

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

Petition No.69 of 2021
Alongwith IA No. 22 of 2021
Date of Order: 08.09.2022

Petition under Section 86 (1) (f) of the Electricity Act read with Article 17.3 of the PPA seeking directions to quash and set-aside the preliminary default notice dated 15.09.2021 issued by PSPCL alleging Seller's event of default under Article 14.1(iv) of the PPA.

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

...Petitioner

Versus

1. Punjab State Power Corporation Limited, through Chief Engineer (PP & R), D-3 Shed, Shakti Vihar, PSPCL, Patiala 147001, Punjab.
2. Punjab State Load Dispatch Centre, through Chief Engineer, SLDC Building, 220 KV Grid Station, PSTCL Ablawal, Patiala-147001, Punjab.

..Respondents

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

TSPL: Sh. Sajan Poovayya, Advocate
Sh. Akshat Jain, Advocate

PSPCL: Ms. M.G Ramachandran, Senior Advocate
Sh. Rupinderjit Randhawa, CE/ARR &TR

PSLDC: Sh. Vikas Chatrath, Advocate

Order

1. Talwandi Sabo Power Limited (TSPL), a generating company, is operating a 1980 MW (3X660 MW) Thermal Plant in Punjab under a Power Purchase Agreement (PPA) dated 01.09.2008 with Punjab State Power Corporation Ltd. (PSPCL) for supplying the entire power of the project to PSPCL. TSPL has filed the present petition challenging the Preliminary Default Notice dated 15.09.2021 issued by PSPCL alleging Seller's Event of Default under Article 14.1 (iv) of the PPA on account of its failure to achieve Average Availability of 65% within the non-consecutive period of 12 months in a continuous aggregate period of 36 months (Sept 2018 - Aug 2021). TSPCL also filed an IA No. 22 of 2021 seeking to restrain PSPCL from taking any coercive action pending the adjudication of the present petition.
2. The petition was taken up for hearing on 22.12.2021 and the respondents were directed to file their respective replies. The petition alongwith IA No. 22 of 2021 was taken up for hearing on 05.01.2022. PSPCL was directed to file its reply to the petition as well as IA and the petitioner to file rejoinder to the reply filed by PSPCL. The petition was again taken up for hearing on mentioning by the Ld. Counsel for TSPL on 19.01.2022 and PSPCL was restrained from withholding/deducting the capacity charges payable to TSPL till the next date of hearing. PSPCL and Punjab State Load Dispatch Centre (PSLDC) who had been served notice, filed their replies dated 25.03.2022 and 29.03.2022 respectively. The petitioner submitted the rejoinders thereto dated 04.04.2022 and 25.04.2022 respectively. The petition was admitted vide Order dated 20.05.2022 and after hearing the submissions of all the parties on 13.07.2022, Order was reserved further directing the parties to file written submissions, if

any, within a week. PSPCL had already filed written submissions vide memo No. 6138 dated 20.05.2022 and TSPL filed written submissions on 29.07.2022.

3. Submissions of TSPL

3.1 TSPL has submitted that PSPCL has issued the Preliminary Default Notice dated 15.09.2021 alleging Seller's Event of Default under Article 14.1(iv) of the PPA on account of alleged failure of TSPL to achieve the Average Availability of its Power Plant to the extent of 65% within the following 12 non-consecutive Months within a continuous aggregate period of 36 Months i.e., from September 2018 to August 2021. However, TSPL has claimed deemed availability in some of the shortfall months and thus an overall total availability above 65% in the period in question has been furnished as below:

Months	As per PSPCL	As per TSPL		
	Availability considered by PSPCL in the Default Notice	Operational Availability as declared by TSPL	Deemed Availability as declared by TSPL	Total Availability declared by TSPL
Nov 2018	71.94%	56.51%	15.43%	71.94%
Feb 2019	77.84%	77.84%		77.84%
Jan 2020	62.35%	62.35%		62.35%
Jul 2020	62.26%	62.26%		62.26%
Oct 2020	62.30%	62.30%	32.65%	94.95%
Nov 2020	19.38%	19.38%	80.35%	99.73%
Mar 2021	64.93%	64.93%		64.93%
Apr 2021	59.15%	59.15%		59.15%
May 2021	57.49%	57.49%		57.49%
Jun 2021	59.23%	59.23%		59.23%

Months	As per PSPCL	As per TSPL		
	Availability considered by PSPCL in the Default Notice	Operational Availability as declared by TSPL	Deemed Availability as declared by TSPL	Total Availability declared by TSPL
3.2 T Jul 2021	32.14%	32.14%		32.14%
h Aug 2021	62.97%	62.97%		62.97%
a Avg. Availability	57.66%			67.08%

t there is no default by TSPL under Article 14.1(iv) of the PPA and the Preliminary Default Notice has been issued by PSPCL in violation of the mandate of Article 14.1 of the PPA. In terms of Article 14.1 of the PPA, if any event occurs as a result of a Force Majeure Event or due to breach by PSPCL of its obligations under the PPA, then such an event would not constitute a Sellers Event of Default. The adverse effect on the operational availability of the power plant during the months of October and November 2020 was due to coal shortage occasioned by:

- a) breach of obligations by PSPCL under the PPA to supply adequate quality and quantity of coal, and
- b) Force Majeure Event i.e., restrictions in movement of coal rakes due to nationwide strike and blockade of roads and railway tracks by various Farmer Unions protesting on the Farm Bills, 2020.

3.3 Further, the Preliminary Default notice is in violation of Hon'ble APTEL judgment dated 19.07.2021 passed in Appeal Nos. 220 & 317 of 2019 in terms of which PSPCL is mandated to consider the Deemed Availability of TSPL's Power Plant in situations when TSPL is forced to declare lower operational Availability of its Power Plant (even when it is technically Available to generate at much higher capacity) due to shortage of coal.

3.4 That during the months of October 2020 and November 2020, TSPL was technically available to generate electricity at full capacity. However due to shortage of coal at the Plant site, TSPL was forced to shut down complete plant operation from 20.10.2020 to 23.11.2020. Hence, the Operational Availability of TSPL's Power Plant in the month of October 2020 (62.30%) and November 2020 (19.38%) was lower than 65% solely due to shortage of coal and not on account of any technical reasons or any other reasons accountable to TSPL. Coal stock at the beginning of June 2020 was more than 7 lac tonnes, which is sufficient for about 23 days of Plant operation and more than average one month's supply under the Fuel Supply Agreement (**FSA**). The actual coal supply by MCL from June 2020 to August 2020 was much less than the coal requisitioned by TSPL. As against total coal requisition of 21,25,060 Tonnes during the period June-August 2020 only 12,24,220 Tonnes (57%) was supplied to TSPL. This resulted in coal stocks coming down to 2,20,021 Tonnes as on 01.09.2020. Sufficient coal stock can only be built when adequate quantity of coal is supplied to TSPL. In September 2020, coal supply improved to 7,03,070 Tonnes, however, the consumption was 7,08,539 Tonnes. TSPL had requisitioned the maximum allocated FSA quantum in October and November 2020 i.e. quantum 8,71,333 MT and 8,14,333 MT. However, in October 2020, TSPL received only 46,187 Tonnes (5.3%) of the requisitioned coal. 5 rakes (19196.14 MT coal) which were in transit was received on 01.10.2020. From 02.10.2020 to 22.10.2020 no rake movement happened due to the Farmers Protest. Another 7 rakes (26990.99 MT coal), which were stranded near TSPL's Plant, were received on 23.10.2020 and in November

2020, TSPL received only 1,99,422 Tonnes (24.4%) of coal against the requisition of 8,14,333 Tonnes.

3.5 That in the beginning of October 2020 coal stock was more than 2 lac Tonnes but gradually depleted and were exhausted on 20.10.2020 since coal supply was totally stopped from 01.10.2020. Coal rake movement to TSPL's Plant was resumed with effect from 23.11.2020 and loading of rakes started from the 2nd half of 24.11.2021. Thus, TSPL has been diligent and following prudent utility practices with respect to procurement/requisition of coal from CIL and MCL. For the months of October and November 2020, TSPL had requisitioned the full quantum of allocated coal under the FSA and the depletion in coal stock during October 2020 and November 2020, was not on account of any reasons attributable to TSPL.

