

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 56 & Appeal No.84 of 2013

Dated: 7th April, 2016

**Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER**

Appeal No. 56 of 2013

In the Matter of:

**Talwandi Sabo Power Limited
Site cum Regd Office
Village Banwala, Mansa
Talwandi Sabo Road
Distt-Mansa
Punjab-151 302**

... Appellant

Versus

- 1) Punjab State Power Corporation Ltd.
Thermal Designs
PSPCL, Shed No.T-2,
Thermal Design Complex,
Patiala-147 001**
- 2) Punjab State Electricity Regulatory Commission
SCO No.220-221, Sector 34-A,
Chandigarh-160022**

... Respondent(s)

**Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishal Anand
Mr. Samhit Panja
Mr. Raveena Dhamija
Ms. Mandakini Ghosh**

Mr. Sitesh Mukherejee

Counsel for the Respondent(s):

Mr. M G Ramachandran
Mr. Anand K Ganesan
Mr. Avinash Menon
Ms. Swapna Seshadri for R-1
Mr. Matrugupta Mishra &
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Tabrez Malawat
Mr. Tushar Nagar
Ms. Meghna Aggarwal for R-2

Appeal No. 84 of 2013

In the Matter of:

**Talwandi Sabo Power Limited
Site cum Regd Office
Village Banwala, Mansa
Talwandi Sabo Road
Distt-Mansa
Punjab-151 302**

... Appellant

Versus

- 1) Punjab State Power Corporation Ltd.
Thermal Designs
PSPCL, Shed No.T-2,
Thermal Design Complex,
Patiala-147 001**

- 2) Punjab State Electricity Regulatory Commission
SCO No.220-221, Sector 34-A,
Chandigarh-160022**

... Respondent(s)

Counsel for the Appellant(s) : Mr. Amit Kapur
Mr. Vishal Anand
Mr. Samhit Panja
Mr. Raveena Dhamija
Ms. Mandakini Ghosh
Mr. Sitesh Mukherejee

Counsel for the Respondent(s): Mr. M G Ramachandran
Mr. Anand K Ganesan
Mr. Avinash Menon
Ms. Swapna Seshadri for R-1
Mr. Matrugupta Mishra &
Ms. Shikha Ohri
Mr. Hemant Singh
Mr. Tabrez Malawat
Mr. Tushar Nagar
Ms. Meghna Aggarwal for R-2

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. **Appeal No.56 of 2013** has been filed u/s 111 of the Electricity Act, 2003 by the Petitioner/Appellant Talwandi Sabo Power Limited (TSPL) against **the Impugned Order dated 24.12.2012** passed by the Punjab State Electricity Commission (State Commission/R-2) in Petition No.46 of 2012 filed by the Appellant.
2. The Appellant, Talwandi Sabo Power Limited (TSPL) has filed the aforesaid Petition u/s 86 (1) (b) and 86(1) (f) of the Electricity Act, 2003 in relation to the disputes arising under the Power Purchase Agreement dated 1.9.2008 (PPA) between Talwandi Sabo Power

Limited (Appellant/TSPL) and Punjab State Power Corporation Limited (R-1).

3. The Appellant, TSPL is a Company incorporated under the Companies Act, 1956 having its registered office at Village Banwala, Dist- Mansa, Punjab. TSPL is a Special Purpose Vehicle that has been set-up initially by the Punjab State Electricity Board (PSEB) for developing the project so as to meet the Long Term Power Supply requirements of the State of Punjab. The entire share holding of the Talwandi Sabo Power Limited (TSPL) was subsequently transferred to M/s. Sterlite Energy Limited (SEL), a Company incorporated under the Companies Act, 1956 having its Registered Office at SIPCOT Industrial Complex, Madurai By Pass Road, T V Puram, PO Tuticorin, Tamil Nadu after it was selected as the successful bidder under the tariff based Competitive Bidding Process held by PSEB for development of the project through TSPL.
4. The Punjab State Electricity Regulatory Commission was constituted by the Government of Punjab under Section 17 of the Electricity Regulatory Commission Act, 1998 vide its Notification dated 31.3.1999 and continues to exercise the jurisdiction as the State Commission under Section 82 of the Electricity Act, 2003.
5. Another **Appeal No.84 of 2013** has been filed by the same Appellant namely Talwandi Sabo Power Limited (TSPL) against the **Impugned Order dated 27.9.2012** passed by the Punjab State Electricity Regulatory Commission (R-2) in Petition No.11 of 2012 filed by

Punjab State Power Corporation Ltd (i.e. one of the successor of the Punjab State Electricity Board) (R-1). The R-1 filed the aforesaid Petition under Section 86(1) (b) of the Electricity Act, 2003 seeking directions of the Commission to the Appellant (TSPL) for signing the Fuel Supply Agreement (FSA) with the Fuel Supplier (i.e. Mahanadi Coalfields Limited (MC L) for the 1980 MW (3 x 660 MW) thermal Power Project in Punjab (Project).

6. Since the issues in **both these Appeals are common and similar in nature**, they have been heard together and are now being decided by this common judgment.

7. **Brief facts of the Case:**

7.1 Ministry of Power, Government of India on 19.1.2005 issued the guidelines for the Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005 (Competitive Bidding Guidelines) under Section 63 of the Electricity Act, 2003. The Competitive Bidding Guidelines are statutory guidelines which have to be followed while carrying out the competitive bidding for setting up a project under either Case 1 or Case 2 route.

7.2 Talwandi Sabo Power Limited (TSPL) (then wholly owned and controlled by Punjab State Electricity Board (PSEB) (now known as Punjab State Power Corporation Limited which is one of the successor entity of PSEB (PSPCL/Respondent No.1) made as a

Special Purpose Vehicle (SPV) by PSEB under the Companies Act, 1956.

- 7.3 On 25.9.2007, TSPL acting as an authorised representative for PSEB issued Request for Qualification (RFQ) for selection of a Developer through tariff based competitive bidding process in line with competitive bidding lines for procurement of power on Long Term basis from the Talwandi Sabo Thermal Project.
- 7.4 On 8.11.2007, TSPL sought approval from the State Commission for further deviation in terms of timelines for arrangement of Fuel Linkage for the project. The Commissions allowed the above sought deviation subject to conditions that the full cost of the implication of this or any other activity enumerated above is clearly made known to the Bidders before the issue of RFP.
- 7.5 On 18.1.2008, the Request for Proposal (RFP) was issued by Talwandi Sabo Power Limited (A wholly owned Company of PSEB). On 8.9.2008, pre-bid Conference with prospective bidders was held at Chandigarh and informed in its presentation to the Bidders that Mahanadi Coal Fields (MCL) by way of its letter dated 28.4.2008 agreed to supply "E" Grade Coal up to 5.00 MT during 2011-12 and 7.70 MT from FY 2012-13 onwards for the project. The Respondent also provided the specification of Fuel during RFP bid conference which is Grade-E, GCV 4500-4600 kcal/kg, Ash 33-34%.

- 7.6 On 18.6.2008, Sterlite Energy Limited (SEL) and others submitted their bids for the project. The SEL was selected as a successful bidder and accordingly, on 4.7.2008, the Respondent No.1 issued Letter of Intent (LoI) in favour of the SEL calling it upon to acquire 100% shareholding in TSPL.
- 7.7 On 1.9.2008, the Share Purchase Agreement (SPA) was executed between SEL and the Respondent No.1 PSPCL transferring 100% shareholding of TSPL to SEL. On the same date i.e. on 1.9.2008, the Power Purchase Agreement was signed between TSPL and PSPCL.
- 7.8 On 2.9.2008, a Memorandum of Understanding (MOU) was executed by the Respondent No.1 PSPCL and TSPCL dealing with the Fuel Arrangements. Pursuant to the signing of the MoU, the Respondent No.1 provided LoA issued by the MCL to SEL, the Appellant.
- 7.9 On 2.12.2009 TSPL wrote a letter to MCL confirming issuance of Letter of Assurance (LoA) dated 14.8.2008 in the name of TSPL and informed that as per the PPA, PSPCL is under an obligation to sign the FSA and transportation Agreement with the MCL.
- 7.10 Ministry of Coal vide its letter dated 17.2.2012 directed Coal India Limited (CIL) to sign FSA with Power Plants that have entered into Long Term PPAs with Discoms and have been commissioned/would get commissioned after 31.3.2009 and on or before 31.3.2015.
- 7.11 Accordingly, Coal India Limited (CIL) directed the MCL vide its letter dated 29.5.2012 to initiate signing of FSAs for Projects mentioned in

the CEA list annexed with SLC Minutes, which would get commissioned before 31.3.2015.

7.12 PSPCL/Respondent No.1 filed a Petition No.11 of 2012 before the Punjab State Electricity Regulatory Commission regarding signing of Fuel Supply Agreement with M/s. Mahandi Coal Fields Limited in respect of 1980 MW Talwandi Sabo Power Limited.

7.13 The State Commission after hearing the arguments of the Petitioner and Respondent in respect of Petition No.11 of 2012 pronounced an order dated 27.9.2012 and directed TSPL to sign FSA with MCL without prejudice to all the rights and contentions of the parties under the PPA dated 1.9.2008.

