CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 258/MP/2019

Coram:
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 01 August, 2023

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 17 of the PPA dated 20.01.2009 for adjudication of dispute with respect to non- payment of amount towards the level of lifting penalty paid to the coal suppliers by Jhajjar Power Limited in terms of Article 1.2.8 of Schedule 7 of the PPA for the Contract Year 2016-17.

And
In the matter of

Jhajjar Power Limited (JPL),
Village: Khanpur Khurd,
Tehsil: Matenhail,
District: Jhajjar-124142, Haryana

….Petitioner

Vs

Tata Power Trading Company Limited,
Shatabdi Bhawan,
2nd Floor, B-12 &13,
Sector-4, Noida 201301

….Respondent

Parties present:

Shri Aniket Prasoon, Advocate, JPL
Ms. Priya Dhankhar, Advocate, JPL
Ms. Aanandini Thakare, Advocate, JPL
Ms. Bitika Kaur, JPL
Shri Venkatesh, Advocate, TPTCL
Shri Rishub Kapoor, Advocate, TPTCL
Shri Jatin Ghuliani, Advocate, TPTCL
Shri V. M. Kannan, Advocate, TPTCL

Ms. Isnain Muzamil, Advocate, TPTCL
Ms. Sarika Jerath, TPTCL
Ms. Aiyer Vaishnavi, TPTCL
Shri Nitish Gupta, Advocate, TPDDL
Ms. Parichita Chowdhury, Advocate, TPDDL

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 between the petitioner and Tata Power Trading Company Limited (TPTCL) and Tata Power Delhi Distribution Limited (TPDDL) with regard to the reimbursement of penalty paid by JPL to the coal companies for low level of lifting of coal under the Fuel Supply Agreements during the contract year 2016-17 due to the failure of the procurers to meet their Minimum Offtake Guarantee.

Facts in brief

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

(a) Haryana Power Generation Corporation Limited (HPGCL) on behalf of Haryana Discoms conducted the international competitive bidding process as per the 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licenses' dated January 19, 2005 issued by the Ministry of Power, Government of India under Section 63 of the Act (Competitive Bidding Guidelines). The Bid Documents envisaged the project to be set up as a Mega Power Project (MPP), which would avail the benefits prescribed under the then

Mega Power Policy, 2006 (Mega Policy) by supplying 10% of the capacity outside the State of Haryana.

(b) Apraava Energy Private Limited (formerly known as CLP India Pvt. Ltd.) submitted its bid on March 10, 2008. Upon the conclusion of the bidding process, Apraava was declared as the successful bidder and was awarded the Project by way of Letter of Intent dated July 23, 2008.

(c) JPL and Haryana Discoms executed a Power Purchase Agreement on 07.08.2008 (as amended vide Amendment Agreement dated 17.09.2008) for a total supply of **90% of the power generated from the Plant, i.e. 556.75 MW each** to UHBVNL & DHBVNL (Haryana PPA).

(d) In order that the Plant meets the qualification requirements of an MPP, the Petitioner executed the Tata PPA on 20.01.2009 with TPTCL, which was amended vide Amendment Agreement dated 21.10.2010, for sale of 10% of the Plant's net capacity at the same tariff discovered under the Haryana PPA.

(e) On the same day, TPTCL executed a Power Sale Agreement with Tata Power Delhi Distribution Limited (TPDDL) (erstwhile Northern Delhi Power Limited) (Tata PSA) and agreed to sell the entire power contracted from the Petitioner to TPDDL for distribution in the National Capital Territory of Delhi.

(f) As per the terms and conditions of the Standard Bidding Documents and Clause 3.1.2(A) of the Haryana PPA, Haryana Discoms were required to arrange coal linkage for the Project. Accordingly, Haryana Discoms arranged coal linkage to

the extent of 5.21 Million Tonne Per Annum (MTPA) of "E" Grade domestic coal from Central Coalfields Limited (CCL) in favour of JPL. The same stood further reduced to 4.937 MTPA while shifting part of the coal linkages from CCL to three other subsidiaries of Coal India Limited.

(g) Accordingly, JPL has entered into four FSAs for the Project, namely with Central Coalfields Ltd. for an ACQ of 3.048 on 07.06.2012, Eastern Coalfields Ltd. for an ACQ of 0.50 on 23.10.2013, Northern Coalfields Ltd. for an ACQ of 0.50 on 18.10.2013, and Bharat Coking Coal Ltd. for an ACQ of 0.889 on 19.01.2015.

(h) In the contract year 2016-17, power off-taken by TPTCL was only 20.50 % of its total contracted capacity, which is below the Minimum Offtake Guarantee stipulated in the Tata PPA. As a result, JPL failed to meet its 'Level of Lifting' obligation under Clause 4.6 of the FSAs with all coal supplying entities, i.e., CCL, NCL, BCCL, and ECL, respectively. Therefore, for the contract year 2016-17, the amounts charged by coal suppliers from JPL as penalty for the shortfall in 'Level of Lifting' stipulated under the respective FSAs, are listed in the table below:

Coal Company	Penalty Amount (in Rs.)
BCCL	18,29,56,221
ECL	16,46,40,972
NCL	5,12,00,000
CCL	Yet to be claimed
Total:	39,87,97,193

(i) It is pertinent to highlight that, except CCL, all the subsidiaries of CIL have claimed and recovered penalties from JPL. CCL is yet to raise its claim in this regard and JPL has reserved its right to claim the same as and when CCL makes a claim in this regard.

(j) The total amount of penalty paid to the aforementioned coal suppliers by JPL is apportioned in ratio of the respective shortfall in the scheduled generation of Haryana Discoms and TPTCL respectively from their stipulated Minimum Offtake Guarantee. Haryana Discoms have already paid their share of low lifting of coal penalty to JPL for the contract year 2016-17 as they had off taken only 25.61% of their total contracted capacity.

(k) JPL through its monthly letters "Dispatches below Minimum Offtake Guarantee" has been indicating monthly/cumulative dispatch schedule given by the Haryana Power Purchase Committee (HPPC) (i.e., designated authorized entity representing Haryana Discoms) for contract year 2016-17 vis-à-vis month-on-month coal-off take status under the FSAs. Further, JPL vide various letters dated 08.07.2016, 29.07.2016, 22.08.2016, 04.11.2016, and 06.12.2016 during contract year 2016-17 itself informed TPTCL that dispatches have been below the Minimum off-take Guarantee due to which JPL will be entitled to claim penalty towards the low level of lifting paid to coal companies from the TPTCL in terms of the provisions of the Tata PPA.

(l) Accordingly, JPL has claimed from TPTCL its proportionate share under Article 1.2.8 of Schedule 7 of the Tata PPA. The principal amount claimed by JPL from TPTCL is Rs. 4,44,77,904/-

(m) In this regard, JPL had raised respective invoices to TPTCL by way of its letters bearing ref no. JPL/TPTCL/FA/07829 dated 18.07.2017 (in relation to ECL's claimed penalty amount), JPL/TPTCL/FA/08161 dated 20.11.2017 (in relation to

BCCL's claimed penalty amount), and JPL/TPTCL/FA/09472 dated 17.01.2019 (in relation to NCL's claimed penalty amount), wherein the Petitioner claimed the aforesaid penalty under Article 1.2.8 of Schedule 7 of the Tata PPA.

(n) Further, JPL vide its various letters dated 24.08.2017, 10.10.2017, 07.06.2018, 04.09.2018, 16.11.2018, and 30.04.2019 requested TPTCL to reimburse its share of penalty paid by JPL to coal companies for shortfall in meeting stipulated 'Level for Lifting' of coal under the respective FSAs. However, the Respondents refused to make payment of the same to JPL, which resulted in delay in payment of the invoices beyond the due date, on account of which JPL is also claiming late payment surcharge till the date of actual payment by TPTCL, in terms of Article 11.3.4 read with Article 11.6.8 of the Tata PPA.

(o) The obligation on part of the Respondent to reimburse the penalty under Article 1.2.8 of Schedule 7 of the Tata PPA is not attached to and/or conditional upon any other reason being cited by the Respondent. It is a pure contractual obligation which is required to be performed by the Respondent by reimbursing the penalty for level of lifting paid to coal suppliers by the Petitioner in terms of Article 1.2.8 of Schedule 7 of the Tata PPA due to failure to meet the Minimum Offtake Guarantee. The Respondent did not fulfil its obligation to procure 65% of the contracted capacity (i.e. Minimum off-take Guarantee) as per the Tata PPA as it mostly off-takes power during peak season despite being fully aware that the Project is meant for base load requirement. As such, the entire genesis of the grounds taken by the Respondent against the claim of the Petitioner is based on

reading extraneous terms, conditions into the Tata PPA which do not find any mention therein and consequently, the Respondent is denying the legitimate claim of the Petitioner which is based on the express terms of the Tata PPA.

3. The Petitioner has invoked the jurisdiction of the Commission under Section 79(1)(b) & (f) of the Act for adjudication of the above disputes between the Petitioner and the Respondents. The Petitioner has made the following prayers:

> "*(i) direct the Respondent to pay the Petitioner an amount of Rs. 4,44,77,904/- (Rupees Four Crores Forty Four Lakhs Seventy Seven Thousand Nine Hundred and Four Only) in terms of Article 1.2.8 of schedule 7 of the Tata PPA for the Contract Year 2016-17;*
>
> *(ii) direct the Respondent to make payment of Rs. 1,17,92,085/- (Rupees One Crore Seventeen Lakhs Ninety-Two Thousand Eighty-Five Only) being the outstanding amount towards the late payment surcharge as on 30.06.2019, plus the late payment surcharge accumulated till the date of the final payment by the Respondent, in terms of Article 11.3.4 read with Article 11.6.8 of the Tata PPA;*
>
> *(iii) direct the Respondent to pay such amounts that may be claimed by CCL in future for the Contract Year 2016-17 in terms of Article 1.2.8 of Schedule 7 of the Tata PPA upon submission of proof of payment by JPL to CCL;*
>
> *(iv) direct Respondent to comply with the terms of the PPA entered into with the Petitioner in letter and spirit including its obligation to make payments in a timely manner;*
>
> *(v) award costs of these proceedings against the Respondent and in favour of the Petitioner; and*
>
> *(vi) grant such order, further relief(s) in the facts and circumstances of the case as this Hon'ble Commission may deem just and equitable in favour of the Petitioner.*"

4. However, during pendency of the Petition, NCL and ECL levied further penalty upon JPL, which were claimed by JPL from TPTCL under Article 1.2.8 of Schedule 7 of the Tata PPA by way of invoices raised through letters bearing ref no.

