

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

**Petition No.57 of 2013
Date of Order: 19.02.2014**

In the matter of : Petition under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003, seeking approval of the terms and conditions for procurement of coal from alternate sources and pass through of the landed cost of such coal.

AND

In the matter of: Nabha Power Limited, SCO-32, Sector 26-D, Madhya Marg, Chandigarh-160019.

Versus

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

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

ORDER

Nabha Power Limited (NPL) filed a petition before Punjab State Electricity Regulatory Commission (Commission) on 05.11.2013, under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 (Act) seeking approval of the terms and conditions for procurement of coal from alternative sources (other than the linkage from Coal India Limited) and passing through the landed cost of such coal as part of tariff under the PPA to the Punjab State Power Corporation limited (PSPCL). The petition was taken up for admission on 12.11.2013. The Commission, after scrutiny of the submissions made in the petition, noted that the petitioner had not completed the tendering process, as such the petition was immature. The Commission also observed that certain prayer in the petition was outside the scope of Order dated 21.08.2013 of Hon'ble Appellate Tribunal for Electricity (APTEL). The Commission, vide Order dated 14.11.2013, did not admit the petition and directed that amended petition be filed. The petitioner filed amended petition on 13.12.2013 and the Commission vide Order dated 24.12.2013 admitted the petition and directed PSPCL to file reply by 03.01.2014. PSPCL filed reply on 03.01.2014. However, on 06.01.2014, the petitioner filed an Application praying for admitting another

amended petition annexed as Annexure P-1 with the said Application. The Commission, vide its Order dated 10.01.2014, admitted the said amended petition replacing the earlier petition admitted vide its Order dated 24.12.2013. The Commission made it clear that the time of 60 days allowed by Hon'ble APTEL in its Order dated 21.08.2013 shall now be reckoned from 10.01.2014.

2. The petitioner in this petition submitted that it is developing the 2 x 700 MW Rajpura Thermal Power Project (Project) which is in advance stage of construction and is scheduled to achieve commissioning of Unit-1 and Unit-2 as per the Power Purchase Agreement (PPA) in January 2014 and May 2014 respectively. The petitioner submitted that it filed the present petition for the purpose of seeking approval of the terms and conditions for procurement of coal from alternate sources (other than the linkage from Coal India Limited) and passing through the landed cost of such coal as part of tariff under the PPA to PSPCL.

The petitioner also submitted that it is a company incorporated under the Companies Act, 1956 having its registered office at PO Box no. 28, near village Nalash, Rajpura 140401, Punjab and was a Special Purpose Vehicle (SPV), which had been initially set up by the erstwhile Punjab State Electricity Board (predecessor of Punjab State Power Corporation Ltd.) for developing the Project. The petitioner further submitted that the entire shareholding of NPL was subsequently transferred to L&T Power Development Limited after it was selected as the successful bidder under the tariff-based competitive bidding process conducted by PSEB.

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

i) The erstwhile PSEB, intending to procure power through competitive bidding under Section 63 of the Act and the "Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005" issued by the Ministry of Power, Government of India (Competitive Bidding Guidelines), decided to invite bids under Case-2 from power developers to set up the Project. The erstwhile PSEB, in terms of the Competitive Bidding Guidelines, incorporated a SPV (NPL) to act as its authorized representative. L&T Power Development Limited emerged as the successful bidder and upon acquisition of 100% of the NPL (SPV), the petitioner executed the PPA on 18.01.2010 for supply of power from the Project to PSPCL (erstwhile PSEB) for a period of 25 years.

ii) The Project was envisaged to operate on the basis of coal assured to be supplied under a linkage from South Eastern Coalfields Limited (SECL), a

subsidiary of Coal India Limited (CIL) through the Letter of Assurance (LoA) and the Fuel Supply Agreement under the aegis of the New Coal Distribution Policy, 2007 (NCDP) which mandated that 100% of the normative coal requirement of a thermal power Project will be provided. However, post the award of the contract, it became clear to the petitioner that the source for supply of coal identified by the respondent at the time of bidding and held out to bidders shall be insufficient to meet the coal requirements of the Project.

iii) The LoA dated 11/18.12.2008 procured by the respondent for the Project through SECL was for 5.55 Million Tonne Per Annum (MTPA) of Grade F coal. As against this, the requirement of the Project (to operate at the normative Availability of 85%) under the PPA is 6.68 MTPA of Grade F coal. The above mentioned quantities are based on the assumption that coal from the Korba coalfield (with 80% normative yield in washing) will be provided for the Project and that this requirement may further change based upon the actual source of supply. Further, CIL / SECL is only assuring supply of coal up to 65% of the LoA quantum (in the first year of operation as imported coal will not be supplied by CIL/SECL) which amounts to 3.61 Million Tonne (MT) under the Coal Supply Agreement (FSA) executed between SECL and NPL. In view of the above, the petitioner estimated that the Project in order to run at the normative availability of 85%, would suffer shortage of coal to the tune of 3.07 MT of Grade F, run of mine (ROM) coal.

iv) Consequently, keeping in view the imminent shortage of coal that the Project would face, the petitioner and its promoter L&T Power Development Ltd. filed Petition No.56 of 2012 before this Commission under Section 86(1)(b) and Section 86(1)(f) of the Act on 30.10.2012 inter alia seeking permission to arrange coal from alternative sources (imported coal as well as domestic e-auction coal, coal from other domestic sources) to meet the deficit in supply of coal.

v) The Commission in its Order dated 31.12.2012 disposed of the Petition No. 56 of 2012 and inter alia observed that in view of the fact that SECL was assuring to supply 80% of Annual Contracted Quantity (ACQ) of coal, the petitioner's apprehensions regarding not being able to operate the plant beyond a certain Plant Load Factor / Availability were not entirely unfounded. The Commission also recognised that a significant investment having been made by the developer in the Project, PSPCL and the State Government have to, besides the developer, take up the matter with the quarters concerned for allocation and supply of adequate quantity / quality / grade of coal for the generating station to run successfully as per PPA. The Commission took cognizance of the problems

related to shortfall in supply of coal from the linked source. However, with respect to use of imported coal from other international markets as well as domestic e-auction coal to meet the shortfall in supply of required quantum of coal for running the Project as per PPA, it directed the petitioner to approach this Commission for approval as per terms of the PPA at the appropriate time.

