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

Appeal No. 36 of 2016 and IA No 91 of 2016

Dated: 3rd July, 2017

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

In the matter of:-

Talwandi Sabo Power Ltd. (TSPL)
Village Banawala,
Mansa-Talwandi Sabo Road,
District Mansa, Punjab-151302 …. Appellant

Versus

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

02. Punjab State Power Corporation Limited (PSPCL)
Office of Chief Engineer Thermal Designs
Thermal Design Complex, Shed No. T-1A
Shakti Vihar, Patiala- 147001 ...Respondent No.2

Counsel for the Appellant: Mr. Amit Kapur
Mr. Vishal Anand
Mr. Akshat Jain
Mr. Jafar Alam
Ms. Aparajita Upadhyay
Mr. Arun Kumar

Counsel for the Respondent: Mr. Sakesh Kumar
Mr. Alok Kumar
Ms. Rita Kumar
Ms. Tanvi Singh for R-1

Mr. M G Ramachandran
Mr. Anand K. Ganeshan
Ms. Swapna Seshadri
Mr. Sandeep Rajpurohit
Ms. Neha Garg
Ms. Poorva Saigal
Mr. Shubham Arya
Ms. Anushree Vardhan for R-2

JUDGMENT

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

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 challenging the Order dated 23.11.2015 (**'Impugned Order'**) passed by the Punjab State Electricity Regulatory Commission (hereinafter referred to as the **'State Commission'**) in Petition No. 31 of 2014 wherein the State Commission has disapproved the pass through of certain components of 'Energy Charges' contrary to clause 1.2.3 of Schedule 7 of the Power Purchase Agreement dated 01.09.2008 ("PPA") between the Appellant and the Respondent No 2 .

2. The Appellant, Talwandi Sabo Power Limited (TSPL), is a company incorporated under the Companies Act, 1956 having its registered office at village Banawala, Mansa - Talwandi Sabo Road, District Mansa, Punjab. The Appellant is a generating company in terms of section 2

(28) of the Electricity Act 2003.Talwandi Sabo Power Limited was a Special Purpose Vehicle (SPV), initially set up by the erstwhile Punjab State Electricity Board ("**PSEB**") for developing Talwandi Sabo Thermal Power Project **("Project")** with contracted capacity of 1800 MW +/- 10% at Banwala, Distt. Mansa, 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 (hereinafter referred to as the 'Act').

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 businesses of PSEB.

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

   i. Erstwhile PSEB invited bids under Scenario-4 of Case-2 of the Competitive Bidding Guidelines ("CBG") under section 63 of the Act from interested parties/bidders to set up the Project for procurement of power on long term basis from the thermal power generating station for the contracted capacity in the range of 1800 MW (+/-10%) to be set up at Village Banawala, Mansa -Talwandi Sabo Road, Mansa, Punjab. In terms of CBG, PSEB incorporated TSPL as SPV to act as its authorized representative in the Bidding process. Request for Qualification ("RFQ") for the Project was

issued on 25.09.2007 and Request for Proposal (“RFP”) for Project was issued on 18.01.2008.

ii. As per terms of the RFP, PSEB had ensured that the fuel requirement of the Project would be arranged by PSEB itself, with coal supply of 8.7 MT / year having Gross Calorific Value (“GCV”) of coal of 3900 kcal/kg. Long term coal linkage had been sought for the Project and the Ministry of Coal; Government of India had approved the issuance of Letter of Assurance ("LoA") to meet the fuel requirement of the Project.

iii. In terms of RFP, a Fuel Supply Agreement (FSA) was to be signed between the Procurer and the Fuel Supplier. Further, the FSA was to be assigned to the selected Bidder during the term of the PPA.

iv. Prior to bidding, the Respondent No 2 informed the prospective bidders that Mahanadi Coalfields Limited ("MCL") had agreed to supply Grade E coal with GCV in the range of 4500-4600 kcal/kg and ash content in the range of 33-34%.

v. On 12.06.2008, a specific query had been raised by a bidder seeking a clarification as to whether the cost of washing of coal would be included in the fuel cost. In reply to the said query, the Respondent No 2 provided a clarification that 'the price of coal for the fuel cost shall be the cost of coal charged by the coal company.'

vi. RFP bid submission date was 23.06.2008. Pursuant to Competitive bidding process, Sterlite Energy Limited (“SEL”) was selected as

the successful bidder. PSEB issued the Letter of Intent (LoI) in favor of SEL on 04.07.2008 calling upon it to acquire 100% shareholding in TSPL.

vii. LoA dated 14.08.2008 was issued by MCL in favour of TSPL (then SPV of the Respondent No 2). Under the LoA, MCL had reserved the right to provide Grade E/F coal for the Project against the assured supply of Grade E coal with GCV 4500-4600 kcal/kg and ash content of 33-34%. Further, as per LoA, MCL also has a right to provide coal through imported sources as against the assured provision of domestic coal only.

viii. SEL acquired 100% stake in TSPL on 1.9.2008 by signing Share Purchase Agreement (SPA) with Respondent No. 2. TSPL entered into the PPA dated 01.09.2008 with Respondent No 2. On 02.09.2008, the Respondent No 2 entered into an MOU with TSPL whereby it undertook to execute the FSA with the fuel supplier and thereafter assign the same in favour of the Appellant.

ix. The Appellant filed Petition No. 46 of 2012 before the State Commission for reasons of delay by the Respondent No 2 in signing of the FSA and Respondent No. 2 also filed Petition No. 11 of 2012 before the State Commission regarding signing of the FSA by the Appellant. Aggrieved by the State Commission's order in the said petitions, appeals were filed before this Tribunal being Appeal Nos. 56 & 84 of 2013. In terms of an Interim Order dated 18.04.2013 passed by this Tribunal in Appeal No. 84 of 2013, the Appellant on 4.9.2013 executed the FSA without prejudice to its rights and contentions.

x. Unit-1 of the Appellant was ready for commissioning activities in July 2013. TSPL, in order to ensure that the coal with ash content of less than 34% is available on time, invited bids on 29.10.2013 for washing of the initial quantity of coal. TSPL selected a bidder based on a transparent competitive bidding process on its own and placed an order for washing of 2,00,000 MT of coal on M/s ACB (India) Limited on 25.12.2013.

xi. After receiving the washed coal from M/s ACB, TSPL requested the Respondent No 2 to pay the charges towards coal washing in terms of the PPA as a part of the actual weighted average cost of the coal in the monthly bills issued.

xii. The Respondent No 2, however, refused to pay the coal washing and associated charges and has withheld approximately Rs 267 Crores till the December, 2015 bill, which are due on account of various components of 'Energy Charges'.

xiii. Aggrieved by the aforesaid facts and circumstances, the Appellant filed a Petition (Petition No. 31 of 2014) before the State Commission. In the said Petition, TSPL inter alia claimed payments towards:

i. GCV of coal most recently received at TSPL's project site on 'As Fired Basis' instead of on Equilibrated GCV (" e-GCV") basis;

ii. Coal Washing Charges;

iii. Transit Losses;

iv. Surface Transportation Charges

v. Finance charges

vi. Advertisement and other related cost of alternate coal procurement tenders

vii. Rake escorting charges

viii. GCV Sampling and testing charges

ix. Unloading charges, and

x. Railway (transportation) shunting charges

xiv. The State Commission vide Impugned Order dated 23.11.2015, disapproved the claim of the Appellant towards payment of the various Fuel Charge Components which are being deducted by the Respondent No 2. Aggrieved by the Impugned Order, the Appellant has preferred the present Appeal before this Tribunal challenging the legitimacy of such deductions (past and present) by the Respondent No 2.

6. **Questions of law:**

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

i. **Whether the Fuel Charge Components form part of 'Capacity Charges' or 'Net Heat Rate' quoted at the time of bidding?**

ii. **Whether the State Commission erred in holding that TSPL ought to have factored the cost of washing coal at the time of submitting its bid, when by their very nature coal washing charges are part of Energy Charges and were not supposed to be quoted by bidders?**

iii. **Whether the Impugned Order was passed in ignorance of the fact that bidding for the Project was based solely on two parameters i.e. Net Heat Rate and Capacity Charges, and bidders did not assume any risk and responsibility in respect of the Fuel for the Project, and that the inclusion of any variable charges in a financial bid could have led either to the sustained unjust enrichment of TSPL or in TSPL suffering sustained losses over the term of the PPA, depending on the actual costs incurred?**

iv. **Whether the State Commission was justified in holding that TSPL ought to have known that the quality of coal to be supplied to the Project would contain ash content of more than 34%, contrary to the express representations of the Respondent No 2 that the ash quantity would not exceed 34%?**

v. **Whether the State Commission erred in holding that the Respondent No 2 was justified in making payments to TSPL on the basis of e-GCV of coal measured by MCL rather than on the basis of the GCV of coal as delivered to the Project site?**

vi. **Whether the State Commission erred in holding that TSPL was under no compulsion to sign the PPA upon successfully bidding for the Project, when it was not possible for TSPL to alter its Financial Bid at such stage on the basis of new information?**

vii. **Whether the State Commission erred in holding that TSPL would only be entitled to receive payments for the cost of coal only on the basis of the charges levied by the Coal Company i.e. MCL, and nothing further?**

viii. **Whether the State Commission erred in holding that surface transportation charges are to be dealt with exclusively based on Clause 9.0 of the FSA?**

ix. **Whether the State Commission erred in holding that TSPL is not entitled to receive unloading charges as such charges are being paid by the 2nd Respondent as part of the Capacity Charges despite the fact that the PPA specifically provides for the payment of unloading charges as part of Energy Charges?**

x. **Whether the State Commission failed to appreciate that the Fuel Charge Components claimed by TSPL fall squarely within the ambit of Clause 1.2.3 of Schedule 7 of the PPA?**

xi. **Whether the State Commission was justified in disallowing payments towards the Fuel Charge Components to the Appellant, contrary to the terms of the PPA?**

7. We have heard at length the learned counsel for the parties and considered carefully their written submissions, arguments put forth during the hearings etc. Gist of the same is discussed hereunder.

8. Following submissions were made before us by the Appellant on the various issues raised in the present Appeal for our consideration:

a) As per the Competitive Bidding Guidelines (CBG) issued by Government of India, no component of primary fuel costs i.e. coal was required to be factored in the financial bid submitted by the Bidders. Only the cost of secondary fuel was required to be included in the Capacity Charges. The relevant extracts of the CBG are reproduced herein below:

"Tariff Structure

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

$$\text{Energy charges} = \frac{\text{Net Quoted Heat Rate x Scheduled Generation x Monthly Weighted Average Price of Fuel}}{\text{Monthly Average Gross Calorific Value of Fuel}}$$

If the price of the fuel has not been determined by the Government of India, government approved mechanism or the Fuel Regulator, the same shall have to be approved by the appropriate Regulatory Commission. In case of coal / lignite fuel, the cost of secondary fuel oil shall be factored in the capacity charges."

