**In the Appellate Tribunal for Electricity,**
**New Delhi**
**(Appellate Jurisdiction)**

**Appeal No. 64 of 2016 and IA No 163 of 2016**

**Dated: 14th December, 2016**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson**
**Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of:-**

**Nabha Power Limited (NPL)**
**SCO 32, Sector 26-D**
**Madhya Marg**
**Chandigarh - 160019 …. Appellant**

**Versus**

1. **Punjab State Electricity Regulatory Commission (PSERC)**
**SCO 220-221, Sector 34A**
**Chandigarh- 160022 ... Respondent No.1**

2. **Punjab State Power Corporation Limited (PSPCL)**
**The Mall, Punjab State Electricity Board**
**Patiala- 147001 ...Respondent No.2**

**Counsel for the Appellant:** Mr. Parag Tripathi, Sr Adv
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Mr. Sandeep Rajpurohit
Ms. Neha Garg for R-2

## JUDGMENT

## PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

**1.** The present Appeal is being filed by Nabha Power Limited (hereinafter referred to as the **"Appellant"**)under Section 111 of the Electricity Act, 2003 challenging the Order dated 01.02.2016 (**'Impugned Order'**) passed by the Punjab State Electricity Regulatory Commission (hereinafter referred to as the **'State Commission'**) in Petition No. 52 of 2014 disallowing the claims of the Appellant for recovery of deductions made by Punjab State Power Corporation Limited ("**PSPCL**") from the monthly bills raised by the Appellant.

**2.** The Appellant, Nabha Power Limited is a company incorporated under the Companies Act, 1956 having its registered office at PO Box no. 28, near Village Nalash, Rajpura, Punjab. Nabha Power Limited was a Special Purpose Vehicle (SPV), initially set up by the erstwhile Punjab State Electricity Board ("**PSEB**") for developing Rajpura Thermal Power Plant with a contracted capacity of 1200 MW +/- 10% **("Project")** at village Nalash, near Rajpura, District Patiala, Punjab.

**3.** The Respondent No 1, PSERC is the Electricity Regulatory Commission for the State of Punjab exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.

**4.** The Respondent No.2, PSPCL is the successor entity of the erstwhile PSEB. Subsequent to the unbundling of PSEB and in accordance with the Punjab Power Sector Reforms Transfer Scheme, 2010, PSPCL has been constituted as a separate corporate entity to take over the generation and distribution business of erstwhile PSEB.

**5.** Aggrieved by the Impugned Order dated 01.02.2016 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:

i. The State Commission while passing the Impugned Order has wrongly interpreted the clauses of the Power Purchase Agreement ("PPA") and disallowed legitimate claims of the Appellant, regarding -

   a. Payment of expenses within cost of coal as sought by the Appellant under the following heads:

      i. Washing of coal,

      ii. Road and surface transportation for bringing coal to the project site,

      iii. Liaisoning for procurement of coal,

      iv. Third party analysis of coal, and

      v. Transit and handling losses in transportation of coal.

ii. Wrongful withholding of payment of capacity charges by PSPCL for the period of 20.02.2014 to 03.03.2014 when availability was declared based on alternate coal; and

iii. Failure to consider Gross Calorific Value ("GCV") of coal on an "as fired" basis at the bunker end.

**6. Facts of the present Appeal:**

a) In 2009, PSEB conducted an International Competitive Bidding (“ICB”) for selection of Developer through tariff based bidding process for procurement of power on Long Term Basis from Power Station to be set up at Village Nalash, Rajpura, District Patiala, Punjab.

b) The Rajpura Thermal Power Station was envisaged as a Case-2 bid project (Case 2, Scenario - 4) criteria by PSEB in terms of the Competitive Bidding Guidelines issued by Govt of India as per Section 63 of the Electricity Act, 2003.

c) PSEB incorporated Nabha Power Ltd. ("**NPL**"/"Appellant") on 09.04.2007 as a special purpose vehicle ("SPV") to implement the Project. The successful bidder was to acquire 100% shareholding of NPL and enter into a 25-year Power Purchase Agreement with PSEB.

d) As per Competitive Bidding Guidelines, issued by Ministry of Power, Government of India, the Procurer is required to complete following activities before commencement of the bidding process for Case-2 projects :

i. Site identification and land acquisition required for the project
ii. Environmental clearance
iii. Fuel linkage
iv. Water linkage
v. Requisite Hydrological, geological, meteorological and seismological data necessary for preparation of Detailed Project Report (DPR), where applicable.

The remaining works, approvals and clearances are required to be undertaken by the Seller/Developer. Under Scenario-4 of Case-2 Bidding, the bidders are required to quote the escalable & non-escalable capacity charges and net Station heat rate, as per the terms and conditions of the Bidding documents.

e) On 10.06.2009, a Request for Qualification ("RFQ") and Request for Proposal ("RFP") inviting proposals to supply 1200 MW of power from Rajpura Thermal Power Project was issued. In the RFQ, it was specified that the following tasks had already been concluded:

i. 1078 acres of land had been acquired.
ii. Environmental clearance had been obtained.
iii. Fuel arrangements had been tied up in the form of LoA dated 11/18.12.2008.
iv. Water arrangement had been tied up.

The RFP specifically provided that:

i. The source of primary fuel (coal) would be coal from SECL since SECL had already issued the LoA.

ii. The Railways had given assurance for transportation of coal from SECL over a distance of 1600 km.

f) In response to queries raised by the bidders, clarifications in respect of the bidding documents were issued on 16.09.2009. It was clarified that:

i. SECL would supply Grade 'F' coal from Korba/Raigarh field, with GCV of 3900 Kcal/kg to 4260 Kcal/kg, Ash Content of 35% to 40%, total inherent moisture of 5% to 6%, Volatile matter of 24% to 32%, fixed carbon of 32% to 37% and Sulphur content of 0.05%.

ii. On a specific query of whether the coal to be supplied would be washed coal or unwashed coal, it was clarified that washing of coal was to be arranged by the successful bidder.

iii. In response to the queries raised by the bidders, clarifications on the model PPA were also issued on 17.09.2009. On the question of the costs associated with fuel supply, transportation and unloading being pass through, it was clarified that tariff payment will be in accordance with Schedule VII of the PPA.

g) L&T Power Development (L&T PDL) participated in the bid on 09.10.2009 and was declared as successful bidder. A Letter of Intent ("LOI") was issued to L&T PDL on 19.11.2009. On 18.01.2010, a Share Purchase Agreement ("SPA") was entered into between PSEB and L&T PDL whereby 100% of the shares of the NPL (then wholly owned subsidiary of PSEB) were duly transferred to L&T PDL. Simultaneously, Power Purchase Agreement (**“PPA”**) was entered into between PSEB and NPL.

h) The Appellant applied to PSEB to change the power plant configuration from 2x660 MW to 2x700 MW on 23.03.2010. The approval for change of configuration was granted on 13.04.2010.

i) The State Commission passed an order in Petition No. 8 of 2010 on 14.07.2010 approving the bidding process and adopting the evaluated levelised tariff of Rs. 2.890 per Kwhr for supply of power by the Appellant to PSPCL.

j) The Appellant on 5.10.2011 wrote to PSPCL raising concerns about the reduced Annual Contracted Quantity (ACQ) of coal as given in Model Fuel Supply Agreement ( FSA) stating:

   i. L&T bid was based on the SECL assurance of making available 100% of entire assured coal of 5.55 MTPA under the LOA.

   ii. Take or Pay level of 50% in FSA by SECL will impose immense threat to the viability of project.

   iii. Less supply of guaranteed coal would result in Appellant not being able to meet the PPA requirement and being exposed to penalty due to lower availability.

k) The Appellant wrote to PSPCL again on 17.10.2011 raising concerns over the Model FSA as :

   i. Model FSA reduces the assured coal quantity but also includes “Imported coal” in the definition of coal.

   ii. There is a need to expand the definition of fuel in PPA to include imported coal besides domestic coal.

   iii. Usage of imported coal may have adverse technical; and commercial implications under PPA.

   Further, the Appellant sought PSPCL’s consent for going ahead with the signing of FSA.

l) There were series of further communications between Appellant and PSPCL dated 05.10.2011, 17.10.2011, 25.10.2011, 9.11.2011 and 18.11.2011 for getting PSPCL's consent for going ahead with the signing of FSA.

m) L&T PDL implemented a 2X700 MW project, wherein Unit 1 of the Project achieved Commercial Operation Date (COD) on 01.02.2014 and Unit 2 achieved COD on 10.07.2014. PSPCL started scheduling power from NPL on 01.02.2014 onwards.

n) In accordance with the provisions of PPA the Procurer (PSPCL) was required to pay to the Seller (NPL) the Monthly Tariff Payment comprising of Capacity Charge, Energy Charge, Incentive Payment & Penalty, if any, with effect from the COD of the Unit-1. From the very first invoice raised by NPL, PSPCL has been making deductions from the amounts due and payable to NPL under the PPA mainly on account of following :

i. Component of the cost of coal comprising washing related costs including washery charges and loss of quantity on account of washing (yield loss);

ii. Consideration of GCV of ROM coal on equilibrated GCV basis ("EGCV") to calculate energy charges;

iii. Denial of road transportation cost - at the plant-end and at the mine-end;

iv. Denial of Liaising charges;

v. Denial of Transit and handling losses;

vi. Denial of Third party coal testing charges; and

vii. Non-Payment of Capacity Charges for the period from 20.02.2014 to 03.03.2014 when the availability was declared on non-linkage (alternate) coal.

o) The Appellant then on 22.08.2014 filed a Petition No.52 of 2014 under Section 86(1) (b) and Section 86(1) (f) of Electricity Act, 2003 before the State Commission for seeking relief on wrongful deduction of certain components of monthly tariff by PSPCL. The said petition was admitted by the State Commission on 22.10.2014.

p) The State Commission on 01.02.2016 passed its Order in Petition No. 52 of 2014, rejecting Appellant's prayers and disallowing the claims for payment of components of monthly tariff wrongfully deducted by PSPCL. Aggrieved by the Impugned Order, the Appellant has preferred the present Appeal before this Tribunal.