3.6 That since the inception, the obligation of signing the FSA and procurement/supply of adequate quantity and quality of coal for the Project has been that of PSPCL. In terms of the RFP, pre-bid conference, PPA and MOU, PSPCL assured TSPL that PSPCL shall ensure that minimum guaranteed quality and quantity of coal is supplied to TSPL throughout the term of the PPA (i.e., 5 mtpa in the first year and 7.7 mtpa thereafter, of Grade E coal with GCV of 4500 to 4600 kCal/kg and ash content of 33-34%) from Coal India or its subsidiaries. PSPCL was under an obligation to make good any shortfall in the minimum guaranteed quality and quantity of fuel for the entire term of the PPA, even after assignment of FSA. TSPL has relied in this regard on the judgment dated 07.04.2016 passed by the Hon'ble APTEL in Appeal Nos. 56 & 84 of 2013 titled Talwandi Sabo Power Limited v PSERC & Anr and judgment dated 19.07.2021 passed in Appeal Nos. 317 & 220 of 2019 titled

Talwandi Sabo Power Limited v PSERC & Anr, wherein after considering the provisions of CBG, RFP, Pre-Bid Conference, LoA, PPA and MoU it has been categorically held that the obligation to sign the FSA and arrange adequate quality and quantity of coal for generation of power from TSPL's Project is that of PSPCL and therefore, PSPCL cannot be absolved of this obligation. PSPCL has challenged the Judgments dated 07.04.2016 and 19.07.2021 before the Hon'ble Supreme Court in Civil Appeal Nos. 4085-86 of 2016 and Civil Appeal No. 5012 of 2021 respectively, which is pending adjudication. However, there is no stay granted by the Hon'ble Supreme Court on operation of both the judgments and hence the same holds the field.

3.7 That during October and November 2020, TSPL by its various letters dated 06.10.2020, 07.10.2020, 21.10.2020 and 29.10.2020 had duly informed PSPCL regarding the depleting coal stock situation at the Plant site and sought indulgence of PSPCL to ensure availability of adequate quantity of coal and stated that TSPL is technically available to generate power at full capacity but due to non-availability of coal (on account of reasons beyond the control of TSPL), the Plant cannot be operated. Despite various letters written by TSPL, PSPCL failed to arrange adequate quality and quantity of coal for generation of power from TSPL's Project during October 2020 and November 2020. As a result, the operational Availability of TSPL's Power Plant during October and November 2020 fell down to 62.30% and 19.38% respectively, which was solely on account of coal shortage occasioned due to the failure of PSPCL to fulfil its obligations under the PPA i.e., to supply adequate coal for generation of power from TSPL's Power Plant.

3.8 That TSPL's obligation to maintain the Average Availability of its Power Plant above 65% in 12 non-consecutive months within a period of 36 consecutive months is dependent on and linked to PSPCL's obligation to supply adequate quantity and quality of coal. The agreement between the parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that if PSPCL fails to perform its obligation it will adversely affect the performance by TSPL. The said position pertaining to the PPA entered between TSPL and PSPCL has been upheld by the Hon'ble Tribunal in its Judgment dated 19.07.2021 passed in Appeal Nos. 220 & 317 of 2019. Further, the Hon'ble Supreme Court in *Sikkim Subba Associates vs. State of Sikkim* (2001) 5 SCC 629 has held that in a contractual arrangement where the fulfilment of obligations depends upon the mutual performance of reciprocal promises, a party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming damages for breach or non-performance by the other party. The Hon'ble Supreme Court in *Timblolrmaos Ltd. v. Jorge Anibal Matos Sequeira*, (1977) 3 SCC 474 has held that a party cannot claim damages for breach of contract if he contributed to the breach. Therefore, PSPCL has failed to perform its own reciprocal promise under the PPA by not providing adequate coal for generation of power resulting in operational Availability of the Power Plant falling below 65% and PSPCL is not entitled to assert any claim for Seller's Event of Default under Article 14.1(iv) of the PPA or for any damages/compensation for alleged breach by TSPL.

3.9 That during October and November 2020, various Farmer Unions protesting against the Farm Bills 2020 had launched the 'Rail Roko' movement which continued from 24.09.2020 to 23.11.2020. Majority of the protest was concentrated in the states of Punjab and Haryana. As a result of the 'Rail Roko' movement the farmers had blocked roads and railway tracks at 30 locations in Punjab including Amritsar, Ferozepur, Gurdaspur, Jalandhar, Hoshiarpur, Jalalabad, Sangrur, Sunam and Barnala. Consequently, the Indian Railways suspended/cancelled the movement of various trains in Punjab as well as diverted many trains due to blockade of the railway tracks by the farmers. The blockade on railway tracks restricted goods trains carrying coal from entering the state of Punjab. The Hon'ble High Court of Punjab & Haryana by its Order dated 18.06.2021 passed in CWP No. 5645 of 2021 titled Adani Wilmar Limited & Anr vs. State of Punjab & Ors noted that 'the farmer's agitation across the country against the farm laws has thrown up an extraordinary situation, and more so in the States of Punjab and Haryana. PSPCL has also acknowledged in its letter dated 05.10.2020 that coal supply to TSPL's Power Plant was disrupted during Oct and Nov 2020 due to protest and blockade of Railway tracks and the coal arranged/requisitioned by TSPL during the months of October and November 2020 (which were in transit through railways) was not delivered to the Project site resulting in coal stock out situation. Consequently, on 20.10.2020, when the available coal stock at the Plant site was exhausted, TSPL was forced to completely shut down its plant operations with effect from 20.10.2020 to 23.11.2020 which resulted in operational availability of TSPL's Power Plant falling to 62.30% in October 2020 and 19.38% in November 2020.

- 3.10 That during October and November 2020, TSPL could not have arranged coal from any other alternate source since all the possible ways for transporting coal to the Plant site were blocked by the agitating Farmer Unions and train services in Punjab were cancelled/suspended by the Indian Railways. All other TPPs in Punjab also faced similar issues of coal stock out situation during October and November 2020 resulting in forced shut down of their Plants. Hence, the unavailability of coal during October and November 2020 was completely beyond the reasonable control of TSPL. TSPL's obligation under the PPA to maintain the Average Availability of its Power Plant above 65% in 12 non-consecutive months within a period of 36 consecutive months was adversely affected by a Force Majeure Event and PSPCL's alleged claim for Seller's Event of Default under Article 14.1(iv) of the PPA is not maintainable in terms of Article 12.7 of the PPA.
- 3.11 That the methodology adopted by PSPCL for computing the Average Availability of TSPL in non-consecutive period of 12 months within a continuous aggregate period of 36 months is incorrect and fallacious. In terms of Article 14.1(iv) of the PPA the Average Availability of each of the 12 non-consecutive months shall be individually less than 65% (and not collectively) for constituting a Seller's Event of Default. PSPCL has erroneously considered the consolidated Average Availability of 12 random non-consecutive months within the period of September 2018 to August 2021 to claim TSPL's Event of Default on account of the consolidated Average Availability of such 12 non-consecutive months being below 65%. In effect, if the methodology adopted by PSPCL is to be accepted then the same would result in a dichotomy within the PPA as TSPL would be penalized even for months when

the Average Availability is way above the threshold of 65% or even above the Normative Availability of 80%. From the 12 random non-consecutive months selected by PSPCL within the period of September 2018 to August 2021, TSPL's operational Average Availability is above 65% in four individual months of November 2018, February 2019, October 2020 and November 2020.

3.12 That during November 2018 there was shortfall of coal at TSPL's Project. Hence, TSPL Units were operating at part load capacity. Since, the Units were technically available to generate at a much higher capacity, TSPL had declared Deemed Availability of 71.94% against the operational Availability of 56.51% only. Neither Punjab SLDC nor PSPCL had accepted the Deemed Availability of 71.94% as declared by TSPL for November 2018. However, pursuant to the judgment dated 19.07.2021, PSPCL has now accepted the Deemed Availability of 71.94% for the month of November 2018, which is evident from the Availability considered by PSPCL in its Preliminary Default Notice. Once PSPCL has accepted the Deemed Availability for November 2018, it ought to have considered the Deemed Availability for October and November 2020 as well since the operational Availability of the Power Plant in these months were also lower than the Technical Availability to generate on account of coal shortage. PSPCL cannot be permitted to approbate and reprobate at the same time by taking inconsistent or contradictory stands with respect to the issue of Deemed Availability of TSPL's Power Plant especially after accepting TSPL's Deemed Availability for November 2018. In this regard, TSPL has relied on the judgment of the Hon'ble Supreme Court in case of Suzuki Parasrampuriah Suintings (P) Ltd v. Official Liquidator, (2018) 10 SCC 707, Joint Action Committee of Air Line Pilots' v. DGCA, (2011) 5 SCC 435 and Judgment dated

12.08.2021 passed in Appeal No. 421 of 2019 titled as Adani Power (Mundra) Limited v. Central Electricity Regulatory Commission &Ors by the Hon'ble APTEL.