Therefore, as per the provisions of the CBG, the bidder i.e. SEL was only required to quote Net Heat Rate and Capacity Charges for the purpose of the bid. The 'Energy Charge' is a function of the

Station Heat Rate, Weighted Average GCV of coal and Weighted Average Price of Fuel as per the formula provided in CBG .The Gross Calorific Value and the price of fuel (i.e., the other two components for calculating Energy Charges) provided by the Respondent No 2 at the time of bid were notional in nature and were used only for the purpose of evaluation of the bids.

b) The Central Electricity Regulatory Commission ("CERC") (Terms and Condition of Tariff) Regulations, 2004 dated 26.03.2004 ("CERC Tariff Regulations, 2004") as amended from time to time defines the term Capacity Charges. As per Regulation 21, Capacity Charges consists of the following components:

   a. Interest on Loan Capital
   b. Depreciation including Advance against Depreciation;
   c. Return on Equity;
   d. Operation and Maintenance expenses;
   e. Interest on Working Capital

   From the above, it is abundantly clear that the Capacity Charge component of tariff is intended to cover only the fixed costs and does not include any variable or fluctuating costs related to fuel i.e. domestic coal, hence Bidders were not expected to factor for any risks associated with the Fuel.

c) Similarly, as per Clause 3 of the RFP issued for the Project, the bidders were required to quote different components of the Quoted Tariff as were specified in Format 1 of Annexure 4 of the RFP

(Clause 3.3.1.3). The relevant extract of the RFP (Format 1 of Annexure 4) are as below:

"ANNEXURE 4

FORMATS FOR FINANCIAL BID

Format 1: Quoted Tariff

Bid for supply of power to the Punjab State Electricity Board (as applicable for Scenario 4 mentioned in Clause 2.7.1.4)

Contract Year	Commencement Date of Contract Year	End Date of Contract Year	Quoted Non-Escalable Capacity Charges (Rs./kwh)	Quoted Escalable Capacity Charges (Rs./kwh)	Quoted Heat Rate (Kcal/kwh)
1.	Scheduled COD of first Unit	March 31			
2.	April 1	March 31		Same as above	Same as above
3.	April 1	March 31		Same as above	Same as above
4.	April 1	March 31		Same as above	Same as above
5.	April 1	March 31		Same as above	Same as above
6.	April 1	March 31		Same as above	Same as above
7.	April 1	March 31		Same as above	Same as above
8.	April 1	March 31		Same as above	Same as above
9.	April 1	March 31		Same as above	Same as above
10.	April 1	March 31		Same as above	Same as above
11.	April 1	March 31		Same as above	Same as above
12.	April 1	March 31		Same as above	Same as above
13.	April 1	March 31		Same as above	Same as above
14.	April 1	March 31		Same as above	Same as above
15.	April 1	March 31		Same as above	Same as above
16.	April 1	March 31		Same as above	Same as above
17.	April 1	March 31		Same as above	Same as above
18.	April 1	March 31		Same as above	Same as above
19.	April 1	March 31		Same as above	Same as above
20.	April 1	March 31		Same as above	Same as above
21.	April 1	March 31		Same as above	Same as above
22.	April 1	March 31		Same as above	Same as above
23.	April 1	March 31		Same as above	Same as above
24.	April 1	March 31		Same as above	Same as above
25.	April 1	March 31		Same as above	Same as above
26.	April 1	25th anniversary of the Scheduled COD of first Unit		Same as above	Same as above

From the above table, it is amply clear that the bidder was only required to quote the Station Heat Rate and Capacity Charges for the purposes of the bid. Hence, the bidders were completely

immune to any risk with respect to fluctuations in the GCV of coal and cost of coal (the other components of Energy Charges) which forms a part of the weighted average price of the fuel.

d) Further, as per clause 2.7.1.4 of the RFP, TSPL was merely required to quote Capacity Charges during the financial bid. It was abundantly clear that no Energy Charges for primary fuel (coal) were to be quoted by the bidders and that the design of the bidding process (Case 2, Scenario 4) did not envisage the factoring of any kind of Energy Charges in the financial bid by the bidders.

e) Under Clause 1.4(B)(2) of the RFP, PSEB had ensured that the fuel requirement of the Project would be arranged by PSEB itself, with coal supply of 8.7 MT / year having GCV of 3900 kCal/kg. It was also specified that the long term coal linkage had been sought for the Project and that the Ministry of Coal, Government of India had approved the issuance of Letter of Assurance ("LoA") to meet the fuel requirement of the Project.

f) Prior to bidding, the Respondent No 2 vide letter dated 18.04.2008 and in the pre-bid conference held on 08.05.2008 at Chandigarh ("RFP Bid Conference") informed the prospective bidders that Mahanadi Coalfields Limited ("MCL") had agreed to supply Grade E coal with GCV in the range of 4500-4600 kcal/kg and ash content in the range of 33-34%. On 03.05.2008, the Respondent No 2 addressed an e-mail to the Appellant stating inter alia that the ash content of the coal would be in the range of 34.4%. The e-mail dated 03.05.2008 was not available in the Appellant's record at the

time of filing the petition before the State Commission and had therefore taken the stand that such information was not sent by the Respondent No 2.

g) Further, additional information vide email dated 12.06.2008 was provided by the Respondent No 2 relating to the proximate and ultimate analysis of coal. Yet again in the said e-mail, the Respondent No 2 had represented to the bidders that MCL had agreed to supply Grade E coal having ash content of 33% - 34%.Thus, the bidders, including the Appellant herein, had premised their respective bids based on the fact that coal of Grade E having ash content of 33% -34% will be provided to it.

h) On 12.06.2008, a specific query had been raised by a bidder seeking a clarification as to whether the cost of washing of coal would be included in the fuel cost. In reply to the said query, the Respondent No 2 provided a clarification that ***'the price of coal for the fuel cost shall be the cost of coal charged by the coal company***.' Although the clarification provided by the Respondent No 2 was vague, the Respondent No 2 did not deny payment towards the washing of coal. Had the Respondent No 2 intended to deny the inclusion of washing charges (as a part of the cost of the fuel) it would have clearly replied to the query stating that the cost of washing would not form a part of the cost of the fuel. An important implication of the Respondent No 2's said clarification is that if the Coal Company i.e. MCL had provided washed coal to TSPL and built the cost of such washing into the bills raised on TSPL, the Respondent No 2 had agreed to pay TSPL for the same.

i) The Appellant was shocked to learn that under the LoA dated 14.08.2008, MCL had reserved the right to provide Grade E/F coal for the Project as against the assured supply of Grade E coal with GCV 4500-4600 kcal/kg and ash content of 33-34% as was represented by the Respondent No 2 prior to Bidding i.e. in the letter dated 18.04.2008, the RFP Bid Conference as well as email dated 12.06.2008. As per the Ministry of Coal, Government of India, gradation of coal norms, the ash content of Grade E coal is 34.1%- 40% and that of Grade F coal is 40.1% - 47%. Thus, there was a material difference between the quality of coal assured by the Respondent No 2 based on which the bid was submitted on 23.06.2008, and the quality of coal now to be received by the Appellant.

j) In its notification G.S.R. 560 (E) dated 19.09.1997, pertaining to the transportation and use of coal with specified ash content, the Ministry of Environment and Forests, Government of India (MoEF) provides as follows:

> *"(8) On and from the 1st day of June 2001, the following coal based thermal power plants shall use beneficiated coal with an ash content not exceeding thirty-four percent namely:*
>
> *(a) any thermal power plant located beyond one thousand kilometres from the pit-head and*
> *….."*

Further, in its Notification G.S.R. 02(E) dated 02.01.2014, the MoEF provided as follows:

"(8) With effect from the date specified hereunder, the following coal based thermal power plants shall be supplied with, and shall use, raw or blended or beneficiated coal with ash content not exceeding thirty-four percent, on quarterly averages basis namely :

a. A stand-alone thermal power plant (of any capacity) or a captive thermal power plant of installed capacity of 100 MW or above located beyond 1000 kilometers from the pit-head or, in an urban area or an ecologically sensitive area or a critically polluted industrial area, irrespective of its distance from the pit head, except a pit-head power plant, with immediate effect.

……..

Explanation: For the purpose of this rule, -

(i) 'beneficiated coal' means coal containing higher calorific value but lower ash than the original ash content in the raw coal obtained through physical separation or washing process,

……."

Therefore, the Appellant came to know of the need to incur the costs of washing the coal much after the final date of bid submission and was never expected to factor for the cost of washing the coal into its Financial Bid.

k) Aggrieved by the aforementioned events, TSPL addressed various letters to the Respondent No 2, requesting it to fulfill its obligations to provide the coal of grade and quality as specified and assured during the pre-bid stage. The Respondent No 2, however, failed to address the aforesaid issue.

l) Once the PPA was signed and the Appellant acquired the SPV on 01.09.2008, the Respondent No 2 turned a blind eye towards its obligation of executing the FSA and assigning the same to the

Appellant. The Appellant filed Petition No. 46 of 2012 before the State Commission for reasons of delay by the Respondent No 2 in signing the FSA. Aggrieved by the State Commission order in the said petition, an appeal was filed before this Tribunal being Appeal Nos. 56 & 84 of 2013. In terms of an Interim Order dated 18.04.2013 passed by this Tribunal in Appeal No. 84 of 2013, the Appellant executed the FSA without prejudice to its rights and contentions.

m) Pursuant to this Tribunal's interim order dated 21.08.2013 in I.A. No. 226 of 2013 in Appeal No. 56 of 2013 and the State Commission's Order dated 11.02.2014 in Petition No. 60 of 2013, the Appellant was allowed to procure alternate coal to meet the expected shortfall of coal from MCL linked sources. The said order of the State Commission dated 11.02.2014 also constituted a 'Standing Committee on TSPL Project comprising of the Secretary, Power/Govt. of Punjab, CMD/ the Respondent No 2 and COO/TSPL to resolve day to day issues pertaining to the Project. The issue of coal washing was discussed by the said committee but could not arrive at a common understanding.

n) **Appointment of a Washery Contractor**

i. Unit I of the Appellant's Plant was ready for commissioning activities in July 2013 and the Appellant was awaiting supply of coal to achieve Commercial Operation Date (CoD) shortly. TSPL, in order to ensure that the coal with ash content of less than 34% is available on time, invited bids on 29.10.2013 for washing of the initial quantity of coal. Although TSPL vide

letter dated 12.11.2013 requested the Respondent No 2 to participate in the price bid opening process for coal washing bids; the Respondent No 2 vide letter dated 13.11.2013 refused to participate. Left with no other option, TSPL selected a bidder based on a transparent competitive bidding process on its own and placed an order for washing of 2,00,000 MT of coal on M/s ACB (India) Limited on 25.12.2013.

ii. After receiving the washed coal from M/s ACB Ltd, TSPL requested the Respondent No 2 to pay the charges incurred towards coal washing in terms of the PPA as a part of the actual weighted average cost of the coal in the monthly bills issued. The Respondent No 2, however, refused to pay the coal washing and associated charges.

iii. TSPL is entitled to receive payment of the cost associated with the washing of the coal as the same forms an integral part of the actual cost within the meaning of phrase purchasing, transporting and unloading as mentioned in the PPA. According to Schedule 7, clause 1.2.3 of the PPA, Energy Charges are based on "***the weighted average actual cost to the Seller of purchasing, transporting and unloading the coal most recently supplied to and at the Project***". The terms purchasing, transporting and unloading emphasize that though the linkage was arranged by the Respondent No 2 but in order to be able to transport and use this linkage, the Appellant was required to get the coal washed in order to meet the law of the land i.e. MoEF norms. Moreover, the term