7.14 The Appellant TSPL sought a Review of the Order passed by the Commission in Petition No.11 of 2012 by way of filing Review Petition No.61 of 2012. The State Commission rejected the said Petition.

7.15 Aggrieved by the directions of the State Commissions' order dated 27.9.2012, TSPL filed Petition No.46 of 2012 u/s 86(1) (b) and 86(1) (f) of the Electricity Act, 2003 before the State Commission in relation to disputes arising under Power Purchase Agreement dated 1.9.2008 between TSPL, the Petitioner and the Respondent PSEB which stands substituted by Punjab State Power Corporation Limited as the successor entity on unbundling of PSEB and failure and or refusal of PSPL to fulfil its obligation of arranging sufficient quantity/quality/grade/original of coal in terms of competitive bidding

guidelines, bidding documents (RfQ and RfP), the PPA and the Memorandum of Understanding with PSPCL dated 2.9.2008 for the project 1980 MWs i.e. being set up under the case No.2 Model (3 x 660 MW) Talwandi Sabo Thermal Power Project.

7.16 After hearing the arguments of the parties, the State Commission pronounced the Impugned Order dated 24.12.2012. The relevant part of the Order is quoted below:

“Conclusively, the Commission holds that LoA and PPA are to be treated as one document/contract and followed/operated in tandem. Thus the Commission directs the petitioner to vigorously pursue the matter with all concerned Government authorities e.g. MCL, Coal India Ltd., Ministry of Coal, Ministry of Power and Central Electricity Authority etc. for maintaining the status quo with regard to quantity/quality/grade/origin for the coal committed as per the LoA as also for additional allocation of coal required for running the plant as per PPA. On its part, PSPCL will fully co-ordinate and co-operate with TSPL to pursue the matter at the highest level, with the State as well as Central Government to fulfill the assurance contained in the LoA. Similarly, PSPCL will also co-ordinate and co-operate with TSPL to pursue the matter for getting additional allocation of coal to run the plant as per PPA.

As regards non-inclusion of Unit-3 in the list of projects commissioning before 31.03.2015 annexed with the Standing Linkage Committee (SLC) minutes dated 14.12.2012, the petitioner is directed to take up the matter at its own level and for which assistance will be provided by the respondent. The Commission notes that, as per the PPA, the scheduled date of commissioning of third Unit is 30.04.2013 and it is also likely to

be commissioned before 31.03.2015. This fact appears to have been missed out by the SLC and be pursued vigorously and the requisite correction got made forthwith.

As regards the prayer for allowing deemed generation benefits and payment of capacity charges and incentives there on to the petitioner in case the project cannot operate at its full capacity due to short fall in the supply of fuel, the same would be as per the terms of the PPA.

The Commission is mandated to strive for maintaining a balance of the equities between the interests of the consumers, the distribution utility and the generators in the State. The Commission, therefore, holds that the remedies to the issues raised in the petition are duly covered under various Articles of the PPA, which is a comprehensive document, including the Force Majeure and Change in Law provisions. The petitioner is free to approach the competent authorities as per PPA having jurisdiction to adjudicate upon issue(s) at the appropriate time, as and when these arise”.

- 7.17 Aggrieved by the orders of the State Commission in the Impugned order dated 27.9.2012, the Appellant filed Appeal No.84 of 2013 and filed Appeal No.56 of 2013 against the Impugned Order dated 24.12.2012.
8. We have heard Mr. Amit Kapur, learned Counsel for the Appellant and Mr M G Ramachandran, learned Counsel for the Respondents and have gone through the material on record including Written Submissions filed by the contesting parties and the Impugned Orders dated 27.9.2012 and 24.12.2012, the following questions would arise for our consideration:

Issue No.1: Whether the State Commission erred in directing the Appellant TSPL to sign the Fuel Supply Agreement with MCL?

Issue No.2: Whether the State Commission erred in fixing the responsibility on the Appellant to make all the arrangements regarding procurement of Fuel for the Talwandi Sabo Power Project?

9. Since the above issues are inter-related, hence both the issues will be taken up together.
10. The following **contentions have been made on behalf of the Appellant TSPL on these issues:**
 - 10.1 That the Impugned Order of the Commission is contrary to the law and to the facts of the case and is also vague with respect to certain issues relating to the Fuel Supply for the project.
 - 10.2 That the Commission has failed to safeguard the sanctity of the bidding process carried out under the competitive bidding guidelines i.e. statutory guidelines issued u/s 63 of the Electricity Act. The Commission has statutory powers and a corresponding duty to adopt the tariff arrived at by a bidding process under Section 63 and is obligated to enforce the terms of the bid in letter and spirit and cannot undo the same by shifting the duties and obligations to arrange coal from the procurer to the Seller.

- 10.3 That the Commission erred in law in not applying the statutory and policy framework (i.e. Competitive Bidding Guidelines, National Electricity Policy and Tariff Policy) while interpreting the obligations of the parties under Case 2 bidding framework. Further, the power procurement under the PPA pursuant to the competitive bidding guidelines issued u/s 63 of the Electricity Act constitutes a statutory contract as has been held by this Tribunal in the case of Essar Power Limited Vs UPERC & ANR (Appeal No.82 of 2011 dated 16.12.2011). Therefore, the power procurement arrangements entered into between the Appellant and Respondent No.1 must be read and construed in the back drop of the statutory and policy framework governing the competitive bidding process.
- 10.4 That the National Electricity Policy, 2005 and Tariff Policy, 2006 envisages promotion of private investments in the Electricity Sector through competitive bidding framework as provided in the competitive bidding guidelines. Therefore, the competitive bidding guidelines gain immense significance and interpretation of the obligations of the parties under Case 2 bidding framework should have been done by the Commission strictly in terms of the Competitive Bidding Guidelines.
- 10.5 That the Commission misdirected itself in not realizing that the Appellant have committed a heavy investment of more than Rs.9,500 Crores for setting up the Project on the basis of risk apportionment between the Seller and Procurer as has been envisaged under the

competitive bidding framework related to Case 2 projects required to be developed under Scenario 4 where fuel arrangement is the obligation of the Procurer.

- 10.6 That the Commission failed to take cognizance of Para 3.2 (I)(iv) of the Competitive Bidding Guidelines which provides that “in case the bidders are required to arrange fuel, the same should be clearly specified in the RFQ”. In terms of this requirement, the Respondent No.1, PSPCL is liable to provide the required Fuel to the successful bidder for the project.
- 10.7 That the Commission misdirected itself in not taking cognizance of the fact that the essence of the Case 2 model (unless provided specifically in bidding document so that bidder has to arrange fuel) is that the procurer undertakes the responsibility for arranging the basic essentials for developing power project like land, water, fuel etc., The Developers of the power projects under Case 2 model are shielded from the risk to arrange such essential amenities.
- 10.8 That the Commission failed to appreciate that the principal consideration for the Appellant to submit the bid for the Project and enter into the PPA with the R-1 was the supply of coal by MCL as per its letter dated 28.4.2008. Without this consideration, the contract could not have come into force because as submitted above, there was no express or implicit obligation of the Appellant to arrange coal for the project to generate the power.

10.9 That the Commission failed to appreciate that the quality parameters of coal as specified in the LoA or for that matter during the actual supply of coal cannot supersede or be in violation of the representations made by the R-1 regarding specifications of coal provided during the RFP bid conference based on which the bid was submitted by the SEL. The R-1 should be safeguarded against any deviations in specifications of coal vis a vis what was represented to SEL at the bid stage.

10.10 That the Commission failed that the SEL had bid for the project based on the basis of R-1's representation that supply of coal for the project would be ensured by CIL as it was nominated by the R-1 to supply fuel for the project. Therefore, in the event CIL fails to meet its commitment to supply coal for the project, the Respondent No.1 is duty bound to make alternate arrangements for the same, including through coal procured/imported from other sources.

10.11 That the Commission misconstrued the respective rights and obligations of the parties as agreed under the Bid Documents i.e. PPA and MoU with respect to the fuel supply obligation in as much as the Commission has held that the Respondent No.1/procurer is not obliged to arrange such fuel for the project. In this regard, it is relevant to note the following:

“Clause 2.1.3 of the RFP:

“A Fuel Supply Agreement will be signed between the Procurer and the Fuel Supplier. The same agreement has a clause

whereby the Procurers has a right to assign this Agreement for specific period, within the term of the Fuel Supply Agreement (FSA) to a third party. Accordingly, the FSA will be assigned to the Selected Bidder during the term of the PPA”.

It is submitted that similar obligations have been cast on the Respondent No.1 under the PPA which defines the FSA as follows:

“means the agreement(s) entered into between the Procurer and the Fuel Suppler 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 Procurer and the Fuel Transporter for the transportation of Fuel in addition to the agreement between the Procurer and the Fuel Supplier for the supply of the Fuel”.

Clause 3 of the MoU further reiterates the obligation by providing a similar provision which entails that:

“The Fuel Supply Agreement (FSA) shall be signed by PSEB with the coal company within six months from the date of the finalisation of the Model FSA, at the request of TSPL, subject to the condition that TSPL shall achieve all milestones/benchmark(s) as stipulated in the Letter of Assurance dated 28 April, 2008 issued by the Mahanadi Coal Fields Limited and FSA and PSEB shall assign the same in favour of TSPL”.

