

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

Petition No. 68 of 2017
Date of Order: **06.03.2019**

In the matter of : Petition under Section 86 (1) (f) and other provisions of the Electricity Act, 2003 for adjudication of the Billing Disputes arisen under the Amended and Restated Power Purchase Agreement dated 25.06.2009 of 2x270 MW Goindwal Sahib Thermal Power Plant at Goindwal Sahib, Punjab.

AND

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

...Petitioner

Versus

Punjab State Power Corporation Limited, The Mall, Patiala

...Respondent

Present: Ms. Kusumjit Sidhu, Chairperson
Sh. S.S.Sarna, Member
Ms. Anjuli Chandra, Member

Order

GVK Power Goindwal (Sahib) Ltd ("GVK") has filed the present petition against PSPCL seeking the following reliefs:-

- "(a) Direct PSPCL to make payments of amounts wrongfully withheld from payments made towards the Infirm Bills and Monthly Bills for January, 2016 to April, 2016, July 2016 to August, 2016 and June, 2017 to October, 2017 along with late payment interest and carrying cost; and

- (b) Restrain PSPCL from making further deductions from ongoing monthly tariff bills raised for supply of power;*
 - (c) Direct the Respondent to make interim payments of the amounts withheld from the Infirm Bills and Monthly Bills for January, 2016 to April, 2016, July, 2016 to August, 2016 and June, 2017 to October, 2017 along with the interest and Late Payment Surcharge; and*
 - (d) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case.”*
2. According to the counsel for GVK, the disputes pertain to the incorrect application of the Order dated 01.02.2016 in Petition No.33 of 2015 and 65 of 2013 as well as PSPCL's illegal and arbitrary actions of withholding legitimate costs incurred by GVK relating to coal.
3. After hearing the parties on 04.04.2008, the Petition was admitted. PSPCL was asked to file its reply by 24.4.2018 and GVK was to file rejoinder within seven days thereafter. PSPCL filed its preliminary reply vide memo No. 6800 dated 03.05.2018. During the hearing on 09.05.2018 GVK submitted a compilation of documents. Both parties were heard and were asked vide order dated 14.05.2018 to submit month wise charts from January 2016 to December, 2017 giving details of the amount billed by GVK and paid by PSPCL. In addition, PSPCL was asked to give reasons for any deductions made by it. PSPCL was also asked to furnish the month-wise weighted average cost of coal for its own thermal stations alongwith GVC of coal. The next date of hearing was fixed for 23.05.2018, but was postponed to 06.06.2018. PSPCL vide memo no. 6915 dated 18.05.2018

filed additional submissions in compliance of the Order dated 14.05.2018. GVK filed rejoinder to the additional submissions vide letter dated 04.06.2018. During the course of hearing on 6.6.2018, both parties agreed that there had been no reconciliation of payments since the start of operations of the plant as provided in Article 11.7 of the Amended and Restated Power Purchase Agreement. PSPCL & GVK were asked to undertake and complete the reconciliation process within a month and thereafter bring any remaining disputes to the Commission. PSPCL was to ensure that it used the month wise weighted average cost of coal of its own thermal plants. PSPCL was to give details and reasons for deductions of Rs. 7.92 Cr. made in August, 2017 without notice as required under Article 11.6 of the PPA. Pursuant to the Order dated 11.06.2018 PSPCL filed written submissions vide memo No. 5387 dated 03.08.2018.

4. Reference was also made to Petition No. 54/2017 relating to fixed charges. At the hearing on 08.08.2018 both parties asked for more time and therefore the case was adjourned to 19.09.2018. The hearing was held on 26.09.2018. The Commission vide Order dated 11.06.2018 referring to its order of 30.01.2018 in Petition No. 01/2018, directed PSPCL to make payment of energy charges as per actual cost of coal received under the Shakti Scheme including the actual cost of transportation charges paid to Indian Railways and surface transportation costs at the mine end, if not included in the original cost of coal. GVK filed I.A. no. 09 of 2018

stating that PSPCL was not paying costs of coal etc. as per the 11.06.2018 Order. PSPCL informed that it had filed an appeal 187 of 2018 in APTEL against the interim order dated 11.06.2018 with reference to the matter of Shakti Coal.

5. Since Petition No. 68/2017 was filed much before the issue of Shakti Coal came into picture and the petitioner spoke specifically of bills from January, 2016 to October, 2017, the Commission vide order dated 28.09.2018 partially modified/amended its order dated 11.06.2018 deleting the para regarding Shakti Coal thus disposing of GVK's I.A. The Commission recorded that both parties were unable to settle their differences except regarding water charges Therefore, GVK and PSPCL were asked to file the details regarding transportation charges by 11.10.2018 as well as detailed submissions pertaining to other billing disputes. The matter was fixed for 18.10.2018. GVK filed its submissions but PSPCL could not respond in time. PSPCL was given time to file its reply and the case was fixed for 28.11.2018. PSPCL filed information on 18.10.2018 and further submitted reply on 12.11.2018 to the additional submissions filed by GVK to the directions of the order dated 28.09.2018. GVK filed rejoinder to the reply filed by PSPCL vide letter dated 10.12.2018. On the request of both parties, the matter was fixed for final arguments on 11.12.2018. Vide order dated 24.12.2018 PSPCL was directed to provide information regarding month wise weighted average cost of coal for its own Thermal Plants from 01.02.2016 onwards, details for

each bill, i.e., whether it was considered as 'wrong billing' or 'billing dispute' by PSPCL and whether the GCV for its own plants is considered on equilibrated or on total moisture (TM) basis. PSPCL, in compliance of the order dated 24.12.2018 submitted its reply vide memo no. 5493 dated 29.01.2019. It was observed by the Commission that PSPCL has not submitted the information as required by the Commission i.e., break up of monthly average cost of own coal provided by PSPCL and has filed information regarding weighted average cost of coal of each plant but not for each month and that has given only component wise final figures and during hearing on 30.01.2019 directed PSPCL to provide the information with a copy to GVK. PSPCL filed the information vide memo No. 5508 dated 01.02.2019 and GVK power filed its submission on the information filed by PSPCL vide letter dated 11.02.2019

6. GVK Submissions:

6.1 At the outset, GVK submitted that their petition filed on 29.12.2017 included inter-alia a prayer to restrain PSPCL from making any unlawful deductions from future bills and therefore any deduction made by PSPCL from monthly bills after October, 2017 would also come under the purview of this petition. And since the process for allocation of Shakti Coal had started when the petition was filed, therefore, the petition covers future bills also.

6.2 Referring to the Commission's Order dated 11.06.2018 mandating, *inter alia*, that the actual landed cost of coal

including actual transportation costs paid to Indian Railways and surface transportation charges at the mine end, received under Shakti 2017 was to be paid to GVK, the counsel stated that it is settled law that a court has the power and the duty to consider changed circumstances after the institution of a suit and accordingly grant relief as held by the Supreme Court of India in the case of *Kedar Nath Agrawal vs Dhanraji Devi* reported as (2004) 8 SCC 76 (para 16). Further, this direction of the Commission was in consonance with the PSERC (Terms and Conditions for Determination of Generation, Transmission and Wheeling Supply Tariff) Regulations, 2014 ("*PSERC Tariff Regulations 2014*") It was submitted that the present Petition covers all unilateral and unlawful deductions made by PSPCL from amounts due and payable to GVK, including amounts deducted towards cost of coal supplied under Shakti 2017.

- 6.3 PSPCL filed Appeal No. 187 of 2018 against Order dated 11.06.2018 before the Appellate Tribunal. Since PSPCL was not paying surface transportation costs in terms of Order dated 11.06.2018 and no stay was granted against Order dated 11.06.2018 by the Appellate Tribunal, GVK filed Interim Application No. 09 of 2018 on 10.08.2018 in the present petition under Section 142, 146 and 149 of the Electricity Act, 2003 inter-alia seeking directions to PSPCL to make payments towards surface transportation cost incurred by GVK for transporting coal supplied under Shakti 2017. On 14.08.2018, PSPCL in compliance with Order dated

11.06.2018, paid Rs 34,99,66,259 Crores towards surface transportation charges incurred by GVK for the months of March 2018 to June 2018. However, subsequently, PSPCL once again unlawfully deducted payments from GVK's bills for July 2018 to October, 2018. On 28.09.2018, this Commission passed an Order reviewing its Order dated 11.06.2018, wherein the directions to PSPCL to pay for coal supplied under Shakti 2017 on actuals along with railway freight and surface transportation costs were deleted. By way of the said Order, this Commission disposed of Interim Application No. 09 of 2018 filed by GVK.

- 6.4 It was submitted that GVK filed Appeal No. 286 of 2018 against the said Order along with an Application for stay against Order dated 28.09.2018. Further, it was prayed before the Appellate Tribunal that PSPCL be restrained from making deductions towards surface transportation cost incurred by GVK for transporting coal supplied under Shakti 2017 to the Project. On 12.10.2018, Appellate Tribunal for Electricity passed an Order directing PSPCL to make payments towards all undisputed amounts to GVK and directed that status quo be maintained with respect to deductions of Rs 46 Crores towards surface transportation charges. However, PSPCL deducted Rs 46 Crores towards surface transportation from the Month of August 2018. On 22.10.2018, GVK filed Contempt Petition No. 3 of 2018 before the Tribunal on account of PSPCL's failure to comply with Appellate Tribunal for Electricity's Order dated

12.10.2018. On 13.11.2018, PSPCL made payment of Rs. 46 Crores towards surface transportation costs for March, 2018- July, 2018 in August and September, 2018. Consequently, GVK withdrew the Contempt Petition. Thereafter, PSPCL has continued to deduct amounts towards surface transportation costs for months of September, October and November 2018.

6.5 It was submitted that GVK has placed on record submissions/documents in the present Petition highlighting the deductions made by PSPCL including deductions made by PSPCL after October 2017 as under:

- (a) PSPCL's Reply dated 03.05.2018.
- (b) PSPCL's Reply dated 24.05.2018
- (c) PSPCL's Additional Submissions dated 18.05.2018
- (d) GVK's Rejoinder to PSPCL's Additional Submissions dated 04.06.2018
- (e) PSPCL's Written Submissions dated 03.08.2018
- (f) GVK's Additional Submissions dated 17.10.2018.
- (g) PSPCL's Reply dated 12.11.2018 to GVK's Additional Submissions.
- (h) GVK's Rejoinder dated 07.12.2018 to PSPCL's Reply dated 12.11.2018.

The present submissions are a consolidation of these filings.

6.6 The amounts wrongfully withheld by PSPCL pertain to:-

- (a) Costs associated with road transportation of coal from mine end to railway siding, including loading and handling of coal ("*Road Transportation Costs*") and testing of coal for GCV ("*Testing Charges*") (including testing charges);

- (b) Transit loss relatable to road transportation of coal;
- (c) Difference in GCV and weighted average cost of coal (“GCV Difference”)
- (d) Railway Freight charges to be recovered on actuals;
- (e) Water charges;
- (f) Compensation for dispatching the power from the Project below normative parameters/ IEGC Compensation;
- (g) UI Charges;
- (h) Capacity Charges due to wrongly understated Project Cost including interest rate variation, normative O&M expenditure and auxiliary consumption. (being claimed as part of Petition No. 54 of 2017)

6.7 It was submitted that this Commission by Order dated 28.03.2018 in Petition No. 54 of 2017 had provisionally held that capacity charges are payable at the rate of Rs. 2.20 per kWh and energy charges as per this Commission’s Order dated 01.02.2016 [Petition Nos. 33 of 2015 and 65 of 2013]. The provisional tariff will be payable from the date of the Order, i.e., 28.03.2018. The submissions of GVK in the present Petition are without prejudice to rights and contentions in Petition No. 54 of 2017.

