CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Coram:
Shri Gireesh B Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S.Bakshi, Member

Petition No. 170/MP/2013
Date of Order: 25.1.2016

In the matter of

Petition/Application under Section 79(1)(f) of the Electricity Act,2003 read with section 63 & 62 of the Electricity Act,2003 in the matter of disputes pertaining to the composite scheme of supply for power to Respondents 1 &2 (situated in State of Haryana).

And in the matter of
Jhajjar Power Limited
Village Khanpur, Tehsil Matenhail
Distt.Jhajjar- 124142
(Haryana) .....**Petitioner**

Vs

1. Uttar Haryana BijliVitran Nigam Limited

2. Dakshin Haryana BijliVitran Nigam Limited

   Through

   Haryana Power Purchase Centre
   Shakti Bhawan, Sector 6,
   Panchkula - 134109
   (Haryana)

3. Tata Power Delhi Distribution Ltd
   Grid Sub Station Building,
   NDPL House, Hudson Lane,
   Kingsway Camp, Delhi-110009

4. Tata Power Trading Company Ltd
   Corporate Centre, A Block,
   34, Sant Tularam Road,
   Carnac Bunder, Mumbai – 400001 .....**Respondents**

Parties Present

1. Shri Sanjay Sen, Senior Advocate for Jhajjar Power
2. Shri Ashim Gupta, Advocate Jhajjar Power
3. Shri AdityaJalan, Advocate for Jhajjar Power
4. ShriAshish Gupta, Advocate, Jhajjar Power
5. Shri David Simmons, Jhajjar Power
6. Shri Tarun Bajaj, Jhajjar Power
7. Shri NaveenMongal, Jhajjar Power
8. Shri M.G. Ramchandran, Advocate, HPGCL
9. Ms. Anushree Bardhan, Advocate, HPGCL
10. Shri Veniktesh, Advocate, TPTCL
11. Shri V.P.Singh, Advocate, TPTCL
12. Shri Ankit Parsoon, Advocate, TPTCL
13. Shri Alok Shankar, Advocate, TPDDCL
14. Shri Vaibhav Choudhery, Advocate, TPDDCL
15. Ms. Richa Shandiya, Advocate, TPDDCL
16. Shri Veniktesh Advocate, TPTCL

ORDER

The petitioner, Jhajjar Power Limited (JPL) has set up, owns and operates the Mahatma Gandhi Thermal Power Plant (MGTPP) with a capacity of 1320 MW (2x660 MW) in the State of Haryana has filed the present petition for adjudication of disputes with regard to the date of commercial operation and payment of capacity charges among other issues between the petitioner and the Uttar Haryana VijliVitran Nigam Limited and Dakshin Haryana VijliVitran Nigam Limited represented through the Haryana Power Purchase Centre (HPPC).

Facts in brief

2. The facts leading to the filing of the petition are capitulated in brief as under:

(a) Haryana Power Generation Company Limited (HPGCL) which was vested with the right related to procurement and bulk supply of electricity by the Government of Haryana was authorised by Uttar Haryana VijliVitran Nigam Limited (UHVNL) and Dakshin Haryana VijliVitran Nigam Limited (DHVNL) to procure power on their behalf. HPGCL conducted the International Competitive Bidding (ICB) in accordance with the ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees’ (Bidding Guidelines) issued by the Government of India on 19.1.2005 under section 63 of the Electricity Act, 2003 (the Act).

(b) As per the Bidding Guidelines, Case 2 projects refer to “hydro power projects, load centre projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process.” In accordance with the Guidelines, HPGCL incorporated Jhajjar Power Limited as a Special Purpose Vehicle for setting up MGTPP which would be transferred to the successful bidder on conclusion of the bidding process.

(c) HPGCL conceived MGTPP under Case 2 to be located at Matenheil, District Jhajjar, Haryana with fuel linkage to be procured from Government of India, Ministry of Coal. On 25.5.2006, HPGCL issued the Request for Qualification (RfQ) for development of MGTPP at the identified location for a capacity within the range of 1000-1200 MW. It was made clear in the RfQ that a bidder could quote more than 1200 MW if it was possible to accommodate the same in the identified project site. Para 2.3 of the RfP provided that MGTPP would have a minimum capacity of 1000 MW and maximum capacity of 1320 MW at the generation bus bar in accordance with the PPA. The RfP further provided that the procurers would contract 90% of the Available Project Capacity or Contracted Capacity from the date of commercial operation of MGTPP and the seller would have to sell the balance 10% of the Available Project Capacity outside the State of Haryana. The RfP also made it clear that MGTPP would fall within the Mega Power Policy as notified by the Ministry of Power, Government of India. Para 2.4.(iv) of the RfP clarified that the coal linkage for

MGTPP had been secured with the likely coal mines and specification of coal indicated in Annexure 13 of the RfP, though the exact location of mine/subsidiary of Coal India Limited wherefrom coal would be supplied was yet to be notified.

(d) China Light and Power Limited (CLP) was issued the RfQ on 19.2.2007 and after being shortlisted, was issued the RfP documents on 24.12.2007. CLP submitted its bid on 10.3.2008. On conclusion of the bidding process, CLP emerged as the successful bidder and Letter of Intent (LOI) was issued on 23.7.2008. Thereafter, CLP acquired 100% equity shares in Jhajjar Power Limited and entered into PPA dated 7.8.2008 with DHBVNL and UHBVNL (Haryana PPA) for supply of power from 90% net capacity of the power project. The petitioner, Jhajjar Power Ltd negotiated sale of 10% of the net capacity to New Delhi Power Company Ltd (presently known as Tata Power Delhi Distribution Ltd or TPDDL) in order to meet the qualification requirement of a Mega Power Project. The sale was executed through an inter-State trader namely, Tata Power Trading Company Limited (TPTCL) through a Power Purchase Agreement dated 20.1.2009 (Tata PPA) for sale of 10% power at the same tariff as under Haryana PPA. TPTCL entered into a back to back Power Sale Agreement dated 20.1.2009 with TPDDL at the same tariff for sale of the entire contracted capacity.

(e) Based on the PPAs dated 7.8.2008 and 20.1.2009 and confirmation of compliance by the Government of Haryana and Government of NCT of Delhi with the terms and conditions of the Mega Power Policy of Government of India, Ministry of Power vide its letter dated 13.5.2009 accorded Mega Power status to the 1320 MW MGTPP of Jhajjar Power Ltd.

(f) Central Coalfield Ltd (CCL) vide its letter dated 14.10.2008 issued the Letter of Assurance (LOA) in favour of Jhajjar Power Ltd for supply of 5.21 million metric tonnes per annum of E grade coal. It was clarified in the LOA that the assurance was subject to review and assessment by CCL of the total coal requirement of the Jhajjar Power Ltd as well as the incremental availability of coal from the mines of CCL and of the imported coal.

(g) The petitioner raised with CCL/CIL certain critical issues in the Model FSA which had adverse impact on the availability of power from the plant and sought resolution of such issues before signing the FSA. The Standing Linkage Committee-Long Term in its meeting held on 8.4.2010 noted the petitioner's readiness to sign the FSA and directed CEA and CIL to jointly resolve the issue raised by the petitioner.

(h) CEA in its letter dated 20.8.2010 advised the petitioner that due to limited availability of indigenous coal, FSAs between the Coal Companies and Power Project Developers would be signed once the unit was commissioned and its operation stabilised. CEA has further stated that all efforts are made by the CEA to ensure supply of coal to the power plant at the time of their commissioning and accordingly, MOUs would be signed between the coal companies and project developers for this purpose. CEA advised the petitioner to get in touch with the office of CEA prior to commissioning of the project so that CEA would advise CIL to issue necessary orders for commencement of supply of coal by the coal companies.

(i) The petitioner taking note of the provisions in New Coal Distribution Policy of Ministry of Coal and Letter of Assurance regarding import of coal to meet the shortfall in supply by CIL and in due consideration of CEA's advice to thermal power generators and boiler manufacturers to design the boilers with a blend ratio of 30:70 imported/High GCV coal: indigenous coal, sought in principle approval of the Haryana Utilities vide its letter dated 17.5.2011 to import coal in the range of 20-30% of the plant's annual coal requirements. The petitioner further sought advice of the Haryana Utilities on whether the petitioner would import coal directly from overseas coal suppliers or through CIL/CCL under the linkage/LOA or through an Independent Agency designated by the procurers. The petitioner through HPGCL requested HERC to opine on the mode of procurement of coal, in reply to which HERC vide letter dated 8.7.2011 clarified that since the tariff of Jhajjar Power Limited was discovered through competitive bidding, any issue that might arise between the parties would be dealt with in accordance with the provisions of the concluded PPA. The petitioner vide its letters dated 7.12.2011, 30.12.2011, 9.1.2012, 31.1.2012, 21.2.2012,9.4.2012 and 18.5.2012 followed up with HPCC/Haryana Utilities/Government of Haryana for permission for import of coal and mode of procurement. HPCC vide its letter dated 20.7.2012 accorded approval for import of 1 million tonnes of coal during 2012-13 out of which 0.4 million tonnes was to be procured from any of the bidders who would participate in the tender process of HPGCL and 0.6 million tonnes of coal was to be procured through ICB or CPSU route. The blending ratio was restricted to 15% of imported coal. After HPGCL selected the coal supplier on 18.10.2012, the petitioner placed orders for import of coal which was supplied with effect from 15.11.2012.

(j) The petitioner vide its letters dated 21.6.2012, 22.6.2012, 25.6.2012 and 29.6.2012 sought permission from HPPC to procure coal on 'as is where is' basis. HPPC vide its letter dated 30.6.2012 granted in principle approval for procurement of additional coal on 'as is where is' basis from the pithead through the petitioner's own arrangement. However, the parties were in correspondence with regard to the transportation/handling charges and in a meeting held on 7.10.2012 between the representatives of JPL, HPPC and Haryana Utilities, HPPC opined that procuring coal on 'as is where is' basis would not be economically viable for the procurers and accordingly, the petitioner dropped the proposal to procure such coal.

(k) As the Fuel Supply Agreement did not materialise before the Scheduled Commercial Operation Date (SCOD), the petitioner declared commercial operation of Unit 1 of MGTPP on 29.3.2012 by arranging coal through MOU route. The petitioner entered into a Fuel Supply Agreement with Central Coalfield Ltd, a subsidiary of Coal India Ltd, on 7.6.2012 for an Annual Contracted Capacity of 5.21 million tonnes of coal. The petitioner declared commercial operation of Unit 2 of MGTPP on19.7.2012.

(l) On account of shortfall in generation and supply of power by the petitioner to Haryana Utilities to the extent of contracted capacity, Haryana Utilities have disallowed capacity charges and also imposed penalties for not achieving the threshold limits as per the PPA, apart from not recognising 29.3.2012 as the date of commercial operation of Unit 1 of MGTPP. In the above factual background, disputes have arisen between the petitioner and Haryana Utilities which has led to the filing of the present petition.

Disputes between the petitioner and HPCC/Haryana Utilities

3. The petitioner has enumerated the disputes between the petitioner and respondents in para 14 of the petition as under:

(a) Non-payment of petitioner's claims of capacity charges for availability which the petitioner would have achieved, had the Haryana Utilities granted timely approvals for procurement of alternate coal such as as-is-where-is coal, e-auction coal and imported coal in terms of PPA with Haryana Utilities;

(b) Haryana Utilities' claim of penalty from the petitioner for failure to achieve threshold of 75% under the PPA;

(c) Non-acceptance by the Haryana Utilities of the date of commercial operation of Unit 1 of MGTPP as 29.3.2012;

(d) Non-payment of the capacity charge by Haryana Utilities which was payable to the petitioner in terms of Article 11 read with Schedules 7 and 11of the PPA for availability declared by the petitioner and power scheduled by SLDC Haryana.

(e) Non-Payment of transit losses claimed by the petitioner @1.5% as part of transportation charges.

(f) Non-Payment of the costs incurred by the petitioner towards railway staff charges, charges towards bank guarantee given by the petitioner to the railway and the coal supplier with respect to the purchase and transportation of coal from the mines to the power station and charges to third party agents for coal linkage to supplement or to achieve coal requirements on account of shortfall in coal under the FSA read with LOA.

(g) Refusal of Haryana Utilities to apply Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 with respect to application of UI charges.

4. The petitioner has invoked the jurisdiction of the Commission under section 79(1)(f) read with section 62 and 63 of the Act for adjudication of the above disputes between the petitioner and the respondents. The petitioner has made the following prayers:

"(a) Pending hearing and final disposal of the present Petition, direct the Respondents to refund and pay to the Petitioner the Penalty already deducted by the Respondents illegally and contrary to the provisions of PPA 1 along with interest thereon @ 18%;

(b) Pending hearing and final disposal of the present Petition, direct the Respondents to grant permission to the Petitioner from time to time, to procure coal from alternate sources and/or procure imported coal, as may be required for achieving 100% availability;

(c) Direct the Respondent to pay the Petitioner, Availability Charges in accordance with the bills of the Petitioner, to the extent envisaged under PPA1;

(d) Direct the Respondents to pay to the petitioner the amounts deducted by the Respondents as penalty, which deductions are illegal and not tenable;

(e) Restrain the Respondents from deducting any further Penalty in contravention of the PPA1;

(f) Direct the Respondents to accept March 29, 2012 as the Commercial Operation Date and to pay the Petitioner, Capacity Charges for the capacity declared by them from March 29, 2012 onwards till 31 March 2012 @ Rs. 0.748/kWh and for the Contract Year commencing on 1 April 2012 to 31 March 2013 @ Rs. 0.918/kWh and for subsequent Contract Years continue to pay in accordance with the Schedule 11 of PPA 1;

(g) Direct the Respondents to pay to the petitioner for transit losses claimed in their Monthly Bills already raised (and brought out in Annexure QQ) and also pay the transit loss charges as and when due, payable and claimed by the Petitioner in future;

(h) Direct the Respondents to pay the Petitioner coal handling agent's charges, railway charges, shunting charges and bank guarantee charges claimed by the Petitioner in their Monthly Bills already raised (and brought out in Annexure QQ) and also pay the said charges as and when due, payable and claimed by the petitioner in future;

(i) Direct the Respondents to pay Late Payment Surcharge and other payments payable under Article 11.3.4 on the outstanding Monthly Bills of the Petitioner;

(j) To relax the regulation allowing a coal transit loss of only 0.8% for non-pithead stations and directing the Respondents to pay the normative rate of allowable transit losses that may be determined by the Hon'ble Commission;

(k) Direct the Respondents to give timely approvals for advance action for procurement of coal from alternative sources, to meet the anticipated shortfalls from the linked sources of coal, to operate the power plant as per the PPA;

(l) Declare that the actions/omissions in the part of the Respondents, and specifically that of delaying/rejecting consent to the Petitioner to procure coal from alternate sources, is an Event of Force Majeure under the terms of PPA 1 as against the Petitioner;

(m) Grant interim and ad-interim ex parte reliefs in terms of reliefs (a) to (j) herein above;

(n) Direct the Respondents to apply only the UI regime with respect to the Petitioner in accordance with the CERC (Terms & Conditions of Tariff) Regulations, 2009 (CERC Regulations as amended from time to time);

(o) Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case; and

(p) For granting costs of the present Petition to the Petitioners."

Reply of Respondents

5. Haryana Power Utilities through Haryana Power Purchase Centre (HPPC) in their affidavit dated 2.12.2013 have taken preliminary objection regarding the jurisdiction of the Commission to adjudicate the dispute. According to the Haryana Utilities, the PPA dated 7.8.2008 between the petitioner and Haryana Utilities was pursuant to the tariff based competitive bidding held under section 63 of the Act and tariff so agreed in the PPA was adopted by Haryana Electricity Regulatory Commission (HERC). The petitioner had filed a petition before HERC in respect of substantially same issues claiming the reliefs under this petition. Haryana Utilities have further averred that the PPA does not deal with the sale of any capacity to TPTCL and therefore, the PPA for generation and sale of electricity by the petitioner to Haryana Utilities is independent of the PPA for generation and sale of power to TPTCL. Haryana Utilities have averred that the petitioner has neither alleged any dispute in regard to its PPA with TPTCL nor has made TPTCL a party to the petition.

On the merit of the claims of the petitioner, Haryana Utilities have submitted the following:

(a) As per Article 4.1.1(b) of the PPA, it is the Seller's obligations to execute the project in a timely manner so as to enable each of the units and the power station as a whole to be commissioned not later than its Scheduled Commercial Operation Date (SCOD) and such that as much of the contracted capacity as can be made available through the use of prudent utility practices will be made available reliably to meet the procurers' scheduling and despatch requirements throughout the term of the agreement. The commissioning of the units by undertaking the performance test as per the PPA will not by itself amount to achievement of commercial operation. The objectives of the commissioning the unit is to enable sustained supply of electricity to the extent of the contracted capacity and commercial operation occurs only if the petitioner is in a position to operate the plant in a sustained manner to supply electricity to the respondents to the extent of the contracted capacity.

(b) As regards the fuel arrangement and procurement, Haryana Utilities have submitted that their obligations are restricted to making available the coal linkage and other initial consents as contained in Schedule II read with Article 3.1.2A of the PPA, and all other obligations in regard to the coal supply including finalisation and signing of the Fuel Supply Agreement are the responsibilities of the petitioner. Moreover, the inadequacy of coal supply from CCL/CIL is not a force majeure event after the commercial operation of the first unit of the power project and the petitioner cannot claim anything contrary to the specific stipulation in the PPA. The FSA with CIL/CCL also provides for a scheme of import of coal by CCL/CIL itself to the extent of shortage of coal and therefore, there is an avenue for the petitioner to obtain imported coal from CCL itself in terms of the FSA.

(c) The petitioner having conducted the performance and commissioning test and having obtained certificate from the Independent Engineer in support of the successful completion of the performance test and commissioning ought not to have proceeded to declare the commercial operation of Unit 1 from 29.3.2012 in the absence of the coal availability for sustained operation. The petitioner could have declared commercial operation of Unit 1 after signing the Fuel Supply Agreement on 7.6.2012. In the circumstances, Haryana Utilities have agreed to treat 7.6.2012 as the appropriate date of commercial operation and the period upto 7.6.2012 need to be considered as pre-commercial operation period. The consequences of having not declared the COD as on the SCOD (i.e.22.1.2012) need to be considered in the light of the provisions of the PPA including Article 12 dealing with Force Majeure. After COD, the Haryana Utilities are liable to pay the capacity charges only to the extent of DC duly declared by the petitioner on the basis that the petitioner has sufficient quantum of coal and will be in a position to generate and deliver electricity. The petitioner is not entitled to claim any capacity charges for the quantum not covered by DC on the ground of inadequate supply of coal by CIL.