10.12 That the Commission has erred in concluding that the LoA being in the name of Appellants and SEL having acquired the Appellant has assumed all the rights and obligations under the bid documents.

- 10.13 That the transfer of the SPV/TSPL in favour of the successful bidder does not absolve procurer/PSPCL of its responsibility to arrange fuel for the project.
- 10.14 That the Commission has failed to appreciate that as per the definition of FSA under the PPA, the obligation of the procurer (PSPCL) to arrange fuel and execute the FSA also includes the responsibility to arrange for transportation of the fuel and sign a separate agreement with the Fuel Transporter in this regard. Hence, it is equally the obligation of respondent/PSPCL under the PPA to execute necessary FTSA so as to ensure sustained supply of fuel upto the project site.
- 10.15 That the Commission has misdirected itself in facts and law in concluding that the Respondent No.1 is under no obligation to provide coal for the ultimate capacity of the project i.e. 1980 MW.
- 10.16 That the Commission has also held that such bid of the Appellant was submitted at its own volition and is not attributable to the Appellant.
- 10.17 That the Commission has failed in appreciating that the commercial feasibility of the project was envisaged with a target availability of 80%. If such availability falls below 80% would also amount in the reduction of recovery of fixed costs. Considering that loans have been procured for the development of the project, this would seriously impact the debt servicing obligations of the Appellant and result into un-viability of the project.

10.18 That the Commission has erroneously held that the Appellant in its letter dated 4.10.2010 has communicated its willingness to sign the FSA. The said letter is out of the context in a bid to mislead the Commission into believing that the Appellant was ready to sign the FSA with MCL.

10.19 That the Respondent No.1 failed to disclose to the Commission that the Appellant had sent another letter to MCL on 2.12.2009 where it is expressly stated that the signing of FSA including FTSA is the obligation of PSPCL under the PPA. Besides, even after giving the letter dated 4.10.2010.

10.20 That the Commission has erred in concluding that the LoA was available with the R-1 at the time of signing the PPA. This finding of the Commission is erroneous and factually incorrect.

10.21 That the LoA was available to the Appellant only after the signing of the PPA. Further, the Appellant was unaware of the material discrepancies in the LoA as compared to the MCL letter. Further the Appellant was unaware of the material discrepancies in the LoA as compared to the MCL letter. Further, the Appellant submitted their bids on the representation and assurance set out in the MCL letter and RfP/RfQ.

10.22 That the Commission has failed to appreciate that in the instance case, though the LoA was dated prior to the execution of the SPA and the PPA (i.e 1.9.2008), it was provided to the Appellant after

execution of the SPA and the PPA and acquisition of TSPL by SEL and that too only for the part capacity of the project i.e 1800 MW. This is contrary to the order of the Commission dated 8.11.2007.

10.23 The Commission has wrongly held that there has been a delay of four years by the Appellant for raising the present issues before the Commission.

10.24 That after SEL's selection as successful bidder and when all the relevant project related documents including the LoA dated 14.8.2008 issued by the Fuel Supplier/MCL were made available, the Appellant for the first time noticed that the Fuel arranged by the procurer is inadequate to meet the demand of the project. The Appellant immediately apprised the Respondent No.1 of its concern with respect to fuel supply and fuel security for the project provided vide its letter dated 22.1.2009 dealing with the issue of fuel supply for the project.

10.25 That the Commission has failed to exercise its regulatory power to provide any guidance regarding usage of domestic coal from non linkage sources i.e. e auction/spot market, coal from PSPCL's own Pachwara Coal Block and/or imported coal from other international sources in view of the deficit vis a vis the actual requirement of coal to run the Plant at 80% availability.

10.26 That the Commission has erred in concluding that the Appellant will not face technical constraints in using the imported coal for the

project as the entire engineering for the project (that has already been completed) and the project equipments are specifically designed/based to operate primarily on domestic coal.

10.27 That the Commission has erred in not providing any effective directions with respect to the Appellant's claim for deemed generation benefits in the event the Respondent No.1 fails to fulfil its obligation of arranging sufficient quantum of coal resulting into fall of the project's generation capacity below the Normative Availability of 80% & 1980 MW of the project.

10.28 That the Commission has failed in providing concrete directions for the inclusion of Unit 3 in the list of projects for commissioning.

10.29 That the non conclusion of unit 3 will have serious adverse implications on the progress and viability of the project.

10.30 That the Commission has erred in directing the Appellant to follow up with the relevant authorities to arrange coal for unit 3 of the Project.

10.31 That the principal obligation of arranging coal under the Competitive Bidding Guidelines, rests with Respondent No.1.

10.32 That the learned Commission ought to have directed R-1 to arrange sufficient quantity and quality of coal for the project including for unit-3 and not the Appellants.

10.33 That the Commission has failed to apply its mind to the actual application of the "Force Majeure" and the "Change in Law" by taking

judicial notice of non-availability of coal for the project. By leaving these issues undecided, the Commission has left the project/investment by the Appellant in complete uncertainty and speculation.

10.34 That the Commission has failed to exercise its regulatory powers as an independent regulator to regulate the industry in such a manner that it becomes competitive making the companies viable so that investments made should not become dead investments. The object of creating an independent regulatory is to take into account the interest of all stakeholders including the Generators and the procurers/consumers and therefore, the Regulator should evolve some mechanism to ensure that the Generator does not become sick or its business does not become unviable.

11. Per contra, the Counsel for the Respondents strongly refuted the submissions of the Appellant and submits as follows:

11.1 that the provisions of the Bidding Documents, the Memorandum of Understanding and the communication between the parties as well as with Mahanadi Coal Field Limited, the issue raised by the Appellant stood addressed. There is no basis whatsoever for the claim made by Talwandi Sabo that the Fuel Supply Agreement should be signed and maintained by PSPCL.

11.2 That the State Commission has decided as to the party which should execute the Fuel Supply Agreement with Mahanadi Coal Field

Limited, namely, whether the Fuel Supply Agreement should be executed by PSPCL or by Talwandi Sabo. The State Commission has not decided on other issues raised by Talwandi Sabo, namely, the consequence of there being a shortfall in the fuel supply by the Coal Company in terms of the Fuel Supply Agreement. The State Commission had at the relevant time directed Talwandi Sabo to vigorously follow up with the Coal Company for signing the Fuel Supply Agreement.

11.3 In regard to the operative part of the Impugned Order dated 27.9.2012 reads as under:

“27. The Commission would like to point out that the respondent appears to have a few other concerns and apprehensions, which have been brought out in its reply to the petition and various subsequent submissions. The Commission opines that these do not fall within the ambit of the decision with regard to the prayer made in this petition, which is for seeking suitable direction(s) for signing of the FSA. Incidentally, the respondent has already conveyed its willingness to MCL to sign the FSA and in turn MCL has invited TSPL for signing the same. Accordingly, other concern(s), if any, should not become an impediment in the course of signing of the FSA. In the opinion of the Commission, the petitioner has no role qua the FSA and MCL and the FSA is required to be signed between TSPL and MCL which for the present is one of the critical links in the chain for timely execution of the Project. In case the respondent has grievance(s) and remedy for the same is not available under the PPA or possibly can not be resolved amicably between the parties mutually and falls within the statutory competency of the Commission, it is free to file a separate petition under the relevant provisions in the Electricity Act, 2003 at appropriate stage. Accordingly, TSPL is directed to

sign the FSA with MCL without prejudice to all the rights and contentions of the parties under the Power Purchase Agreement dated 1st September, 2008. The petition is disposed of accordingly.”

- 11.4 Despite the above, Talwandi Sabo has sought to allege various things in the Appeals. These other aspects, namely, excluding the obligation to execute the Fuel Supply Agreement does not arise out of the impugned Orders dated 27.09.2012 and 24.12.2012 decided by the State Commission.
- 11.5 that at no point of time, was there any representation made by PSPCL that it would be responsible for procuring the coal from Mahanadi Coal Field or otherwise would take the responsibility for the shortfall in the coal supply from Mahanadi Coal Field/Coal India Limited.
- 11.6 that the only representation of PSPCL in the bidding process was that the coal allocation of the above mentioned quantum of 7.70 MTPA from Coal India Limited/subsidiaries was to be given to the project. The above was made known to all the bidders and the bidders were required to submit their bids based on the above position. It was not open to the bidders to make assumptions of overall liability of PSPCL to arrange quantum of coal being made available or otherwise have any claim against PSPCL for procuring a coal allocation for a higher quantum.
- 11.7 That from the fact it was envisaged to assign FSA would mean that all the rights and obligations under Coal Linkage, the Letter of Intent

(LoA) and the Fuel Supply Arrangements would be eventually of the successful bidder and not of PSPCL.

11.8 That the “Task Undertaken” provided in the RFQ namely, obtaining of fuel linkage as one of the task to be undertaken by PSEB/PSPCL before signing of the Share Purchase Agreement with the successful bidder and the bidder being responsible for obtaining all necessary clearances and permits for completion and operation of the project.