JPL/TPTCL/FA/011224 dated 01.04.2021 (in relation to ECL's claimed penalty amount), and JPL/TPTCL/FA/010521 dated 10.04.2020 (in relation to NCL's claimed penalty amount), the details of which were brought on record by JPL vide additional affidavits dated 20.06.2022 and 25.10.2021. Accordingly, for the contract year 2016-17, the total amounts charged by coal suppliers from JPL as penalty for the shortfall in 'Level of Lifting' stipulated under the respective FSAs, are listed in the table below:

Coal Company	Penalty Amount (in Rs.)
BCCL	18,29,56,221
ECL	17,69,90,579
NCL	7,02,27,268
CCL	Yet to be claimed
Total	43,01,74,068

5. Accordingly, the principal amount claimed by JPL from TPTCL towards its proportionate share under Article 1.2.8 of Schedule 7 of the Tata PPA is Rs. 4,79,77,371/-

6. During the course of hearing of the Petition on 5.5.2020, learned counsel for TPTCL took preliminary objection that despite invoking the jurisdiction of this Commission citing composite scheme in respect of its generating station on the basis of the TPTCL's back-to-back power supply arrangement with Tata Power Delhi Distribution Company Limited ('TPPDL'), TPDDL has not been impleaded as a party to the Petition. The Commission after considering the submissions of the parties directed the Petitioner to implead TPDDL. Accordingly, the Petitioner has impleaded TPDDL as a party.

<u>Reply of TPTCL and Written submissions</u>

7. TPTCL in its reply dated 5.6.2020 and Written Submissions dated 31.5.2022 has mainly submitted the following:

(a) TPTCL is merely an Intermediary/ Electricity Trader and has back to back agreement with TPDDL through Trading PSA and. The back-to-back arrangement as per the Tata PPA clearly establishes that the role of TPTCL is of an intermediary between the Petitioner and TPDDL and has no substantial role in the present dispute.

(b) The back to back arrangement has already been recognized by the Commission in its Order dated 18.4.2016 in Petition No. 319/MP/2013. Therefore, taking into consideration the stipulations of the Tata PPA executed between JPL and TPTCL and PSA executed between TPTCL and TPDDL together with the order passed by the Commission vide its order dated 18.4.2016 in Petition No. 319/MP/2013, it can be concluded that TPTCL's role is to facilitate the process of supply of electricity and hence TPTCL is a mere intermediary and the Trading PSA and the TPTCL PPA are completely dependent on each other.

(c) Insofar as scheduling of power is concerned, TPTCL's role is minimal. The scheduling of power from JPL is coordinated by Haryana SLDC. TPDDL sends its requisition of power on day ahead basis to Haryana SLDC, Delhi SLDC and JPL, directly. JPL also informs about its schedule to Haryana SLDC. Haryana SLDC then finalizes the schedule and informs about the schedule to NRLDC and Delhi SLDC. Any revision in schedule is similarly conveyed by TPDDL and JPL, with no communication being routed through TPTCL in this regard.

(d) Even on the issue of compensation for breach of Minimum Offtake Guarantee under Article 1.2.8 of Schedule 7 of the Tata PPA is concerned, the ultimate liability is to be borne by TPDDL under Article 1.2.8 of Scheduled 7 of the PSA. From the perusal of the PSA, it is evident that provisions are *pari materia* in Tata PPA as well as Trading PSA and hence the ultimate liability of the present Petition is to be borne by the TPDDL. Therefore, the role of TPTCL is limited in the present dispute and the Commission may take a suitable view in the matter after considering the submission of TPDDL who has been impleaded vide Order dated 5.5.2020 passed by the Commission. Due to the very nature of transaction involved, the alleged liability of TPTCL cannot be separated from first fixing the same upon TPDDL.

(e) JPL is guilty of taking contrary stands before the Commission as on the one hand JPL contends that there exists a composite scheme of generation of electricity in more than one State to make out the jurisdiction of the Commission and on the other hand it contends that there is no privity of contract between JPL and TPDDL, and the only arrangement entered between JPL was either with Haryana DISCOMs or TPTCL. Considering the case of JPL for the sake of *arguendo* admitting to the case of JPL that there is no privity of contract between JPL & TPDDL, then by virtue of the definition of Delivery Point in TATA PPA dated 20.1.2009 executed between JPL & TPTCL, power generated by JPL is sought to be delivered to TPTCL at the "*final gantry of the Power Station 400 kV switchyard*" thereby meaning that the power so generated by JPL shall stand to

be delivered within Power Station which is situated in Haryana, hence no case for composite scheme of generation of electricity in more than one State is made out and JPL in law would be precluded to exercise the Commission jurisdiction under Section 79(1)(b) of the Act. Further, the supply of electricity happens from the State of Haryana and is consumed in the State of NCT of Delhi. Thus, without existence of a composite scheme, the Commission will not have jurisdiction to adjudicate upon the present dispute under Section 79(1)(f) of the Act and the instant Petition is liable to be dismissed on JPL failing to make out jurisdiction of this Commission.

Reply of TPDDL and Written Submissions

8. TPDDL in its reply dated 7.7.2020 and Written Submissions dated 7.9.2022 has mainly submitted the following:

(a) TPDDL has been regularly requisitioning power from the power plant however, owing to the reasons not attributable to TPDDL at all, the same was not being scheduled to TPDDL by JPL. In the contract year 2016-2017, there have been many occasions when TPDDL has requisitioned power from the Petitioner however, the same was either not scheduled or less scheduled by the Petitioner. A perusal of the table (as mentioned in Para 18 below) submitted by the Petitioner shows that during the contract year 2016-2017, the Petitioner was not in a position to ensure reliable supply of power to TPDDL which is prejudicial to TPDDL/its consumers' interests.

(b) A perusal of Clause 1.2.8 of the Schedule 7 to the TATA PPA shows that in order to hold TPDDL liable to pay penalty, the availability of the contracted capacity has to be higher than Minimum Offtake Guarantee i.e. 65% of the contracted capacity. However, the contacted capacity cannot be considered to be available since Petitioner was not in a position to deliver it to TPDDL. During contract year 2016-2017, either one or both the Units of the Power Plant were under shut down for 247 days (both Units were Off Bar/under shutdown for 147 days and for 100 days either of the Unit was Off Bar/shutdown) i.e. more than 67% period in the said contract year. Resultantly, the Petitioner was not in a position to deliver power to TPDDL yet, it was declaring availability at 100%.

(c) Declaration of 100% availability given the fact that Petitioner's Units were Off Bar/under shutdown is wrongful and contrary to the TATA PPA and principles of business efficacy. Declared capacity of the Power Plant will have to calculated as per the CERC's Tariff Regulations, 2014. Therefore, declared capacity of the Power Plant has to be according to its capability of delivering the power. Pertinently, if the power plant is Off Bar/under shut down due to instructions from Haryana SLDC than, it cannot be argued that it was in a capacity to deliver the power.

(d) Therefore, the Petitioner cannot be allowed to approbate and reprobate in as much as it cannot recover penalty from TPDDL for not off-taking the minimum guaranteed power when admittedly, it was not in a position to deliver the said power to TPDDL owing to shutdown of the power plant/powerplant being off bar.

Similarly, penalising TPDDL for such hypothetical availability of Power Plant will have serious financial/economic ramifications for TPDDL's consumers which, cannot be lost sight of by this Commission.

(e) The Petitioner is already being paid fixed charges by TPDDL for the entire contracted capacity. Since the Petitioner is being put Off Bar/under shutdown by Haryana SLDC, the distribution companies of Haryana may have agreed to pay penalty for offtake below minimum guaranteed without any protest. However, TPDDL cannot be made liable to pay the said penalty given the fact that lower offtake of power is not attributable to TPDDL but either to the Petitioner or the Haryana SLDC. In any case, TPDDL cannot be compelled/held liable to pay such penalty only because Haryana DISCOMS have paid the penalty as claimed by the Petitioner.

(f) It is also a matter of record that all attempts on the part of TPDDL to increase the offtake of power from Power Plant was met with stiff resistance from the Petitioner. TPDDL had written to the Petitioner seeking allocation for requisitioning of un-requisitioned surplus power from the power plant so as to increase its share from off-take however, the same was opposed by the Petitioner for untenable reasons. Further, TPDDL's repeated requests to avail the complete and maximum contracted capacity from the running Unit of the Power Plant, in case another Unit is under reserve shut down in compliance of the Commission's Order No. L-1/219/2017/CERC dated 5.5.2017 - Detailed Operating Procedure qua Reserve Shutdown (DOP), met with stiff resistance

from the Haryana Utilities. Due to the said resistance, TPDDL had approached the Commission by way of Petition No. 114/MP/2018 which culminated into order dated 4.2.2020. Vide the said order, the Commission came to a conclusion that TPDDL can avail the entire contracted capacity (123.72) from the running unit of the Power Plant in case the other unit is under RSD. Thus, TPDDL cannot be held responsible for lower offtake of power as compared to guaranteed minimum under the PPA as it has taken all necessary steps to requisition its contracted capacity.

(g) It is an admitted position of JPL that the Plant was under RSD on account of non-scheduling of power by the Haryana SLDC, due to non-requisition of power by the Haryana DISCOMs. While the same may hold true, JPL has not been able to justify that such instructions were issued by Haryana SLDC on account of lower requisition of power by TPDDL. In fact, JPL has no basis to claim / allege that TPDDL's requisition of power was less which led to the Plant being put under RSD. Notably, on one hand JPL has alleged that the lower lifting of coal was on account of lower offtake of power by TPDDL, and on the other hand JPL has stated that it could not have provided the power to TPDDL as per its requisition since Article 7.3 of the Tata PPA states that JPL is not liable to deliver any electrical output if it is restricted from generating beyond a stipulated schedule. JPL has continued to state that its availability was maintained even in such circumstances. If JPL's Plant was available and still JPL did not lift the coal as per the quantum stipulated in the FSAs, then the resulting penalty paid by JPL is

on account of its own conduct and cannot be attributed to TPDDL under any circumstances.

(h) Non-scheduling/low scheduling of power from the Petitioner by TPDDL cannot be attributed to TPDDL insofar as power from the Power Plant ranks very high in the Merit Order Dispatch and costlier as compared to others in the stack. Scheduling of power from Power Plant would have thus, resulted in violating the Merit Order Dispatch principles thereby leading to higher cost burden on TPDDL/its consumers. Variable Cost (VC) of Power Plant is very high due to low quality of coal leading to higher ECR of power from power plant. Thus, TPDDL cannot be penalized for low quality of coal being utilized by the Petitioner for generation of electricity.