vi) Being in urgent need to arrange coal to meet the deficit in supply of coal for the Project and also to establish their case that the respondent is liable to arrange all the coal required for the operation of the Project in terms of the PPA, the petitioner and its promoter L&T Power Development Ltd. on 18.02.2013 filed the Appeal No.68 of 2013 before the Hon'ble APTEL impugning the Order of the Commission dated 31.12.2012 in Petition No.56 of 2012.

vii) In the meanwhile during pendency of Appeal No.68 of 2013 before the Hon'ble APTEL, the petitioner commenced the tender process of carrying out the competitive bidding for procurement of imported coal to meet the deficit in supply of coal for the Project. As a proactive measure to finalize the contract for the import of coal, the petitioner had prepared and forwarded the tender documents to the respondent for review and comments vide its letter dated 08.06.2013. Thereafter, the petitioner issued a Notice Inviting Tender (NIT) on 10.06.2013 for supply of imported coal and also sent a reminder letter to the respondent on 14.06.2013 for seeking their comments on the tender documents. The respondent sent a letter dated 04.07.2013 in response to the petitioner's aforementioned letters. However, it did not provide any comment on such tender process. Meanwhile, the petitioner through its letter dated 26.06.2013 also informed the respondent that the tender documents have been purchased by 11 parties.

viii) Subsequently, the petitioner filed Interlocutory Application (IA) No.227 of 2013 in Appeal No. 68 of 2013 on 08.07.2013 seeking the permission of the Hon'ble APTEL to carry on / continue with the tender process for the import of coal to meet the imminent shortage facing the Project. The petitioner relied upon the decision of the Cabinet Committee on Economic Affairs (CCEA) dated 21.06.2013 (which was reported vide the Press Information Bureau's release of the even date) wherein it allowed CIL to import coal and also the self-import of coal by Thermal Power Plants (TPPs) to meet shortfall in supply of domestic coal to power projects (CCEA Policy Decision). Further, the petitioner also mentioned in the aforementioned IA that as per SECL letter addressed to NPL bearing no. SECL/BSP/S&M/COMM/359/NPL dated 19.06.2013, the Project will qualify for receiving coal from CIL / SECL, subject to it being commissioned and having

completed the applicable Build-up Period (i.e., 12 months from First Delivery Date). In case of this Project, the Build-up Period is expected to be completed by January, 2015, consequently, the Project will not be eligible to receive imported coal from SECL/CIL until then, thus leaving no option for the petitioner but to include such shortfall as part of the quantum required to be self-imported. In addition, the petitioner also relied on the follow-up decision of the Ministry of Coal dated 26.07.2013 whereby it amended the NCDP dated 18.10.2007. The amended NCDP provided that “.....*Taking into account the overall domestic availability and the likely actual requirements of these TPPs, it has been decided that FSAs will be signed for the domestic coal quantity of 65%, 65%, 67% and 75% of ACQ for the remaining four years of the 12th Plan for the power plants having normal coal linkages.....*” and also reiterated the CCEA policy decision by allowing the thermal power plants to import coal on their own to meet the shortfall in supply of coal.

ix) On 21.08.2013, the Hon’ble APTEL passed the Order in the IA No.227 of 2013 in Appeal No.68 of 2013 (APTEL’s Order) and in its Order observed that advance action is required to be taken to meet the expected shortfall in availability of coal from the linked domestic sources during the pendency of Appeal No.68 of 2013 as the tendering process for import of coal takes time of about 9-10 months. The Hon’ble APTEL allowed the petitioner to take advance action for procurement of coal from alternative sources to meet the anticipated shortfall from the linked sources of coal in order to operate the power plant as per the PPA subject to the following conditions:

“

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

(i) *The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL.*

(ii) *The Appellant will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.*

- (iii) *No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.*
- (iv) *The Appellants will give preference to the coal supplied by CIL / subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.*
- (v) *The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law as expeditiously as possible but not later than 60 days from the date of filing of the application:*

(B) We want to make it clear that the above interim order is to enable the Appellants to take advance action for procurement of coal from alternative sources and this will not give any right to the Appellants to raise any charges over and above that admissible to them as per the terms and conditions of the PPA. The actual procurement of coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.

(C) The above interim order is without prejudice to the inter-se claims of the parties in these Appeals.”

4. The petitioner submitted that it followed a transparent and fair process for conducting the tender process in accordance with the Order of Hon'ble APTEL. The petitioner further submitted that the tender process involved two stages comprising of Technical Bid and Price / Financial Bid and the petitioner published the NIT on 10.06.2013 and shared all tender related documents for procurement of imported coal with PSPCL and also sought their comments/ views at every stage of the bid process.

The petitioner submitted that it received technical and financial bids from 3 bidders for supply of imported coal. In terms of the APTEL's Order, the technical bids were opened on 27.09.2013 in the presence of the representatives of the respondent. Upon evaluation of the technical bids, all the 3 bidders qualified. Thereafter, the financial/price bids received from the bidders were also opened in the presence of the respondent's representatives on 08.10.2013. The technical and price bids opened on 27.09.2013 and 08.10.2013 respectively were signed by the PSPCL's representatives during bid opening.

5. The petitioner submitted that as per Article 1.2.3 of Schedule 7 of the PPA, the Monthly Energy Charges are a direct function of the weighted average actual cost to the seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project site before the beginning of the month. Therefore, the actual price of the landed cost of the imported coal as discovered pursuant to the aforementioned bidding process is required to be allowed as pass through.

6. The petitioner submitted that at present it is proposing to receive supply to the tune of 1.3 MT of imported coal in order to operate the Project as per the terms and conditions of the PPA (85% PLF) for a period of 12 months from the expected commencement of operation of the first Unit of the Project i.e. January 2014. However, if the plant is operated at 100% PLF, the requirement of imported coal would be higher (i.e., 1.82 MT), which can be ascertained after stabilization of the Units. The petitioner enclosed the calculations justifying the import of coal to the tune of 1.3 MT (@ 85% PLF) and 1.82 MT (@ 100% PLF) as Annexure P/7B with the petition.