11.9 that Clause 2.1.3A providing that the Procurer (PSPCL) will be responsible in the event of minimum off-take guaranteed by the Procurer is not taken and consequent payment to be made by Talwandi Sabo under the Fuel Supply Agreement; and Clause 5.5 in regard to the obligation of Talwandi Sabo to obtain various consents.

11.10 that Schedule-2 of PPA dealing with the initial consents to be obtained by PSPCL is restricted to the Long Term Coal Linkage and not to the signing of the Fuel Supply Agreement.

11.11 Accordingly, the only obligation of PSPCL was to make arrangements for coal linkage. It is thereafter for the selected bidder, in the present case, Sterlite Energy Limited and Talwandi Sabo to deal with the Authorities in regard to the Fuel Supply Agreement and matters connected thereto.

11.12 In the present case even before the bidding, the letter of Fuel linkage dated 28.04.2008 and after bidding the Letter of Assurance 14.08.2008 were given only in the name of Talwandi Sabo.

Accordingly, there is no question of PSPCL signing the Fuel Supply Agreement. In fact, Coal India and its subsidiaries would sign the Fuel Supply Agreement only with the entity to which the Letter of Assurance was issued and not with an entity such as PSPCL which did not issue the Letter of Assurance. Accordingly, Talwandi Sabo was required to sign the Fuel Supply Agreement.

11.13 The communications between Talwandi Sabo, PSPCL and Mahanadi Coal Field extracted herein above clearly establishes the circumstances under which the Fuel Supply Agreement was required to be signed by Talwandi Sabo.

11.14 That there has been no adverse impact or change in regard to the rights and obligations of the respective parties, namely, PSPCL and Talwandi Sabo, by the reason of Talwandi Sabo being required to sign the Fuel Supply Agreement instead of PSPCL signing the Fuel Supply Agreement and assigning all rights and obligations under the Fuel Supply Agreement to Talwandi Sabo. The legal implication is clear. Once the Fuel Supply Agreement is assigned to Talwandi Sabo, all the rights and obligations qua Mahanadi Coal Field would be of Talwandi Sabo. There cannot be any further obligation on the part of PSPCL.

11.15 That the contention of the Appellant is that it is not responsible for execution of the Fuel Supply Agreement or that the responsibility of supplying fuel to the project is that of the answering Respondent is wrong and is a clear after-thought. It is stated that at the relevant time

the case of the Appellant was not that the assignment could not be made by the answering Respondent in favour of the Appellant and it was only for the answering Respondent to execute the Fuel Supply Agreement directly with MCL without any obligation on the part of the Appellant. On the other hand, consistent with the specific provision of assignment and considering the fact that the Letter of Assurance was also in favour of the Appellant directly, the Appellant stated that it would execute the Fuel Supply Agreement with MCL.

11.16 that the claim of the Appellant, seeking to cast the liability on the answering Respondent to arrange for coal or to supply coal to the Appellant is contrary to the Agreement between the parties and also the conduct and representations of the parties. The answering Respondent has not retained any right in the fuel linkage for purchase of fuel by it. The entire obligation of procuring the fuel stands transferred to the Appellant. In view of the above basic premise on which the Appellant has proceeded in the present case is without any merit.

11.17 That the Appellant is not entitled to claim advance rulings on the aspects of coal availability at this stage. The prayers sought in the instant Appeals filed by the Appellant, Talwandi Sabo, cannot be granted and/or be gone into at this stage. At present, the issue needs to be only restricted to the obligation to execute the Fuel Supply Agreement with MCL. The various aspects relating to possible short supply of fuel by MCL under the Fuel Supply Agreement do not arise

for consideration at this stage. The issue of whether coal would be supplied only to the extent of 80% of the annual contracted quantity by MCL and the consequences thereof etc. cannot be considered on a speculative basis and these do not arise for decision at present.

11.18 That for the reasons mentioned herein above, there is no merit in the appeals filed. The Appellant, Talwandi Sabo is seeking to raise various external issues which are not relevant in regard to the challenge to the impugned Orders dated 27.09.2012 and 24.12.2012 passed by the State Commission.

12. Our Discussions and Considerations on the Issues:

12.1 The main contention of the Appellant is that the bid for the project was under Scenario 4 of Case No.2 of competitive bidding where fuel linkage is to be provided by the procurer. Thus, it is the responsibility of the procurer/Respondent to arrange the Fuel of assured quantity, quality, grade and source otherwise, it would amount to converting the nature of the project from Case 2 to Case 1. The bidders were required to bid only capacity charges and the Station Heat Rate under Scenario 4 of Case No.2 and therefore, it is the responsibility of the procurer/PSPCL to arrange adequate Fuel for the ultimate capacity of 1980 MW of the project. Further, the Appellant contested that the procurer has to enter FSA with Mahanadi Coal Field Limited.

12.2 The Respondent PSPCL strongly refuted and denied that it had assured coal to the extent of 7.7 mtpa having GCV of 3900 kCal/Kg

and the same was the condition of the bid document. It was made clear that the Coal may be of E or F Grade as per linkage documents.

Further, it is submitted that the Petitioner has to approach Coal Companies with regard to Coal Linkage and type of coal etc., The Petitioner cannot seek advance decision on the actual supply of coal and the rights and obligations of parties based thereon. PSPCL has submitted that it is baseless to allege that commercial operation date of the project will be affected by the coal supply. The supply of coal becomes relevant only after the commissioning of the project. PSPCL has further submitted that it is wrong that there will be financial or commercial implications on the Petitioner by supply of blended coal by MCL by including an appropriate and permissible quantum of imported coal. All such issues including the cost of coal, variable charges, operational parameters etc would be relevant upon the commencement of actual supply of coal and not at this stage. The Petitioner is raising irrelevant issues at this stage to justify time over run or seek additional tariff.

Further, the PSPCL has denied any obligations on its part to arrange fuel/coal for the project beyond the coal linkage.

- 12.3 After hearing the contention of the Appellant TSPL and Respondent PSPCL we come to the conclusion that the real controversy is whether the Appellant or the Respondent No.1, Punjab State Power Corporation Ltd (PSPCL) is responsible for the execution of the FSA and for making arrangements for the Fuel requirements of the project.

12.4 Now let us examine the relevant parts of the Bid documents, RfA, RfQ, PPA and MoU entered between the parties.

(a) Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees:

(i) Government of India, Ministry of Power vide Resolution dated 19.1.2005 passed a resolution regarding guidelines for procurement of power by the distribution licensees under the provisions of the section 63 of the Electricity Act, 2003. The specific objectives of these guidelines are:

(aa) To promote competitive procurement of electricity by distribution licensees;

(ab) To facilitate transparency and fairness in procurement processes;

(ac) To facilitate reduction of information asymmetries for various bidders;

(ad) To protect consumer interests by facilitating competitive conditions in procurement of electricity;

(ae) To enhance standardization and reduce ambiguity and hence time for materialization of projects;

(af) To provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers.

(ii) Accordingly, in the guidelines, it is clearly specified that the bid documents shall be prepared in accordance with the guidelines specified by the Government of India and the approval of the appropriate Regulatory Commission shall be obtained. Further, approval of the appropriate Commission shall be sought in the event of the deviations from the bidding conditions contained in these guidelines.

(iii) The main controversy pertains to fuel Arrangements for the project. The relevant clause of the bidding document i.e. Clause 3.2 (iv) specifies that “If fuel linkage or captive coal mine)(s) are to be provided, the same should be available before the publication of RFQ. In case, bidders are required to arrange fuel, the same should be clearly specified in the RFQ.

(iv) As per the records/submissions, that the TSPL as a representative of PSEB sought approval for directions regarding time taken for adjustment of fuel charge and the TSPL filed a Petition No.29 of 2007 for approval of deviations from the guidelines procured its order dated 8.11.2007. The relevant part is quoted below:

“...While the Petitioner has reported that approval of the Standing Coal Linkage Committee (Long Term) has been obtained for grant of Letter of Assurance, the Commission notes that it is not clear at this stage whether approval of the aforesaid Committee constitutes the final formal clearance in this respect. On the other hand, it is also evident that the time table for obtaining final clearance for fuel linkage is not in the control of the Petitioner and it may not be proper, therefore, to withhold the bidding process only on this account. The Commission, accordingly, permits deviation in finalizing fuel linkage which would be completed before signing of the Share Purchase Agreement with the successful bidder subject to the conditions that the full cost implication of this or any other activity enumerated above is clearly made known to the bidders before the issue of RfP.”

Thus, the Commission directed the TSPL that the Fuel Linkage should be revealed to all the bidders before issuing RfP.

(b) Request for Qualification:

(i) The Request for Qualification (RfQ) for selection of Developers was issued on 25.9.2007 by TSPL. The relevant Clauses specifies that under Request for Qualification (Revised) for selection of Developer on Build, Own & Operate (BOO) basis through Tariff Based Bidding Process for procurement of Power on Long Term Basis from Thermal Power Station to be set up near Talwandi Sabo at Village Banwala, Distt Mansa, Punjab India is as under:

Clause 1.7:

“Talwandi Sabo Power Limited shall complete the following tasks before the signing of the SPA with the successful Bidder. However, the cost implications of all the acidities required so as to enable the bidders in determination/calculation of tariff will be made known to them at the RfP stage. The tasks are:

1. Project Site identification and acquisition of land required for the project.
2. Obtaining environment clearance for the project
3. Fuel linkage

(c) Transfer of Project Site:

Clause 1.8: The Procurer/Authorised representative will transfer the project site to the successful bidder at a price to be indicated in RfP to implement the project after signing of Agreement.

