue towards unloading charges at any stage therefore it cannot seek parity with the Commission's Order dated 06.05.2019 in TSPL's case. Even otherwise on merits also the claims of NPL were not tenable. However, on 07.07.2023,

NPL again wrote to PSPCL reiterating its claims towards unloading charges.

4.2 It is the case of NPL that it is entitled to the unloading charges in terms of the judgment dated 05.10.2017 passed by the Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 and also the Commission's Order dated 06.05.2019 passed in Petition No. 31 of 2014 filed by TSPL. The said contention is wholly misconceived. The claims and adjudication by the Commission, Hon'ble APTEL and the Hon'ble Supreme Court for the Petitioner and for TSPL were by different orders and considering the petitions of each of them. No claim of unloading charges was considered at any stage for the Petitioner.

4.3 The judgment dated 05.10.2017 passed by the Hon'ble Supreme Court in Civil Appeal No. 179 OF 2017 is not applicable to the present case, considering that:

a) NPL had filed Petition No. 52 of 2014 before this Commission with the prayers as under:

"i) Issue suitable directions to PSPCL for payment of capacity charge for the period of its availability on coal procured from alternative sources as per the directions of the Commission in Order dated 19.02.2014;

ii) Approve the coal washing expense, surface transportation expense, and Liaisoning expense as sub components of coal purchase cost;

iii) Approve the road transportation expense as sub component of coal transportation cost;

iv) Approve the third-party analysis charges, transit, and handling loss as sub components of coal unloading cost;

- v) *Issue suitable directions for consideration of coal on “as fired” GCV for calculation of energy charge; and*
- vi) *Pass such order, as the Commission may deem fit and proper in the facts and circumstances of the case.”*

b) That the Commission rejected all the claims of NPL on 01.02.2016 causing NPL to file an Appeal No. 64 of 2016 before APTEL. Even at the appellate stage, the issues which are now sought to be raised by NPL were not urged. The Hon'ble APTEL, while remanding the issue of capacity charges back to this Commission, rejected all other issues. Feeling aggrieved, NPL challenged the APTEL's Order before the Hon'ble Supreme Court by way of Civil Appeal No. 179 of 2017 raising only the following issues:

- i. Component of the cost of purchasing coal comprising washing related costs including washery charges and cost of coal towards loss of quantity on account of washing (yield loss);*
- ii. Consideration of mid-point of GCV of ROM coal on equilibrated GCV basis ('EGCV') to calculate energy charges;*
- iii. Denial of road transportation cost – at the plant-end and at the mine-end.*
- iv. Denial of Liaising charges, denial of Transit and handling losses and denial of Third party coal testing charges; and*
- v. Non-payment of Capacity Charges, for the period from 20.02.2014 to 03.03.2014, when the availability was declared on non-linkage (alternate) coal.”*

c) That the Hon'ble Supreme Court vide its judgment dated 05.10.2017 decided the Civil Appeal No. 179 of 2017 filed by NPL as under:

“Conclusion:

73. We, thus, partly allow the appeal to the extent that the appellant is held entitled to the washing cost of coal, the transportation from the mine site via washing of coal to the project site inclusive of cost of road transportation for the period where it was necessary. The Calorific Value of the coal would have to be taken at the project site. All other claims in appeal stand rejected. ...”

- d) From above, it becomes evident that no claim of the nature sought to be now raised by NPL under the head ‘unloading charges’ was ever raised by NPL before this Commission, APTEL or the Hon’ble Supreme Court. Therefore, the decision dated 05.10.2017 cannot be the fountainhead for the claims now sought to be raised by NPL.

4.4 Also, NPL cannot *simpliciter* take refuge under the Commission’s Order passed in case of TSPL:

- a) That aggrieved by the Commission’s Order dated 23.11.2015 in Petition No. 31 of 2014 rejecting its claims, TSPL filed Appeal No. 36 of 2016 whereon Hon’ble APTEL decided the issue of unloading charges vide Order dated 03.07.2017, as under:

“ix. Whether the State Commission erred in holding that TSPL is not entitled to receive unloading charges as such charges are being paid by the 2nd Respondent as part of the Capacity Charges despite the fact that the PPA specifically provides for the payment of unloading charges as part of Energy Charges?”

.....