(d) The petitioner has wrongly alleged that the Haryana Utilities have not facilitated and have denied consent to the petitioner to procure coal through open auction or under MoU route in fulfilment of the obligations of the Haryana Utilities under Article 7.2 of the PPA. Article 7.2 of the PPA cannot be interpreted in a manner which gives right to the petitioner to decide on the sourcing of coal at its whims and expect the respondents to give their consent. The Fuel Supply Agreement offered by CCL/CIL was in accordance with the Coal Policy of the Government of India notified from time to time. The petitioner had been asking CCL for deviation in material respects in regard to the terms proposed by CCL based on the coal policy. CCL did not agree to the above deviation. The petitioner ought to have accepted the terms and conditions of CCL and procured the necessary coal if the petitioner was interested in declaring the COD soon after the synchronization and commissioning on 22.1.2012. The petitioner cannot hold the Haryana Utilities in any way responsible or liable for the delay in the execution of the Fuel Supply Agreement on account of the differences between the petitioner and CCL on the terms of the Model Fuel Supply Agreement. As regards the allegation of not allowing the petitioner for importing coal, Haryana Utilities have submitted that the petitioner has been taking inconsistent stand on the use of imported coal i.e. while the petitioner initially stated that it cannot use more than 15% of the plant capacity for generation through imported coal, subsequently the petitioner has claimed that it can use imported coal upto the extent of 40% to 60% of the plant capacity. Based on the recommendations of the CEA, the petitioner was allowed to blend 40% of the imported coal and not exceeding 35% on annual basis and the petitioner cannot be allowed to blend more than the said quantum. Moreover, the petitioner did not import coal in accordance with the approval taken from the Haryana Utilities for procuring imported coal from the sources identified for the purpose, and imported coal from some other sources.

(e) As regards the transmission losses and other issues raised by the petitioner for adjudication, Haryana Utilities have submitted that all such claims have to be considered in accordance with the provisions of the PPA and none of such claims can be entertained or allowed if they are not envisaged in the PPA.

6. During the hearing of the petition on 7.1.2014, learned counsel for the Haryana Utilities took preliminary objection that TPTCL has not been impleaded as a party in the petition even though it is off taking 10% of power from MGTPP under Tata PPA. Learned senior counsel for the petitioner opposed the preliminary objection on the ground that since TPTCL had been making payments in terms of the PPA and the petitioner had no dispute with TPTCL, there was no requirement to implead TPTCL as respondent in the petition. The Commission after considering the submissions of the petitioner and Haryana Utilities decided vide its order dated 22.4.2014 observed as under:

> "8. The petitioner claims that the generating station has a composite scheme for supply of power to more than two States, i.e. 90% of contracted capacity to Haryana Utilities and 10% power to Tata Power Delhi Distribution Limited through TPTCL. In this connection, para 10 of the petition is extracted as under:
>
> > "10. In order that the Plant meets the qualification requirement of a Mega Project and as the same was formed as a composite scheme, the petitioner negotiated sale of 10% of the net capacity to New Delhi Power Limited ("NDPL") (now called Tata Power Distribution Limited).

The sale was executed through a trader i.e. Tata Power Trading Company Limited ("TPTCL") vide a Power Exchange Agreement dated January 20, 2009 for sale of power generated from 10% of the Plant`s Net capacity, i.e. 123.72 MW, at the same tariff as under PPA 1 ("PPA 2"). The duration of PPA 2 was 25 years. The sale of power to TPTCL under PPA 2 was made conditional on it re-selling such power solely and exclusively to the distribution licensee in the National Capital Territory of Delhi by the name of NDPL at the relevant time. NDPL is now known as Tata Power Delhi Distribution Limited ("TPDDL").TPTCL, accordingly, executed a back-to back Power Sale Agreement with TPDDL on the same day and on the same tariff, and agreed to sell the entire power contracted from the petitioner to TPDDL for distribution in the National Capital Territory of Delhi i.e. outside the State of Haryana. Thus, a composite scheme actually came into existence on the lines conceptualized under the Bid Documents."

It is evident from the above that the petitioner is supplying power to Tata Power Delhi Distribution Limited (TPDDL) through TPTCL. The petitioner has a PPA with TPTCL which has a back to back Power Supply Agreement with TPDDCL. Since the petitioner is supplying power to Haryana Utilities as well as TPDDCL, it prima facie satisfies the conditions of section 79(1) (b) of the Act.

9. The petitioner has stated that similar PPA has been entered into by the petitioner with TPTCL as in the case of Haryana Utilities. It therefore follows that decision on the disputes with regard to the various provisions of the PPA with Haryana Utilities will equally affect the TPTCL and TPDDCL. In view of that matter, TPTCL and TPDDCL are considered as necessary parties and need to be heard. Accordingly, we direct the petitioner to revise the memo of parties to implead TPTCL and TPDDCL as respondents and serve copies on them within one week. TPTCL and TPDDCL are directed to file their replies if any within two weeks and the petitioner may file its rejoinder if any within one week thereafter. The petitioner is directed to file its rejoinder to the reply of HPPC within two weeks if not already filed."

7. Accordingly, the petitioner has impleaded TPTCL and TPDDL as parties. TPTCL and TPDDL have filed their replies.

Jurisdictional Issue

8. The Haryana Utilities in their reply dated 2.12.2013 had taken the stand that the agreement for generation and sale of electricity by the petitioner to the Haryana Utilities is independent of the agreement entered into by the petitioner with TPTCL

and therefore, there cannot be any composite arrangement for generation or sale of electricity within the meaning of Section 79 (1) (b) of the Act for this Commission to exercise the power of adjudication under Section 79 (1) (f) of the Act. In the interim order dated 22.4.2014, the Commission took a prima facia view that the petitioner has a composite scheme for generation and sale of electricity in more than one State and directed TPTCL and TPDDL to be impleaded as parties. The petitioner has impleaded both TPTCL and TPDDL as parties to the petition. Both TPTCL and TPDDL have filed their submissions. TPTCL in its reply dated 28.8.2014 has admitted that it entered into a PPA dated 20.1.2009 with the petitioner for purchase of 10% power generated from the project and in turn entered into a back to back PSA on the same day with TPDDL for sale of such power. TPTCL has submitted that it has completely complied with the provisions of Tata PPA and PSA by proactively engaging with the petitioner as well as TPDDL. TPTCL has further submitted that the averments made by the petitioner claiming breach of contractual provisions in Haryana PPA are specific to Haryana Utilities and no allegation has been made qua TPTCL. TPDDL in its reply dated 23.6.2014 has submitted that TPDDL has filed Petition No.319/MP/2013 under section 79(1)(f) of the Electricity Act seeking certain reliefs including a declaration regarding the date of commercial operation of the power project. TPDDL in para 9 of its reply has submitted that this Commission has been conferred with requisite power under the Electricity Act to adjudicate the dispute raised in the petition.

9. This Commission has been vested with the function under clause (b) of sub-section (1) of section 79 of the Electricity Act to regulate the tariff of generating companies other than those owned or controlled by the Central Government which either enter into or otherwise have a composite scheme for generation and sale of

power in more than one State. Thus, for invocation of section 79(1)(b) of the Electricity Act, the conditions that are required to be fulfilled are: (a) the generating company is not owned or controlled by the Central Government; (b) the generating company has a composite scheme for generation and sale of electricity in more than one State; and (c) the generating company has either entered into or otherwise has a composite scheme. There is no dispute that MGTPP is not owned or controlled by Central Government. It is a Private Limited company which has been selected through the competitive bidding carried out under section 63 of the Act to develop, own, operate and maintain MGTPP. The second feature is the composite scheme for generation and sale of electricity in more than one State. The words "composite scheme", "enter into" and "otherwise have not been defined in the Electricity Act. Therefore, as per the standard rule of interpretation, the Commission has to consider the dictionary meaning of terms used. Webster's Third New International Dictionary defines the word 'composite' as 'something that is made up of diverse elements'. P Ramanatha Aiyer's Law Lexicon defines 'scheme' as "a plan; purpose; a specific organisation for some end; a combination of things by design." Webster's New World Dictionary and Shorter oxford English Dictionary, Vol. II defines 'scheme' as 'a carefully arranged and systematic programme of action; a systematic plan for attaining some object; a project; a system of correlated things." In State of West Bengal Vs Swapan Kumar Guha (AIR 1982 SC 949), the Hon'ble Supreme Court has held that "the systematic programme of action has to be a consensual arrangement between two or more persons....".In section 79(1)(b) of the Electricity Act, the word 'composite scheme' has been followed by the words 'generation and sale of electricity in more than one State'. Therefore, under section 79(1)(b), a composite scheme signifies a systematic programme of action betweena generating company and more than one State for generation and sale of electricity. The third feature is that the generating company has either entered into or otherwise has a composite scheme. P Ramanatha Aiyar's Law Lexicon defines the words "enter into" as "to engage in or bind oneself by (an engagement, contract, treaty etc.)". Therefore, in the context of section 79(1)(b), the words "enter into…a composite scheme" will mean that the generating company has entered into a contract or agreement for generation and sale of electricity in more than one State. The other words used in section 79(1)(b) are "otherwise enter into". Webster Dictionary defines the term 'otherwise' as "in a different manner; in other respects." Therefore, "or otherwise have" will signify the composite scheme emerging in a different way or circumstance than through entering into contracts. The scheme can emerge by operation of law such as in case of reorganisation of a State into more than one State requiring the generating company to supply power to more than one State.

10. In the light of the above discussion, we shall now consider whether the petitioner, Jhajjar Power Limited, has a composite scheme. There is no dispute that the petitioner is not owned or controlled by Central Government. As regards the composite scheme, we have noticed that in both RfQ and RfP documents floated by HPGCL to select a bidder for development of MGTPP and supply of power to the Haryana Utilities, there was clear stipulation that the successful bidder would have to find a buyer outside the State of Haryana to sell 10% of the available project capacity since the project would fall under the Mega Power Policy as notified by Ministry of Power, Government of India. Consequent to the award of the bid, CLP acquired Jhajjar Power Limited as its 100% subsidiary and Jhajjar Power Limited entered into PPA dated 23.7.2008 with Haryana Utilities and PPA dated 20.1.2009 with TPTCL

for supply of power to TPDDL who entered into a back to back PSA with TPTCL. Therefore, Jhajjar Power Limited as a generating company hasa composite scheme for generation and sale of electricity in more than one State. Moreover, Ministry of Power under its letter dated 13.5.2009 has accorded Mega Power Project status to the power project and the Mega Power Certificate issued by Ministry of Power certifies that the power project being set up by M/s Jhajjar Power Limited is an inter-State thermal power plant of capacity of 1320 MW supplying power to the States of Haryana and Delhi. In view of the above discussion, we conclude that Jhajjar Power Limited fulfils the conditions of a generating company having a composite scheme for generation and sale of electricity in more than one State and falls within the regulatory jurisdiction of the Central Commission under clause (b) of sub-section (1) of Section 79 of the Electricity Act. Any dispute relating to the regulation of tariff under section 79(1)(b) shall be adjudicated by this Commission under section 79(1)(f) of the Act. Moreover, Article 17.3.1 of the Haryana PPA provides that where any dispute arises from a claim made by any party for any change in or determination of the tariff or any other matter related to tariff or determination of any such claim which would result in change in tariff, such disputes shall be submitted for adjudication by the Appropriate Commission. Appropriate Commission has been defined in the Haryana PPA as the HERC or CERC as the case may be. Similar provisions also exist in the PPA between Jhajjar Power Ltd and TPTCL and in the PSA between TPTCL and TPDDL and Appropriate Commission has been defined in these agreements as CERC or HERC or DERC as the case may be. Since Jhajjar Power Limited has a composite scheme for generation and supply of electricity to the States of Haryana and National Capital Territory of Delhi, the Appropriate

Commission for adjudication of the dispute between the petitioner and the procurers under the Haryana PPA, Tata PPA and Tata PSA is the Central Commission.

11. Haryana Utilities have raised the point that the petitioner had filed a petition before HERC and has accordingly accepted the jurisdiction of HERC. The petitioner has submitted that the petitioner was inadvertently mistaken in filing Petition No. HERC/PRO-13 of 2013 before HERC under section 86(1)(b) of the Electricity Act in order to comply with the requirements of the Haryana Utilities as brought out during the meeting held on 7.10.2012. The petitioner having realised the statutory scheme in the Electricity Act has withdrawn the petition filed before HERC. We have perused the order dated 27.8.2013 passed by HERC. The following paragraphs of the said order are relevant which have been extracted as under:

> "In the hearing held on 14.8.2013, the Ld. Counsel appearing for the petitioner moved a motion seeking order/directions from this Commission to permit them to withdraw their main petition i.e. HERC/PRO-13 of 2013 on the plea that the jurisdiction to hear the present dispute between the parties lies with the Central Electricity Regulatory Commission under section 79(1)(b) read with section 79(1)(f), 62 and 63 of the Act. The Ld. Counsel for the petitioner further prayed that they may be granted leave to re-approach and re-file a petition before this Commission should the Central Commission conclude that they do not have the jurisdiction to hear and decide the matter.

……………………………………………………………………………………………

> The petitioner is permitted to withdraw the petition (Case No.HERC/PRO-13 of 2013) with liberty to file a fresh petition later on the same grounds, if they choose to do so.
>
> Before parting with this order the Commission makes it abundantly clear that the Commission has not gone into the merit of the case including the issue of jurisdiction."

The petitioner has withdrawn the petition at the preliminary stage which has been permitted by HERC. Moreover, HERC has not gone into the issue of jurisdiction and merit of the case as categorically stated in the said order. We are of the view that the objection of Haryana Utilities cannot be sustained and the petitioner is not prevented from invoking the jurisdiction of the Commission in terms of appropriate provisions of the Electricity Act for adjudication of the dispute.

12. It is pertinent to note that the Haryana Utilities in their written submission have accepted the jurisdiction of this Commission to adjudicate the dispute. Relevant para of the written Submission is extracted as under:-

> "From the pleading in the present petition and in the connected petition it appears that 10% of the power from the project is to be sold to Tata Power Trading Company Limited to be in turn sold to Tata Power Delhi Distribution Company Limited on the same terms and conditions contained in the Power Purchase Agreement dated 7.8.2008 for sale of 90% of the power to the Haryana Utilities. The only additional feature in the case of sale of Tata Power Trading Company Limited is the implication of the transmission charges. In the above premise and with the representation of JPL that the sale of 10% contracted capacity to Tata Power Trading Company Limited is at the same tariff as that to Haryana Utilities, the present submissions are being made on the merits of the case without pressing the issue of jurisdiction raised under Section 79 (1) (b) of the Electricity Act, 2003."

13. Having settled the issue of jurisdiction, we now proceed to consider the disputes raised by the petitioner on merit.

A. Dispute regarding Commercial Operation Date of Unit 1 of the Power Project

14. The petitioner has submitted that Haryana Utilities were obliged under Article 3.1.2A of the Haryana PPA to provide to the petitioner a coal linkage from Ministry of Coal. Haryana Utilities arranged issuance of LOA from CCL for supply of 5.21 million tonnes of E grade coal per annum. According to the LOA dated 14.10.2008, any shortfall in the supply of domestic coal would be made up by importation of coal. There is no dispute that the petitioner had achieved all milestones as stipulated in the LOA. The petitioner was required under Article 3.1.2 of the Haryana PPA to

execute a Fuel Supply Agreement with the coal supplier within 13 months of the issuance of LOI i.e. by 22.8.2009. According to the petitioner, the model FSA circulated by CIL/CCL contained certain onerous and unfavourable terms which were detrimental to the interests of the petitioner and the Haryana Utilities. Those conditions were (a) the minimum supply obligation was pegged at 50% of the Annual Contracted Quantity; (b) tenure of the FSA was for 5 years; and (c) the coal supplier could supply upto 50% of its supplies under the proposed FSA through importation of coal. The petitioner is stated to have approached Ministry of Coal and Ministry of Power, Government of India and Department of Power, Government of Haryana seeking their assistance to modify the terms of the FSA in line with the PPA. In the fourth coordination committee meeting held on 25.2.2010 between the petitioner and Haryana Utilities, it was agreed that HPPC in consultation with HPGCL would take up the matter with Ministry of Coal, Government of India to sort out the various issues such as terms of the FSA for the project to be of 25 years, supply of 90% of the domestic coal, impact of blending on tariff, and limitation on use of imported coal on boilers. CEA in its letter dated 20.8.2010 informed the petitioner that in view of limited availability of coal, the FSA would only be signed after stabilisation of the unit after its commissioning and CEA was making efforts to ensure that the coal requirement of the power projects would be met through supplies under Memorandum of Understanding (MOU) signed between project developers and coal companies. HPGCL vide its letter dated 30.8.2010 requested CEA that keeping in view the commissioning of 1st unit during 11th plan period i.e. December 2011, the request of the petitioner regarding consistent supplies of requisite quantities of coal for the project initially for commissioning/early operation period through MOU be considered to meet the ever-growing demand of power in the State of Haryana.

HPGCL also granted time till 30.4.2012 to the petitioner to sign the Fuel Supply Agreement and Fuel Transportation Agreement vide its letter dated 12.8.2011 and further advised the petitioner to obtain interim supply of coal for the commissioning of the project through MOU route on the recommendations of Central Electricity Authority. Pursuant to HPGCL's advice, the petitioner entered into MOUs with CCL, the details of which are given below, to procure coal, until such time the FSA was executed:

Date of MOU	Period of Supply	Quantity Committed (Tonne)	Quantity received (Tonne)
September 20, 2011	December 2011	60000	57,145.10
February 2, 2012	March 2012	75000	1,15,251.58
February 25, 2012	March 2012	60000	
March 13,2012	March 2012	75000	

On account of inability of the CIL/CCL to supply the quantities of coal contracted under the above MOUs, the petitioner expressed its inability to commission the unit by Scheduled Commercial Operation Date (SCOD) of 22.1.2012 and vide its letter dated 28.12.2011 issued a notice to the HPCC/Haryana Utilities intimating them about the Natural Force Majeure Event in which it was indicated that the estimated commissioning date would be 17.2.2012. HPPC vide its letter dated 7.1.2012 requested the petitioner to submit a certificate from the Independent Engineer in terms of Article 12.3 (i) of the PPA which the petitioner submitted vide its letter dated 12.1.2012. The petitioner also sought deferment of the SCOD of the unit, Scheduled Connection Date and Scheduled Expiry Date in terms of Article 4.5 of the Haryana PPA. The petitioner vide its letter dated 21.2.2012 intimated the Haryana Utilities that in the light of anticipated coal supplies, performance test was expected to be commenced after 24.2.2012. The petitioner vide its letter dated 27.2.2012 informed

HPPC that it had built up a coal reserve of around 7 days @ 9500-9800 Tonnes/day for full load operation of Unit 1 and was ready for lighting the boiler on 28.2.2012 and conduct the performance test in terms of the PPA. According to the petitioner, MGTPP was affected by Natural Force Majeure from 12.1.2012 (i.e. 10 days prior to the SCOD date of 12.1.2012) and ceased on 27.2.2012 when the petitioner built up sufficient coal stock. The petitioner has submitted that in terms of Article 4.5 of Haryana PPA, the SCOD of Unit 1 should at the very least stand deferred by 10 days from the date of cessation of Force Majeure Event i.e. from 27.2.2012. As per the OEM Manual, it would take 375 minutes to achieve synchronisation from lighting up of the boiler and 575 minutes for achievement of full load from synchronisation. The petitioner has submitted that taking these factors into consideration, SCOD should have been revised to 10.3.2012.