3.13 That Punjab SLDC has not Considered TSPL'S Declared Capacity for October & November 2020 in violation of Grid Code, Electricity Act and ABT Mechanism. Punjab SLDC at the behest of PSPCL has unilaterally reduced the availability of TSPL's Project to 62.30% for October 2020 and 19.38% for November 2020 despite TSPL declaring availability of 94.95% and 99.73% for the said months. The availability of TSPL's Project recorded by Punjab SLDC in the State Energy Account ('SEA') for October and November 2020 is actually the quantum of power scheduled by PSPCL in such months and not the actual DC/availability declared by TSPL, which was much higher than PSPCL's scheduling. DC as being declared by TSPL is independent of despatch instructions issued by and requirement of power by PSPCL. Declaration of DC is the sole prerogative of TSPL and PSPCL/Punjab SLDC does not have any discretion or say in the same. Further, there is no correlation between the DC as declared by TSPL and the scheduling/requirement of power by PSPCL which is evident from the SEA published by Punjab SLDC which has two tables to record the daily DC and the daily schedule of power. At the behest of PSPCL and considering coal shortage, Punjab SLDC has not considered the actual DC declared by TSPL for its Project during October and November 2020 and consequently wrongly computed the PAFM. Declaration of DC/Availability of the Power Plant is the sole prerogative and statutory right of TSPL and Punjab SLDC is obligated to consider and record the DC as declared by TSPL. Fuel shortage or instruction from PSPCL does not in any way impinge

upon SLDC's statutory obligation to consider/record the DC/Availability declared by TSPL for its Power Plant which was technically available to generate power at full capacity during October and November 2020.

3.14 That in term of Regulation 14.1.6 of the Punjab Grid Code, IPPs such as TSPL can raise objection on the State Energy Account prepared by SLDC. Accordingly, TSPL by its letters dated 07.11.2020 and 09.12.2020 to Punjab SLDC has communicated its objections with respect to wrongful preparation of the SEA for October and November 2020. However, SLDC has failed to revise the SEA.

3.15 TSPL, has prayed to

- a) *Quash and set-aside the Preliminary Default Notice dated 15.09.2021 issued by PSPCL as being violative of the PPA and Hon'ble Tribunal's Judgment dated 19.07.2021;*
- b) *Direct PSPCL and Punjab SLDC to consider and accept the Deemed Availability of TSPL's Project for the months of October and November 2020 in compliance of Hon'ble Tribunal's Judgment dated 19.07.2021;*
- c) *Direct Punjab SLDC to revise the SEA for October and November 2020 by recording the actual DC as declared by TSPL and upload such SEA on its website;*
- d) *Direct PSPCL to pay Capacity Charges for the months of October and November 2020 in terms of the Deemed Availability declared by TSPL in compliance of Hon'ble Tribunal's Judgment dated 19.07.2021 including Late Payment Surcharge from the date of billing till the date of actual payment by PSPCL;*
- e) *Direct PSPCL to pay the entire legal cost incurred by TSPL; and*
- f) *Pass such other order(s) as the Commission may deem just in the facts of the present case"*

4. **Submissions of PSPCL**

PSPCL filed its reply to the petition vide memo No. 5590 dated 25.03.2022 and has submitted that the Preliminary Default Notice was issued on account of the Sellers Event of Default, as provided in Article 14.1(iv) of the PPA, namely the failure on the part of TSPL 'to achieve Average Availability of sixty five percent (65%), within a non-consecutive period of twelve (12) months within any continuous aggregate period of thirty six (36) months' ranging from Sep 2018 to Aug 2021. The grounds raised by TSPL for quashing the Preliminary Default Notice dated 15.09.2021 are misconceived and without any merit.

- 4.1 That, as on date, the responsibility of dealing with the coal companies, namely to procure linkage coal, continues to be that of TSPL and admittedly, TSPL has been dealing with Mahanadi Coalfields (MCL) in the procurement of coal during the relevant period. In terms of the prevalent arrangement, pending the decision of the Hon'ble Supreme Court in CA Nos. 4085-4086/2016, PSPCL's obligation is to make payment of the Energy Charges incurred by TSPL as per the terms of the PPA. The energy charges include, primarily, the cost of coal procurement. Admittedly, TSPL has been operating on the above basis and procuring the coal. Accordingly, the failure on the part of TSPL to make the necessary arrangement to procure coal from MCL as per the arrangement that has continued, when there is no shortage of availability of coal from MCL, constitutes a default on the part of TSPL. PSPCL cannot be expected to requisition coal on behalf of TSPL nor can it ensure the availability of coal from CIL/ MCL. Coal is still being procured in

terms of Fuel Supply Agreement dated 04.09.2013 between TSPL and Coal India Limited.

- 4.2 That TSPL has failed to maintain the requisite coal stock at its Generating Station and the same cannot be said to be attributable to the Procurer. The claim of TSPL, based on their plea of the obligation of PSPCL to sign the FSA under the PPA and not TSPL, is without any merit. Further, even if the FSA is to be signed by PSPCL, the Agreement provides for the FSA to be assigned forthwith to TSPL for all intents and purposes with the necessary implication of TSPL arranging the coal under the FSA on a day to day basis. The failure of TSPL to arrange the requisite quantum of coal, which was otherwise available from MCL cannot be set at naught by TSPL making allegations in regard to the signing of the FSA by PSPCL.
- 4.3 That obligation to deal with Coal India in regard to requisitioning the coal requirement against the Contracted Quantum of coal on a quarterly basis, arranging for its supply etc. is of TSPL in terms of the interim arrangement put in place as per Order dated 21.08.2013 passed by the Hon'ble Tribunal in Appeal No 56 and 84 of 2013 at the instance of TSPL and the FSA dated 04.09.2013 executed between TSPL and MCL in pursuant thereto. Further, in the Civil Appeal bearing No(s).4085-4086/2016 filed by PSPCL against the Judgment dated 07.04.2016 passed by Hon'ble Tribunal in Appeal No. 56 & 84 of 2013, the Hon'ble Supreme Court has passed the following order on 02.05.2016:

“Admit.

The learned counsel appearing for the appellant has submitted that the appellant is ready and willing to pay the energy charges, which would also

include fuel charges, as per the Power Purchase Agreement. The energy charges shall be paid accordingly.”

4.4 That Article 12.3 of the PPA stipulates that

“a force majeure event means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under this agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the affected party and could not have been avoided if the affected party had taken reasonable care or complied with prudent utility practices”.

4.5 That TSPL has consistently failed to maintain the coal stock of 30 days as a prudent utility and as mandated by the Central Electricity Authority (CEA) Guidelines dated 08.11.2017. Had TSPL acted in accordance with the prudent utility practices and had build up the requisite coal stock, then it would not have been affected by the Farmers Agitation. PSPCL had called upon TSPL to build up the requisite coal stock. TSPL had not placed on record any details/justifications for the steps taken by it to build up the coal stock prior to the purported Force Majeure Condition in October and November, 2020. The opening balance of October, 2020 was only 223836.79 MT which is sufficient to run the plant only for 9 days at normative availability.

4.6 That, as regards the import of decision dated 19.07.2021 passed by the Hon'ble Tribunal in Appeal No. 220 and 317 of 2019, it has been submitted that the above judgment dated 19.07.2021 has been challenged by PSPCL before the Hon'ble Supreme Court in Civil Appeal No. 5012-5013 of 2021 and the same is pending adjudication. In any event, the decision on the FSA to be signed by

PSPCL cannot lead to the conclusion that TSPL should not be made liable for its failure to arrange the coal necessary for generation of electricity to maintain the requisite quantum of supply. This is particularly when, indisputably, the entire quantum of coal from MCL throughout the relevant period till date has actually been coordinated and arranged by TSPL directly. MCL had also recognized TSPL to be the eligible procurer of coal under the FSA.

4.7 That without prejudice to its rights and contentions in the Civil Appeal pending before the Hon'ble Supreme Court, PSPCL submits that the premise of the decision dated 21.07.2021 is that TSPL was within its means to requisition sufficient coal (alternate or otherwise) well in advance in order to maximize its availability. In the present case, TSPL has failed to procure the required quantum of coal and was therefore, adversely affected on account of the 'rail roko' by the farmers agitation. At all relevant times, TSPL has been requisitioning the coal from the coal companies. The existing FSA is between TSPL and the Coal Company. It is reiterated that PSPCL cannot requisition coal on behalf of TSPL. It is only TSPL, being the Generating Company that is in a position to requisition coal.