(i) TPDDL is under a statutory duty to protect its consumers' interests and make sure that cheapest power is made available to them. Thus, purchasing power from Petitioner's Power Plant would have not only violated the principles of Merit Order Dispatch but also been prejudicial to its consumers' interests. Undoubtedly, TPDDL cannot be penalized for safeguarding its consumers' interests especially in light of the fact that it has been paying for the fixed charges regularly.

(j) In the present matter, JPL has claimed that it could not lift the coal as per the quantum specified in the FSA on account of offtake being less than the Minimum Offtake Guarantee. However, such position taken by JPL is contradictory to the position JPL took in Petition No. 285/MP/2019 wherein it has categorically stated

that since the commissioning of the Plant, JPL has faced significant shortage in supply of linkage coal to the Plant, especially in financial year 2016- 17 i.e. the contract year when the coal supply was the lowest in 4 years. Such submissions of JPL are recorded in the Commission's Order dated 21.3.2022 in Petition No. 285/MP/2019.

(k) Without prejudice to the above, the Petitioner has wrongfully contended that the power off-taken by TPDDL for the contract year 2016-17 is only 20.50% of its total contracted capacity. Consequently, the Petitioner has calculated TPDDL's percentage of penalty paid to coal companies. The calculation of percentage of power off-taken by TPDDL is flawed and perverse. The correct percentage of power considered to be off-taken by TPDDL as against its contracted capacity is 58%.

(l) The penalty imposed upon the Petitioner by Coal Companies and sought to be recovered by it from the TPDDL due to offtake lower than minimum guaranteed under the PPA is in the nature of recover of losses. It is a settled law that under Section 73 of the Indian Contract Act, 1872, a party seeking losses for breach of contract is under a duty of taking all reasonable steps to mitigate the losses consequent on the breach. Pertinently, no such steps were taken by the Petitioner and therefore, it cannot seek recovery of said losses from TPDDL. In this regard, TPDDL relied upon the decision of the Hon'ble Supreme Court in the case of *Murlidhar Chiranjilal* v. *Harishchandra Dwarkadas* [AIR 1962 SC 366].

(m) The Petitioner was under a contractual as well as statutory duty to adopt means for remedying the penalty being imposed due to alleged low offtake of power by TPDDL which, it has failed to do thereby disentitling itself for any relief from this Hon'ble Commission. The Petitioner could have remedied the penalties/losses being caused due low level of lifting of coal by taking following steps to mitigate the losses:

(i) The Petitioner could have reduced the purchase of the quantum of coal if the units of the plant were going into RSD or if the procurers were not scheduling the full capacity.

(ii) Sought approval from the beneficiaries to sell the power through short -term third party sale mechanism. In fact, the TATA PPA recognizes such a sale in terms of Clause of 4.4.3.

Rejoinder Submissions of the Petitioner

9. The Petitioner vide its rejoinder to the reply of TPTCL and its written submissions has mainly submitted as under:

(a) By way of the present Petition, the Petitioner is seeking enforcement of its contractual right and TPTCL's contractual obligation under Article 1.2.8 of Schedule 7 of the Tata PPA. Therefore, the issue in the present Petition involves interpretation of Article 1.2.8 of Schedule 7 of the Tata PPA and the rights and obligations of the Petitioner and the Respondent under the Tata PPA, to which TPDDL is not a party.

(b) The Petitioner and TPDDL have not entered into any contract. It is the Petitioner and the TPTCL which had entered into the PPA by virtue of which the Petitioner was obligated to sell 10% of the Plant's net capacity to TPTCL. TPTCL had entered into a back-to-back arrangement for selling the power to TPDDL/Respondent No. 2 in terms of the Tata PSA entered between the two entities. Merely because the Tata PPA required TPTCL to enter into an onward agreement for sale of power does not entitle TPTCL to attempt and shirk away from its contractual obligations.

(c) Reliance by TPTCL upon the Commission's order dated 18.4.2016 in Petition No. 319/MP/2013 has no bearing to the case at hand. The said order dated 18.4.2016 has been challenged before the APTEL and, after hearing arguments at length, the APTEL has reserved its judgment in Appeal Nos. 134; 138; 149; and 308 of 2016 and Appeal No. 209 of 2017 vide daily order dated 16.6.2020. In any event, the present Petition has not been filed by the Petitioner challenging the issue of the alleged interlinking of the Tata PPA and Tata PSA, which according to the Petitioner is devoid of any merit whatsoever. In any event, the Commission vide its order dated 18.04.2016 in Petition No. 319/MP/2013 has nowhere discharged TPTCL from its obligations under the Tata PPA.

(d) JPL has nowhere averred that the power generated from the Project is NOT sold to TPDDL under the Tata PSA, as is attempted to be alleged by TPTCL. Merely availing the benefits under the Mega Power Policy or eventual supply of power generated from the Project to TPDDL or JPL's admission that the Project is under

a composite scheme does not entitle TPTCL to attempt and create a nexus between the Tata PPA and the Tata PSA so as to insulate it from its explicit obligations under the Tata PPA.

(e) Without prejudice to JPL's contentions in Appeal Nos. 134; 138; 149; and 308 of 2016 and Appeal No. 209 of 2017, JPL relied upon the Commission's order dated 28.1.2020 in Petition Nos. 67/MP/2019 & 68/MP/2019, wherein it was held that though the power purchase agreements are interconnected and back-to-back, payment to the generators by the trader under the power purchase agreements is not conditional upon the payment to be made by the distribution licensees to the trader.

(f) In this regard, JPL also relied upon and referred to the Delhi Electricity Regulatory Commission's order dated 13.5.2010 in Petition No. 5 of 2009 filed by TPDDL *inter alia* seeking approval of Power Purchase Agreement between TPDDL (formerly known as NDPL) and TPTCL for procurement of 132 MW Power on Long-Term Basis from JPL, which categorically records TPDDL's submission that the payment risk to JPL is to be borne by TPTCL. Since, TPTCL has not challenged the Delhi Electricity Regulatory Commission's order dated 13.05.2010 (wherein TPDDL's categorical submissions to justify the trading margin of 7 paise per unit have been recorded), TPTCL cannot be permitted to take a contrary position to the same.

10. The Petitioner in its Rejoinder to the reply filed by TPDDL on 21.7.2021 and written submissions dated 7.9.2022 has mainly submitted as under:

(a) The present Petition involves implementation of Article 1.2.8 of Schedule 7 of the Tata PPA, from a perusal of which it is clear that upon the following conditions being satisfied, the amount under Article 1.2.8 of Schedule 7 of the Tata PPA is payable by TPTCL to the Petitioner:

(i) The Petitioner has to pay penalty to the Fuel Supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the FSAs;

(ii) During the said contract year, the availability of the contracted capacity is greater than the Minimum Offtake Guarantee; and

(iii) TPTCL has not scheduled energy corresponding to such Minimum Offtake Guarantee during that contract year.

(b) Thus, in the present framework, the Tata PPA envisages a certain risk allocation matrix and as per this risk allocation matrix, in the current fact situation, the risk and penalty is to be borne by the procurers due to the reason that if the procurers had met the Minimum Offtake Guarantee under the respective PPAs, the Petitioner would not have been liable to pay the penalty under the FSAs. Further, as is evident from the above, upon the aforesaid conditions being satisfied, the question of further determining fault does not arise.

(c) In the present case, all the aforesaid three conditions are satisfied in the following manner, and as such, the Petitioner is entitled to the amount under Article 1.2.8 of Schedule 7 of the Tata PPA:

(i) For the contract year 2016-17, the Petitioner made payment of Rs. 41,78,24,461/- to the Fuel Suppliers under the FSAs for not purchasing the minimum guaranteed quantity of fuel;

(ii) During the contract year 2016-17, the availability of the contracted capacity was 92% which is higher than the Minimum Offtake Guarantee of 65%; and

(iii) The Respondents have only scheduled 20.50% of the contracted capacity which is less than the Minimum Offtake Guarantee. In any case, even if it is assumed that the Respondents scheduled 58% of the contracted capacity as stated in para F of TPDDL's Reply (though the same is vehemently denied), then too the energy scheduled by the Respondents is less than the Minimum Offtake Guarantee.

(d) The Petitioner is not responsible for scheduling power and the same is the responsibility of Haryana SLDC based on the power requisitioned by the procurers (i.e., Haryana Discoms and Respondents). The Petitioner can only declare its availability to generate power, and SLDC in line with the Grid Code and power requisitioned by procurers provides the Schedule Generation (SG) to keep the Project operating or advises the Petitioner to put the Project under Reserve Shut Down ("***RSD***"). Meaning thereby, the Unit(s) of the Petitioner's Project is/are instructed to go under RSD by SLDC depending upon the power requirement of Haryana Discoms and the Respondents as per the terms and

conditions of the Grid Code and as such, the Petitioner has no control over such shut downs and is statutorily obligated to follow the instructions being given to it under Section 33 of the Act.

(e) Even if Unit(s) of the Project are taken under RSD, the same does not impact the Project's capacity, which continues to remain available. Thus, even during a RSD, the Project continues to remain available and the Petitioner's Declared Capacity is not affected.

(f) It is a well-known industry wide fact that coal based power plants have certain technical limitations and cannot be operated below a specific technical minimum level. The load dispatch centres like SLDC are required to take into account the technical minimum requirement of power plants while issuing dispatch instructions. The aforesaid principle of operation is also explicitly envisaged in Article 7.3 of the Tata PPA which specifies requirement of the Minimum Rated Net Capacity (being 50% of rated net capacity of any one Unit) for operation of MGTPP Units. In terms of the aforesaid provision, if schedule of power to be procured cumulatively by Haryana Discoms and Respondents *is less than at least 50% of rated net capacity of any one Unit, and the Petitioner is restricted technically and/or commercially by the Grid by instructing not to generate beyond stipulated schedule* ***the Petitioner shall not be liable to deliver any Electrical Output under the Tata PPA****.* However, even in such a scenario, the Petitioner's Project technically continues to be available to supply power and its Declared Capacity is not affected.

(g) As per Schedule 13 of the Tata PPA, the Petitioner's obligation to supply power to the Respondents is capped or ring fenced to 61.86 MW from each Unit, i.e. 123.72 MW from the Project. Therefore, if one Unit of the Project is under RSD on account of Haryana Discoms not having sufficient power requirement in terms of the Haryana PPA and consequently SLDC issuing instruction to the Petitioner to take one Unit under RSD, the maximum power that can be dispatched to the Respondents is 61.86 MW. In effect, the Respondents were well aware at the time of signing the Tata PPA and Tata PSA that the contracted capacity stipulated from each Unit in such agreements is less than the technical minimum capacity, and that as a result of this, Unit(s) will be shut down if combined demand of Haryana Discoms and the Respondents is not more than the technical minimum limit. Therefore, keeping in view, the contractual framework of this Project which supplies 90% of the power to Haryana Discoms, the Respondents always knew that without agreement of Haryana Discoms, the Petitioner cannot in any manner provide additional supply from any Unit beyond the terms and conditions of the Tata PPA and Haryana PPA.