6.8 A table indicating the present position vis-à-vis the deductions from energy charges was submitted. As on 10.12.2018, over the past 35 Months (January 2016 onwards) the total amount deducted by PSPCL towards energy charges stood at Rs. 247,80,92,514 against a total of Rs. 1078,27,94,259 payable to GVK. Thus PSPCL had effected deductions to the tune of 23% rendering GVK’s

investment and the PPA completely unsustainable and forcing GVK to resort to a resolution plan.

The deductions against different heads were as follows:

a) Difference in GCV	Rs.	69,83,05,787
b) Transit loss	Rs.	1,99,71,587
c) Difference in Coal cost	Rs.	65,71,60,542
d) Difference in Road Transport	Rs.	109,58,77,555
e) Testing Charges	Rs.	67,77,034
Total:	Rs.	247,80,92,514

6.9 GVK stated that while calculating Energy Charge Rate (“ECR”) payable PSPCL has been withholding payment towards the Railway freight costs incurred by GVK towards transportation of coal; Road Transportation Costs incurred by GVK in transportation of coal from the mine end to the railway siding including loading and handling; GCV Difference, Transit Loss; and Testing Charges. Furthermore, deductions from the Infirm Bills and Monthly Bills for April (16.04.2016 onwards), July 2016 to August 2016 were made post-facto (deductions were effected from the Monthly Bill for June, 2017).

6.10 At the hearing on 09.05.2018, the Commission had permitted GVK to submit a list of information/data required from PSPCL and directed PSPCL to furnish month-wise weighted average cost of its own coal along with GCV. Though GVK sent the list of information/data to PSPCL on 10.05.2018 PSPCL did not respond to the said letter. Furthermore, no supporting documents were provided.

6.11 On 11.06.2018, the Commission, inter-alia directed PSPCL

and GVK to under-take the reconciliation process as provided for in Article 11.7 of the Amended and Restated PPA. GVK and PSPCL held meetings on 18.06.2018, 03.07.2018 and 02.08.2018 towards the same. However the reconciliation process was limited to the months of October 2017 and February 2018 since PSPCL had only provided the data for the said months. The reconciliation process failed to achieve its objective since PSPCL had not agreed to the amounts payable as justified by GVK, except water charges to be paid on actuals. Accordingly, the dispute pertaining to the determination of the other elements of energy charges were to be adjudicated by the Commission.

6.12 The Commission by way of its Order dated 01.02.2016 in Petition No. 33 of 2015 and Petition No. 65 of 2013 had put in place an interim arrangement for the payment of energy charges to GVK pursuant to the cancellation of the Tokisud Coal Block and during the pendency of the proceedings before Arbitral Tribunal as under:

“35...Accordingly, the Commission holds that the petitioner shall be paid, the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month, along with the actual transportation charges paid by the petitioner to the Indian Railways for transporting the coal to the Project from the port / mine in case of imported / domestic coal as the case may be or the actual cost of coal procured by the petitioner, whichever is less....”

In terms of Order dated 01.02.2016, GVK is permitted to recover the lesser of the two costs being:-

- (a) weighted average cost of coal received by PSPCL along with actual transportation charges paid by GVK to Indian Railways; or
- (b) actual cost of coal procured by GVK.

According to GVK's counsel, the actual cost of coal procured by GVK will include all charges incurred in transportation including surface transportation charges. It would otherwise lead to an anomalous situation where transportation charges are to be factored in for coal procured by PSPCL but not for coal procured by GVK. This would be contrary to the content and purpose of the Order dated 01.02.2016. It was further submitted that: -

- (a) The intention behind the order dated 01.02.2016 was to compensate GVK for actual transportation costs. The cost of road transportation at the mine end is only incidental to railway transportation, and the same ought to be compensated.
- (b) GVK is procuring coal from under Shakti 2017 as well as e-auction coal. As a result, GVK has to ensure that the coal is loaded at the various mines, transported to the railway siding and unloaded at the Project end. GVK does not have any say in which mine the coal is to be allocated to it under e-auction or Shakti 2017.
- (c) It was pointed out that the distance between the various mines to the Project cannot be completed by railways alone since the railway sidings are not always available for direct

loading from the mine allotted. Some Component of road transportation is mandatory for GVK on account of priority being given to public sector undertakings at railways sidings at the mine side. Hence, in order to ensure that the coal reaches the Project , GVK had to engage the services of third parties to handle the processes involved in transportation of coal from the mine to the railway siding , transportation by road, loading the coal to the railway wagons, ensuring proper billing, testing of coal etc.

- (d) Regulation 40 of the PSERC (Terms and Conditions for Determination of Generation, Transmission and Wheeling and Retail Supply Tariff) Regulations 2014 (“*PSERC Tariff Regulations*”) includes transportation by rail/road in the landed cost of coal. This position is consistent with Regulation 30(8) of the CERC (Terms and Conditions of Tariff) Regulations, 2014 (“*CERC Tariff Regulations*”) which *inter-alia* provides that landed cost of fuel shall include transportation cost by rail/road or any other means.
- (e) The order dated 01.02.2016 refers to cost of coal ‘received’ by PSPCL station which includes Road Transportation Costs.
- (f) Supreme Court of India’s judgment in *Nabha Power Ltd vs PSPCL* reported as (2018) 11 SCC 508 (para 64) has held that the mode of transportation of coal is irrelevant and the cost incurred from point to point transportation of coal has to be reimbursed to the generator. Furthermore, it was specifically noted by the Supreme Court, whilst interpreting

the phrase “to the project”, that GCV of coal has to be measured at the Project site. Accordingly, it was concluded by the Supreme Court that all cost of coal upto the Project site has to be included and the calorific value of coal is to be taken at the Project site.

- (g) In terms of Arbitral Award dated 10.04.2017, it has been held that the cancellation of captive coal block and consequential non-availability of fuel is an event of change in law under the PPA. Relevant extracts of the Arbitral Award have been reproduced below:

“142. In the light of above we hold that Cancellation of Coal Blocks pursuant to the judgment of the Supreme Court on 25.08.2014 and Promulgation of Ordinance are a Change in Law Events, according to Article 13 of Power Purchase Agreement as well as a Force Majeure Events, according to Article 12 of Power Purchase Agreement.”

- (h) In the light of the findings of the Arbitral Tribunal, GVK asserted that it is entitled to be compensated for the change in law event such that it is restored to the same economic position as if such change in law event did not take place. It was submitted that since GVK has incurred the Road Transportation Costs and Testing Charges in order to procure coal from alternate sources, which was a direct result of the Coal Judgment and subsequent Cancellation Order, therefore, GVK is entitled to be compensated for the expenses associated with the Change in Law event. PSPCL and other IPPs are recovering cost of road transportation. This Commission, in accordance with Section 61 of the

Electricity Act, 2003, has to consider principles of efficiency in the performance of GVK.

6.13 GVK stated that vide an email dated 18.08.2017 issued by PSPCL in connection with the bill for June 2017 PSPCL had considered the cost of freight paid to Indian Railways (as per railway receipt) as Rs. 2830.665 per MT and disregarded the Road Transportation Costs and Testing Charges since GVK's 'weighted average railway transport cost' alone is Rs. 2830.66 per MT as under:

GVK 'weighted average landed price of coal'	PSPCL 'weighted average landed price of coal'	Amounts deducted
Rs. 5.167 per kg (inclusive of road transportation charges)	Rs. 4.9733 per kg	Rs. 6,622,290 – Road Transportation Costs, Handling charges and Rs. 82,908 - Testing Charges

It is thus evident that PSPCL has deducted amounts incurred by GVK towards Road Transportation Costs, thereby decreasing the weighted average landed price of coal from Rs 5.167 per kg to Rs 4.9733 per kg. GVK emphasised that PSPCL has not denied the fact that it is paying surface transportation charges for coal procured for its own generating stations and recovering the same as part of tariff. It was submitted that different standards ought not be applied to coal procured by PSPCL and GVK. From the Aggregate

Revenue Requirement and Tariff Petition upto FY 2016-17 and MYT Petition for Control Period from FY 2017-18 filed by PSPCL shows that it is using road plus rail transportation for transportation of coal. That being the case, road transportation costs (being incidental to railway transportation) ought not to be excluded. In the light of the admission and acceptance by PSPCL, GVK is entitled to surface transportation charges.

6.14 GVK also pointed out that initially PSPCL had disbursed amounts towards surface transportation costs incurred by GVK over and above the cost of coal and railway freight for the period between January 2016 and August 2016 amounting to approximately Rs 7.60 Crores. However, from the monthly tariff bill for June 2017, PSPCL unilaterally and unlawfully recovered the said amount along with late payment surcharge. Once it became evident that PSPCL had deducted surface transportation charges already paid to GVK and continued to deduct such amounts from subsequent bills from June 2017 onwards, GVK filed the present Petition challenging the same.

6.15 Explaining further, Counsel for GVK stated that PSPCL does not have a component of surface transportation charges for transporting coal from the heap to railway siding since the coal allocated to PSPCL is generally from mines which have associated railways sidings (within 20 km of the coal mine). Further, when coal is sent from the mine end to the washery, additional surface transportation is incurred by PSPCL which

is included in the washery bill.

6.16 It was also submitted that pursuant to this Commission's Order dated 11.06.2018, GVK had filed information/details pertaining to the road transportation costs incurred by it. In response PSPCL has wrongly contended that surface transportation charges claimed by GVK are arbitrary, exorbitant and grossly imprudent in nature. It was submitted that GVK pays surface transportation charges as per the limited competitive bidding process and the transportation rates finalized pursuant to the same, for lifting, transportation from various mines to nearest railway sidings and further loading and dispatch by rail rakes for delivery at the Project. The contracts for surface transportation of coal are awarded on the basis of the credentials of the contractors and their ability to perform and not solely on the basis of the lowest bid. Furthermore, GVK placed on record the names of various railway sidings used for transporting the coal to the Project and the distance from the mine end to these sidings by way of its Affidavit dated 17.10.2018 .It was submitted that costs of transportation from heaps to railways sidings differs from mine to mine depending on local conditions/circumstances such as, village barriers, toll operations and security situations etc. and does not solely depend on the distance to the railway siding. Further, GVK has to use railway sidings which are not the closest to the coal mines on account of the following:

- (a) Priority is accorded to generating stations operated by public

sector companies for loading of coal at railway sidings in the Eastern Central Railway zone. Most of the mines from which e-auction coal and Shakti coal is supplied are situated in the Eastern Central Railway zone. Therefore, in certain instances when there is a backlog of loading of rakes at such railway sidings, to ensure faster loading and supply of coal to the Project, GVK is forced to load coal from railway sidings which are immediately available which may entail additional cost.

- (b) The programme for loading of rakes is known from the Railway FOIS which is available on the Railway Website. In case the pendency of indents is high at the nearest railway siding, the next closest railway siding is considered to ensure there is no delay in the supply of coal to the Project.
- (c) Some of the railways sidings such as KSNT/Balumath/Phulabasia/Ber Tori have security issues due to local village agitations, naxal attacks, etc. Therefore, alternate railway siding are considered for ensuring continuous supply of coal to the Project.
- (d) 'No entry' restrictions are imposed by the local district administration restricting the movement of trucks during day times. Accordingly, the coal has to be transported at night times only. Therefore, in some instances, more than one railway siding is used for transporting coal from one mine alone i.e. Amrapalli/Tetraikhar & Magadh mines.

6.17 GVK's counsel submitted that PSPCL's contention that as

regards coal under Shakti 2017, GVK cannot claim energy charges more than those provided under Order dated 01.02.2016 in the light of Article 5 of the Supplementary PPA is wrong and denied . Article 5 of the Supplementary PPA provides as under:

“5. The execution of this Agreement is only for capturing the discount available to PSPCL in the tariff for allocation of coal linkage to GVK and shall in no manner be construed as recognition or acceptance by PSPCL of any higher fixed charges or higher energy charges than as applicable and payable to GVK under the provisions of the PPA and relevant Orders of this PSERC.”