"actual cost to the seller" has been used in the PPA with the specific intention of passing on the actual cost of coal purchase, transportation and unloading as incurred by seller.

iv. The term "***most recently supplied to and at the project***" postulates that all the costs incurred for supply of coal as arranged by the Respondent No 2 up to the project site are to be considered for computation of Energy Charges. Since in the present case, the coal was required to be washed (to meet the MoEF norms) before transportation and/ or use, the cost of the same would necessarily be included in the fuel cost. A conjoint reading of clause 1.2.3 of Schedule 7 of the PPA along with the definition of the terms 'Project' and 'Power Station' (as defined in Article 1 of the PPA) clearly shows that term 'Project' mentioned in clause 1.2.3 of the PPA means the Power Station of TSPL. Thus, in terms of Clause 1.2.3 of Schedule 7 of the PPA, TSPL is entitled to receive payment towards cost of washing of coal and other associated costs.

o) The judgment dated 14.12.2016 passed in the Nabha Power case (Appeal No. 64 of 2016) by this Tribunal will not be applicable since in the present case, PSPCL undertook the obligation of signing the FSA and arranging the coal which is not the case in Nabha Power. A comparison between the definition of ‘Fuel Supply Agreement’ in TSPL’s case and Nabha Power’s case clearly lays down the distinction as under:-

Nabha Power Ltd. PPA	Talwandi Sabo Power Ltd. PPA
*"FSA means 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".*	*"FSA 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."*

Signing of FSA and arrangement of coal for the project is the obligation of PSPCL which is established in view of this Tribunal's judgment dated 7.4.2016 passed in Appeal No. 56 & 84 of 2013, PSPCL's undertaking before Hon'ble Supreme Court on 2.5.2016 and the State Commission's consequential Order dated 6.9.2016.

p) Other major difference Nabha Power Ltd. and TSPL case is that all along in case of TSPL it was informed to the bidders that the coal arranged by PSPCL is having ash content less than or equal to

34% based on which the bid was submitted by the Appellant. In case of Nabha Power Ltd. the grade of coal informed was ‘F’ grade.

q) **Fuel Charge Components incurred by TSPL in respect of the Coal supplied to and at the Project**

TSPL vide its bills also claimed the following charges as components of 'Energy Charges':

i. **Transit Losses**: Transit losses are the costs associated with the loss of quantity when the coal is transported from one place to another over long distances and included in cost of transportation as 'Energy Charges' mentioned in Clause 1.2.3 of Schedule 7 of the PPA. The State Commission has allowed a transit loss of 1% or actual whichever is lower to all of PSPCL's plants in the state of Punjab. TSPL has on its own regulated its claim of Transit losses to 1% or actual whichever is lower.

ii. **Transportation Charges**

Transportation Charges as incurred by TSPL for transportation of coal from MCL mines to TSPL site consist of following:

a) **Surface Transportation Charges**: Charges for transportation from MCL mines to nearest Railway siding or MCL mines to Washery siding. The Respondent No 2 has denied payment of Surface Transportation Charges (transportation through road mode) on an arbitrary interpretation that the transportation cost includes only rail transportation.

b) **Railway Freight**: These charges are paid to Indian Railways to transport coal from coal mine areas to the Transit Point in TSPL plant's railway siding served by Sada Singh Wala railway station of Indian Railways.

c) **Railway (Transportation) Shunting Charges**: These charges are paid to the Indian Railways by TSPL for the 'to and fro' movement of Indian Railway's engine to and from the transit point of TSPL's project site. The Respondent No 2 had initially been paying TSPL for these charges, in the normal course as part of Energy Charges but has abruptly stopped paying the said Railway Shunting Charges and has also unilaterally adjusted the amounts paid earlier in this regard.

iii. Further, TSPL also incurs following cost towards unloading at the TSPL site:

- Diesel consumed for TSPL Loco for Coal movement from transit point to wagon tippler and vice-versa.
- Operation charges for manpower operating TSPL Loco.
- Other Rake handling and In-plant movement charges related to unloading including manpower.
- Consumption of electricity for Wagon Tippler.
- Manual unloading charges, if applicable

The aforementioned costs are included in cost of transportation and unloading as 'Energy Charges' and are thus payable to the Appellant.

iv. **Finance Charges**: TSPL was permitted to procure alternate coal only subsequent to the bidding as permitted by the State

Commission in its order dated 11.02.2014 in Petition No. 60 of 2013 pursuant to this Tribunal's order dated 21.8.2013. Therefore, the Appellant could not have factored the said cost at the time of bidding. Finance charges include the cost incurred for maintaining the Letter of Credit, Bank Guarantee etc. related to alternate coal procurement. As per the clause 1.2.3 of Schedule 7 of the PPA, weighted average actual cost of the coal supplied to and at the Project is to be taken for calculation of 'Energy Charges' for billing and thus must be paid to TSPL .

v. **Advertisement and other related cost of Alternate Coal Procurement Tenders**

TSPL incurs certain costs towards the publication of each tender for procurement of alternate coal as per the order of this Tribunal dated 21.08.2013 and the order of the State Commission dated 11.02.2014. The said costs form a part of the cost towards purchasing coal and therefore form a part of Energy Charges.

vi. **Rake Escorting Charges**

Rake Escorting Charges are the costs incurred by TSPL in escorting the Indian Railway Rakes to avoid/ prevent theft of coal in transit phase from the MCL Mines/ Imported Coal Stockyards etc. till TSPL's Project site. The said cost forms a part of transportation costs and thus falls within the ambit of 'Energy Charges' as per Schedule 7 of the PPA.

vii. **GCV Sampling and Testing charges**

The sampling and testing of coal is carried out at the loading point of MCL in pursuance of the sampling guidelines laid down by Coal India Limited and being an integral part of coal cost it must be paid to the Appellant.

r) **PPA contemplates payment of Energy Charges for GCV on As Fired Basis and not on an e-GCV Basis**

i. The GCV of coal invoiced by MCL/CIL (which is e-GCV) regularly varies significantly from the GCV of coal received at site. The degree of variation is not predictable and cannot be captured in a bid. Moreover, by design, bidders were provided with the values of GCV and price of coal and were not required to factor any risk associated with the GCV or price of coal.

ii. In the formula for computation of Energy Charges under the PPA there is an embedded element of specific coal consumption which represents the actual coal consumed in generation of electricity. Specific coal consumption gets computed by dividing the heat rate by the GCV of coal. In the method of energy charge computation as adopted by PSPCL the GCV of coal is considered on eGCV basis which is a theoretical measurement. Consideration of eGCV at mine end fails to take into account loss of GCV due to absorption of moisture, transit loss, etc., and hence results in the developer burning coal of a lower GCV and getting reimbursed for an inflated and notional GCV. As a result, the specific coal consumption so derived does not represent the actual quantity of

coal consumed in generation of electricity and thereby does not ensure pass through of actual cost.

iii. Equilibrated GCV (e-GCV) is a notional figure computed under test conditions, used for the purpose of maintaining uniformity in GCV measurement and pricing across coal companies under CIL. Equilibrated basis is a method of computation of GCV which cannot be made the basis for computation of energy charges. It is significantly higher than the actual GCV of the coal received by the developer, which is resulting in an under recovery of the cost incurred by the Appellant in burning the coal received from the coal company.

iv. The difference between GCV on an 'As Fired Basis' and e-GCV essentially occurs because of various factors which are beyond the control of generating companies. Hence, TSPL and other bidders were not expected to factor these completely unpredictable and uncontrollable parameters in their tariff bids for the project. Further nowhere it was mentioned that GCV (as used in the PPA) actually means e-GCV which the Respondent has adopted for payment purposes.

v. In the event that due to efficiency gains on the part of CIL/ MCL and the railways, the gap between the GCV of coal estimated on 'As Fired Basis'' and on e-GCV basis is substantially bridged, a bidder who had taken a 1000 kcal difference between the two (and factored in a high e-GCV) would be enormously enriched over a

period of 25 years of the power purchase agreement, without any contribution on its own part to the said efficiency;

vi. The definition of 'PCVn' (the GCV component) as used in the formula for the Monthly Energy Charges, provided at Clause 1.2.3 of Schedule 7 of the PPA, states as "***the weighted average gross calorific value of the coal most recently delivered to the Project*** " The State Commission has held that the Respondent No 2 is only liable to pay the coal cost component as charged by MCL with the GCV mentioned in bills raised by MCL, which is on e-GCV basis. Clause 1.2.3 of Schedule 7 of the PPA does not limit the costs payable to the Appellant only to those charged by the coal company i.e. MCL.

vii. The measurement of coal on e-GCV basis does not reflect the true quality of the coal ***'most recently delivered to the Project'***. The PPA uses the term ***'delivered to the Project'*** instead of ***'delivered to the Seller'***. The terms 'Project' and 'Seller' are specifically defined in the PPA and have distinct and separate meanings, the former refers to TSPL as an entity and the latter to the physical assets and equipment used in the thermal power plant. As the PPA specifically states that the GCV must be taken at the project site alone (i.e. TSPL project) and not at the MCL coal mine, based on the coal most recently delivered to the Project.

s) PSPCL is obliged to compensate TSPL as per the principle set out in Section 70 of the Indian Contract Act, 1872 as it is the obligation of PSPCL to arrange the coal for the Project. This has been held by Hon’ble Supreme Court in catena of judgments including Food

Corporation of India Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd. (2007) 13 SCC 544. PPA is to be given effect keeping the interest of all stakeholders and intention of parties executing the PPA. In this regard the Appellant has relied on the judgment of the Hon'ble Supreme Court in DLF Universal Ltd. Vs. Town and Country Planning, Haryana (2010) 14 SCC 1 and on 6th Edition of 'The interpretation of Contracts' by Sir Kim Lewison.

t) The Appellant also submitted that as a rule obligation under a contract cannot be assigned except with the consent of promisee. On the other hand, rights under a contract are assignable. In this regard the Appellant relied on the judgments of Hon'ble Supreme Court viz. Khardah Co. Ltd. Vs. Raymon & Co. Pvt. Ltd. (1963) 3 SCR 183, Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd. (1999) 2 SCC 37 and ICICI bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd. (2010) 10 SCC 1.