On this count we differ with the view taken by the State Commission as clause 1.2.3 of Schedule 7 of the PPA clearly

provides that energy charges payable by the Respondent No.2 are to be calculated based on weighted average 'cost to the Seller' of purchasing, transporting and unloading the coal most recently supplied to and at the Project. We decide this issue in favour of the Appellant. The State Commission is directed to identify cost components for unloading of coal at the project site and necessary mechanism for allowing such coal unloading charges in coal cost.

.....

ORDER

".....The Impugned Order dated 23.11.2015 passed by the State Commission is hereby remanded to the State Commission for deciding cost components related to unloading of coal at the project site of TSPL & allowing the same in coal cost and for allowing Railway (Transportation) shunting charges under coal transportation cost to the Appellant. No order as to costs."

- b) It is in this background, that the Commission's Order dated 06.05.2019 came to be passed in remand proceedings and NPL can't claim parity with the findings contained there under.
- 4.5 That the decisions of the Commission, Hon'ble Tribunal and the Hon'ble Supreme Court are binding on the parties. However, when the claim itself is not raised by the Petitioner, the consequence in law is that the said claim is given up. It is not even open to the Petitioner to file a separate claim at this stage, when the said claim ought and should have formed part of the previous proceedings for adjudication. This is well settled in terms of the principle of constructive res-judicata.
- 4.6 That, the Petitioner seeks to enforce its unilateral claims made in the invoices, which is grossly misconceived and is liable to be

rejected. Therefore, when the question of payment of unloading charges does not arise consequently the payment of LPS also does not arise. Hence, the claim of NPL in this regard is not tenable. In any event, the claim itself being made only now, the question of LPS does not arise.

4.7 Without prejudice to the above, it is stated that while the Petitioner seeks to invoke parity with TSPL on the issue of unloading charges, the Petitioner does not seek to follow the same procedure for determination of the unloading charges as undertaken by the Commission. NPL has simply categorised its claim under an umbrella head 'unloading charges', without substantiating its claims by giving a breakup with respect to the number of operators required by it towards operating Loco and Wagon Tippler. Whereas, in the case of TSPL the generator had provided detailed breakup of the expenses incurred which was then determined by this Commission after hearing the objections of PSPCL. Herein, NPL has unilaterally quantified amounts without any basis. Even if the case of NPL is to be considered, the cost components cannot be allowed to NPL without details being provided.

5. On 04.10.2024, NPL submitted its Rejoinder to PSPCL's reply dated 13.08.2024. While reiterating its earlier submissions, it has further submitted as under:

5.1 The Hon'ble Supreme Court in Civil Appeal No. 179 of 2017 has clearly held that the definition of F^{COAL}_n is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site. Therefore it is no longer *res-integra* that the definition of F^{COAL}_n is inclusive of the costs incurred towards

unloading of the coal at the project site. That despite submitting in the proceedings before the Hon'ble Supreme Court that the unloading charges are a component of tariff payable as part of the monthly energy charges, PSPCL has been withholding unloading charges from the Monthly Bills raised by NPL.

5.2 Further, PSPCL's contention that the Commission's Order dated 06.05.2019 in Petition No. 31 of 2014 filed by TSPL is not applicable in the present case is unlawful and misconceived. Therein, the various cost components of unloading of coal at the project site has been allowed to TSPL, having similar PPA provisions for calculation of Monthly Energy Charges as the present PPA. The Order dated 06.05.2019, which has attained finality, is also required to be applied to NPL considering the settled principles of judicial propriety and discipline as well as parity. It is a settled proposition of law that once a party is given relief by any court, judicial body, tribunal, etc., similarly situated persons should not be forced to approach the courts to get the same relief. Further, PSPCL, being a public sector undertaking, cannot give differential treatment to similarly situated persons.

5.3 That as per Article 18.3 of the PPA even failure by any party to insist on performance of the terms of the PPA or other indulgence granted by any party would not amount to giving up the right to claim performance of the terms of the PPA. Rather, such giving up of right under the PPA would only be construed as valid if it is in writing and executed by the authorized signatory of the Party. PSPCL has not produced any correspondence in writing executed by the authorized signatory of NPL agreeing to not claim unloading charges from PSPCL for the term of the PPA. Therefore, PSPCL is estopped from taking a contrary stand to

deny the genuine claim of NPL arising out of Schedule 7 of the PPA.