7. The petitioner submitted that as required in the ibid Order of Hon'ble APTEL, it confirms that :

- (i) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the petitioner for procurement of coal from alternative sources will be passed on to respondent;
- (ii) Preference will be given to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged from alternate sources and that petitioner will not put any restrictions on supply of coal from the linked sources and will accept the entire quantity of coal offered for supply from the linked sources.

8. The petitioner further submitted that keeping in view the various guidelines mentioned in the ibid Order of Hon'ble APTEL, it proposes to enter into Coal Supply Agreement (CSA) on the terms & conditions enclosed in Annexure P/7 of the petition and the qualification requirements and specifications of imported coal.

9. The petitioner submitted that apart from procurement of imported coal, the ibid Order of Hon'ble APTEL also allows for procurement of coal from alternative domestic sources. The petitioner further submitted that as domestic coal is also available through a transparent process of e-auction conducted by CIL and since e-auction process itself is very transparent process of price discovery, a separate tender process was not required to be carried out by it. The petitioner submitted that it may be allowed the procurement of e-auction coal provided that the price, on energy adjusted basis, of such e-auction coal is lower than most recently supplied imported coal under the present tender. The petitioner further submitted that e-auction coal as and when procured would be a replacement for imported coal for which approval is sought by way of this petition and procurement of domestic coal through e-auction coal will reduce the quantum of imported coal procured under the tender process and consequently, will result into overall reduction of Energy Charges.

10. The petitioner submitted that pursuant to the ibid Order of Hon'ble APTEL which allowed the petitioner to procure coal from alternative domestic sources, it also initiated a tender process for procurement of coal from domestic sources to meet the deficit in supply of coal for operation of the Project. The petitioner submitted that it published a Notice Inviting Tender (NIT) for supply of up to one lakh tonne of Non-Coking Coal for the Project in all editions of The Times of India on 21.11.2013.

11. The petitioner further submitted that in response to the tender process for domestic coal, seven (7) parties submitted their bids. Non-financial (technical) bids were opened on 18.12.2013 and upon evaluation, all the seven bidders qualified and thereafter the price bids were opened on 26.12.2013. These bids were opened in the presence of representatives of PSPCL. The technical and price bids opened on 18.12.2013 and 26.12.2013 respectively were signed by the PSPCL's representatives during bid opening. The petitioner submitted that it followed a transparent bidding process in accordance with Hon'ble APTEL's Order and is proposing to enter into a Coal Supply Agreement (CSA). The petitioner has annexed a copy of draft CSA as Annexure P/10 with the petition.

12. The petitioner submitted that it carried out a tender process for procurement of 1.3 MT of imported coal but it has the option of procuring a lesser quantum of imported coal

and presently sought approval for an initial quantity of 0.35 MT of imported coal. Accordingly, the petitioner proposed that out of the total quantum requirement of 1.3 MT imported coal at approximately 6300 kcal/kg(GAR), it will, subject to approval of the Commission, procure 60,000 tonnes of coal from domestic sources at 4400 kCal/kg GAR basis and the balance coal (i.e. 1.26MT including the 0.35 MT) will be procured from imported sources, in order to operate the Project as per the terms and conditions of the PPA (at 85% PLF) for a period of 12 months from the expected commencement of operation of the first Unit of the Project i.e. January 2014. The petitioner submitted the calculations for quantum of coal required to be procured from imported and domestic sources as Annexure P/11.

13. The petitioner submitted the following prayer to the Commission:

- a) take on record the price of coal offered by the lowest bidder pursuant to the conclusion of the tender process for supply of imported coal for a period of one year from the expected commencement of operation of the Unit-1 and allow pass through of cost of such coal as part of tariff in terms of the PPA;
- b) approve the terms and conditions of the CSA (set out at Annexure P/6A of the petition) proposed to be entered for supply of imported coal; and
- c) allow and approve procurement of coal through e-auction process conducted by CIL in terms of Para 26 (of the petition) subject to the price of e-auction coal not exceeding the price approved in terms of Para (a) above.
- d) take on record the price of coal offered by the lowest bidder(s) pursuant to the conclusion of the tender process for supply of coal from domestic sources for the expected commencement of operation of Unit-1 and allow pass through of cost of such coal as part of tariff in terms of the PPA;
- e) approve the terms and conditions of the CSA (set out at Annexure P/10 of the petition) proposed to be entered for supply of coal from domestic sources; and
- f) allow the procurement of imported coal and coal from domestic sources in terms of the quantum mentioned at para 26(F) of the petition.
- g) grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the petitioner.

14. After hearing the petitioner and PSPCL on 10.01.2014, the Commission in its Order of even date, decided to constitute a Committee comprising of Secretary, Power/Govt. of Punjab as Chairman along with CMD/ PSPCL and CEO/ NPL

as members of the Committee. The Committee was to submit its report by 20.01.2014 on the following:

- i) The annual requirement of coal as per PPA.
- ii) The annual availability of coal from SECL/CIL as per FSA.
- iii) The anticipated shortfall in supply of coal by SECL/CIL on realistic basis for first year of operation, keeping in view the commissioning of both Units.
- iv) Whether the shortfall worked out by NPL in the petition pertained to meet coal requirement for 85% availability of plant at delivery point or beyond that?
- v) Whether each of the stipulations contained in the Order dated 21.08.2013 passed by Hon'ble APTEL while allowing advance arrangement for procurement of additional coal by the Company had been met with by NPL?
- vi) Should NPL not have explored the option of getting full quantity of anticipated shortfall of coal from Coal India Limited and/or its subsidiaries through e-auction and domestic coal available from other sources at a cheaper or economical rate and terms and conditions?
- vii) Genuineness and reasonability of price of coal discovered through this bidding process.
- viii) To suggest the terms and conditions which need to be imposed by the Commission for procurement of coal through the bidding process, in addition to those imposed by Hon'ble APTEL.
- ix) Modalities to regulate the supply of this coal.
- x) Extent of coal quantity up to which cost of coal to be procured through the bidding process can be a pass through in terms of PPA.
- xi) Any other issue which the Committee considers relevant to the petition.

The Commission in the aforementioned Order dated 10.01.2014 also directed NPL to furnish reply to the following queries by 20.01.2014:

1. Why competitive bidding process for procurement of domestic coal for one lakh tonne only was carried out whereas the same for coal to be imported has been carried out for 1.3 million tonnes?