**7. QUESTIONS OF LAW**

As per Appellant, the following questions of law arise in the present appeal:

**a) Whether the State Commission has failed to act in accordance with its mandate as set out in the statutory framework comprising of Sections 61, 63 and 86(1) (b), (f) and (k) of the Electricity Act read with Clauses 4.7 and 5.17 of the Competitive Bidding Guidelines further read with Articles 12, 13 and 17 of the PPA, in terms of the judgment of this Tribunal in Essar Power Limited v. Uttar Pradesh ERC [2012 ELR (APTEL) 182]?**

**b) Whether the State Commission fell into error in holding tariff bid out under Section 63 of the Electricity Act as cast in stone which is beyond its jurisdiction?**

**c) Whether the State Commission failed to discharge its statutory role in a competitively bid out PPA to adapt/adjust/provide for developments during the life of the PPA?**

**d) Whether the Impugned Order constitutes unlawful disallowances of legitimate claims and suffers from non-application of mind and lack of reasons insofar as several material submissions and legal**

**principles argued by the Appellant have either not been considered in entirety or have been dismissed without giving any reasons?**

**e) Whether the State Commission erred in interpreting Clause 1.2.3 of Schedule VII of the PPA, since the said clause defines the cost of coal as the weighted average actual cost to the seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project, which would mean that all actual expenses incurred in the process of bringing such coal to the project site would be included?**

**f) Whether the State Commission has erred in disallowing payment of washing charges of coal to the Appellant, failing to appreciate that the cost for washing coal is a part of fuel cost and ignoring the following points that:**

**i. Appellant had undertaken the washing of coal only on behalf of SECL in order to comply with the requirements of the Ash Notification, which required only such coal to be supplied and used which had Ash Content below 34%.**

**ii. Amendment of 02.01.2014 to the Notification of 1997 was subsequent to the bidding for the project and is a Change in Law event insofar as after the amendment, the coal company can no longer supply coal with Ash Content higher than 34% to the project site of the Appellant.**

**iii. Subsequent to the amendment, there is a restriction on supply of ROM coal (having ash content higher than 34%), because of which the option of blending with imported coal to reduce Ash content is no longer available to the Appellant.**

**iv. Appellant took the prudent step of washing the coal on its own in order to ensure the smooth operations of the power plant and in compliance with the environmental law.**

**g) Whether the State Commission erred to disallow payment of road transportation charges to the Appellant, while failing to appreciate that this arose due to delay in land acquisition which was a stated obligation of the State Govt., and ignoring the fact that:**

**i. The acquisition of land for Railways siding at Sarai Banjara was required to be done by the Government of Punjab as per its order dated 07.11.2008, therefore the delay in acquisition of land due to pending litigations of land owners, cannot be attributable to the Appellant.**

**ii. Appellant is forced to use road transport instead of Railways as the railway siding could not be built at Sarai Banjara due to delay in the process of land acquisition and on account of change in scope of work, for which the Appellant cannot be held responsible.**

**iii. This Tribunal's judgment dated 23.04.2014 passed in Appeal No. 207 of 2012 allowed an increase in project cost on account of change in scope of work of the Railway Siding at Sarai Banjara, therefore the fact that the Appellant was not responsible for the delay caused due to change in scope of work has been recognized.**

**h) Whether State Commission erred to disallow payment/recovery of energy charges based on consideration of GCV of coal on "as-delivered to the Project" basis, to misinterpret Clause 1.2.3 of Schedule VII of the PPA?**

**i) Whether the State Commission erred to disallow charges incidental to procurement of coal (liaisoning, third party coal**

**analysis charges and loss of coal in transit), failing to appreciate this being normal utility practice to allow these charges?**

**j) Whether the State Commission erred to disallow payment of capacity charges to the Appellant for the period 20.02.2014 to 03.03.2014 when availability for the project was declared using coal procured from alternate sources, misinterpreting the Order passed by this Tribunal on 21.08.2013 and acting contrary to its own Order dated 19.02.2014 and the provisions of the PPA?**

**8.** We have heard at length Mr. Amit Kapur, the learned counsel for the Appellant and Mr. Sakesh Kumar, learned counsel for Respondent No.1, and Mr. M. G. Ramachandran and Mr. Anand K. Ganesan, the learned counsel for Respondent No.2 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is as under.

**9.** During course of hearing and through further written submissions filed by the Appellant, the Appellant has limited the questions of law under the present Appeal on the following five Issues:

**a) Issue 1: Denial of Washing Related Costs**

**Question 1 (a): Whether PSPCL's bid clarification was clear and unambiguous that the washing related costs were to be borne by the successful bidder?**

**Question 1(b): Whether washing related costs form part of the cost of coal as per the formula for Energy Charges in Cl. 1.2.3 of Schedule 7 of the PPA?**

**Question 1(c): Whether washing related costs could be factored by bidders either in the Capacity Charge or the net Quoted Heat Rate?**

**b) Issue 2: Consideration of Incorrect GCV of coal**

**Question 2(a): Whether the term "gross calorific value of coal most recently delivered to the Project" in the definition of PCVn in Clause 1.2.3 of Schedule 7 of the PPA refers to ROM coal at mine-end or washed coal at Power Station?**

**Question 2(b): Whether the term "gross calorific value" in the definition of PCVn used in Clause 1.2.3 of Schedule-7 of the PPA used for determination of Energy Charges is Equilibrated-GCV (EGCV) of mid-point of G-11 grade declared by SECL or As-Received Basis-GCV (GCV- ARB) delivered to the Project?**

**c) Issue 3: Denial of Road Transportation Cost**

**Question 3: Whether the term "transporting" used in the definition of $F^{coal}n$ in the formula for Energy Charges in Clause 1.2.3 of Schedule 7 of the PPA limits the transportation of coal by a particular means of transport or by a specified agency/carrier/transporter?**

**d) Issue 4: Non Payment of Capacity Charges**

**Question 4: In light of interim order dated 21.08.2013 passed by this Tribunal, whether NPL could have declared availability based on alternate coal as per the terms of the PPA?**

**e) Issue 5: Non Payment of third party analysis charges, liaising charges and transit and handling losses**

**Question 5: Whether NPL was entitled to claim the costs namely third party agency, Liaising, Transit & Handling losses under clause 1.2.3 of Schedule 7 of PPA?**

**10. Issue 1: Denial of Washing Related Costs**

**(a)** On Issue No 1, following submissions were made before us by the Appellant for our consideration:-

i. Appellant is bound to use washed coal in accordance with Ministry of Environment & Forests (MoEF) Notifications and bid clarifications given by PSPCL.

ii. The process of washing is mandated to reduce the ash content within the statutorily prescribed limit (34%). It results in loss of quantity (approx. 20%), besides significant costs towards Washing charges, etc.

iii. PSPCL pays only for the raw (or Run-of-mine, ROM) coal, ignoring the significant loss of quantity in washing and denies payment of washery related cost under the pretext that a clarification was provided to the bidders stating "Successful bidder to arrange washing" and that there is no provision in the PPA for payment of washing related costs.

iv. Under Case 2 Scenario 4 of the Guidelines, it was PSPCL's responsibility to arrange and provide the required quantity of suitable coal as required for generation of electricity. It is obvious that in the absence of an assured quality of coal, it would be meaningless for PSPCL to seek bids on an efficiency parameter such as Net Quoted Heat Rate, which includes boiler efficiency and is very much dependent on the quality of coal.

v. At the time the bid was invited, the extant MoEF Notification' required that thermal power plants located beyond 1000 kms from

the pit head shall use beneficiated coal with ash content not exceeding 34%. It specified that coal shall be beneficiated by physical separation or washing. Given that ash content in SECL coal ranged from 35% to 40%, PSPCL was aware that only washed coal could be used at NPL. It was also aware that supplier (SECL) had no provision for supplying washed coal. Since SECL was not able to supply washed coal, PSPCL asked the bidders to "arrange" washing to meet the environmental regulations. SECL has since confirmed that they are in the process of setting up their own washeries and have quoted an indicative price of washed coal. Coal India Ltd. and its subsidiaries notify the price of washed coal only in case of supply of washed coal by them.

vi. Cambridge International Dictionary of English defines the word "arrange" as to "plan" or "make preparation (for); to organize". P. Ramanatha Aiyer's Advanced Law Lexicon explains the word "arrange" as "to make preparation". Therefore, the word "arrange" in the present context would mean to organize and the meaning of the phrase "Successful Bidder to arrange washing of coal" would simply mean that the bidder had to organize washing of coal for the time being till SECL starts commencing supply of washed coal.

vii. It was neither necessary nor feasible to include the washing related costs either in the Capacity Charge or the Net Quoted Heat Rate by the Bidders. If PSPCL had truly intended that bidders factor the washing related costs in their bids, it could have accomplished this objective by simply inserting the phrase "at his cost" at the end of their clarification.

viii. Had PSPCL intended that bidders should absorb the washing related costs, the same should have been explicitly conveyed including by amending draft PPA with specific provisions in respect

thereof. The Energy Charge formula in CIause 1.2.3 of Schedule 7 of the PPA provides for payment of actual costs of coal to the Seller, it is clear that the successful bidder's responsibility was to merely arrange for washing and not to bear the washing related costs including loss of quantity.

ix. PSPCL had to inform the cost implications of all the activities required to enable the bidders in determination/calculation of tariff 30 days before the bid submission date. While intimating the bidders cost implication of various activities, the washing related cost did not find any place as part of these cost implications.

x. The quantity of coal worked out by the PPA formula is actually that of washed coal being used for generation of electricity, however PSPCL makes payment as if it was ROM coal. PSPCL, thus, pays the cost of purchasing a reduced quantity of ROM coal ignoring the loss of quantity in washing. Interestingly, PSPCL pays only the cost of transporting washed coal, thus fully appropriating the benefit of reduced transportation cost due to washing of coal. As a result of this erroneous approach, PSPCL denies NPL the cost of ROM coal lost during washing process as well as the associated washing related costs, while retaining the complete benefit of reduction in transportation costs as a result of washing.

The PPA makes it clear that "actual cost to the Seller" must be paid; accordingly it is imperative that all costs must pertain to the actual coal being used i.e. washed coal. By paying selectively, at its convenience, PSPCL contravenes the terms of the PPA.

xi. The term "actual cost to the Seller of purchasing the coal" must refer to and include all the costs incurred by the Seller in procuring the actual coal, which can be lawfully used for generation of

electricity i.e. washed coal in accordance with relevant Environment Regulations and the directions of PSPCL during the bid clarifications.

xii. The term "Fuel" in the PPA means primary fuel, i.e., coal used to generate electricity. The coal arranged by PSPCL with ash content in excess of 34% could not be used to generate electricity by the plant situated beyond 1000 Km from the pit head, since it does not meet the criteria stipulated in MoEF Notification dated 19.09.1997. The said coal becomes eligible to generate electricity only after washing which was also confirmed by PSPCL in the bid clarifications. As such, the MoEF Notification of 1997 is implied within the definition of "Fuel" under the PPA. Thus, it is clear beyond any doubt that the cost of purchasing coal is the cost of coal or Fuel actually used to generate electricity i.e. washed coal. Hence all washing related costs must form an inherent and integral part of the cost of purchasing coal.

xiii. Furthermore, after the MoEF Notification of 2014 it is impossible for SECL to supply and NPL to purchase Fuel arranged by PSPCL without undertaking to wash the same. Washing related costs, therefore, are essentially intrinsic components of the actual cost of purchasing coal.

xiv. The Bidders were required to quote the following two numbers, namely:

a) Capacity Charge; and

b) Net Heat Rate.