15. The petitioner has submitted that it informed the Haryana Utilities about the revised procedure for PPA Performance Test approved by the Independent Engineer vide its letter dated 27.2.2012. The petitioner in its letter dated 1.3.2012 informed the Haryana Utilities that it had lighted up the boiler on 28.2.2012 at 0406 hours, synchronised unit 1 with the grid at 2132 hrs and started PPA Performance Test at 2100 hours on 29.2.2012. The petitioner on 2.3.2012 informed the Haryana Utilities that Unit 1 had successfully completed Noise Level Test and Auxiliary Consumption Test and was undergoing 72 hours Full Load Test and Emission Test. On 5.3.2012, the petitioner informed Haryana Utilities that Unit 1 boiler tripped due to instrumentation problem at 10.45 hours on 4.3.2012 and could not complete the Performance Test. Vide its letter dated 16.3.2012, the petitioner informed the Haryana Utilities that had the coal stock of around 5 days and it was in the process

of receiving coal from CCL under the second MOU and was ready for Performance Test with the tentative schedule of lighting the boiler on 17/18.3.2012 and synchronisation with the grid on 18/19.3.2012. The petitioner vide its letter dated 28.3.2012 informed the Haryana Utilities that the Unit 1 has passed the commissioning test which was witnessed by the Independent Engineer and the representatives of Haryana Utilities and annexed the Final Test Certificate of the Independent Engineer stating that Unit 1's tested capacity was 660 MW (i.e. more than 95% of the Contracted Capacity) and was acceptable. The petitioner has submitted that in terms of Article 6.3.1 of the Haryana PPA, Unit 1 stood commissioned on 29.3.2012 i.e. the day after the Haryana Utilities received the Final Test Certificate.

16. According to the petitioner, it informed HPPC that it had sent its Declared Capacity to Haryana SLDC on 29.3.2012 requesting for scheduling of power and accordingly, Haryana SLDC scheduled power from 29.3.2012. The petitioner's grievance is that though it declared availability between 21.4.2012 and 11.5.2012, Haryana SLDC did not issue scheduled generation regularly on the contention that HPPC had not confirmed the COD for Unit 1 which was in complete violation of the PPA.

17. Haryana Utilities have submitted that the declaration of commercial operation of Unit 1 on 29.3.2012 by the petitioner was not valid as the petitioner was not in a position to continuously generate electricity with sustained operation of Unit 1 from 29.3.2012. Haryana Utilities have submitted that the attempt of the petitioner to declare the commercial operation of the Unit 1 from 29.3.2012 was to take

advantage of the obligation to supply in the first year at a lower tariff of Rs.0.748 in three days, namely, 29th, 30th and 31st March 2012 only and thereafter claim the second year tariff for the financial year 2012-13. Haryana Utilities have submitted that Article 6.1 of the PPA deals with synchronisation of the units of MGTPP with the grid and Article 6.2 deals with the commissioning of units of MGTPP which essentially relates to the performance test to see whether the plant operates upto 95% of the contracted capacity on a sustained basis for a continuous period of 72 hours. Haryana Utilities have submitted that after the performance has been certified in terms of Article 6.2 by the Independent Engineer by issue of a Final Test Certificate that the plant can be operated on a sustained basis, then only the plant can be said to have been operated and in the absence of the certificate to that effect, COD cannot be said to have been occurred. Haryana Utilities have submitted that the PPA does not envisage commercial operation as an empty formality but with a definite purpose as required under Article 4.1.1.b of the PPA i.e. as much of the contracted capacity will be made available reliably to meet the scheduling and commercial operation requirements of Haryana Utilities. Haryana Utilities have further submitted that as far back as 3.1.2012, the petitioner had accepted the position that the availability of coal stock for undertaking commissioning of the unit was not there which was supported by the letters of the Independent Engineer dated 3.1.2012 and 12.1.2012. The same situation that was prevailing as on 3.1.2012 with the plant's inability to operate with limited coal and consequent inability of the petitioner to declare the COD existed on 29.3.2012 with an almost similar limited quantum of coal being available. The petitioner during the hearing had contended that the Haryana Utilities in the meeting dated 10.5.2012 between the officers of JPL and officers of Haryana Utilities had not questioned the date of commercial operation of the Unit 1 as 29.3.2012. In response to the said contention, Haryana Utilities have submitted that the minutes of the meeting dated 1.5.2012 pertained to the financial year 2012-13 and in that context, JPL agreed that for the purpose of annual availability, the capacity charges would be restricted to the days when the electricity was actually scheduled and not otherwise, and the minutes of 10.5.2012 was not an endorsement of the commercial operation as 29.3.2012. Haryana Utilities have submitted that the petitioner having conducted the performance and commissioning test and having obtained certificate of the Independent Engineer in support of the successful completion of the performance and commissioning, ought not to have proceeded to declare the commercial operation from 29.3.2012 in the absence of the coal availability for sustained operation. Haryana Utilities have submitted that the petitioner signed the FSA on 7.6.2012 and therefore, the commercial operation could commence on sustained basis with effect from that date. As regards the period prior to 7.6.2012, Haryana Utilities have submitted that the period upto 7.6.2012 need to be considered only as pre-commercial operation period and the consequence of having not declared the COD as on the SCOD i.e. 22.1.2012 need to be considered in the light of the provisions of the PPA including Article 12 dealing with force majeure.

18. TPTCL has submitted that it has acted merely as a facilitator for the sale and purchase of power between the petitioner and TPDDL and has no further role to play vis-à-vis the adjudication of the dispute raised in the petition. TPDDL in its reply has submitted that the petitioner did not have a Fuel Supply Agreement in place and was therefore not in a position to generate power after the COD of the first unit. However, the petitioner managed to procure coal for conducting the commissioning test and

declared commercial operation of the Unit 1 and Unit 2 of MGTPP on 29.3.2012 and 19.7.2012 respectively. TPDDL has submitted that after the commercial operation of the units of the generating station, negligible power has been supplied to TPDDL due to inefficient fuel linkage and TPDDL had to pay transmission charges of approximately Rs. 33 crore to PGCIL and HVPNL without getting the commensurate supply of power. TPDDL has further submitted that as per clause 7.2.1 of the PSA between TPTCL and TPDDL, if Haryana Utilities give their consent to Fuel Supply Agreement proposed to be entered into, the consent of TPDDL is deemed to have been given and therefore, TPDDL neither assumed any obligation in relation to the fuel for the generating station nor had any significant role in procurement of fuel as per PSA. TPDDL has submitted that the declaration of commercial operation is an indication to the off-taker of the generating company about the readiness of the generating station to commence supply of power on firm basis. According to TPDDL, all the actions of JPL constitute a fraud by inducing TPDDL into believing about the ability of the generating station to generate power and thus incurring the liability to pay transmission charges. TPTCL in its reply has submitted that it signed a Power Purchase Agreement with the petitioner on 20.1.2009 for purchase of 10% of power generated from MGTPP and in turn has entered into a back to back PSA of the same date with TPDDL for sale of such power.

19. The petitioner has submitted that the Haryana PPA and Tata PPA provide for specific guidelines based on which COD of the unit may be declared. The PPAs further require that for the purpose of declaration of COD, final test certificate should be issued by the Independent Engineer to the effect that the commissioning tests have been carried out as per Schedule 5 of the Haryana PPA and the unit’s tested

capacity is not less than 95% of its contracted capacity as existing on the effective date. The final test certificate for Unit 1 issued by the Independent Engineer on 28.3.2012 conclusively stated that the commissioning tests had been carried out in accordance with the PPA and were acceptable and the results of the performance test showed that the tested capacity of Unit 1 was more than 95% of the contacted capacity as on the effective date. The petitioner has submitted that the Haryana Utilities and TPTCL were provided with the final test certificate on 28.3.2012and the findings of the Independent Engineer in the Final Test Certificate have not been disputed or challenged by the Haryana Utilities and TPTCL. The petitioner has further submitted that since the PPAs provide that the COD of the unit would be the date on the day after the date when each of the procurers received a copy of the Final Test Certificate of the Independent Engineer as per the provisions of Article 6.3.1, the petitioner has declared the COD of Unit 1 as 29.3.2012. The petitioner has further submitted that the conduct of the Haryana Utilities and TPTCL further established that the result of the final test certificate and consequently, COD of Unit 1 were accepted by the procurers. As regards the allegation of Haryana Utilities and TPDDL that the petitioner was required to execute FSA and to arrange sustained supply of fuel prior to the declaration of COD, the petitioner has submitted that execution of FSA was not and could not have been a pre-requisite for declaration of COD as CEA vide its letter dated 20.8.2010 had stated that on account of limited availability of indigenous fuel, FSA would be signed only after the Unit was commissioned and its operation had stabilized. The petitioner has further submitted that the petitioner secured sustained coal supply through MoUs as per the directions of CEA prior to declaration of the COD.

20. We have considered the submissions of the petitioner and the respondents on the issue of declaration of commercial operation of Unit 1 of MGTPP. Considering the rival submissions of the parties, the following issues arise for our consideration:

(a) Issue No. 1: Whether the petitioner has discharged its responsibilities under the PPAs to procure fuel for commissioning of the Units and for operation of the units of MGTPP after their commercial operation?

(b) Issue No. 2: Whether signing of a Fuel Supply Agreement is a condition precedent for declaration of commercial operation of the units of MGTPP?

(c) Issue No. 3: Whether the petitioner has complied with the provisions of the PPAs for declaration of the commercial operation of Unit 1 of MGTPP?

Issue No. 1: Whether the petitioner has discharged its responsibilities under the PPAs to procure fuel for commissioning of the Units and for operation of the units after their commercial operation?

21. According to the Haryana Utilities, the arrangement of coal linkage is the responsibility of the procurers under Case 2 bid and after signing of the PPA, it is the responsibility of the seller (Project Developer) to arrange for the fuel including signing the Fuel Supply Agreement. On the other hand, the petitioner has argued that the MGTPP was envisaged as a Case 2 project under which the procurers were required to bear the risk of fuel and its cost as evident from the RfQ, RfP and the PPAs. TPDDL in its reply has submitted that as per Article 7.2.1 of the PSA between TPTCL and TPDDL, if Haryana Utilities give their consent to fuel supply agreement proposed to be entered into, TPDDL's consent is deemed to be given. TPDDL has

submitted that under the provisions of the PSA, TPDDL neither assumed any obligation in relation to fuel for MGTPP nor had any significant role in procurement of fuel as per the PSA.

22. In view of the submissions of the parties as noted above, it is pertinent to discuss the provisions of the RfQ, RfP and PPAs to understand the responsibility of the seller and procurers with respect to the arrangement of fuel for COD and subsequent operation of MGTPP. The RfQ document for MGTPP was issued by HPGCL on 25.5.2006.An addendum was issued on 9.2.2007 to the RfQ document in which it was indicated that "HPGCL will also be providing coal linkage for the project to the successful bidder". The RfP for the project was issued on 24.2.2007. Clause 3.1.2A of the RfP provided as under:-

> "3.1.2AThe procurer has secured firm coal linkage from Ministry of Coal. However, Fuel Supply Agreement (FSA) is yet to be signed with the fuel supplier. In case the procurer signs the FSA before the Effective Date, it will have a clause whereby the procurer would have a right to assign this agreement for the term of the PPA, within the terms of the Fuel Supply Agreement (FSA) to a third party. Accordingly, the FSA will be assigned to the Seller during the terms of the PPA. In the event the procurer is not able to sign the FSA before the effective date, the seller will sign the FSA with the fuel supplier."

Therefore, as per the provisions of the RfQ and RfP, it is the responsibility of HPGCL to arrange for the coal linkage and HPGCL has informed the bidders through these documents that the procurers had secured a firm coal linkage from the Ministry of Coal. The petitioner has alleged that CIL vide its letter dated 3.3.2008 had intimated the availability position of the coal for Jhajjar Power Limited which was 7 days prior to the bid deadline; however, the said letter was not disclosed to the bidders and such non-disclosure has prejudiced the interests of the petitioner. Relevant paras of the said letter dated 3.3.2008 are extracted as under:

"MOC has cleared the requirement of Jhajjar Thermal Power Project (Case-2) on 2.8.2007 and has indicated the same vide letter no. 23011/52/2007-CPD dated 27.8.2007.

MOC vide letter No. 23011/52/2007-CPD dated 24.9.2007 has advised CIL to issue LOA for Jhajjar TPS for a capacity of 1320 Mw. The said communication does not contain the source nor the quantity.

The matter was taken up with CCL both by HPGCL and also by CIL. In response to CIL's communications, no unequivocal commitment from CCL for supply of coal to the said plant is forth-coming.

CIL has discussed the matter. The total commitment through LOA and linkage works out to 778.08 Mill.Ts. during the terminal year of XI plan against production target to 520.60 Mil.Ts. As such, availability for the new linkages works out to (-) 257.58 Mil.Ts. This is based on the progressive requirement of the units to be set up during XI plan.

However, NCDP places the responsibility on CIL to meet the coal requirement placed on it either through indigenous production or through coal imports.

Since the coal availability is negative as indicated above, CIL is contemplating to meet the same by importing coal, provided the consumer agrees to obtain the same through CIL on commercially agreeable terms.

The detailed modalities will be worked out for implementing the same along with implementation of the New Coal Distribution Policy."

Haryana Utilities have submitted in their reply that the said letter dated 3.3.2008 was received by them on or about 2/3.4.2008 after the bidding was over. Haryana Utilities have further submitted that the petitioner was fully aware of the policy of the Government of India with regard to coal linkage and the obligation of the CCL/CIL to provide coal and the letter dated 3.3.2008 did not make any change in regard to the terms and conditions on which the bid was invited.In our view, the letter dated 3.3.2008 highlighted the shortage of coal during the terminal year of 11^{th} Plan and during 2011, the first unit of MGTPP was scheduled to be commissioned. Therefore, the shortfall in the supply of coal during 11^{th} Plan had the potential impact on the commercial operation and supply of power from Unit 1 of MGTPP. Accepting the contention of Haryana Utilities that the letter of CIL was received after the bidding was over, the contents of this letter could have been shared by HPGCL/Haryana Utilities with the petitioner as the successful bidder and mutual arrangement could have been made to work out the modalities of procurement of coal during the period when CIL/CCL was not in a position to supply the required quantity of coal. However, we are unable to agree with the petitioner that non-disclosure of the said letter has prejudiced the interests of the petitioner as the shortage of coal highlighted in the letter was for a limited period and in any case, the letter merely conveyed that in accordance with the mandate of NCDP, CIL would arrange the imported coal to the extent of shortfall in supply by CIL or its subsidiaries, subject to the consent of consumers.

23. Letter of Intent (LOI) was issued to China Light and Power Limited on 23.7.2008 who after acceptance of the LOI, acquired the JPL and entered into a PPA on 7.8.2008.The provisions of the PPA in so far as they pertain to fuel are extracted as under:

> ”Fuel” means primary fuel used to generate electricity namely, coal.”
>
> “Fuel Supply Agreements” means the agreement(s) entered into, between the seller and the fuel supplier and fuel transporter, for the purchase, transportation or handling of fuel required for the operation of the power station.”
>
> “3.1.2 Unless otherwise provided in this Article, the Seller agrees and undertakes to duly perform and complete the following within (i) 12 months from the effective date; or (ii) 13 months from the date of issue of Letter of Intent, which is later, unless such completion is affected due to the ‘Procurers’ failure to comply with their obligations under Article 3.1.2A of this Agreement or by an Force Majeure event or if any of the activities are specifically waived in writing by the procurers:
>
> (i) xxxxxx
>
> (ii) the seller shall have executed the Fuel Supply Agreements and have provided copies of the same to the procurers.”

"3.1.2A The procurers shall jointly ensure that the following activities are completed within the time period mentioned below:-

Activity	Time for completion
1. Ensure the completion of the following tasks: (a) Handling over the possession of the land for the power station; (b) Coal linkage from Ministry of Coal; and (c) Site clearance from Ministry of Environment and Forests ("MOEF") for the power station.	Within three months from the date of issue of letter of intent.
2. Providing an irrevocable letter to the lenders duly accepting and acknowledging the rights provided to the lenders under the terms of this Agreement and all other RfP Project Documents.	On or prior to the date of NTP.

"7.2.1 The seller shall enter into the Fuel Supply Agreement only on the basis of:

(a) Advice of the procurers;

(b) With the express written consent of the procurer, which shall not be unreasonably withheld, if the seller satisfies the procurer that, the FSA intended to be entered into by the seller is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project in question;

(c) Approval of HERC, if required under the Competitive Bidding Guidelines; and

(d) Prudent Utility Practices."

Proviso under Article 12.3.i regarding natural force majeure

"Provided that in the event of the procurer is convinced and agrees in writing that the seller has made all reasonable efforts and has fulfilled all its obligations to sign Fuel Supply Agreements with the respective agencies, but is not able to do so within the deadline mentioned in Article 3.1.2 owing to reasons beyond the Seller's reasonable control, then the seller shall be construed to be affected by the Natural Force Majeure event."

Provision in the Power Purchase Agreement between JPL and TPTCL

"7.2.1 JPL shall enter into Fuel Supply Agreement (FSA) on the basis of:

(a) Advice of TPTCL

(b) With the express written consent of TPTCL, which shall not be unreasonably withheld, if JPL satisfies TPTCL that the FSA is intended to be entered into by JPL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;

c) Approval of DISCOMs under the DISCOMs PPA and Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required; and

d) Prudent Utility Practices.