(h) It was only on 4.2.2020 that the Commission vide its order in Petition No. 114/MP/2018 filed by TPDDL clarified that the Respondents can avail the entire contracted capacity (123.72 MW) from the running Unit of the Project in case another Unit is under RSD and the Haryana Discoms are not scheduling power from the running Unit upto their allocated capacity in the unit. The said petition was filed by TPDDL after the Commission issued the Detailed Operating

Procedure in the Proceeding No. L-1/219/2017/CERC dated 05.05.2017 ("***DoP***") wherein it was observed that in case one Unit of a generating station is under RSD and if the total requisitioned power can be supplied through other Unit(s) of the same generating station on bar, then the generator shall be scheduled according to the requisitions received. The fact that TPDDL itself filed Petition No. 114/MP/2018 before this Commission to seek specific permission in view of the DoP, shows that during the period prior to the Commission's order dated 4.2.2020, including specifically contract year 16-17, the Petitioner could not have supplied the entire contracted capacity of power from the running Unit. Thus, the Petitioner cannot be held liable for not supplying the entire contracted capacity from one Unit of the Project prior to this Commission's order dated 4.2.2020 in Petition No. 114/MP/2018.

(i) In any case, the Petitioner cannot be made liable for any such reason as even during adjudication of Petition No. 114/MP/2018 before this Commission, the Petitioner had expressed its willingness to supply entire contracted capacity under the Tata PPA from one running Unit (the other Unit being under RSD) of the Project subject to agreement in this regard between Haryana Discoms and the Respondents in terms of the DoP issued by this Commission. It is apparent that the Petitioner has always behaved as a responsible counterparty and has taken steps to benefit the procurers wherever it is possible within the terms and conditions of the PPAs entered into for the Project.

(j) The Petitioner has also indicated instances vide its letter dated 29.7.2016 to the Respondent No. 1 (*annexed as Annexure P/8 of the Petition*), wherein Unit(s) of the Project were running and power was offered to the Respondents but was not procured by them. The aforesaid only suggests that either there is a mismatch in timings of demand by the Haryana Discoms under Haryana PPA and the Respondents under the Tata PPA & Tata PSA or that TPDDL has contracted for surplus power or a combination of both these scenarios on which the Petitioner has no control.

(k) Since the commissioning of the Project, the Respondents have never scheduled power corresponding to their Minimum Offtake Guarantee of 65% of the contracted capacity from the Project and it was only owing to dispatches provided by Haryana Discoms that the Petitioner was able to meet its obligations under the FSAs avoiding any penalty. The details of the power off taken by the Respondents are as follows:

Year	TPTCL/TPDDL Despatch
2014-15	34.57%
2015-16	24.48%
2016-17	20.50%
2017-18	52.51%
2018-19	53.02%
2019-20	48.02%

(l) The availability of the Petitioner's Project during the contract year 2016-17 was 92% of the contracted capacity. The same was not even disputed by TPDDL at the relevant time, which is substantiated by the fact that TPDDL made payment of the entire capacity charges of the Project. This is also admitted by TPDDL in

paragraph G of the reply. Further, in paragraph F(iii) of the reply, TPDDL has itself relied upon the Petitioner's availability for the contract year 2016-17 as 92%. Clearly, TPDDL cannot be permitted to approbate and reprobate at the same time.

(m) It is inappropriate on part of TPDDL to refer to the definition of Declared Capacity under the Tariff Regulations 2014 for a term which is well defined under the Tata PPA and therefore, the definition in the Tariff Regulations 2014 is not relevant to the present Petition. However, even if for the sake of argument, the definition of Declared Capacity as per Tariff Regulations 2014 is considered, it nowhere indicates that the same overrides the provisions of Tata PPA and/or the Grid Code for delivering electrical output by the Petitioner as being contended by it.

(n) The definition of Declared Capacity as per the Tata PPA or for that matter, even as per the Tariff Regulations 2014, does not in any manner make the declaration of availability contingent upon the Petitioner's ability to not supply due to RSD taken by HPPC/ SLDC. The aforesaid definition only states that the declaration of availability of the Project will be subject to availability of fuel and water and further qualifications under other regulations. It does not mean that on account of a Unit of the Project being under RSD due to SLDC's/Haryana Discoms' instruction based on their power requirement and Grid Code, the Petitioner's capability to declare availability is adversely affected.

(o) The so-called calculation of TPDDL's power procurement being equivalent to 58% is based on some purported calculations and as such the said methodology as explained in Para F of the reply, is completely extraneous to the terms of the Tata PPA. The Respondents' liability under the Tata PPA is to at least procure power corresponding to the Minimum Offtake Guarantee, which is linked to the contracted capacity. The liability, therefore, remains unchanged and is to be always reckoned with respect to 65% offtake of contracted capacity of 1084 MUs. However, in paragraph F(iii) of the reply, TPDDL has calculated the Minimum Offtake Guarantee to be 65% of the availability of the Project/Available Capacity in the particular contract year, which is clearly contrary to the provisions of the Tata PPA. Further, as admitted by TPDDL in paragraph F(v) of the reply, the Respondents have actually scheduled 222 MUs of power from the Project. Accordingly, it is abundantly clear that the quantum of power off taken by the Respondents is approximately 20.50%, i.e., (222/1084) *100.

(p) *Assuming arguendo* that TPDDL has off taken power corresponding to 58% of the contracted capacity (though the same is vehemently denied), then too the power off taken by TPDDL is less than the Minimum Offtake Guarantee of 65%, despite the availability of the Project being 92% of the contracted capacity, as stated in paragraph F(iii) of the reply. Therefore, the liability of the Respondent No. 1 to make payment to the Petitioner under Article 1.2.8 of Schedule 7 of the Tata PPA is absolute and cannot be disputed.

(q) Further, the penalty amount claimed by the Petitioner from the procurers, i.e., Haryana Discoms (which have already paid the same) and the Respondents, is calculated as per the terms of the Tata PPA in the following manner, which was duly informed to the Respondent vide Petitioner's letter dated 17.1.2019:

(i) Haryana Discoms and the Respondents were required to offtake power corresponding to 65% of their respective contracted capacity, i.e., 65% of 1113.5 MW for Haryana Discoms and 65% of 123.72 MW for the Respondents, respectively. As such, Haryana Discoms were obligated to offtake at least 6,34,02,57,612 kWh of power and the Respondents were obligated to offtake at least 70,44,73,068 kWh of power;

(ii) As against which, during the contract year 2016-17, Haryana Discoms have actually off taken 2,49,82,30,230 kWh of power and the Respondents have off taken 22,21,81,160 kWh of power;

(iii) As such, there was a total shortfall of 4,32,43,19,290 kWh in procurement of power by the Procurers, which translates into shortfall of 3,84,20,27,382 kWh in procurement of power by Haryana Discoms and shortfall of 48,22,91,980 kWh in procurement of power by the Respondents respectively;

(iv) Accordingly, the Respondents are liable for 11.15% of the shortfall in procurement of power (as 48,22,91,980 kWh is 11.15% of

4,32,43,19,290 kWh) and Haryana Discoms are liable for 88.85% of shortfall (as 3,84,20,27,382 kWh is 88.85% of 4,32,43,19,290 kWh); and

(v) Therefore, the penalty levied on the Petitioner by the coal suppliers under the FSAs is claimed by the Petitioner from the procurers on *pro rata* basis corresponding to their share of shortfall in procurement of power.

(r) The amount payable by the Respondents under Article 1.2.8 of Schedule 7 of the Tata PPA is a sum which is named/stipulated in the contract as the amount to be paid in case of breach of the Minimum Offtake Guarantee, despite the availability of the Contracted Capacity being higher than the Minimum Offtake Guarantee. As such, the Petitioner's claim under the Petition is one under Section 74 of the Indian Contract Act, 1872 i.e., of liquidated damages, and not under Section 73 thereof i.e., of unliquidated damages. Further, it is settled law that the principle of mitigation of losses is applicable in cases where damages is claimed under Section 73 of the Indian Contract Act, 1872 and not under Section 74 of the Indian Contract Act, 1872. The same is further substantiated by the fact that the explanation of Section 73 of the Indian Contract Act, 1872 explicitly provides that *in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account*; whereas no such explanation or provision is made under Section 74 of the Indian Contract Act, 1872.

(s) Notwithstanding and without prejudice to the above, the alleged steps enumerated by TPDDL as measures for mitigation of losses are also completely

misconceived, erroneous and irrelevant. The Petitioner's point-wise response to the same is as follows:

(i) TPDDL has contended that in order to mitigate its losses the Petitioner could have reduced the purchase of the quantum of coal if the Unit(s) of the plant were going into RSD or if the procurers were not scheduling the full capacity. It appears that TPDDL has entirely failed to appreciate that the penalty payable under Article 1.2.8 of Schedule 7 of the Tata PPA is applicable only when the quantum of coal purchased under the FSA is lower than the minimum guaranteed quantity stipulated therein. In other words, penalty is applicable because reduced quantum of coal (i.e., lesser than the minimum guaranteed quantity under the FSAs) was procured by the Petitioner and therefore, the mitigating step as suggested by TPDDL was already taken.

(ii) In any case, if it is TPDDL's contention that since the Project was under RSD and the Haryana Discoms and the Respondents were not procuring power corresponding to their Minimum Offtake Guarantee, the Petitioner should have reduced its Annual Contracted Quantity (ACQ) under the FSA, then too the said view is completely baseless and erroneous. It is completely inappropriate for the Petitioner to modify its ACQ under the FSAs as such action is based on short term view and would make it impossible to restore the ACQ once surrendered. The low power demand in the States of Haryana and Delhi was a temporary phenomenon and has

significantly changed thereafter. Therefore, any steps taken towards modifying ACQ based on the then current scenario would have proved detrimental to both the parties in long term, especially in the present situation of demand picking up post Contract Year 2016-17. Therefore, modifying the ACQ under FSA is not a viable option as being contemplated by TPDDL.