4.8 That in terms of the applicable FSA dated 04.09.2013, it is the responsibility of TSPL to requisition the coal from CIL and ensure the stocking as per the applicable Guidelines (including the CEA Guidelines). PSPCL cannot requisition coal on behalf of TSPL. Further, the payment for coal has to be made by TSPL to the Coal India Limited, which is then paid by PSPCL to TSPL in terms of the Schedule 7 of the PPA. As on date, the transaction of sale and purchase of coal takes place between TSPL and Coal India/MCL. TSPL has been and is required to take up the issue of supply of

coal by MCL to the adequate extent qua the allocation of linkage coal and the coal requisitioned by TSPL. There may also be issues of delay in payment to Coal India Limited. PSPCL is not privy to the details of payments made by TSPL to MCL and whether the same had a cascading/consequential effect on the shortfall of coal. PSPCL had called upon TSPL to maintain the requisite coal stock of 30 days as per the CEA Guidelines. Further, at the relevant time, namely in the months preceding October, 2020, there was no coal shortage and rather, on account of the onset of COVID -19, there was a drastic fall in scheduling and TSPL could have build up its coal stock, in accordance with the CEA guidelines. Had the requisite coal stock been build up, then TSPL would not have been affected by the Farmers Agitation. The decision dated 21.07.2021 of the Hon'ble Tribunal unequivocally states that the Generator has to arrange the fuel in advance and 'has to keep the coal ready well in advance not on day-to-day basis'. In the present case, the Generator has not done so and has therefore been affected by the Farmers Agitation. Article 12.3 of the PPA only recognizes those events which could not have been avoided if reasonable care or prudent utility practices had been complied with, as force majeure events. Accordingly, the non-availability of fuel cannot be considered as a Force Majeure Event.

- 4.9 That, reliance on newspaper articles does not substantiate the claim of TSPL. It is well settled principle that the newspaper reports by themselves are not evidence. And, the Letter dated 05.10.2020 from PSPCL to the Railways was to ensure the continuous supply of rakes/coal to TSPL, by no means can it be construed to be an admission of Force Majeure and/or breach of any obligation on the part of PSPCL. PSPCL re-iterates that had

TSPL maintained the required coal stock, as stipulated, it could have avoided the consequences of the Farmers Agitation and would not have been affected. However, even if the said two months of November and October, 2020 were excluded for the purposes of Article 14.1 (iv), then for the same block of 36 months, namely from September, 2018 to August, 2021, TSPL would still be in default as detailed below:

Month	Availability
Oct-18	85.02%
Nov-18	71.94%
Dec-18	83.76%
Feb-19	77.84%
Jan-20	62.35%
Jul-20	62.26%
Mar-21	64.93%
Apr-21	59.15%
May-21	57.49%
Jun-21	59.23%
Jul-21	32.14%
Aug-21	62.97%
Average	64.92%

4.10 Further, if there has been a shortfall in the delivery of coal by Coal India, as against the coal requisitioned by TSPL, then the details of the compensation paid to TSPL (as per Clause 4.6 of the FSA) are required to be furnished, which TSPL has failed to do. TSPL

cannot seek to pass on the burden of shortfall in coal on a purported breach by PSPCL and/or an alleged Force Majeure event without undertaking prudent utility practices including seeking recompense under the terms of the FSA.

4.11 That, with regard to Force Majeure Notice, dated 21.10.2020, PSPCL has submitted that TSPL is at a distance of 1606 Kms from the MCL mine and therefore, had to maintain a coal stock of 30 days. Had the Guidelines been adhered to and TSPL built up the requisite stock then it would not have been affected by the blockade or the effect of the same would stand mitigated to a large extent. Further, Judgment dated 21.07.2021 passed by the Hon'ble Tribunal also proceeds on the premise that the Generator has to plan and arrange its requirements in advance and cannot do so on a day to day basis. Therefore, in terms of the above judgment, coupled with the CEA Guidelines, TSPL ought to have built up a coal stock of 30 days.

4.12 The contention of TSPL that the terminology 'Average Availability' used in Article 14.1(iv) of the PPAs is only with reference to the availability over a month where the average availability is less than 65% and not the average availability of the identified 12 months (consecutive or in any non-consecutive period) within any continuous aggregate period of 36 months, is patently wrong. The interpretation sought to be made by TSPL is contrary to the plain terms used in Article 14.1 read with Article 14.3 of the PPA. The expression does not provide that the availability in each of the 12 months has to be below 65%. The interpretation made by TSPL would amount to rendering the word 'Average Availability' used in Article 14.1(iv), redundant and purposeless. The use of the expression 'Average' in Article 14.1(iv) cannot be rendered

redundant or meaningless or be construed to be referring only to the months where Availability is less than 65%. The 'average' used in the said provision is necessarily with reference to the average of the 12 identified months. The purpose of providing for Average Availability is to ensure that the declaration of availability is done in a consistent manner and there is no cherry picking by the Generator at its whims, to declare considerably more availability for certain months and in the remaining months, less availability.

- 4.13 That SLDC had been acting as per the prevalent law including the provisions of the Grid Code. There was neither any direction nor finding by the Appellate Tribunal or this Commission granting 'deemed fixed charges' to TSPL. It is a settled principle that fixed charges are only payable to the extent of the availability of the Generating Station on the basis of the fuel available. Therefore, the Generating Station should not just be equipped with the plant and machinery but should also have the requisite coal stock so that the Generating Station is capable of generating power if so scheduled by the Procurer. Therefore, the Generating Station can only declare capacity to the extent of the fuel actually available and not otherwise. Else it would amount to mis-declaration. Even the Statement of Objects and Reasons to the Fifth Amendment to the IEGC, 2010, as relied upon by TSPL recognizes that declared capability is based on fuel/water availability. In terms of the above, the SLDC can only consider the DC to the extent the Generator (TSPL) is actually capable of generating power (including the fuel and water availability).

5. Submissions of Punjab State Load Despatch Centre (PSLDC)

PSLDC vide its reply dated 29.03.2022, has stated that the main grievance which the Petitioner has raised is that the answering respondent has not correctly considered the declared capacity of Petitioner's plant for the months of October and November, 2020 while issuing the State Energy Accounts. PSLDC has submitted that it is discharging its functions as per the prevalent law, including the provisions of the Grid Code. Further, the capacity charges are fixed and are paid on the basis of the capacity declared available by the Petitioner and is not based on the schedule given by PSLDC or actual energy injected by the Petitioner into the grid. From the definition of Declared Capacity it is very much clear that the Generating Station can only declare capacity to the extent of the fuel actually available and not otherwise. In case of non-availability of fuel, the generating plant is not capable of delivering electricity. In view of the above, Punjab SLDC considered the Declared Capacity to the extent the Generator (TSPL) is actually capable of generating power (including the fuel/coal availability) during the months of October & November-2020 while preparing the implemented DC and State Energy Accounts.

6. Rejoinder filed by the Petitioner

- 6.1 TSPL filed rejoinders to the reply filed by PSPCL and SLDC. While reiterating the submissions earlier made in the petition, it has further submitted that PSPCL is re-agitating the issues related to obligation for arrangement of coal which has already been settled by APTEL in judgments dated 07.04.2016 and 19.07.2021. PSPCL in its reply has admitted that it has considered the Deemed Availability for the month of November 2018 as directed by APTEL.

Hence, there is no intelligible reason for PSPCL not to accept the Deemed Availability for the month of October 2020 and November 2020.