The Capacity Charge includes those components of cost which are fixed in nature and are not dependent on actual generation or availability of the Power Station. Secondary fuel (Oil) is the only

element of variable cost that was required to be specifically included in the Capacity Charge since it is normative in nature and the calorific value of oil is also of constant nature .If the procurer had the intention that washing related costs ought to be included in the quoted Capacity Charges, then the same should have been stated in the bid documents. The consumption of coal depends upon the actual generation of electricity and varies widely depending on the extent of generation. It would be absurd to suggest that an element of variable cost such as washing related costs could possibly be included into a fixed cost such as the Capacity Charge.

xv. If the Bidders were to build in washing related costs into the Capacity Charge, then they would be constrained to assume a PLF equivalent to the normative availability of 85%. PSPCL would then be required to continue paying a fixed washing charge at the normative PLF of 85% as part of the Capacity Charge, irrespective of the actual generation of electricity by the Power Station. As a result, the consumers would have been subjected to a higher tariff when actual PLF is lower than 85%. It can be seen that the impact of ~ 47 paise/unit of washing related cost on each 1% reduction in annual PLF from normative level of 85% is Rs 5.4 Crore annually. Since the cumulative average PLF of NPL plant since Commercial Operation Date of 1st Unit till October 2016 is 63%, PSPCL would have paid an excess amount of ~ Rs 119 Crore per year to NPL.

xvi. Washing related cost could not have formed part of the Net Station Heat Rate quoted by the bidders since the Net Station Heat Rate is a measure of efficiency, not costs. As such, Net Station Heat Rate is derived from:

a. Turbine Cycle Heat Rate which is a measure of turbine efficiency and is expressed in units of heat required to generate one unit of electricity. Larger the number, lesser is the efficiency of the turbine. An efficient machine will comparatively use less amount of heat to generate one unit of electricity.

b. Boiler Efficiency is the percentage of heat input which gets converted into useful heat in the form of steam. Higher the Boiler Efficiency, lesser are the heat losses in the boiler.

c. Auxiliary Consumption is the consumption of electricity by the internal machinery of the power plant and represents the difference between gross generation and net generation by the Power Station.

Hence no component of washing related cost could be factored into either the capacity charge or the Net quoted Station Heat Rate by the Bidders.

**(b)** On Issue No 1, following submissions were made before us by the Respondent No 2 for our consideration:-

i. The entire premise of the arguments of the Appellant proceeds on the basis that the actual variable/energy cost in the generation of electricity is to be paid for on actual basis by PSPCL. The PPA was entered with the Appellant pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003. All the legal implications of a competitive bidding process squarely apply to the present case.

ii. The PPA provides for the payment of the quoted capacity charges and the variable charges as per the formula as specified in Schedule 7 of the PPA.

iii. The capacity charges were to be quoted by the bidders taking into account all the costs and risks, apart from those specifically undertaken as to the account of PSPCL. The capacity charges are not towards any specific cost element such as return on equity, interest on loan etc. as in the case of cost plus tariff under Section 62. The bidding documents, in clause 2.7.2.1 and 2.7.2.2 of the RFP specifically provide for all the cost and risk to be that of the bidders without any claim for additional time or financial compensation being maintainable.

iv. In any event, being a bidding process, unless a particular cost element is specifically provided to be to the account or risk of the procurer, such risk or cost is that of the bidder. Otherwise, the sanctity of the bidding process would be vitiated.

v. As is evident from the provisions of Schedule 7 of the PPA, the cost to be paid for by PSPCL is only the actual cost of purchasing, transporting and unloading of coal. No other element of cost is payable. The basic contention of the Appellant that the actual cost in relation to coal is payable is misconceived and is contrary to the terms of the PPA.

vi. It is well settled principle of interpretation that when express inclusions are specified, anything not mentioned expressly is excluded and the presumption is that having expressed some they have expressed all the conditions by which they intend to be bound under that the said contract.

vii. Further, the detailed presentations and submissions of the Appellant are only on the assumptions and alleged actual costs incurred by the Appellant, which are irrelevant for consideration. Neither was the bidder required to disclose, nor was it disclosed as to the actual costs, expenses or assumptions of the bidders.

Therefore, all such contentions are liable to be ignored as being irrelevant to the legal issue that arises in the present case. The only relevant consideration is the terms of the bidding documents including the PPA.

viii. The contention of the Appellant that washing cost is included in terms of definition of $F^{coal}n$ in clause 1.2.3 of the Schedule 7 of the PPA is wrong and misconceived. In terms of clause 1.2.3 of the Schedule 7 of the PPA, $F^{coal}n$ is the cost of the purchasing, transporting and unloading of coal as per PPA and the bidding documents and not the washing cost.

ix. The coal purchased by the Appellant is unwashed coal. The title and risk over the coal passes on to the Appellant upon delivery of coal by SECL. The washing is undertaken by the Appellant subsequent to the purchase, under a separate contract and with an independent contractor.

x. The cost of purchase of coal by the Appellant from SECL is paid for on actual basis, in terms of the formula in Schedule 7. This is based on the linked coal. Further, the transportation cost paid to Railways is also paid on actual basis. The unloading charges subject to proof is also payable in terms of Schedule 7. No other charges are payable.

xi. The statutory requirement to wash the coal was well known to the bidders at the time of bidding itself (Ministry of Environment and Forest Notification dated 19.09.1997). Being fully aware of the requirement of washing of coal, the specified clarification was sought by the Bidders that whether the coal supplied would be washed or unwashed. It was specifically clarified even at that time that the successful bidder was to arrange for washing of coal. The clarification was sought only on the issue as to whether the coal to

be supplied would be washed or unwashed and not about the cost of washing, if any. On this query, it was clarified that the washing would be the responsibility of the bidder.

xii. Further, when a particular obligation is placed on a person, unless otherwise specifically provided for, the cost and risk associated with such obligation also falls on such person only. The bidding documents specifically require the bidders to consider all costs and it was but obvious that in the absence of any provision for PSPCL to wash the coal or bear its cost, the same was to the account of the bidder.

**(c) The learned counsel for the State Commission adopted the above arguments/submissions of the Respondent No.2.**

**(d) After considering the arguments made by the parties and their respective written submissions and facts on record, our observations on Issue No 1 i.e. Payment of Washing Charges of coal and Question of law 1 (a), Question of law 1 (b) and Question of law 1 (c) are as follows :**

i. The procurement of power by Distribution Licensee through competitive bidding as per the competitive Bidding Guidelines issued by the Government of India has been provided in the Electricity Act 2003. The basic objective of such provision is to bring in the competition in the power procurement process while ensuring the transparency and providing level playing field to all the Bidders.

ii. The Bidding documents which consist of the RFQ, RFP and PPA specify Brief description of the project, inputs available at the time of issuance of bids, Bidding parameters, bid evaluation criteria, the terms and conditions of the bidding process which includes the obligations of the suppliers as well procurers, supply and despatch

of electricity, billing and payment mechanism, dealing issues related to Force majeure and change in law, dispute resolution mechanism and such other related matters to ensure transparency in the Bidding process and ensure discovery of tariff for supply of electricity to the procurers in the most optimal manner.

iii. The notification dated 19.09.1997 issued by the Ministry of Environment and Forests (MOEF) makes it mandatory for thermal power plants located 1000 KMs from pithead and also those located in urban areas/sensitive areas/ critically polluted areas, irrespective of their distance from pithead, excepting any pithead thermal power plant, to use beneficiated coal with ash content not exceeding 34% from 1st June, 2001. The MOEF notification dated 19.09.1997 regarding use of washed coal was in existence prior to date of Bid submissions and the specific requirement regarding use of washed coal at the Project which is situated more than 1000 KMs from the coal source was known upfront to all the Bidders including the Appellant.

**iv. Question 1(a) i.e. Whether PSPCL's bid clarification was clear and unambiguous that the washing related costs were to be borne by the successful bidder?**

a) In the background of above facts now we shall proceed to deliberate on the issues under consideration i.e. **Whether PSPCL's bid clarification was clear and unambiguous that the washing related costs were to be borne by the successful bidder?**

b) It has been brought to our notice that the Bidders during RFQ/FRP stage have asked several queries prior to Bid submissions to have clarity in the provisions of the Bidding documents, so that necessary

safe guards/ actions can be taken care of while formalising their Bidding strategies.

c) To decide on this issue we have to first look into the query raised by the Bidders as per the records submitted by the Appellant. On perusal of the Reply dated 16.09.2009 to queries of Bidders on RFQ and RFP document, we find that the clarification was sought by the Bidders under RFP Clause 1.4.B (2) Fuel –(i) primary Fuel and the query was asked as ***" Coal quality as per LOA to be specified and the coal analysis to be provided. Is the Coal to be supplied for the Project is washed coal or unwashed coal?"***

d) In response to the specific Bidders' queries, PSPCL has categorically informed to all the bidders that the successful bidder has to arrange washing of coal. The response of the PSPCL was as below:

***"Coal analysis is as follows:***

1. ***Coal is expected to be supplied by M/S South Eastern Coal Field from Korba/Raigarh field. Primary 'F' grade coal is expected to be supplied.***

2. ***The proximate analysis of coal, taken from SECL is as under:***

| | |
|---|---|
| ***Ash*** | ***35-40%*** |
| ***Total Inherent Moisture*** | ***5-6 %*** |
| ***VM*** | ***24-32 %*** |
| ***Fixed Carbon*** | ***32-37%*** |
| ***Sulphur*** | ***0.05%*** |
| ***GCV*** | ***3900 to 4260 Kcal/kg*** |

***Successful Bidder to arrange washing of coal."***

This establishes that use of washed coal was clearly contemplated by both Bidders as well as PSPCL at the time of Bidding.

e) As per the argument put forth by the Appellant that the bid clarification provided by PSPCL made no reference to washing related costs and also did not cast the responsibility of the same upon the successful bidder in terms of provisions of the RFP. The cost related to the component which will not be considered for reimbursement was clearly mentioned in the RFP documents such as Clause 2.7.1.4 (6) of RFP which required the bidders to include the cost of secondary fuel in the Capacity Charge.