(iii) TPDDL's contention that the Petitioner ought to have sought approval from the beneficiaries to sell the power through short -term third party sale mechanism under Article 4.4.3 of the Tata PPA is entirely extraneous to the present dispute and ought to be rejected for the following reasons:

(I) The framework of the Tata PPA does not provide that the Respondents' obligation to offtake power corresponding to the Minimum Offtake Guarantee or liability under Article 1.2.8 of Schedule 7 of the Tata PPA is absolved in case a sale of power to third party is made under Article 4.4.3 of the Tata PPA.

(II) In any case, the provision for sale of power through short-term third party sale mechanism under Article 4.4.3 of the Tata PPA is a right of the Petitioner and not its obligation. As such, the Respondents cannot take advantage of their own wrong, i.e., failure to offtake power corresponding to the Minimum Offtake Guarantee, by relying upon the Petitioner's right under Article 4.4.3 of the Tata PPA.

(III) Furthermore, the aforesaid contention of TPDDL is clearly an afterthought as TPDDL did not raise the said issue at any time prior to the filing of the reply. In the contemporaneous correspondence between the parties, there is no mention of the Petitioner being required to sell power to a third party as the Respondents failed to procure power equivalent to the Minimum Offtake Guarantee.

(IV) Without prejudice to the above, the Petitioner could not have possibly sold power through the short-term third-party sale mechanism, as the Petitioner was still obligated to ensure availability of the Project for the Respondents and TPDDL never stated that it is not going to procure power from the Project for a specified time.

Analysis and Decision

11. We have considered the submissions of the Petitioner and the Respondents on the issue of reimbursement of penalty towards low level of lifting of coal. At the outset, we bring out certain relevant facts and numbers associated with the dispute between JPL (the Petitioner) and TPTCL and TPDDL (Respondents):

a) The Petitioner's plant with installed capacity of 1320 MW (2x660 MW) supplies power to two Haryana Discoms which have 90% share in ex-bus installed capacity and to TPTCL which has 10% share in ex-bus installed capacity . As per terms of PPAs (Haryana PPA and Tata PPA) minimum off take guarantee for each beneficiary is 65% of its contracted capacity. As such, the following table

depicts the contracted capacity, corresponding contracted energy, energy corresponding to Minimum off take guarantee, energy dispatched to Haryana and TPTCL:

Sl. No	Beneficiary	Contracted Power (MW)	Corresponding contracted energy for the year 2016-17 (MUs)	Minimum off take guarantee In Energy Terms (MUs) (65% of contracted capacity)	Actual Dispatch (MUs)
1	TPTCL	123.72	1083.80	704.47	222.18
2	Haryana Discoms	1113.50	9754.24	6340.26	2498.23
	Total	**1237.22**	**10838.05**	**7044.73**	**2720.41**

- The combined dispatch of energy from the station was 25.10% of contracted capacity

b) Because of low dispatch of energy from the station during the contract year, the Petitioner did not lift coal from the linked coal mines and as a result had to pay low coal lifting penalty to the coal supplier in terms of FSAs. The total amounts including service tax charged by coal suppliers from JPL as penalty for the shortfall in 'Level of Lifting' stipulated under the respective FSAs, are listed in the table below:

Coal Company	ACQ (in MTPA)	Mandated to be lifted as per FSA (75% of ACQ) (in Million Tonne)	Actual Coal lifted (in Million Tonne)	Penalty Amount (in Lakhs.)
BCCL	0.889	0.667	0.279	18,29.56
ECL	0.50	0.375	0.151	17,69.91
NCL	0.50	0.375	0.193	7,02.27
CCL	3.048	2.286	1.018	Yet to be claimed
Total	4.937	3.703	1.641*	43,01.74

*Detailed daily break up of coal receipt indicates the same to be 1.644 MMT

Out of total amount of Rs.43.01 crore paid to the coal companies, the share of TPTCL has been worked out as Rs.4.80 crore as principal amount which was communicated to TPTCL by the Petitioner through various communications which have been made part of the Petition.

12. The dispute between the Petitioner and the Respondents with regard to reimbursement of penalty towards low level of lifting of coal paid to coal companies by the Petitioner in terms of clause 4.6 of FSA, revolves around the interpretation of the provisions of Article 1.2.8 of Schedule 7 of the Tata PPA. The relevant provisions of the Tata PPA and FSAs with coal companies are extracted as under:

Tata PPA:

*"**Minimum Offtake Guarantee**" or **"MoG"** means guaranteed offtake of sixty five percent (65%) of the total Contracted Capacity during a Contract Year;"*

"*1.2.8 Penalty and rights relating to Minimum Guaranteed Quantity of Fuel*

*In case JPL has to pay penalty to the Fuel supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the Fuel Supply Agreement and if during that Contract Year Availability of the Contracted Capacity is greater than the Minimum Offtake Guarantee but **TPTCL has not Scheduled Energy** corresponding to such Minimum Off-take Guarantee during that Contract Year, then JPL will raise an invoice for the lower of the following amount on TPTCL who has not achieved Minimum Off-take Guarantee during the Contract year, in proportion to the difference between Scheduled Energy assuming off-take corresponding to Minimum Off-take Guarantee and Scheduled Energy (as applicable to TPTCL) for the following amount: (a) penalty paid to the Fuel supplier under the Fuel Supply Agreement in that Contract Year, along with documentary proof for payment of such penalty, or (b) an amount corresponding to twenty percent (20%) of cumulative Monthly Capacity Charge Payment (in Rs.) for TPTCL made for all the Months in that Contract Year multiplied by (1- X/Y) where:*

X is the Scheduled Energy during the Contract Year for TPTCL (in kwh); and

Y is the Scheduled Energy corresponding to Minimum Offtake Guarantee for TPTCL during the Contract Year (in kwh).

Provided, within ten (10) days of the end of each Month after the COD of the first Unit, JPL shall provide a statement to TPTCL, providing a comparison of the cumulative dispatch for all previous Months during the Contract Year with the Minimum Offtake Guarantee of TPTCL. Further, such statement shall also list out the deficit, if any, in the Fuel offtake under the Fuel supply agreement, due to cumulative despatch being less than the Minimum Offtake Guarantee. In case of a Fuel offtake deficit, within a period of fifteen (15) days from the date of receipt of the above statement from JPL and after giving a prior written notice of at least seven (7) days to JPL, ***TPTCL shall have the right to avail himself such deficit at the same price at which such deficit fuel was available to JPL*** *under the Fuel supply agreement and to sell such deficit to third parties.*"

It is observed from the above article of Tata PPA (similar provision is also available in Haryana PPA) that the Petitioner can pass low coal lifting penalty on to TPTCL (and Haryana Discoms) if all of the following conditions are getting satisfied:

a) *That JPL has to paid penalty to the Fuel supplier for not purchasing the minimum guaranteed quantity of Fuel mentioned in the Fuel Supply Agreement.*

b) *Availability of the Contracted Capacity is greater than the Minimum Offtake Guarantee*

c) ***TPTCL has not Scheduled Energy*** *corresponding to such Minimum Off-take Guarantee during that Contract Year*

13. Further, the clause 4.6 of FSA envisages penalty for low level of lifting coal reads as under:

"***4.6 Compensation for short delivery/lifting***
*4.6.1 If for a Year, the Level of Delivery by the Seller, or the Level of Lifting by the Purchaser falls below ACQ with respect to that Year, the defaulting Party shall be liable to pay compensation to the other Party for such shortfall in Level of Delivery or Level of Lifting, as the case may be ("**Failed Quantity**") in terms of the following:*

<table>
<tr><th rowspan="2">Source</th><th rowspan="2">Level of Delivery / Lifting of Coal in a Year</th><th colspan="3">Percentage of Penalty for the failed quantity (at the rate of weighted average of Base Priced of Grades of coal supplied)</th></tr>
<tr><td>2012-13, 2013-14 & 2014-15</td><td>2015-16</td><td>2016-17 onwards</td></tr>
<tr><td>Imported + Domestic Qty</td><td>Below 100% but upto 80% of ACQ</td><td>NIL</td><td>NIL</td><td>NIL</td></tr>
<tr><td rowspan="3">Applicable for Imported Coal Only</td><td>Below 80% but up to 75% of ACQ</td><td rowspan="3">0 – 1.5</td><td rowspan="2">0 – 1.5</td><td>0 – 1.5</td></tr>
<tr><td>Below 75% but up to 67% of ACQ</td><td>-</td></tr>
<tr><td>Below 67% but up to 65% of ACQ</td><td>-</td><td>-</td></tr>
</table>

<table>
<tr><th>Source</th><th colspan="4">Percentage of Penalty for the failed quantity (at the rate of weighted average of Base Prices of Grades of coal supplied)</th></tr>
<tr><td></td><td>Level of Delivery/Lifting of Coal in a Year</td><td>2012-13, 2013-14 & 2014-15</td><td>2015-16</td><td>2016-17 onwards</td></tr>
<tr><td rowspan="7">Applicable for Domestic Coal</td><td>Below 75% but up to 70% of ACQ</td><td>-</td><td>-</td><td>0-5</td></tr>
<tr><td>Below 70% but up to 67% of ACQ</td><td>-</td><td>-</td><td rowspan="2">5-10</td></tr>
<tr><td>Below 67% but up to 65% of ACQ</td><td></td><td>0-2</td></tr>
<tr><td>Below 65% but up to 60% of ACQ</td><td>0-5</td><td>2-7</td><td>10-20</td></tr>
<tr><td>Below 60% but up to 55% of ACQ</td><td>5-10</td><td>7-20</td><td rowspan="3">20-40</td></tr>
<tr><td>Below 55% but up to 50% of ACQ</td><td>10-20</td><td rowspan="2">20-40</td></tr>
<tr><td>Below 50% of ACQ</td><td>20-40</td></tr>
</table>

4.6.2 The penalty payable shall be computed in the same manner as done slab-wise for computation of income-tax. However, unlike income tax, the percentage of compensation shall grow on linear basis within each slab

** Note: For the phasing period the annual coal requirements shall be based on the quantities mentioned by the Purchaser for the initial years under Schedule 1 of this agreement*

Note: The Purchaser has to give unconditional acceptance of imported coal and pricing mechanism thereof as would be decided by CIL, by signing Schedule VII of this agreement. Unless such acceptance is accorded, the penal provision for supply below 80% and upto 65% of ACQ for the years 2012-13, 2013-14 and 2014-15 and below 80% and upto 67% of ACQ for the year 2015-16 shall not be applicable. The penal provision for supply below 75% shall be applicable from the year 2016-17 and onwards. The terms of import and the pricing mechanism shall be as per the provisions of the side agreement.

4.6.3 Agreements made earlier under the 'Coal Distribution System' as defined at clause 1.1(j) shall take precedence over the commitments made under this agreement.