6.2 That the shortfall in supply of linkage coal by Coal India to TSPL during the months of October and November 2020 was solely on account of Force Majeure event i.e., restrictions in movement of coal rakes due to nationwide strike and blockade of roads and railway tracks by various Farmer Unions protesting on Farm Bills 2020. TSPL has been diligent and following prudent utility practices with respect to procurement/requisition of coal from CIL and MCL. For the months of October and November 2020, TSPL had requisitioned full quantum of allocated coal under the FSA. In the months of June 2020 and July 2020, TSPL had requisitioned linkage coal more than the allocated coal quantum for such months. However, the quantum of linkage coal requisitioned by TSPL in the said months was not delivered/ lifted by TSPL due to various reasons beyond the control of TSPL. The same is evident from:-

Rake Unload month	Allocation of FSA Coal-As per MSQ			Rakes lifted	Coal Rake lifted w.r.t. FSA quantity	Remarks
	Quarterly Allocation (%)	Contracted Qty.as per ACQ				
		MT	No. of racks	Nos. of Rakes	%	
Jun-20	25%	643333.3	165	72	43.64	Majorly due to delay or non-payment by PSPCL
Jul-20	22%	566133.3	145	76	52.41	
Aug-20	22%	566133.3	145	199	137.24	Lifted through Import substitution also
Sept-20	22%	566133.3	145	177	122.07	
Oct-20	25%	643333.3	165	11	6.67	Majorly due to Rail Roko Restrictions
Nov-20	25%	643333.3	165	59	35.76	

- 6.3 Notwithstanding the above it is submitted that procurement of coal by TSPL depends upon timely payment of Monthly Tariff Invoices (including energy charge) by PSPCL. Timely payment of energy charge bill by PSPCL is essential for timely procurement of adequate quantity of coal to ensure uninterrupted power supply to PSPCL. Without timely payment from PSPCL, TSPL is restricted to procure adequate quantity of coal to supply the contracted capacity. In the present case, it is an admitted position that PSPCL has failed to fulfil its obligation under the PPA i.e., to make payment of Tariff Invoice by the Due Date.
- 6.4 CEA Guidelines dated 08.11.2017 pertain to new methodology for monitoring coal stock at the thermal power stations i.e. preparation of daily coal report as being prepared or published by CEA and is not a directive for coal stocking of a thermal power plant. The CEA has indicated maintenance of 30 days coal stock calculated at the normative availability for the plants located more than 1000 km from the coal mine. The guidelines are merely indicative in nature and not binding.
- 6.5 TSPL has always been prudent in requisitioning coal from MCL. TSPL had requisitioned full quantum of coal from MCL. However, MCL did not supply the coal as requisitioned by TSPL, which resulted in coal shortfall. The coal offered/supplied under the FSA is inadequate to operate the plant at 100% capacity or maintain 30 days coal stock at the plant site. Evidently, coal stock can only be built when sufficient quantity of coal is supplied / available with TSPL. Since there is inherent shortfall in supply of linkage coal under the FSA and PSPCL (on all occasions) does not allow

procurement of alternate/imported coal – TSPL cannot maintain the 30-day coal stock on a regular basis.

6.6 PSPCL has contended that PSERC Tariff Regulations provide for the norms of interest on working capital to be commensurate to the coal stock of 60 days at normative availability. Therefore, the underlying premise is that the Generator should have sufficient coal stock at all times. PSERC Tariff Regulations and the normative tariff parameters stipulated therein are only applicable to Section 62 Projects whose tariff is determined by the Commission. TSPL is a Section 63 Project whose tariff has been adopted by the Commission as discovered in the competitive bidding conducted by PSPCL. Hence, PSERC Tariff Regulations and the normative norms stipulated therein have no relevance for TSPL's case.

6.7 PSPCL relying upon Hon'ble Tribunal's Judgment dated 03.07.2017 passed in Appeal No. 36 of 2016 has contended that the obligation to arrange for the requisite quantum of coal for TSPL is not that of PSPCL. The aforesaid contention of PSPCL is wrong and has been specifically rejected by the Hon'ble Tribunal in a subsequent Judgment dated 19.07.2021 passed in Appeal Nos. 220 & 317 of 2019 holding that:-

"193. There is yet another legal aspect. The judgment dated 03.07.2017 on the issue of obligation of PSPCL to supply coal to Appellant's project can be termed as per incurium, therefore it has no binding effect because it was rendered in ignorance of the ratio laid down by this Tribunal in a previous Judgment dated 07.04.2016, which is a binding authority and holds the field till date and further it did not consider the impact of the PSPCL's Coal Obligation in terms of explicit provisions of CBG, RFP and Pre-Bid conference, in particular para 2.1.3A of RFP."

- 6.8 PSPCL in its reply has contended that even if the said two months of October 2020 and November 2020 are excluded for the purposes of Article 14.1(iv), then for the same block of 36 months (i.e., September 2018 to August 2021) TSPL would still be in default if Availability for the months of October 2018 and December 2018 is considered instead of October and November 2020. It is submitted that even if TSPL's Availability for October 2018 and December 2018 is considered instead of October 2020 and November 2020 there will be no default by TSPL under Article 14.1(iv) of the PPA. However, the cause of action qua the present Petition is the Preliminary Default Notice dated 15.09.2021 issued by PSPCL which pertains to alleged default by TSPL in a set of 12 non-consecutive months identified by PSPCL in the said Notice. Hence, at this stage PSPCL cannot change the very premise of its Preliminary Default Notice dated 15.09.2021 by alleging defaults in other months which does not form part of the 12 non-consecutive months stated by PSPCL in the Notice dated 15.09.2021.
- 6.9 Moreover, in arguendo, even if the default as per Notice dated 15.09.2021 is to be considered, TSPL has remedied the same by achieving average availability of more than 65% in the subsequent months including the 3 months of the consultation period i.e., October 2021, November 2021 and December 2021. Evidently (without prejudice to above) the alleged default stands cured in terms of TSPL's Availability being more than 65% in the 3 months of Consultation Period i.e., October 2021, November 2021 and December 2021.
- 6.10 PSLDC in its reply has admitted that capacity charges are paid on the basis of the capacity declared available by TSPL and is not based on the schedule given by PSLDC or actual energy injected

by TSPL into the grid. Since, it is a settled position of law that admissions in pleadings or judicial admissions made by the parties or their agents are fully binding on the party that makes them and constitute a waiver of proof. Hence, PSLDC ought to be directed to revise the SEA for October & November 2020 by recording the DC/availability declared by TSPL.

7. **Observations and the decision of the Commission**

The Commission has examined the petition, the reply filed by the respondents and rejoinder/sur-rejoinders thereto filed by the petitioner and submissions and arguments made by the parties. The issue under adjudication is the Default Notice dated 15.09.2021 issued by PSPCL citing the Petitioner's failure to achieve Average Availability of 65% within a non-consecutive period of 12 months within the continuous aggregate period of 36 months of September 2018 to August 2021. The Petitioner is disputing the same with respect to its plant availability considered for the months of October & November 2020 on the issue of:

- a) Obligation to provide coal for generation of power.
- b) Force Majeure Event of blockade by agitating farmer unions.
- c) Deemed Capacity.
- d) Interpretation of Article 14.1(iv) of the PPA.
- e) Curing of the default.

The observations and the decision of the Commission on these are as under:

7.1 **Obligation to provide coal for generation of power:**

The Petitioner is pleading that in terms of Article 14.1 of the PPA, if any event occurs as a result of a Force Majeure Event or due to a

breach by PSPCL of its obligations under the PPA, then such an event would not constitute a Seller's Event of Default. It has been submitted that, despite being technically available, the plant could not be operated at the requisite capacity in the months of October and November 2020, on account of coal shortage occasioned by PSPCL's breach of its obligations under the PPA to provide adequate quality and quantity of coal for generation of power. It was submitted that Hon'ble APTEL has held that obligation to sign the FSA and arrange adequate quality and quantity of coal for generation of power from its Project is that of PSPCL.

Whereas, PSPCL's contention is that it has challenged Hon'ble APTEL judgment dated 07.04.2016 before the Hon'ble Supreme Court in Civil Appeal No. 4085-86 of 2016. The coal is being procured in terms of Fuel Supply Agreement dated 04.09.2013 between TSPL and Mahanadi Coalfields (MCL). As on date, the responsibility of dealing with the coal companies, namely to procure linkage coal continues to be that of TSPL and admittedly, TSPL has been dealing with MCL in the procurement of coal during the relevant period. In terms of the prevalent arrangement, pending the decision of the Hon'ble Supreme Court in CA Nos. 4085-4086/2016, PSPCL's obligation is to make payment of the Energy Charges incurred by TSPL as per the terms of the PPA. The energy charges include, primarily, the cost of coal procurement. Admittedly, TSPL has been operating on the above basis and procuring the coal. Further, even if the FSA is to be signed by PSPCL, the Agreement provides for the FSA to be assigned forthwith to TSPL for all intents and purposes with the necessary implication of TSPL arranging the coal under the FSA

on a day to day basis. The failure of TSPL to arrange the requisite quantum of coal, which was otherwise available from MCL cannot be attributed to PSPCL.