Clause 1.12: The project shall be based on Coal Procurer has applied to Ministry of Coal for coal linkage and the details of fuel linkage will be provided at RfP stage.

(i) **Second RfP Bidders Conference** was conducted on 8.5.2008 by TSPL and specified the bid conference regarding land acquisition, water linkage and coal arrangements. The following such coal arrangements specified in the Conference:

COAL ARRANGEMENTS

➤ MCL VIDE LETTER DATED 28.04.2008 HAS CONVEYED SUPPLY OF 'E' GRADE COAL – UPTO 5.00 MT DURING 2011-12 AND 7.70 MT FROM 2012-13 ONWARDS

➤ FUEL DATA (WEIGHTED AVERAGE) AS PROVIDED BY MCL FOR 'E' GRADE COAL

MOISTURE(%)	4.8-5.4	5.0
ASH CONTENT(%)	33 – 34	33.9
UHV(kCal/Kg)	3536 – 3600	3536
GCV(kCal/Kg)	4500-4600	4500

(ii) Further, the MCFL informed to TSPL regarding the coal linkage for TSPL project Punjab vide letter dated 28.4.2008.

The relevant part is quoted as under:

“As agreed in the meeting, it is possible to supply up to 5.00 MT coal (E Grade) during 2011-12 and 7.70 MT of Coal (E Grade) from 2012-13 onwards from the mines of Basundhara Coalfield as communicated by Ministry of Coal, Govt of India and also enclosed the analysis result of joint samples collected at loading point for the month of February, 2008.

(d)Request for Proposal:

(iii) TSPL issued Request for Proposal for Selection of Developer on 18.1.2008. As per the RfP document, “**Seller**” shall mean Talwandi Sabo Power Limited, a Company incorporated under the Companies act, 1956 and having its registered office at PSEB Building, the Mall, Patiala-147001

(Pb) for the purposes of development, finance, ownership, design, engineering, procurement, construction, commissioning, operation and maintenance of the project in accordance with ten RfP. Talwandi Sabo Power Limited shall act as the authorised representative till acquisition of its 100% equity shareholding by the Selected Bidder.

(iv) The activities/milestones to be completed before issue of RfP as per bidding guidelines as per Clause 1.4 (A). It specifies project related activities and other project related activities. Under this, the details for fuel is specified as follows:

(aa) Primary (Coal) at 8.7 MT/Year, GCV 3900 kCal/kg and specifies that the Long Term Coal linkage sought and Ministry of Coal, GOI has approved the issuance of Letter of Assurance (LOA).

(ab) Secondary Fuel (FFO/LSHS), 28,000 klitre/annum Bidder's Scope.

(v) Clause 1.7 states that all bidders are required to submit bids in accordance with the instructions set forth in this RfP.

(vi) Clause 2.1.3 of the RfP specifies that a Fuel Supply Agreement will be signed between the procurer and the fuel supplier. The same agreement has a clause whereby the procurer has a right to assign this agreement for a specific

period, within the term of the Fuel Supply Agreement (FSA) to a third party. Accordingly, the FSA will be assigned to the selected bidder during the term of the PPA.

(vii) Clause 2.1.3A of the RfP specifies that once the FSA as per 2.1.3 has been assigned to the Seller, any penalty for not procuring the minimum guaranteed fuel shall be borne by:

(aa) The procurer, if the availability of the Seller's generating plant has been more than the minimum off take guaranteed by the procurer; and

(ab) The seller, if the availability of Seller's generating plant has been less than the minimum availability guaranteed by the Seller.

(viii) **Clause 2.7.1.4:** The Bidder shall inter alia take into account the following while preparing and submitting the Financial Bid:

1. The Bidder shall quote the Quoted Escalable Capacity Charge and Quoted Non-Escalable Capacity Charges. The Bidder shall also quote the Net Quoted Heat Rate (kCal/kWhr). No adjustment shall be provided for heat rate degradation. In case of Quoted Escalable Capacity Charges, the Bidder shall quote charges only for the first Contract Year after Scheduled COD of first Unit.

2. Ratio of minimum and maximum Quoted Capacity Charges during the term of PPA shall not be less than zero point seven (0.7) and this ratio shall be applied only at the Bid evaluation stage on the Quoted Capacity Charges after duly escalating the

Quoted Escalable Capacity Charge on the basis of the escalation rates specified in Clause 3.3.1.3.

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 costs, statutory taxes, duties, levies while quoting such tariff. Availability of the inputs necessary for generation of power should be ensured by the Seller at the 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.

4. Bidders are required to insert the Contract Years, commencing from the Scheduled COD of the first Unit, in the Format 1 of Annexure 4. For instance, if the Scheduled COD of first Unit is on June 1, 2011, then Contract Year corresponding to such date shall be 2011-2012. Thereafter, the Contract Year shall be in terms of subsequent financial years (April 1 to March 31) i.e. the next Contract Year shall be 2012-2013 and so on.

Provided that the last Contract Year in the Format 1 of Annexure 4 shall be the financial year (i.e. April 1 to March 31) in which the [25]th anniversary of the Scheduled COD of the First Unit occurs. For the avoidance of doubt, in case the Scheduled COD of the First Unit occurs on June 1, 2013 then the [25]th anniversary of the Scheduled COD of the First Unit shall occur on June 1, 20[38], i.e. in the Contract Year 20[38]-[39].

5. Bidders shall have the option to quote firm Quoted Energy Charges and/or firm Quoted Capacity Charges for the term of the PPA, i.e. where the Quoted Escalable Energy Charges and/or Quoted Escalable Capacity Charges shall be 'nil' for all the Contract Years.

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.

(e) Share Purchase Agreement:

On 01 Sept, 2008, Share Purchase Agreement was made between Punjab State Electricity Board (PSEB) (hereinafter

referred to as Procurer of the first part) and TSPL, a wholly owned Company of PSEB incorporated under the Companies act, 1956 of the second part and SEL, a Company incorporated under the Companies Act (herein referred to as Selected Bidder” which expression shall, unless repugnant to the context, mean and include its successors in interest) of the third part.

Clause 2 (Transfer of Shares) of the Agreement specifies as under:

2.1 Subject to the terms and conditions of this Agreement, the Shares Seller agrees to sell and transfer to the Selected Bidder and the Selected Bidder hereby agrees to purchase from the Shares Seller, the Sale Shares free from Encumbrances together with all assets and liabilities of the Company with rights and benefits attached thereto in consideration of the Acquisition price and the Covenants, undertakings and the Agreements of the Selected Bidder contained in this Agreement.

2.2 The Shares Seller hereby undertakes to cause the Nominees to transfer part of the Sale Shares held by them as nominees of the Shares Seller to the Selected Bidder and execute any documents required to deliver good title to the Sale Shares to the Selected Bidder.

The SEL was declared as successful bidder and Letter of Intent dated 4.7.2008 was issued by the PSPCL to SEL.

Clause 3: Closing:

Clause 3.3 The Selected Bidder shall immediately upon receiving the Sale Share Certificates and the Share Transfer Forms, duly execute the Share Transfer Forms and duly lodge the Share Transfer Forms and the Share Certificates with the Company along with the names of its nominees to be appointed on the Board of the Company and the address within the jurisdiction of the Registrar of Punjab, which would be the new registered office of the Company. The Company shall upon receipt of the said documents from the selected Bidder, do the following:

(a) Approve the transfer of the shares constituting the sale shares from the shares Seller and the Nominees to the name of the selected bidder and transfer of all assets and liabilities of the company as on closing date:

(b) to (e).....

(f) Approving the draft of all the RfP project documents to be signed by the Company on the closing date and authorise the authorised signatory to sign all the said agreements on behalf of the Company.

Clause 3.5: The selected Bidder hereby acknowledges and agrees that after the date of acquisition of one hundred percent(100%) of the equity shareholding of the Company by the Selected Bidder as per Clause 3.3, (a) the authority of the authorised representative in respect of the Bid Process

shall forthwith cease and any actions to be taken thereafter regarding the Bid Process will be undertaken by the Procurer itself or through its any other authorized representative(s), (b) all rights and obligations of the Authorized Representative in its capacity as the Authorized Representative of the Procurer shall cease forthwith (c) all other rights and obligations of the Company shall be of the Selected Bidder and (d) any decisions taken prior to the date of acquisition by the Company as the Authorized Representative shall continue to be binding on the Procurer.

Clause 5: Obligations of the Selected Bidder:

The selected Bidder agrees that the Shares Seller shall not be liable in any manner, no shall it assume any responsibility or liability whatsoever, in respect of the business of the Company and its operations or activities, arising after Closing Date, to any Person or any authority, central, state, local or municipal or otherwise and the same shall be the sole responsibility of the Selected Bidder.