9. Following submissions were made before us by the Respondent No 2 on the various issues raised in the present Appeal for our consideration:

a) The PPA has been entered into and the project has been awarded to the Appellant pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003, being a Case-2 bidding process as per the Competitive Bidding Guidelines notified by the Government of India and as approved by the State Commission.

b) Being a competitive bidding process, the rights and obligations of the parties are strictly governed by the PPA entered into. There

can be no claim of the Appellant which is maintainable de hors the provisions of the PPA. Further, the risks and obligations of PSPCL are clearly defined and identified in the bidding documents including the PPA and unless any particular risk or cost specifically agreed to be to the account of PSPCL, all the costs, risks, obligations etc are that of the bidders.

c) The entire petition before the State Commission proceeded on the basis that the Appellant is entitled to a cost plus tariff under Sections 61 & 62 of the Act and not a competitive bidding methodology under Section 63 of the Act. The claims of the Appellant before the State Commission which were based on the premise that any and every cost incurred by the Appellant in the procurement of coal and generation of electricity is to be reimbursed by PSPCL are fundamentally flawed.

d) The Appellant in its petition before the State Commission contended that the claims arose on the basis of the Changes in Law brought about by the MoEF requiring the washing of coal subsequent to the Cut-Off Date, namely, 7 days prior to the bid deadline which was not correct.

e) The bidding documents (Case 2) required the prospective bidders to quote the capacity charges and the Net Heat Rate, which were the criteria for bid evaluation. The capacity charges to be quoted by the prospective bidders were required to include all costs, expenditure, risks, obligations etc. associated with the power project and which were not specifically agreed to be to the account

of PSPCL. It is not that the capacity charges was only to the extent of depreciation, return on equity, interest on loan etc as understood in a cost plus tariff determination exercise.

f) The recent Full Bench judgment of this Tribunal dated 07/04/2016 in Appeal No. 97 of 2014 & batch in case of Uttar Harvna Bijli Vitran Nigam Ltd vs. CERC & Ors and batch, has held that in a competitive bidding process, the relief of additional tariff / compensation can only be claimed in terms of the PPA and not dehors thereof. This issue was also repeatedly raised by PSPCL before the State Commission wherein PSPCL called upon the Appellant to state as to under which provision of the PPA relief was being claimed by the Appellant.

g) PSPCL wishes to place on record the following relevant extracts from the Competitive Bidding documents -

"(i) EXTRACTS FROM RFQ

Tasks Undertaken*: The Punjab State Electricity Board (PSEB), Punjab, has incorporated a company under the name Talwandi Sabo Power Limited, which would operate as a Special Purpose Vehicle (SPV) and would be domiciled for the Project. The development of the project near Talwandi Sabo at Banawala Village, District Mansa, Punjab, India has commenced. About 2,100 acres of land is being made available. The Bidders can choose any configuration as per land availability. Land will be made available to the Successful Bidder or the Developer free of encumbrances. Resettlement & Rehabilitation-issues would be the responsibility of Govt./PSEB. The following tasks shall be completed before the signing of the SPA with the Successful Bidder. However, the cost implications of all the activities 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:*

- *Project Site identification and acquisition of land required for the Project Environment clearance for the Project.*
- *Fuel linkage*
- *Water linkage for the Project*

Transfer of Project Site: *The SPV along with the land for the Project Site will be transferred to the Successful Bidder at a price to be indicated at the RFP stage. (Annexure-A)*

Clearances, consents and permits*: The Bidder shall be responsible for ensuring that all the necessary clearances and permits required for completion and operation of the Project during the term of PPA, other than what is relevant to the task completed by the Procurer are timely procured and renewed by Talwandi Sabo Power Limited " (Annexure-A)*

(ii) EXTRACTS FROM RFP

"The Procurer/procurer through the Authorized Representative has initiated development of the project near Talwandi Sabo at Village Banawala Dist. Mansa, Punjab, India. The status of completion of various activities/milestones is given as under:

Activities / Milestones to be completed before issue of RFP as per Bidding Guidelines.

2.1.3 : 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.

2.1.3 A 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:

a) The Procurer, if the availability of the Seller's generating plant has been more than the minimum offtake guaranteed by Procurer; and

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

2.7.1.4 The Bidder shall inter alia take into account the following while preparing and submitting the Financial Bid:-

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 Bidders shall quote charges only for the first Contract Year after Scheduled COD of first Unit

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.

The Quoted tariff in Format 1 of Annexure- 4 shall be an all inclusive tariff and no exclusion 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.

Bidders are required to insert the Contract Years, commencing from the Scheduled COD of the first Units, 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. Therefore, 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.

.....
.....

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.

The Bidders should factor the cost of the secondary fuel into the Quoted Tariff and no separate reimbursement shall be allowed on this account.

3.3.1.3 The Bidders shall quote the different components of Quoted Tariff as specified in Format 1 of Annexure 4. Based on the Quoted Tariff provided by the Bidders, the Levelised tariff (in Rs. Per Kwh) of each Bid shall be calculated for the term of the PPA as per the methodology mentioned below:

For the purposes of comparison of Financial Bids, the Quoted Escalable Capacity Charge of each Bidder shall be uniformly escalated as per the inflation / escalation rates mentioned below. For the actual tariff payment, however, such factors shall be applied as per the provisions of the PPA.

…….

…….

…….

The factor at Sl No. 1 in the above table shall be applied from the Scheduled COD of the first Unit and the factor at SL No. 2 shall be applied from the bid Deadline. Further, all the factors (mentioned in SL No. 1 and 2) shall be applied as at the mid-point of each Contract Year."

***(iii) EXTRACTS FROM PPA** dated 01/09/2008 :*

"Fuel" means primary fuel used to generate electricity namely, domestic coal;

"Fuel Supply Agreement" means the agreements(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,

3.1.2 A The Procurer shall ensure that the following activities 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 ofthe Effective Date.

4.2 Procurer's Obligation
Subject to the terms and conditions of this Agreement, the Procurer:

Shall be responsible for procuring the Interconnection and Transmission Facilities to enable the Power Station to be connected to the Grid System not later than the Scheduled Connection Date;

shall ensure that the Seller is provided an electrical connection for reasonable construction, commissioning and start up power at the Project as reasonably requisitioned by the Seller by written intimation to the Procurer, on then prevalent terms and conditions as applicable to such consumers;

Shall be responsible for payment of the Transmission Charges and RLDC and SLDC Charges;

Shall make all reasonable arrangements for the evacuation of the Infirm Power from the Power Station, subject to the availability of transmission lines and fulfilling obligations undertaken by them under this Agreement.

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.

SCHEDULE 2: INITIAL CONSENTS:

i. Notification by Government of Punjab for acquisition of land under the land Acquisition Act;
ii. Environmental Clearance;
iii. Long term coal linkage;
iv. Water linkage;
v. Tasks mentioned in Article 3.1.2A of PPA on their completion within the time period provided therein."

h) Merely because the bidders were required to quote the net heat rate and the capacity charges do not mean that all other costs which may be incurred by the Appellant would become a pass through in tariff or alternatively can be claimed by the Appellant under Clause 1.2.3 of Schedule 7 of the PPA. The bidding documents had been circulated to all bidders and the bidders were required to factor in all their costs and expenses except the costs which would be reimbursed by PSPCL.

i) **GCV of Coal as received at the project site**

a) The Appellant has claimed the GCV of coal to be as received at the project site. In other words, the difference in GCV on account of incorrect delivery of coal as per the GCV billed, any pilferage, contamination etc. resulting in loss of GCV by the time the coal

reaches the project site is sought to be passed on to PSPCL and consequentially to the consumers in the State of Punjab.

b) With regard to the contention of the Appellant that GCV should be taken on as fired basis, the RFP specifically provides as under –

"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 Bidders 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 exclusion 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 Units, 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. Therefore, 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 25th 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 25th anniversary of the Scheduled COD of the First Unit shall occur on June 1, 2038, i.e. in the Contract year 2038.

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."*

Therefore, it was for all bidders including the Appellant to take into account all costs including the GCV of coal.

c) 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.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. Once the coal is delivered, the entire risk associated with the coal is to the account of the project developer.

d) The delivery of coal by Coal India Limited/MCL to the Appellant is at the point of loading, at which point the risk and title over the coal passes on to the Appellant. The PPA does not provide for coal as received or delivered at the project site to be the basis for calculation of GCV for the purposes of energy charges. In this regard, the PPA in Clause 1.2.3, Schedule 7, inter-alia, provides as under -

> *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."*

e) The conscious and specific expression used with regard to the GCV is ***'average gross calorific value of the coal most recently delivered to the Project'***. The expression used is not ***'at the Project'***. The above is in contradistinction to the definition of $F^{COAL}n$, wherein the expression-used is ***'to and at the Project'*** and reads as under -

> *"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)"*

The above establishes the following:

i. The situs of **'to the Project'** is different from **'at the Project'**. Both the expressions obviously do not refer to the same place otherwise there would be no purpose in the specific term being used 'to the project' and 'at the project' separately. If the term 'to the Project' is interpreted to mean at the project site, the term **'to and at the Project**' would be redundant. The same term 'to the project' would have then been used.

ii. The term '**at the Project'** obviously refers to the project site whereas '**to the Project'** refers to when the delivery is made and the risk and title passes on to the Project.

iii. When the term '**at the Project'** is used, the said definition also includes the transportation and unloading of coal. This itself establishes that '**at the project'** is after transportation of coal from the coal mine to the project site. Whereas the term '**to the project'** is before transportation of coal, where the risk and title over the coal passes on to the Appellant.

f) 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, there would be some mechanism provided for in the PPA for joint inspection of the GCV of coal as received at the project site.

j) **WASHING CHARGES**

i. The claim for washing charges was made by the Appellant as a change in law in terms of Article 13 of the PPA. The case of the Appellant was that due to a notification dated 02/01/2014 issued by the MoEF there is a change in law requiring the Appellant to wash the coal and therefore, the coal washing charges should be allowed to the Appellant.

ii. Article 13 of the PPA deals with Change in Law. Article 13.1.1 of the PPA defines the term " Change in Law" and the relevant extract of the same is reproduced below;

""Change in Law" means the occurrence of any of the following events after the date, which is seven (7) days prior, to the Bid Deadline:

(i) the enactments, brining into effect, adoption, promulgation, amendment, modification or repeal, of any Law or (ii) a change in interpretation of any Law by a Competent Court of Law, tribunal or Indian Governmental Instrumentality provided such Court of Law, tribunal or Indian Governmental Instrumentality is final authority under law for such interpretation or (iii) change in any consents, approvals or licenses available or obtained for the Project, otherwise than for default of the Seller, which results in any change in any cost of or revenue from the business of selling electricity by the Seller to the Procurer under the terms of this Agreement, or (iv) any change in the (a) Declared Price of Land for the Project or (b) the cost of implementation of the resettlement and rehabilitation package of the land for the Project mentioned in the RfP or (c) the cost of implementing Environmental Management Plan for the Power Station but shall not include (i) any change in any withholding tax on income or dividends distributed other shareholders of the Seller, or (ii) change in respect of UI Charges or frequency intervals by an Appropriate Commission."

iii. The bid deadline date under the Tariff Based Competitive Bidding Process initiated by PSPCL was 23/06/2008. The Cut Off Date for the purpose of considering the Change in Law occurring in the tariff adjustment in terms of Article 13 of the Power Purchase Agreement is 16/06/2008 being 7 days prior to the bid deadline on 23/06/2008. Even at the relevant time i.e. on the Cut Off Date mentioned herein above, there was a directive of the Central Government vide Notification dated 19/09/1997, that in case of coal with ash content of 34% and above requiring transportation to power projects at a distance of 1000 KMs and above, it is

necessary to undertake washing of coal and transportation of washed coal. The requirement to undertake washing of coal is not an event subsequent to the Cut Off Date specified in the Bidding Documents, namely, 7 days before the Bid Deadline i.e. as on 16/06/2008 and not a change in law as per the PPA.

iv. The Notification dated 02/01/2014 issued by the MoEF is not the first occasion where the requirement of washed coal to be used has been imposed. This is evident from the Notification of the Government of India in the year 1997, wherein, the requirement of washing of coal, had been already specified. The MoEF notification of 1997 is to be additionally complied with, independent of Environmental Clearance dated 11/07/2008 of Ministry of Environment and Forest.