The Commission notes that the issue of obligation under the PPA with regard to the coal has been a subject of dispute between the parties since the beginning of the project. The Commission refers to the developments in the same as under:

(i) Hon'ble APTEL judgment dated 07.04.2016 (in Appeal Nos. 56 & 84 of 2013), wherein it was held as under:

"13. In view of the above discussion and analysis of the provisions of law including guidelines issued by the Government of India, RFP's request for proposal, Power Purchase Agreement (PPA) and Memorandum of Understanding, we clearly hold that the Respondent No. 1, PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited and the Procurer cannot be absolved of its obligation to supply fuel to the Appellant/Petitioner for its power generating station and further to sign the Fuel Supply Agreement with the coal supplier.

.....

15. Both these Appeals being Appeal No. 56 of 2013 and Appeal No. 84 of 2013 are hereby allowed and Impugned Orders dated 27.09.2012 and 24.12.2012 impugned therein are hereby set aside. The State Commission is directed to pass the consequential order in the light of our above noted observations within three months from today under intimation to this Tribunal."

(ii) Further, the Hon'ble Supreme Court vide interim Order dated 02.05.2016 in the Civil Appeal Nos. 4085-86 of 2016 filed by PSPCL (Appellant) against the above APTEL Order, ordered as under:

“Admit

The learned counsel appearing for the appellant has submitted that the appellant is ready and willing to pay the energy charges, which would also include fuel charges, as per the Power Purchase Agreement. The energy charges shall be paid accordingly.”

Thereafter, the Hon'ble Supreme Court vide interim Order dated 12.07.2016, observed that the pendency of the appeals shall not stand in the way of the State Commission proceeding with the matter as per the remand.

(iii) Accordingly, the Commission proceeded to comply with Hon'ble APTEL Order dated 07.04.2016. The Commission in Orders dated 06.09.2016 and 08.09.2016 (Petitions 11 & 46 of 2012) has dealt the issue as under:

“III.

..... The Hon'ble APTEL has clearly held that “PSPCL/Procurer is under obligation to sign the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited”. Considering the same, the Commission directs PSPCL to approach Mahanadi Coalfields Limited (MCL) within 7 days of the date of issue of this Order and sign the FSA forthwith with MCL in substitution of the earlier FSA dated 04.09.2013 signed by TSPL.

.....

The Commission notes that as assignment of the FSA by PSPCL to the successful bidder was provided in the RfP, therefore the bidders including Sterlite Energy Limited (the successful bidder which acquired the SPV TSPL) had the knowledge that the FSA would be assigned to the selected bidder during the term of the PPA. TSPL gave its consent for the assignment of the FSA to it by PSPCL by signing the MoU with PSPCL on 02.09.2008 i.e. following day of signing of the PPA on 01.09.2008 wherein it was expressly provided that the FSA shall be signed by PSEB (now PSPCL) with the coal company and PSEB shall thereafter assign the same in favour of TSPL.

In view of above, the Commission holds that assignment of the FSA by PSPCL to TSPL after signing the same with MCL will be in consonance with the Bidding Documents, PPA, MoU and the law of the land laid by Hon'ble Supreme Court of India.

IV.

Considering the above, the Commission holds that after assignment of the FSA including FTA by PSPCL to TSPL, TSPL shall operate the same for purchasing the coal from the Mine, transporting the same through Indian Railways to the Project and unload the coal at the Project site and PSPCL shall pay the Monthly Energy Charges for the units of electricity supplied in terms of the PPA.

V.

Accordingly, the Commission holds that TSPL shall pursue with Ministry of Coal, MCFL (MCL) and other relevant departments for the Fuel (Coal) for smooth and timely operation of the Project duly assisted by PSPCL in this regard, for which PSPCL shall extend full co-operation to TSPL.

In the eventuality of established shortage in availability of coal for the Project, the Commission shall, on being so approached, pass appropriate Order at appropriate stage after considering the reasons.”

The above Order of the Commission has also been challenged by TSPL before Hon'ble APTEL through Appeal no. 331 of 2016. However, no stay has been granted by Hon'ble APTEL and thus it continues to be operational.

Thus, the position emerging as on date is that PSPCL was mandated to sign the FSA (including FTA) with MCL and assign the same to TSPL. TSPL is to operate the same for purchasing the coal from the mine, transporting the same through Indian Railways to the Project site, unload and use it for generating power. PSPCL is to pay the Monthly Energy Charges for the units of electricity supplied in terms of the PPA. In the eventuality of an established shortage in availability of coal for the Project, the Commission can be approached for appropriate orders at the appropriate stage after considering the reasons.

The Commission observes, that pending final decision in the appeals filed by the parties in Hon'ble APTEL and the Hon'ble Supreme Court, presently, the coal is being procured by TSPL in terms of Fuel Supply Agreement dated 04.09.2013 executed between TSPL and MCL. PSPCL pays the energy charges, which also include fuel charges, as per the Power Purchase Agreement and as per the mandate issued by the Hon'ble Supreme Court vide interim Order dated 02.05.2016 in the Civil Appeal Nos. 4085-86 of 2016. Thus, conclusively it is the

responsibility of TSPL to stock adequate fuel as per norms to keep the plant running.

The Commission also notes that it was never approached by TSPL for appropriate orders by establishing any shortage of coal for the project in light of the above referred orders of the Commission dated 06.09.2016 and 08.09.2016 in petition nos. 11 and 46 of 2012. Now in hindsight, it cannot use shortage of coal as a reason for not achieving average availability of 65% and assign it as the responsibility of PSPCL.

7.2 Issue of Force Majeure Event:

The petitioner is pleading that the Indirect Non-Natural Force Majeure events prescribed under Article 12.3(2)(a) includes any blockade, embargo, revolution, riot or insurrection. During the period October and November 2020; various Farmer Unions protesting against the Farm Bills 2020 had launched the 'Rail Roko' movement which continued from 24.09.2020 to 23.11.2020. The 'Rail Roko' restricted the movement of trains carrying coal. The coal arranged by TSPL to be transported through railways could not be delivered to the project site resulting in coal stock-out situation. That, on 21.10.2020, as per the terms of the PPA, TSPL issued the notice to PSPCL intimating that it has been forced to shut down its complete plant operation on 20.10.2020 due to coal stock-out situation on account of the restrictions in coal movement caused by strike of Kissan Unions as an event of Force Majeure and claimed capacity charges for the affected period of coal stockout starting from 16.10.2020 till the restarting of the plant. After nearly 2 months of blocking the railway tracks, members of farmers union announced the lifting of their protest w.e.f

23.11.2020. It was further submitted that all other TPPs in Punjab also faced similar issues of coal stock out situation during October and November 2020 resulting in forced shut down of their Plants. The Petitioner also pleaded that it has always been prudent in requisitioning coal from MCL, but for an inherent shortfall in supply of linkage coal which prevented it from maintaining the coal stock.

However, PSPCL contended that TSPL itself was at fault as it had not been maintaining the requisite fuel stock at its generating plant. Article 12.3 of the PPA recognizes only those events as Force Majeure which could not have been avoided through reasonable care or prudent utility practices. The situation could have been reasonably avoided if TSPL had taken adequate steps as a prudent utility and maintained the required coal stock of 30 days as mandated by CEA guidelines dated 08.11.2017. Had TSPL acted in accordance with prudent utility practices and built up the requisite coal stock, then it would not have been adversely affected by the Farmers Agitation. PSPCL had been asking TSPL to build up the requisite coal stock time and again; however TSPL has not placed on record any details of the steps taken by it to build up the coal stock prior to the purported Force Majeure condition claimed by it in October and November 2020. It was also submitted that while TSPL has been claiming that there has been a shortfall in the delivery of coal by MCL, there is no proof furnished by TSPL to indicate that any penalty/compensation has been demanded and received by TSPL for such failure of MCL to make available the full quantum of requisitioned coal as per the terms of FSA.

The Commission refers to the relevant provisions of the PPA, stating as under:

“12.3 Force Majeure

A ‘Force Majeure’ means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices.”

.....

ii. Non-Natural Force Majeure Events:

.....