2. The justification be given for procuring 1.3 million tonnes of imported coal whereas the same worked out to be 0.45 million tonne as per LoA (5.55 MTPA) for 12 months from the commissioning of the 1st Unit of the Project?
3. The FSA was not annexed with the petition, 10 copies of the same be filed.

15. The petitioner filed reply to the queries, raised by the Commission in its Order dated 10.01.2014, on 20.01.2014 as under:

a) The petitioner submitted that it explored the option of getting commercial domestic coal by way of conducting a tender for supply of up to one lakh tonne of non-coking coal with GCV of 4400 Kcal/kg on GAR basis. In the said tender, 7 bidders participated and therefore, each bidder could have offered one lakh tonne and thus the tender had the potential for receiving bids for 7 lakh tonnes. However, all the 7 bidders cumulatively offered to supply only 3.8 lakh tonnes of domestic coal which itself clearly shows the limited availability of commercial domestic coal. The petitioner further submitted that out of the said 3.8 lakh tonnes offered by the 7 bidders, only a cumulative quantum of 1.4 lakh tonnes was offered at a price which was lower than the price discovered by NPL for supply of imported coal. The prices quoted by bidders for the balance 2.4 lakh tonnes of commercial domestic coal are generally in the same price range or higher than the offers for supply of imported coal received by NPL. The petitioner further submitted that the lack of availability of commercial domestic coal is also borne out by the fact that for 15% ACQ commitment, CIL is resorting to imports. The petitioner submitted that its approach of basing its estimates for inviting domestic commercial coal supply has been fully borne out by practicalities of the domestic coal market and the Commission may take judicial notice of the lack of availability of commercial coal in the domestic market (other than CIL sources) which has put the entire power generation industry under severe constraints and consequently, has forced a number of such power generation companies, including public sector ones, to import coal from outside India.

b) The petitioner while justifying the procurement of 1.3 million tonnes of imported coal submitted that it is relevant for the petitioner to set out the key facts and circumstances under which the Hon'ble APTEL passed its Order dated 21.08.2013 while disposing of the IA No.227 of 2013 filed in Appeal No.68 of 2013 and it was also important to note the material observations contained in the APTEL's Order which led to the filing of the instant petition. The petitioner

submitted that Hon'ble APTEL allowed it to arrange from alternate sources, such quantum of coal which is actually required to operate the Project at Normative Availability in terms of the PPA, that is to say, the coal required to operate the Project at Normative Availability minus coal (both domestic & imported) which in fact would be supplied by CIL/SECL. The petitioner also submitted that in terms of the Hon'ble APTEL's Order, there was no restriction on the quantum of supply that would come from CIL/SECL as the said Order did not envisage any condition which mandates NPL to arrange balance coal (to meet the shortfall in supply) only to the tune of 0.45 MT as nowhere in the APTEL's Order, it is mentioned that the "shortfall from the linked sources" will be limited to the quantum of 15% of the LoA quantum of 5.55 MTPA.

The petitioner further submitted that it had submitted before the Hon'ble APTEL and is also submitting before the Commission that it would procure all the coal offered by CIL/SECL. The petitioner submitted that the tender process undertaken by it was to make advance arrangement to meet "any" shortfall of supply from CIL/SECL. NPL submitted that at the same time, it cannot impose the cost of making such alternative arrangement on PSPCL because it is not allowed to refuse CIL coal or pass on the cost of "take or pay" obligation towards the alternate coal supplier. The petitioner further submitted that it therefore made a realistic assessment of the shortfall from CIL sources based on certain administrative directions given by the Government of India to CIL after many deliberations and in order to ensure a threshold minimum quantum of coal is made available by CIL for the new power projects such as NPL. The petitioner also submitted that as per SECL's letter dated 19.06.2013, imported coal will be supplied to the Project only after Build-up Period is over which in terms of clause 2.10.1 of the FSA is a period of 12 months that commences from the First Delivery Date. Therefore the Project will not qualify to receive imported coal unless the Build-up Period of 12 months is over and as per the FSA, CIL/SECL is not under any obligation to pay any penalty even if the supply of coal falls below 65% during the Build-up Period.

The petitioner further submitted that in view of the overarching shortfall in production of domestic coal, the calculation for shortfall was based on the annual availability of coal from SECL/CIL on the expected level of materialization of 65% of ACQ (65% of 5.55 = 3.61 MTPA) for a period of one year from the CoD of Unit-1. The petitioner also submitted that penalty, if any, paid by CIL/SECL after the Build-up Period for short supply of coal under the FSA will be passed on to PSPCL. The petitioner submitted that it has sought permission to arrange

imported coal to the tune of 1.3 MT considering the overall expected shortage for the entire year. However, at present, it is only going to award a firm contract for 0.35 MT of imported coal in the first quarter of the year subject to approval of the Commission as this approach of entering into firm contract for shorter quantum of imported coal in each quarter will ensure that NPL always retains the flexibility to reduce the quantum of imported coal in remaining quarters if it receives higher quantum of coal from CIL in any preceding quarter.

c) The petitioner submitted 10 copies of FSA dated 11.05.2013 along with Addendum #1 dated 04.09.2013 and Tripartite Side Agreement signed with CIL and SECL on 04.07.2013 in terms of clause 4.3.1 of the FSA.