(g)Power Purchase Agreement:

Power Purchase Agreement was entered into between Pb State Electricity Board and TSPL on 1.9.2008. As per the PPA, the procurer is PSEB or their successor and TSPL (hereinafter referred to as Seller). The relevant part of the PPA is reproduced as below:

“D” Pursuant to the said bidding process, Sterlite Energy Limited has been identified by the Authorised Representative, as the Selected Bidder to construct the Project for a Contracted Capacity (as defined hereunder) of 1841.4 MW and sale and supply of electricity in bulk there from to the Procurer in accordance with the terms of this Agreement.

Contracted Capacity: means

- a) (i) for the first unit, 613.8 MW; (ii) for the second unit, 613.8 MW; and (iii) for the third unit 613.8 MW rated net capacity at the interconnection point, and in relation to the power station as a whole means 1841.4 MW rated net capacity at the interconnection point as mentioned in the Selected Bid,
- b) In case the Seller exercises its option as per Article 3.1.1A, the rated net capacity expressed in MW of each unit and Power Station up to the maximum or the contracted capacity demanded in the RfP.

Or

Such rated capacities as may be determined in accordance with Article 6.3.4 or Article 8.2 of this Agreement.

(i) **Fuel:** Means primary fuel used to generate electricity namely, domestic coal;

(ii) **Fuel Supply Agreements:** means the agreement(s) entered into between the procurer 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 Procurer and the Fuel Transporter for the transportation of Fuel in addition to the Agreement between the Procurer and the Fuel Supplier for the supply of the Fuel;

(iii) **Clause 3.1.2:**The Seller agrees and undertakes to duly perform and complete the following activities within (i) 12 months from the effective date or (ii) 14 months from the date of issue of Letter of Intent, whichever is later, unless such completion is affected due to the Procurer's failure to comply with its obligations under Article 3.1.2A of this Agreement or by any Force Majeure event or if any of the activities is specifically waived in writing by the Procurer:

(iv) **Clause 3.1.2A:** The procurer shall ensure that the following activity is completed within the time period mentioned below:

“Obtaining order of the Appropriate Commission adopting the Tariff under Section 63 of the Electricity Act, 2003, within six months of the Effective Date”.

(v) **Article 4:** Deals with the Seller’s Obligation and Procurer’s Obligation.

(vi) **Article 4.1:** The Seller’s Obligation to build, own and operate the Project.

(vii) **Article 4.1.1** Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller’s own cost and risk for;

(viii) **Article 4.2 : Procurer’s Obligation:** Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller’s own cost and risk, for

(aa) obtaining (other than initial consents) and maintaining in full force and effect all consents required by it pursuant to this Agreement and Indian law;

(ab) executing the project in a timely manner so as to enable each of the units and the Power station as a whole to be commissioned no later than its Scheduled Commercial Operations Date and such that as much of the Contracted Capacity as can be

made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirements throughout the term of this Agreement but under no event earlier than 36 months from NTP.

(ac) owning the project throughout the term of this Agreement free and clear of encumbrances, except those expressly permitted by Article 16;

(ad) procure the requirements of electricity at the project (including construction, commissioning and start-up power) and to meet in a timely manner all formalities for getting such a supply of electricity;

(ae) provide on a timely basis relevant information on Power station specifications which may be required for interconnecting system with the transmission system;

(af) fulfilling all other obligations undertaken by him under this Agreement.

(ix) Article 4.3 : Purchase and Sale of Available Capacity and Scheduled Energy:

(aa) Article 4.3.1: Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurer, and the Procurer undertakes

to pay the tariff for all of the available capacity up to the contracted capacity and scheduled energy of the Power Station, according to its then existing contract capacity, throughout the term of this Agreement.

(ab) Article 4.3.2: Unless otherwise instructed by the Procurer, the Seller shall sell all the available capacity up to the contracted capacity of the Power station to the Procurer pursuant to Dispatch Instructions.

(x) **Article 5.5 Consents:** The Seller shall be responsible for obtaining all Consents (other than those required for the Interconnection and Transmission Facilities and the Initial Consents) required for developing, financing, constructing, operating and maintenance of the Project and maintaining/renewing all such Consents in order to carry out its obligations under this Agreement in general and this Article 5 in particular and shall supply to the Procurer promptly with copies of each application that it submits, and copy/ies of each consent/approval/license which it obtains. For the avoidance of doubt, it is clarified that the Seller shall also be responsible for maintaining/renewing the

Initial Consents and for fulfilling all conditions specified therein.

(h)Memorandum of Standing (MoU)

A Memorandum of Understanding (MoU) is made on 2.9.2008 between Punjab State Electricity Board (hereinafter referred to as PSEB which expression unless repugnant to the context or meaning thereof shall be deemed to include its successors and permitted assigns) of the first part and Talwandi Sabo Power Limited (hereinafter referred as TSPL which expression shall unless repugnant to the context or meaning thereof be deemed to include its successors and permitted assigns) of the other part.

Clause 3: The Fuel Supply Agreement (FSA) shall be signed by PSEB with the coal company within six months from the date of finalisation of the Model FSA, at the request of TSPL, subject to the condition that TSPL shall achieve all milestones/benchmark(s) as stipulated in the Letter of Assurance dated 28 April, 2008 issued by Mahanadi Coal Fields Limited and PSEB shall thereafter assign the same in favour of TSPL.

Clause 4: It is further clarified that TSPL shall be solely responsible for achieving all the milestones/benchmark(s) as stipulated in the Letter of Assurance dated 28th April, 2008

issued by Mahanadi Coal Fields Limited and FSA and for any breach of any conditions stipulated in the Letter of Assurance dated 28 April, 2008 issued by Mahanadi Coal Fields Limited and the FSA.

Clause 5: Nothing in this MOU shall be deemed to constitute a partnership between the parties or constitute any party the agent of any other party for any purpose or entitle any party to commit or bind any other party in any manner or give rise to fiduciary duties by one party in favour of any other.

Clause 6: Neither party shall be entitled to assign or transfer any of its rights or obligations under this MoU except with the prior written consent of the other party concerned.

12.5 After going through the Standard Bid Documents, RfA, RfQ, PPA and MoU, the following important observations are made from the above documents. The main issue in the Appeal is about signing of Fuel Supply Agreement with MCFL and arrangement of Fuel for generation of electricity.

12.6 The State of Punjab decided to call for bids to set-up a 3x613.8 MW (contracted capacity) Coal Fuel power plant for supply of Long Term Power to Punjab State Power Corporation Ltd (a successor entity of erstwhile PSEB). PSPCL incorporated Talwandi Sabo Power Ltd as a Special Purpose Vehicle (SPV) vested with the project and invited bids under Case 2, Scenario-4 of Govt of India guidelines notified

under Section 63 for determination of Tariff by Bidding process to set up a Power Plant at Talwandi Sabo.

12.7 The Bidding documents were prepared as per the guidelines of Government of India to facilitate transparency and fairness in procurement process. As per Case 2, Scenario-4, the procurer has to arrange for fuel linkage and the bidder has to quote the capacity charges and Station Heat Rate. Further, Clause 3.24 of the Bidding Documents specifies if Fuel Linkage or captive coal mines are provided, the same shall be available before the publication of RfQ.

12.8 As per the RfQ, the Talwandi Sabo Power Limited has to perform certain tasks specified before issue of RfP stage and one of the task is Fuel Linkage. TSPL due to delay in completing the task, filed a Petition before the State Commission for approval of certain deviation in Petition No.10 of 2007 and the State Commission approved the deviation in the Order dated 11.6.2007. The relevant part of the Order is as under:

“The Commission is of the view that in order to initiate and complete the bid process for selection of a developer in the shortest possible time frame, deviation from the application of the provisions of Clause 3.2 deserves to be allowed to the petitioner upto the stage of issuance of RFP. Further in order to bring transparency and fairness in the procurement processes, it is necessary to comply with the provisions of Clause 3.2 of the Guidelines before the issue of RFP to ensure that bidders are in possession of all information necessary for the submission of a bid. The Petitioner is, therefore, allowed to initiate the bid process for selection of a developer up to the stage of

RFP. The RFQ notice will, however, explicitly indicate that the activities mentioned in Clause 3.2 of the Guidelines shall be completed before the RFP stage. The prayer of the Petitioner is allowed accordingly”.

12.9 RfQ was issued by TSPL on 25.9.2007 and as per RfQ, TSPL has to complete certain tasks such as project site identification and acquisition of land, environmental clearance, Fuel Linkage, water linkage for the project etc before issue of RfP. TSPL filed another Petition on 10.7.2007 vide Petition No.29/2007 seeking approval of the deviation from the guidelines for determination of tariff by bidding process due to certain modification suggested by the bidders. Accordingly, the State Commission approved the deviation in the Order dated 8.11.2007 and permitted the TSPL's deviation in finalising Fuel Linkage and directed to complete before signing of the Share Purchase Agreement with successful bidder subject to condition that full cost implication of this or any other activity enumerated above is clearly made known to bidders before the issue of RfP.