2) Indirect Non-Natural Force Majeure Events

a) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action: or

a) The Commission notes that the PPA specifies that the ‘Force Majeure’ clause can be invoked only if such events or circumstances could not have been avoided, if the affected party had taken reasonable care or complied with Prudent Utility Practices. Thus, the Commission finds it appropriate to examine the Prudent Practices required to be followed and whether the petitioner had taken reasonable care in complying with the same. In this regard, the Commission refers to the CEA guidelines dated 08.11.2017 stipulating as under:

“3. Coal Stocking Norms (Normative Coal Stock):

The normative coal stock is to be calculated based on the coal requirement at 85% PLF. The norms for number of days of coal stock to be kept in the power plant depends on the distance of the power plant from the mine-head are as per the details given below:

<i>Distance of Power Plant</i>	<i>Days of Stock</i>
.....	
<i>Beyond 1,000 kms away from Coal Mine</i>	30

The perusal of the aforementioned CEA guidelines illustrates that the petitioner’s plant, owing to its distance from the coal mine, is required to maintain the normative coal stock of 30 days. However, as per TSPL’s own submission, the opening coal stock at the start of October 2020 was only 2.238 LT i.e. sufficient to meet its requirement for about 7 days. The submission of TSPL that the CEA guidelines are merely indicative in nature and not binding is not acceptable, as the same has been issued by the designated government instrumentality constituted under the provisions of the Electricity Act, 2003 and is a prudent industry practice. Even if they are taken as indicative, then the Petitioner should have been guided by the Project report defined in RFP document, which envisages a coal storage of 1½ months, even more than the 30 days norm prescribed by CEA. That is the indicated inventory of coal the Petitioner would have taken into account while calculating its bid for the project.

Further, the Petitioner's plea that it has always been prudent in requisitioning coal from MCL but for an inherent shortfall in supply of linkage coal prevented it from maintaining the required coal stock also reinforces the observations and decision of the Commission in para 7.1 above. It is an acknowledgement by TSPL of its responsibility to procure and adequately stock coal which it has been discharging all along and now cannot pass it on as the responsibility of PSPCL. Keeping in view the low PLF at which TSPL operated since the onset of COVID 19 in march 2020, it could have built up its coal stock. Also, there is nothing on record to show that it had approached PSPCL seeking to source coal from alternate sources, neither had it approached the Commission in terms of the Orders dated 06.09.2016 (read with 08.09.2016) in Petitions 11 & 46 of 2012, wherein it was held that, in the eventuality of established shortage in availability of coal for the Project, the Commission shall, on being so approached, pass appropriate Order after considering the reasons.

Also, the petitioner while submitting the status of Rakes lifted vis-à-vis allocation for the months of June to November has indicated in the "Remarks" column the reasons of short/surplus materialization. It has not attributed the shortage to either the inadequacy of coal linkage or to the level of delivery by the coal company. Also, the reason attributed to delay or non-payment by PSPCL does not seem to be logical, as the provisions for dealing with the same, including payment of LPS to compensate its financing costs, exist separately in the PPA.

The Commission also refers to the terms of the FSA dated 04.09.2013 executed between MCL and TSPL, specifying as under:

“4.6 Compensation for short delivery/lifting

4.6.1 If for a year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect to that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting, as the case may be ("Failed Quantity").

The Commission notes that the FSA provides for payment of compensation for shortfall in delivery of coal, as contended by PSPCL. However, despite the query raised by PSPCL in this regard, the petitioner did not submit any document to indicate that TSPL had sought the said compensation from Coal Company for any shortfall in delivery of coal, thus giving rise to the conclusion that such shortfall did not exist.

Thus, the Commission observes that had reasonable care and due diligence been undertaken by TSPL to maintain the coal stock as mandated by the CEA/ as per the Project report, the adversity due to coal shortage during the period under consideration could have been avoided. The Commission, while noting TSPL’s submission that all other TPPs in Punjab also faced similar issues of coal stock out situation during October and November 2020 resulting in forced shut down of their Plants, observes that none of them has sought to invoke the same as a Force Majeure Event.

- b) The Petitioner has pleaded that the Indirect Non-Natural Force Majeure events prescribed under Article 12.3(2)(a) of PPA includes any blockade, embargo, revolution, riot or insurrection. The Commission refers to the said provision of the PPA, which states asunder

“2) Indirect Non-Natural Force Majeure Events

- b) Any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action:”*

The Commission observes that the Petitioner is pleading to invoke ‘Indirect Non-Natural Force Majeure’ by terming the ‘blockage of rail tracks due to the farmers agitation’ as ‘blockade’ contained in the Force Majeure clause of the PPA. However, as is evident, here in the PPA the term ‘blockade’ is applied in context of an act of war between nations and not otherwise. None of the other terms in this clause which could indicate a Force Majeure event are applicable in the present case. The Commission refers to several reputed dictionaries, wherein the term ‘blockade’ is defined as under:

- a) Oxford Languages: *“a situation in which a place is surrounded by soldiers or ships in order to prevent goods or people from reaching it”*
- b) Cambridge Dictionary: *“the situation in which a country or place is surrounded by soldiers or ships to stop people or goods from going in or out”*
- c) Collins Dictionary: *“The isolating, closing off, or surrounding of a place, as a port, harbour, or city, by hostile ships or troops to prevent entrance or exit”*

d) Webster Dictionary: *“The isolation by a warring nation of an enemy area (such as a harbour) by troops or warships to prevent passage of persons or supplies”.*

Thus, the Commission is of the view that the Petitioner is attempting to confuse ‘blockage of rail tracks’ as ‘blockade’ contained in the Force Majeure clause of the PPA in order to inappropriately avail its benefit.

Also, the Petitioner has asserted that ‘the farmer's agitation across the country against the farm laws had thrown up an extraordinary situation, and more so in the States of Punjab and Haryana’ as noted in the Hon’ble High Court of Punjab & Haryana Order dated 18.06.2021 in CWP No. 5645 of 2021 (Adani Wilmar Limited & Anr vs. State of Punjab & Ors). However, the Hon’ble High Court’s observation was a general expression made while dealing with the prayer made thereof for issuance of direction to the State authorities to ensure the free movement of food grains etc. In this context, PSPCL’s letter dated 05.10.2020 to the Railway Board was also for seeking their intervention to ensure rake movement on priority to the IPPs in Punjab. These cannot be construed to indicate acceptance of the farmer agitation as a Force Majeure event under the existing PPA.

Thus in light of the above analysis, the Commission concludes that, under the given circumstances, the Petitioner’s plea to consider its failure to achieve the prescribed Average Availability of its plant due to a Force Majeure event is not sustainable.

7.3 Issue of Deemed Capacity (DC):

The Petitioner is also challenging the PSLDC's action of not considering the DC as declared by it for October & November 2020 in terms of Hon'ble APTEL judgment dated 19.07.2021, as considered by PSPCL for the month of November 2018. The Petitioner further pleaded that as per the provisions of the PPA, Punjab Grid Code & IEGC; DC/Availability declaration is the prerogative of TSPL and PSPCL/SLDC do not have any say in the same. It was submitted that CERC in the Statement of Objects and Reasons issued with the 5th amendment to IEGC 2010 has clearly stated that declaration of capacity is the prerogative of generating company. TSPL vide its letters dated 07.11.2020 and 09.12.2020 addressed to PSLDC has communicated its objections w.r.t wrongful preparation of SEA for October and November 2020. However, PSLDC has not considered the DC declared by TSPL. Further, TSPL, in its rejoinder, has submitted that PSLDC in its reply has admitted that capacity charges are paid on the basis of the capacity declared available by TSPL and is not based on the schedule given by PSLDC or actual energy injected by TSPL into the grid. It is a settled position of law that admissions in pleadings or judicial admissions made by the parties or their agents are fully binding on the party, hence PSLDC ought to be directed to revise the SEA for October and November 2020 by recording the DC/availability declared by TSPL.

Whereas, PSLDC while stating that the capacity charges are fixed and are paid on the basis of the capacity declared available by the Petitioner and are not based on the schedule given by PSLDC or actual energy injected by the Petitioner, also submitted that from the definition of 'Declared Capacity' it is clear that the Generating

Station can only declare capacity to the extent of the fuel actually available and not otherwise. In case of non-availability of fuel, the generating plant is not capable of delivering electricity. Accordingly, it has considered the Declared Capacity to the extent the Generator (TSPL) was actually capable of generating power (based on the fuel/coal availability) during the period while preparing the implemented DC and State Energy Accounts.