Counsel submitted that it was evident that the energy charges payable to GVK are as per the provisions of the Restated and Amended PPA and the relevant Orders of the Commission.

6.18 It was submitted that the PSERC Tariff Regulations contemplate reimbursement of cost of coal on actual basis. The tariff is to be determined by the Commission in terms of Section 61, 62 and 64 of the Electricity Act, 2003 read with Regulation 2(b) of the PSERC Tariff Regulations. Contracts entered by regulated entities must be interpreted/aligned with any Regulations framed under Section 178 or Section 181 of the Electricity Act, 2003 as the case maybe, as held by the Constitutional Bench of the Supreme Court in the case of *PTC India vs CERC & Ors*, (2010) 4 SCC 603 at paragraphs 66, 92. Accordingly, the CIL notified price of coal has to be considered for determining energy charges for GVK.

6.19 It was further submitted that in terms of Clause (B)(ii) of Policy Guidelines to Shakti, 2017, CIL/SCCL may grant coal linkage on notified price on auction basis. This position has been recorded at Clause 2.1.2 of the Scheme Document as well. Further, in terms of:

- (a) Clause 5.3.2 of the Scheme Document, the cost of coal supplied under SHAKTI 2017 will be as per the Notified Price of CIL.
- (b) Clause 5.4. of Scheme Document, the successful bidder under Shakti 2017 would be entitled to receive payment for generation of power on the basis of the notified price of the declared grade of the consignment by CCL/SCCL.

6.20 It was submitted that Article 5 of the Supplementary PPA would have to be read in consonance with provisions of the Scheme Document and Policy Guidelines, which have the force of law as well as the PSERC Tariff Regulations. Article 5 cannot be read to mean that PSPCL is only required to pay energy charges on the basis of the interim arrangement put in place by way of this Commission's Order dated 01.02.2016. It was submitted that GVK ought to be paid energy charges taking into account the Notified Price of Coal including all costs incurred for transportation of the same to the Project including but not limited to the GCV on ARB basis and other components as specified under the PSERC Tariff Regulations.

6.21 It was submitted that apart from the surface transportation

charges, GVK also incurs costs towards 'handling charges' for the supply of coal. The handling charges are incurred in the process of transportation of coal viz. lifting of coal from the mine end, unloading of coal, weighing of trucks, completion of documentation for lifting and transportation, stacking of the coal after unloading and overall supervision as well as escorting the coal from mine end to the Project. For FY 2017-18, the handling charges were in the range of Rs. 25-Rs. 100 per MT. Further, GST is levied for the transportation as well as the handling service.

- 6.22 In terms of the Order dated 01.02.2016, PSPCL is required to pay actual railway freight costs. However, PSPCL is comparing the cost of coal received by its thermal plants and the cost of coal received by GVK on the basis of per EGCV cost of coal i.e. Cost paid by PSPCL for 1 kcal versus the cost paid by GVK for 1 kcal of coal, whichever is lower. On determining the cost of coal per ton on the above basis, the railway freight charges per ton are added to the cost of coal for arriving at the landed cost of coal. This landed cost of coal is applied for determining the energy cost per Unit considering normative heat rate and landed cost of coal on EGCV basis. The freight charges being paid to railways by GVK are on weight basis but not on GCV basis. The quantity of coal arrived at as per the above method of calculation is much less than the actual quantity consumed/transported by GVK. This results in under-recovery of rail freight as the tonnage of coal used by GVK and PSPCL, is not the same. It

was submitted that this is contrary to the plain language of the Order dated 01.02.2016 which contemplates computation of cost of coal and railway freight cost separately.

6.23 It was submitted that the GCV of coal procured by PSPCL and GVK are different. Therefore, incorporating the railway freight cost in the coal cost and computing a per unit cost on the basis of GCV is akin to comparing apples to oranges. By way of illustration, if 100 kg of coal is procured at Rs. 50 per kg. and the railway freight is considered at Rs. 2 per kg, GVK is entitled to Rs. 500 (it should be 5000) *plus* Rs. 200. However, PSPCL is applying artificial and normative computations thereby resulting in the transportation cost being factored into the coal cost itself. This is impermissible and contrary to the Order dated 01.02.2016. In terms of Order dated 01.02.2016 of the Commission, fuel cost is lesser of: (i) actuals; or (ii) weighted average of cost of coal received by PSPCL's thermal power plants from Coal India Ltd and its subsidiaries' in a particular month. However, PSPCL has not provided the basis/method for computing the weighted average cost of coal. It was submitted that PSPCL is deliberately using a cost lower than its actual weighted average cost of coal. As a result, PSPCL has withheld amounts towards energy charges due to variance in the weighted average cost and GCV of coal of PSPCL's thermal power plants viz. the weighted average cost and GCV of coal utilised by GVK for its Project.

6.24 Further, it was evident from the correspondence between

PSPCL and GVK detailing amounts withheld from payments for the Monthly Bill of October 2017 that, PSPCL is calculating the weighted average cost of coal on the basis of weighted average cost of coal received at PSPCL's thermal generating stations from previous months. PSPCL is computing the weighted average cost of coal and GCV for the monthly bill of October, 2017 considering the coal received by PSPCL thermal generating stations in August, 2017 i.e. data of coal procured three months prior to the monthly bill of October, 2017. Effectively, data for coal procured three months prior to the monthly bill of October, 2017 has been considered by PSPCL. The calculation in this manner has resulted in the values of weighted average cost of coal and GCV of PSPCL Thermal Plants to fluctuate. It was submitted that PSPCL has adopted this method for computing weighted average cost of coal and GCV for the monthly bills of June, 2017 to July 2018 as well.

- 6.25 Counsel for GVK contended that there is a discrepancy/irregularity in the manner in which PSPCL is recording the GCV of coal being received at its thermal power plants. Consequently, the weighted average cost of coal used in its thermal stations computed by PSPCL also appears to be incorrect. It was submitted that during the reconciliation process undertaken by GVK and PSPCL, GVK had sought data from PSPCL regarding the mode and manner in which GCV of Coal is measured. However, PSPCL provided data only for the months of October 2017

and February 2018. From the data provided, it appears that PSPCL is measuring GCV on “as received” for the purpose of computing energy charges for its own thermal project. However, in the case of GVK, PSPCL has paid energy charges on equilibrated basis which has resulted in lower energy charges payable to GVK.

6.26 In terms of Regulation 39.4 of the PSERC Tariff Regulations, energy charges are to be computed considering GCV of coal on “as received” basis. In this regard, the term and method “As Received” is a separate and distinct method as compared to equilibrated basis, as evidenced by Bureau of Indian Standards’ IS 1350-2 (1975): Methods of Test for Coal and Coke, Part II: Determination of Calorific Value [PCD 7: Solid Mineral Fuels]. However, PSPCL contrary to the said Regulations, has been making payments to GVK on the basis of GCV computed on equilibrated basis. It was submitted that on the basis of the information provided, GVK has submitted revised monthly bills for October 2017 and February 2018. The said bills were revised considering GCV of coal on “as received” basis instead of GCV of coal on equilibrated basis. The difference in amounts claimed by GVK from PSPCL is Rs 18,15,68,264 for the month of October 2017 and Rs. 5,51,81,184 for the month of February 2018.

6.27 Furthermore, it was submitted that in the data filed by PSPCL in its Additional Submissions dated 18.05.2018,

(a) PSPCL has provided the GCV of coal received by its

generating stations in its emails detailing deductions made by PSPCL as well as provided month wise data for GCV of the coal received at its Generating Stations on equilibrated basis. However, no supporting documents such as invoices raised by CCL/BCCL have been provided in support of the month wise data used for computing GCV of coal except for the months of October 2017 and February 2018 (provided during reconciliation process).

- (b) PSPCL has incorrectly compared GCV of the coal used in its generating stations in a particular month to the GCV of coal used by GVK during other months i.e. GCV of coal used by PSPCL in the month of January 2016 has been compared with the GCV of Coal used by GVK in the April 2016. In terms of the Order dated 01.02.2016 passed by the Commission, GVK was to be paid the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd and its subsidiaries in a particular month. However, it is evident that PSPCL has not followed these directions and has been comparing GCV data differently for different months.

6.28 It was submitted that PSPCL has withheld amounts in an ad-hoc and arbitrary manner towards GCV Difference and there is no basis for PSPCL's computation. The total amount withheld by PSPCL on this account from January, 2016 to October, 2018 is Rs. 69,83,05,787. PSPCL should be directed to reimburse the amounts deducted on account of difference in the GCV of coal.

- 6.29 GVK submitted that PSPCL has not factored “Transit and Handling Loss” for the Road Transportation Costs. PSPCL is applying Transit and Handling loss of coal at 1% only on the railway freight being paid by GVK. In terms of Regulation 40 of the PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014, 1% transit and handling loss is to be allowed on Road Transportation Costs as well. The amounts payable by PSPCL to GVK is Rs. 199,71,587.
- 6.30 PSPCL has not considered any Testing Charges incurred by GVK to measure the GCV as part of the ECR. The testing of coal is being carried out by GVK in compliance with Regulation 39.4 of the PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014. The total amount withheld by PSPCL from June 2017 to October 2018 towards testing charges is Rs. 67,77,034.
- 6.31 GVK has been raising bills for water charges on PSPCL as per actuals. However, PSPCL has been withholding payments towards such amounts. The PSERC Tariff Regulations 2014 are silent regarding water charges. In terms of Regulation 29(2) of the CERC Tariff Regulations, water charges are to be paid separately. The total amount withheld by PSPCL from June, 2017 to October 2018 is Rs. 1,91,73,888. PSPCL has agreed to pay water charges pursuant to the reconciliation process after GVK submits proof of payment towards the same.

6.32 The Project has been operating at part load below NAPAF pursuant to backing down instructions issued by PSPCL. The PSERC Regulations (Punjab State Grid Code) Regulations, 2013 (“*PSERC Grid Code*”) do not provide for a mechanism for compensation for Project operating on a part load basis. However, in terms of Section 86(h) of the Electricity Act, 2003, the State Grid Code ought to be consistent with the CERC (Indian Electricity Grid Code) Regulations 2010 (“*CERC Grid Code*”). Furthermore, Regulation 1.13 of the Punjab Grid Code provides that the same is compatible with the CERC Grid Code as under:

“1.13 Compatibility with Indian Electricity Grid Code

This State Grid Code is consistent/ compatible with the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (IEGC), as amended from time to time. However, in matters relating to inter-State transmission, if any provisions of the State Grid Code are inconsistent with the provisions of the IEGC, then the provisions of IEGC shall prevail.”

Since Punjab Grid Code is silent about IEGC compensation, reliance is placed upon Regulation 6.3B of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) (Fourth Amendment) Regulations, 2016 (“Fourth Amendment to CERC IEGC”), in terms of the Appellate Tribunal for Electricity’s decision in Lanco Judgment . Regulation 6.3B of the CERC Grid Code provides for a compensation mechanism for generating stations operating on part load below NAPAF for station heat rate, auxiliary

power consumption and secondary fuel oil consumption. Since the CERC Grid Code provides for a method of compensation, the same compensation mechanism ought to be applied to GVK Project to determine the compensation for part load operations. It was submitted that the SLDCs consider the technical minimum specified in the Sub-Regulation 6.3B of CERC Grid Code as the technical minimum for the projects in Punjab and accordingly, issue backing down instructions. Since the SLDCs, including PSLDC are applying standards prescribed for Central Generating Station or inter-State Generating Station regarding the technical minimum while issuing its backing down instructions, the corresponding provision regarding compensation to the said stations ought to also be made applicable to intra - state projects. In this regard, PSPCL has withheld compensation of approximately Rs. 40.64 Crores from June, 2017 to October, 2018 in this regard.