4.6.4 the Seller shall be entitled to modify/amend the penalty levels as specified at clause 4.6.1 pursuant to review undertaken by MOC in terms of clause 2.6(ii).
………

4.8 Level of Lifting:
Level of Lifting with respect to a Year shall be calculated in the form of percentage as per the following formula:

$$\text{Level of Lifting (LL)} = \frac{(ACQ-DDQ) \times 100}{ACQ}$$

Where:
LL = Level of Lifting of Coal by the Purchaser during the Year.
DDQ shall have the same meaning as given in Clause 4.11.
……………………
4.9 For the purpose of computing DDQ and RF, the weight per rake will be as per the Railway rules, which shall be used for calculation of compensation from either the Purchaser or Seller.
………
4.11 ***Deemed Delivered Quantity:***
For the purpose of this Agreement the aggregate of the following items provided under Clause 4.11.1 to 4.11.2 shall constitute the Deemed Delivered Quantity with respect to a Year.
4.11.1 ***For supply of Coal by rail:***
(i) The quantity of Coal not supplied by the Seller owing to omission or failure on the part of Purchaser to submit in advance the designated rail programme(s) to the Seller as per agreed time-table with respect to the Scheduled Quantity.
(ii) The quantity of Coal not supplied by the Seller owing to cancellation, withdrawal or modification of the rail programme(s) by the Purchaser after its submission whether before or after allotment of wagon(s) by Railways.

(iii) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to pay and/or submit/maintain IRLC, as applicable, in accordance with Clause 12.1.2.
(iv) The quantity of Coal not supplied by the Seller owing to Seller exercising the right of suspension of supplies in terms of Clause 14.
(v) The quantity of Coal offered by Seller from domestic and/or imported coal in terms of Clause 4.3.1 and 4.3.2 not accepted by the Purchaser.

4.11.2 ***For Supply of Coal by road/ ropeways/MGR/belt conveyor:***
(i) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to pay and/or submit IRLC, as applicable, in accordance with Clause 12.1.2.
(ii) The quantity of Coal not supplied by the Seller owing to Seller exercising the right of suspension of supplies in terms of Clause 14.
(iii) The quantity of Coal not supplied by the Seller owing to Purchaser's failure to place the requisite number/type of transport at the Delivery Point for delivery of Coal within the validity period of the sale order/delivery order.
(iv) The quantity of Coal offered by Seller from domestic and/or imported coal in terms of Clause 4.3.1 and 4.3.2 not accepted by the Purchaser.
4.11.3 Deemed Delivered Quantity in terms of Clause 4.11.1 and 4.11.2 shall be calculated on cumulated monthly basis during a Year."

As brought out at para 11 above that because of low dispatch of energy from the station the level of coal lifting went below 75% of annual contracted quantities (ACQ) resulting in payment of low coal lifting penalty by the Petitioner to fuel companies to the tune of 43.01 crore (principal amount). Out of total amount of Rs.43.01 crore paid to the coal companies, the share of TPTCL has been worked out as Rs.4.80 crore as principal amount which was communicated to TPTCL by the Petitioner through various communications which have been made part of the Petition. Apart from the principal amount, the Petitioner has also claimed late payment surcharge till date on which final payment is made by TPTCL/TPPDL (Tentative LPS claimed by the Petitioner from TPTCL/TPDDL was at Rs.2.86 crore as on 10.3.2021). It is observed that TPTCL/TPDDL has not disputed the principal amount but has rather argued that it is not liable to pay the principal amount or its share needs to be reduced. In this regard,

Petitioner has submitted that Haryana Discoms have already paid their share of short lifting penalty.

14. Considering the above facts, provisions of Tata PPA and the rival submissions of the parties, the following issues arise for our consideration:

(a) Issue No. 1: Whether the availability of the Plant was greater than the Minimum Offtake Guarantee during Contract Year 2016-17?

(b) Issue No. 2: Whether the energy scheduled by the respondents was less than Minimum Offtake Guarantee during Contract Year 2016-17?

(c) Issue No. 3: Whether the Petitioner is entitled to reimbursement of penalty as per Article 1.2.8 of Schedule 7 of the Tata PPA and what exactly shall be the liability of TPTCL?

Issue No. 1: Whether the availability of the Plant was greater than the Minimum Offtake Guarantee during Contract Year 2016-17?

15. TPDDL in its reply has alleged that the availability of the Plant during Contract Year 2016-17 was not greater than the Minimum Offtake Guarantee since the Petitioner was not in a position to deliver power to TPDDL on account of either one or both the Units of the Power Plant being under shut down, either under RSD or for planned maintenance for 247 days which is more than 67% period in the said Contract Year. It is TPDDL's case that Declared Capacity of the Power Plant will have to calculated as per the CERC's Tariff Regulations, 2014 and therefore, Declared Capacity of the Power Plant has to be according to its capability of delivering the power, which cannot be the case if the power plant is Off Bar/under shut down due to instructions from Haryana SLDC.

16. *Per contra*, the Petitioner has submitted that the availability of the Project during the Contract Year 2016-17 was 92% of the Contracted Capacity, which is substantiated by the fact that TPDDL made payment of the entire capacity charges of the Project. The Petitioner contends that even if unit(s) of the Project are taken under RSD, the same does not impact the availability of the Plant.

17. We have considered the submissions of the parties. The coal-based power plants have certain technical limitations and cannot be operated below a specific technical minimum level. We also note that in case power is not requisitioned corresponding to the technical minimum requirement of power plant and the unit/s choose to be under RSD even then the availability of the power plant is considered equivalent to the availability declared by the generator.

18. It is noted that Article 7.3 of the Tata PPA specifies requirement of the Minimum Rated Net Capacity of 50% of rated net capacity of any one unit for operation of MGTPP units. In terms of the aforesaid provision, if requisition of power to be procured cumulatively by Haryana Discoms and Respondents is less than at least 50% of the rated net capacity of any one Unit, and the Petitioner is restricted technically and/or commercially by the Grid Operator instructing not to generate beyond stipulated schedule, the Petitioner shall not be liable to deliver any electrical output under the Tata PPA. However, even in such a scenario, the Petitioner's project technically continues to be available to supply power and its Declared Capacity is not affected. Even the definition of Declared Capacity as per the Tata PPA or for that matter, even as per the

Tariff Regulations 2014, does not make the declaration of availability contingent upon the Petitioner's ability to not supply due to RSD taken by HPPC/ SLDC.

19. Therefore, the Respondent having admitted the availability of the Project during the Contract Year 2016-17 as 92% of the contracted capacity by making payment of the entire capacity charges of the Project can not dispute the said availability now. As quoted above, as per the terms of the Tata PPA, the Minimum Offtake Guarantee is 65% of the Contracted Capacity. In view of availability of the project as 92% during the contract year 2016-17, we hold that availability of the Plant was greater than the Minimum Offtake Guarantee during Contract Year 2016-17.

Issue No. 1 is answered accordingly.

Issue No. 2: Whether the energy scheduled to Respondents was less than Minimum Offtake Guarantee during Contract Year 2016-17?

20. The final position in respect of power scheduled/dispatched to TPDDL and Haryana Discoms during the year 2016-17, against their minimum off take guarantee as per PPAs/PSA and share of each beneficiary towards the penalty, as reported by the Petitioner was as under:

Sl. No	Beneficiary	Minimum off take guarantee In Energy Terms corresponding to 65% of Contracted capacity (kWh)	Actual Dispatch	Shortfall (kWh)	Share of penalty (%)
1	TPPDL	704,473,068	222,181,160	482,291,908	11.15
2	Haryana	6340,257,612	2498,230,230	3842,027,382	88.85
	Total	7044,730,680	2720,411,390	4324,319,290	100

In terms of above position, the Petitioner has submitted that the energy scheduled/dispatched to TPPDL was only 20.50% of the Contracted capacity against minimum off take guarantee, which is 65% of the contracted capacity. Accordingly, the Petitioner has asserted that second condition pf Article 1.2.8 gets satisfied that energy scheduled to TPTCL was less than the Minimum off take guarantee.

21. TPDDL has submitted that it had been regularly requisitioning power from the power plant. However, owing to the reasons not attributable to TPDDL at all, the same was not being scheduled to TPDDL by JPL. It is TPDDL's case that in the contract year 2016-17, there have been many occasions when TPDDL requisitioned power from the Petitioner however, the same was either not scheduled or less scheduled by the Petitioner. A table showing similar such instances is as under:

Month	Requisition by TPDDL (MU's)	Scheduled to TPDDL (MU's)
Apr'16	12.86	0.00
May'16	0.00	0.00
June'16	3.00	0.04
Jul'16	0.20	0.00
Aug'16	4.48	0.30
Sep'16	16.85	0.08
Oct'16	8.54	3.95
Nov'16	0.43	0.12
Dec'16	0.37	0.27
Jan'17	7.44	2.71
Feb'17	27.82	2.18
Mar'17	5.71	0.33
Total	**87.70**	**9.97**

22. TPDDL has pointed out that non-scheduling/low scheduling of power from Petitioner by TPDDL cannot be attributed to TPDDL insofar as power from the Power Plant ranks very high in the Merit Order Dispatch and costlier as compared to others in the stack. TPDDL has also alleged that all attempts on the part of

TPDDL to increase the offtake of power from Power Plant was met with stiff resistance from the Petitioner. TPDDL in its reply has submitted that it had written to the Petitioner seeking allocation of un-requisitioned surplus power from the power plant so as to increase its share, however, the same was opposed by the Petitioner for untenable reasons.

23. Further, TPDDL has urged that its repeated requests to avail the complete and maximum contracted capacity from the running Unit of the Power Plant, in case another Unit is under reserve shut down in compliance of the Commission's Order No. L-1/219/2017/CERC dated 5.5.2017 - Detailed Operating Procedure qua Reserve Shutdown (DOP), met with stiff resistance from the Haryana Utilities. As a result, TPDDL had to approach the Commission by way of Petition No. 114/MP/2018 which culminated into order dated 4.2.2020, whereby Commission held that TPDDL can avail the entire contracted capacity (123.72 MW) from the running unit of the Power Plant in case the other unit is under RSD. Accordingly, TPDDL submits that it cannot be held responsible for lower offtake of power as compared to guaranteed minimum under the PPA as it has taken all necessary steps to requisition its contracted capacity.

24. The Petitioner has submitted that the Respondents have been scheduled power corresponding to 20.50% of their Contracted Capacity as against the Minimum Offtake Guarantee of 65% due to which there was low level of lifting of coal by the Petitioner which attracted levy of penalty in terms of Clause 4.6 of the FSAs. The Petitioner stated that:

(a) The Unit(s) of Petitioner's Project is/are instructed to go under RSD by SLDC depending upon the power requirement of Haryana Discoms and the Respondents as per the terms and conditions of the Grid Code and as such, the Petitioner has no control over such shut downs and is statutorily obligated to follow the instructions being given to it under Section 33 of the Act.