PSPCL submitted that it had considered the deemed availability for November 2018 as directed by the Hon'ble APTEL in Order dated 21.07.2021, without prejudice to the civil Appeal filed against the same. However, it is a settled principle that fixed charges are only payable to the extent of availability of the Generating Station on the basis of fuel availability. Even the Statement of 'Objects and Reasons' to the Fifth Amendment of the IEGC, 2010, relied upon by TSPL in its submissions, also recognizes that declared capability is based on fuel/water availability.

a) The Commission refers to the Hon'ble APTEL judgment dated 19.07.2021 (in Appeal Nos. 317 & 220 of 2019) cited by the petitioner, wherein it has been held as under:

"178. Coming to the issue of payment of Deemed Capacity Charges, according to the Appellant, the thermal plant of the Appellant was available and was declared based on the technical capacity to generate and coal stock position. As envisaged in the PPA and coupled with the Judgment dated 07.04.2016, the Respondent-PSPCL was obliged to arrange adequate quantity and quality of coal to the Appellant's plant. Apparently, the said obligation was not kept up by the Respondent- PSPCL. Added to this, the inaction of the PSPCL to give approval for procuring coal from other CIL mines and so also coal offered by CIL through RCR mode has resulted in

continuous shortage of coal for running the plant of the Appellant. Ultimately, this has compelled the Appellant to declare lower operational availability of its plant though it was technically available to generate and supply much higher quantum of electricity to Respondent No.2-PSPCL. We see the force in the contention of the Appellant that the obligation of the Appellant to operate the Plant at its full capacity is interdependent and linked to the obligation of PSPCL to supply adequate quantity and quality of coal. The terms of agreement between the parties, discussed above, goes to show the fulfilment of obligation depends upon the mutual compliance of reciprocal commitments. Therefore, the failure of PSPCL to discharge its obligation, definitely, affects TSPL adversely. Hence, we are of the opinion that the Appellant is justified in claiming deemed capacity charges between September 2016 to May 2017 and October 2017 till 2018 for the reasons stated above.”

From the perusal of the above judgment dated 19.07.2021 allowing the Petitioner's claim of deemed capacity charges between September 2016 to May 2017 and October 2017 till 2018, it is evident that the matter dealt therein was the issue of shortage of linked coal coupled with the inaction of the PSPCL to give approval for procuring coal from other CIL mines and coal offered by CIL through RCR mode resulting in continuous shortage of coal for running the plant. However, in the instant case, there is nothing on record to substantiate that the shortage of coal in the months under consideration (i.e. October and November 2020) was attributed to inadequacy of the linked coal or inaction on the part of PSPCL to give approval for procurement of coal from alternate sources.

As discussed above, the shortage was actually a result of the Petitioner's failure to stock adequate quantity of coal

consistently. Even at the point when the farmers agitation started having its effect on supplies of coal through the railways, TSPL's coal inventory was only sufficient for 7 days. Also, during low capacity utilization period, it failed to build up the coal stock and maintain adequate coal inventory as per CEA norms/Project report. Thus, the Commission is of the view that the petitioner's claim of deemed capacity for the months of October and November 2020 is not sustainable in the instant case.

b) Further, the Commission refers to the relevant provisions of the PPA, State Grid Code and the Hon'ble Punjab & Haryana High Court Order dated 04.07.2022, specifying as under:

(i) PPA:

In the PPA; the Declared Capacity has been defined as *under*:

"In relation to a Unit or the Power Station at any time means the net capacity of the Unit or the Power Station at the relevant time (expressed in MW at the Interconnection Point) as declared by the Seller in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff;"

Also, Article 8.3 of the PPA states as under:

"8.3 Availability

The Seller shall comply with the provisions of the applicable Law regarding Availability including, in particular, to the provisions of the ABT and Grid Code relating to intimation of Availability and the matters incidental thereto.

(ii) Further, the State Grid Code Regulations specifies as under:

“11.3.10During fuel shortage condition, in case of thermal stations, they may specify minimum MW, maximum MW, MWh capability and declaration of fuel shortage..... In case of a gas turbine generating station or a combined cycle generating station, the generating station shall declare the capacity for units and modules on APM (Administered Pricing Mechanism) gas, RLNG (Regasified Liquefied Natural Gas) and liquid fuel separately, and these shall be scheduled separately.

11.3.11

11.3.12 It shall be incumbent upon the SGS to declare the plant capabilities faithfully, i.e., according to their best assessment.....”

(iii) And, the Statement of Reasons issued for 5th Amendment to IEGC 2010, cited by the petitioner, states that:

“Generator based on its experience about the healthiness of the units is allowed to declare its declared capability based on machine and fuel/water availability...”

(iv) Hon’ble Pb. & Haryana High Court Order dated 04.07.2022 in CWP Nos. 7519 of 2020 and 7715 of 2020, filed by TSPL and NPL, has observed as under:

“[49]. Declared Capacity means the capability of the generating station to deliver ex-bus electricity in MW declared by such generating station in relation to any period of the day or whole of the day, duly taking into account the availability of fuel.

.....

[78]. ...Under Regulations 11.3.10, 11.3.12 and 11.3.13 of the Punjab Grid Code and Article 8.3 of the Power Purchase Agreements, the petitioners are duty bound to correctly declare their availability/declared capacity every day corresponding to their capabilities to generate

electricity. PSLDC in turn is duty bound to consider the declared capacity and prepare the SEA accordingly. PSLDC cannot deviate from its statutory obligations in this regard.”

Thus, the Commission is of the view that, the Generators are mandated to declare their plant availabilities faithfully based on machine and fuel/water availability. The petitioner’s action of declaring availability of 94.95% and 99.73% for the months of October 2020 and November 2020 respectively, despite being fully aware and stating the shortage of fuel, construes to be mis-declaration and is wilful and conscious violation of the grid code and their obligations thereunder. Accordingly, the Commission is of the view that the petitioner’s claim of considering and allowing capacity declared by it for the months of October and November 2020, without having sufficient fuel to generate the declared power is deliberately misleading and thus is not sustainable.

7.4 Interpretation of Article 14.1(iv) of the PPA:

The petitioner is also pleading that, the methodology adopted by PSPCL for computing the Average Availability of TSPL for determining the default is incorrect and fallacious. In terms of Article 14.1(iv) of the PPA the Average Availability of each of the 12 non-consecutive months shall be individually less than 65% (and not collectively) for constituting a Seller’s Event of Default. The ‘Average Availability of the month’ refers to the average availability of each day of the month and not the consolidated average of the 12 non-consecutive months. It was submitted that, from the 12 random non-consecutive months selected by PSPCL within the period of September 2018 to August 2021; TSPL’s

operational Average Availability is above 65% in four individual months of November 2018, February 2019, October 2020 and November 2020.

Whereas, PSPCL has contended that the interpretation sought to be made by TSPL is contrary to the plain terms used in the PPA. The PPA does not provide that the availability in each of the 12 months has to be below 65%. The interpretation made by TSPL would amount to rendering the word 'Average Availability' used in Article 14.1 (iv), redundant and purposeless. The purpose of providing for Average Availability is to ensure that the declaration of availability is done in a consistent manner.

The Commission refers to the relevant provisions of the PPA, which are reproduced below:

Article 14: Events of Default and Termination

"14.1 Seller Event of Default

The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Procurer of its obligations under this Agreement, shall constitute a Sellers Event of Default:

.....

iv) after Commercial Operation Date of all the Units of the Power Station, the Seller fails to achieve Average Availability of sixty five percent (65%), for a period of twelve (12) consecutive Months or within a non-consecutive period of twelve (12) Months within any continuous aggregate period of thirty six (36) Months"

As is evident, the bare reading of the clause provides adequate clarity for its interpretation. The PPA specifies the threshold Average Availability of sixty five percent (65%), either for a period of twelve (12) consecutive Months or within a non-consecutive period of twelve (12) Months within any continuous aggregate period of thirty six (36) Months. The use of word 'Period' signifies the intent to consider the average of the plant availability over a period. Thus, Acceptance of the Petitioner's interpretation would render the intent of the clause meaningless.

Accordingly, the Commission is of the considered view that the Petitioner plea that the Average Availability of each of the 12 non-consecutive months shall be individually less than 65% (and not collectively) for determining its default is not sustainable.

7.5 Curing of the default:

The Petitioner has also submitted a plea that, even if the default as per Notice dated 15.09.2021 is to be considered, the alleged default stands cured in terms of TSPL's availability being more than 65% in the 3 months of the Consultation Period i.e., October, 2021 to December, 2021.

The Commission refers to the impugned default notice dated 15.09.2021. The default pertains to the issue of the Average Availability within a non-consecutive period of 12 months within the continuous aggregate period of 36 months of September 2018 to August 2021. Accordingly, improved availability in subsequent months i.e. other than the specified in the default notice is not germane to the present issue under

consideration and thus cannot be construed as a curing of the said default.

In light of the detailed analysis and observations and decisions of the Commission above, the prayers of the petitioner are disallowed. The petition and IA are disposed of in terms of the above Order.

Sd/-

(Paramjeet Singh)
Member

Sd/-

(Viswajeet Khanna)
Chairperson

Chandigarh
Dated:08.09.2022