12.10 TSPL issued Request for Proposal on 18.1.2008. In the RFP documents, TSPL indicated about the primary fuel and secondary fuel. Regarding primary fuel, it is submitted that 8.7 MTPA per year GCV 3900 kCal/kg and also stated that the Long Term Coal Linkage is sought from Ministry of Coal, Government of India. Regarding Secondary Fuel it is specified as bidder's scope. In the RfP Clause 2.1.3 of the Fuel Supply Agreement it specifies that the Fuel Supply Agreement will be signed between the procurer and the fuel supplier.

The same Agreement has a clause whereby the procurer has a right to assign this Agreement for a specific period within the term of Fuel Supply Agreement to a 3rd party. Accordingly, FSA will be assigned to the selected bidders during the term of the PPA.

12.11 The procurer conducted second pre bid conference on 8.5.2008 and informed the bidders regarding coal arrangements by disclosing the MCL letter dated 28.4.2008 in the bid conference. According to MCFL letter, MCFL will supply 'E' grade coal upto 5.00 MTA during 2011-12 and 7.7 MTA from 2012- 2013 onwards. Further MCL has provided technical specifications of "E" grade coal in the same letter. Thus, the TSPL informed all the bidders regarding type of coal and quality of coal to be supplied by MCFL.

12.12 The bidders were asked to quote escalable capacity charges and non escalable capacity charges. The bidders were also directed to quote the Station Heat Rate (kc/kWh) with a note that no adjustments shall be provided for Heat Rate degradation. As per the information provided by TSPL regarding coal linkage and other activities in the bidding conference, the bidders have quoted their bids. SEL was declared as a successful bidder.

12.13 In our opinion, the bidders up to the date of submission of their bids, were under the impression that the Fuel Linkage will be done by procurer, PSEB. Further, during the 2nd bid conference conducted by PSEB/TSPL, the bidders were informed about the MCFL letter dated 28.4.2008 regarding type of coal to be supplied by MCFL. The State

Commission while passing the order dated 8.11.2007, clearly directed the procurer to inform cost implication or any other activity enumerated is clearly known to bidders before the issue of RfP. Bidders have worked out their bid Tariff and capacity charges based on the type of coal and its calorific value and Station Heat Rate etc before the last date of submission of bids i.e. 18.6.2008.

12.14A Tripartite Agreement was entered on 1.9.2008 between PSEB and TSPL and SEL entered into Share Purchase Agreement. As per SPA, 100% of the shares of the TSPL (PSEB) were transferred to lowest bidder i.e. SEL. According to the Share Purchase Agreement, all the rights and obligations of the authorised representative of PSEB i.e. TSPL in its capacity as authorised representative of the procurer shall cease forthwith and all other rights and obligations of the Company shall be of the selected bidder. Further, in its decision taken prior to the date of acquisition by the Company as the authorised representative shall continue to be binding on the procurer (here the procurer is PSPCL).

12.15A Power Purchase agreement was entered on 1.9.2008 between the Punjab State Electricity Board and TSPL. As per the PPA, the procurer is PSEB or their successor PSPCL and TSPL hereunder referred to as a Seller. In the PPA, Fuel is defined as primary fuel used to generate electricity namely domestic coal.

Fuel Supply Agreement **means** the agreement(s) entered into between the procurer 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 Procurer and the Fuel Transporter for the transportation of Fuel in addition to the Agreement between the Procurer and the Fuel Supplier for the supply of the Fuel.

12.16 Analysing the Share Purchase Agreement, Power Purchase Agreement signed by the parties on the same day i.e. 1.9.2008, the Share Purchase Agreement is a Tripartite Agreement and as per SPA, the existence of TSPL (SPV) got vanished and all the rights and obligations of SPV have been transferred to the lowest bidder SEL. On the same day, the Power Purchase Agreement was entered between the procurers PSEB/PSPCL and TSPL (SEL) as a Seller. The Power Purchase Agreement clearly spells that the Fuel Supply Agreement (s) has to be entered into between the procurers and the Fuel Supplier.

12.17 The contention of the Respondent (PSEB) is that, having transferred 100% shares of the then SPV, the liability of entering FSA also transferred from SPV to SEL. It is true that the FSA and PPA was signed by the parties on the same day and hence if at all the obligation lies on the Appellant/Petitioner due to acquiring of 100% Shares of SPV, then the procurer has to incorporate the same Clause in the PPA also that the obligation of signing FSA lies with Appellant, but the Respondent did not contest at the time of signing PPA.

12.18 Subsequently, a MoU was made on 2.9.2008 between the PSEB and TSPL. MoU specifically stated that the Fuel Supply Agreement shall be signed by PSEB with the coal company within six months from the date of the finalisation of the model FSA at the request of TSPL subject to the conditions that TSPL shall achieve all milestones/bench marks as stipulated in the Letter of Assurance (LoA) dated 28.4.2008 issued by MCFL and PSEB shall thereafter assign the same in favour of the TSPL under Clause 3 of the MoU. TSPL shall be solely responsible for achievement of milestones/bench marks as stipulated in the LoA dated 28.4.2008 issued by MCFL. Clause 6 of the MoU specifies that neither party shall be entitled to assign or transfer any of its rights or obligations under this MoU except with prior written consent of the other party concerned.

12.19 Further, Clause 3 of the MoU clearly indicates that the Fuel Supply Agreement (FSA) shall be signed by PSEB with the Coal Company within six months from the date of finalisation of Model FSA at the request of the Appellant TSPL. Further, the Seller TSPL shall achieve all the milestones stipulated in the Letter of Assurance dated 28.4.2008 issued by Mahanadi Coal Fields Limited as specified in Clause 4 of MoU. Thus, we feel that as per MoU, the obligation to sign the FSA lies with the Respondent only viz PSPCL

12.20 On 14.8.2008, MCFL issued Letter of Assurance in the name of TSPL. The important contents of LoA is as follows:

“In consideration of the request by the Chariman cum Managing Director, Talwandi Sabo Power Ltd, No.25, 29 & 30, Officers Flats, Shakti Vihar, Punjab State Electricity Board (PSEB), Patiala-147 001 (Punjab) (hereinafter referred to as “the Assured”) for issuance of Letter of Assurance (hereinafter referred to as “LOA”) requiring 7.72 Million tonnes per annum (mtpa) of E/F Grade coal for its 1800 MW Power Plant (to be) located at Talwandi Sabo (hereinafter referred to as “the Plant”) from about December, 2011 as requested by the assured, Mahanadi Coalfields Limited (hereinafter referred to as “the Assurer”) hereby provisionally assures that it would endeavour to supply coal to the Assured subject to the following terms and conditions specified in LoA”.

12.21 The contention of the Respondent PSPCL is that the Fuel Supplier MCFL had written both the letters dated 28.4.2008 and Letter of Assurance (LoA) dated 14.8.2008 were addressed in the name of TSPL and hence the liability lies on the existing lowest bidder SEL/TSPL. In the letter of Assurance (LoA) dated 14.8.2008, the authorised representative of PSEB i.e. TSPL is called as Assured, the Coal Supplier is called as Assurer.

12.22 Further, as per LoA, the Assured PSEB/PSPCL has to sign the FSA after completing the milestones specified in Clause 2.1 of LoA. As per PPA & MoU, the procurer has to sign FSA and the Seller/Appellant is liable to complete the milestones specified in the LoA and Clause 2.2 of LoA states that the assured shall submit the status of each activity/milestones including the documentary evidence in relation to such stations within the time period as mentioned in LoA. Further, it is also stated in the LoA that Assured

shall not without the express prior consent of the Assurer (MCFL), assign to any third person the LoA, or any right, benefit, obligation or interest therein or thereunder.

12.23 The then TSPL is an authorised representative of PSEB to select the bidder for development of Generating Station for procurement of Long Term Power to the State of Punjab and hence the Fuel Supplier addressed letters to TSPL. Due to shifting of shares of TSPL in the name of Lowest Bidder (SEL), the obligation of signing FSA and shifting of obligations of assigning the Fuel for the Generating Station cannot be shifted in the name of the Appellant because as per the Clause of PPA and MoU, the liability of signing of the Fuel Supply Agreement lies with the procurer PSEB.

12.24 Thus, the PPA, MoU clearly specifies that signing of FSA is the obligations of procurers PSEB /PSPCL only. Due to transfer of 100% share of the then TSPL (SPV) in the name of lowest bidder (SEL now it is called as TSPL), the liability of signing of FSA does not fall in the jurisdiction of the Seller, TSPL.

12.25 We have gone through the Appellant's correspondence (letters dated 29.11.2011 to 29.8.2013) addressed to the Chief Engineer, Thermal Designs Complex, PSPCL, Patiala. The Appellant has been pursuing with the Respondent regarding signing of FSA and for arranging coal to the project. Further, the Appellant has informed MCFL periodically regarding stage of activities specified in the LoA. The Respondent PSPCL replied to TSPL regarding their stand

towards signing of FSA in their replies to the letters received from TSPL.

12.26 The Respondent contested that the Appellant has waited for long time regarding signing of FSA and now raising the issue of Fuel Linkage.