*"2.7.1.4 (6) The Bidders should factor the cost of the secondary fuel into the Quoted Tariff and no separate reimbursement shall be allowed on this account."*

f) The Appellant has submitted that as per clause 1.7 of RFQ, the procurer PSPCL was obliged to give cost implications of all activities required so as to enable bidders in determination/calculation of tariff, 30 days before bid submission date. If such information for cost implication of washing of coal was not available to the Bidders before 30 days of bid submission date, it is the responsibility of the Bidders to seek such clarifications to ensure the submissions of cost reflective Bids.

g) The provisions of Clause 2.5.3 of RFP Document provides that the Bidders may seek clarifications or suggest amendments to RFP project documents. Such clarifications to reach the Authorised representative atleast 15 days prior to Bid due date. The clause 2.5.3 is reproduced as below:

*"2.5.3 The Bidders may seek clarifications or suggest amendments to RfP - Project Documents in writing, through a letter or by fax (and also soft copy by e-mail) to reach the Authorised Representative (in both cases thereof) at the address indicated in Clause 2.16 within the date and time mentioned in Clause 2.8.2. For any such clarifications or*

*amendments the Bidder should adhere to the format enclosed in Annexure 7. Procurer/ Authorised Representative is not under any obligation to respond to any clarifications sought by the Bidders or consider amendments suggested by the Bidders. Further, in case Bidders need any clarifications after the issuance of amendments, they should ensure that written request for such clarification is delivered to the Authorised Representative at least fifteen (15) days prior to the Bid Deadline as mentioned in clause 2.8.2. Procurer/ Authorised Representation may issue clarifications only as per its sole discretion, which are considered reasonable by it. Any such clarification issued shall be sent to all the Bidders to whom RFP has been issued. Clarifications sought after this date shall not be considered in any manner and shall be deemed not to have been received."*

h) Further, the clause 2.7.1.4 (3) of the RFP put the conditions that the Tariff quoted by the Bidders shall be all inclusive tariff and no exclusions shall be allowed. Bidder has to take into considerations all costs while quoting tariff and also ensure availability of necessary inputs for generation of power at Project site and consider all costs involved in procuring such inputs at Project site which are necessary for generation of power. The Clause 2.7.1.4 of RFP is reproduced as below;

*"2.7.1.4. (3) The Quoted Tariff in Format 1 of Annexure 4 shall be an all inclusive tariff and no exclusions shall be allowed. The Bidder shall take into account all costs including capital and operating cost, statutory taxes, duties, levies, while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at Project site and all costs involved in procuring the inputs (including statutory taxes, duties, levies thereof) at the Project Site must be reflected in the Quoted Tariff."*

i) It is clear that use of coal as primary fuel for generation of power was known to all the Bidders. The source of coal from the coal mine located at around 1600 KMs from the Project site was also made known to all the Bidders. The availability of raw coal with ash content in the range of

35% to 40% was also known to the Bidders. The notification of MOEF mandating use of washed coal when the source is more than 1000 KMs from the pithead was also known upfront to the Bidders. On a specific query raised by the Bidders that whether the coal to be supplied would be washed coal or unwashed coal, it was clarified that washing of coal was to be arranged by the successful bidder hence the requirement of washed coal for generation of power and responsibility of washing of coal on the successful Bidder was also known to all the Bidders prior to bid submissions.

j) We have found that there was no specific query from the Bidders (before and after the clarification dated 16.09.2009 issued by the PSPCL in response to Bidders query) regarding the treatment of cost of the washing in the Tariff , like who has to bear the cost of washing and how it is going to be reflected in the Tariff. In such a situation it is understood that all the Bidders were having sufficient clarity that if they have to arrange for the washing of coal the corresponding cost of washing of coal should also be factored in their respective bids. Considering above facts it is imperative that the Bidders who have submitted their Bids, have consciously submitted their quotes for Tariff as per their specific bidding strategies.

k) The Appellant has also submitted that the Ash Notification dated 02.01.2014 issued by Ministry of Environment and Forest puts a restriction on the "supply" of coal with ash content more than 34%. As such since then any "transportation" of such coal with ash content more than 34% washing or benefaction of coal at mine end is now a mandatory requirement imposed by law. The requirement of these notifications is with regard to restriction on the 'supply' and 'use' of coal with ash content exceeding 34% on a quarterly average basis which

may be achieved through blending of coal or beneficiation of coal through physical separation or washing process.

l) We have observed that Appellant has not filed the petition with the State Commission for seeking any relief under “Change in Law” condition nor this issue of “change in law” has been raised in the present Appeal.

m) In view of above, we are of the opinion that the clarification provided by the PSPCL on the query raised regarding supply of washed coal or unwashed coal was just and clear to the query which was asked by the Bidders.

n) Hence this issue is decided against the Appellant.

**v. Question 1(b) i.e. Whether washing related costs form part of the cost of coal as per the formula for Energy Charges in Cl. 1.2.3 of Schedule 7 of the PPA?**

a) Now the next issue under consideration is about washing related cost of coal as per the Energy Charge formula provided under Power Purchase Agreement clause 1.2.3 of Schedule 7.

b) Energy Charge formula in CIause 1.2.3 of Schedule 7 of the PPA specifies the components of cost of coal and calorific value of coal which would reflect in the Energy Charges calculations for payment purposes. The formula for computation of Energy Charges in Clause 1.2.3 of Schedule 7 of the PPA is as follows:

$$\text{Monthly Energy Charges } MEP_n = \frac{NHR_n \times F^{coal}_n}{PCV_n}$$

Where

- **NHRn** is the Net Heat Rate for the Contract Year in which month `m' occurs expressed in Kcal/kwh and is equal to the Quoted Net Heat Rate of the Contract Year in which month 'm' occurs, as provided in Schedule 11.

- **F $^{COAL}$n** is the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project before the beginning of month 'm' (expressed in Rs/MT in case of domestic coal)

- **PCVn** is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning 'of month 'm' expressed in kcal/kg."

c) It is seen that the cost of coal which is being reflected in the Energy Charges payable on month to month basis to the Seller is the weighted average actual cost to the Seller of (i) purchasing, (ii) transporting and (iii) unloading the coal most recently supplied to and at the Project.

d) This formulation does not explicitly provide for inclusion of cost of washing of coal. As per the Appellant the term "actual cost to the Seller of purchasing the coal" must refer to and include all the costs incurred by the Seller in procuring the actual coal, which can be lawfully used for generation of electricity i.e. washed coal in accordance with relevant Environment Regulations and the directions of PSPCL during the bid clarifications.

e) The Appellant contended that had PSPCL intended that bidders should absorb the washing related costs, the same should have been explicitly conveyed including by amending draft PPA with specific provisions in

respect thereof. In our view if such clarity regarding cost of washing of coal was not there in the PPA or energy charge provisions, there was no restriction on the Appellant to get clarifications from PSPCL before submission of their Bid.

f) The RFP Clause 2.7.2.1 and Clause 2.7.2.2 specifically provide that it is the responsibility of the Bidder to enquire and satisfy itself in respect of all the information required and fully investigate all the factors before submitting its Bid. The relevant extracts are reproduced as below;

"*2.7.2.1 - The Bidder shall make independent enquiry and satisfy itself with respect to all the required information, inputs, conditions and circumstances and factors that may have any effect on his Bid. While submitting the Bid the Bidder shall be deemed to have inspected and examined the site conditions (including but not limited to its surroundings, its geological condition, the adequacy of the road and rail links to the Site and the availability of adequate supplies of water), examined the laws and regulations in force in India, the transportation facilities available in India, the grid conditions, the conditions of roads, bridges, ports, etc. for unloading and/or transporting heavy pieces of material and has based its design, equipment size and fixed its price taking into account all such relevant conditions and also the risks, contingencies and other circumstances which may influence or affect the supply of power. Accordingly, the Bidder acknowledges that, on being selected as Successful Bidder and on acquisition of the Seller, the Seller shall not be relieved from any of its obligations under the RfP Project Documents nor shall the Seller be entitled to any extension of time or financial compensation by reason of the unsuitability of the Site for whatever reason.*

*2.7.2.2 - In their own interest, the Bidders are requested to familiarize themselves with the Electricity Act, 2003, the Income Tax Act 1961, the Companies Act, 1956, the Customs Act, the Foreign Exchange Management Act, IEGC, the regulations framed by regulatory commissions and all other related acts, laws, rules and regulations prevalent in India. The Procurer(s)/ Authorised Representative shall not*

*entertain any request for clarifications from the Bidders regarding the same. Non-awareness of these laws or such information shall not be a reason for the Bidder to request for extension of the Bid Deadline. The Bidder undertakes and agrees that before submission of its Bid all such factors, as generally brought out above, have been fully investigated and considered while submitting the Bid."*

g) Considering the above deliberations, we are of the considered opinion that in the absence of specific mention of washing related costs to be allowed under the cost of coal to be considered in the Energy Charge calculations, cost of washing of coal by the Appellant cannot form part of the cost of coal to the Seller for purpose of calculation of energy charges.

h) Accordingly this issue is decided against the Appellant.

**vi. Question 1(c): Whether washing related costs could be factored either in the Capacity Charge or the net Quoted Heat Rate?**

a) It has been submitted by PSPCL that the bidders were required to factor washing related costs in the bid i.e. either in the quoted Capacity Charge and the Net Quoted Heat Rate.

b) As per the Appellant, it was clear at the bidding stage that the all primary fuel related costs, including washing related costs, were to be reimbursed by PSPCL as part of the actual cost to the Seller of purchasing coal as per Clause 1.2.3 of Schedule 7 of the PPA. Accordingly no component of cost of primary fuel needed to be considered by the bidders either in the quoted Capacity Charge or the Net Quoted Heat Rate.

c) The Appellant has further contended that the cost of washing of coal could not have been factored either in quoted capacity charges or in Net Quoted Station Heat rate as the Capacity Charge includes those components of cost which are fixed in nature and are not dependent on

actual generation or availability of the Power Station and if Bidder has to build washing related costs into capacity charges they will have to assume a PLF equivalent to normative availability, then PSPCL would then be required to pay excess amount and similarly Washing related cost could not have formed part of the Net Station Heat Rate quoted by the bidders since the Net Station Heat Rate is a measure of efficiency, not costs.

d) It is a known fact that the Bidder has participated in the power procurement process under the competitive bidding framework. The Bidding process was conducted as per the Competitive Bidding guidelines and Standard Bidding Documents issued by the Government of India.

e) The Bidding option under Case-2 Scenrio-4 was exercised by the Procurer, PSPCL. The necessary information, response to Bidders query etc as per the bidding process was made available to all the Bidders. As the discovery of tariff pursuant to bidding process based on competition and not determination of tariff through cost plus basis, hence it was the responsibility of the Bidders to seek any clarification before the submission of their Bids as per the timeline identified in the Bidding documents. The risk of interpretation of any provision of the Bidding documents which may or may not recover their costs has to solely on the account of the Bidders. The Appellant himself has in its submission admitted that there was a possibility of inclusion of washing cost in the Capacity charges but it could have burdened PSPCL with excess payments if generation level is below the PLF equivalent to normative Availability.

f) In view of the above deliberations we would be constrained not to express any specific view that how a Bidder should have factored the costs related to washing of coal into their Bids. In our view, it is the

Bidders Bid specific strategy to submit their quotes as per the project specific inputs.

g) Hence the issue under question 1 (c) is also decided against the Appellant.

**11. Issue 2: Consideration of Incorrect GCV of coal**

**a)** On Issue No 2, following submissions were made before us by the Appellant for our consideration:-

i. Gross calorific value of coal is a key input in the formula for Energy Charge in the PPA. Correct value of gross calorific value is a necessary prerequisite for correct computation of the Energy Charge. Clause 1.2.3 of Schedule 7 of PPA defines the term PCVn as the "gross calorific value of the coal most recently delivered to the Project".

ii. While making wrong deductions from the invoices of NPL, PSPCL makes the following errors:

   a. PSPCL considers gross calorific values of raw, unwashed (ROM) coal at the mine-end instead of gross calorific value of washed coal delivered to the Project;

   b. PSPCL considers equilibrated gross calorific value (EGCV) in place of GCV - As Received basis; and

   c. PSPCL considers the EGCV of the mid-point of the EGCV of G-11 grade of coal declared by South Eastern Coalfields Limited (SECL) rather than the actual GCV on As Received basis at the project.

As a result, the Energy Charge computation by PSPCL is completely erroneous and does not reflect the actual Energy Charge payable to NPL. The State Commission has erroneously upheld the wrong methodology adopted by PSPCL in the impugned order.

iii. The answer to this question must be seen in two parts. Firstly, what is the meaning of "coal" referred to in this term? Whether the term "coal" refers to raw/unwashed/ROM coal or does it refer to washed coal?