Provided however that in the event that the DISCOMs provide their consent to JPL under DISCOM PPA and TPTCL does not provide JPL with such written consent, JPL shall have the right to execute the FSA and the requirement of TPTCL's consent shall no longer be applicable.

In the event:
(a) TPTCL provides the written consent to JPL as mentioned in sub-article 7.2.1 (b) above;
Or
(b) TPTCL chooses not to provide such written consent to JPL but avails of the Contracted Capacity and the Electrical Output corresponding to the Available Capacity at the Delivery Point;

TPTCL shall be deemed to have given consent to the execution of the FSA under this Agreement and provisions of Article 7.2.2 and 7.2.3 shall apply to TPTCL. It is further clarified that in the event TPTCL chooses not to provide written consent to JPL and does not purchase the Allocated Contracted Capacity and the Electrical Output corresponding to the available capacity at the Delivery Point, the provisions of Article 7.2.2 and Article 7.2.3 shall not be applicable."

<u>Provision in the Power Sale Agreement between TPTCL and TPDDL</u>

"7.2.1 JPL/TPTCL shall enter into Fuel Supply Agreement (FSA) on the basis of:
(a) Advice of NDPL;

(b) With the express written consent of NDPL, which shall not be unreasonably withheld, if JPL/TPTCL satisfies NDPL that the FSA is intended to be entered into by JPL/TPTCL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;

c) Approval of DISCOMs under the DISCOMs PPA and Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required; and
d) Prudent Utility Practices.

> Provided however that in the event that the DISCOMs provide their consent to JPL under DISCOM PPA and NDPL does not provide TPTCL/JPL with such written consent, JPL/TPTCL shall have the right to execute the FSA and the requirement of NDPL's consent shall no longer be applicable."

24. The above quoted provisions of the Haryana PPA provide that the seller shall be required to enter into Fuel Supply Agreement which includes agreement with the fuel supplier and fuel transporter within 13 months from the date of issue of LOI i.e. by 23rd August, 2009. This requirement of signing the FSA within 13 months may be affected in three circumstances, namely, on account of procurers' failure to comply with their obligation under Article 3.1.2Aof the PPA or by any force majeure events or if it is specifically waived in writing by the procurers. Article 3.1.2A enjoins on the procurers to ensure that coal linkage from Ministry of Coal is completed within a period of 3 months from the date of LOI. Central Coalfield Limited issued a Letter of Assurance (LOA) on 14.10.2008 committing to supply 5.21 Million Metric Tonnes per annum of E Grade Coal to the petitioner. The LOA was valid for 24 months and the petitioner was required to complete all the activities as mentioned in Annexure 1 to the LOA within the said period and sign the FSA within 3 months of the expiry of the validity of the LOA or satisfactory achievement of all milestones whichever was earlier. Since there were certain onerous and unfavourable conditions in the model FSA, the petitioner sought indulgence of CCL/CIL, CEA and Haryana utilities to resolve the critical issues before the FSA is signed. The main issues flagged by the petitioner were (i) the minimum supply obligation was pegged at 50% of annual contracted capacity under the model FSA whereas the petitioner was required under the PPAs to deliver 80% availability; (ii) the term of the FSA was 5 years under model FSA whereas the term of the PPA was 25 years and; (iii) there was the proposal in the model FSA to supply as high as 50% of the quantity supplied in the

form of the imported coal which requirement was not compatible with the boiler design as per the RfP document. These onerous and unfavourable conditions in the model FSA were also taken note of by the various authorities and procurers as under:-

(a) In the 4th Meeting of the Coordination Committee held on 25.2.2010 to review the progress of the power project, the following were discussed and agreed between the petitioner and Haryana utilities:

> "**Signing of Fuel Supply Agreement (FSA) and Fuel Transmission Agreement (FTA):**
>
> It was deliberated that coal linkage of 5.21 MTPA has been obtained by JPL. This linkage is to be translated into FSA. As cost of fuel will pass on to consumers, therefore the impact of cost of coal beyond 50% of linkage with domestic coal needs to be studied/worked out. Matter may be taken up with GoI for granting/allocation of 90% linkage of domestic coal as otherwise it will have much burden on consumers of Haryana. Information about this subject be given to regulator (HERC) also.
>
> After detailed deliberations, it was decided that CE/HPPC in consultation with FA/HQ, HGPCL will take up the matter with Ministry of coal/GoI to sort out the various issues viz terms of FSA for this project to be 25 years, supply of 90% of domestic coal, impact of blending on tariff, limitation of use of imported coal in boiler etc."

(b) In the minutes of the meeting of Standing Linkage Committee (Long Term) for Power held on 8.4.2010, the following decision was taken with respect to the power project of the petitioner:

> "The Committee was informed that projects at S. No. 1 (Jhajjar Thermal Power Project) and 2 are ready to sign FSA but due to non-settlement of some terms and conditions of draft model FSA circulated by CIL,the matter is pending. After discussions, the Committee decided that the matter may be resolved between CIL and CEA".

(c) In his letter dated 30.8.2010, Chief of operations, HPGCL sought the intervention of Central Electricity Authority to sort out the onerous and unfavourable clauses in the Model PPA to enable the petitioner to sign the FSA. Relevant part of the letter is extracted as under:

> "As already brought out that on the recommendations of SLC (LT), CCL has already issued a Letter of Assurance (LOA) for 5.21 MPTA on 14.10.2008 in favour of Jhajjar Power Limited for supply of fuel to this project. M/s JPL has already achieved all the milestones as stipulated in the LOA and is ready to execute the FSA with CCL/CIL but the matter is pending due to non-settlement of some of the terms and conditions of the Model Fuel Supply Agreement relating to penalties for non-supply, tenure of the agreement and component of imported coal etc.
> ....
> Further, it is requested that the CIL/CCL may be advised to resolve the onerous clauses of Model FSA so that the long term FSA for 1320 MW MGTPP, Jhajjar can be executed as soon as possible."

(d) In recognition of the difficulties expressed by the petitioner, HPGCL granted extension of 6 months' time vide its letter dated 10.9.2009 and further extension of 6 months' time vide letter dated 15.4.2010 for execution of the Fuel Supply Agreement and Fuel Transport Agreement. Further, HPGCL vide its letter dated 12.8.2011 granted extension of time to the petitioner till 30.4.2012 for execution of FSA. These extensions were granted subject to the condition that the petitioner should not delay its obligation to supply power as per the original schedule given in the PPA.

The above documents show that the conditions of the model FSA were onerous and unfavourable on account of which the petitioner could not sign the FSA within the time limit laid down in the PPA. The Haryana Utilities not only acknowledged the difficulties faced by the petitioner for signing of the FSA but were also actively involved in there solution of the critical issues to facilitate the signing of the FSA at the earliest. It is pertinent to note that vide its letter dated 12.8.2011, the time for execution of the FSA has been extended by HPGCL till 30.4.2012 which date falls beyond the SCOD of the first unit of the generating station i.e. 21.1.2012. It means that the Haryana Utilities were fully aware as far back as 12.8.2011 that the FSA could not be executed before the SCOD of the first unit of MGTPP.

25. When the Fuel Supply Agreement based on the LOA dated 14.10.2008 granted by CCL was unlikely to materialise before the SCOD of Unit 1 of MGTPP and the Haryana Utilities extended the time for execution of the FSA till 30.4.2012 which was beyond the SCOD of Unit 1, subject to the condition that the petitioner would not delay its obligation to supply power as per the original schedule in the PPA, the options available to the petitioner were to explore the possibility of supply of coal from alternative sources, namely,imported coal, e-auction coal, coal available on 'as is where is basis' and coal from the CIL or its subsidiaries through MOU routes in order to declare the COD of the units as per the SCOD given in the PPA and supply power to the procurers in terms of its obligations under the PPA. It is however noted that the petitioner did not enjoy the freedom under the PPA to buy coal from any source it decides. Since energy charge is a pass through in tariff, the Haryana PPA makes it obligatory for the petitioner to buy coal in certain circumstances. Article 7.2.1 of Haryana PPA provides that the petitioner shall enter into Fuel Supply Agreement only on the basis of (a) advice of the procurers; (b) with the express consent of the procurers; (c) approval of HERC, if required, under the competitive bidding guidelines; and (d) prudent utility practices. Articles 7.2.1 of the TATA PPA and TATA PSA provide that if TPTCL/TPDDL do not give their consent but Haryana Utilities give their consent, in that case the consent of TPTCL/TPDDL shall be deemed to have given. In effect, the petitioner has to execute the FSA in accordance with Article 7.2.1 of Haryana PPA.

26. At the cost of repetition, the provisions of Article 7.2.1 of Haryana PPA are extracted as under:

"7.2.1 The seller shall enter into the Fuel Supply Agreement only on the basis of:

(a) Advice of the procurers;

(b) With the express written consent of the procurer, which shall not be unreasonably withheld, if the seller satisfies the procurer that, the FSA intended to be entered into by the seller is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project in question;

(c) Approval of HERC, if required under the Competitive Bidding Guidelines; and

(d) Prudent Utility Practices."

It is seen that options have been mentioned sequentially and are not mutually exclusive.

27. The first option is at the instance of the procurers. That means, the procurers may advise the seller to enter into Fuel Supply Agreement with a particular coal supplier. The second option is at the instance of the seller where seller seeks the written consent of the procurers to enter into FSA with a particular coal supplier. Here the seller has to satisfy the procurer that the FSA to be entered into is on best commercial terms as per the prevailing industry practice. The third option states that the seller shall enter into FSA on the basis of "approval of HERC, if required, under the competitive bidding guidelines." Para 4.2 of the Competitive Bidding Guidelines provides as under:

"4.2 In case of long term procurement with specific fuel allocation (Case 2), the procurer shall invite the bids on the basis of capacity charge and net quoted heat rate. The net heat rate shall be ex-bus taking into account internal power consumption of the power station. The energy charges shall be payable as per the following formula:

Energy Charges = Net quoted heat rate x Scheduled Generation x Monthly weighted Average Price of Fuel/Monthly Average Gross Calorific Value of Fuel

If the price of fuel has not been determined by the Government of India, government approved mechanism or the Fuel Regulator, the same shall have to be approved by the appropriate Regulatory Commission."

Under the provisions of the Competitive Bidding Guidelines, the appropriate Regulatory Commission shall determine the price of fuel where the same has not been determined either by the Government or by Government approved mechanism or Fuel Regulator. In other words, if the seller procures fuel from any other source (i.e. other than where price of coal has been determined by Government of India or Government approved mechanism or Fuel Regulator) whether on the advice of the procurers or with the written consent of the procurers, then the price of fuel has to be approved by the appropriate Commission. In such circumstances, the project developer has to seek approval of the appropriate Commission before entering into FSA. The fourth option is the 'prudent utility practices' which has been defined in the PPA as under:

> "Prudent Utility Practices means the practices, methods and standards that are generally accepted internationally from time to time by electric utilities for the purpose of ensuring the safe, efficient and economic design, construction, commissioning, operation and maintenance of power generation equipment of the type specified in this Agreement and which practices, methods and standards shall be adjusted as necessary to take account of (a) operation and maintenance guidelines recommended by the manufacturer of the plant and equipment to be incorporated in the Project; (b) the requirements of the Indian Law; (c) the physical conditions at the site."

Thus the prudent utility practices refer to the practices, methods and standards that are generally accepted by the utilities internationally for commissioning, maintenance and operation of the power generation equipment; and such methods, standards and practices have to be adjusted to take into account the operation and maintenance practices of the manufacturer of plant and equipment, requirements of Indian Law and physical conditions of the site. A harmonious reading of all provisions of Article 7.2.1 reveals that the seller has principally two options to enter into FSA i.e. either on the advice of the procurers or on the basis of the written consent of the procurers which should not be unreasonably withheld if the seller satisfies the procurers that it is in the best commercial terms as per the prevailing industry practice. The other two options namely, prudent utility practices and/or approval of HERC if required under Competitive bidding guidelines may apply in case of the two principal options. The fuel to be procured under the proposed FSA should conform to the prudent utility practices for commissioning, maintenance and operation of the power generation equipment. Further, if the price of the fuel to be procured under the FSA has not been determined by the Government of India, or government approved mechanism or the Fuel Regulator, the price will be determined by the Appropriate Commission.

28. Haryana Utilities have submitted that after signing of the PPA, it is the responsibility of the petitioner to enter into Fuel Supply Agreement and procurers have no role to play. In our view, considering that fuel cost is a pass through in tariff in terms of the PPA and in the light of the express provisions in the Haryana PPA requiring the petitioner to enter into FSA either on the advice of the procurers or on the basis of written consent of the procurers, the position taken by the Haryana Utilities cannot be sustained. The Haryana Utilities had secured the coal linkange from CIL and based on the linkage, LOA was issued by CCL on 14.10.2008 to the petitioner. The LOA fructified into the FSA which was signed by the petitioner with CCL on 7.6.2012. When there is delay in signing the FSA or there is shortfall in supply of coal under the FSA, the petitioner is required to arrange the coal from alternative sources. In that case also, the petitioner has to take consent of the procurers as the procurers will ultimately pay the energy charges to the petitioner. Moreover, the submission of Haryana Utilities in para 44 of the reply dated 2.12.2013

clearly confirms that Haryana Utilities retained absolute say in the matter of purchase of fuel by the petitioner. Para 44 of their reply dated 2.12.2013 is extracted as under:

> "44. Without prejudice to the above, provisions of clause 7.2 of the PPA also gives a right to the Respondents to withhold the consent if there is reason for doing so. The petitioner having participated in the tariff based competitive bidding process and agreed to generate and supply electricity at a competitive price, it is reasonable for the Respondents to expect that the Coal is not procured at a price which is excessively high. Clause 7.2 of the PPA cannot be interpreted in a manner that it gives a right to decide on the sourcing of coal at its whims and expect that the Respondents give their consent."

29. Next we have to examine the efforts made by the petitioner to arrange coal for commercial operation of the units of MGTPP and sustained operation thereafter for supply of power to the procurers. As per para 5 of the New Coal Distribution Policy(NCDP)promulgated by the Central Government on 18.10.2007 and LOA dated 14.10.2008 issued by CCL in favour of the petitioner, CIL and its subsidiaries had the option to import coal to meet such short fall in the supply of domestic coal. Further, CEA in its letter dated 19.4.2011 addressed to thermal power generators and boiler manufacturers advised that in view of shortage of domestic coal supplies, boilers of future coal fired stations should be designed for blending ratio of 30:70 (or higher) imported/high GCV coal : indigenous coal. The petitioner was advised by the boiler manufacturer that domestic coal could be supplemented with imported coal upto30% and accordingly, the petitioner vide its letter dated 17.5.2011 proposed to the Haryana Utilities to procure imported coal to the extent of 20% to 30% of the total coal requirement for the project. The petitioner suggested two options for procurement of imported coal, namely, (a) use imported coal procured by CIL/CCL under the terms of the coal linkage/LOA or an independent agency designated by the procurers; and (b) independently arrange for importation of coal, and sought in-principle approval for import of coal from the Haryana Utilities in terms of Article 7.2

of the PPA through any of the suggested options. After receipt of the communication from the petitioner, the Haryana Utilities approached HERC for its opinion on the issue of import of coal under the arrangements with CIL/CCL or independently. HERC in its letter dated 8.7.2011 advised the parties to resolve the issue among themselves in terms of the provisions of the concluded PPA. The petitioner was advised by HPGCL and Ministry of Power to procure at least 15% of its allocated coal quantity through import and to put in place an imported coal procurement plan in consultation with the lead procurer (UHBVNL). Accordingly, the petitioner vide its letter dated 7.12.2011 wrote to UHBVNL suggesting that coal could be imported either by engaging analysing agencies such as MMTC, STC or directly by the petitioner and requested for confirmation of preferred option for importation of coal. The petitioner vide its letter dated 30.12.2011 also sought the concurrence of HPCC to buy 150000 MT of coal to meet the shortfall for carrying out the commissioning test from a few coal suppliers identified by the petitioner. The petitioner vide its letter dated 9.1.2012 requested HPPC to provide its clearance on the quantity and mode importation of coal. The petitioner vide its letter dated 27.1.2012 requested UHBVNL, HPGCL and HPCC to include the quantity of importation of coal by the petitioner during 2012-13 in the impending tendering process of HPGCL for importation of coal for its plants and also sought the consent in terms of Article 7.2.1 of the PPA. CEA vide its letter dated 27.1.2012 mandated the petitioner to import 1 million metric tonnes of coal during the financial year 2012-13. The petitioner vide its letter dated 30.1.2012 also forwarded to HPCC the recommendations of CEA to have a target for import of 1 million tonnes of coal and requested for permission. The petitioner vide its letters dated 21.2.2012 and 9.4.2012 reiterated its request for permission for import of coal. In the meeting dated 10.5.2012 between the petitioner and

HPGCL/HPCC, it was agreed that the petitioner would blend imported coal to the extent of the import target set by CEA in its letter dated 27.1.2012 and the imported coal procurement process would be finalised. The petitioner vide its letter dated 18.5.2012 requested HPGCL to permit the petitioner to import 1 million metric tonnes of coal in two tranches i.e. 0.4 million metric tonnes through negotiation with L1 bidder of HPGCL tender subsequent to the discovery of L1 prices at the same or lower price and 0.6 million metric tonnes through international competitive bidding process. HPPC vide its letter dated 20.7.2012 accorded approval for importation of coal of 1 million tonnes during 2012-13 out of which 0.4 million tonnes was to be procured from any of the bidders who participated in the HPPCL's tender on the condition that that the price should not be more than the price at which HPGCL's order was finalised and GCV of coal should not be less than the GCV of HPGCL's procurement. The balance 0.6 million tonnes was allowed to be procured through ICB or CPSU route. However, the maximum blending of imported coal was restricted by Haryana Utilities to 15%. HPGCL finalised the price of imported coal and placed the order on 17.10.2012 on MMTC Ltd. The petitioner placed the order for procurement of coal on 18.10.2012 and the first shipment of imported coal arrived on 11.11.2012. Haryana Utilities vide their letter dated 20.11.2012 directed the petitioner to the petitioner to submit a certificate from boiler manufacturer regarding the designed capacity of the boiler to burn imported coal. The petitioner vide its letter dated 17.12.2012 has submitted a certificate by the OEM Harbin Boiler Company Limited. The Certificate dated certifies the following:

> "This is to certify that we have supplied 2 x 660 MW super critical boilers for Jhajjar Power Limited Plant located in the State of Haryana, India.
> We have successfully completed the trial of mixed firing of domestic Indian Coal with Indonesian coal of GCV 5500 kCal/Kg (ARB) on November 16, 2012. The ratio of Indonesian coal to Indian coal was 40:60 by energy.