12.27 The contents of one of the letter dated 29.11.2011 is quoted below:

“

In the best interest of our project, we hereby again solicit your kind cooperation in the matter and request you to kindly execute the FSA with MCL and thereafter assign the same in favour of TSPL. Further, we request you that while executing the FSA, please ensure that all the terms of the RfQ, RfP, PPA and the MoU in relation to coal supply are taken care of and our specific concerns as mentioned in the MCL letter reiterated herein below should also be addressed by your good offices while executing the FSA:

1.....

2.....

3.....

We further request that in the event PSPCL is bound to execute the FSA, in its current model form, then PSPCL, should in order to fulfil its obligations under the PPA, arrange for adequate coal availability to TSPL, at the earliest in order to enable TSPL to effectively and efficiently progress with the project. In this regard, we understand that PSPCL has already entered into a joint venture with a third party (as mentioned in Memo No.90/DPT-97 dated February 17, 2011). However, PSPCL in the said Memo has not committed the availability of coal b lock and the timelines for provision of the same. We reiterate that in

terms of the PPA r/w the MoU provision of coal for utilizing the ultimate capacity of the project is the sole responsibility of the PSPCL and therefore request you to please expedite the process.

We further request you to represent to Ministry of power, CEA, Ministry of Coal, Coal India Ltd regarding the FSA terms and conditions which are against the Case 2 tariff based competitive bidding, project and also request the concerned ministries not to cancel the LoA and forfeit the Bank Guarantee of TSPL till the matter is resolved.

We further state that, despite our repeated requests as mentioned above, in the event PSPCL does not execute the FSA with MCL at the earliest, TSPL would be constrained to execute the same keeping in view the best interest of the project and the possibility of MCL revoking its willingness to enter into FSA thereby refusing to provide TSPL with any coal linkage at all. However, the execution of the FSA by TSPL with MCL will be without prejudice to any of TSPL's rights against PSPCL under the RfQ, RfP, PPA, MoU or any law or otherwise.

In anticipation of your kind co-operation in the matter, we remain”

12.28 The contentions of the Respondent-1 is that the Appellant, TSPL in one of their letters dated 4.10.2010 informed MCFL their willingness to sign FSA, further the Appellant in its letters dated 30.7.2010 addressed to Ministry of Power, Government of India requesting for taking up with MOC (Ministry of Commerce) for enhancement of Coal Linkage from 1800 to 1980 MW and sign FSA with it accordingly.

We feel that writing a Letter of Acceptance to MCFL will not take away the responsibility to sign FSA by PSPCL.

Further, in the PPA, it is mentioned that “Pursuant to the said bidding process, Sterlite Energy Limited has been identified by the Authorised Representative, as the Selected Bidder to construct the Project for a Contracted Capacity (as defined hereunder) of 1841.4 MW and sale and supply of electricity in bulk there from to the Procurer in accordance with the terms of this Agreement.

Thus, the Appellant has considered that the procurers will arrange primary fuel for 1800 MW whereas the installed capacity is 1980 MW and hence the Appellant approached Ministry of Power, GOI for requirement of fuel for the extra generation i.e. 180 MW (1980-1900 MW). This does not mean that the Appellant has agreed to sign the FSA.

12.29 The State Commission in the Impugned Order dated 27.9.2012 directed TSPL to sign FSA with MCL. The relevant part of the Impugned Order is quoted below:

“The Commission opines that these do not fall within the ambit of the decision with regard to the prayer made in this petition, which is for seeking suitable direction(s) for signing of the FSA. Incidentally, the respondent has already conveyed its willingness to MCL to sign the FSA and in turn MCL has invited TSPL for signing the same. Accordingly, other concern(s), if any, should not become an impediment in the course of signing of the FSA. In the opinion of the Commission, the petitioner has no role qua the FSA and MCL and the FSA is required to be signed between TSPL and MCL which for the present is one of the critical links in the chain for timely execution of the Project. In case the respondent has grievance(s) and remedy for the same is not available under the PPA or possibly can not be resolved amicably between the parties mutually and falls within the

statutory competency of the Commission, it is free to file a separate petition under the relevant provisions in the Electricity Act, 2003 at appropriate stage”

12.30 We feel that the Commission is legally not right in directing the Appellant to sign the FSA even though the PPA, MoU clearly specifies the obligations of the Procurer.

12.31 The relevant part of the State Commission's Impugned Order 24.12.2012 is quoted below:

“The Commission is of the view that after having signed the SPA on 01.09.2008 for acquiring TSPL, there was no compulsion to sign the PPA on the same day without comprehensively checking all the relevant and important documents, especially those having a bearing on the quoted tariff, as also relating to the operation of the plant. It should have been the foremost endeavour and concern of the Petitioner to check all the relevant documents before signing the PPA. Furthermore, the Petitioner, of its own volition, chose not to raise the issue(s) before the Commission for a period of four years, this Petition having being filed on 10.09.2012 whereas the PPA was signed on 01.09.2008. The Commission is of the opinion that having acquired TSPL, in whose name the LoA was issued, with all its rights and obligations, the Petitioner cannot now, after four years, put the entire responsibility of arranging the coal on the Respondent. The Commission further notes that the Respondent had assigned the FSA to the Petitioner as early as 23.12.2009 as it was appropriate to do so since the LoA was in the name of TSPL which was required to sign the FSA. Moreover, it was only TSPL who could have completed various milestones enlisted in the LoA as pre-conditions for signing the FSA. The Respondent had no role to play in achieving the said milestones. Rightly so, the Petitioner in its letter dated

04.10.2010 informed MCL of the completion of various milestones and its readiness for signing the FSA”.

12.32 In our opinion, it is the Obligation of the Respondent as per RfP, LoA, PPA & MoU to arrange for the Fuel for the Generating Station. Further, we also direct the Appellant to pursue with Ministry of Coal, MCFL and other relevant departments for the fuel even though the Obligation of arranging Fuel lies with the Respondent PSPCL for smooth and timely operation of the Plant.

12.33 The Obligation of signing FSA was clearly specified in the PPA and MoU including arrangement of fuel for the generating plant. Further, the bidding was conducted under Case-2, Scenario-4 of the Standard Bidding documents and as per guidelines specified by Govt of India under Section 63 of Electricity Act, 2003, the procurer has to arrange fuel for the contracted capacity of the Generating Plant.

12.34 As noted above, the Impugned Order dated 27.09.2012 passed by the State Commission in Petition No. 11 of 2012 is under challenge in Appeal No. 84 of 2013. The Appellant/Petitioner filed Petition No. 11 of 2012 before the State Commission seeking its direction to the Appellant for signing Fuel Supply Agreement (FSA) with the Fuel Supplier (Mahanadi Coalfields Limited) for the 1980 MW (3x 660 MW) Thermal Power Project in Punjab. The State Commission vide its Order dated 27.09.2012 came to the conclusion that the said prayer cannot be allowed because the Respondent PSPCL/Procurer had already conveyed its willingness to Mahanadi Coalfields Ltd. to sign the FSA and in

turn, MCL has invited the Appellant, TSPL for signing the same. The State Commission held that the said prayer seeking direction for signing of the FSA does not fall within the statutory competence of the Commission and the Appellant/Petitioner is free to file a separate petition under the relevant provisions of the Electricity Act, 2003 at an appropriate stage.

12.35 Another Impugned Order dated 24.12.2012 passed by the State Commission in Petition No. 46 of 2012 is under challenge in Appeal No. 56 of 2013. By this Impugned Order dated 24.12.2012, the Learned State Commission held that the obligation of signing Fuel Supply Agreement with the Mahanadi Coalfields Limited is of the Appellant/Petitioner and the Respondent, PSPCL is under obligation to sign Fuel Supply Agreement with the coal supplier as the Respondent PSPCL/Procurer had assigned the FSA to the Appellant/Petitioner on 23.12.2009 and it was appropriate to do so since the letter of acceptance was in the name of the Appellant and hence the Appellant was required to sign the FSA with the coal supplier.

13. In view of the above discussion and analysis of the provisions of law including guidelines issued by the Government of India, RFP's request for proposal, Power Purchase Agreement (PPA) and Memorandum of Understanding, we clearly hold that the Respondent No. 1, PSPCL/Procurer is under obligation to sign

the Fuel Supply Agreement with the Fuel Supplier, namely Mahanadi Coalfields Limited and the Procurer cannot be absolved of its obligation to supply fuel to the Appellant/Petitioner for its power generating station and further to sign the Fuel Supply Agreement with the coal supplier.

- 14. All the findings and observations recorded in the aforesaid Impugned Order dated 27.09.2012, are liable to set aside as the said findings in the Impugned Orders are against the provisions of law and are based upon the incorrect appreciation and the documents on record. Consequently, both these Impugned Orders are liable to be set aside and both these Appeals are liable to be allowed.**

ORDER

- 15. Both these Appeals being Appeal No. 56 of 2013 and Appeal No. 84 of 2013 are hereby allowed and Impugned Orders dated 27.09.2012 and 24.12.2012 impugned therein are hereby set aside. The State Commission is directed to pass the consequential order in the light of**

our above noted observations within three months from today under intimation to this Tribunal.

16. No order as to cost.

17. Pronounced in the Open Court on this **7th day of April, 2016.**

(T Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~