The PPA defines the term "Fuel" as "primary fuel used to generate electricity". Clearly, any fuel that is not permissible to be used to generate electricity is not "Fuel" under the terms of the PPA. As such, for all interpretations of the PPA, the only reference to "Fuel" can be to such coal which at relevant time could have been transported and used to generate electricity at the Power Station.

iv. On the date of issuance of the RFQ as also the signing of the PPA, the extant MoEF Notification of 1997 prohibited the use of coal arranged by PSPCL with ash content exceeding 34% to generate electricity at this Power Station which is located at a distance exceeding 1000 km. The said coal can be used to generate electricity only after washing, corroborated in the bid clarification by PSPCL wherein it categorically instructed that the successful bidder to arrange for washing of coal. As such, at the time of bidding, PSPCL was aware of the fact that the coal that will be delivered to and used by the Power Station shall be washed coal only. It is clear that the term "coal" refers only to washed coal and not to raw/unwashed/ROM coal.

v. In the second part we need to answer whether the term "delivered to the Project" means delivery of ROM coal to NPL (Seller) at the mine-end as suggested by PSPCL or delivery of washed coal to the Power Station.

vi. For understanding the term "Project" in the PPA, three definitions in the PPA have to be considered namely, the definitions of "Site", "Project" and "Power Station", as under:-

a. The term "Site" in the PPA is defined to mean the land over which the Project will be developed as provided in Schedule 1A. Schedule 1A specifies the location of the power plant as "located near Nalash village 8 Km away from Rajpura Town . Site and vicinity maps are enclosed as part of Schedule 1A.

b. The term “Project” is defined in the PPA to mean "Power Station undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the Seller

c. The term "Power Station" is defined to mean the "domestic coal based power generation facility comprising of any or all the units "

It is clear therefore, that the term "Project" in the PPA refers to the Power Station set up at the Site namely "near village Nalash 8 Km away from Rajpura Town" and not any other location including the mine-end in Chhattisgarh.

vii. As such the term "delivered to the Project" means delivery of washed coal delivered to the Project, i.e., the Power Station near village Nalash 8 Km away from Rajpura Town and not the delivery of ROM coal to the Seller at mine-end. It appears that PSPCL seeks to mix-up the concept of "Project" with the identity of the "Seller".

viii. The argument of PSPCL to create a distinction between the words "to the Project" and "to and at the Project" is a fictitious argument to deny the legitimate entitlement of Energy Charge to NPL. There is no difference between the two terms in the context and meaning of $PCV_n$ in the Energy Charge formula in Clause 1.2.3 of Schedule 7 of the PPA. In both the cases, the measurements of quantity, cost and gross calorific value must be undertaken at the Power Station located in Punjab in

view of the definition of the term "Project" in the PPA. Any other interpretation will give incorrect value of Energy Charge.

ix. A given sample of coal in a specific ambient (immediate surroundings) condition has a calorific value corresponding to that ambient condition, since the moisture content (relative humidity) and the ambient temperature affect the heat content delivered by combustion of coal at those conditions. As an example, if we pick up a coal sample from a particular mine and test the same in different locations having different ambient conditions of relative humidity and temperature, the calorific value of the coal sample will turn out to be different, although the coal was the same. However, if the sample is tested in different laboratories with the same standard conditions of relative humidity and temperature, the test results will turn out to be the same. The method of measuring gross calorific value at defined standard conditions of relative humidity (60%) and temperature (40 °C) thus nullifying the impact of location-specific ambient conditions is called the equilibrated basis of reckoning of calorific value and the calorific value thus measured is referred to as Equilibrated GCV(EGCV). EGCV neither reflects actual gross calorific value of the coal supplied at mine-end nor the actual gross calorific value at the Power Station.

x. At the Power Station, the boiler burns the coal as it is received. The coal is received at the power station in As-received condition and the same is fired and burned to give the desired heat.

xi. For working out consumption of coal in the Power Station, only 'As received' calorific value of coal has to be used. Use of any other measure of calorific value would lead to incorrect computation of coal consumption and hence incorrect computation of Energy Charge.

xii. As such, for the Energy Charge formula specified in Cl. 1.2.3. of Schedule VII of the PPA to deliver the correct value, the GCV - As Received Basis (GCV-ARB) of coal delivered to the Project i.e. the Power Station must be considered and not the EGCV at the mine end.

xiii. In terms of the State Commission's order dated 19.02.2014, NPL as well as PSPCL is already carrying out joint sampling and testing of the washed coal delivered to the Power Station to measure gross calorific value of coal on As-Received Basis. However, PSPCL ignores these results and continues to apply the EGCV of ROM coal at mine-end.

**(b) On Issue No 2, following submissions were made before us by the Respondent No 2 for our consideration:-**

i. The contention of Appellant that GCV should be calculated on "as received" basis is misconceived. There is no such provision in the PPA. The PSPCL is not liable to pay for the difference in the GCV of coal except as provided in Clause 1.2.3 of Schedule 7 and the Appellant is not entitled to claim any adjustments for the coal cost being on 'as fired basis' other than those covered in the formula under Schedule 7.

ii. The PPA only provides for the GCV of the coal delivered to the project. The coal is delivered to the project by SECL at the point of sale and the GCV at such point of delivery is mentioned in the invoice raised by SECL. The above is the only authentic third party validation of the GCV of the coal supplied to the Project.

iii. Beyond such point of delivery, the title and risk over the coal passes on to the Appellant and any degradation of GCV etc. is the cost of the Appellant. There is no provision in the PPA for allowing such losses to the Appellant. The Appellant is not entitled to any adjustment of the GCV and is only entitled to the GCV as per the invoices raised by the

coal supplier (SECL) at the point where the title and risk of the coal passes on to the Appellant.

iv. The fact that the GCV shall be as is delivered to the Project at the point of delivery is established by the different expression used in the PPA with regard to GCV measurement and for the purpose of the payment of coal purchase, transportation and unloading. The expression used for GCV is `to the project' while the expression used for coal purchase, transportation etc. is 'to and at the project'. The difference in the expressions has a purpose. 'To the project' refers to when the title and risk is handed over to the Appellant, while 'to and at the project' refers to not only the title and risk handed over to the project but also the situs of the project. This is because in regard to the coal procurement, transportation charges etc. the transportation cost of Indian Railways from the point of delivery to the project site is to be included and therefore it refers to 'to and at the project'. This expression is however changed to only 'to the project' in the very next provision in the PPA, as it only refers to the point of delivery of coal to the Appellant for measurement of GCV.

v. It is a well settled principle of law that when two different expressions are used, they have to be given their own meaning. Otherwise the very purpose of using two different expressions would be rendered otiose and when different expressions are used, it must be construed that the same had been done consciously with a view to convey different meanings.

vi. The reliance of the Appellant on the practice for projects for which tariff is determined under Section 62 is misconceived. The Appellant's PPA is under Section 63 of the Electricity Act and the PPA is the only governing document. The Regulations of the State Commission or the Central Commission have no application to the present case.

vii. In the circumstances, PSPCL is not liable to pay for the GCV of coal except as provided in Clause 1.2.3 of Schedule 7, which is the GCV of coal as delivered to the Appellant by SECL and for which invoices are raised by SECL. The Appellant is not entitled to claim any adjustments for the coal cost being on 'as fired basis' other than those covered in the formula under Schedule 7.

**(c) The learned counsel for the State Commission adopted the submissions/arguments of the Respondent No.2 as above.**

**(d) After considering the arguments made by the parties and their respective written submissions and facts on record, our observations on Issue No 2 i.e. Consideration of Incorrect GCV of coal and Question of law 2 (a) and Question of law 2(b) are as follows :**

**i. Question 2(a): Whether the term "gross calorific value of coal most recently delivered to the Project" in the definition of PCVn in Cl. 1.2.3 of Schedule 7 of the PPA refers to ROM coal at mine- end or washed coal at Power Station?**

a) Energy Charge formula in CIause 1.2.3 of Schedule 7 of the PPA specifies the components of cost of coal and calorific value of coal which would reflect in the Energy Charges calculations for payment purposes. The calorific value of the coal i.e. $PCV_n$ has been defined in Schedule 7, as the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month 'm' expressed in kcal/kg.

b) The Appellant has contended that PSPCL is considering gross calorific values of raw, unwashed (ROM) coal at the mine-end instead of gross calorific value of washed coal delivered to the Project.

c) As per the Respondent PSPCL, the provisions of PPA refer to GCV of the coal as delivered to the project. The coal is delivered to the project by SECL at the point of sale and the GCV at such point of delivery is mentioned in the invoice raised by SECL. Any loss of GCV after point of delivery should be on the Appellant's cost and no adjustment should be allowed on GCV variation.

d) The Appellant has contended that the term "Fuel "as defined in the PPA is the primary fuel which is being used for generation of electricity. As in view of MOEF notifications that the fuel used for power generation can only be washed coal and not the raw coal, it is the GCV of washed coal at the Project which needs to be taken into consideration during calculation of Energy Charge.

e) The Appellant has also contended that the phrase "delivered to the Project" means the measurements of quantity, cost and gross calorific value of coal must be undertaken at the Power Station located in Punjab in view of the definition of the term "Project" in the PPA.

f) The term "Fuel" as defined in the PPA means "*primary fuel used to generate electricity namely, domestic coal*." Similarly Fuel Supply Agreement has been defined as "*the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In case the transportation of the Fuel is not the responsibility of the Fuel Supplier, the term shall also include the separate agreement between the Seller and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Seller and the Fuel Supplier for the supply of the Fuel.*" The Clause 1.2.8 of the Schedule 7 of the PPA refers to the "**Penalty and rights relating to minimum guaranteed quantity of Fuel**" for not purchasing the minimum guaranteed quantity of fuel mentioned in the Fuel Supply

Agreement. Hence it is clearly contemplated in the PPA that the term "Fuel" refers to the domestic coal being supplied to the Seller pursuant to the agreement(s) entered into between the Seller and the Fuel Supplier for the purchase, transportation and handling of the Fuel, required for the operation of the Power Station. In view of above, the Appellant's argument interpreting "Fuel" as only "Washed Coal" used for power generation cannot be accepted.

g) While deciding on the issue no 1 regarding cost of washing of coal, we have concluded that the cost of washing of coal is not to be included in cost of coal in the formula identified in the Schedule 7 of the PPA. The Appellant has acknowledged that the fuel used for power generation is washed coal as per the prevailing regulations before Bid submission date. The Bidder has not sought any clarifications on the terms of PPA regarding calculation of Energy Charge on the basis of GCV of washed coal or raw coal. The SECL was the supplier of coal as informed during Bidding stage. The parameters related to quality of coal including GCV of coal were communicated during reply to Bidders queries. When the fact that washing of coal to be arranged by the successful Bidder was made known prior to bidding, any cost implication due to GCV variation of coal at Mine end or as received at Project must have been incorporated by the Bidder or otherwise clarifications should have been sought from the PSPCL. Further , the only independent verification of the GCV of coal delivered to the project is at the point of delivery. The same is also duly reflected in the invoices raised by Coal India Limited/SECL for the supply of coal. The PPA does not provide for any mechanism for verification of the GCV of coal when received at the plant site. If the intention of the parties and the provisions of the PPA was to take the GCV of coal as received at the project site, then there should have been some mechanism provided for in the PPA for joint

inspection of the GCV of coal as received at the project site. As the tariff discovered under the competitive Bidding process was under section 63 of the Electricity Act, 2003 and not under the Section 62 of the Electricity Act, 2003 based on cost plus mechanism, such interpretation to the measurement of GCV of coal as of the washed coal as received at the Project cannot be accepted.

h) Hence this issue is also decided against the Appellant.