6.33 PSPCL has unilaterally withheld Rs. 14,02,533 toward UI Charges from amounts payable to GVK with no basis for the period of June 2017 to July 2018. It was submitted that GVK is seeking detailed computation of UI charges based on 15 'minutes block' data from PSPCL. PSPCL is yet to provide the same.

6.34 The capacity charges payable by PSPCL to GVK is calculated by multiplying the Fixed Charges Rate ("*FCR*") with the energy declared during the bill period. In considering the energy declared during the bill period, PSPCL has taken

the Declared Capacity data on ex-bus basis compiled by SLDC. Thereafter, PSPCL has multiplied the energy declared during the bill period on ex-bus data with the FCR computed on the basis of the total generating capacity at the generator terminal to determine the capacity charges payable to GVK.

- 6.35 It was submitted by GVK that in doing so, PSPCL has failed to consider auxiliary consumption of the Project by not grossing up the Declared Capacity on ex-bus basis for the month by 9% i.e. normative auxiliary consumption for the Project. Declared Capacity data on ex-bus basis considered by PSPCL as energy declared during bill period ought to be grossed up by 9% in order to arrive at the total Declared Capacity at the generator terminal so as to include auxiliary consumption in the total amounts payable to GVK. This has resulted in a loss of Rs. 99,77,30,835 to GVK.
- 6.36 In this context, reference was made to Regulation 3.50 and 3.51 read with 38.2 and 38.3 of the PSERC Regulations 2014, 'Normative Annual Plant Availability' ("NAPAF") and 'Plant Availability Factor' ("PAF") is to be calculated by grossing up the Declared Capacity with the normative auxiliary energy consumption.
- 6.37 PSPCL has claimed a rebate of Rs 3.03 Crores towards timely payment of Monthly Bills of July 2017 and August 2017 and thereafter withheld the said amount from the payments made towards subsequent monthly bills raised by GVK. It was submitted that PSPCL is not entitled to claim

any rebate since it has failed to make complete payment, as has been held by the Supreme Court, in its judgment *Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Company Private Limited* reported as (2014) 11 SCC 53 (para 71). Accordingly, it was submitted that PSPCL be directed to pay the amounts that have been deducted towards rebate.

6.38 Referring to PSPCL's contention in its Additional Submissions that GVK is artificially inflating the Scheduled Energy, GVK submitted that it (GVK) had relied on the information/data provided by SLDC for claiming scheduled energy. It was, however, submitted that there were certain errors during the months of July 2016 to August 2016 and from June 2017 to September 2017 due to revisions made in the scheduled energy by SLDC. The difference in the Energy claimed by GVK and the revised SLDC data shows both positive and negative changes. GVK submitted that the difference on account of the errors may be reconciled at the end of the contract year.

6.39 It was reiterated that PSPCL had unlawfully withheld amounts contrary to the PPA which were due and payable to GVK. Therefore, in terms of Article 11.3.4 of the PPA, GVK is entitled to late payment surcharge on the amounts wrongfully withheld by PSPCL for the period from the date on which the amounts were due to the date of actual payment. Due to the withholding of amounts by PSPCL as detailed above, GVK has been unable to meet its debt servicing

obligations towards the loans availed to set up the project. If these circumstances continue, the Project is at risk of becoming a stressed asset as well as jeopardizing the funds lent by the financial institutions, as this Commission recognised in order dated 28.03.2018. Further, as contemplated by the provisions of Article 11.6.7, of the PPA, GVK submitted that the Commission passed interim orders protecting GVK's interest by directing PSPCL to make interim payment of the disputed amounts of the Infirm Bills and Monthly Bills for January, 2016 to April, 2016, July, 2016 to August, 2016 and June, 2017 to July, 2018 along with interest or Late Payment Surcharge.

6.40 GVK counsel stated that GVK has raised Infirm Bills and Monthly Bills as per the PPA which have attained finality and are due for payment on the 30th day of the Monthly Bill being raised in terms of Article 11.6.1 of the PPA. Infirm Bills and Monthly Bills have not been disputed in terms of Article 11.6.2 which is a mandatory provision. However, PSPCL has withheld the amounts payable to GVK in violation of provisions of Article 11.3.2 of the PPA. The billing and payment mechanism under Article 11 of the PPA provides as under:

- (a) From the COD of first unit, PSPCL is required to pay Monthly Tariff determined in accordance with Article 11 and Schedule 6 of the PPA. (Article 11.1) .
- (b) GVK is required to issue a signed Monthly Bill to PSPCL for the preceding month which will include: (Article 11.2)

- (i) Details including availability and energy account for the relevant month as per REA for Monthly Bill and RLDC's daily energy account for Provisional Bill;
 - (ii) Computation of the components of the Monthly Tariff Payments in accordance with Schedule 6; and
 - (iii) Supporting data, documents and calculations in accordance with the PPA
- (c) PSPCL is liable to pay the amount under Monthly bills on the Due Date. (Article 11.3.1)
- (d) Payments under the PPA would only include any deduction or set off for
- (i) Deductions required by the Law; and
 - (ii) Amounts claimed by PSPCL from GVK, through an invoice duly acknowledged by GVK and not disputed by GVK within 30 days of the receipt of such invoice. The deductions/set off can only be made to the extent of the amounts not disputed.
 - (iii) The maximum amounts that can be deducted or set-off by PSPCL in a contract year shall not exceed Rs 13.5 Crores (Article 11.3.2).
- (e) In the event of a delay in payment of a Monthly Bill by PSPCL beyond the due date, late payment surcharge is payable by PSPCL to GVK. (Article 11.3)
- (f) In the event a party does not dispute a monthly, provisional or a supplementary bill raised by the other party within 30

days, such bill will become conclusive. (Article 11.6.1)

- (g) PSPCL is required to issue a Bill Dispute notice to GVK within 30 days from the date of receipt of the Monthly Bills setting out the following details explicitly:- (Article 11.6.2)
- (i) *Details of discrepancies/differences* as communicated;.
 - (ii) Estimate of correct amount as per PSPCL;
 - (iii) All evidences/written material in support of its Claim (i) and (ii) above
 - (iv) Proper opportunity for GVK to respond to such reasons.
- (h) It is noteworthy that notwithstanding a dispute regarding an invoice, PSPCL is required to make payment to the extent of lower of: (Article 11.6.9)
- (a). an amount equal to simple average of last three (3) Months invoices (being the undisputed portion of such three Months invoices), and
 - (b). *Monthly Invoice* which is being disputed.

6.41 In terms of Article 11.3.1 of the PPA, PSPCL is obligated to pay the monthly bill raised by GVK within 30 days of receipt of the same. Further, in terms of Article 11.6.1 of the PPA, PSPCL may raise a dispute within 30 days of receiving such monthly bill, failing which such bill shall be taken as conclusive.

6.42 The infirm *Bill dated 07.04.2016 for March, 2016,* and *Monthly Bill for June, 2017* are admitted liability of PSPCL

since PSPCL failed to raise a dispute regarding the said Bills within 30 days of receiving the same, as provided for in terms of Article 11.6.2 of the PPA. In fact PSPCL paid the Infirm Bills and Monthly Bills for January 2016 to April 2016 and July 2016 to August 2016 without any protest. The dates of communication of objections against each bill is set out below:

Month	Date of issuance of Bill	Due Date	Date of payment by PSPCL after deductions	Date of intimation of the details of deductions
INFIRM POWER				
January 2016	15.03.2016	16.04.2016	06.05.2016 to	(reversed Rs 7.92 Crores paid)
February 2016	15.03.2016	16.04.2016	26.05.2016	
March 2016	07.04.2016	08.05.2016		
April 2016 (upto 15.04.2016)	09.05.2016	10.06.2016	31.05.2016	
April 2016 (16.04.2016 onwards)	09.05.2016	10.06.2016	26.05.2016	
FIRM POWER				
July 2016	05.08.2016	06.09.2016	07.09.2016	18.08.2017
August 2016	07.09.2016	08.10.2016	06.10.2016	
June 2017	07.07.2017	08.08.2017	29.08.2017	18.08.2017
July 2017	07.08.2017	08.09.2017	07.09.2017	04.09.2017 and 03.11.2017 (revised amounts)

Month	Date of issuance of Bill	Due Date	Date of payment by PSPCL after deductions	Date of intimation of the details of deductions
August 2017	13.09.2017	14.10.2017	11.10.2017	26.09.2017
September 2017	06.10.2017	07.11.2017	02.11.2017	31.10.2017
October 2017	07.11.2017	06.12.2017	01.12.2017	04.12.2017
November 2017	07.12.2017	08.01.2018	06.01.2018	28.12.2017
December 2017	07.01.2018	08.02.2018	07.02.2018	01.02.2018
January 2018	07.02.2018	08.03.2018	06.03.2018	06.03.2018
February 2018	07.03.2018	08.04.2018	06.04.2018	09.04.2018
March 2018	09.04.2018	10.05.2018	04.05.2018	07.05.2018
April 2018	07.05.2018	08.06.2018	14.06.2018	07.06.2018
May 2018	07.06.2018	08.07.2018	25.06.2018 & 05.07.2018	06.07.2018
June 2018	06.07.2018	07.08.2018	04.08.2018	31.07.2018
July 2018	07.08.2018	08.09.2018	06.09.2018	05.09.2018
August 2018	06.09.2018	08.10.2018	12.10.2018	05.10.2018
September 2018	08.10.2018	09.11.2018	Rs.60 Cr received on 17.10.2018 ,Rs. 45 Cr on 02.11.2018 and the balance received on	06.11.2018

Month	Date of issuance of Bill	Due Date	Date of payment by PSPCL after deductions	Date of intimation of the details of deductions
			06.11.2018	
October 2018	06.11.2018	07.12.2018	Rs. 50 Cr received on 21.11.2018 and 49.40 Cr received on 05.12.2018	04.12.2018

Furthermore, it was pointed out that for the months of January 2016 to August 2016, October 2017 and February 2018 the details of the deductions were shared with GVK after the amounts were paid to GVK and deductions had already been carried out. PSPCL has withheld amounts contrary to Article 11.3.2 and Article 11.6.2 of the PPA and continues to flout the law while proceedings are pending.

6.43 PSPCL has not served a Bill Dispute Notice disputing the amounts claimed by GVK. The emails dated 18.08.2017, 04.09.2017, 26.09.2017, 31.10.2017, 04.12.2015, 28.12.2017, 01.02.2018, 06.03.2018, 09.04.2018, 07.05.2018, 07.06.2018, 06.07.2018, 31.07.2018 and 05.09.2018 issued by PSPCL ("*PSPCL Emails*"), did not provide the basis for withholding of amounts nor was any

evidence provided in lieu of the same. Furthermore, GVK was not provided a proper opportunity to respond to the withholding of amounts.

6.44 It was submitted that PSPCL is obligated to pay all dues as per the invoices raised by GVK, subject to deductions as are required by Law, or amounts that have been claimed by PSPCL through a duly raised invoice, and agreed to by GVK, that too only when the Seller, i.e., GVK herein does not dispute any such invoice. However, none of the conditions stipulated in the PPA for deduction of amounts as mentioned above are met with respect to the amounts unilaterally withheld by PSPCL. Therefore, in terms of Articles 11.3.1 and 11.6.2 of the PPA, the Infirm Bills and Monthly Bills have attained finality and are due for payment on the 30th day from the date on which the respective Bills have been raised.