> Based on the results, we hereby certify that the Boiler has demonstrated the capability of performing mixed firing with specified imported coal up to 40% by energy. Further trial runs may allow the operators to blend more imported coal based on operating experience."

Based on the above certificate, HPPC allowed blending of imported coal upto 40% in 2013. The petitioner has submitted that had HPCC approved the usage of imported coal with 15% blending by February 2012(One month prior to COD of Unit 1), MGTPP would have been in a position to conduct necessary tests and gain operational experience by the end of April 2012 to increase the blending ratio to 40%. The petitioner has further submitted that had 40% blending been allowed by HPCC by April 2012, MGTPP would have consumed the entire 1 million tonnes by February 2013 and sought HPCC's approval for further procurement of coal and would have achieved average availability of 56.53% during 2012-13. The petitioner has submitted that the actual supply of coal during 2012-13 was very low (44.16%) and in view of the cap on blending of imported coal, the petitioner could achieve availability of 30.89% only. In our view, there is merit in the submission of the petitioner. Based on the availability position of coal, CEA had advised the petitioner to arrange for 1 million tonnes of imported coal for the year 2012-13 vide its letter dated 27.1.2012 which was forwarded to the Haryana Utilities on 30.1.2012. Had the action been taken in time and permission been given for use of imported coal in a progressive manner, the petitioner would have been able to generate to achieve the availability.

30. Next we examine the efforts made by the petitioner for arrangement of coal from other sources in the country and the outcome thereof. The petitioner entered into a FSA on 7.6.2012 with CCL for supply of 5.21 MMT of coal per annum for a

period of 25 years. However, due to short supply of coal under the FSA, the petitioner had to look for alternative sources of coal. CCL in notice dated 19.6.2012 invited offers from the power utilities including IPPs drawing coal under FSA during 2012-13 to lift the coal which held in stock on ‘as is where is’ basis at the FSA price under own evacuation arrangement and the coal so lifted would serve the objective of honouring the FSA upto trigger point with normal despatches. The petitioner in its letter dated 21.6.2012 sought in-principle approval of HPGCL to lift the ‘as is where is’ coal as the petitioner was not receiving contracted capacity of coal due to insufficient allotment of rakes by the Indian Railways. The petitioner in its letter dated 22.6.2012 reiterated its request to HPGCL and Haryana Utilities and in its letter dated 25.6.2015 requested the Principal Secretary Power Department, government of Haryana to accord requisite approval. Further, the petitioner in response to the queries of Principal Secretary, Power Department submitted vide letter dated 29.6.2012 the justification regarding procurement of additional coal, a certificate that no other cheaper option was available and detailed calculation of coal cost. The ‘in principle’ approval for procurement of coal on ‘as is where is’ basis was granted by HPGCL vide its letter dated 30.6.2012 subject to the condition that the transportation and handling charges shall be restricted to the charges levied by CIL/CCL and to the extent approved by HERC. The petitioner vide its letter dated 5.7.2012 expressed its interest to CCL to lift 2.76 Million Tonne of pithead coal on ‘as is where is’ basis. There were some correspondence between the petitioner and respondents regarding appointment of coal handling agent and approval of transport charges by HERC. However, in the meeting held on 7.10.2012 held in the office of CMD, it was decided as under:

“E) Coal from pithead offered by CIL on as is where is basis

> It was agreed that coal from pit-heads offered by CIL on as is where is basis will be a costly option and would not be viable economically. JPL agreed to drop the idea of purchase of such coal on 'as is where is' basis."

31. To recapitulate, in terms of the Bidding Documents, Haryana Utilities secured a coal allocation from CIL. Letter of Assurance was issued by CCL on 14.10.2008 for supply of 5.21 MMT of coal per annum. Though the milestones stipulated in the LOA were achieved by the petitioner, FSA could not be entered into on account of certain onerous and unfavourable clauses in the FSA which were not in the interest of the petitioner as well as the procurers. The petitioner made efforts by seeking the indulgence of all concerned including the Haryana Utilities for resolution of the critical issues. After issue of Presidential directives in April 2012, CCL entered into an FSA with the petitioner on 7.6.2012. Pending resolution of issues pertaining to FSA, the petitioner has been making efforts to purchase coal through importation since 17.5.2011 and through as is where is basis since 27.1.2012. CEA vide its letter dated 27.1.2012 had advised the petitioner to arrange 1 million metric tonne of coal during 2012-13. The permission for purchase of coal on 'as is where is' basis was accorded by HPGCL as on 30.6.2012 subject to certain conditions with regard to transportation and handling charges. Since the petitioner and Haryana Utilities could not sort out the issue, it was decided in a meeting of the petitioner and Haryana Utilities in a meeting held on 7.10.2012 to drop the proposal to purchase coal 'as is where is' basis being a costly and economically unviable option. The permission to purchase 1 million tonne of imported coal was given by HPCC vide its letter dated 20.7.2012 in two tranches i.e. 0.4 million tonnes to be procured from any of the bidders who participated in HPGCL's tender and limited to price finalised by HPGCL and 0.6 million tonnes through ICB or CPSU route. On account of delay in finalisation of HPGCL's tender, the petitioner could only place the order for 0.4

million tonnes on 18.10.2012 and the supply of such coal started on 11.11.2012. However, there is no pleading on record as to why the petitioner could not procure 0.6 million tonne of coal through ICB or CPSU route even though the permission was granted on 20.7.2012. From the above narration of facts and evidence on record, it clearly emerges that since energy charges are a pass through in tariff as per the PPA and /or procurement of coal from alternative sources including importation, the petitioner could not have proceeded for imported coal or coal on as is where is basis to meet the shortfall in supply under the LOA/FSA by CIL or its subsidiaries without the permission of the Haryana Utilities.

32. What is important is that since energy cost is a pass through in tariff under Harayana PPA and the Fuel Supply Agreement was not maturing before the SCOD, Haryana Utilities being the principal procurers should have set clear cut guidelines and instructions for the petitioner with regard to procurement of coal before the signing of the FSA in exercise of their responsibility under Article 7.2.1 of the PPA. Similarly, after the FSA was signed and when it was widely known that CIL/its subsidiaries were not in a position to supply the coal upto the level of ACQ, Haryana Utilities should have further set the guidelines with regard to the use of imported coal or coal on 'as is where is basis'. It has to be borne in mind that where the project developer is required to quote on the basis of fixed cost and net heat rate and fuel cost is a pass through, the project developer had no occasion to hedge any risk with regard to the fuel in the quoted tariff. In that scenario, it becomes the responsibility of the Procurers to give clarity and comfort to the project developer with regard to procurement and transportation of fuel so that the project developer is not required to incur losses on account of procurement of fuel.

Issue No.2: Whether signing of a Fuel Supply Agreement is a condition precedent for declaration of commercial operation of the units of the power project?

33. Haryana Utilities have submitted that declaration of commercial operation of Unit 1 of the power project on 29.3.2012 by the petitioner was not valid as the petitioner was not in a position to continuously generate electricity with sustained operation with effect from 29.1.2012. According to Haryana Utilities, as on 29.3.2012, the petitioner did not have a Fuel Supply Agreement and the FSA was signed with CCL on 7.6.2012 and therefore, the petitioner did not have requisite quantum of coal for sustained operation of the power project effective 29.3.2012. The operation of the power project during the period of synchronisation, testing, commissioning etc. and thereafter for a few days was with the coal made available by the Coal Company was not for the commercial operation but for such testing and commissioning. Haryana Utilities have submitted that the PPA does not envisage commercial operation as an empty formality but with a definitive purpose, that is, to make each of the units and power station as a whole to be commissioned not later than the SCOD and to make as much of the contracted capacity reliably available to meet the procurers' scheduling and despatch requirement throughout the term of the agreement as required under Article 4.1.b of the PPA. Haryana Utilities have further submitted that requirement of FSA as a condition precedent for declaration of commercial operation is further fortified by the provisions relating to liquidated damages for the delayed commercial operation as provided in Article 4.6 read with Article 12.3 of the PPA. Article 4.6.1 provides that if the unit or the power station as a whole could not be commissioned by the stipulated date, there will be a claim for liquidated damages by the Haryana Utilities except for reasons mentioned in Article

4.5.1 i.e. where the unit cannot be commissioned because of force majeure events. Article 12.3 provides that non-supply of coal from Coal India or its subsidiaries shall be treated as a force majeure event affecting the commissioning of the power plant. Haryana Utilities have submitted that since non-availability of coal for starting, commissioning and commercial operation has been specifically provided as force majeure, and not the non-availability of coal after the COD, the logical conclusion is that the petitioner cannot commence commercial operation without a proper FSA. In that event, the commercial operation need to be deferred till FSA is in place and coal supplies begins under the FSA. Haryana Utilities have also submitted that in the absence of Independent Engineer's Final Test Certificate to the effect that the plant cannot be operated on a sustained basis, the COD cannot be said to have occurred.

34. TPDDL has submitted that the averments in the petition by the petitioner about non-availability of adequate coal should be read as admission of the fact that the commercial operation of the power project was declared without making adequate provisions of coal. Relying on its averment in Petition No.319/MP/2013, TPDDL has submitted that the declaration of commercial operation is a representation by the generating company of its ability to commence supply of power on firm basis. In the instant case, the petitioner was aware that it would not be capable of supplying power on firm basis and even then, the petitioner induced the beneficiaries to belie-e that it would commence supply of power and the same was intended to deceive the beneficiaries. TPDDL has submitted that the declaration of commercial operation is liable to be struck down as being null and void as the same is not in line with prudent utility practice.

35. The petitioner has submitted that the petitioner's obligation to ensure commissioning of the units of the power project is not independent of the procurer's responsibility to ensure sustained coal linkage and/or provide prompt and timely consents to the petitioner's request for procurement of coal from alternate sources, both of which obligations the procurers have failed to fulfil. The petitioner has submitted that neither the definition of commissioning and commercial operation date nor any provision in the PPA states that COD can only be achieved if the plant is capable of running on a sustained basis. The petitioner has further submitted that availability of contracted capacity is dependent on several factors including technical availability of the plant and availability of fuel. In reply to the submission of TPDDL, the petitioner has denied that execution of the Fuel Supply Agreement was a pre-requisite under Haryana PPA and Tata PPA for declaration of COD or the FSA was the only means through which the petitioner could have been in a position to generate power. The petitioner has submitted that even the execution of the PPA does not guarantee adequate coal supplies due to extant shortage of domestic coal in the country. The petitioner has submitted that based on CEA's letter, the petitioner entered into MOUs in order to procure coal for generation of power from the plant. According to the petitioner, it has acted in accordance with the directions of CEA and in due compliance with the provisions of the PPAs while declaring COD of Unit 1 of MGTPP.

36. We have considered the submissions of the petitioner and the procurers. As already explained in the earlier part of this order, it is the responsibility of the procurers to provide linkage of coal in Case 2 bidding. In this case Haryana Utilities arranged linkage of coal from CIL and this was made clear in the RfP document for

the information of all bidders. LOA was issued on 14.10.2008 by CCL for supply of 5.21 million tonnes of coal per annum for the power project. However, on account of certain onerous and unfavourable conditions in the Model FSA which was acknowledged by the Haryana Utilities, CEA, MoP and Standing Linkage Committee, FSA could not be signed by the petitioner before the SCOD. Haryana Utilities in due consideration of the petitioner's difficulties in signing the FSA within 13 months of the issue of LOI as required under the PPA has waived the condition and allowed the petitioner time till 30.4.2012 for signing of the FSA. It is pertinent to mention that this date falls beyond the SCOD of 21.1.2012 as per the PPA. Moreover, the extension of time for execution of FSA has been given on the clear-cut condition that the petitioner shall not delay its obligations to supply power as per the original schedule in the PPA. As scheduling of power can take place after the date of commercial operation, it can be safely inferred that Haryana Utilities have not linked the signing of the FSA as a pre-condition for the declaration of commercial operation. It is pertinent to mention that pending resolution of the issues relating to onerous and unfavourable terms in the model FSA, CEA in its letter dated 20.8.2010 advised the petitioner as under:

> "In this context, it may be mentioned that in view of limited availability of indigenous coal, fuel supply agreement (FSA) between the coal companies and the power project developer is signed once the unit is commissioned and its operation has stabilized. The FSA inter-alia also indicates the Annual Contracted Quantity (ACQ) of coal to be supplied by the coal companies. However, all efforts are made by CEA to ensure supply of coal to the power plants at the time of their commissioning and accordingly MOUs are signed between coal companies and project developers for this purpose.
>
> It is, therefore, requested that as Jhajjar Power Plant is a Green field project, you may kindly get in touch with this office just prior to the commissioning of your project and CEA would advise Coal India Limited to issue necessary orders for commencement of supply of coal by the coal companies."

It was clear from the above letter of CEA that signing of the FSA was delinked from the commissioning of the project which was to be carried out on the basis of coal available through MOUs with CIL to be facilitated by CEA. The letter dated 30.8.2010 written by HPGCL to CEA also acknowledges that FSA is not a pre-condition for declaration of commercial operation. Relevant paras of the said letter are extracted as under:

> "It is given to understand that owing to coal shortage and pending finalisation of the policy guidelines for FSA with power generating companies provided with coal linkage, the Government of India (MoC/CIL/MoP/CEA) are considering to arrange the coal supplies for power stations that are ready for commissioning through signing of Memorandum of Understanding (MoU) with an understanding that FSA would be executed after commissioning of the project.
>
> Keeping in view the commissioning of 1st unit during 11th Plan period i.e. December 2011, the request of M/s JPL regarding consistent supply of requisite quantities of coal initially for commissioning/early operation period through MoU may please be considered to meet the growing demand of power in the State of Haryana."

CEA in its letter dated 10.11.2010 informed MoC that the signing of FSAs be deleted from the milestones to be achieved by the power projects. CEA further informed the MoC that in the year 2010-11, FSA will be signed with the plants that have been commissioned in the year 2009-10 and MoUs will be signed with plants commissioned/expected to be commissioned during the year 2010-11. Ministry of Coal in its letter dated 30.3.2012 clarified the following:

> "I am directed to inform you that the FSAs for Thermal Power Plants commissioned by 31.12.2011 have not been signed so far by Coal India Limited. As signing of FSA may take some more time, it has been suggested by the Ministry of Power that CIL may continue to supply coal to the Thermal Power Plants commissioned or likely to be commissioned by 31.3.2012 during 2012-13 through MoU route till the time FSAs for these plants take place including the case linked with cost plus mines. This Ministry is in agreement with the views of Ministry of Power.
>
> 2. CIL is requested to issue suitable instruction to all the coal companies accordingly under intimation to this Ministry and Ministry of Power."

While granting extension of time for signing of the FSA till 30.4.2012 vide letter dated 12.8.2011, Haryana Utilities have advised the petitioner as under:

> "Further the interim supply of coal for the commissioning of the project may be obtained through MoU route on the recommendations of the Central Electricity Authority."

Therefore, the above mentioned documents clearly point to the fact that the then prevailing situation for supply of coal was that FSA was to be signed only after the unit was commissioned and its operation stabilised and till that time, coal would be supplied on MoU basis. Moreover, considering the supply position of coal prevailing at that point of time, Haryana Utilities have themselves advised the petitioner to obtain the coal through MOU route for commissioning and commercial operation of MGTPP.

37. Reliance has been placed by Haryana Utilities on the provisions Article 4.1.1(b) and Article 4.6 read with Article 12.3 to contend that Fuel Supply Agreement is a pre-requisite for declaration of commercial operation of the units of MGTPP. Article 4.1 provides as under:

> 4.1 THE SELLER'S OBLIGATION TO BUILD, OWN AND OPERATE THE POWER STATION
>
> 4.1.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible at Seller's risk for:
>
> a. obtaining(other than initial Consents) and maintaining in full force and effect all Consents required by it pursuant to this Agreement and Indian Law;
>
> b. executing the Project in a timely manner so as to enable each of the Units and the Power Station as a whole to be commissioned no later than its Scheduled Commercial Operations Date and such that as much of the Contracted Capacity as can be made available through the use of the Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirements throughout the term of this Agreement but not later than forty two (42) months from Start Date. However, in the event

> of early commissioning, a prior written consent of the Procurers needs to be obtained."

The petitioner's obligations for executing the project in a timely manner to supply as much of the contracted capacity to the procurers are subject to the terms and conditions of the Agreement. One of the terms and conditions of the PPA under Article 7.2.1 is that the seller shall enter into FSA only on the basis of advice of the procurers or express written consents of the procurers which shall not be unreasonably withheld. Therefore, the petitioner's obligations under Article 4.1.1 (b) cannot be seen independent of the Haryana Utilities' obligations to arrange for coal linkage, and till the coal linkage is converted into a FSA for sustained supply of coal, to facilitate through prompt and timely consent to the petitioner's request for procurement of coal from alternative sources. Further, Haryana Utilities have relied upon Article 4.6 read with Article 12.3 of the PPA in support of their contention that since inadequate availability of coal by CIL or its subsidiaries are not covered under force majeure after the COD of the first Unit of the Power Project, FSA is a necessary condition for declaration of COD. Article 4.6.1 provides as under:

> " 4.6.1 If any Unit or the Power Station as a whole is not commissioned by its Scheduled Operation Date other than for the reasons specified in Article 4.5.1, the Seller shall pay to each Procurer liquidated damages, proportionate to their then existing Allocated Contracted Capacity for the delay in such commissioning or making the Unit's Contracted Capacity available for dispatch by such date….."

Article 4.6 states that that if an unit of MGTPP is not commissioned by the SCOD, the Seller is liable to pay to the procurers liquidated damages for delay in commissioning the unit or making the contracted capacity available for despatch except for reasons covered under Article 4.5.1 of the PPA. Article 4.5.1 provides that time can be extended if a Unit or the Power Station cannot be commissioned by its

Scheduled Commercial Operation Date because of Force Majeure Event.Article 12.3 of the PPA provides as under:

> "12.3 Force Majeure
>
> A 'Force Majeure' means any event or circumstance or combination of events or circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:
>
> 1. Natural Force Majeure Events:
>
> ………………………………………………………………………………………..
>
> Provided that in the event the Procurer is convinced and agrees in writing that the Seller has made all reasonable efforts and has fulfilled all its obligations to sign Fuel Supply Agreements with the respective agencies, but is not able to do so within the deadline mentioned in Article 3.1.2 owing to reasons beyond the Seller's reasonable control, then the Seller shall be construed to be affected by Natural Force Majeure event:
>
> Provided further that in the event the first Unit of the Power Station is ready in all other respect but is not able to achieve commissioning by the Scheduled COD due to: (a) non-completion of the Rail corridor for the transportation of coal from CIL's/CIL subsidiary's linked coal mines to the Project site; and (b) non-supply of coal from the CIL/CCL's subsidiary, then the Seller shall be construed to be affected by the Natural Force Majeure event. It must be noted that the Unit shall be considered as ready for commissioning only when the Independent Engineer certifies so in writing to the Procurer;
>
> Notwithstanding anything stated above, inadequate availability of the Rail corridor for the transportation of coal or inadequate supply of coal by CIL/CIL's subsidiary shall not be construed as any kind of Force Majeure event after COD of first Unit of the Power Station."