**ii. Question 2(b): Whether the term "gross calorific value" in the definition of PCVn used in Clause1.2.3 of Schedule-7 of the PPA used for determination of Energy Charges is Equilibrated-GCV (EGCV) of mid-point of G-11 grade declared by SECL or As-Received Basis-GCV (GCV- ARB)?**

a) As per the Appellant, the Respondent PSPCL is considering the EGCV of the mid-point of the G-11 grade of coal declared by South Eastern Coalfields Limited (SECL) rather than the actual GCV on As Received basis at the project for calculation of Energy Charges. EGCV neither reflects actual gross calorific value of the coal supplied at mine-end nor the actual gross calorific value at the Power Station. This basis is not reflecting the actual energy charge being payable to Appellant.

b) As per Respondent PSPCL, there is no provision in the PPA to calculate GCV on as received basis.

c) One of the Bidding parameters of Project was Net Station Heat Rate which is the measure of efficiency of the Machine to convert coal energy to electrical energy. The quality of coal impacts the performance of Boiler hence the efficiency. The quality of coal has been specifically provided to the Bidders during reply to Bidders query dated 16.09.2009.

d) The Energy charge reflects the cost of coal used for power generation. The weighted average actual cost of coal to the seller for purchasing coal has to be considered in calculation of Energy Charge. The cost of coal is dependent upon the calorific value of the coal. The coal companies are charging based on the quality and quantity of coal delivered. The calorific value on EGCV basis is used by the coal companies for determining grade of coal and the corresponding price of coal. Hence we are of the view that the calorific value PCVn should be the weighted average gross calorific value of the coal based on EGCV most recently delivered to the Project by the Coal companies as per the mid-point of the G-11 grade of coal declared by South Eastern Coalfields Limited.

e) Hence this issue is also decided against the Appellant.

**12. Issue 3: Denial of Road Transportation Cost**

**(a)** On Issue No 3, following submissions were made before us by the Appellant for our consideration:-

**i. Denial of Road Transportation Cost At Plant-End**

a. Under the Energy Charge formula given under Clause 1.2.3 of Schedule VII of the PPA, NPL is entitled to receive actual cost of transporting the coal.

b. On 01.02.2014, NPL achieved COD of Unit 1 which was duly witnessed and accepted by PSPCL vide letter dated 31.01.2014 sent by PSPCL to SLDC. In the same letter, PSPCL requested SLDC to schedule power from NPL. At that time, the Railway Siding connecting the Power Station was not complete due to delay in land acquisition which was being carried out by the State Government and the only mode of transport available for transporting coal to the Power Station was rail up

to the nearest available rail sidings at Mandi Gobindgarh/Chandigarh (1500 Km) and thereafter by road (~50 km).

c. NPL, by its letters dated 08.03.2013 and 22/27.05.2013 duly informed PSPCL about road transportation of coal from the nearest railway sidings (Mandi Gobindgarh/Chandigarh). No objection was raised by PSPCL. NPL started transporting coal by trucks from nearby railway sidings to the Power Station to meet the Scheduled Generation requirements of PSPCL.

d. NPL included actual cost of transportation in invoices raised towards Energy Charges. However, PSPCL denied reimbursement of road transportation costs to NPL on the ground that NPL is only entitled to get coal transportation cost by rail and not by road transportation.

e. The State Commission upheld the contention of PSPCL primarily on the ground that road transportation charges for transporting the coal from Mandi Gobindgarh/Chandigarh to the Project are not payable by PSPCL in terms of Cl. 1.2.3 of Schedule 7 of the PPA

**ii. Denial of Road Transportation Cost At Mine End**

a. Ministry of Environment & Forests (MoEF) Notifications and bid clarifications given by PSPCL mandate use of washed coal by NPL. For getting the coal washed, the unwashed ROM coal necessarily has to be transported by road from the mine to the washery and washed coal has to be transported by road from the washery to the railway siding for loading into rail wagons.

b. PSPCL has wrongfully denied payment of road transportation cost at the mine-end under the pretext that since washing charges have already been denied to NPL, therefore any charges associated with washing i.e., charges for transporting the coal are not payable by

PSPCL. This view has been erroneously upheld by the State Commission.

c. The PPA specifically distinguishes the elements of Energy Charge to be computed on the basis of weighted average actual costs to the Seller. The PPA obliges PSPCL to pay the actual cost of "transportation". The State Commission has limited the meaning of the term "transportation" to "transportation by railway" which is wrong and unlawful.

**(b)** On Issue No 3, following submissions were made before us by the Respondent No 2 for our consideration:-

i. The transportation link for the project is the identified railway link with the associated railway siding facilities till the project site. This was specified in the bidding documents and the initial consents from the railways was also obtained.

ii. The definition of power station also includes all associated facilities of the project. This includes the railway siding facilities to be created by the Appellant.

iii. However, the Appellant took a commercial decision to declare the COD of the project without completing all activities and completion of the railway siding facilities for the power station. This being a commercial decision taken by Appellant, the Appellant cannot now seek to claim any additional costs from PSPCL on account of transportation other than railway transportation.

iv. Further, it was clarified in Rfp documents that the responsibility of acquisition of land related to water intake channel, railway siding, and railway lines from nearby railway station to site shall be responsibility of NPL. The role of the Government of Punjab was only a facilitatory role, without any statutory or contractual obligation. The land could have been acquired by the Appellant through any means known in law, including direct purchase from land owners etc. The bidding documents

or the PPA did not specify the manner in which the land was to be procured.

v. The Appellant approached the Government of Punjab for acquisition of land under the Land Acquisition Act, which the Government of Punjab agreed to proceed and acquire the land for the Appellant. This was a facilitation for the Appellant for acquiring the necessary land .

vi. The Appellant has alleged delays in the land acquisition made under the Land Acquisition Act. The Appellant has not claimed the said delays being beyond its control and the Appellant has specifically stated that it is not pleading force majeure. Further, the Appellant has not made any claim against the Government of Punjab.

vii. When the Appellant had made a conscious and commercial decision to declare the generating station for COD without the railway siding facilities, the risk for any increased cost on account of other means of transportation other than the identified means is that of the Appellant and the same cannot now be sought to be claimed from PSPCL and eventually from the consumers at large in the State. PSPCL has also consistently and specifically mentioned in its response letters that the cost, risk and responsibility lies with the Appellant.

**(c) The learned counsel for the State Commission adopted the above submissions made by the Respondent No.2.**

**(d) After considering the arguments made by the parties and their respective written submissions and facts on record, our observations on Issue 3 i.e. Denial of Road Transportation Cost and Question 3 i.e. Whether the term "transporting" used in the definition of $F^{coal}n$ in the formula for Energy Charges in Clause 1.2.3 of Schedule 7 of the PPA limits the transportation of coal by a particular means of transport or by a specified agency/carrier/ transporter ?, are as follows :**

a. As per PPA the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project has to be used for calculation of Energy Charges.

b. On achieving COD of the Unit-1, the railway siding was not completed and the Appellant had no other option than transporting coal to Mandi Gobindgarh/Chandigarh (1500 Km) and thereafter by road (~50 km). The Appellant has contended that the PSPCL has denied reimbursement of actual cost of road transportation of fuel to the Power Station.

c. As per Respondent PSPCL, the approval of the railways was provided for railway siding and land for the railway siding was to be acquired by the successful bidder.

d. As per competitive bidding documents all the responsibilities of construction of railway siding was of the Appellant and in RfP documents it was clarified that “Railway siding and rail lines from nearby station to site is to be acquired by Selected Bidder as per the requirement. Govt. of Punjab will facilitate acquisition of land as desired by the Selected bidder. Further RFP specifies that for Fuel Transportation, Railways have given assurance for transportation of coal from SECL.

e. As per Respondents, the Appellant was well aware at the time of bidding itself that the construction of railway sliding and acquisition of land for railway siding was the responsibility of successful bidder. It was a conscious and commercial decision of the Appellant to declare COD of generating station without railway siding facilities and transporting coal to the power station by other means. Hence the corresponding increased cost of other means of transport is on the account of the Appellant only.

f. The State Commission in the Impugned Order has observed as :

*"Considering the submissions of both the parties, the Commission is inclined to rule that road transportation charges for transporting the coal from Mandi Gobindgarh/Chandigarh to the project are not payable by PSPCL to NPL in terms of clause 1.2.3 of Schedule 7of the PPA. The Commission agrees that it was NPL's commercial decision to declare the CoD without completing all construction activities relating to the project. NPL unilaterally decided to shift the unloading of coal at Sarai Banjara station to Mandi Gobindgarh and transport the same by road in trucks to the project without the consent of PSPCL. The delay in land acquisition or grant of various permissions by railways cannot alter the terms of the PPA as such matters are likely to occur in large infrastructural projects and supposed to have been taken care of by the concerned party. The Commission notes that the PPA provides for signing of a separate Fuel Transportation Agreement (FTA) between the seller of electricity (NPL) and the transporting agency (Railways) besides signing of the Fuel Supply Agreement with the fuel supplier (SECL). The Commission further notes that the FTA has not been signed by NPL with railways without assigning any cogent reason. The Commission also notes that the permission for grant of surface/emergency cross-over by railways was applied very late by NPL, which, in the opinion of the Commission, should have been applied much earlier. In the opinion of the Commission, the construction of the enhanced scope of works at Sarai Banjara station should have been aligned with the commissioning schedule of DFCCIL and accordingly the alternative arrangements at the Sarai Banjara station for movement of rakes to the project should have been made much earlier in time. Under the circumstances, the Commission is of the opinion that it is between NPL and the railways to sort out the issue and the claim, if any, of NPL with regard to non-completion of the railways siding works etc. lies with the railways and not with PSPCL. The consumers of Punjab cannot be burdened for default on the part of other authorities.*

*In view of the above, the claim of NPL with regard to payment of charges for transportation of coal from Mandi Gobindgarh /Chandigarh to the project by road through trucks cannot be allowed."*

g. Considering the facts and the circumstances, we are in agreement with the observations of the State Commission in the Impugned Order. The

State Commission has rightly disallowed the cost of transportation of coal through road transport for calculation of energy charges.

h. Hence this issue is also decided against the Appellant.