5.4 That PSPCL's contention that the relief claimed by NPL is also barred by constructive *Res Judicata* is misconceived. The Principle of Constructive Res Judicata as prescribed under Explanation IV of Section 11 of the Code of Civil Procedure, 1908 deals with grounds of attack and defence which ought to have been raised, but not raised. Constructive res judicata applies when a party ignores a matter that could have been used as a claim or defence in a previous suit. It is a legal doctrine that prevents a party from bringing a second suit on the same set of facts if they had a fair opportunity to raise the issue in the first suit.

5.5 That the earlier proceedings on which PSPCL is relying upon is Petition No. 52 of 2014, when the coal required for the Project was being procured through road transportation from Mandi Gobindgarh/Chandigarh to the Project as the railway siding for the Project was not operational. It was only on 04.02.2016 that the railway siding for the Project became operational. Therefore, NPL could not have claimed unloading charges being claimed now by way of Petition No. 52 of 2014. Thus, the doctrine of constructive res judicata is not applicable. Further, the Hon'ble Supreme Court in a catena of judgments has held that the technical plea of constructive res-judicata should not be resorted to for denying relief, which is otherwise due to the party.

5.6 That from 04.02.2016 i.e., after the railway siding became operational, the monthly energy bills raised by NPL included the cost incurred by it *qua* unloading of coal at the Project site in accordance with Clause 1.2.3 of Schedule 7 of the PPA. Further

after issuance of the Commission's Order dated 06.05.2019 in TSPL's case, NPL has been regularly requesting PSPCL to make payment of the unloading charges component of the monthly bills, by way of various letters dated 27.10.2020, 08.12.2020, 22.01.2021, 07.07.2023. Thus, it cannot be said that there has been any failure of NPL to claim payment of unloading charges until 2024 and does not bar it from claiming the relief of payment of unloading charges by filing a petition in 2024.

5.7 That NPL has duly submitted the detailed monthly bills from March 2021 to January 2024 to PSPCL. Further, the supporting documents regarding costs incurred by NPL against each of the heads towards unloading charges stand duly furnished to PSPCL along with the monthly bills from time to time. That, NPL also undertakes to provide all such further details as may be required for determination of the quantum of unloading charges or undertake joint inspection/study as may be directed by this Commission for determination of the amount of unloading charges payable by PSPCL.

6. The Petition was taken-up for hearing on 20.11.2024. After hearing the parties, the Order was reserved with directions that the parties may file consolidated submissions within a week. NPL and PSPCL submitted their respective written submissions on 27.11.2024 and 29.11.2024, mainly reiterating the earlier submissions.

7. Observations and Decision of the Commission:

The Commission has examined the submissions and arguments thereon made by the parties. The Petition is for adjudication of the dispute between the parties on the issue of payment of unloading

charges i.e., the cost components of unloading of coal at the Project site. The observations and decision of the Commission are as under:

7.1 Principle of Waiver and/or Constructive *Res-Judicata*:

PSPCL's contention is that no claim of the nature sought to be now raised by NPL under the head 'unloading charges' was ever raised by it either before the Commission or APTEL/Supreme Court. It was submitted that when the claim itself is not raised by the Petitioner, the consequence in law is that the said claim is given up. Also, as per the well settled principle of constructive res-judicata, it is not even open to the Petitioner to file a separate claim at this stage, when the said claim ought and should have formed part of the previous proceedings for adjudication.

On contra, NPL's submission is that Article 18.3 of the PPA provides that giving up of a right under the PPA would only be construed as valid if it is in writing and executed by the authorized signatory of the Party. Further, the Principle of Constructive *Res-Judicata* being cited by PSPCL deals with the grounds of attack and defence which ought to have been raised, but not raised. That the earlier proceedings on which PSPCL is relying upon is Petition No. 52 of 2014 filed by NPL, when the railway siding for the Project was not even operational and the coal required for the Project was being procured through road transportation from Mandi Gobindgarh/Chandigarh to the Project site. It was only on 04.02.2016 that the railway siding for the Project became operational. Therefore, NPL could not have raised a claim/dispute on the issue of unloading charges, as being raised now, in Petition No. 52 of 2014. It was also pleaded that it is a trite law that the technical plea of constructive res-judicata should not be

resorted to for denying relief, which is otherwise due to the party.

The Commission refers to Article 18.3 of the PPA, which reads as under:

“18.3 No Waiver

A valid waiver by a Party shall be in writing and executed by an authorized representative of that Party. Neither the failure by any Party to insist on the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by any Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.”