v. Reduction in ash content of the coal can be either through physical process or through washing process. The normal course of separation of ash content is through washing process, particularly, in the case of coal of Grade E, Grade F etc. which has higher quantum of ash content. The physical separation may be possible in the case of coal of higher Grade such as Grade A or B where the ash content may be in the range of 20%. PSPCL is not involved in the activities of separation of coal by physical segregation.

vi. Further, at the time of the bidding, PSPCL had agreed to pay as the fuel cost only the price that may be charged by the Coal Company, namely, Mahanadi Coal Field Limited. PSPCL had not agreed to make any payment for the washing of coal. The

Appellant was fully aware of the terms on which the bid was invited by PSPCL, namely, that PSPCL will not be required to pay the charges for washing of coal and also the statutory requirement in regard to the washing of coal before transportation. The Appellant submitted the bid based on the above and should, therefore, be deemed to have accepted the condition that PSPCL, will not be required to pay any additional charges for the purpose of washing of the coal.

vii. The Appellant should have submitted their bids after factoring in all the information supplied to them by PSPCL. Moreover, it was obligatory on the part of bidders to seek and confirm the information available in public domain on CIL website with regard to the ash content of all grades of coal including grade E which is in the range of 34.1% to 40% i.e higher than 34%. Such important information on which the payment of energy charges was dependent could not have been afforded to be missed out while submitting the bids.

viii. The PPA provides for the coal cost to be paid only to the extent of purchasing, transporting and unloading the coal and not for any other aspect. Washing charges or any cost associated with or consequential to washing of coal cannot and does not form part of the Energy Charges to be paid by PSPCL to the Appellant.

k) In view of the definition of the term ‘Fuel Supply Agreement’ (FSA) in the PPA dated 01.09.2008 being different from the definition of the FSA in the PPA dated 18.01.2010 of Nabha Power Ltd., there

is no implication to the interpretation and application of Clause 1.2.3 of Schedule 7 of the PPA in regard to the liability of PSPCL to pay for the Washing Charges. The term 'F-Coal' in Clause 1.2.3 Schedule 7 of the PPA defines as "cost to the Seller" which is Appellant and not "PSPCL who is Procurer". The cost of coal payable by PSPCL to Seller i.e. TSPL is only purchasing, transporting and unloading of coal. If PSPCL/Procurer is required to arrange purchase and supply of coal to TSPL there is no question of Schedule 7 of the PPA providing for cost to the Seller i.e. TSPL. If PSPCL has to purchase coal and make available to TSPL then the agreement between them would have been Tooling Agreement or an Agency Agreement for conversion of coal to electricity by using physical assets established by TSPL.

l) The Appellant is ignoring the second part i.e. assignment of FSA and its consequential implications. The Clause 2.1.3 of the RFP clearly provides that after signing FSA the same will be assigned to the Selected Bidder i.e. the Appellant during the term of the PPA. Further, the MOU dated 2.9.2008 executed between the Appellant and the Respondent No. 2 clearly brings out that the FSA is to be assigned in favour of the Appellant. Upon assignment it would necessarily mean that the FSA to be implemented between the Appellant and MCL. The communications exchanged between the Appellant/Respondent No. 2/ MCL also brings out the fact that the Appellant had admitted for signing of FSA by it with MCL.

m) Also according to this Tribunal's decision dated 7.4.2016 in Appeal No. 56 & 84 of 2013, the Respondent No. 2 is required to sign FSA

as per PPA and assign the same to the Appellant. Pursuant to this Tribunal's decision, the State Commission on remand has passed the order dated 6.9.2016 according to which PSPCL will sign the FSA and assign the same to the Appellant. Upon such assignment the rights and obligations under FSA would be that of the Appellant. The Appellant has challenged the order before this Tribunal being Appeal No. 331 of 2016 which is pending.

n) The FSA defined, in TSPL's PPA dated 01.09.2008 will not make any change to the interpretation and application of Schedule 7 of the PPA. The interpretation and application made by this Tribunal in the decision dated 14.12.2016 in Appeal No. 64 of 2016 (Nabha Power Ltd. case) will equally apply to the present appeal and accordingly washing charges are not payable by PSPCL to TSPL.

o) The Appellant has pointed out that the judgment of this Tribunal dated 14.12.2016 in Appeal No. 64 of 2016 in Case of Nabha Power Ltd. V. PSERC & Anr. is not applicable in the present case as PSPCL undertook the obligation of signing the FSA and arranging the coal which is not the case in Nabha Power Ltd. The Respondent No. 2 has submitted that the said judgment of this Tribunal applies in the present case as there is no difference between the two when the FSA is assigned to the Appellant after its execution by the Respondent No.2 and the charges payable by it to the Appellant are governed by the Schedule 7 of the PPA.

p) **UNLOADING CHARGES**

i. The Appellant has claimed coal handling charges (unloading charges) at the power plant site under the following heads:

a) Stone Picking;
b) Loco Operation and Diesel Expenses of Loco;
c) Wagon Tippler Operation Expenses;
d) Manual unloading Expenses(Bulge Wagons); and Diesel for equipments
e) Manual Unloading Expenses (Trucks etc)

The above claims of the Appellant need to be considered within the scope of the PPA. Schedule 7 of the PPA according to which PSPCL needs to pay the costs in relation to coal and coal handling on actual basis on three counts namely (a) price payable to coal companies as per the bills raised by such coal companies; (b) cost of transportation; and (c) unloading charges. The unloading charges, if any, are payable separately like transportation cost, independent of price payable to coal companies and of the quoted fixed charges based on which the bidder was selected.

ii. The Standard Design Criteria/Guidelines for Balance of Plant of Thermal Power Project of capacity 500 MW or above, published by Central Electricity Authority defines the coal handling plant (CHP) in a thermal power station as:

"The coal handling plant (CHP) in a thermal power station covers unloading of coal, its crushing, storage and filling of boiler bunkers,"

iii. The coal unloading facility to be provided depends on the mode of transportation of coal which in the case of the Appellant is through Indian Railway System using 'BOXN' Wagons. The unloading of coal from 'BOXN' Wagon is through wagon tippler wherein side arm chargers are employed for placement of wagons on the tippler table after tippling.

Provision is kept for shunting locomotives for placing the rakes in position for the side arm charger to handle and begin unloading operation. These Guidelines further describe that coal handling in thermal plants involves:

a) Coal unloading
b) Coal crushing
c) Coal Stacking & Reclaiming at Stockyard
d) Dust Control System and Ventilation System
e) Miscellaneous facilities

iv. Based on the above, PSPCL had analyzed the charges claimed by the Appellant and submitted to the State Commission as under -

a) **Stone Picking:**

This is sub activity of coal handling required on conveyors leading to the crusher house, which is a part of the coal handling, thus Stone Picking is a part of the Power Station activity and is covered by O&M Expenses.

b) **Loco Operation:**

The loco as per PPA & CEA Guidelines is part of the coal handling facility and as such any expense incurred on its operation is the expense incurred on the Power Station.

Therefore, the operating expenses in regard to loco operation are a part of the capacity charges and no additional cost be allowed.

c) **Wagon Tippler Operation Expenses**:

Wagon tipplers are also part of the coal handling facility and are electrically operated and the electricity consumed is covered by O&M Expenses.

d) **Manual unloading expenses (Bulge wagon) and Diesel for equipments:**

As per the scheme provided in the CHP, there are four Wagon Tipplers provided for unloading the coal and the non-operation of CHP Mechanism and use of any alternate manual or other mechanism for coal handling will be entirely for factors attributable to the Appellant and is not a scheme envisaged by the project specification. PSPCL has no liability to pay the cost of unloading when the CHP is not functional due to factors attributable to the Appellant.

e) **Manual unloading expenses (Trucks etc):**

No part of it is admissible as the project envisages the unloading of the coal through wagon tippler. The operation and maintenance of the wagon tippler is the responsibility of the Appellant.

Therefore, each of the above heads of expenditure claimed by the Appellant was either after the unloading of the coal through wagon tippler or related to the work envisaged to be undertaken by equipment such as wagon tippler. These expenses are the part of the O&M Expenses and the capital cost to be serviced.

v. At the time of bidding, all the Bidders were informed under Article 2.7.1.4 of RFP that while preparing and submitting the Financial Bid , they 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. Therefore, the Unloading Charges claimed by the Appellant are not payable in term of PPA and project documents. Hence, it is not correct for the Appellant to claim competitive bidding for Unloading Charges.

q) **COAL TRANSIT LOSSES**

i. Once the matter was reserved for order by the State Commission, the Appellant filed an application before State Commission seeking additional hearing and thereafter added this claim of coal transit loss.

ii. As per provisions of the Power Purchase Agreement, the monthly energy charges are payable as per the Schedule 7, Clause 1.2.3 and the formula given there under. This includes transportation charges. The Power Purchase Agreement does not provide for any adjustment for the transit loss of the coal.

iii. Further, Schedule 7 of the Power Purchase Agreement does not refer to the application of the Tariff Regulations of the State Commission for the purpose of determination of the monthly charges. PSPCL is only liable to pay strictly as per Clause 1.2.3 of

the PPA which does not provide for any compensation for coal transit losses.

r) **Surface Transportation Charges, Finance Charges, Advertisement Charges etc.**

These claims are related to the cost of procurement of alternative coal which has been allowed to be blended @ 20 % to the Appellant because of some special circumstances. However, the surface transportation charges are not payable as per the PPA. What is payable to the Appellant is only the difference between the cost of purchase of MCL coal and the cost of purchase of alternative coal to the extent that the blending has been permitted.

s) **Rake escorting charges, GCV sampling charges**

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.

t) **Railway Transportation Shunting Charges**

As per Schedule 7 of the PPA, only the following charges with respect to coal need to be paid by PSPCL**:**

i. Cost of coal purchase in Rs./ Kg terms or the cost of coal purchased from MCL;
ii. Cost of transportation of coal by Indian Railways i.e Freight;
iii. Cost of unloading the coal at the plant site through Wagon Tipplers which cost stands included in the capital cost of the project;

The Appellant has not completed all activities for coal transportation and sought to operate the project. Therefore, as per the PPA, only the railway freight from the place of receipt of coal to the plant site is payable which has already been paid by PSPCL.

u) PSPCL submitted that the principle of assignment is well settled and all right and obligations of under a contract are that of the assignee who steps into the shoes of the original contracting party. In this regard PSPCL relied on the judgment of the Hon'ble Supreme Court in case of Khardah Co. Ltd. Vs. Raymon & Co. (1963) 3 SCR 183. It was also argued that it is well settled that admissions in the pleadings are the best evidence and PSPCL in this regard relied on judgments of the Hon'ble Supreme Court viz. Narayan Vs. Gopal AIR 1960 SC 100, Nagindas Ramdas Vs. Dalptramlchharan alias Brijram (1974) 1 SCC 242, Avtar Singh Vs. Gurdial Singh (2006) 12 SCC 552, Shreedhar Govind Kamerkar Vs. Yeshwant Govind Kamerkar (2006) 13 SCC 481 and Thiru John Vs. Returning Officer AIR 1977 SC 1724. Further, it is also well settled that a statement not only includes what is expressly stated but also what is necessarily implied therefrom [Reference Hon'ble Supreme Court judgment in case of Tahsildar Singh & Anr. Vs. State of U.P. (1959) Suppl. 2 SCR 875= AIR 1959 SC 1012].