16. The Commission after the hearing on 21.01.2014, in its Order of even date observed that a Committee was constituted by it for submitting its report by 20.01.2014 on the issues mentioned in Order dated 10.01.2014 but the report of the Committee was still awaited. The Commission, therefore, directed the Committee to submit its report latest by 27.01.2014. The Commission in its aforementioned Order also observed that NPL while filing the FSA on 20.01.2014 did not annexe the Tripartite Side Agreement, which NPL was directed to file in two days. The Commission observed that on the perusal of the FSA read with Addendum #1, the coal quantity to be supplied by SECL and its off-take by NPL during the Build-up Period is 4,62,500 tonnes per month i.e. 55,50,000 tonnes per annum and the supply of coal is to start after the Power Plant is ready to start lighting up the boiler(s), to be confirmed by the petitioner to SECL in writing with documentary evidence. The Commission further noted that as per clause 4.1 of the FSA, the Annual Contracted Quantity (ACQ) of coal agreed to be supplied by SECL and undertaken to be purchased by the NPL is also 55,50,000 tonnes from the SECL's mines and/or from import. Also, as regards supply of imported coal, the Commission noted that NPL has signed 'Option-A' in Schedule VII of the FSA confirming acceptance of supply of 15% ACQ of coal by SECL through import. In view of the above, the Commission inferred that (i) SECL is liable to supply the same quantity of coal from its mines and/or from import as ACQ during the Build-up Period also and (ii) the supply of coal shall start from the confirmation of readiness of the Power Plant to start lighting up the boiler(s). In the light of above, the Commission directed NPL to reconcile its submissions and the prayer in the petition and PSPCL was also directed to submit its comments on these issues. The Commission observed that NPL needs to prove with the support of documentary evidence that SECL would be supplying coal quantity less than that provided in the FSA during Build-up Period and shall also submit the coal supply schedule from SECL during the Build-up Period. NPL was also directed to submit the

date when the Power Plant was ready for lighting up the boiler(s) and the date on which the same was confirmed to SECL authorities in terms of clause 2.10.1 of the FSA. Besides, the Commission directed NPL to submit the details including quantity, GCV and landed price of coal received so far, at the Project.

The Commission directed NPL and PSPCL to file their respective responses by 29.01.2014.

17. PSPCL did not file its response to this amended petition of NPL dated 06.01.2014. However, PSPCL on 03.01.2014, in compliance to the Commission's Order dated 24.12.2013 filed its response to the earlier amended petition of NPL dated 13.12.2013. In this response, PSPCL submitted that it was not filing a para wise reply to the averments and allegations made by the petitioner and further submitted that the present proceedings be restricted to consideration of the approval for procurement of coal from alternative sources as per the specific directions and conditions set forth in the Order dated 21.08.2013 passed by Hon'ble APTEL.

PSPCL further submitted that in terms of the above order dated 21.08.2013, the Competitive Bidding Process conducted by the petitioner was only to enable the petitioner to take advance action for procurement of coal from alternative sources and cannot give any right to the petitioner to any charges over and above admissible in terms of the PPA and before the petitioner effects actual procurement of coal from alternative sources, namely, from the sources selected under the above Competitive Bidding Process, the petitioner is required to independently establish to the satisfaction of the Commission that the coal is not available from any other source at a cheaper or economical rate and other better terms and conditions. These include exploration of the possibility of getting coal from Coal India Limited and/or its subsidiaries through e-auction and coal availability from other avenues both domestic and imported as per the terms and conditions specified by the Hon'ble APTEL in the Order dated 21.08.2013.

PSPCL also submitted that the competitive bidding process held by the petitioner for procurement of coal from alternative sources from the domestic market can at this stage be only an advance action undertaken by the petitioner. The petitioner need to file appropriate petition before the Commission specifying other efforts made including procurement of coal through e-auction at a better and economical rate. PSPCL further submitted that the nominee of the respondent had participated in the bid opening and except the above, it is for the petitioner to establish to the satisfaction of the Commission about the terms and conditions for the arrangements made by the petitioner as an advance arrangement for procurement of coal, if it becomes necessary at the relevant time and further that the coal is not available from any other alternative source at the

relevant time of procurement at a more economical term. The Commission will have to examine the price of coal available through alternative process at the relevant time of actual procurement of coal. PSPCL also submitted that the petitioner will not have a right to insist on finalizing any arrangements pursuant to the competitive bidding process held or otherwise fasten any liability on the respondent in regard to the terms and conditions for procurement of coal under the competitive bidding process without satisfying the Commission on various other aspects.

PSPCL further submitted that the rates discovered for procurement of domestic coal are less than the rates for import of coal. In the circumstances, the petitioner needs to justify the requirement of imported coal when domestic coal is available to the petitioner.

PSPCL further submitted that in the facts and circumstances mentioned above, the petitioner may be called upon to establish each of the stipulations contained in the order dated 21.08.2013 passed by the Hon'ble APTEL in Appeal Nos. 68 of 2013, 56 of 2013 and 84 of 2013 including but not limited to e-auction conducted by CIL and/or its subsidiaries at a better rate and more economical term. The respondent reserved the right to make appropriate submissions in regard to the materials that may be placed by the petitioner in terms of the Order dated 21.08.2013 passed by the Hon'ble APTEL at the appropriate stage. PSPCL also submitted that save as expressly stated herein in the present affidavit, each and every averment and allegation made by the petitioner is denied and that many of the aspects contained in the petition were not relevant at this stage when the Commission is considering the matter in pursuance to the Order dated 21.08.2013 passed by the Hon'ble APTEL. PSPCL stated that it reserved the right to deal with the specific averments made by the petitioner, if necessary, at the appropriate stage.

18. Secretary, Power/Government of Punjab submitted report of the Committee on 23.01.2014 which is enclosed as Annexure-1. The Committee has given its comments on few issues while in many, it has evaded from offering any comments. Main issues chosen by the Committee for offering its comments are as follows:-

- a. The Committee on the issue of 'annual requirement of coal as per PPA' submitted that the PPA does not have a figure for annual requirement of coal and the requirement of coal for power generation would depend on the Heat Rate, Gross Calorific Value of the coal and Plant Load Factor or actual energy generated. The Committee submitted that as only heat rate, contracted capacity and normative availability have been mentioned in PPA and there is no mention of GCV, therefore actual annual requirement of coal cannot be depicted at this

stage without certain presumptions. The Committee further submitted that the Fuel Supply Agreement signed by NPL with SECL specifies grades of coal G10 to G12. GCV corresponding to these grades as per CIL notification falls in the range of 4600 to 3700 kcal/kg and the annual requirement of coal for normative availability of 85% at the middle of above GCV range works out to 5.347 MT. The Committee in the report submitted that as stated by Chief Executive/ NPL, commissioning coal received from SECL is of lesser GCV than the average taken above.