As is evident, the failure by any Party to insist on the performance of the terms, conditions and provisions of the PPA cannot be construed as a waiver of such right under the PPA unless executed in writing by an authorized representative of that Party. Further, it is also observed that PSPCL has not disputed NPL’s submissions that it was only on 04.02.2016 that the railway siding for the Project became operational and therefore it could not have raised the impugned issue in its earlier Petition No. 52 of 2014 which preceded the commissioning of the railway siding. It, thus, cannot be considered to be a second suit on the same set of facts. Accordingly, the Commission is of view that PSPCL’s contention about the NPL’s claim being barred by the principle of waiver and/or constructive *Res Judicata* is not sustainable.

7.2 Issue of entitlement of Unloading Charges at the Project Site:

The Petitioner has placed reliance on the interpretation of the

term (F^{COAL_n}), defined in the Monthly Energy Charge formula under Clause 1.2.3 of Schedule 7 of the PPA, in the Hon'ble Supreme Court's judgment dated 05.10.2017 in Civil Appeal No. 179 of 2017 titled NPL vs. PSPCL and this Commission's Order dated 06.05.2019 in Petition No. 31 of 2014 filed by TSPL. On the contrary, PSPCL's contention is that no claim of the nature sought to be now raised by NPL under the head 'unloading charges' was ever raised by it either before the Commission or APTEL/Supreme Court. Therefore, the Orders dated 05.10.2017 by the Hon'ble Supreme Court and the Commission's Order dated 06.05.2019 in TSPL's case cannot be made the fountainhead for the claims now sought to be raised by NPL. The Commission examines the same as under:

a) The Hon'ble Supreme Court's judgment dated 05.10.2017 in Civil Appeal No. 179 of 2017 filed by NPL:

The Commission refers to the Hon'ble Supreme Court's judgment dated 05.10.2017, which reads as under:

"Facts:

8.It is the case of the appellant, that the first respondent made deductions from the amount due and payable under the invoices, on the following accounts:

"i. Component of the cost of purchasing coal comprising washing related costs including washery charges and cost of coal towards loss of quantity on account of washing (yield loss);

ii. Consideration of mid-point of GCV of ROM coal on equilibrated GCV basis ('EGCV') to calculate energy charges;

iii. Denial of road transportation cost- at the plant-end and at the mine-end.

iv. Denial of Liaising charges, denial of Transit and handling losses and denial of Third party coal testing charges; and

v. Non-payment of Capacity Charges for the period from 20.02.2014 to 03.03.2014 when the availability was declared on non-linkage (alternate) coal."

9. The aforesaid gave rise to a cause for the appellant to file Petition No.52 of 2014 under Section 86(l)(b) & (f) of the EA before the State Commission seeking relief on account of wrongful deduction of certain components of monthly tariff by the first respondent. The State Commission, post admission, dismissed this petition vide order dated 1.2.2016. The appellant, thus, filed Appeal No.64 of 2016 before the Appellate Tribunal ('AT'). The appeal was, however, rejected vide order dated 14.12.2016 on most grounds except the non-payment of capacity charges allowed in favour of the appellant.

10. **The dispute really is about the interpretation of the provisions of the PPA dated 18.1.2010 and is, thus, one of pure interpretation of the terms of the contract.**

.....

Plea of the First Respondent:

22. The first respondent through Mr. V. Giri, learned Senior Advocate canvassed that any claim of the appellant relating to coal has to be considered in terms of Clause 1.2.3 of Schedule 7 of the PPA. In terms thereof, there are stated to be only three distinct identifiable components of coal recognized for tariff: (a) Purchase; (b) Transportation and (c) Unloading. Thus, until and unless the claims squarely fall under one of

these three heads, the same cannot be included in the monthly energy charges.....

.....
Our View:

52. Schedule 7 of the PPA provides for tariff payment and its computation. The monthly energy charges form part of clause 1.2.3 of the 7th Schedule. This clause is extracted as under:

“1.2.3 Monthly Energy Charges

The Monthly Energy Charges for Month "m" shall be calculated as under:

$$MEP_m = AEO_m \times MEP_n$$

Where:

AEO_m is the Scheduled Energy during the Month m (in kWh) Monthly Energy Charge

$$MEP_n = \frac{NHR_n \times F^{COAL}_n}{PCV_n}$$

Where,

NHR_n is the Net Heat Rate for the Contract Year in which month "m" occurs expressed in kCal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month "m" occurs, as provided in Schedule 11.