Thus the above provisions show that if an unit of MGTPP is not commissioned by the SCOD, the Seller is liable to pay to the procurers liquidated damages for delay in commissioning the unit or making the contracted capacity available for despatch except where the Seller is affected by Natural Force Majeure Event which may arise on account of non-completion of rail corridor for transportation of coal from CIL's/its subsidiary's coal mines or non-supply of coal from CIL or its subsidiaries.It has been further provided that after commissioning of the first unit of MGTPP, inadequate transportation system or inadequate supply of coal by CIL or its subsidiaries will not be considered as Force Majeure Event. There is no provision in the PPA which suggests that COD of the unit of the power project can only be declared after signing of the FSA. Mere signing of the FSA does not assure sustained supply of coal by CIL/CCL to the extent of ACQ and in order to meet the shortfall, there is provision in the FSA to supply coal through importation to the extent of shortfall. We are therefore unable to agree with the Haryana Utilities and TPDDL that the petitioner should have deferred commercial operation of the Unit 1 of the generating station till it signed the FSA. Further, there is nothing on record which suggests that the Procurers had advised to the petitioner not to go ahead with the commercial operation of the Unit 1 till the FSA was signed.

Issue No.3: Whether the Petitioner has complied with the provisions of the PPAs for declaration of the commercial operation of Unit 1 of the generating station?

38. The petitioner has submitted that the PPAs provide for specific guidelines based on which COD of a unit can be declared. According to the petitioner, the PPAs require that for the purpose of declaration of COD, the Final Test Certificate should clearly state that the commissioning tests have been carried out in accordance with the Schedule 5 of the PPA with Haryana Utilities and that the Unit's tested capacity is not less than ninety five percent of its contracted capacity as existing on the effective date. The petitioner has further submitted that the Performance Tests were carried out in the presence of the representatives of Haryana Utilities and copies of the Final Test Certificate were provided to Haryana Utilities and TPTCL. The findings of the Independent Engineer in the Final Test Certificate dated 28.3.2012 in respect

of Unit 1 has not been disputed or challenged by the Haryana Utilities and TPTCL. Since the findings in the Final Test Certificate bring out beyond doubt that the performance tests were carried out in accordance with Article 6.3.1 of the PPA with Haryana Utilities and the PPAs provide that the COD of the unit shall be the date on the day after the date when each of the procurers receive a Final Test Certificate of the Independent Engineer, the requirement having been complied with, the COD of Unit 1 was validly declared as 29.3.2012. Haryana Utilities have submitted that in the absence of Independent Engineer's Final Test Certificate to the effect that the plant can be operated on a sustained basis and when there are specific qualifications contained in the certificate given by the Independent Engineer as to the sustained operation of the power project, the COD cannot be said to have occurred. Similar views have been expressed by TPDDL.

39. In view of the submission of the parties as stated above, it is pertinent to examine the provisions of the PPAs with regard to Commercial Operation Date or COD. COD has been defined in Article 1.1 of the PPA with Haryana Utilities as under:

> "Commercial Operation Date or COD means, in relation to a Unit, the date one day after the date when each of the Procurers receive a Final Test Certificate of the Independent Engineer as per the provisions of article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3 are received by the Procurers for all Units."

Similarly, the PPA between the petitioner and TPTCL dated 20.1.2009 provides as under:

> "Commercial Operation Date or COD means, in relation to a Unit, the date one day after the date when TPTCL receives a Final Test Certificate of the Independent Engineer as per the provisions of article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3 are received by the TPTCL for all Units."

Articles 6.3.1 and 6.3.2 of the PPA with Haryana utilities provide as under:

> "6.3.1 A Unit shall be commissioned on the day after the date on which all the Procurers receive a Final Test Certificate of the Independent engineer stating that:
>
> > (a) The Commissioning Tests have been carried out in accordance with Schedule 5 and are acceptable to him; and
> >
> > (b) The results of the Performance Test show that the Unit's Tested capacity, is not less than ninety five (95) percent of its Contracted Capacity as existing on the Effective Date.
>
> 6.3.2 If a Unit fails a Commissioning Test, the Seller may retake the relevant test, within a reasonable period after the end of the previous test, with three(3) day's prior written notice to the Procurers and the Independent engineer. Provide however, the Procurers shall have a right to require deferment of any such re-tests for a period not exceeding fifteen (15) days, without incurring any liability for such deferment, if the Procurers are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the Procurers or due to inadequate demand in the Grid."

In case of PPA with TPTCL, Article 6.3.1 and 6.3.2 provide as under:

> "6.3.1 A Unit shall be commissioned on the day after the date when the DISCOMS and JPL receive a Final Test Certificate of the Independent Engineer stating that:
>
> > (a) The Commissioning Tests have been carried out in accordance with the provisions of Schedule 5 of the DISCOMS PPA and are acceptable to him; and
> >
> > (b) The results of the Performance Test show that the Unit's Tested Capacity, is not less than ninety five (95) percent of the Contracted Capacity under the DISCOM PPA.
>
> 6.3.2 If a Unit fails a Commissioning Test, JPL may retake the relevant test, within a reasonable period after the end of the previous test, with three(3) day's prior written notice to the DISCOMS and the Independent engineer. JPL shall provide TPTCL a copy of such notice three (3) days prior to the relevant test. Provided however, the DISCOMS shall have a right to require deferment of any such re-tests for a period not exceeding fifteen (15) days, without incurring any liability for such deferment, if the DISCOMS are unable to provide evacuation of power to be generated, due to reasons outside the reasonable control of the DISCOMS or due to inadequate demand in the Grid."

40. From the above provisions, the following clearly emerge with regard to the Commissioning Tests and declaration of COD in respect of the unit(s) of MGTPP:

(a) COD of a Unit shall be declared on the date one day after the date when the Haryana Utilities and TPTCL receive the Final Test Certificate from the Independent engineer;

(b) The Final Test Certificate shall state that the Commissioning Tests have been carried out in accordance with provisions of Schedule 5 of the PPA of Haryana Utilities and the Unit's Tested Capacity is not less than 95 percent of the Contracted Capacity under the PPA with Haryana Utilities.

41. The procedure leading to issuance of the Final Test Certificate by the Independent Engineer is specified under Article 6 read with Schedule 5 of the Haryana PPA and TATA PPA. Article 6.1.2 deals with synchronization of the unit with the grid and provides that the unit may be synchronized to the grid when it meets all connection conditions prescribed in any Grid Code or all other Indian legal requirements for synchronization. Article 6.2 deals with the commissioning of the unit. Article 6.2.1 provides that the petitioner shall be responsible for ensuring that each unit is commissioned in accordance with Schedule 5 at its own cost, risk and expense. Under Article 6.2.2, the petitioner is required to give the Haryana Utilities and the Independent Engineer ten days prior written notice of the commissioning test of the unit, with copy of such notice to TPTCL. In accordance with Article 6.2.3, the petitioner, the Haryana Utilities (jointly), TPTCL and the Independent Engineer shall each designate qualified and authorized representatives to witness and monitor the commissioning test. Article 6.2.4 provides that testing and measuring procedures applied during each commissioning Test shall be in accordance with the codes,

practices and procedures mentioned in Schedule 5 of the PPA. Article6.2.5 enjoins upon the petitioner to provide within 5 days of the Commissioning Test to the Haryana Utilities, TPTCL and Independent Engineer copies of the detailed commissioning test results. Further, within 5 days of the receipt of the commissioning test results, Independent Engineer shall provide to Haryana Utilities and the petitioner in writing his findings from the evaluation of the commissioning test results either in the form of Final Test Certificate certifying the matters specified in article 6.3.1 or the reasons for non-issuance of Final Test Certificate. The petitioner is required under TATA PPA to give copy of the Independent Engineer's findings.

42. The provisions relating to conduct of the Performance Test referred to in Article 6.2.2 of the PPA are in corporated in Schedule 5 of both PPAs. Perusal of Schedule 5 shows that the objective of the Performance Test is to ascertain whether the unit is capable of operating continuously for 72 hours at or above 95% of the contracted capacity as on effective date within the electrical system limits and the Functional Specifications and complies with the parameters of supercritical technology.

43. The SCOD of the Unit 1 of MGTPP was 22.1.2012. According to Article 3.1.2 of the Haryana PPA, the petitioner was required to sign the FSA with the coal supplier within 13 months from the date of issuance of LOI i.e. by 22.8.2009. LOA was issued to the petitioner by Central Coalfield vide letter dated 14.10.2008 for supply of 5.21 million tonnes of E grade coal annually. On account of certain onerous conditions in the Model FSA, the petitioner took up the matter with Haryana Utilities, Central Electricity Authority, Ministry of Power, Ministry of Coal. The issue was acknowledged by all concerned including the Haryana Utilities, CEA and Standing Linkage Committee (Long Term). In fact, Standing Linkage Committee-Long Term in

its minutes dated 8.4.2010 directed CEA and CIL to jointly resolve the issue raised by the petitioner. CEA in its letter dated 20.8.2010 advised the petitioner that due to limited availability of indigenous coal, FSA with coal companies would be signed once the unit is commissioned and its operation stabilised and further advised the petitioner approach CEA at the time of commissioning so that arrangement of coal can be made from CIL through MOU basis. The copy of the letter of CEA was shared by the petitioner with the Haryana Utilities. HPGCL vide its letter dated 30.8.2010 requested CEA that keeping in view the commissioning of Unit 1 during the 11th plan period (i.e. December 2011), the request of the petitioner regarding consistent supplies of required quantities of coal for the project for commissioning/early operation period through MOU may be considered to meet the ever growing demand for power in the State of Haryana. Further, HPGCL in its letter dated 12.8.2011 while granting time to the petitioner till 30.4.2011 to enter into FSA advised the petitioner to obtain interim supply of coal for commissioning of the project through MOU route on the recommendations of CEA. Thus there is an acknowledgement by the Haryana Utilities that there was shortage of fuel; the petitioner was to arrange fuel through MOU route with the assistance of CEA; and that commissioning/early operation of the plant had to take place in December 2011 (which corresponds to SCOD) in order to meet the power demand in the State of Haryana.

44. The petitioner entered into an MOU dated 20.9.2011 with CCL for supply of for supply of 60000 tonnes of coal in December 2011. This quantity of coal was not sufficient for carrying out the commissioning tests for declaration of COD. Accordingly, the petitioner vide its letter dated 28.12.2011 gave a notice under Article 12.5 of the PPA for extension of the date of SCOD of Unit 1 on account of non-

availability of coal to achieve commissioning. Paras 2 and 6 of the said letter clearly brings out the efforts made by the petitioner and the actual availability of coal under the MOU route:

> "2. We would like to inform you that the allotted coal quantity of 60,000 MT would last only upto completion of Unit # 1 synchronisation, consequent to which Unit #1 will unfortunately, have to be shut down due to delay/shortfall in supply of adequate coal required for its commissioning. JPL would require a further allotment of 1,62,288 MT of coal for completing the Commissioning Tests and thereby commission Unit#1.
>
> ……………………………………………………………………………………………
>
> 6. With a view to mitigating the delay/shortage of coal supply, JPL has kept all the stakeholders including the Procurers, HPGCL, HPCC,CEA, MoP, MoC and CIL/CCL apprised of the situation and has repeatedly requested the relevant authorities to allot adequate quantities of coal to JPL. To this end, JPL had written to the CEA as early as on 24th January 2011 informing them of the JPL's phased coal requirement until COD of the Project and requesting the CEA to include JPL's coal requirements. Subsequent to CEA's visit to the site to appraise the project status in July 2011, JPL again wrote a letter dated 20th July 2011 updating the CEA to recommend to CIL the release of 2,76,000 MT of coal for commissioning Unit # 1. The letter also mentioned that JPL will separately request the CEA for allocation of additional coal for continuous operation of Unit # 1 post COD and for testing, trial run and commissioning of Unit # 2 from 1.1.2012 to 3rd week of March 2012. Further JPL had made a representation to CEA on 16th November 2011 whereby we had informed the CEA that 1,62,288 MT would be required for commissioning of Unit # 1 after synchronisation. JPL also sent a letter dated 8th December 2011 to the CEA revising the Project's minimum coal requirement upto March 2012. This also included coal required for commissioning of Unit # 1 in our estimation (1,62,288 MT).These letters are enclosed herewith for your ease of reference. We had apprised the CEA Chairman of the need for further allotment of coal on 16th December, 2011. We again attended a review meeting of CEA and MoP on 21st December, 2011 and raised our concern in this meeting. On the same day, JPL also met the Chief Engineer (O&M) CEA who assured that JPL would receive the letter allotting 1,50,000 MT of coal by 28th December 2011."

The petitioner after assuming that 150000 MT of coal would be allotted by 28.12.2011, calculated the time for applying for and allotment of rakes by Indian Railways and the time for the commissioning tests to achieve the full load and indicated the tentative date of commissioning of Unit 1 as 17.2.2012. Subsequently, the petitioner in its letter dated 30.12.2011 informed HPCC that in view of non-receipt of response from CEA for allocation of additional quantity of coal, the petitioner has identified few coal suppliers who indicated their ability to supply coal at short notice and furnished a list of such suppliers alongwith the landed cost of coal at petitioner's plant site. HPPC vide its letter dated 7.1.2012 advised the petitioner to arrange to supply a certificate from the Independent Engineer in terms of Article 12.3 (i) of the PPA that the plant was ready for commissioning. Further, HPCC vide its letter dated 9.1.2012 advised the petitioner to give a force majeure notice in terms of Article 12.5 of the PPA for deciding further course of action. The petitioner, in compliance with the requirement specified under second proviso to Article 12.3 (i), under its letter dated 12.1.2012 supplied a copy of the Independent Engineer's Certificate of the same date to the Haryana Utilities, in which it was certified that Unit 1 was ready for commissioning but could not be commissioned because of unavailability of sufficient coal stocks. Relevant extract of the Independent Engineer's Certificate is reproduced as under:

> "Readiness of Performance Tests:
>
> Having achieved synchronisation, Unit-1 is now ready in all respect, but is not expected to achieve commissioning of Unit # 1 unless sufficient stock of coal is available at the project site. The reclaimable coal reserve in the plant (approx. 45,000 MT) will not be adequate for stabilisation of Unit-1 and completion of the Performance Tests which is required to achieve Commissioning of Unit-1. Accordingly, it is suggested that additional coal stocks be built prior to undertaking the Performance Test runs."

45. The petitioner vide its letter dated 10.2.2012 informed the Haryana Utilities that it was ready to conduct the Commissioning and Performance Tests in the third week of February 2012 and by its letter dated 27.2.2012 informed the Haryana Utilities and TPTCL that it had built up the coal stock of around 7 days and it intended to light up the boiler on 28.2.2012.The petitioner in its letter dated 1.3.2012 informed the Procurers that it had lighted up the boiler at 04.06 hrs and synchronised

Unit 1 with the grid at 21.32 hrs on 28.2.2012 and started performance test at 21.00 hrs on 29.2.2012. The petitioner vide its letter dated 2.3.2012 informed the Procurers that Unit 1 had successfully completed the noise level test and auxiliary consumption test and was undergoing 72 hours full load tests and emission tests. The petitioner in its letter dated 5.3.2012 informed the procurers that Unit 1 tripped due to instrumentation problems at 10.45 hrs on 4.3.2012 and would initiate the light up activity on or about 13.3.2012 after receiving additional coal which was expected by mid-march. The petitioner in its letter dated 16.3.2012 informed the procurers that it was in the process of receiving coal from CCL under its second MoU and had coal stock of five days and would light up the boiler on 17/18.3.2012 and synchronise Unit 1 with the grid on 18/19.3.2012. The petitioner in its letter dated 28.3.2012 informed the procurers that Unit 1 had passed the Commissioning Tests in the presence of the Independent Engineer and the representatives of the procurers. The petitioner also forwarded the Final Test Certificate of Independent Engineer to the Haryana Utilities and TPTCL and informed that Unit 1 would be declared under commercial operation with effect from 29.3.2012. The petitioner has submitted that the tested capacity was 660 MW which was more than 95% of the contracted capacity. The Final Test Certificate dated 28.3.2012 stated as under:

> "The Performance and Commissioning Tests of Unit 1 were started at 7:00 hrs on 25th March, 2012 and concluded at 7:00 hrs on 28th March 2012.
> …………………………………………………………………………………………..
>
> L & T- S7L, as independent Engineers for the PPA Test, witnessed the Test and based on the report furnished, certify here that:
>
> a) The Commissioning Tests have been carried out in accordance with Schedule 5 of PPA and are acceptable.
>
> b) The results of the Performance Test (without FGD in operation) show that the Tested Capacity of Unit 1 is more than ninety five (95) percent of its Contracted Capacity as existing on the effective date."

46. In para 26 of the reply dated 2.12.2013, Haryana Utilities have submitted that in the absence Independent Engineer's Final Test Certificate to the effect that the plant can be operated on sustained basis, and when there were specific qualifications contained in the certificate given by the Independent Engineer, as to the sustained operation of the plant, COD cannot be said to have occurred. The reference is to the observation of the Independent Engineer in its certificate dated 12.1.2012 quoted in para 40 above which was issued in the context of non-availability of sufficient coal for undertaking performance test. Further in terms of the second proviso under Article 12.3.i of the PPA, in the event the Seller is construed to be affected by Natural Force Majeure Event due to non-supply of coal from CIL/CIL subsidiary, the unit shall be ready for commissioning only after the Independent Engineer certifies so in writing to the procurers. In other words, the Independent Engineer is required to issue a certificate regarding availability of coal required for conducting commissioning and performance test after cessation of force majeure event, and not in the context of sustained generation of electricity after the unit has been successfully commissioned and its COD declared. Therefore, the Independent Engineer is required to issue the Final Test Certificate in terms of Article 6.3.1 of the PPA and said Article does not require the Independent Engineer to certify that sufficient coal has been arranged by the petitioner for sustained operation of the plant after commercial operation.