(b) As per Schedule 13 of the Tata PPA, the Petitioner's obligation to supply power to the Respondents is capped or ring fenced to 61.86 MW from each Unit, i.e. 123.72 MW from the Project. Therefore, the maximum power that can be dispatched to the Respondents is 61.86 MW from each unit. It was only on 4.2.2020 that the Commission vide its order in Petition No. 114/MP/2018 filed by TPDDL itself clarified that the Respondents can avail the entire contracted capacity (123.72 MW) from the running Unit of the Project in case another Unit is under RSD and the Haryana Discoms are not scheduling power from the running Unit upto their allocated capacity in the unit.

(c) The fact that TPDDL itself filed Petition No. 114/MP/2018 before this Commission to seek specific permission in view of the Detailed Operating Procedure (DoP), shows that during the period prior to the Commission's order dated 4.2.2020 including specifically Contract Year 2016-17, the Petitioner could not have supplied the entire Contracted Capacity of power from the running Unit. In any case, the Petitioner cannot be made liable for any such reason as even during adjudication of Petition No. 114/MP/2018 before the Commission, the Petitioner had expressed its willingness to supply entire Contracted Capacity

under the Tata PPA from one running Unit (the other Unit being under RSD) of the Project subject to agreement in this regard between Haryana Discoms and the Respondents in terms of the DoP issued by the Commission.

25. We have considered the rival submissions in this regard. At the outset, we observe that the condition stipulated in the PPAs for passing on the low coal lifting penalty to TPTCL explicitly provides that energy **scheduled by** TPTCL shall be less than energy corresponding to Minimum offtake guarantee. On the contrary, the Petitioner has compared the energy **scheduled to** TPTCL with energy corresponding to Minimum offtake guarantee. As such, there is clear distinction between "energy scheduled by" and "energy scheduled to". As per day ahead scheduling process, it is prerogative of the generator to declare availability of the plant based on machine and fuel availability where as it is the prerogative of the beneficiaries to advise their drawl schedule based on their share in the plant capacity/contracted capacity and it is RLDC/SLDC which based on availability declared by the generator and drawl schedule advised by the beneficiaries decides final injection and drawl schedule for the generator and beneficiaries, respectively and in consideration of the fact that whether or not unit/s are going under RSD. As such, energy finally **scheduled to** TPTCL was less than energy drawl **schedule advised by TPTCL** (i.e. energy requisitioned by TPTCL). In our considered view, minimum off take guarantee needs to be compared to the requisition given by TPTCL/TPDDL and not with energy scheduled to TPTCL/TPDDL. To make things more clear let us consider an extreme situation where Haryana Discoms requisition NIL energy for the whole year and on the other hand TPTCL/TPDDL gives requisition equal to its contracted capacity which is much more

than its minimum offtake guarantee i.e. 65% of the contracted capacity. However, under this situation the total requisition coming from Haryana Discoms and TPTCL/TPDDL being less than 50% i.e. technical minimum, the units would go into RSD and as such power scheduled to TPTCL/TPDDL would be nil, thus making it liable it to pay low coal lifting penalty in spite its intention to procure much more than the Minimum off take guarantee. Accordingly, we hold that as per explicit provision the necessary condition for passing the low coal lifting penalty to TPTCL is: "Energy **scheduled by** (requisitioned by) TPTCL by way of its advised drawl schedule shall be less than the energy corresponding to Minimum off take Guarantee.

26. With regard to the contention of TPDDL that it was not scheduled power equivalent to its requisition on many occasions due to unit/s being under RSD, we have already observed that scheduling of power is not the prerogative of the beneficiary and as such the liability to pay the low coal lifting penalty shall be with respect to energy requisitioned by TPTCL/TPDDL and Haryana Discoms and not based on the energy finally scheduled to them.

27. TPDDL has submitted that non-scheduling/low scheduling of power from Petitioner by TPDDL cannot be attributed to TPDDL insofar as power from the Power Plant ranks very high in the Merit Order Dispatch and costlier as compared to others in the stack. In this regard it is noted that on one hand, TPDDL is attributing non-scheduling/low scheduling to power from the plant being costlier in terms of MOD and on the other hand it has submitted that it has made all attempts to increase the offtake of power from Power Plant which was met with stiff resistance from the Petitioner and

Haryana Discoms. The Commission observes that while safeguarding the interests of consumers is the responsibility of the Discoms, however, any consequential charges payable as per agreed terms of PPA for not scheduling the costlier power needs to be borne by the Discoms.

28. With regard to the submission of the Respondent/s that in its bid to increase power off take from the power plant, it had written to the Petitioner seeking allocation of requisitioning of un-requisitioned surplus power, however, the same was opposed by the Petitioner. The Petitioner has submitted that Standard Bid Document does not have any provision allowing URS power to the procurers. It has been further submitted that such arrangement would require agreement of Haryana Discoms, revision of Tata PPA/PSA as well as Haryana PPA. In view of the above rival submissions, Commission observes that the requisitioning of un-requisitioned surplus power did not fructify during 2016-17 and as such deliberating on this hypothetical situation does not need our attention.

29. With regard to assertion of TPDDL that its repeated requests to avail the complete and maximum contracted capacity from the running Unit of the Power Plant, in case another Unit is under reserve shut down in compliance of the Commission's Order No. L-1/219/2017/CERC dated 5.5.2017 - Detailed Operating Procedure qua Reserve Shutdown (DOP) met with stiff resistance from Haryana Discoms, we observe that Detailed Operating Procedure for units going under RSD was put into place by Commission vide order 5.5.2017 i.e. a date after the expiry of the disputed period i.e. 2016-17, and as such in absence of such frame work during 2016-17 and in view of non-agreement of the major stakeholders i.e. Haryana Discoms, the Petitioner was not

in position to allow scheduling of entire contracted capacity of TPTCL/TPDDL from one running unit of the Power Plant, in case another Unit was under reserve shut down.

30. Further, TPDDL based on its calculations has submitted that its requisition shall be deemed equal to 58% of the contracted capacity considering that if the units were not on RSD then it would have requisitioned same percentage of power from off bar unit also which it had requisitioned from the on-bar units. Per contra, the Petitioner has submitted that calculations made by the Respondent are based on presumptions which are not consistent with the Tata PPA/PSA and Commission may like to reject it.

31. In this respect, we note that the calculation of TPDDL leading to its deemed requisition being 58% of the contracted capacity is based on TPDDL's assumptions and is not in line with Article 1.2.8 of PPA. The PPA explicitly provides that actual energy scheduled by the TPTCL/TPDDL shall be the basis of calculating low coal lifting penalty and not the deemed energy scheduled based on the assumption that TPTCL/TPDDL would have requisitioned same percentage of power from off bar unit also which it had requisitioned from the on-bar units. The position taken by the Respondents is also not acceptable because at the time of advising drawl schedule, they are not sure whether or not any Unit/s would go under RSD due to combined requisition being less than technical minimum.

32. We also observe that the energy requisitioned by TPTCL/TPDDL during the year 2016-17 was 291.58 MUs as against Minimum off take guarantee of 704.47 MUs. Accordingly, it is observed that the another condition of low coal lifting penalty being payable by TPTCL/TPDDL i.e ***'energy scheduled by TPTCL is less than energy***

corresponding ***to such Minimum Off-take Guarantee during that Contract Year"*** is satisfied during the contract year 2016-17, even based on the energy requisitioned by TPTCL/TPDDL.

33. The Issue No. 2 is answered accordingly.

Issue No. 3: Whether the Petitioner is entitled to reimbursement of penalty as per Article 1.2.8 of Schedule 7 of the Tata PPA and what exactly shall be the liability of TPTCL?

34. In view of the above, it is clear that the availability of the plant was greater than the Minimum offtake Guarantee during contract year 2016-17 and ***energy scheduled by TPTCL was less than energy*** *corresponding* ***to Minimum Off-take Guarantee*** during contract Year 2016-17. Therefore, now we have to examine whether in the present case, the Petitioner is entitled to reimbursement of penalty as per Article 1.2.8 of Schedule 7 of the Tata PPA.

35. It is TPDDL's contention that the Petitioner is not entitled to reimbursement of penalty imposed upon the Petitioner by Coal Companies as the Petitioner has failed to fulfil its duty to mitigate losses under Section 73 of the Indian Contract Act, 1872. *Per contra*, the Petitioner submits that the amount payable by the Respondents under Article 1.2.8 of Schedule 7 of the Tata PPA is a sum which is explicitly stipulated in the contract as the amount to be paid in case of breach of the Minimum Offtake Guarantee, despite the availability of the contracted capacity being higher than the Minimum Offtake Guarantee. As such, the Petitioner's claim under the Petition is one under Section 74 of

the Indian Contract Act, 1872 i.e. of liquidated damages, and not under Section 73 thereof i.e., of unliquidated damages.

36. We agree with the Petitioner's contention that the penalty leviable in the present case is under Section 74 of the Indian Contract Act, 1872. We note that the explanation of Section 73 of the Indian Contract Act, 1872 explicitly provides that *in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account*; whereas no such explanation or provision is made under Section 74 of the Indian Contract Act, 1872. Therefore, we are of the view that the principle of mitigation of losses which is applicable in cases where damages are claimed under Section 73 of the Indian Contract Act, 1872, is not applicable under Section 74 of the Indian Contract Act, 1872.

37. Further, during the hearing of the Petition on 26.5.2022, the Petitioner was directed to submit the details of coal off-take and power scheduled to the beneficiaries during the period for which penalty is claimed due to low lifting of coal and details of coal stock (in number of days). We have perused the data submitted by the Petitioner by way of additional affidavit dated 18.6.2022 and observe that during the period of low-offtake of coal from coal companies, the Petitioner had adequate coal stock of more than 30 days through out the year, as prescribed under the coal stocking norms issued by the Central Electricity Authority.

38. Thereafter, by way of letter dated 26.8.2022, the Petitioner was directed to submit the day-wise coal procured, coal consumed, DC declared (combined and

segregated for both units), capacity under reserve shutdown, segregated schedule given by respondents, actual generation, energy supplied to beneficiaries, energy sold in market, duration of forced outage and planned outage for each unit during the FY 2016-17. The Respondents were also directed to submit day-wise DC made available by the Petitioner, scheduled given to the generator and actual energy consumed from the generator during FY 2016 - 17. We have perused the data submitted by the parties and from the same, we conclude that there is a direct correlation between requisitioning of power by the procurers , units going into RSD and procurement of coal by the Petitioner. We also observe that despite the Petitioner declaring available capacity, power scheduled by the respondents fell short of Minimum off take guarantee.