- b. The Committee on the issue of 'annual availability of coal keeping in view the Letter of Allocation and the latest policy guidelines by Ministry of Power' submitted that the Letter of Allocation issued by SECL to NPL is for 5.55 MTPA of coal and the Annual Contracted Quantity (ACQ) in the FSA, signed by NPL is also 5.55 MTPA and as the FSA has trigger level of 80% for levy of disincentive and 90% for levy of incentive, it can be speculated that annual availability of coal would be more than 4.44 MTPA.
- c. On the issue of 'shortfall in supply of coal by CIL on realistic basis for first year of operation', the Committee submitted that shortfall in supply 'on realistic basis' cannot be predicted at this stage as the shortfall if any, would be known only after NPL achieves CoD of its Units and supply of coal from SECL commences. As per PPA, the scheduled dates of CoD for the first and second Unit are 17.01.2014 and 17.05.2014 respectively and NPL has started the process for achieving CoD of the first Unit while CoD of the second Unit is presumed to happen as scheduled. The Committee submitted that requirement of coal for 1st year of operation for 85% normative availability works out to 4.46 MT. Assuming domestic linkage coal supply at 65% of ACQ in the first year, shortfall could be 1.45 MT which at this stage is purely speculative based on number of assumptions and is based on trigger levels of penal provisions as per FSA. Actual availability could be more as FSA does not indicate any sub limit other than ACQ.

19. NPL filed reply to queries of the Commission on 30.01.2014 in compliance to Order dated 21.01.2014. NPL submitted that prior to filing IA before the Hon'ble APTEL on 08.07.2013, NPL had signed FSA with SECL on 11.05.2013 which was only for Unit-1 of 700 MW of its Project, since only Unit-1 of the Project was included by Ministry of Coal in its list dated 17.02.2012 for execution of FSA. NPL has further submitted that the aforementioned FSA was signed for 93.5% of LoA quantity (27,75,000 tonnes) which was based on reduction on account of auxiliary consumption to the tune of 6.5%. NPL further submitted that the FSA signed prior to Hon'ble APTEL's Order was never signed

for supply of only 65% of LoA quantum as FSA ACQ. NPL submitted that later on, when it executed Addendum #1 with SECL on 04.09.2013, Unit-2 of 700 MW was included within the scope of FSA and the ACQ was revised to 55,50,000 tonnes of coal i.e., the entire LoA quantum including coal on account of auxiliary consumption for both Units. Therefore, by virtue of the execution of the Addendum #1, the effective increase in the ACQ for Unit-1 was only 6.5% vis a vis the actual ACQ for which the FSA was signed on 11.05.2013. NPL submitted that CIL's penal obligation for short supply of domestic coal remains the same i.e. when supply of domestic coal falls below 65% of the ACQ and in all likelihood, there is going to be shortage in supply of coal by SECL during the Build-up Period.

NPL submitted that though it exercised the 'Option-A' giving unconditional acceptance to the supply of imported coal in order to receive the maximum quantum of coal from CIL/SECL's coal linkage, SECL in its letter dated 19.06.2013 has stated that NPL will be eligible to receive imported coal from CIL/SECL only after the completion of Build-up Period. In terms of clause 2.10 of the FSA, Build-up Period in case of domestic and imported coal comprises of 6 months and 12 months respectively from the First Delivery Date. Clause 2.10 of the FSA provides that during the Build-up Period, any compensation arising on account of short supply or short lifting as specified in other clauses of the FSA is not payable. Therefore, it is apparent that CIL/SECL's commitment of giving imported coal during this period of one year is neither specifically enforceable nor subject to redress in terms of seeking damages, in case of shortfall in supply of imported coal.

NPL submitted that there is huge mismatch between the actual demand of domestic coal and the domestic coal production in India. The demand of domestic coal i.e. total commitment under the FSAs/LoAs in the country is around 741.79 MT in the financial year 2014-15. However, the overall production is projected to be 507.80 MT. On account of such shortfall to the tune of 233.99 MT in coal supply, CIL is forced to import coal from outside India. In view of the above, it is apparent that CIL and its subsidiaries would not be able to meet the supply obligation as per their agreements/FSAs with various TPPs.

NPL while quoting a News report dated 18.12.2013 submitted that a tender for procurement of imported coal to the tune of 5 MT floated by CIL has failed to attract even a single bidder as on last date of submission of bids i.e. 17.12.2013 which apparently will delay in arrangement of imported coal by CIL.

NPL submitted that SECL has not responded to its letter dated 16.01.2014 seeking information regarding estimate of likely supply of coal by SECL. NPL further submitted that it also intimated SECL vide letter dated 10.10.2013 indicating readiness

for light up along with certificate from Independent Engineer(Continental Foundation) and it also informed SECL vide letter dated 31.12.2013 regarding synchronisation of power plant with Grid.

NPL further submitted that based on testing of 20 rakes of trial coal received in November-December by the third party agency appointed by NPL, average GCV of the coal has been assessed as 4425 kcal/kg and landed price of this batch of 20 rakes is ₹4356 per tonne.

20. The Commission heard NPL and PSPCL at length on 31.01.2014. The Commission in its Order dated 05.02.2014 observed that NPL has filed the response to the queries raised by the Commission in its Order dated 21.01.2014. NPL clarified during hearing that 80,000 tonnes of coal has been received through 20 rakes in November-December, 2013. On the request of NPL for short adjournment due to cancellation of flight of its counsel, the Commission observed that there is hardly any requirement for further hearing as the submissions of parties are complete. The Commission directed NPL to file written submissions by 05.02.2014 and closed the hearing of the petition. Order was reserved.

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

Commission's findings and decision:

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

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

- (i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL.
- (ii) The Appellants will select the prospective supplier of coal based on the lowest price discovered through the competitive bidding process.
- (iii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of its obligations to third parties under the

contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.

- (iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.
- (v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law.

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

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

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

23. As per submissions in this petition, NPL undertook the competitive bidding process for procurement of 13 lakh tonnes of imported non-coking steam coal with Net

Calorific Value (NAR) as 6000 kcal/kg, out of which initially 3.5 lakh tonnes is proposed to be procured with option for extending the quantity for balance 9.5 lakh tonnes. NPL has stated that the tender process has been carried out in a fair and transparent manner as required by the Hon'ble APTEL. Further, it has been submitted that in terms of Hon'ble APTEL's Order, the technical as well as price bids were opened in the presence of PSPCL's representatives. NPL has submitted that three bids were received and upon evaluation of the technical bids, all the three bidders qualified and accordingly the price bids were opened. The Commission notes that the technical and price bids opened on 27.09.2013 and 08.10.2013 respectively were signed by the PSPCL's representatives during bid opening.