10. The learned counsel for the State Commission has adopted the above submissions/arguments of the Respondent No.2.

11. **After considering the arguments made by the rival parties and examining the written submissions placed before us on the**

various issues raised in the present Appeal, our observations on the various issues and Questions of law raised by the Appellant are as follows.

i. The Competitive Bidding Guidelines issued by Government of India as per Section 63 of the Act provides the basic framework including the process, procedure and obligations of the parties etc., for procurement of power by Distribution Licensee through competitive bidding. The Standard Bidding Documents i.e. Request for Qualifications (RFQ), Request for Proposal (RFP) and Power Purchase Agreement (PPA) provide the details about the terms and conditions for procurement of power so that the interest of both the parties are balanced. 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 and to ensure discovery of tariff for supply of electricity to the procurers in the most optimal manner.

ii. In the current case under consideration, the Bidding documents which consist of the RFQ, RFP and PPA, were issued by the PSEB under Scenario-4 of Case-2 of the Competitive Bidding Guidelines, specifying 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 include the obligations of the sellers 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 etc.

iii. It is important to note that the MoEF on 19.9.1997, issued a notification which 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.

iv. As the RFP Bidding documents were issued on 18.01.2008, it can be seen that 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, if ash content of sourced coal is more than 34%, at the Project which is situated more than 1000 KMs from the coal source was known upfront to all the Bidders including the Appellant.

v. In the background of above facts now we will discuss the first four Questions raised in the Appeal together i.e.

Question 6. i. i.e. Whether the Fuel Charge Components form part of 'Capacity Charges' or 'Net Heat Rate' quoted at the time of bidding?

Question 6. ii. i.e. - Whether the State Commission erred in holding that TSPL ought to have factored the cost of washing of coal at the time of submitting its bid, when by their very nature coal washing charges are part of Energy Charges and were not supposed to be quoted by bidders? ,

Question 6. iii. i.e. -Whether the Impugned Order was passed in ignorance of the fact that bidding for the Project was based solely on two parameters i.e. Net Heat Rate and Capacity Charges, and bidders did not assume any risk and responsibility in respect of the Fuel for the Project, and that the inclusion of any variable charges in a financial bid could have led either to the sustained unjust enrichment of TSPL or in TSPL suffering sustained losses over the term of the PPA, depending on the actual costs incurred? And

Question 6. iv. i.e. Whether the State Commission was justified in holding that TSPL ought to have known that the quality of coal to be supplied to the Project would contain ash content of more than 34%, contrary to the express representations of the Respondent No. 2 that the ash quantity would not exceed 34%?

a) For addressing the issue raised in this Question no 6. i., i.e. Whether the Fuel Charge Components form part of 'Capacity Charges' or 'Net Heat Rate' quoted at the time of bidding, we need to see that what were the informations available at the time of Bidding to the prospective Bidders including the Appellant considering the various provisions related to 'Capacity Charges', ‘Net Heat Rate and also ‘Fuel Charge’ and its Components.

i. Regarding Capacity Charges, Section 4.4 of the CBG provides as under:

“Capacity charges
4.4 Capacity charge shall be paid based on actual availability in kwh, as per charges quoted in Rs/kwh and shall be limited

to the normative availability (or normative capacity index for hydro electric stations). The normative availability shall be higher by a maximum of 5% of the level specified in the tariff regulations of the Central Electricity Regulatory Commission (CERC) prevailing at the time of the bid process, and shall be computed on annual basis. The capacity component of tariffs may feature separate non-escalable (fixed) and escalable (indexed) components. The indices to be adopted for escalation of the escalable component shall only be Wholesale Price Index (WPI), Consumer Price Index (CPI) or a combination of both WPI and CPI and the Base year shall be specified in the bid document."

It can be seen that there has been no specific formulation provided in the Bidding documents as to how a Bidder has to ascertain the Capacity Charge or what are the components of the Capacity Charge.

ii. The bids were invited under Scenario 4 of the Case-2 Bidding. As per CBG issued by Central Government, Sub section 4.2 of the Section -4 " Tariff Structure" states as follows:

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

Energy Charges = Net quoted heat rate X Scheduled Generation X Monthly Weighted Average Price of Fuel / Monthly Average Gross Calorific Value of Fuel.

If the price of the fuel has not been determined by the Government of India, government approved mechanism or the

Fuel Regulator; the same shall have to be approved by the appropriate Regulatory Commission.

In case of coal / lignite fuel, the cost of secondary fuel oil shall be factored in the capacity charges."

Hence for determination of Energy Charges the factors which are to be considered are the Net Quoted Heat Rate, Scheduled Generation, Monthly weighted average price of fuel and monthly average gross calorific value of the fuel. The Bidding Documents as well as the PPA specify the details as how these elements are to be considered for calculation of Energy Charges.

iii. Energy Charge formula in Clause 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:

$$\text{"Monthly Energy Charges } MEPn = \frac{NHRn \times F^{coal}n}{PCVn}$$

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.*

- $\boldsymbol{F^{COAL}n}$ *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."*

Hence the Heat Rate to be used for calculation of Energy Charges is the Net Quoted Heat Rate for the contract year. Similarly the cost of coal which is being reflected in the Energy Charges 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 and the quality of coal is the weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month. Hence all the three elements and their specific sub-elements were defined clearly in the PPA. The Bidders were known upfront prior to submission of Bids as to how the Energy Charges shall be determined.

iv. 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. The Energy Charge formulation does not explicitly provide for inclusion of cost of washing of coal. As clarity regarding cost of washing of coal was not there in the PPA related to energy charge provisions, the Bidders sought clarifications from Respondent No 2 before submission of their Bid, as to '***whether the cost of washing of coal would be included in the fuel cost'***. In reply to the said query, the Respondent No 2 provided a clarification that ***'the price***

of coal for the fuel cost shall be the cost of coal charged by the coal company.'

v. The Appellant contended that the clarification provided by the Respondent No 2 was vague and the Respondent No 2 did not deny payment towards the washing of coal. Had the Respondent No 2 intended to deny the inclusion of washing charges (as a part of the cost of the fuel) it would have clearly replied to the query stating that the cost of washing would not form a part of the cost of the fuel. Further, the Appellant stated that an important implication of the clarification given by the Respondent No 2 is that if the Coal Company i.e. MCL had provided washed coal to TSPL and built the cost of such washing into the bills raised on TSPL, the Respondent No 2 had agreed to pay TSPL for the same.

vi. As per the argument putforth by the Appellant the cost related to fuel which will not be considered for reimbursement as part of energy charges 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.

vii. The Appellant has referred the CERC Tariff Regulation 2004 to define the term Capacity Charges and putforth the argument that the Capacity Charges component of tariff is intended to cover only the fixed costs and does not include any variable or fluctuating costs related to fuel i.e. domestic coal, hence Bidders were not expected to factor for any risks associated with Fuel. We would like to mention here that the CERC Tariff Regulations are being framed

under Section 62 of the Electricity Act for determination of tariff of generating companies under cost-plus route. The CBG issued under Section 63 of the Electricity Act and the bidding documents issued for procurement of power under competitive bidding do not specify the factors which need to be considered for quoting capacity charges, hence the reference made by the Appellant to CERC Tariff Regulations, 2004, in this regard, does not hold good.

viii. 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.

ix. Further, 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.

> *"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."

x. In view of the above deliberations, we observe that the Fuel Charge Components which will be used for calculation of Energy Charge were specifically provided in the PPA and were known to all the Bidders prior to submitting their respective Bids. We are of the view that it is the responsibility of the Bidders to get necessary clarifications from the Procurers on reimbursement of any component or sub-components of fuel charge, which are not

explicitly provided in the Bidding documents. If some clarifications are vague or uncertain about the reimbursement of costs, it is upto the Bidders to take decision to participate in the Bidding process. If Bidders are willing to participate then they need to factor such risk(s), if any, suitably in the quoted tariff, which in the present case consists of 'Capacity Charges' and 'Net Heat Rate' , as per their specific Bidding strategy.

xi. **Hence the issues raised under Question 6. i. are decided accordingly.**

b) On issues raised in Question No. 6 ii. i.e. Whether the State Commission erred in holding that TSPL ought to have factored the cost of washing coal at the time of submitting its bid, when by their very nature coal washing charges are part of Energy Charges and were not supposed to be quoted by bidders?, We have already discussed at length, while deciding the very first Question i.e. Question 6. i., about the provisions of Bidding parameters i.e. Capacity Charges, Net Heat Rate as well as Fuel Charge components for determination of Energy Charges for payment purpose, as provided in the Schedule 7 of the PPA. We have also discussed that as far as cost of washing of coal is concerned, there is no specific mention in the PPA as to how the cost of washing of coal, if any, shall be treated for reimbursement or determination of energy charges.

i. The findings of the State Commission at Page Nos. 106-110 of the Impugned Order state as below :

"(ii) The Commission notes that a bare reading of the MoEF notifications dated 19.09.1997 and 02.01.2014 reveals that as per these notifications, coal based thermal plants of capacity 100 MW or above and located beyond 1000 kms from the pit-head are mandated to be supplied with and use raw or blended or beneficiated coal with ash content not exceeding 34% on quarterly average basis. Rightly so, such a condition that ash content in the coal to be used in the project shall not exceed 34% was stipulated in the environmental clearance accorded to the project. The notification dated 19.09.1997 existed prior to bidding deadline i.e 23.06.2008 with cut-off date 16.06.2008. The amendment dated 02.01.2014 included use of raw or blended coal in addition to beneficiated coal and further specified the requirement that ash content not exceeding 34% was to be complied with, on quarterly average basis. As per the information available with the Commission, TSPL's project has been commissioned on 05.07.2014 and is thus covered by both these notifications.

The Commission is of the view that washing of coal for the purpose of transporting the same to project is not mandatory in terms of these notifications. 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. TSPL has stated that in this petition only washing of coal for reducing ash content below 34% has been considered. The Commission is of the view that since these notifications forbid 'supply' of coal (by the coal company) and 'use' of coal (by the generating company) of ash content not exceeding 34% on quarterly average basis for projects located beyond 1000 kms from the pithead, it is for MCL (supplier of coal) and TSPL (user of coal) to sort out the issue amongst themselves. Furthermore, the requirement of using the coal with ash content not exceeding 34% is on quarterly average basis, the entire quantity of coal may not be required to be washed and secondly as per the notification this requirement can also be met with through physical separation or blending.

By washing the entire quantity of coal supplied by the coal company before transportation to project, TSPL is saving on the transportation cost of the coal and receiving coal with improved GCV to its benefit in the shape of reduced costs. The Commission further opines that since the obligation of supplying coal with ash content not exceeding 34% on quarterly average basis is on the coal company as rightly admitted by TSPL in its submissions dated 09.12.2014, in case the coal company is not complying with the same, TSPL needs to take up the matter in right earnest with the coal company i.e MCL.