**13. Issue 4: Non Payment of Capacity Charges**

**a)** On Issue No 4, following submissions were made before us by the Appellant for our consideration:-

i. Under Case 2 Bidding, the procurer PSPCL is under an obligation to arrange fuel for the Project. Prior to achieving COD, NPL was apprehensive that coal arranged by PSPCL will not be sufficient to meet the requirement of the project as per PPA on account of the fact that there was a reduction in allocation by CIL/SECL against the Annual Contracted Quantity (ACQ).

ii. PSPCL filed Petition No. 18 of 2012 before the State Commission praying that NPL be directed to execute the FSA with SECL. The State Commission, by its Order dated 03.10.2012, directed NPL to sign Fuel Supply Agreement (FSA) with SECL without prejudice to the all rights and contentions of the parties under PPA

iii. In October 2012, NPL filed Petition No. 56 of 2012 before the State Commission owing to failure of PSPCL to fulfil its obligation of arranging sufficient quantity /quality/ grade of coal in terms of the competitive bidding guidelines/ bidding documents and the PPA. The same was dismissed by the State Commission by its order dated 31.12.2012. NPL filed Appeal No. 68 of 2013 challenging the order dated 31.12.2012.

iv. This Tribunal in its Order dated 21.08.2013 passed in Appeal No. 68 of 2013 specified a mechanism for procurement of coal from alternate source to meet the expected shortfall in supply from linked source in order to operate the power plant as per the terms and conditions of the PPA. This was followed by the State Commission's order dated

19.02.2014, laying down the modalities for procurement of alternate coal. Accordingly, NPL procured alternate coal to meet the expected shortfall.

v. On 19.02.2014, NPL informed PSPCL that it was constrained to use coal procured from alternative sources for Unit No. 1 post 20.02.2014 due to non-availability of SECL supplied coal.

vi. During the period in question, the linkage coal was not available despite best efforts undertaken by NPL. Supply of linkage coal under the FSA commenced on 22.02.2014 i.e. within one month from the COD of Unit-1. Accordingly, NPL declared availability on the basis of coal procured from alternate sources.

vii. PSPCL asked NPL to stop the plant and denied payment of capacity charges towards availability declared for the period 20.02.2014 to 03.03.2014.

viii. The State Commission has upheld the conduct of PSPCL by observing that:-

a) The use of coal from alternative sources was intended to be allowed only to meet the shortfall in the supply of coal by SECL. The adverse impact of using entirely the coal received from domestic alternate sources is clearly visible as the energy charges indicated by NPL were around Rs 3.26 per kWh for such generation as against Rs 2.64 per kWh using a blend of coal sourced from SECL and alternative sources.

b) There is no provision in the PPA for using coal from alternative sources.

ix. In order to recover capacity charges, NPL has to declare the Availability of the Project in terms of the PPA. In the PPA the "Declared Capacity" and "Availability Based Tariff" has been defined, as under:

- "*Availability Based Tariff" shall mean all regulations contained in the Central Electricity Regulatory Commission (terms and conditions of Tariff) Regulations, 2004, as amended or revised from time to time, to the extent applied as per the terms of this Agreement.*

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

x. Since, the period in question is from 20.02.2014 to 03.03.2014, accordingly, in line with the terms of the PPA the said period falls under CERC (Terms and Conditions of Tariff) Regulations 2009, wherein "Declared Capacity" has been defined as under:

*“3. Definitions. - In these regulations, unless the context otherwise requires, "declared capacity" or "DC" in relation to a generating station means, the capability to deliver ex-bus electricity in MW declared by such generating station in relation to any time-block of the day or whole of the day, duly taking into account the availability of fuel or water, and subject to further qualification in the relevant regulation;"*

As per the existing Regulatory Framework, declaration of availability is only subject to availability of fuel and water. Once generating company demonstrates that fuel is available, it can declare its capacity for which PSPCL is required to pay capacity charges. In view of the above regulations, it is evident that declaration of capacity has no connection with the source of coal.

xi. This Tribunal's order dated 21.8.2013 allowed usage of alternate coal at NPL in the event of shortfall in linkage coal which was followed by State Commission’s order dated 19.02.2014 laying down the modalities. NPL complied with all the conditions laid down by this Tribunal and the State

Commission regarding procurement of coal from alternate sources, including requisitioning the coal from SECL, and no condition has been violated by NPL. The proportion of use of coal from alternate sources and its impact on tariff has to be considered over a longer period and not on day to day basis.

xii. Once the availability has been declared by NPL on the basis of alternate fuel, PSPCL may schedule the power based on Merit Order Principles. If the energy charges are lower in the Merit Order then the power will not be scheduled by PSPCL. However, PSPCL is liable to pay capacity charges for the capacity declared by NPL.

xiii. As such there is no link between declaration of availability which is required for payment of capacity charges and payment of energy charges which is linked to scheduling of power. In fact, during the said period PSPCL had not scheduled power from NPL, and accordingly, has not paid any energy charges qua alternate fuel.

**b)** On Issue No 4, following submissions were made before us by the Respondent No 2 for our consideration:-

i. The alternative coal was to be used on minimum basis and project was based on domestic coal. This Tribunal in order dated 21.08.2013 specifically clarified that the interim order will not create any right to the Appellants to raise any charges and procurement of coal from alternative sources will be subjected to the terms and conditions imposed by the State Commission, the relevant extract as follows

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

ii. The State Commission had also directed that the usage of imported/alternate coal would only be on minimal basis and used by blending with the linkage coal for availability up to the normative levels.

iii. As per Schedule 7 of the PPA provides for payment of Capacity Charges was to be made only for declaration based on domestic coal, which was the identified coal linkage granted to the project. The procurement of alternate/imported coal was only as a special case to meet the shortfall in supply of coal by SECL. The imported/domestic coal was to be used on minimal basis and to be blended with the linkage coal to declare availability up to the normative levels. However, there was no right to the Appellant to declare availability purely on alternate/imported coal without using any domestic coal.

iv. For the period in issue, the claim of the Appellant is that there was no domestic coal available for the project. It was for the Appellant to follow up with SECL for supply of coal. SECL was contractually bound to supply coal, and had in fact supplied coal for the commissioning of the project and also subsequently.

v. In any event, there is no right for the Appellant to declare availability purely based on alternate/imported coal, require the Respondent to purchase such electricity and pay the capacity charges for the same.

**c) The learned counsel for the State Commission adopted the above submissions of the Respondent No.2.**

**d) After considering the arguments made by the parties and their respective written submissions and facts on record, our observations on Issue 4 i.e. Non Payment of Capacity Charges and Question 4 i.e. In light of interim order dated 21.08.2013 passed by**

**this Tribunal, whether NPL could have declared availability based on alternate coal as per the terms of the PPA?, are as follows :**

i. The issue pertains to declaration of Availability of the Power Station during the period 20.02.2014 to 03.03.2014 when the domestic coal from SECL was not available and the Appellant declared the availability of the power station based on the entire quantity of coal sourced from alternate sources.

ii. The Appellant has claimed that the prevailing regulations do not put restriction on the Generator to declare availability linked to any specific source of coal. Hence the availability based on coal sourced from alternate sources has to be recognised by Respondent, PSPCL and capacity charges corresponding to such availability has to be paid by them.

iii. The Appeal filed by NPL to this Tribunal was to allow them to continue with the tender process undertaken by the Applicants to import coal by conducting competitive bidding for procurement of imported coal to the tune of 1.3 Million tonnes from international market to meet the shortfall in supply of coal for the project without prejudice to their rights and contentions in the Appeal and to allow pass through of cost of imported coal discovered pursuant to conclusion of the tender process. This Tribunal in order dated 21.08.2013 specifically clarified that the interim order will not create any right to the Appellants to raise any charges and procurement of coal from alternative sources will be subjected to the terms and conditions imposed by the State Commission. The Interim Order dated 21.08.2013 of this Tribunal reads as under:

*"12. After considering the submissions of both the parties, we feel that suitable interim directions may be issued pending disposal of the above Appeals. Those are following:*

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

*(i) The bids received from the intended suppliers pursuant to the tender process will be opened in the presence of the nominee of PSPCL (R-1).*

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

*(iii) No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of their obligations to third parties under the contracts entered into by the Appellants for procurement of coal from alternative sources will be passed on to PSPCL.*

*(iv) The Appellants will give preference to the coal supplied by CIL/subsidiaries of CIL over coal to be directly arranged by them from alternate sources and will not put any restrictions on supply of coal from the linked sources and accept the entire quantity of coal offered for supply from the linked sources.*

*(v) The Appellants immediately after opening of the price bids shall approach the State Commission by filing application to take approval of the State Commission regarding terms and conditions for procurement of coal and modalities for passing through the cost of coal procured from alternative sources to PSPCL. The State Commission shall then decide the matter and pass the order accordingly as per law as expeditiously as possible but not later than 60 days from the date of the filing of the application.*

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

*coal from the alternative sources will be subject to the terms and conditions imposed by the State Commission.*

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

*13. Thus, the IA nos. 226 of 2013 in Appeal no. 56 of 2013, 130 of 2013 in Appeal no. 84 of 2013 and 227 of 2013 in Appeal no. 68 of 2013 are disposed of with the above directions."*

iv. The State Commission through its order dated 19.02.2014 in Petition No.57 of 2013 filed by NPL has laid down the modalities for the sourcing of alternate coal.

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

*i. NPL shall requisition the coal regularly from SECL as per clause 4.5 'Scheduled Quantity' of the FSA.*

*ii. NPL will give preference to the coal supplied by SECL over coal to be directly arranged by it from alternative sources and will not put any restrictions on supply of coal from SECL and accept the entire quantity of coal offered for supply from SECL.*

*iii. NPL will not use the coal supply from the alternative sources unless warranted by the exigencies of short supply of coal by SECL in terms of the FSA, that too on 'Minimal Usage' basis.*

*iv. NPL will daily upload on its website, the inventory of coal received from SECL as well as alternative sources. The same shall, source-wise, include quantity requisitioned, quantity received, quantity used, balance quantity and quantity of coal form alternative sources used as a percentage of coal from SECL, on daily basis.*

v. *The coal consumption/stock position will be monitored fortnightly by Chief Engineer/Fuel, PSPCL Patiala from the information available on NPL website for review by PSPCL management. For the purpose, the officer so appointed may also visit the power plant; at least once a month and NPL shall provide access to the coal stockyard and relevant record to him.*

vi. *Joint sampling and testing of coal 'as received' and 'as fired' shall be conducted and certified by NPL and PSPCL. For this purpose, a PSPCL team shall be permanently posted at NPL premises.*

vii. *No 'take or pay liability' or any compensation regarding off-take of coal supply or any loss on account of NPL's obligations to suppliers under the contracts entered into by it for procurement of coal from alternative sources will be passed on to PSPCL.*

viii. *Coal from alternative sources/imported coal shall be procured by NPL at lowest prices) arrived at through its tender overseen and signed by PSPCL on 27.09.2013 & 08.10.2013 for imported coal and 18.12.2013 & 26.12.2013 for domestic coal. Taxes and duties shall be payable/pass through as applicable.*

ix. *As decided by Hon'ble APTEL in Para 12(B) of its Order dated 21.08.2013 this procurement of coal form alternative sources, as an advance action, will not give any right to NPL to raise any charges over and above those admissible to it as per the terms and conditions of the PPA. The Commission has held in its Order dated 31.12.2012 in Petition No.56 of 2012 that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. Now FSA has followed the LoA and both FSA as well as LoA provide a window for supply of imported coal. Thus the cost of imported coal/coal procured from alternative sources would be a pass through in terms of LoA/PPA.*