- (a) For the Infirm Bills of January, to August 2016, no dispute was raised by PSPCL within the 30 day period. Therefore, the said Bills have become conclusive in terms of Article 11.6.1 of the PPA. However, PSPCL has wrongly deducted amounts paid towards Infirm Bills retrospectively from amounts payable under the Monthly Bill for July 2017.
- (b) For the Monthly Bill for June 2017, PSPCL issued an email 14 days after due date detailing the deductions made from the amounts due and payable to GVK. Since no Bill Dispute was raised by PSPCL within 30 days, the Monthly Bill for

June 2017 has become conclusive and no deductions are permitted.

- (c) For the Monthly Bill for July 2017, PSPCL issued an email on 04.09.2017 and 03.11.2017 (after due date), detailing the deductions from amounts due and payable to GVK. Since no dispute has been raised by PSPCL within 30 days, the Monthly bill for July 2017 has become conclusive and no deductions are permitted.
- (d) For the Monthly Bill for February 2018, PSPCL issued an email on 09.04.2018, detailing deduction from amounts due and payable to GVK after the due date. Since no dispute has been raised by PSPCL within 30 days, the Monthly Bill for February 2018 has become conclusive and no deductions are permitted.

6.45 PSPCL had paid the Infirm Bills and Monthly Bills for January, 2016 to April, 2016 and July, 2016 to August, 2016 without protest or objection. However, PSPCL has reversed Rs. 7.92 Crores (including interest for the amount paid) from the Monthly Bill for June, 2017 to recover amounts it has already paid for said bills towards Road Transportation Costs incurred by GVK. It was submitted that this is post facto deduction which is violative of Article 11.3.2.

6.46 It was submitted that notwithstanding an alleged dispute regarding an invoice as claimed by PSPCL, in terms of Article 11.6.9 of the PPA, PSPCL is required to make payment to the extent of lower of:

- (a) an amount equal to simple average of last three (3) Months invoices (being the undisputed portion of such three Months invoices), or
- (b) Monthly Invoice which is being disputed.

Accordingly, PSPCL ought to have made payment either equal to simple average of last 3 months invoice (being the undisputed invoice) or towards the monthly invoice being disputed. It is evident that the Bill Dispute procedure set out in the PPA has not been followed.

6.47 It was submitted that PSPCL is sitting in judgment and arbitrarily deducting / withholding amounts from the monthly bills which is impermissible and contrary to the terms of the PPA. The Appellate Tribunal has held in its judgment in *TNEB v. GMR Power Corporation and Others*, 2012 ELR (APTEL) 461 that the Procurer cannot unilaterally decide what constitutes a legitimate component of an invoice and it should use the dispute resolution mechanism if need be, as under:-

“12.4. The State Commission has analyzed the issue in details. The relevant paragraphs are reproduced below:

...

(10) The Respondent submits that he is bound to make full payment against an invoice, only if the invoice conforms to the PPA. This is a dangerous proposition, because the Respondent wants to arrogate to himself the authority to determine what constitutes a legitimate claim under the PPA. He wants to exercise the powers of an adjudicator. Dispute Redressal Mechanism is available to the Respondent under the PPA, which is meant to tackle such eventualities. He never exercised this option. The PPA is emphatic that the

invoice shall be paid in full before raising a dispute. Therefore, we have no hesitation in dismissing the plea of the Respondent to decide what constitutes a legitimate component of an invoice.

...

12.5. We do not find any infirmity with the findings of the State Commission and accordingly confirm the same.”

6.48 Further, the Supreme Court in its judgment in *Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Company Private Limited*, (2014) 11 SCC 53 has also upheld this position by stating that unilateral deductions from monthly bills without adjudication are illegal, as under:

“71. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part-payment of the monthly invoices within 5 business days. We have noticed earlier that it was a precondition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, Aptel has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by Aptel. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Articles 10.3(a) to (c) of the PPA, letter of credit is to be established covering three months estimated billing, one month prior to commercial operation date. Under Article 10.3(d) of the PPA, an escrow account is to be established by the appellant in favour of the power company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of

the appellant. Under Article 10.2(e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of Aptel on this issue do not call for any interference.

72. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for compensation payment and billing. We are also not able to accept the submission of Mr Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part-payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by PSPCLs. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices.”

In light of these decisions, GVK contended that the deductions made by PSPCL are illegal and contrary to the terms of the PPA. The said amounts could not have been withheld without raising a dispute within 30 days of receipt of the Bill.

6.49 In this context, at the hearing on 09.05.2018 in the present Petition, the Commission *inter-alia* directed PSPCL to file month-wise chart giving details of the amounts to be billed by GVK and paid by PSPCL along with a copy of the objections given by PSPCL to GVK within 30 days. PSPCL has failed to file a statement recording the particulars of amounts paid by PSPCL against each bill and the correspondence recording the objections/basis for deductions. Therefore, GVK has filed a statement along with the Rejoinder to the Additional Submissions filed by PSPCL showing the billing and payment details.

7. PSPCL's submissions:

7.1 PSPCL in its reply (03.05.2018) to the Petition stated that the tariff for the supply of electricity by GVK to PSPCL is to be determined by the Commission and cannot be unilaterally claimed by GVK. In I.A no. 01/2018, in Petition No. 54 of 2017, the PSERC has vide its Order dated 28.03.2018 allowed interim capacity charges of Rs. 2.20 per kwh. In Petition No. 33 of 2015 and 65 of 2013 vide Order dated 01.02.2016 the Commission has capped the energy charges at the weighted average cost of coal received by the thermal Power Plants of PSPCL from Coal India Ltd. and its

subsidiaries in the particular month along with actual transportation charges paid by the Petitioner to the Indian Railways for transporting the coal to the Project from port/mine in case of imported/domestic coal as the case may be or the actual cost of coal procured by the petitioner, whichever is less. PSPCL claimed that the Order dated 01.02.2016 is binding and not open to variation and that GVK was seeking an amendment to include road transport when the Commission had specifically restricted the transport costs to rail transport. It was further submitted that PSPCL had used the weighted average cost of coal for its own plants for computation of the energy charges as per the Order dated 01.02.2016. As per the PSERCs Order of 28.03.2018, capacity charges are being paid from that date. GVK itself approached the PSERC at a very late stage for tariff determination and is seeking an amendment now, when the tariff has still not been determined. As and when the same is determined, adjustments as required would be made.

- 7.2 On the issue of compensation payable for backing down, PSPCL stated that the IEGC was restricted to the Central stations and in the State it would be the State Grid Code which would be applicable.
- 7.3 In its reply on 18.05.2018, PSPCL further stated that there was no particular format prescribed for disputes to be raised, the only requirement being of communicating the details of the dispute. According to PSPCL this was done. It was

added that the PPA does not, nor can it prescribe a limitation period for disputes to be raised. Nor does the PPA provide that whatever has been billed has to be paid and is binding on the Commission and the consumers. PSPCL stated that the issues have to be adjudicated on merits and GVK cannot contend that the Commission has no jurisdiction. Specially, when the invoices raised by GVK are highly inflated.

7.4 PSPCL submitted that the present approved Capital Cost of the Project is Rs. 2963.81 Cr. and GVK cannot unilaterally claim any higher Capital Cost without the approval of the Commission. It was GVK's obligation to establish that the bills raised and claims made were correct. GVK has been claiming capacity charges ranging from Rs. 2.26 per kwh in April 2016 to Rs. 5.81 per kwh in Feb. 2018. In March, 2018, the Commission in Petition No. 54/2017 has provisionally allowed Rs. 2.20 per kwh. If GVK's claim that all bills are to be paid without dispute is accepted then Petition No. 54 is infructuous and GVK's unilateral claims for capacity charges should be accepted.

7.5 As regards energy charges, the 01.02.2016 Order of the Commission prevails, stating therein that cost of coal as paid for PSPCL and railway charges are payable or actual cost of coal whichever is lower. PSPCL has submitted information showing that since PSPCL's costs were lower, these have been paid.

8. GVK's rebuttal.

8.1 In rebuttal, GVK stated that PSPCL had wrongly withheld costs associated with road transportation of coal from mine end to railway siding including loading and handling and testing of coal amounting to Rs. 22,53,23,107 ; transit loss and handling and loading charges for road transport amounting to Rs. 90,48,834; difference in GCV & weighted average cost of coal amounting to Rs. 8,99,54,527 ;Water Charges amounting to Rs. 70,64,064; IEGC compensation of Rs 10,87,65,513; U.I charges amounting to Rs. 1,14,51,743 and wrong capacity charges. As far the capacity charges are concerned, since Petition No. 54/2017 is pending, Counsel for GVK stated that this petition is limited to the other issues excluding capacity charges. GVK denied the other charges made by PSPCL and stated that PSPCL had not responded to its queries inter-alia regarding its cost of coal , transportation by road, GCV, washing charges and transit loss. GVK gave a table showing that in the period from January 2016 to July, 2017 and for February, 2018, PSPCL had not intimated details of deductions within 30 days as stipulated in the PPA , and several bills were paid after the due date. In response to the Commission's direction to PSPCL for placing on record the details of payments made and deductions effected, PSPCL has not filed full information from January 16 to July 17 and then Feb. 18. Deduction details have been shared after deductions have been made, denying GVK the opportunity to contest the same. For the

remaining months, the notices regarding disputes have been sent by e mail and are cryptic and not as per the requirement of Article 11.6.2 of the PPA. As per the PPA either the average of the last 3 months' bills or the monthly invoice under dispute should have been paid. APTEL has pointed out that the procurer must follow the dispute resolution mechanism (TNEB V GVK Power Corp.& Others 2012 ELR (APTEL) 461). The Supreme Court has upheld this in TG and DCh & PPN Power Generating Company pvt.ltd. (2014)118 cc 53.

- 8.2 GVK further denied that it was trying to modify the Order dated 01.02.2016. It was submitted that as per the Order dated 01.02.2016, fuel cost is the lower of weighted average cost of coal received by PSPCL's generating stations with actual transportation costs incurred by GVK or actual cost of coal procured by GVK. In both cases, it was the Landed cost of coal . GVK maintained that from the ARR and Tariff Petition filed by PSPCL upto 2016-2017 and the MYT petition for control period 2017- 2018, road plus rail transportation is being considered. Therefore, road transportation incidental to railway transportation ought not to be excluded and GVK is entitled to road transport on actual as was the intention of the 01.02.2016 Order. GVK procures coal from many alternate sources through Coal India , and in many cases road transport is required from the mine to the railway siding, this involves loading, unloading, handling ,testing charges. PSERC regulations, 2014 (Reg.40)-

includes transportation by rail and road in the landed cost of fuel. The Supreme Court in NPL Vs. PSPCL has held that transport cost incurred from point to point has to be reimbursed and that GCV coal has to be measured at the project site. GVK further stated that the Arbitral Award has held that the cancellation of coal blocks was a change in law and Force Majeure event and GVK has to be restored to the same economic position as if change in law has not take place. PSPCL and all other IPPS are getting Cost of road transport. As per the Electricity Act, 2013, the Commission has to consider principles of efficiency in performance of GVK.

- 8.3 With regard to PSPCL's submissions regarding the cost of coal, GVK brought to the notice of the Commission that surface transportation has not been taken into account in the computation of cost of coal received in PSPCL's claims. In addition the costs of transportation of coal, from mine to washery, from washery to railway siding, washery charges, loss of quantity of coal in washing ,handling charges of coal, transportation from mine to railway siding, testing charges and transit losses are not being added in the cost of transportation of coal. Thus PSPCL is projecting the cost of coal lower than the actual. No mention has been made of washing charges in PSPCL's account. No supporting documents have been made available. GVK sought permission to recover road transportation costs incurred for coal being transported from mine end to railway siding. GVK

found fault with PSPCL's comparison of GCV data and pointed out that no evidence was given of the comparison made, different months were compared and in some cases the GCV was lower at the loading point than at the project end.