47. In terms of Article 6.3.1, the petitioner shall commission the plant on the day after the date the procurers have received the Final Test Certificate. Both Haryana Utilities and TPTCL received the Final Test Certificate on 28.3.2012 and the petitioner has declared the COD of Unit 1 on 29.3.2012. In para 34 of the affidavit

dated 2.12.2013, Haryana Utilities have submitted that “the petitioner having conducted the performance and commissioning test and obtained the certificate of the Independent Engineer in support of the successful completion of the Performance Test and commissioning, ought not to have proceeded to declare the commercial operation from 29.3.2012 in the absence of the coal availability for sustained operation.” TPDDL vide its letter dated 18.7.2012 raised the issue of COD of the project only in the context that the project would not be able to operate for any reasonable period of time after declaration of commercial operation. Thus, the procurers have raised the objection that even after successful Performance and Commissioning Test, the petitioner should not have declared the commercial operation as it did not have sufficient quantity of coal to generate electricity on sustained basis. The petitioner has submitted that pursuant to the declaration of COD, the petitioner scheduled power based on such declaration which was accepted by SLDC Haryana and procured by Haryana Utilities and TPTCL. In support, the petitioner has placed on record the declared capacity and scheduled generation between 29.3.2012 and 1.4.2012. The petitioner in its rejoinder has submitted that in terms of the MoUs executed with CCL, Unit 1 of MGTPP achieved availability of 25.62% and supplied 188.0388 MUs to the procurers between 29.3.2012 and 7.6.2012 when the FSA was signed. The petitioner has further submitted that improvement in supply of coal after execution of the FSA was only marginal which enabled the petitioner to achieve availability of 31.05% in FY 2012-13. In our view, neither Haryana Utilities nor TPTCL/TDPPL have, after receipt of the Final Test Certificate and the intimation of the petitioner regarding declaration of COD of Unit 1 with effect from 29.3.2012, raised any objection with regard to the said declaration or have advised the petitioner to defer the COD till the FSA is signed.Further, the petitioner has achieved availability of 25.62% till the date of signing of FSA compared to the availability of 31.05% for the FY 2012-13. Therefore, the availability of Unit 1 has been affected due to non-availability coal from CIL/CCL both under the MoU route and the FSA which were beyond the control of the petitioner. For non-availability of sufficient coal to generate power upto the contracted capacity, declaration of COD of Unit 1 as 29.3.2012 cannot be held as invalid as contended by the Haryana Utilities and TPTCL/TPDDL. In the light of the above discussion, it is held that the Commercial Operation Date of Unit 1 of MGTPP has been correctly declared as 29.3.2012 after following the provisions of the PPAs.

B. Non-payment of Capacity Charges in Terms of Article 11 read with Schedules 7 &11 of the PPA with Haryana Utilities

48. The petitioner has submitted that on 18.7.2012,Unit 2 of MGTPP successfully completed the Performance and Commissioning Tests and in terms of Article 6.2.5 of the Haryana PPAs, the petitioner vide its letter dated 18.7.2012 notified HPPC about the COD of Unit 2 as 19.7.2012, enclosing therewith copy of the Final Test Certificate of the Independent Engineer. HPPC vide its letter dated 8.8.2012 took notice of COD of Unit 2 as 19.7.2012 but claimed that it would pay capacity charge @ Rs.0.748/kWh which was also reiterated vide letter dated 16.8.2012. The petitioner vide its letters dated 13.8.2012 and 23.8.2012 questioned HPPC's decision to pay @ Rs.0.748/kWh for Unit 2 in the 2nd Contract Year (2012-13) instead of Rs.0.918/kWh. The petitioner was informed in the meeting held on 7.10.2012 that in the light of the legal opinion of learned Advocate General of Haryana, COD of Unit 1 could not be accepted as 29.3.2012. The petitioner has submitted that in terms of PPA with Haryana Utilities, monthly bills are being raised for both Unit 1 & 2 of

MGTPP in accordance with schedule 11 of the PPA which the Haryana Utilities have refused to pay @ Rs. 0.918/kWh for second contract year (2012-13) and Rs. 1.068/kWh for third contract year (2013-14) but are paying at the rate of Rs.0.748/kWh and Rs. 0.918/kWh for second and third contract years respectively. The petitioner has submitted that TPTCL who is a procurer of 10% of the power being generated from the petitioner's power project has been making payments at the applicable tariff of Rs.0.748/kWh for the first contract year and Rs.0.918 for the second contract year. The petitioner has further submitted that the Haryana Utilities have accepted the COD of Unit 1 as 29.3.2012 when they agreed in the meeting held on 10.3.2012 to pay the capacity charge from COD of Unit 1 on 29.3.2012 barring the days when they did not schedule power. The petitioner has further submitted that both RfP and PPA do not envisage the two Units to have separate Contract Years running concurrently and for the power project as a whole, the first contract year would start from SCOD of Unit 1. The petitioner has submitted that it is entitled to be paid strictly in terms of Schedule 11 of the PPA and anything to the contrary would be illegal.

49. Haryana Utilities in their reply have denied that the petitioner is entitled to tariff on the basis of the COD of Unit 1 as 29.3.2012 and the tariff including capacity charges payable for the year 2012-13 is based on the operation being for the second year. Haryana Utilities have further denied that Unit 2 is eligible for tariff as applicable to the second year for the period from July 2012 to 31.3.2013. It has been further submitted that the first contract year for both the units was during 2012-13 and not 2011-12.

50. The dispute between the parties is whether the first contract year of tariff of MGTPP should be 2011-12 or 2012-13. Article 11 of Haryana PPA which deals with billing and payment reads as under:

> "From the COD of the first Unit, the Procurers shall pay the Seller the Monthly Tariff Payment, on or before the Due Date, comprising of Tariff for every Contract Year, determined in accordance with this Article and Schedule 7."

Para 1.1 of the Schedule 7 of the Haryana PPA provides as under:

> "1.1 General
>
> i. The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.
>
> ii. The Tariff shall be paid in two parts comprising of Capacity and Energy Charge.
>
> iii. For the purpose of payments, the Tariff will be Quoted Tariff, escalated as provided in this Schedule 7 for the applicable Contract Year as per Schedule 11.
>
> iv. The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and incentives shall be provided for Availability beyond 85% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by Seller as provided in this Schedule."

As per the above provisions, the payment of tariff shall be on monthly basis starting from the COD of the Unit 1 which shall comprise of tariff for every contract year determined in accordance with Schedule 7. Schedule 7 provides that tariff shall be in two parts comprising of capacity and energy charge and for purpose of payment, tariff shall be at the quoted tariff for the applicable contract year as per schedule 11, and escalated as provided in schedule 7. Schedule 11 of the PPA contains the details of the tariff quoted by the petitioner for a period of 25 years and accepted by the Haryana Utilities. For adjudication of the present dispute, the tariff payable for the first four Contract Years and the last Contract Year is extracted as under:

Contract Year	Commencement Date of Contract Year	End Date of Contract Year	Quoted Non-Escalable Capacity Charge (Rs/kWh)	Quoted Escalable Capacity Char (Rs./kWh)	Quoted Net Heat Rate (kCal/kWh)
1	Scheduled COD of first Unit	31-March	0.748	0.000	2396
2	01- April	31- March	0.918	Same as above	Same as above
3	01- April	31- March	1.068	Same as above	Same as above
4	01- April	31- March	1.068	Same as above	Same as above
26	01-April	25th anniversary of the scheduled COD of the first Unit	0.748	Same as above	Same as above

It is evident from the Schedule 11 that the first contract year and the last contract year of the quoted tariff are with reference to the Scheduled COD of Unit 1 of MGTPP only. In other words, there is no separate contract year for Unit 2. The term 'applicable contract year' used in schedule 7 indicates that if Unit 2 achieves its COD in second contract year, then the applicable tariff for Schedule 2 will be the tariff for the second contract year. Moreover, the quoted capacity charge is in kWh and is applicable to the electricity produced and supplied from both units.

51. In the Haryana PPA, contract year has been defined as under:

> "Contract Year means the period beginning on the Effective Date (as defined hereunder) and ending on the immediately succeeding March 31 and thereafter each period of 12 months beginning on April 1 and ending on March 31 provided that:
>
> (i) in the financial year in which Scheduled COD of the first Unit would have occurred, a Contract Year shall end on the date immediately before the Scheduled COD of the first Unit and a new Contract Year shall begin again from Scheduled Commercial Operation Date of the first Unit and end on immediately succeeding March 31 and provided further that (ii) the last Contract Year of this Agreement shall end on the last day of the term of this Agreement;
>
> Provided that for the purpose of payment, the tariff will be the Quoted Tariff for the applicable Contract Year as per Schedule 11."

As per the above provision, the Contract Year begin from the SCOD of the Unit 1 of the generating station and end on immediately succeeding March 31, and the last Contract Year shall end on the last day of the term of the PPA. It is not in dispute that as per the PPA, the SCOD of Unit 1 was 22.1.2012 and SCOD of Unit 2 was22.7.2012 counting 42 months and 48 months respectively from the date of issue of LOI. The petitioner was affected by force majeure event on account of non-materialisation of Fuel Supply Agreement and accordingly, the petitioner sent a notice to the Procurers seeking extension of SCOD of the first Unit of the Power Project. In para 60 of the petition, the petitioner has stated that SCOD ought to have been revised to 10.3.2012. Haryana Utilities in their reply have not disputed the revision of SCOD to 10.3.2012. Therefore, in terms of Article 4.5.3 of the PPA, SCOD stands revised to 10.3.2012. The first contract year of Unit 1 as per the revised SCOD will start from 10.3.2012 and end on 31.3.2012. The second Contract Year as per schedule 11 will start on 1.4.2012 and end on 31.3.2013 and third contract year will start on 1.4.2013 and end on 31.3.2014 and so on.

52. As already held, COD of Unit 1 of MGTPP was validly declared on 29.3.2012. There is no dispute about the COD of Unit 2 as 19.7.2012. Since Schedule 11 recognises the first and last contract year with reference to SCOD of Unit 1 only and there is no provision in the PPA to separately calculate the contract year for Unit 2 with reference to SCOD, it is held that when the COD of Unit 2 was declared on 19.7.2012, the applicable contract year for the purpose of tariff will be the second contract year. The petitioner will be entitled for tariff of the first contract year during 2011-12 and of second contract year during 2012-13 and tariff for the subsequent contract years will be admissible accordingly.

C. Payment of Capacity Charges for Availability andRefundof Penalty imposed under Clause 1.2.5 of Schedule 7 of PPA

53. The petitioner has submitted that due to overarching coal shortage in the country and the persistent actions of the Procurers to thwart the petitioner's efforts to procure alternate coal, MGTPP was only able to achieve commercial availability of 31.05% in the Financial Year 2012-13 whereas the technical availability of the project was 76.56% which would have been achieved, had the Haryana Utilities granted timely consents for procuring imported coal (with increasing blending ratio) and domestic coal from alternate sources such as e-auction coal and as is where is basis. The petitioner has submitted that Haryana Utilities have deducted an amount of Rs.55.79crore from the petitioner's bill of March 2013 in terms of Article 1.2.5 of Schedule 7 of the Haryana PPA in an arbitrary and untenable manner. The petitioner is stated to have brought to the notice of Haryana Utilities that the following factors solely attributable to the Haryana Utilities are responsible for low availability:

(a) Low materialisation of domestic coal linkage that was arranged by the Haryana Utilities;

(b) Despite request made in May 2011, Haryana Utilities unreasonably delayed the approval of imported coal during 2012-13;

(c) Delay in finalisation of HPGCL contract for procurement of imported coal which impacted the petitioner's ability to place orders on the same place;

(d) Haryana Utilities imposed blending restrictions of 15% of imported coal and refused to increase the same despite repeated requests of the petitioner;

(e) Haryana Utilities imposed restrictions on the quantity of coal that can be imported in the Financial Year 2012-13.

(f) Haryana Utilities refused to consent to the petitioner's proposal to procure 'as is where is coal', e-auction coal and open market coal.

The petitioner has submitted that delay and/or denial on the part of the Haryana Utilities to give consent for the procurement of coal from alternate sources qualifies as an event of force majeure under the Haryana PPA. Article 12.3 of the PPA defines force majeure to mean any event or circumstance or combination thereof including those enumerated therein that prevents or delays a party from performing its obligations thereunder, but only if such events or circumstances are outside such party's reasonable control and could not have been avoided. Article 12.3 (ii)(b) of the PPA inter alia provides that any unlawful, unreasonable and discriminatory refusal to grant any consent required for the operation of the plant by the procurers shall be considered as a Direct Non-Natural Force Majeure Event, provided an appropriate court has declared such refusal to be unlawful, unreasonable or discriminatory and strikes the same down. The petitioner has sought a declaration by the Commission that the unreasonable refusal by Haryana Utilities to grant their consent for procurement of alternate sources of coal as a Direct Non-Natural Force Majeure Event. The petitioner has further submitted that the Haryana Utilities ought not to be permitted to penalise the petitioner or claim liquidated damages from the petitioner for any alleged default on the part of the Petitioner of the provisions of the PPA as the petitioner is the Affected Party. The petitioner has further submitted that as per Article 12.7(e) of the PPA, if the plant's average availability falls below 80% for over 2 consecutive months or for any non-consecutive period of 4 months both within any continuous period of sixty months, as a result of a Direct Non-Natural Force Majeure Event, then with effect from the end of that period and so long as the daily average availability continues to be reduced below 80% as a result of such Direct Force Majeure Event, the petitioner may through a written notice to the Procurers deem the availability of the plant to be 80% from the end of such period, regardless of its actual available capacity. The procurers are liable to pay the Capacity Charge calculated on such deemed Normative Availability, after the cessation of the effects of the Non Natural Direct Force Majeure in the form of increase in Capacity Charge. The petitioner has submitted that the capacity charge increase is required to be determined by this Commission on the basis of putting the petitioner in the same economic position as it would have been, had the petitioner been paid the Capacity Charges in a situation where the Direct Non Natural Force Majeure had not occurred. The petitioner has submitted that since the technical availability of the plant during 2012-13 was 76.56%, the Capacity Charge to the extent of the Plant's technical availability be allowed in terms of Article 11.7(e) of the Haryana PPA.

54. Haryana Utilities in their reply have submitted that capacity charge is payable on declared capacity, namely, the capacity which the petitioner declares that it is in a position to generate and supply electricity with the requisite availability of fuel. According to Haryana Utilities, there cannot be a declaration of capacity in the absence of fuel both under the PPA as well as regulations of scheduling and despatch. It has been submitted that in terms of Article 3.1.2, the FSA needs to be pursued and signed by the petitioner and not by the procurers. Haryana Utilities have denied that the time taken by the petitioner from 17.5.2011 to 21.6.2012 in the matters relating to procurement of coal was on account of any act of omission or commission or otherwise at the instance of Haryana Utilities. They have further submitted that the petitioner was entitled to secure domestic supply of coal only in

accordance with fuel supply agreement or in accordance with the mutual agreement with the Haryana Utilities. They have submitted that the petitioner was not entitled to procure high cost of coal under an alternative arrangement proposed by the petitioner. Haryana Utilities have further denied that the provision of Article 12.3(ii)(b) or Article 12.7(e) of the PPA has any application to the present case since in terms of Article 12.3, inadequate supply of coal by CIL/CCL does not amount to any kind of force majeure under the PPA. Haryana Utilities have urged that Article 7.2 of the PPA cannot be interpreted in a manner to confer upon the petitioner a right to decide on the sourcing of coal at its whims and expect that the Haryana Utilities to give their consent. They have alleged that the petitioner had been taking inconsistent stand on the use of quantum of imported coal, because its assessment varied from 15% to 40%. They have pointed out that the petitioner was permitted to blend 40% of the imported coal and not exceeding by 35% by weight on annual basis based on the recommendations of CEA.

55. The dispute between the petitioner and Haryana Utilities with regard to the deduction of penalty and withholding of capacity charge for an amount of Rs.55.79 crore till March 2013 revolves around the interpretation of the provisions of Article 12.3, Article 12.3(ii)(b), Article 12.7(e)and Clause 1.2.5 of Schedule 7 of Haryana PPA. Accordingly, relevant provisions of Haryana PPA are extracted as under:

> “12.3 Force Majeure
>
> A Force Majeure means any event or circumstance or combination of events or circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent such events or circumstances are not within the reasonable control, directly or indirectly of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Events:
act of God, including but not limited to lightning, drought, fire, explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures of the last hundred (100) years,

Provided that in the event the Procurer is convinced and agrees in writing that the Seller has made all reasonable efforts and has fulfilled all its obligations to sign the Fuel Supply Agreements with the respective agencies, but is not able to do so within the deadline mentioned in Article 3.1.2 owing to reasons beyond the Seller's reasonable control, then the Seller shall be construed to be affected by Natural Force Majeure event.

Provided further that in the event the first Unit of the power station is ready in all respects but is not able to achieve the commissioning by the scheduled COD due to :(a) non-completion of the Rail corridor for transportation of coal from CIL's/CIL subsidiary's linked coal mines to the Project site; or (b) non-supply of coal from CIL or CIL's subsidiary, then the Seller shall be construed to be affected by the Natural Force Majeure event. It must be noted that the Unit shall be considered as ready for commissioning only when the Independent Engineer certifies so in writing to the Procurer.

Notwithstanding anything stated above, inadequate availability of Rail corridor for transportation of coal or inadequate supply of coal by CIL/CIL's subsidiary shall not be construed as any kind of Force Majeure event after COD of first unit of the generating station.

ii. Non-Natural Force Majeure Events:

1. Direct Non-Natural Force Majeure Events
a)…………………………………………….
b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any consent required by the Seller or any of the Seller's contractors to perform their obligations under the project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the Project. Provided that an appropriate Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c)………………………………………………………………………………
2. Indirect Non-Natural Force Majeure Events:
…………………………………………………………………………………..