Later on, NPL initiated another tender process to procure coal from domestic sources for supply of non-coking coal up to one lakh tonne. 7 bids were received and upon evaluation of the technical bids, all the 7 bidders qualified and accordingly their price bids were opened. NPL submitted that these bids were opened in the presence of PSPCL's representatives. The technical and price bids opened on 18.12.2013 and 26.12.2013 respectively were signed by the PSPCL's representatives during bid opening. Out of 13 lakh tonnes of coal to be procured, NPL proposes to procure 60,000 tonnes from domestic sources and the rest from sources offering to supply imported coal.

24. The Commission in its Order dated 21.01.2014 had stated that PSPCL shall file its reply to the amended petition admitted vide its Order dated 10.01.2014 by 29.01.2014, which has not been received. However, PSPCL in its reply to the earlier petition of NPL, which was admitted by the Commission vide its Order dated 24.12.2013, submitted that the competitive bidding process conducted by NPL is to enable it to take advance action for procurement of coal from alternative sources and cannot give any right to NPL to any charges over and above that is admissible in terms of PPA. PSPCL has further submitted that NPL needs to make all efforts to obtain coal from the linked mines and also from alternative sources at the most economical rate and preferred terms and file another petition before the Commission specifying other efforts made including procurement of coal through e-auction at a better and economical rate. The petitioner will not have a right to insist on finalizing any arrangements pursuant to the competitive bidding process held or otherwise fasten any liability on PSPCL in regard to the terms and conditions for procurement of coal under this process without satisfying the Commission on various other aspects. PSPCL further submitted that the rates discovered for procurement of domestic coal are less than the rates for imported coal and in the circumstances the petitioner needs to justify the requirement of imported coal.

25. The Committee constituted by the Commission vide its Order dated 10.01.2014 for submitting report on various points as brought out in Para 14 above, has submitted that the Committee does not have a role to play in a matter before the Commission in which NPL is the petitioner and PSPCL is the respondent. It has been further submitted that as per the orders of the Hon'ble APTEL, it is the responsibility of the Commission to decide the matter as per specific directions and conditions set forth by Hon'ble APTEL and as per provisions of the PPA. However, in deference to the Commission's Order and considering that the Punjab Government owns 100% shareholding of PSPCL, the Committee has given the report stating it to be without prejudice to the provisions of the PPA, rights, contentions and submissions made by both the parties before the Commission. The report in brief is as under:

- (a) The annual requirement of coal considering GCV of coal as per FSA and the Project parameters i.e. normative availability, Contracted capacity and Net Station Heat Rate as per PPA, is 53.47 lakh tonnes.
- (b) The annual quantity of coal to be supplied by SECL to NPL as per LoA and FSA is 55.5 lakh tonnes. The FSA has trigger level of 80% for levy of disincentive and 90% for levy of incentive. Therefore, it is speculated that annual availability of coal could be more than 44.4 lakh tonnes.
- (c) As per PPA, CoD of Unit-1 and Unit-2 is 17.01.2014 & 17.05.2014 respectively. Accordingly, the requirement of coal for first year of operation of the power plant is 44.6 lakh tonnes. Assuming domestic linkage coal supply at 65% of the ACQ in the first year, shortfall would be 14.5 lakh tonnes. This shortfall is based on number of assumptions and trigger levels of penal provisions of FSA.

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

26. The Commission notes that as on the date of Hon'ble APTEL's Order dated 21.08.2013 in the IA, the Coal Supply Agreement (FSA) had been signed on 11.05.2013 for Unit-1 only for an ACQ of 25,94,625 tonnes and 2,16,218 tonnes per month during Build-up Period. However, on 04.09.2013, Addendum #1 to the FSA was signed for both the Units of 700 MW each for 100% ACQ of 55,50,000 tonnes with revised coal requirement during Build-up Period as 4,62,500 tonnes per month. NPL confirmed

acceptance of supply of 15% ACQ of coal through import by SECL by exercising Option-A in Schedule-VII of the FSA and also signed the Tripartite Side Agreement for supply of imported coal with Coal India Limited (CIL) & SECL in terms of clause 4.3.1 of the FSA.

27. As per clause 4.1 of the FSA read with Addendum #1, the Annual Contracted Quantity (ACQ) of coal agreed to be supplied by SECL and undertaken to be purchased by the NPL is 55,50,000 tonnes from the SECL's mines and/or from import. As per Schedule-III, coal to be supplied under the FSA would be of F Grade, as mentioned in the Letter of Assurance on UHV (Useful Heat Value) basis, with corresponding Grades in terms of equivalent GCV (Gross Calorific Value) G10, G11 & G12. In another petition filed by NPL, it was seen that in the Letter of Assurance (LoA) dated 11/18.12.2008 issued by SECL, the quantity and Grade of coal assured to be supplied is 55,50,000 tonnes per annum of F Grade further clarifying that in the event that the incremental coal supplies available with SECL are less than the incremental coal demand, such incremental availability shall be distributed on pro-rata basis and the balance quantity of coal requirement shall be met through imported coal available with SECL. In view of these facts, it is inferred that the quantity and GCV of the coal contracted to be supplied by SECL to NPL in the FSA is the same as assured in the LoA.

28. As per price notifications issued by CIL from time to time, the GCV range of G10, G11 & G12 Grades of coal is 4300 to 4600 kcal/kg, 4000 to 4300 kcal/kg and 3700 to 4000 kcal/kg respectively. The average GCV for supply of coal of Grade G10, G11 & G12 works out to 4150 kcal/kg. The annual coal requirement for NPL's Project having contracted capacity of 1320 MW (2x660 MW), Normative Availability as 85%, Net Station Heat Rate as 2268 kcal/kWh as per PPA and Coal GCV 4150 kcal/kg as per FSA, works out to 53.71 lakh tonnes per annum. The actual requirement may be lesser than 53.71 lakh tonnes after discounting for oil used as secondary fuel. The Committee constituted by the Commission vide its Order dated 10.01.2014 in its report dated 23.01.2014 has worked out the annual coal requirement for NPL's Project as 53.47 lakh tonnes per annum.