8.4 GVK refuted PSPCL's contention that it had inflated the scheduled energy stating that it relied on SLDC information. However, GVK did admit to certain errors which would be reconciled at the end of the contract year. GVK reiterated its right to auxiliary consumption and denied that it sought double adjustment for auxiliary consumption. GVK pointed out that as per Reg. 3.50, 3.51 read with Reg. 38.2 and 38.3 of the PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014, NAPAF & PAF is to be calculated by grossing up declared capacity with auxiliary energy consumption. In the absence of details of the UI charges towards which deductions had been made, GVK stated that it had sought detailed information regarding UI charges based on 15 minute block data from PSPCL. In the absence of any reference to water charges in the State Regulations, GVK sought to be covered by CERC Regulations and sought compensation for expenditure incurred on water charges. Similarly GVK reiterated its right to be compensated as per IEGC for operating at part load below PAF pursuant to backing down instructions issued by PSPCL.

8.5 In support of its claims, GVK submitted bills for the months

of Nov.2017 to July, 2018 along with calculations and the copies of the CIL notification dated 12.11.2017 regarding levy of surface transport charges and sample invoices, distances from various mines to railway siding for all coal received by GVK, details of rake wise surface transport charges incurred by GVK for e auction coal and Shakti coal and copies of a few tenders issued by GVK, responses from bidders along with comparison of prices offered for handling coal. Counsel for GVK reiterated that PSPCL was not paying GVK for the surface transport, handling and loading charges from mine end to Railway siding. PSPCL is also not supplying GVK information in respect of the cost of surface transport etc. of its own coal from Amprali & Magadha mines. PSPCL and GVK remained at odds on all the issues raised.

- 9 In response, PSPCL gave information regarding the rates paid by it for surface transport beyond 20 Kms to the coal companies . PSPCL also submitted information to the effect that Surface Transport Cost was claimed as part of washery bills for washed coal. PSPCL on 12.11.18 reiterated that the Commission's Order of 01.02.2016 was binding on the petitioner. This allowed only transport costs to Indian Railways. PSPCL stated that it is also paying surface transport charges billed by Coal India and its subsidiaries at mine end and this is also being paid to GVK. GVK has not sought any review of the Order dated 01.02.2016 and through the present petition is actually seeking amendment of this order while claiming charges not covered by that

Order. Surface Transport Charges levied by coal India at the mine end form part of the weighted average cost of coal procured. This is being paid by PSPCL to GVK. Thereafter GVK is entitled only to the transport charges payable to Indian Railways. Being aware of the terms of the Order dated 01.02.2016, if GVK chooses to procure coal from any particular source it cannot then claim charges not allowed in the Order dated 01.02.2016. GVK can only ask for charges in conformity with the Order and cannot seek to amend it.

- 9.1 Reiterating that Shakti Coal was not part of this petition, PSPCL stated GVK was aware of the discount terms and cannot now seek for the tariff itself to be increased from what was previously applicable. The supplementary agreement of 01.02.2018 was quoted by PSPCL as under:

“

1. *The seller shall provide the year –on – year Discount from the tariff in the monthly bills as described in aforesaid paragraph ‘G’ of this agreement.”*
2. *This Agreement will come into force with effect from the date of approval by Hon’ble Punjab State Electricity Regulatory Commission or signing of Fuel Supply Agreement whichever is later.*
3. *The terms of this agreement are in addition to and not in derogation of the terms of the PPA which shall remain in effect.*
4. *This agreement is limited to procurement of coal under Shakti 2017 and is without prejudice to the rights and contentions of GVK and PSPCL in pending proceedings. The parties expressly reserve their rights in this regard.*

5. *The execution of this Agreement is only for capturing the discount available to PSPCL in the tariff for allocation of the coal linkage to GVK and shall no manner be constructed as recognition or acceptance by PSPCL of any higher fixed charges or higher charges than as applicable and payable to GVK under the provisions of the PPA and the relevant Orders of the PSERC.....”*

9.2 PSPCL stated that it is not sourcing coal from Amrapali and Magadh mines at all and if GVK decides not to take coal from the Railway siding allotted by the coal companies, it cannot expect PSPCL to pay for the additional cost. Pointing out the anomalies in the rates for Surface Transport Cost shown by GVK, PSPCL again raised its doubts on the validity of the competitive bid held by GVK. Specially, since GVK has not furnished details regarding contractual obligations enforced or recovery of charges. Costs for the mileage are not consistent and comparable between contractors stating that reconciliation of PSPCL accounts for different months than those being calculated for GVK, is underway. GVK's own accounts are not for the same month as those billed.

9.3 Referring to GVK's concern regarding GCV, it was stated that the measurement of GCV is done in units namely TM basis or equilibrated basis. This is not theoretical, nor is it 'as received'. The term 'as received' does not denote measurement but only the point of measurement i.e. project site. (GVK has been submitting bills on equilibrated basis). Regulations do not prohibit the measurement of GCV either on TM basis or equilibrated basis. The coal suppliers bills are

also on equilibrated basis. PSPCL bills are also on equilibrated basis. The petitioner has billed PSPCL on this basis and cannot raise a dispute now. GVK also does not have any testing facility at its project site and is presently getting it done at Udaipur. It was submitted by PSPCL that it has been applying the normative transit loss of CERC at 0.8% though the PSERC Regulations allow 1%. PSPCL coal cost already includes transit loss, testing charges. PSPCL gets its testing done internally and there is no concept of paying testing charges. Further, PSPCL argued that IEGC does not apply to intra-state entities which are covered by the State Grid Code, where there is no provision for compensation and UI charges are based on the SLDC certification and are paid accordingly. For Auxiliary Consumption, Regulation 30(6) of the CERC Tariff Regulation 2014 applies. On the issue of rebate, PSPCL maintains that it deducts rebate for the payment which it clears as due and payable and if the rest of the bill has been incorrectly raised, it cannot take the same into account.

10. Observations, Findings and Decision

10.1 The Commission has examined the petition, replies submitted by PSPCL, rejoinder filed by GVK, written submissions and the other documents filed by the parties.

10.2 GVK Industries Ltd., Hyderabad was selected to set up a thermal power plant after International Competitive Bidding. GVK Power (Goindwal Sahib)

Limited was incorporated as a SPV by GVK Industries Ltd. to set up the TPP. GVK entered into a PPA with PSEB (now PSPCL) on 17.04.2000 which could not be operationalized by GVK within the frame work envisaged in the said PPA. Thereafter, on 08.02.2006, a Memorandum of Understanding (MoU) was signed between GVK and erstwhile PSEB to proceed further in the matter. MoU provided for increase in Unit rating up to 250+20%MW. Tokisud North Coal Block was recognised for captive Mining by GVK. PSEB agreed to purchase electricity with the tariff to be approved by PSERC. The Amended and Restated PPA was signed between GVK and erstwhile PSEB on 26.05.2009. At that time, the coal was to come from mines allotted to GVK for the project and the cost of coal was capped at the cost of coal that PSPCL obtained from its own mine at Pachhawara.

- 10.3 With the Supreme Court Order on cancellation of mines, Pachhawara, Tokisud and Seregarah Block ceased to be available as a source of coal. GVK pleaded Force Majeure & change of Law and the Arbitration Award went in its favour. This is under challenge by PSPCL in a Civil Court. The Commission vide Order dated 01.02.2016 conveyed that GVK was free to commission its plant on the basis of the alternative coal it had tied up for the next 2-1/2 years. However, the cost of this coal was capped to

weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month, alongwith the actual transportation charges paid by GVK to the Indian railways for transporting the coal to the project.

10.4 GVK commissioned Unit-I and Unit-II of its plant on 06.04.2016 and 16.04.2016 respectively. In December, 2017, GVK approached the Commission in the instant petition seeking the following reliefs:

- (a) Direct PSPCL to make payments of amounts wrongfully withheld from payments made towards the Infirm Bills and Monthly Bills for January, 2016 to April, 2016, July, 2016 to August, 2016 and June, 2017 to October, 2017 along with late payment interest and carrying cost;**
- (b) Restrain PSPCL from making further deductions from ongoing monthly tariff bills raised for supply of power; and**
- (c) Direct the Respondent to make interim payments of the amounts withheld from the Infirm Bills and Monthly Bills for January, 2016 to April, 2016, July, 2016 to August, 2016 and June, 2017 to October, 2017 along with the interest and Late Payment Surcharge.**

10.5 As per the filings in the petition, the Commission notes that neither GVK has been raising the bills in terms of the PPA nor PSPCL is paying the bills correctly and is making deductions on its own interpretation of the PPA. As such, the disputes in billing arose on the following issues and each needs

to be examined separately:

- 1- Capacity Charges and Auxiliary Consumption;
- 2- Cost of coal, Surface Transport at mine end & Handling charges;
- 3- Gross Calorific Value (GCV);
- 4- Testing charges;
- 5- Transit & handling losses;
- 6- Water charges;
- 7- IEGC compensation;
- 8- Unscheduled Interchange (UI) charges;
- 9- Difference in Scheduled Energy and
- 10- Rebate on amount paid and interest on amount withheld.

10.6 Capacity Charges and Auxiliary Consumption

10.6.1 Capacity Charges

From the information filed, it appears that GVK has been billing PSPCL for capacity charges ranging from Rs. 2.26 per kWh in April 2016 to Rs. 5.81 per kWh in February, 2018. It also appears that in September/October, 2016, PSPCL worked out a provisional fixed tariff of Rs. 1.92 per kWh based on the APTEL approved Capital Cost of Rs. 2963.81 crore. Neither GVK nor PSPCL thought it fit to approach this Commission to decide this matter. It was only when GVK in November, 2017 submitted its ARR for FY 2016-17 and for the MYT period 2017-2018 to 2019-2020 that this anomaly came to light. Therefore, for this period of April 2016 to 27.03.2018, since the actual capital cost of the Project as certified

by the auditors appointed jointly by GVK and PSPCL has not yet been made available to the Commission by the two parties, and GVK has not challenged the Rs. 1.92 per kWh provisional capacity charges fixed by PSPCL, the same would hold till the final decision in petition no. 54 of 2017. Further, in the course of hearing petition no. 54 of 2017, this Commission has allowed the provisional tariff of the project with capacity charges as Rs. 2.20 per kWh to be charged from 28.03.2018 onwards. Both parties have agreed to abide by the provisional capacity charges fixed by the Commission in March, 2018 and that would continue till the final decision in petition no. 54 of 2017.

10.6.2 Auxiliary Consumption

GVK submitted that the capacity charges are calculated by PSPCL by multiplying fixed charge rate with energy declared. GVK further submitted that PSPCL has taken the Declared Capacity data on ex-bus basis as compiled by SLDC for calculating the capacity charges whereas the same ought to be grossed up by 9% i.e. normative auxiliary consumption, in order to arrive at the total declared capacity at the generator terminal so as to include normative auxiliary consumption in the total amounts payable to GVK.

10.6.3 The Commission notes that it has been provided in the Schedule 6 of the Amended and Restated PPA dated 26.05.2009 that the monthly capacity charges

based on the capital cost and the monthly energy charges, shall be calculated and paid as approved by PSERC as per CERC (Terms and Conditions of tariff) Regulations as applicable. During the course of hearings, both the parties agreed that the said CERC Regulations cannot be made applicable in the instant case as the project is located in the State of Punjab and supplies the entire power generated to the State utility.

10.6.4 Accordingly, it is clarified that upto FY 2016-17, the applicable Regulations shall be the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2005 and thereafter from FY 2017-18 onwards, the applicable Regulations shall be the Punjab State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 as amended from time to time, for supply of electricity by GVK to PSPCL.

10.6.5 GVK submitted that with reference to Regulation 3.50 and 3.51 read with Regulation 38.2 and 38.3 of PSERC (Terms and Conditions for Determination of Generation, Transmission and Wheeling Supply Tariff) Regulations, 2014, 'Normative Annual Plant Availability Factor' (NAPAF) and 'Plant Availability Factor' (PAF) is to be calculated by grossing up the

declared capacity with the normative auxiliary consumption.