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 month "m" (expressed in Rs./MT in case of domestic coal)

PCV_n is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month "m" expressed in kcal/kg.”

[Emphasis Supplied]

53. *The variable component of 'F^{COAL_n}' refers to the 'actual' cost to the seller/ appellant of the three components, i.e., (a) purchasing; (b) transporting; and (c) unloading the coal. Thus, there is no hesitation in our concluding that in view of the specific formula provided, only three aspects relatable to coal would determine the particular co-efficient.*

54. *These three expressions are thereafter followed by the stipulation that the coal has to be recently supplied "to and at the project." The question is, what is the meaning of this expression? The word 'to' obviously would have reference to transporting while the word 'at' would have relationship with unloading since it would be 'transporting to' and unloading at'. Any other construction will fail to make grammatical sense. Not only that, all the three, i.e., purchasing, transporting and unloading, have a reference to "the Project." Thus, the definition of F^{COAL_n} is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site.*

.....

67. *On behalf of the first respondent an endeavour has been made to make a distinction between 'at the site' and 'to the project' in the definition of FCOAL_n and PCV_n. However, this is not of much assistance to the first respondent, in our view, as delivery 'to the project' could only mean 'at the site of the project'. It cannot be at the mine site.*

.....

73. We, thus, partly allow the appeal to the extent that the appellant is held entitled to the washing cost of coal, the transportation from the mine site via washing of coal to the project site inclusive of cost of road transportation for the period where it was necessary. The Calorific Value of the coal would have to be taken at the project site. All other claims in appeal stand rejected.....”

[Emphasis Supplied]

As is evident, herein the Hon’ble Supreme Court has perused the ‘Formula for computation of Monthly Energy Charge specified under Clause 1.2.3 of Schedule 7 of the PPA’ to interpret that “the definition of F^{COAL}_n is the weighted average actual cost incurred by the appellant of purchasing the coal and transporting it to the project site and thereafter unloading the coal at the project site”.

Therefore, even though the issue of ‘unloading charges at the project site’ was not part of the prayers made by the Petitioner, the Commission is of view that the Hon’ble Supreme Court’s interpretation of the term F^{COAL}_n contained in Clause 1.2.3 of Schedule 7 of the PPA adequately addresses the issue of unloading charges being impugned in the present petition. Accordingly, the Commission is in agreement with the NPL’s plea that in view of the Supreme Court judgment it is no longer *res-integra* that the definition of F^{COAL}_n is inclusive of the costs incurred towards unloading of the coal at the project site.

b)The Commission’s Order dated 06.05.2019 in TSPL’s case:

The Petitioner’s plea is that this Commission vide Order dated 06.05.2019 in Petition No. 31 of 2014 has allowed the cost

components of unloading of coal at the project site to TSPL having similar PPA provisions for calculation of Monthly Energy Charges as the present PPA. Therefore, the Order dated 06.05.2019, which has attained finality, is also required to be applied to NPL considering the settled principles of judicial propriety and discipline as well as parity.

On contra, PSPCL's contention is that NPL cannot *simpliciter* take refuge under the orders passed by the Commission in case of TSPL.

The Commission, while agreeing with PSPCL that one cannot *simpliciter* take refuge under the Orders passed in case of another party, however, notes that herein the impugned provision of "Monthly Energy Charges" under the PPAs of both the parties i.e., TSPL and NPL are similarly worded. Therefore, the Commission is inclined to subscribe to the NPL's plea that considering the principles of judicial propriety and discipline as well as parity, the ratio as settled/decided by the Commission in allowing the inclusion of manpower and fuel/electricity expenses for the operation of the Locos and Wagon Tipplers for unloading of coal at the project site to TSPL for computation/payment of monthly energy charges under clause 1.2.3 of Schedule 7 of the PPA, should also be made applicable to the similarly placed project of NPL, albeit from the date of raising of such claim and subject to the issue of Limitation, if any.

c) Assessment of the Unloading Charges:

PSPCL has also contended that while the Petitioner seeks to invoke parity with TSPL on the issue of unloading charges, the

Petitioner does not seek to follow the same procedure for determination of the unloading charges as undertaken in the case of TSPL. It was submitted that NPL has simply raised its claim without substantiating the same by giving a breakup with respect to the number of operators required by it towards operating the Loco and Wagon Tippler. Whereas, in the case of TSPL the generator had provided a detailed breakup of the expenses incurred, which was then determined by this Commission after hearing the objections of PSPCL.