39. We have considered the submissions of the parties in the light of the above analysis and the terms of Article 1.2.8 of Schedule 7 of the Tata PPA. In our view, having established that the availability of the Plant was greater than the Minimum Offtake Guarantee during contract year 2016-17 and the power scheduled by TPTCL/TPDDL was less than the Minimum Offtake Guarantee during contract year 2016-17, **the respondents are liable to reimburse to the Petitioner their part of the low coal lifting penalty paid to the coal companies by the Petitioner on account of low level of lifting under Clause 4.6 of the FSAs.**

TPTCL has alleged that since it is only an intermediary between the Petitioner and TPDDL having no consequent role in the present matter. We have already considered the issue of liability of TPTCL/TPDDL in such a scenario in detail and dealt with the same by way of our decision in Petition No. 170/MP/2013 and Petition No. 319/MP/2013

The Commission has also issued detailed findings regarding role of an intermediary in such transactions qua SECI/NTPC in the context of renewable energy generators in various orders which are squarely applicable to the present case. Therefore, we cannot accept TPTCL/TPDDL's arguments regarding their liability being restricted and the same are thus rejected as being untenable.

40. Now, coming to the issue of the quantum of penalty leviable upon the Respondents under Article 1.2.8 of Schedule 7 of the Tata PPA. In this respect, as a first step, it needs to be ascertained whether the penalty paid by the Petitioner to coal companies could have been reduced by better procurement of domestic and imported coal. In this regard, it is noticed from the data submitted by the Petitioner that during the year it has procured and consumed imported coal, TPDDL has also objected to the same by submitting that on one hand the Petitioner is claiming that it was unable to lift coal as per FSA and on the other hand it has imported coal for FY 2016-17 In our view, Petitioner should have avoided procurement of imported coal to reduce the low domestic coal lifting penalty. It is noted from the submissions that during the contract year 2016-17, the Petitioner has procured 65,599 Tonnes (0.066 Million Tonne) of imported coal with average GCV of 4334 kcal/kg. Considering the fact that reported average GCV of domestic coal was 3635 kcal/kg, the Petitioner by avoiding procurement of imported coal could have lifted additional domestic coal to the tune of 78,213 Tonne (65599x4334/3635). As such, there is a need to rework the total penalty amount payable by the Respondents and Haryana Discoms by considering the additional equivalent domestic coal as calculated above which could have been lifted over and above domestic coal lifted by the Petitioner. In this regard, the revised

principal amount to be paid by Haryana Discoms and TPTCL on combined basis has been worked out as Rs. 3873.38 lakh as against Rs.4301.74 lakh paid by the Petitioner to coal suppliers, after equal addition of domestic coal equivalent to imported coal to the actual domestic coal lifted from each supplier i.e. 0.026 Million Tonne (0.078/3):

Coal Company	ACQ (in MTPA) (a)	Quantity mandated to be lifted as per FSA (75% of ACQ) (b)	Actual Coal lifted (in Million Tonne) (c)	Level of lifting (% of ACQ) (d)	Penalty Amount paid by petitioner (in Lakhs.) (e)	Revised quantity of coal lifted (in Million Tonne) (f)= (c) +0.026	Revised level of lifting (% of ACQ) (g)	Revised amount of Penalty payable by Haryana Discoms +TPPCL (h)= (e)x {(b)-(f)} /[(b)-(c)]
BCCL	0.889	0.667	0.279	31.38	1829.56	0.305	34.31	1706.96
ECL	0.50	0.375	0.151	30.20	1769.91	0.177	35.40	1564.47
NCL	0.50	0.375	0.193	38.60	702.27	0.219	43.80	601.95
Total	**1.889**	**1.417**	**0.623**	**32.98**	**4301.74**	**0.701**	**37.11**	**3873.38**

Further, the share of Haryana Discoms and TPTCL in the low coal lifting penalty has been calculated by the Petitioner as 11.15% and 88.85% based on the energy shortfall calculated as difference between minimum off take guarantee and **energy scheduled to** each beneficiary as under:

Sl. No	Beneficiary	Minimum off take guarantee In Energy Terms corresponding to 65% of Contracted capacity (kWh)	Actual Dispatch/energy scheduled to each beneficiary	Shortfall (kWh)	Share of penalty (%)
1	TPPDL	704,473,068	222,181,160	482,291,908	11.15
2	Haryana	6340,257,612	2498,230,230	3842,027,382	88.85
	Total	7044,730,680	2720,411,390	4324,319,290	100

However, having held (at issue no. 1) that in terms of explicit provision of PPA, the share of TPTCL and Haryana Discoms should have been based on the difference between minimum off take guarantee and energy **scheduled by/requisitioned by** each beneficiary, the share of each beneficiary needs to be reworked by the Petitioner as under:

Sl. No	**Beneficiary**	**Minimum off take guarantee In Energy Terms corresponding to 65% of Contracted capacity (kWh) (a)**	**Actual energy scheduled by/requisitioned each beneficiary* (kWh) (b)**	**Shortfall (kWh) (c)=(a)-(b)**	**Share of penalty (%) (d)= (c)x100/ Total (c)**
1	TPTCL/TPPDL	704,473,068	291580800	412892268	412892268x 100 /(**6753149880-Y)**
2	Haryana	6340257612	Y*	6340257612-Y	(6340257612-Y)x100 /(**6753149880-Y)**
	Total	**7044,730,680**	291580800+Y	**6753149880-Y**	**100**

*Not available in Petition

41. In view of the above deliberations, the revised penalty amount of Rs. **3873.38 lakh needs to be shared between Haryana Discoms and TPTCL in the ratio as would be calculated by the Petitioner by f the methodology indicated in the above table.**

42. With regard to late payment surcharge, the Petitioner has submitted that it is also entitled to late payment surcharge from the date of respective invoices pertaining to low coal lifting penalty till the date of final payment by the Respondents in terms of Article 11.8 read with Article 11.6.8 of the Tata PPA.

43. In this regard, of Article 11.8 of the Tata PPA, read as under:

PAYMENT OF SUPPLEMENTARY BILL

11.8.1 Either Party may raise a bill on the other Party ("Supplementary Bill") for payment on account of:

i. adjustment required by the Regional Energy Account (if applicable)
ii. Tariff Payment for change in parameters, pursuant to provisions in Schedule 7: or
iii. Change in Law as provided in Article 13, and such Bill shall be paid by the other Party.

11.8.2 TPTCL shall remit all amounts due under a Supplementary Bill raised by the JPL to JPS's Designated Account by the Due Date and notify JPL of such remittance on the same day. Similarly, JPL shall pay all amounts due under a Supplementary Bill raised by TPTCL by the Due Date to TPTCL's designated bank account and notify TPTCL of such payment on the same day. For such payments by TPTCL, rebates as applicable to Monthly Bills pursuant to Article 11.3.5 shall equally apply.

11.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 11.3.4.

44. The perusal of Article 11.8 brings out that raising of the Supplementary bill for payment on account of Tariff payment for change in parameters, pursuant to provisions in Schedule 7 is covered by clause 11.8.1(ii). Further, considering the fact that low coal lifting penalty is covered by article 1.2.8 of Schedule 7, the invoices raised by the Petitioner on TPTCL are covered by Article 11.8 of Tata PPA. Further, clause 11.8.3 refers to payment of late payments Surcharge at the same terms applicable to the Monthly Bill in Article 11.3.4. Perusal of the Article 11.3.4 reveals that LPS is payable from due date (one month from the date of invoice) @ of 2% in excess of the applicable SBAR (as defined in PPA) per annum. In this regard we observe that Article 11.8 & 11.3.4 are for delayed payments which have not been disputed by TPTCL, whereas the case in hand is with regard to payment of supplementary bill disputed by TPTCL.

45. Accordingly, the clause 11.6.8 of Article 11.6 pertaining to "Disputed Bills" as referred by the Petitioner has been pursued. The same reads as under:

11.6 Disputed Bills

11.6.8 If a Dispute regarding a Monthly Bill, Provisional Bill or a Supplementary Bill is settled pursuant to Article 11.6 or by Dispute Resolution mechanism provided in

this Agreement in favour of the Party that issues a Bill Dispute Notice, the other party shall refund the amount, if any incorrectly charged and collected from the disputing Party or pay as required, within five (5) days of the Dispute either being amicably resolved by the parties Pursuant to Article 11.6.5 or settled by Dispute Resolution mechanism along with interest at the same rate as Late Payment Surcharge from the date on which such payment had been made to the invoicing Party or the date on which such payment was originally due, as may be applicable.

46. We observe that this clause is not appropriate to the instant dispute as it provides for refund by JPL of any amount incorrectly charged and collected from TPTCL along with LPS provided the case is settled in the favour of TPTCL. Further, the case has not been settled in favour of TPTCL (disputing party) and no amount was collected from TPTCL before the settlement of the case by the Commission. In our considered opinion, clause 11.6.7 of Article 11.6 which reads as under, is more appropriate to the case in hand:

11.6.7 In case of Disputed Bills, it shall be open to the aggrieved party to approach the Appropriate Commission for Dispute Resolution in accordance with Article 17 and also for interim orders protecting its interest including for orders for interim payment pending Dispute Resolution and the Parties shall be bound by the decision of the Appropriate Commission, including in regard to interest or Late Payment Surcharge, if any directed to be paid by the Appropriate Commission.

47. As such, this clause puts an onus on the Commission to decide the penalty amount to be paid along with appropriate interest or LPS. The Commission, balancing the interests of consumers and the generator, considers it appropriate that TPTCL apart from coal lifting penalty (principal amount) as directed at para 41 above shall also pay interest on the principal amount for the delayed period (from due date till date of actual payment of the principal amount) at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor's Certificate) or the rate of interest on working capital as per the CERC's 2019 tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. .

48. We direct the Petitioner, TPTCL and Haryana Discoms to reconcile the amount within two weeks and TPTCL is directed to make payment to the Petitioner within three weeks thereafter in terms of Article 1.2.8 of Schedule 7 of the PPA, along with interest @ decided at para 47 above on its share in the revised principal amount of Rs. 3873.38 lakh**.** Needless to say that TPDDL is liable to reimburse TPTCL and make payment of the amount on back-to-back basis in terms of the Tata PSA.

49. Petition No. 258/MP/2019 is disposed of in terms of above.

Sd/-	Sd/-	Sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S. Jha)**
Member	**Member**	**Member**