10.6.6 The Commission notes that Regulation 3.51 of the ibid PSERC Regulations relates to Plant Load Factor (PLF) and not NAPAF. The Commission further notes that the capacity charges payable to Thermal Generating Plant for a calendar month are calculated in accordance with the formulae provided in Regulation 38 of PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 related to the recovery of Annual Fixed (Capacity) charges. In the formulae, the Annual Fixed Cost (AFC), Plant Availability Factor upto the end of a particular month (PAFM) and Normative Plant Availability Factor in percentage (NAPAF) are required to be considered for working out the capacity charges. It has been provided in Regulation 38.3 of the ibid PSERC Regulations that the PAFM up to the end of a particular month and PAFY shall be computed in accordance with the following formula:

$$PAFM \text{ or } PAFY = \frac{10000 \times \sum_{i=1}^N DC_i}{N \times IC \times (100 - AUX)} \%$$

Where,

AUX = Normative auxiliary energy consumption in percentage.

DC_i = Average declared capacity (in ex-bus MW) for the i^{th} day of the period i.e. the month or the year as the case may be, as certified by the SLDC after the day is over.

IC = Installed Capacity (in MW) of the generating station.

N = Number of days during the period i.e. the month or the year as the case may be.

10.6.7 The Auxiliary Consumption has been considered in the above formula for working out the PAFM/PAFY and the PAFM/PAFY is used in the formula for working out the capacity charges as brought out hereunder:

“CC₁=(AFC/12)(PAF₁/NAPAF) subject to ceiling of (AFC/12)

CC₂=((AFC/6)(PAF₂/NAPAF) subject to ceiling of (AFC/6))-CC₁

.....
CC₁₂=((AFC)(PAFY/NAPAF) subject to ceiling of (AFC))- (CC₁+CC₂+CC₃+CC₄+CC₅+CC₆+CC₇+CC₈+CC₉+CC₁₀+CC₁₁)

Where,

AFC=Annual fixed cost specified for the year (in Rupees)

NAPAF=Normative annual plant availability factor (in percent)

PAFM (M=1,2,3.....) = Plant availability factor (in percent)

PAFY =Plant availability factor achieved during the year (in percent)

CC₁, CC₂, CC₃, CC₄, CC₅, CC₆, CC₇, CC₈, CC₉, CC₁₀, CC₁₁ and CC₁₂ are the Capacity Charges of 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th months respectively.”

10.6.8 The clause 1.2.2 under ‘SCHEDULE 6: TARIFF’ of the Amended and Restated PPA dated 26.05.2009 provides that monthly capacity charges shall be paid as per CERC (Terms and Conditions of Tariff)

Regulations as applicable. However, as clarified above and agreed by both parties, PSERC regulations are applicable. As of now, as brought out above, fixed capacity charges of Rs. 2.20 per kWh as decided by the Commission in another petition are being paid by PSPCL on provisional basis on ex-bus energy as an interim measure, without calculating the PAFM/PAFY. After the capital cost of the project and consequently the AFC is determined by the Commission, PAFM/PAFY shall be worked out by PSPCL to determine the capacity charges as per the PSERC Regulations and paid to GVK. Needless to add that the amount of provisional capacity charges @ Rs. 1.92/2.20 per kWh paid/being paid by PSPCL to GVK shall be accounted for while making the payment of capacity charges as per the Regulations by PSPCL to GVK after the determination of AFC by the Commission.

10.7 Cost of Coal, Surface Transport at Mine End & Handling charges

10.7.1 Cost of Coal

The Commission in its Order dated 01.02.2016 common to petition no. 65 of 2013 and petition no. 33 of 2015 filed by GVK held that

“.....the petitioner shall be paid, the weighted average cost of coal received by the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month,or

the actual cost of coal procured by the petitioner, whichever is less.”

PSPCL submitted that the surface transport charges levied by the coal companies at the mine end from mining point to pickup point, form part of the cost of coal procured. However, PSPCL has informed that in the bills of the coal companies, the cost of coal and surface transportation charges are shown separately. The Commission notes that in the copy of bills of coal submitted by GVK, the cost of coal and surface transportation charges are shown separately. The Commission further notes that the surface transportation charges shown in the bills of the coal companies are from the mining point where coal is extracted upto the pickup/delivery point in the mine itself. The surface transportation charges from pickup/delivery point to the railway siding are over and above the surface transportation charges included in the bills of the coal companies in case the designated railway siding is away from the pickup/delivery point. Therefore, the Commission clarifies in terms of its Order dated 01.02.2016 that PSPCL shall work out the weighted average cost of coal received by PSPCL's Thermal Power plants and GVK's plant including surface transportation charges from the mining/extraction point upto the pickup/delivery point within the mine (internal STC) but

excluding surface transport charges/handling charges etc. from pickup/delivery point to the railway siding (external STC) if required in cases where the railway siding is away from the pickup/delivery point.

10.7.2 The surface transport charges from pick up delivery point within mine to railway siding has been dealt with as decided in the sub-paragraph. The petitioner shall be paid, the weighted average cost of coal received at the thermal power plants of PSPCL from Coal India Ltd. and its subsidiaries in the particular month or the actual cost of coal procured by the petitioner, whichever is less, accordingly. Further, in case the weighted average cost of coal for that particular month is not available and the same of previous month(s) is considered for working out weighted average coal cost for PSPCL's thermal power plants against the GVK's bill for the said particular month, then, in such cases the accounts/bills shall be reconciled by PSPCL and GVK within 15 days after the end of each quarter in a financial year.

10.7.3 In case of washed coal for GVK's plant for a particular month, the cost of the same (excluding external STC) shall be compared with the weighted average cost of washed coal (excluding external STC) for PSPCL's thermal plants for the same month. If PSPCL's plants have not received washed coal in that particular

month, such data for the month in which the washed coal was most recently received by PSPCL's thermal plants would be considered.

10.8 Surface Transport at Mine End & Handling Charges (External STC)

10.8.1 In terms of the Commission's Order dated 01.02.2016 common to petition no. 65 of 2013 and 33 of 2015, the actual transportation charges paid by the petitioner to the Indian railways for transporting the coal from the mine to the Project are payable. The Order dated 01.02.2016 has been quoted by both GVK and PSPCL. GVK has argued that some surface transportation of coal is necessitated for many reasons between the delivery point at the mine end and the Railway loading station. These reasons include transportation of coal to the washery and then to the Railway Station and sometimes because the available rail head is far off or due to non availability of rakes at the nearest rail head and also to ensure early lifting of coal. GVK also stated that it has arranged for this transportation and handling through a competitive bidding process.

10.8.2 PSPCL has alleged that this insistence on surface transportation at the mine end is GVK's attempt to seek an amendment in the 01.02.2016 Order without actually having filed an appeal or a review. PSPCL has also stated that Coal India Ltd. and its subsidiaries bill the thermal stations for the cost of

surface transportation of coal to the washeries and then to the rail head at a flat rate for slabs upto 20 km and thereafter on actual cost. PSPCL found the rates being paid by GVK as inconsistent and exorbitant and not reflecting actual charges in terms of deductions for shortages etc. PSPCL in fact has questioned the very bidding process by which GVK has arrived at these rates, as also the need for GVK to arrange its own surface transportation from rail heads other than those arranged by Coal India Ltd. Given the limitation in the 01.02.2016 Order, PSPCL is of the view that it cannot pay Surface Transportation charges to GVK.

10.8.3 The Commission has been made aware of instructions issued by Coal India Ltd. and its subsidiaries stating therein that there are flat rates charged for various distances upto 20 km of surface transport from the mines to the rail head. The instructions also state that actual costs are charged beyond 20 km. Distances would vary depending on the rail head/siding where the coal is loaded and as and when the coal is taken to the washeries. GVK has pleaded that for reasons of efficiency and faster handling it has engaged its own handlers and road transporters to move the coal from the mine to the rail head and asked for separate surface transportation charges.

10.8.4 Bharat Coking Coal Limited vide Ref. No. BCCL/M&S/SA/17/927 dated 29.03.2018 issued price notification no. 105 regarding revised surface transportation charges (STC) effecting from 01.10.2017 as under:

“BCCL Board in its 340th Meeting held at Koyla Bhawan, Dhanbad on 23rd March, 2018 vide Item No. 340.51 approved the revised Surface Transportation charges applicable on sale of Raw Coal w.e.f 01/10/2017 as amended below:

As recommended by the Audit Committee, Board after deliberation approved the Revised transportation Charges on sale of Raw Coal of BCCL as under w.e.f. 01.10.2017:

<i>Lead Distance in Km</i>	<i>Recommended rate of STC (in Rs./Te)</i>
<i>0-3</i>	<i>23.00</i>
<i>3-10</i>	<i>60.00</i>
<i>10-20</i>	<i>159.00</i>
<i>More than 20</i>	<i>As per Actual Expenditure.</i> „

10.8.5 In view of Coal India Ltd. or its subsidiaries instructions regarding rates of surface transportation charges on raw coal, which are amended from time to time, there actually appears to be no need for GVK to pay at different rates for external surface transportation at the mine end from pick up/delivery point to railway siding. Even if GVK has done so, it would have to be limited to what Coal India would have charged in its bills for that same distance. The information placed by GVK before the Commission

with regard to rates does appear inconsistent as stated by PSPCL. It is understood that in case of supply of coal to PSPCL by Coal India Ltd. or its subsidiaries, mostly the railway siding is available at the pickup/delivery point of the coal mine and there is no requirement for external surface transport. In a few cases, where external surface transport is required, the same is also billed by the coal company in the coal bill. It is in this background that the Order dated 01.02.2016 provided for payment of only rail transportation charges. As per PSERC Tariff Regulations, 2014, landed cost of coal is to be allowed which would include surface transportation also, of course subject to prudence check.

10.8.6 In view of the above, the Commission decides that in case GVK resorts to surface transport from pick up/delivery point at the mine end to railway siding on its own, it would be limited to surface transport up to the nearest railway siding and at the rates prescribed by BCCL or its subsidiaries upto 20 kms and for the distances beyond 20 kms at actuals (as provided in the notification above) as would have been billed by these coal agencies for the same nearest rail head. In such cases, the bill issued by the coal company for the coal would not include external surface transport costs. Such separate bill for the external surface transportation shall be supported by documentary

evidence where the coal company has charged the rate for external surface transport as per actuals for distances beyond 20 kms in the most recent past.

10.8.7 As regards SHAKTI coal, the Commission in its interim Order dated 11.06.2018 held as under:

“A supplementary agreement for long term coal linkage allocated under SHAKTI Scheme has been signed by GVK and PSPCL as per Commission’s Order dated 30.01.2018 in Petition no. 01 of 2018. In respect of the coal received under the SHAKTI Scheme, the energy charges shall be payable as per the actual cost of coal received under the said scheme including the actual transportation charges paid to Indian Railways and surface transportation charges at the mine end, if not included in the original cost of coal. GVK shall give discount on the gross amount of the bill in terms of clause G of the ‘Supplementary Agreement for long term coal linkage allocated under SHAKTI Scheme 2017’. This discount shall be computed with reference to Scheduled Generation from Linkage Coal supplied under SHAKTI Scheme.”

The said interim Order was challenged by PSPCL in Appeal No. 187 of 2018 before Hon’ble Appellate Tribunal for Electricity (APTEL) which came up for hearing on 16.07.2018. On 20.08.2018, GVK filed IA No. 09 of 2018 praying to the Commission to direct PSPCL to comply with the said Order dated 11.06.2018. The Commission vide interim Order dated 28.09.2018 decided to partially modify/amend the interim Order dated 11.06.2018 to the extent of deletion

of above para. This interim Order of 28.09.2018 has been challenged by GVK before Hon'ble APTEL on 04.10.2018 in Appeal No. 286 of 2018.