Whereas, NPL's plea is that the supporting documents regarding costs incurred by NPL against each of the heads towards unloading charges have been duly furnished to PSPCL along with the monthly bills from time to time. That, NPL is also willing to submit all the relevant details and information as may be required by this Commission for effective adjudication of the present dispute.

The Commission notes that vide Order dated 06.05.2019 it has allowed the consideration of cost components for unloading of coal at the project site to TSPL with directions that PSPCL shall carry out due diligence by deputing its personnel at the project to work out the diesel consumption and manpower requirement including the applicable rates in consultation and consensus with TSPL within a period of three months. However, the parties could reach consensus only on the issue of diesel expense for Loco operation @ 145.24L/rake and the requirement of 13 nos. of manpower and 13.71 L/rake diesel expense for bulge wagon/sticky coal unloading, with the provision that the diesel rate will be taken as per weighted average monthly cost of

diesel purchased for which TSPL shall submit diesel purchase bills on a monthly basis. It was also agreed that the manpower and diesel expenses for bulge wagon/sticky coal unloading will be paid till July 2021 i.e., the expected time of the modification of wagon tippers at the plant. Accordingly, the TSPL filed an IA No. 13 of 2021 for deciding the pending cost components for unloading of the coal at the project site. The Commission, vide Order dated 11.03.2022, after obtaining an assessment report from the committee of its officers constituted to witness the unloading activity of the coal at the Petitioner TSPL's plant and nearby Thermal Plant GHTP Lehra Mohabbat, allowed the same as under:

“7.2 Manpower requirement for Locomotive and Wagon Tippler operations for unloading of coal:

.....

The Commission's analysis and decision on the issue of manpower requirement for unloading of coal at TSPL plant site is as hereunder:

(i) Loco Operators and Wagon Tippler operators

The commission observes that, both the parties are agreeable to 7 Loco Operators and 10 Wagon Tippler operators, for 2 locos and 4 wagon tippers. The committee is of the view that, the same seems to be genuine and may be considered. The Commission accepts the same.

(ii) Station Masters/Supervisors

....., the Committee's assessment is of 4 station masters /supervisors i.e. requirement of one person per shift plus

one reliever for panel operation and coordinating the unloading activities for rake receipt, placement and release. The Commission agree with the committee's assessment of station masters and allow 4 Supervisors who could be retired railway personnel.

(iii) Points-Man

....., the Committee's assessment is of 7 Points-Man i.e. 1 Points-man to assist each loco shunter operator for coupling/decoupling of rakes, track clearance and rake placement. As such, 2 points men per shift (3 shifts) plus 1 reliever. The Commission agree with the committee's assessment, which is after detailed due diligence and assessment of the work load.

(iv) Shunt-Man

....., the Committee's assessment is of 14 Shunt-men i.e. One Shunt-Man at each Wagon Tippler for coupling and decoupling of the wagons. At times when no rake is placed at any of the wagon tippler, the shunt-man could be used to assist others. As such; 4 persons per shift (3 shifts) plus 2 relievers seems adequate. The Commission agree with the committee's assessment.

(v) Gate-Man

....., the Committee has assessed that there is no requirement of any Gateman with the observation that there is no public movement in the unloading area at the plant site. The Commission agree with the committee's assessment.

(vi) Safety Officer

....., the Committee has not assessed the requirement of any independent safety officer for the unloading activity, with the observation that the coal handling plant is a part of the thermal plant, the safety officer deployed for the plant can manage safety issues in the coal handling plant also. The Commission is inclined to agree with the committee's assessment. The duties of the safety officer are to ensure a safe working environment by ensuring that a SOP for safe operation and testing of the equipment(s) is in place and he is not required to be physically present at every operation.

(vii) House Keeping

TSPL's claim is for requirement of 8 housekeeping against nil agreeable by PSPCL. It has been pleaded that, they are required for removing boulders for clearing the grating of wagon tippers. And, the Committee has assessed the TSPL's claim to be genuine. The Commission accept the same.

7.3 Wages/salary for unloading of coal, including for manual unloading:

.....