With regard to the PSPCL's obligation of supplying correct information in respect of ash content of the coal assured by the coal company at the bidding stage, the Commission is convinced on the basis of the discussion above that from the information furnished by PSPCL to the bidders at the bidding stage, it was sufficiently clear to infer that coal with ash content of more than 34% has been assured by the coal company. In fact it was amply clear from the analysis results of coal enclosed with MCL's letter dated 28.04.2008 that the ash content of the coal of grade E to be supplied by MCL for the project shall be more than 34%. It was through this letter that MCL had for the first time indicated that it will be able to supply grade E coal for the project upto 5.0 million tonne during FY 2011-12 and 7.70 MTPA from 2012-13 onwards. Again while referring to this letter, PSPCL vide its email dated 03.05.2008 informed the ash content of the coal to be supplied by MCL as 34.4%. It was for the bidders to take a call on this issue and submit their bids accordingly after factoring in all the information supplied to them by PSPCL. Moreover, it was obligatory on the part of bidders to seek and confirm the information available in public domain on CIL website with regard to the ash content of all grades of coal including grade E which is in the range of 34.1% to 40% i.e higher than 34%. Such an important information on which the payment of energy charges was dependent could not have been afforded to be missed out while submitting the bids.

As regards TSPL's contention that in response to the specific query whether the cost of washing of coal is included in the fuel cost, to which PSPCL had clarified that price of coal for

the fuel cost shall be the cost of coal charged by the coal company, PSPCL did not clearly deny the inclusion of the coal washing charges to be part of cost of fuel. It can be seen that PSPCL never admitted to the payment of washing charges as well. Considering that the obligation for supply of coal with ash content less than 34% for projects located beyond 1000 kms from the pithead on quarterly average basis is that of the coal company or its use by the generating company, the aforementioned reply of PSPCL to the query is fairly unambiguous.

As regards, TSPL's contention that LoA of coal dated 14.08.2008 issued by MCL was provided by PSPCL to the petitioner after signing of PPA on 01.09.2008, the Commission disagrees with the same. The Commission is of the view that TSPL (after acquisition by SCL) was under no compulsion to sign the PPA without satisfying itself of having received to its complete satisfaction all the documents related to the project. The Commission also does not agree with the contention of TSPL that email dated 03.05.2008 prior to bid conference of 08.05.2008, wherein reference of MCL letter dated 28.04.2008 was made which mentioned the quality of coal as grade 'E' with ash content 34.4%, was not received by it because the same was clearly addressed to the representative(s) of Vedanta (SEL), the petitioner bidding company, along with other bidders .

Further, with regard to TSPL's contention that PSPCL and NTPC are getting the coal washed prior to transportation, the Commission finds it untenable to extend the logic to the present petition which is with regard to alleged dispute between the generating company and the distribution licensee as to whether cost of washing of coal is included in the fuel cost assured by the coal company for the project awarded through competitive bidding process carried out as per the Govt. of India guidelines dated 19.01.2005 under case-2 scenario-4 for procurement of power by the distribution utilities."

Hence the State Commission while deciding the issue related to Washing Charges has analyzed the requirement of MOEF

Notifications, informations provided to Bidders prior to Bidding regarding coal quality, options available to comply with the MOEF notifications and Obligations of the Bidders to seek and confirm the information available in public domain on CIL website with regard to the ash content of all grades of coal including Grade- E etc. We do not observe any infirmity in the above impugned findings.

ii. The Power Purchase Agreement has clearly detailed out the methodology for determination of Energy Charge and components of Energy Charges which will be considered for determination of Energy Charge. Considering all the arguments putforth by the Appellant, Respondent No 2 as well as findings of the State Commission in the Impugned Order, we are of the view that the State Commission was right in observing that the Appellant has to satisfy itself on the informations available as per all the documents related to the project prior to Bidding and factored the cost accordingly at the time of submitting its bid.

iii. We have gone through the submissions and arguments putforth by the parties in this regard. After careful examination of the same we observe that the bidding process was designed under Case 2, Scenario 4 of the CBG, wherein the Respondent No. 2 is required to pay tariff to the Appellant which comprises of Capacity Charges and Energy Charges based on the quote of the Appellant. The RFP and MoU signed between the Appellant and the Respondent No. 2 on 2.9.2008 envisage assignment of the FSA signed by the Respondent No. 2 with the coal company i.e. MCL to the Appellant.

iv. This Tribunal vide judgment dated 7.4.2016 in Appeal No. 56 & 84 of 2013 has held that PSPCL is under obligation to sign FSA with MCL and the Procurer cannot be absolved of its obligation to supply fuel to the Appellant for its power generating station and further to sign FSA with coal supplier. The findings of this Tribunal ('.....Procurer cannot be absolved of its obligation to supply fuel to the Appellant.....') is in the backdrop of provisions of the CBG and RFP documents which mandates Procurer for arranging of coal under Case 2, Scenario 4 in the form of fuel linkage. In this regard, the relevant provisions of the CBG are reproduced below:

> *"3.2 In order to ensure timely ..... (Case 2) ..... indicated below:*
> *(iv) Fuel Arrangements: 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.*
> *4. Tariff Structure*
> *4.2 In case of long term procurement with specific fuel allocation (Case 2), the procurer shall invite bids on the basis of capacity charge and net quoted heat rate. The net heat rate shall be ex-bus taking into account internal power consumption of the power station. The energy charges shall be payable as per the following formula:*
> *.....*
> *.....*

According to the aforesaid provisions of the CBG, the Respondent No. 2 (erstwhile PSEB) issued RFQ/RFP under Case-2 Scenario-4 in terms of specific fuel allocation / linkage as activity under the scope of the Procurer/ its Authorized Representative. The same is

mentioned under Clause 1.7 of the RFQ and Clause 1.4 (B) 2 i) 'Fuel-Primary (Coal)' of the RFP.

This Tribunal in the judgment dated 7.4.2016 has also discussed the requirement of fuel linkage to be provided by the Procurer/Respondent No. 2.

From the above it can be seen that the Procurer/ Respondent No. 2 was required to arrange fuel linkage for the Project.

v. Now let us have a look at the provisions of RFP/ PPA and MoU with respect to signing/assignment of the FSA.

The provisions of Clause 2.1.3 of the RFP are reproduced below:

> *"2.1.3 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."*

The definition of FSA in PPA is reproduced below:

> *""Fuel Supply Agreement" means the agreements(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."

Further the MoU dated 2.9.2008 signed between the Appellant and Respondent No. 2 have the following provisions:

"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."

Thus after arranging the coal linkage the FSA was to be signed by the Procurer/ Respondent No. 2 and thereafter assigning the same to the Appellant during the term of the PPA.

vi. This Tribunal in the said judgment dated 7.4.2016 has held as below:

"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."

With the background as discussed above and after perusal of the decision of this Tribunal as produced above it can be concluded that the obligation to supply fuel by PSPCL to the Appellant is to be understood in terms of its responsibility for arrangement of coal in the form of fuel linkage for the Project and further signing of FSA with MCL as per RFP/PPA/MoU. After signing of the FSA with MCL by the Respondent No. 2 it is to be assigned to the Appellant during the term of the PPA.

vii. In view of our discussions as above, the State Commission in the remand order dated 06.09.2016 modified on 08.09.2016 has rightly held for signing of FSA by PSPCL/ Respondent No. 2 with MCL and assigning the same to the Appellant. The State Commission has further rightly held that the assigned FSA is to be operated by the Appellant and PSPCL will pay Energy Charges as per Clause 1.2.3 of Schedule 7 of the PPA based on weighted average 'cost to the Seller' of purchasing, transporting and unloading the coal most recently supplied to and at the Project.

In our considered opinion the assignment of FSA is unconditional and the Appellant is obligated to carry out all the functions as required under the FSA. In case if PSPCL is required to purchase/transport/ unload coal, the very basic purpose of the competitive bidding is defeated. We are in agreement with the views of the Respondent No. 2 that the findings of this Tribunal in its judgment dated 14.12.2016 in Appeal No. 64 of 2016 in case of Nabha Power Ltd. V. PSERC & Anr. are applicable and

accordingly washing charges are not payable by PSPCL to the Appellant.

viii. **Hence the issues raised under Question No. 6. ii. are decided against the Appellant.**

c) On issues raised in Question 6. iii. i.e. Whether the Impugned Order was passed in ignorance of the fact that bidding for the Project was based solely on two parameters i.e. Net Heat Rate and Capacity Charges, and bidders did not assume any risk and responsibility in respect of the Fuel for the Project, and that the inclusion of any variable charges in a financial bid could have led either to the sustained unjust enrichment of TSPL or in TSPL suffering sustained losses over the term of the PPA, depending on the actual costs incurred? , we would like to reiterate that the Bidding parameters and the methodology and calculation of energy charge including its component, which are allowed were upfront made available to all the Bidders. It was up to the Bidders to prepare their financial bids based on their wisdom according to the terms of RFP documents. Hence any risk related to any of the components ought to be suitably factored in by the Bidders in their bids.

Hence this issue is also decided against the Appellant.

d) Now on the Question 6. iv. i.e. Whether the State Commission was justified in holding that TSPL ought to have known that the quality of coal to be supplied to the Project would contain ash content of

more than 34%, contrary to the express representations of the Respondent No 2 that the ash quantity would not exceed 34%? , we find that the Clause 2.7.2.1 of the RFP clearly specifies that the Bidder shall make independent enquiry and satisfy itself with respect to all the required informations, inputs, conditions and circumstances and factors that may have any effect on his Bid.

i. The fact about seeking and confirming information available about the Ash content of E grade coal is also evident by the fact that one of the Bidders raised the query about cost of washing of coal anticipating that there may be need for use of washed coal in the Project which is situated around 1500 kilometers from the coal source.

ii. We do not find any infirmity in the decision of the State Commission in the Impugned Order in this regard. Hence the issues raised in Question 6. iv. are also decided against the Appellant.

e) Now on the next two related question of law raised in the present Appeal i.e. Question No. 6. v. -Whether the State Commission erred in holding that the Respondent No 2 was justified in making payments to TSPL on the basis of e-GCV of coal measured by MCL rather than on the basis of the GCV of coal as delivered to the Project site? And

Question 6. vii. i.e. -Whether the State Commission erred in holding that TSPL would only be entitled to receive payments for

the cost of coal only on the basis of the charges levied by the Coal Company i.e. MCL, and nothing further?, we decide as follows:

i. The Appellant has contended that PSPCL is considering gross calorific values of coal as billed by the Coal Companies which is on e-GCV basis instead of gross calorific value of coal delivered to the Project at Project site. 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.

ii. As per the Respondent No 2, the provisions of PPA refer to GCV of the coal as delivered to the project. The coal is delivered to the project by MCL/CIL at the point of sale and the GCV at such point of delivery is mentioned in the invoice raised by coal companies. Any loss of GCV after the point of delivery should be on the Appellant’s cost and no adjustment should be allowed on GCV variation.

iii. Now let us peruse the impugned findings on the issue of GCV. The State Commission at page nos. 118-120 in the Impugned Order has decided as reproduced below :-

> *“ ii) It is the claim of TSPL that energy charges are to be paid by PSPCL with GCV of coal on 'as received basis' minus 150 kCal/kg to bring it at par with coal with GCV on 'as fired basis'. TSPL has submitted that thermal plants of PSPCL are being allowed payment of energy charges based on GCV of coal on `as fired basis'. TSPL has further submitted that PSPCL is*

making payment based on eGCV of coal i.e the GCV of coal being measured at the mine end under standard conditions of relative humidity of 60% and temperature of 40 degree centigrade when maintained for minimum 72 hours. PSPCL has submitted that the energy charges are to be paid in terms of clause 1.2.3 of Schedule 7 of PPA wherein GCV is defined as the weighted average gross calorific value of the coal most recently delivered to the project. During arguments before the Commission, PSPCL took the stand that the term 'coal most recently delivered to the project' implies coal delivered to the project at the mine end which was countered by TSPL stating that the term implies coal with GCV on 'as fired basis'. PSPCL has argued that while defining the actual cost of purchasing the coal, the language used in the PPA is "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", whereas with regard of GCV the language used in the PPA is "weighted average gross calorific value of the coal most recently delivered to the Project before the beginning of month " Thus, as per PSPCL, the GCV of coal which is to be considered for the payment of energy charges payable to TSPL is the one mentioned in the MCL/CIL bills raised to TSPL for payment of cost of coal.