The Commission now decides that the external surface transportation charges for coal received/to be received by GVK under SHAKTI Scheme shall also be payable as per directions detailed in the foregoing paras.

10.9 Gross Calorific Value (GCV)

10.9.1 Regulation 39.4 of PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 provides as under:

“39.4 Energy Charge Rate (ECR) in Rupees per kWh on ex-power plant basis for coal based thermal power plant shall be determined to three decimal places in accordance with the following formulae:

$$ECR = \{(SHR - SFC \times CVSF) \times (LPPF / CVPF) + SFC \times LPSF\} \times 100 / (100 - AUX)$$

Where,

AUX = Normative auxiliary energy consumption in percentage;

CVPF = Weighted Average Gross calorific value of primary fuel as received, in kCal per kg or per litre or per cubic meter as applicable;

CVSF = Weighted Average Calorific value of secondary fuel, in kCal per ml;

ECR = Energy charge rate, in Rupees per kWh sent out;

SHR = Station Heat rate, in kCal per kWh;

SFC = Specific fuel oil consumption, in ml per kWh;

LPPF = Weighted average landed price of primary fuel, in Rupees per kg or per litre or per cubic meter as applicable;

LPSF = Weighted Average Landed Price of Secondary Fuel in Rs./ml.”

As per the above Regulation, weighted average gross calorific value of primary fuel, which is coal in case of thermal power plants, needs to be considered on ‘As Received Basis’.

- 10.9.2 PSPCL stated that GVK has been submitting bills with GCV on equilibrated basis and the coal suppliers bills are also on equilibrated basis. GVK does not have any coal testing facilities at its project site and gets the coal tested at Udaipur. PSPCL submitted that the bills of coal companies supplying coal to PSPCL’s Thermal Power plants also show the GCV of coal on equilibrated basis. GVK has submitted that GCV should be taken on ‘As Received Basis’. GVK has further submitted that PSPCL has incorrectly compared GCV of the coal used in its generating stations in a particular month to the GCV of coal used by GVK during other months. Moreover, PSPCL has used the GCV on ‘as received’ basis for working out the weighted average cost of coal for its own thermal power plants and has compared the same with the cost of coal supplied to GVK plant while taking the GCV of coal received at GVK plant on equilibrated

basis. GVK submitted that PSPCL has withheld the billed amounts in an adhoc and arbitrary manner towards GCV difference.

10.9.3 The Commission finds that the coal analysis reports of PSPCL's laboratories and the laboratory at Udaipur i.e. Mitra S.K. Pvt. Ltd. from which GVK gets its coal tested after sending the coal samples from the plant, mention both the Gross Calorific Value (Equilibrated Basis) and Gross Calorific Value (ARB). The Commission notes that PSPCL has been considering the Gross Calorific Value (Equilibrated Basis) while calculating the cost of coal of GVK plant for comparing it with the weighted average cost of coal of PSPCL's own thermal plants. Further, while taking the GCV for calculating the energy charge rate, PSPCL considers GCV on equilibrated basis in case of GVK whereas for claiming energy charges for its own thermal plants, PSPCL considers GCV on as received basis. The Commission is of the view that it is not fair on the part of PSPCL to consider Gross Calorific Value (Equilibrated Basis) instead of Gross Calorific Value (ARB) in contravention to the Commission's Regulations. The Commission holds that in line with the aforesaid Regulation 39.4, Weighted Average Gross Calorific Value of coal as received (ARB), in kCal per kg, shall be considered by PSPCL while working out the energy charge rate for GVK plant.

Further, GCV on ARB shall be considered for working out the weighted average cost of coal for PSPCL's own plants and GVK's plant for comparison and deciding the cost of coal for calculating the energy charge rate.

GVK is directed to set up the accredited coal testing facility/laboratory at its plant within one month. After the establishment of coal testing facilities at GVK project site, the testing of coal shall be carried out in the presence of PSPCL's representative(s) at the project site.

In case, for any reason, GCV of previous month(s) is considered for working out weighted average coal cost for PSPCL's thermal power plants against the GVK's bill of a particular month, then, in such cases the accounts/bills shall be reconciled by PSPCL with GVK within 15 days after the end of each quarter in a financial year.

10.10 Testing Charges

GVK's plea to be paid testing charges has been countered by PSPCL by stating that GVK does not have any testing facility of its own at project site and has been sending samples for testing to Udaipur.

The Commission is of the view that GVK is responsible for testing the coal it receives at the project site itself. Sending samples to Udaipur would mean a loss of calorific value and variation in

moisture and would defeat the purpose of testing coal ‘as received’. GVK must set up its own testing facility as directed in the foregoing para. No payment can be charged for this testing of its own coal.

10.11 Transit and Handling Loss

Regulation 40 of PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 provides as under:

“.....normative transit and handling losses as percentage of the quantity of indigenous coal dispatched by the coal supplying company as 1.0% (one) percent or actual, whichever is less:

Provided that no transit and handling losses shall be permissible in case of coal which is priced on FOR destination basis.”

The aforesaid Regulation was amended with effect from 01.10.2018 as under:

“The landed cost of fuel for the month for the purpose of computation of energy charge shall be as specified in Regulation 30(8) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014, as amended from time to time.”

The aforesaid Regulation 30(8) provides as under:

*“The landed cost of fuel for the month shall include price of fuel
.....
....., and, for the purpose of computation of energy charge, and in case of coal/lignite shall be arrived at after considering normative transit and*

handling losses as percentage of the quantity of coal or lignite dispatched by the coal or lignite supply company during the month as given below:

.....

Non-pithead generating stations : 0.8%

.....

Provided further that in case of imported coal, the transit and handling losses shall be 0.2%.”

Therefore, upto the period 30.09.2018, PSPCL's statement that it is allowing 0.8% transit and handling losses does not hold good. The Regulations must be followed. GVK needs to show its actual losses after proper checking and weighment at both the loading and project end. The bill must include proof of actual loss and state whether actual loss is being billed or the normative loss of 1.0%. As per the Regulations, normative transit and handling losses as percentage of the quantity of indigenous coal dispatched by the coal supplying company as 1.0% (one) percent or actual, whichever is less, is payable upto 30.09.2018. Transit and handling losses upto 30.09.2018 for imported coal from the unloading port in India to the plant, if any, procured by GVK shall also be payable as per CERC Tariff Regulations, 2014 as the same is not provided for in the aforesaid PSERC Tariff Regulations. From 01.10.2018 onwards transit and handling losses @ 0.8% shall be payable in terms of the 2nd Amendment of the said PSERC Regulations

issued on 08.08.2018 as amended upto date.

10.12 Water Charges

PSPCL has agreed to pay actual water charges and therefore, there is no dispute in this matter.

10.13 IEGC Compensation

GVK has asked for compensation for backing down its generation on the direction of PSPCL on the basis of the provision in the CERC (Indian Electricity Grid Code) Regulations, 2010 (IEGC) as opposed to no provision on this account in the PSERC (Punjab State Grid Code) Regulations, 2013 (SGC). PSPCL's argument is that while the IEGC prevails in matters of inter-state transmission, in the case of intra-state generation, the State Grid Code would prevail. There is no provision in the State Grid Code for compensation to be paid to generators when they are instructed by the SLDC to back down. The Commission agrees with PSPCL that in the absence of any provision in the SGC for such compensation, it is not payable.

10.14 Unscheduled Interchange (UI) Charges

GVK submitted that PSPCL has unilaterally withheld a sum of Rs. 14,02,533/- towards UI charges from amounts payable to GVK arbitrarily and without any basis. This has been done for the period from June, 2017 to July, 2018. GVK is seeking detailed computation of UI charges based on 15 'minutes

block' data from PSPCL. However, till date PSPCL has failed to provide the same. PSPCL submitted that GVK's contention with regard to UI charges is not understandable. The UI charges are based on the UI settlement made by the SLDC for the State. PSPCL has acted based on such UI settlement. If GVK has any issue with the UI charges or the UI settlement, the same is to be raised against the SLDC and not against PSPCL.

The Commission notes that the UI charges/Deviation Settlement Accounts are prepared by SLDC wherein UI/Deviation amount payable/recoverable by PSPCL for over-injection/under-injection by IPP is mentioned. Considering the same, the Commission directs that the matter may be settled by GVK with SLDC as per the provisions in the State Grid Code.

10.15 Difference in Scheduled Energy

Considering the submissions of GVK and PSPCL regarding difference in Scheduled energy due to revisions made by SLDC, the Commission holds that difference on account of the errors in scheduled energy, if any, may be reconciled by GVK and PSPCL at the end of each contract year after ascertaining the scheduled energy from SLDC.

10.16 Rebate on Amount paid and Interest on Amount withheld

As contended by GVK, PSPCL has been making part

payment of the bills and availing rebate on that payment, claiming that the rest of the billed items are incorrect and it cannot pay the entire billed amount when it is inflated. GVK has quoted Hon'ble APTEL and Hon'ble Supreme Court of India in this matter on two issues; One that neither party in dispute can set itself up as Judge and arbiter and second that rebate is available only when the full amount is paid, not when payment is done in part. The Hon'ble Appellate Tribunal has held in its judgment in *TNEB v. GMR Power Corporation and Others*, 2012 ELR (APTEL) 461 that the Procurer cannot unilaterally decide what constitutes a legitimate component of an invoice and it should use the dispute resolution mechanism if need be, as under:

“12.4. The State Commission has analyzed the issue in details. The relevant paragraphs are reproduced below:

.....

(10) The Respondent submits that he is bound to make full payment against an invoice, only if the invoice conforms to the PPA. This is a dangerous proposition, because the Respondent wants to arrogate to himself the authority to determine what constitutes a legitimate claim under the PPA. He wants to exercise the powers of an adjudicator. Dispute Redressal Mechanism is available to the Respondent under the PPA, which is meant to tackle such eventualities. He never exercised this option. The PPA is emphatic that the invoice shall be paid in full before raising a dispute. Therefore, we have no hesitation in dismissing the plea of the Respondent to

decide what constitutes a legitimate component of an invoice.

.....

12.5. We do not find any infirmity with the findings of the State Commission and accordingly confirm the same.”

The Hon’ble Supreme Court of India in its judgment in Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Company Private Limited, (2014) 11 SCC 53 has held as under:

“71. The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part-payment of the monthly invoices within 5 business days. We have noticed earlier that it was a precondition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, Aptel has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by Aptel. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Articles 10.3(a) to (c) of the PPA, letter of credit is to be established covering three months estimated billing, one month prior to commercial operation date. Under Article 10.3(d) of the PPA, an escrow account is to be established by the appellant in favour of the power company into which collections from designated circles are to flow

in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2(e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of Aptel on this issue do not call for any interference.

72. In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for compensation payment and billing. We are also not able to accept the submission of Mr Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part-

payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by PSPCL. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices.”

It is true that GVK's billing has not been entirely correct. PSPCL has also been arbitrary in its deductions/payments. Had PSPCL and GVK undertaken a reconciliation earlier, some of these issues would have been sorted out. A full reconciliation of accounts based on this order needs to be conducted. If after reconciliation, it transpires that PSPCL has to make some payment in a bill in pursuance of this Order, then PSPCL will pay interest on that amount, and return the rebate (if taken) with interest thereon also.

Both parties are directed to follow the billing procedure and the dispute resolution procedure mentioned in the PPA in future.

The petition is disposed of in terms of the above.

Sd/-

**(Anjali Chandra)
Member**

Sd/-

**(S.S. Sarna)
Member**

Sd/-

**(Kusumjit Sidhu)
Chairperson**

Chandigarh
Date: **06.03.2019**