The Commission is of the view that, labour being a regulated activity, there has to be benchmark regarding the applicability of the wages. Thus, the Commission thinks it appropriate to allow the applicable DC rates as notified by the Labour Department, Govt. of Punjab for the purposes of computing the manpower expenses for unloading of Coal at the project site. The Commission also notes that the DC

rates are being revised from time to time with applicable escalation and thus also cover the aspect of compensation for inflation, as assessed by the Labour Commissioner. These rates are applicable all over the State.

7.4 Approval of the methodology for payment of electricity expenses for Wagon Tippler operations on average basis, as agreed between the parties:

It was submitted that the Commission in its order dated 06.05.2019 had directed TSPL to install meters at each of the wagon tippers which were to be tested and sealed by PSPCL for consideration of electricity expenses. However, TSPL is facing practical difficulties in installation of multiple seals/paper seals on switchgear, motors and associated electrical equipment (which is part of the proposed schematic). Also, the sealing of equipment hampers the proper operation and maintenance activities to be carried out by TSPL. Accordingly, TSPL requested PSPCL's team to visit the Project site to measure the average consumption of electricity for wagon tippler operation during unloading of rakes and this average can be used for making payments to TSPL. PSPCL also submitted that it is agreeable to the TSPL's suggestion, subject to the approval of the Commission.

The Commission has no objection if both the parties are agreeable to the methodology for payment of electricity expenses for Wagon Tippler operations on average basis as assessed by them mutually.....”

As is evident, while the Fuel requirement for Loco operation is

based on per rake basis, the assessment of manpower requirement is based on per shift basis and numbers of Locos/wagon tipplers available at the project site. As such, the same ratio can also be applied to NPL's project to decide this petition and for the future subject to reconciliation by the parties depending on variation(s), if any, in the numbers of Locos/wagon tipplers available at the project site. Accordingly, the Petitioner's prayer for entitlement/payment of the costs for unloading of coal at the Project site as part of the Monthly Energy Charges formula in terms of Clause 1.2.3 of Schedule 7 of the PPA is also disposed of on the above terms.

7.3 Late Payment Surcharge (LPS) and other Costs:

NPL's plea is that though NPL has been billing PSPCL for unloading charges since 2016, it is only claiming unloading charges for the period from March 2021 through the present Petition as per the cost components allowed vide this Commission's Order dated 06.05.2019 in TSPL's case. NPL submitted that PSPCL is also liable to pay LPS to NPL on the amounts unlawfully withheld by it towards unloading charges from the monthly bills in terms of Article 11.3.4 of the PPA read with LPS Rules 2022.

On contra, PSPCL's contention is that while the Petitioner seeks to invoke parity with TSPL on the issue of unloading charges, it does not seek to follow the same procedure for determination of the unloading charges as undertaken in case of TSPL and has proceeded unilaterally to raise the bills for the same.

The Commission notes that, no doubt there is a provision for a late payment surcharge in the event of delay in payment of a

monthly bill but in the present case it is not as if there are undisputed bills remaining unpaid. In fact, the object of Late Payment Surcharge (LPS) is a penal provision to enforce timely payment of monthly bills to a generator i.e., to penalise the procurer(s) who delays the routine monthly payments. However, in the present case the issue is of unilateral addition of new cost elements in the monthly bills. PSPCL has raised a pertinent point that since the Petitioner seeks to invoke parity with TSPL on the issue of unloading charges, it ought to have also followed the same procedure for determination of the impugned cost elements as undertaken in the case of TSPL and therefore the delay in resolution of the issue, if any, is to the account of Petitioner itself.

Accordingly, the Commission agrees that the present case is not a fit one for application of the principle of LPS. However, the Commission understands that in order to give time value to money the Petitioner, having now raised a dispute and followed the procedure as in the case of TSPL, is now entitled to the carrying cost for the period which lapsed in the adjudication of the present petition i.e., from the date of its filing till the issuance of this Order.

Thus, the Petitioner shall be entitled to the interest/carrying cost on the principal amount determinable towards the cost components for unloading of the coal at its project site in terms of the present Order at the rate as applicable to PSPCL on its working capital (*i.e., the One Year SBI MCLR as applicable as on 1st April of the relevant year plus 250 basis points*). Further, in case of delay in payment of the same, if any, PSPCL shall henceforth be liable to pay the applicable LPS as per the

provisions specified in the PPA read with the LPS Rules.

No Order as to Costs. Parties will bear their own costs of this litigation.

The Petition is disposed of in light of the above analysis/observations and directions of the Commission.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: **12.12.2024**