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

*The petition is disposed of as above."*

As per the State Commission, the use of alternative coal to be made on minimum basis and high priority to be given to coal supplied from SECL

as the project was based on domestic coal. The cost of imported/alternate coal was allowed to be pass through in terms of FSA/PPA.

v. While deciding the issue related to payment of capacity charges during the period from 20.02.2014 to 03.03.2014, the State Commission in the Impugned Order has decided that :

*"The Commission notes that Hon'ble APTEL's Order and consequential Commission's Order allowed NPL to procure coal from alternative sources to meet with the shortfall in supply of coal from SECL for a period of 12 months from the CoD of Unit-1 and to use the same on 'Minimal Usage' basis. The intention behind the said Orders is amply clear, straight forward and unambiguous. There is no confusion in interpreting that the use of coal from alternative sources was intended to be allowed only to meet the shortfall in the supply of coal by SECL that too as an interim measure for a period of 12 months from CoD of Unit-1 of the project which was, in fact, also the intent of NPL in the interim application filed by it before Hon'ble APTEL. The adverse impact of using entirely the coal received from domestic sources is clearly visible as the energy charges indicated by NPL were around ₹ 3.26 per kWh for such generation as against ₹ 2.64 per kWh using a blend of coal sourced from SECL and alternative sources. It can be safely inferred that the energy charges would be still lower when coal sourced only from SECL is used. There is no provision in the PPA for using coal from alternative sources. It was an exception allowed by Hon'ble APTEL, on the apprehensions expressed by NPL, to overcome the shortage in supply of coal by SECL purely on temporary basis for a period of 12 months from the CoD of Unit-1 and consequently by the Commission to procure coal from alternative sources, its use having been rightly restricted through various conditions. The significant difference between the energy charges as brought out above cannot be allowed as a pass through in terms of the PPA to burden the consumers of Punjab.*

*Considering the above, the Commission holds that declaring availability of the project by NPL by exclusively using coal procured from alternative sources and claim capacity charges for the same is not justifiable and hence cannot be allowed. Consequently, it is held that PSPCL is not liable to pay any capacity charges to NPL for the interregnum between 20.02.2014 to 03.03.2014 when the project*

*capacity was declared available by NPL by exclusively using the coal procured from alternative sources."*

vi. As per the Competitive Bidding guidelines and Standard Bidding Document issued by the Government of India, the use of Linkage coal was envisaged under Scenario-4 of Case-2 Bidding, which is the present case under consideration. The PPA and the competitive bidding documents do not even envision coal from alternate sources and the whole basis of the PPA was that linkage coal from SECL is to be procured for operating the project.

The procurement of alternative coal was allowed for a limited period and purpose and subject to the conditions imposed by the State Commission as well as this Tribunal. The Availability factors shall be determined as per Schedule–6 of the PPA which specifies the Availability factor and calculation of availability or availability factor shall be as per prevailing Grid Code and ABT Regulations. The Declaration of Availability by the Generator has not been restricted by the PPA only to the availability of linkage coal. The schedule and payment of energy charge shall be as per the formula specified in the Schedule-7. The use of alternate coal and pass-through of such coal in tariff was allowed by this Tribunal as well State Commission with the clear direction to have minimal use of such coal. The impact of use of coal from alternate source cannot be pass-through in the energy charges unless the Declaration of such availability has been done by the Generator. This Tribunal Order as well as methodology issued by State Commission has not put any specific restriction that the availability of the power station cannot be declared purely based on use of alternate coal.

vii. In view of the above, we are inclined towards the argument made by the Appellant in this regard. The capacity charges are to be allowed during the period when use of coal from alternate sources was allowed by this Tribunal as well as State Commission based on the Availability as declared by the Appellant during that period.

viii. Hence this issue is decided in favour of the Appellant.

**14. Issue 5: Non Payment of third party analysis charges, liaisoning charges and transit and handling losses**

**a)** On Issue No 5, following submissions were made before us by the Appellant for our consideration:-

i. NPL incurs additional cost towards purchasing, transporting and for unloading the coal at Project site, as under:

a) Third party testing- In compliance with State Commission order dated 19.02.2014 which mandates joint sampling and testing of coal by NPL and PSPCL at plant end.

b) Liaising - Logistics coordination with coal supplier and railways to ensure timely and regular supply of coal.

c) Transit & Handling losses - Quantity loss during loading, unloading and transporting coal over a distance of 1500 km

ii. Respondent No 2 , PSPCL denied to pay the aforesaid on the ground that NPL is seeking indirect charges for numerous issues as if it is a Section 62 proceeding. These charges are not a part of Clause 1.2.3 of Schedule VII of the PPA and are not payable to NPL.

iii. The definition of $F^{coal}n$ in Clause 1.2.3 of the Schedule 7 of the PPA provides that NPL is entitled to weighted average actual cost to the

Seller of Purchasing, transporting and unloading the coal most recently supplied to and at the Project before the beginning of month "m" (expressed in Rs./MT in case of domestic coal). As such, it includes all actual expenses incurred in the process of bringing such coal to the project site for computation of energy charges.

iv. The bid was submitted only for Capacity Charges and Net Quoted Heat Rate with a clear understanding that the actual cost of fuel will be a pass through. Developer does not make any profit from the Energy Charges as they are a complete pass through these incidental charges are payable.

v. **Third party testing:**

a. The joint sampling and testing of coal on As-Received & As-fired basis is undertaken by NPL and PSPCL in accordance with the order dated 19.02.2014 passed by the State Commission.

b. Joint sampling of the washed coal delivered to the Power Station is done to measure gross calorific value of coal on As-Received Basis. As such the same is essential for arriving at gross calorific value in term of definition of PCVn.

**vi. Liaisoning Charges**

a. As per prudent utility practice and practices followed in the power sector, competent liaison agents are to be appointed to ensure quality and quantity of coal being supplied from the coal company, thereby securing efficient operations.

b. Expenses in regard to liaison agents have been identified as one of the components of coal cost in CPRI's Report dated 13.08.2012. Even the Supreme Court has recognized the concept of Coal Liaising in its judgement in the matter of B.S.N. Joshi & Sons vs. Nair Coal Services Ltd; (2006) 11 SCC 548. CERC's order dated 25.01.2016 in the matter of Jhajjar Power Ltd. has held that 'Coal

handling agent charges', 'transit and handling losses' are legitimate expenses towards supply of energy.

**vii. Transit & handling charges**

a. Loss of coal at different stages of the supply chain on account of transit loss and handling loss occurs during transportation of coal and hence, it is necessary to factor in a normative loss on account of such losses. CERC has allowed transit and handling loss of 0.8 % in case of non-pithead generating stations. The same has been contemplated by CPRI in its fuel audit report dated 13.08.2012. The State Commission has allowed transit & handling loss of 1% to PSPCL Plants in the ARR tariff order for FY16-17.

b. Quantity loss during loading, unloading and transporting the coal over a distance of 1500 km needs to be factored.

**b)** On Issue No 5, following submissions were made before us by the Respondent No 2 for our consideration:-

i. The said charges are also claimed on the same premise as washing charges, namely that the Appellant is entitled to any and every cost and expenses under the PPA in relation to coal. This basic premise is incorrect.

ii. The Appellant is claiming indirect charges for numerous issues as if this is a Section 62 proceeding. These charges are nowhere conceived in the PPA and are not liable to be paid to the Appellant.

**c) The learned counsel for the State Commission adopted the above arguments/submissions made by the Respondent No.2.**

**d) After considering the arguments made by the parties and their respective written submissions and facts on record, our observations on Issue 5 i.e. Non Payment of third party analysis charges, liaisoning charges and transit and handling losses and Question 5 i.e. Whether NPL was entitled to claim the costs namely**

**third party agency, Liaising, Transit & Handling losses under clause 1.2.3 of Schedule 7 of PPA?, are as follows :**

i. The State Commission in the Impugned Order has decided as :

*"The Commission has gone through the submissions made by NPL and PSPCL in respect of the claims of NPL for liaisoning charges, charges for third party analysis of coal at the project and charges incurred on account of transit & handling loss. The Commission notes that the tariff for the NPL's project was determined under section 63 of the Act through competitive bidding process. As per the PPA, the tariff including the energy charges is payable as per clause 1.2.3 of Schedule 7 of the PPA. The Commission is of the considered opinion that the said clause does not cover the payment of such expenses separately, in addition to the cost of coal paid by NPL to SECL, transportation charges paid by NPL to railways and unloading charges provided for there under. The Commission finds that neither there is any specific provision in the PPA for computing monthly energy charges considering any of the aforesaid charges nor did PSPCL, at any stage, agreed to pay such charges to NPL separately. As per the Commission's interpretation of the provisions in the PPA, such charges are not payable additionally by PSPCL. The CPRI report dated 13.08.2012 and the judgment of Hon'ble APTEL dated 01.04.2014 relied upon by NPL for claiming liaisoning charges are applicable in the context of tariff determination under section 61, 62 and 64 of the Act read with the Regulations framed by appropriate Commission whereas in the instant case, the tariff has been determined under section 63 of the Act on conclusion of the competitive bidding process. With regard to NPL's request for specifying transit & handling loss, the Commission is of the opinion that the same cannot be done as the tariff has been determined under competitive bidding process. The Commission is of the view that allowing any of the above charges, at this stage, would be unfair to other bidders who participated in the bidding and tantamount to vitiating the competitive bidding process.*

*In view of the above, the Commission holds that the claims of NPL in respect of the liaisoning charges, charges for third party analysis of coal at the project and charges incurred on account of transit & handling loss of coal are not allowable under the provisions of the PPA."*

ii. The provisions of Clause 1.2.3 of the Schedule 7 of the PPA have been deliberated in detail in this judgment. The components of the cost of

coal which are to be considered while determining Energy Charges are actual cost to Seller of purchasing, transporting and unloading the coal. Clause 1.2.3 of Schedule 7 does not explicitly provide for consideration of charges towards third party agency, Liaising, Transit & Handling losses or any other charges. Being a competitive bidding process, unless the provisions of Bidding documents specifically provide for the reimbursement of any expenses or consideration of any cost in the Tariff components, it cannot be allowed after completion of the Bidding process. Bidders could have sought such queries from the Procurer before submission of the Bid. We are in agreement with the findings of the State Commission in this regard.

iii. Hence this issue is decided against the Appellant.

## ORDER

We are of the considered opinion that the issues raised in the present Appeal and I.A. are devoid of merit except the one issue at Para 13 above which needs fresh consideration by the State Commission. Accordingly the Appeal is hereby partially allowed. In view of this, I.A. No. 163 of 2016 does not survive and is disposed of as such.

The Impugned Order dated 01.02.2016 passed by the State Commission is hereby remanded to the State Commission to the extent as ordered above.

No order as to costs.

Pronounced in the Open Court on this **14th day of December, 2016.**

**(I.J. Kapoor)**
**Technical Member**

**(Mrs. Justice Ranjana P. Desai)**
**Chairperson**

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**REPORTABLE/NON-REPORTABLE**

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