12.4 Force Majeure Exclusions
Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions except to the extent they are consequences of an event of force majeure:

a. Unavailability, late delivery, or changes in the cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the plant;

…………………………………………………………………………………………………
…

12.7 AVAILABLE RELIEF FOR A FORCE MAJEURE EVENT

Subject to this Article 12:
(a) No party shall be in breach of its obligations pursuant to this Agreement to the extent that performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;
(b)……………………………………………………………………………………
(c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurers for the part of the Contracted Capacity affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event. For the balance part of the Contracted Capacity, the Procurers shall pay Tariff to the Seller, provided during such period of Natural Force Majeure Event, the balance part of the Power Station is declared to be Available for the scheduling and dispatch as per ABT for supply of by the Seller to the Procurers;
(d)…………………………………………………………………………………
(e) If the average Availability of the Power Station is reduced below eighty (80) percent for over two (2) consecutive Months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) Months, as a result of a Direct Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below eighty (80) percent as a result of a Direct Non Natural Force Majeure of any kind, the Seller may elect in a written notice to the Procurers, to deem the Availability of the Power Station to be eighty (80) percentage from the end of such period, regardless of its actual Available Capacity. In such a case, the Procurers shall be liable to make payment to the Seller of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Non Natural Direct Force Majeure in the form of an increase in Capacity Charge. Provided such Capacity Charge increase shall be determined by the Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity charges in a situation where the Direct Non Natural Force Majeure had not occurred."

"SCHEDULE 7 : TARIFF

1.1 General

i. The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this schedule.
ii. The Tariff shall be paid in two parts comprising of Capacity and Energy Charge.
iii. For the purpose of payments, the tariff shall be Quoted Tariff escalated as provided in this Schedule 7 for the applicable Contract Year as per Schedule 11.
iv. The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and incentive shall be provided for

Availability beyond 85% as provided in this Schedule shall be given. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule.

……………………………………………………………………………………….

1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year: In case the Availability for a Contract Year is less than 75%, the seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity charge (in Rs./kWh) for all Months in the contract Year applied on the energy (in kwh) corresponding to the difference between 75% and Availability during such Contract Year".

56. From the above provisions of the PPA, the following emerge with regard to the liability of the procurers to pay the capacity charges in case the availability is affected by a force majeure event and the liability of the petitioner to pay the penalty where the availability is not affected by force majeure event:

(a) Force Majeure means any event or circumstance or combination of events or circumstances which wholly or partly prevents or unreasonably delays an Affected Party from discharging its obligations under the PPA and to the extent such circumstances or events are not within the reasonable control of the Affected Party and could have been avoided had the Affected Party taken reasonable care or adopted prudent utility practices.

(b) The Seller is affected by Natural Force Majeure Event if the procurer is convinced that the seller is unable to sign the FSA within the timeline specified in Article 3.1.2 of the PPA despite making reasonable efforts and fulfilling all obligations to sign PPA.

(c) If first unit of MGTPP is ready in all respects but is prevented from commissioning before SCOD due to non-completion of rail corridor from for transportation of coal from CIL/subsidiary's mines or due to non-supply of coal from CIL's/subsidiary's mine, the seller will be affected by Natural Force Majeure Event.

(d) There is a non-obstante clause to the above provision which states that inadequate availability of rail corridor or inadequate supply of fuel by CIL/its subsidiary shall not be construed as a force majeure event after COD of the first unit of MGTPP.

(e) Any unlawful, unreasonable or discriminatory revocation or refusal to renew or refusal to grant any consent for the development/operation of the project is an event of non natural force majeure provided that an appropriate Court of Law declares such revocation or refusal to renew or refusal to grant such consent as unlawful or unreasonable or discriminatory.

(f)Unavailability, late delivery, or changes in the cost of Fuel is excluded unless it is the consequence of an event of force majeure.

(g) Every party shall be entitled to claim relief in relation to a force majeure event in regard to its obligations.

(h) If the average availability of the power station is reduced below 80% for over two consecutive months or for any non-consecutive period of four months within any continuous period of sixty months as a result of direct non natural force majeure, the seller shall through a notice to the procurers elect to deem the availability of the power station as 80% and the procurers shall be liable to pay for such deemed availability in the form of increase in capacity charge subject to the determination by the Appropriate Commission by putting the seller in the same economic position as if the force majeure event had not occurred.

(i) The full capacity charges shall be payable based on the contracted capacity at normative availability (80%) and in case of capacity charges being less than normative availability, the capacity charges shall be payable on normative basis in addition to the penalty to be paid by the seller in terms of clause 1.2.5 of the Schedule 7 of the PPA.

(j) In case availability falls below 75% for a contract year, the seller shall pay the penalty @ 20% of the simple average capacity charge for all the months in a contract year applied to the energy (in kWh) corresponding to the differences between 75% and availability during such contract year.

57. Let us consider the case of the petitioner in the light of the above provisions. The petitioner could not sign the FSA within the time stipulated in the PPA on account of certain onerous and unfavourable clause though the petitioner fulfilled all conditions laid down in the LOA. Haryana Utilities in due recognition of the problem have extended the timeline for signing the FSA till 30.4.2012. The problems have been appreciated by all concerned authorities and the procurers, mainly, Haryana Utilities. After the issue of Presidential Directive in April 2012, CCL entered into a PPA with the petitioner on 7.6.2012. Para 4.3.1 of the FSA provides as under:

> "4.3.1 The seller shall endeavour to supply coal from own sources as mentioned in Schedule 1. In case the Seller is not in a position to supply the Scheduled Quantity (SQ) of coal from such sources as indicated in Schedule 1, the Seller shall have at its sole discretion, the option to supply the balance quantity of coal through import to be delivered by CIL. In case of acceptance of imported coal by the Purchaser, the Purchaser shall execute a back to back agreement for supply with the Seller for such imported coal. In the event the quantity offered for imported coal is not accepted by the Purchaser, no penalty shall be applicable for the shortfall."

As per Schedule 1 of the FSA, the petitioner would be supplied 5.21 million tonnes of coal annually from all the operative mines of CCL. In case of shortfall in supply of coal, the CCL at its sole discretion shall have the option to supply balance quantity of coal through import. In the event, the coal offered by CIL is not accepted by the petitioner, then no penalty shall be applicable for the shortfall. Further, para 4.6.1 of the FSA regarding the penalty clause in the FSA provides as under:

> "4.6.1 If for a year, the level of Delivery by the Seller, or the level of lifting by the purchaser falls below ACQ with respect to that year, the defaulting party shall be liable to pay compensation to the other party for such shortfall in level of delivery of level of lifting, as the case may be ("Failed Quantity") in terms of the following:

S. No.	**Level of Delivery / Lifting of Coal in a year**	**Rate of compensation for the Failed Quantity (at the rate of simple average of Base Prices of Grades, as shown in Schedule III)**	**Formula for calculation of compensation**
1	Less than 100% but up to 80%	NIL	
2	Less than 80%	0.01%	0.0001 x P x ((80-LD or LL)/100) x ACQ
# to be operative after a period of three years from the date of signing of the FSA			

It may be seen that in the FSA, there is no penalty for short supply of coal between 80% and 100%. Further, for supply below 80% of the SQ, CCL will be liable for penalty @0.01% of the average price of coal. It is further qualified that the penalty clause will be applicable only after 3 years of signing the FSA i.e. after 7.6.2015. Therefore, during the contract years 2012-13, 2013-14 and part of 2014-15, the petitioner is not assured of the full ACQ of coal as per the FSA nor is entitled to any penalty for the shortfall. In case of shortage of coal supply by CCL under the FSA, the petitioner has no other means but to resort to procurement of coal from alternative sources namely, imported coal, e-auction coal and coal available on 'as is where is basis'.

58. Haryana Utilities have taken the position that as per the non-obstante clause under Article 12.3.i of the Haryana PPA, inadequate supply of coal by CIL/CIL's subsidiaries shall not be construed as any kind of force majeure event after the COD of first unit of the power station. Accordingly, Haryana Utilities have argued that after the COD of Unit 1 of MGTPP, shortfall in coal supply by CCL shall not be considered as force majeure. The non-obstante clause under Article 12.3.i is extracted as under:

> "Notwithstanding anything stated above, inadequate availability of Rail corridor for transportation of coal or inadequate supply of coal by CIL/CIL's subsidiary shall not be construed as any kind of Force Majeure event after COD of first unit of the generating station."

This is a limited non-obstante clause excluding the operation of Natural Force Majeure Events as described in Article 12.3.i of the PPA. This clause does not control the provisions of Article 12.3.ii regarding Non Natural Force Majeure Events and Article 12.4 of the PPA regarding Force Majeure Exclusions under which reliefs have been claimed. Therefore, we are not in agreement with Haryana Utilities that short supply of coal after the FSA was signed cannot be covered under force majeure.

59. The petitioner has submitted that CEA in its letter to the petitioner mandated for import of 1 million tonnes of coal on 27.1.2012. Haryana Utilities accorded approval of import of coal vide their letter dated 20.7.2012. However, 0.4 million tonnes were linked to the tender process of HPGCL which delayed the matter till middle of November 2012. The petitioner has further submitted that Haryana Utilities capped the blending of imported coal to 15% which was relaxed to 35%-40% only at the fag end of the contract year 2012-13 as a result of which the petitioner could not take advantage of blending higher percentage of coal to increase the availability

during 2012-13. As regards procurement of coal on as is where is basis, the petitioner has submitted that the petitioner requested HPCC, HPGCL and Haryana Government vide its letters dated 18.5.2012, 22.6.2012 and 25.6.2012 respectively and further provided justification through its letter dated 29.6.2012. Though HPCC granted in principle approval to procure coal on as is where is basis, the approval was subject to the conditions that the transportation charge/handling charges that would be incurred would be limited to the lower of the actual cost being incurred by HPGCL for such procurement and the cost as may be notified by CIL/CCL, if any. There was also issue between the petitioner and Haryana Utilities as regards the appointment of handling/transportation agent. After prolonged correspondence, the parties could not sort out the dispute and in a meeting dated 7.10.2012, both parties agreed that procurement of coal on ‘as is where is basis’ is a costly option and the proposal was accordingly dropped. The petitioner has submitted that had the permission been granted in time for import of coal and procurement of coal on ‘as is where is’ basis, the petitioner would have been able to achieve an availability of 78.51%. The petitioner in its letter dated 23.5.2013 addressed to CMD UHBVNL and DHBVNL has given the calculation in support of its contention.

60. We have considered the submission of the petitioner. In our view, unreasonable delay in according approval for procurement of coal from alternative sources by the Haryana Utilities which has prevented the petitioner to achieve the full availability is covered under Article 12.3.ii (b) of the PPA relating to Direct Non-Natural Force Majeure Event. However, under Article 12.4.(a) of the PPA, unavailability of fuel cannot be considered as force majeure unless it is the consequence of an event of force majeure. Since delay in approval by Haryana

Utilities has resulted in non availability of fuel, this circumstance will be covered under force majeure. It is however noted that the petitioner is also responsible to some extent for non-availability of fuel. There is no pleading on record which justices the inaction of the petitioner to procure coal of 0.60 million tonnes from CPSU route after the approval was accorded on 20.7.2012. In our view, the petitioner is partially affected by force majeure condition during the period 2012-13. In accordance with article 12.7(e) of the PPA, if the average availability is reduced below 80% for over two consecutive months or any non consecutive period of four months within a continuous period of 60 months as a result of direct non natural force majeure event, the seller is entitled for capacity charges on such deemed normative availability after cessation of non force majeure event. Further, as per clause 1.2.7 under Schedule 7 of the PPA, if the availability falls below 75% during the contract year, the petitioner is liable to pay penalty @20% of the simple average capacity charge for all months of the contract year corresponding the difference between the availability and 75%.

61. Next we consider the availability achieved by the petitioner after 7.6.2012 till 31.3.2013. The petitioner in its letter dated 29.6.2012 addressed to Additional Chief Secretary, Government of Haryana, the petitioner has apprised the availability of coal after signing of FSA as under:

> "<u>Justification for procurement of additional coal from pit head</u>
>
> We have signed the FSA with CCL on 7 Jun 2012. As per the FSA, CCL has obligation to supply minimum 80% of linkage coal. However, considering the above demand supply scenario, we will be receiving only 60% to 80% of the offered quantity i.e. total 48% to 64%. To run both the units on consistent basis, we need additional coal."

From the above, it emerges that the petitioner was in a position to arrange 48% to 64% of its coal requirement from the date of signing of FSA till 31.3.2012. Taking an average of 48% and 64%, the petitioner was assured of supply upto 56% and was required to arrange coal upto 24% of its requirement through procurement from alternative sources which could not materialise on account of delay in according approval, delay in finalisation of its coal import by HPGCL and mutual decision not to pursue coal on as is where is basis being a costly option. In our view, the arrangement of coal for 24 % availability i.e. 56% to 80%, the petitioner was affected by Direct Non-Natural Force Majeure Event under Article 12.3.ii(b) read with Article 14.4(a) of the Haryana PPA and accordingly, the petitioner is entitled for capacity charges upto 24% of availability in terms of Article 12.7(e) of the PPA. The petitioner has actually achieved commercial availability of 31.05% during 2012-13. Therefore, we direct that for the Contract Year 2012-13, the petitioner shall be entitled for capacity charges for the availability of 55.05% (31.05% + 24%) during 2012-13. Accordingly, the penalty under clause 1.2.5 of Schedule 7 of the PPA shall be worked out by taking the availability as 55.05%. Haryana Utilities shall work out the availability of MGTPP during 2012-13 accordingly and refund the excess capacity charges withheld with interest @ 12% per annum.

Non-payment for Transit Losses and Miscellaneous Costs

62. The petitioner has submitted that it suffers transit losses from the mines to the power project at Jhajjar. The petitioner has submitted tat though the Haryana Utilities have acknowledged the transit loss of coal suffered by the petitioner, they have showed their inability to pay the same in the absence of provision in the PPA and have advised the petitioner to approach HERC in this regard. The petitioner has submitted that in terms of the Tariff regulations of the Commission for the period 2009-14, transit loss of 0.8% for non-pithead stations has been specified which is insufficient to meet the losses. The petitioner has submitted that HERC has granted

transit loss of 1.5% to the generating stations of HPGCL. The petitioner has requested to determine the transit losses, keeping in view the distance from the mine to the power project of the petitioner. The petitioner has also claimed reimbursement of expenses incurred in connection with purchase and transportation of coal such as bank guarantee cost, railway charges, coal handling agent charges etc.

63. Haryana Utilities have submitted that the petitioner's claim for coal transit loss, coal handling charges, railway staff charges, shunting charges, charges associated with transportation etc. are not admissible in a tariff based competitive bidding where there is no such stipulation in the PPA for allowing such charges.

64. In our view, transit loss of coal, expenses incurred in connection with purchase and transportation of coal such as bank guarantee cost, railway charges, coal handling agent charges are legitimate expenses which the petitioner has incurred for supply of power to the procurers. However, there is no provision in the PPA in this regard. We direct the petitioner and respondents to mutually sort out the expenses on these accounts after taking into account the actual expenditure incurred by the petitioner and the prevailing industry practices and approach the Commission for approval.

D. Payment of UI Charges

65. The petitioner has submitted that Haryana Utilities have been insisting to apply the HERC (Terms and Conditions for Grant of Connectivity and Open Access for Intra-State Transmission and Distribution System) Regulations, 2012 (the HERC Regulations)in cases of under/over injection of power from the Project contrary to the provisions of Article 8.3 and 8.4 of the PPA which requires that the matters relating

to availability and despatch shall be determined in accordance with Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009. According to the petitioner, under/over injection of power is to be regulated in terms of this Commission's regulations. Per contra, the Haryana Discoms have stated that since the Project is located within the State of Haryana, it is governed by the HERC Regulations. The Haryana Discoms have pointed out that the intra-State ABT has not been introduced within the State.

66. Articles 8.3 and 8.4 of the PPA provide as under:

"8.3 AVAILABILITY

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

"8.4 Dispatch

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

67. Article 8.3 and 8.4 of the PPA provide in general terms that in matters concerning declaration of availability and dispatch, the petitioner shalbe governed by the provisions of the ABT and Grid code. The PPS does not specifically identify, and rightly so, the Commission whose regulations on ABT and Grid code would apply to the petitioner since it depends upon the nature of the generating station, that is, whether it is inter-State or Intra-State. The power project which is the subject matter of the present petition is an inter-State generating station. It has already been held that the petitioner, as a generating company, has the composite scheme for generation of electricity in more than one State and the Central commission exercises regulatory jurisdiction over the Power Project. In this view of the matter,

there is no force in the contention of the Haryana Utilities that since the Power Project is located in the State of Haryana, it is governed by the HERC Regulations. Accordingly, it is held that the petitioner and the respondents are governed by the ABT Regulations and the Grid code specified by this commission. Accordingly, it is directed that all cases, past and future, of under/over injection are to be settled in terms of the Central Electricity Regulatory commission (Unscheduled inter-change Charges) Regulations, 2009, as applicable from time to time or Central Electricity Regulatory Commission(deviation Settlement Mechanism and related matters) Regulations, 2014, as the case may be.

Late Payment Charges

68. Jhajjar Power has pointed out that in the past on certain occasions the Haryana Discoms failed to release of payments in time and are therefore liable to pay the Late Payment Charges. The Haryana Discoms have not contested the petitioner's claim. It is, therefore, directed that the petitioner shall be entitled to Late Payment Charges in accordance with Article 11.3.4 of the PPA.

Summary of our decisions

69. In view of the above discussions, our findings on the various issues are as under:

(a) The petitioner has taken the necessary measures available under the PPA to procure coal for supply of power to the procurers but was prevented on account of delay in grant of approval by the Haryana Utilities.

(b) As per the provisions of PPA, signing of Fuel Supply Agreement is not a condition precedent for declaration of the COD of Unit-I of the power project.

(c) COD of the power project has been validly declared as 29.3.2012 after following the provisions of the PPAs with Haryana Utilities and TPTCL.

(d) The first Contract Year for the purpose of tariff is 2011-12 and the second Contract Year is 2012-13. Therefore, the non-escalable capacity charge of Rs. 0.748/kWh and Rs. 0.918/kWh shall be applicable for the first and second contract Year respectively.

(e) The availability of MGTPP for the year 2012-13 shall be considered as 55.05% for the purpose of payment of capacity charges and penalty. Haryana Utilities shall calculate the capacity charge and penalty accordingly and refund the excess amount withheld if any to the petitioner with interest @ 12% per annum.

(f) The regulations of the Commission shall be applicable for the purpose of availability and dispatch in terms of Article 8.3 and 8.4 of the PPA.

(h) The Petitioner and the procurers shall work out mutually and decide transit loss and other charges such as railway staff charges, loading and unloading charges, handling agent charges, bank guarantee charges etc. and approach this Commission for approval.

(i) The Haryana Utilities are liable to pay the late payment charges in accordance with Article 11.3.4 of the PPA for any delay in payment.

70. The petition is disposed of in terms of above.

Sd/-	sd/-	sd/-
(A. S. Bakshi)	**(A.K. Singhal)**	**(Gireesh B.Pradhan)**
Member	**Member**	**Chairperson**