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

30. Further, as per clause 2.10 of FSA read with Addendum #1, the coal quantity to be supplied by SECL and its off-take by NPL during the Build-up Period is 4,62,500 tonnes per month i.e. 55,50,000 tonnes for 12 months. The supply of coal is to start after the power plant is ready to start lighting up the boiler(s), to be confirmed by NPL to SECL

in writing with documentary evidence. The Commission notes that the quantum of coal to be supplied as per FSA in the Build-up Period, which is 12 months from First Delivery Date is the same i.e. 55.5 lakh tonnes as the ACQ. Also, the supply of coal is to start after NPL's power plant is ready to start lighting up the boiler(s) to be confirmed by NPL to SECL. In view of these facts, the Commission vide its Order dated 21.01.2014 expressed that NPL needs to prove with the support of documentary evidence that SECL would be supplying coal quantity less than that provided in the FSA during Build-up Period and submit the coal supply schedule of SECL for the Build-up Period. Also, NPL was asked to submit the date on which the power plant was ready for lighting up the boiler(s) and the date on which the same was confirmed by NPL to SECL in terms of clause 2.10 of the FSA. NPL was also asked to submit the details of quantity, GCV and landed price of coal received at the Project from SECL.

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

- (i) On 10.10.2013, SECL was intimated along with Independent Engineer's Certificate indicating readiness for lighting up boiler for Unit-1. Also, SECL was requested for proceeding with signing of MoU for release of trial coal.
- (ii) The power plant was synchronized with 400 kV Grid on 15.12.2013 and SECL was informed of the same vide NPL's letter dated 31.12.2013. SECL was requested to plan verification visit tentatively in the week beginning 13.01.2014.
- (iii) SECL has not yet provided information regarding likely supply of coal during the first year of operation in response to NPL's letter 16.01.2014.
- (iv) NPL has received about 80,000 tonnes of trial coal in November-December, 2013 having an average GCV of 4425 kcal/kg at ₹4356 per tonne approximately.

32. Considering the provisions in the FSA i.e. ACQ as 55.5 lakh tonnes per annum, same quantum of coal to be supplied by SECL to NPL during Build-up Period and option by NPL agreeing for supply of 15% imported coal by SECL, it cannot be inferred that there would be any short supply of coal by SECL during the Build-up Period. As per NPL's estimate of anticipated short supply of 13 lakh tonnes of coal during first 12 months of operation of the power plant, it proposes to procure only 3.5 lakh tonnes initially. The Committee, assuming domestic linkage coal supply at 65% of ACQ, has stated that the shortfall of coal supply from coal linkage could be 14.5 lakh tonnes and further stated that at this stage it is purely speculative based on number of assumptions and also based on trigger levels of penal provisions as per FSA and the actual

availability could be more as FSA does not indicate any sub limit other than ACQ. The Commission notes that the Committee, which included the Chief Executive of NPL, has not been able to make exact assessment of the shortfall in supply of coal by SECL. As such, NPL's action for procuring coal from alternative sources is based only on apprehensions and the assessment with regard to quantum of short supply of coal by SECL during the 12 months/Build-up Period is speculative.

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

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

35. Although under the Act, the Commission is not mandated to approve procurement of material yet taking a holistic view and considering that the competitive bidding process has been overseen by PSPCL and its representatives signed the technical and price bids opened on 27.09.2013 & 08.10.2013 for supply of imported coal and 18.12.2013 & 26.12.2013 for domestic coal during bid opening, the Commission approves the competitive bidding process undertaken by NPL for procurement of coal from alternative sources to operate the power plant as per terms and conditions of the PPA for a period of 12 months from the expected commencement of operation of Unit-1 of the Project on coal subject to the following terms & conditions and modalities for passing through cost of this coal:

- (i) NPL shall requisition the coal regularly from SECL as per clause 4.5 'Scheduled Quantity' of the FSA.
- (ii) NPL will give preference to the coal supplied by SECL over coal to be directly arranged by it from alternative sources and will not put any restrictions on supply of coal from SECL and accept the entire quantity of coal offered for supply from SECL.
- (iii) NPL will not use the coal supply from the alternative sources unless warranted by the exigencies of short supply of coal by SECL in terms of the FSA, that too on 'Minimal Usage' basis.
- (iv) NPL will daily upload on its website, the inventory of coal received from SECL as well as alternative sources. The same shall, source-wise, include quantity requisitioned, quantity received, quantity used, balance quantity and quantity of coal from alternative sources used as a percentage of coal from SECL, on daily basis.
- (v) The coal consumption/stock position will be monitored fortnightly by Chief Engineer/Fuel, PSPCL Patiala from the information available on NPL website for review by PSPCL management. For the purpose, the officer so appointed may also visit the power plant, at least once a month and NPL shall provide access to the coal stockyard and relevant record to him.
- (vi) Joint sampling and testing of coal 'as received' and 'as fired' shall be conducted and certified by NPL and PSPCL. For this purpose, a PSPCL team shall be permanently posted at NPL premises.
- (vii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of NPL's obligations to suppliers under the contracts entered into by it for procurement of coal from alternative sources will be passed on to PSPCL.
- (viii) Coal from alternative sources/imported coal shall be procured by NPL at lowest price(s) arrived at through its tender overseen and signed by PSPCL on 27.09.2013 & 08.10.2013 for imported coal and 18.12.2013 & 26.12.2013 for domestic coal. Taxes and duties shall be payable/pass through as applicable.
- ix) As decided by Hon'ble APTEL in Para 12(B) of its Order dated 21.08.2013, this procurement of coal from alternative sources, as an advance action, will not give any right to NPL to raise any charges over and above those admissible to it as per the terms and conditions of the PPA. The Commission has held in its Order dated 31.12.2012 in Petition No.56 of 2012 that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. Now FSA has followed the LoA and both FSA as well as LoA provide a window for supply of imported coal.

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

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

The petition is disposed of as above.

**Sd/-
(Gurinder Jit Singh)
Member**

**Sd/-
(Virinder Singh)
Member**

**Sd/-
(Romila Dubey)
Chairperson**

**Chandigarh
Dated: 19.02.2014**

[Click here for Annexure-1](#)