PSPCL has further argued that TSPL's project, which was awarded under competitive bidding process, cannot be compared with PSPCL's projects which are allowed the costs as per Commission's Regulations. PSPCL has submitted and argued that monthly energy bills are being paid as per PPA under Schedule 7 of tariff wherein fuel cost is the weighted average actual cost of purchasing the coal by TSPL and the weighted average GCV of the coal delivered to the project for which TSPL has made the payment to CIL/MCL.

Considering the discussion above, the Commission is of the opinion that the rational interpretation of the relevant provisions in the PPA would be that PSPCL is liable to make payment of the coal cost component in the monthly energy charges on the basis of the bills for the cost of coal raised by MCL to TSPL with GCV mentioned therein.

Accordingly, the Commission concludes that PSPCL is making the payment of the monthly energy charges to TSPL as per the PPA."

From the above impugned findings, we observe that the State Commission has held that PSPCL is liable to make payment of the coal cost component in the monthly energy charges on the basis of the bills for the cost of coal raised by MCL to TSPL with GCV mentioned therein.

iv. The Energy Charge formula in CIause 1.2.3 of Schedule 7 of the PPA has specified 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'.***

v. The MCL was the supplier of coal as informed during bidding stage. The price of coal is being charged by the coal companies based on the quality (grade) of the coal. The grade of the coal is being determined based on GCV of the coal. It is the known practice that quality parameter of the coal i.e. GCV is measured by the coal companies using e-GCV basis only. The Bidders have not sought any clarifications on the terms of PPA regarding basis for measurement of GCV of coal to be used for calculation of energy charges, when in fact the cost of coal for fuel charges to be charged by the coal company was made known prior to the

bidding. Hence any cost implication due to GCV variation of coal at Mine end or as received at Project must have been factored in by the Bidder in its bid otherwise they were free to seek such specific clarifications in this regard from PSPCL before submission of the bid.

vi. We find substance in the argument of Respondent No 2 that 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/MCL for the supply of coal. The PPA does not provide for any mechanism for verification of the GCV of coal when it is being 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, there would have been some mechanism provided for in the PPA for joint inspection of the GCV of coal as received at the project site.

vii. In view of these facts, such interpretation to the measurement of GCV of coal as received at the Project cannot be concluded. We are of the view that the calorific value PCVn should be the weighted average gross calorific value of the coal based on e-GCV most recently delivered to the Project by the Coal companies and the cost of coal for determination of fuel charge shall be as charged by the coal companies. Hence we do not find any infirmity in the decision of the State Commission in this regard.

viii. Hence issues raised in both the Questions i.e. Question No 6. v. and Question No 6. vii. are decided against the Appellant.

f) Now on the next question of law raised in the present Appeal i.e. Question No 6. vi. - Whether the State Commission erred in holding that TSPL was under no compulsion to sign the PPA upon successfully bidding for the Project, when it was not possible for TSPL to alter its Financial Bid at such stage on the basis of new information?, we observe as below:-

i. The State Commission has observed as below at Page 109 of the Impugned order:-

> *" .....TSPL's contention that LoA of coal dated 14.08.2008 issued by MCL was provided by PSPCL to the petitioner after signing of PPA on 01.09.2008, the Commission disagrees with the same. The Commission is of the view that TSPL (after acquisition by SEL) was under no compulsion to sign the PPA without satisfying itself of having received to its complete satisfaction all the documents related to the project…."*

Hence the State Commission has observed that TSPL was under no compulsion to sign the PPA without satisfying itself of having complete clarity and its related obligations on all the documents related to the Project.

ii. We would like to refer to the Clause 2.1.3.2 of the RFP, which states as:

> *" 2.1.3.2 Within sixty (60) days of the issue of the Letter of Intent, the Selected Bidder shall:*
>
> *a) furnish to the Procurer the Performance Guarantee in accordance with Clause 2.13.1 and*

b) ensure that the Seller simultaneously signs the PPA and the other RfP Project Documents with the parties thereto, provided that the recitals as mentioned in the PPA and other Project Documents are true and valid on that date. In case the recitals of the PPA are not valid, the date of signing will be delayed on a day to day basis till the end of the Bid validity. All stamp duties payable for executing the PPA and other RfP Project Documents shall be borne by the Seller. The PPA and the other RfP Project Documents shall be signed in required number of originals so as to ensure that one original is retained by each Procurer and one original is retained by the Seller.

Provided that if any obligation of Procurer under Clause 1.4, have not been complied with, the above period of sixty days shall be extended, on a day for day basis till the end of the Bid validity period.

……

2.1.4 If the Successful Bidder fails or refuses to comply with its obligations under Clause 2.1.3.2 and provided the Procurer and/or other parties to the respective RfP Project Documents are willing to execute the said documents, such failure or refusal on the part of the Selected Bidder shall constitute sufficient grounds for cancellation of the Letter of Intent and the Procurer shall be entitled to invoke the Bid Bond of the Selected Bidder."

Hence there was a timeline of 60 days identified for signing of the PPA after the issuance of LoI to the successful Bidder. However it was also provided that this timeline shall be extended, on a day for day basis till the end of the Bid validity period, if any obligations of Procurer under Clause 1.4 have not been complied with. Clause 1.4 (B) (2) provides for Fuel and Letter of Assurance for primary fuel i.e. Coal.

iii. It can be seen that the RFP bid submission date was 23.06.2008. After successful completion of the Bidding process, Sterlite Energy Limited was selected as the successful bidder and TSPL (the then SPV of PSEB) issued the LoI in favour of SEL on 04.07.2008 calling upon it to acquire 100% shareholding in TSPL. LoA for coal was issued by MCL on 14.08.2008 in favour of TSPL (then the SPV of the Respondent No 2). TSPL entered into the PPA with Respondent No 2 on 01.09.2008.

iv. The Appellant has contended that under the LoA dated 14.08.2008, MCL had reserved the right to provide Grade E/F coal for the Project against the assured supply of Grade E coal with GCV 4500-4600 kcal/kg and ash content of 33-34%. Further, as per LoA, MCL also has a right to provide coal through imported sources as against the assured provision of domestic coal only and this condition was not known prior to Bid submission.

v. We find that prior to signing of the PPA, the successful Bidder has to satisfy himself about the all important project related documents. RFP document also provided extension of timeline for signing of PPA beyond specific timeline of 60 days from issuance of LOI under Clause 2.1.3.2, if any of the obligations of Procurer under Clause 1.4 have not been complied with, which included LOA for primary fuel i.e. coal.

vi. Hence on this issue we do not find any infirmity in the observation of the State Commission. Accordingly this issue is also decided against the Appellant.

g) Now on the next question of law raised in the present Appeal i.e. Question No 6. viii. -Whether the State Commission erred in holding that surface transportation charges are to be dealt with exclusively based on Clause 9.0 of the FSA?, our observations are as follows;

i. As per the Appellant, the State Commission, in the Impugned Order, has erroneously held that the Respondent No 2 is obliged to pay for the surface transportation charges only when levied by MCL. Such a finding is contrary to Clause 1.2.3 of Schedule 7 of the PPA, which provides that the Respondent No 2 is required to bear the entire cost of transporting coal most recently supplied to and at the project site and is not restricted to the transportation charges levied by MCL. Under the terms of the FSA, MCL does not transport coal to the Project site but only to a delivery point which may be a colliery with railway siding or a colliery without a railway siding. Moreover, Article 8 of the FSA provides that the entire risk and responsibility of the coal supplied by MCL passes on to TSPL at the point of delivery near the coal mine. Thus, it was imperative for TSPL to incur this charge. In instances where TSPL is required to take possession of coal from a colliery which is not equipped with railway siding, TSPL is constrained to transport the coal by road to the nearest railway siding at an additional cost with no involvement from MCL. Furthermore, in cases where washing of coal is not done by MCL, but by third parties, the raw coal from MCL's colliery is required to be transported at first to the washery by road without MCL's involvement and post washing to a railway

siding. Such cost of transporting coal to the nearest railway siding is an essential component of the total cost of transporting coal to the Project site and is therefore within the ambit of transportation charges to be paid to TSPL by the Respondent No 2 in accordance with the PPA.

ii. The State Commission at Page Nos. 110-111 of the Impugned Order has observed as below:-

> *"iii) With regard to TSPL's contention that surface transportation charges payable to the contractor for unwashed coal are required to be reimbursed by PSPCL as these were even otherwise payable to MCL, the Commission is of the view that payment of surface transportation charges to MCL are governed by the terms & conditions of the FSA signed between TSPL and MCL wherein such charges are payable by TSPL to MCL in terms of clause 9.0 "Price of Coal". As per the said clause, "As Delivered Price of Coal" for the coal supplies is the sum of Base Price, Other Charges [which includes transportation charges (sub-clause 9.2.1)] and Statutory Charges as applicable at the time of delivery of coal. Thus, the Commission notes that the surface transportation charges are payable by TSPL to MCL in terms of above which is part of the delivered price of coal claimed by MCL in the bills raised by it for the coal supplied to TSPL, which is being paid by PSPCL as per submissions made by it in this petition. Therefore, in terms of above, no separate surface transportation charges are payable by PSPCL to TSPL."*

iii. Payment of surface transportation charges to MCL are governed by the terms & conditions of the FSA signed between TSPL and MCL wherein such charges are payable by TSPL to MCL in terms of clause 9.0 of the FSA i.e. "Price of Coal". As per the said clause, "As Delivered Price of Coal" for the coal supplies is the

sum of Base Price, Other Charges [which includes transportation charges (sub-clause 9.2.1)] and Statutory Charges as applicable at the time of delivery of coal. The surface transportation charges are payable by TSPL to MCL in terms of above which is part of the delivered price of coal claimed by MCL in the bills raised by it for the coal supplied to TSPL, which is being paid by PSPCL .

iv. We have already observed earlier that cost of washing of coal cannot be pass-through in terms of PPA entered into between the parties. Hence surface transportation charges incurred by the Appellant for requirement of transportation of coal for washing (i.e. from delivery point to washery and from washery to Railway Siding) where coal company i.e. MCL is not involved cannot be considered. During pre-bid conference on the issue of cost of washing of coal, PSPCL had clarified that price of coal shall be the cost of coal charged by the coal company. This cost (Delivered Price of Coal) under FSA charged by MCL may or may not include washing & surface transportation charges as required. Such charges included under Delivered Price of Coal by MCL are payable by PSPCL to TSPL. Apart from this beyond the delivery point of MCL, the responsibility of washing of coal (if any) and transportation thereof is the responsibility of the Appellant and its related charges are not payable by PSPCL. As discussed earlier, as per RFP it was the responsibility of the bidder to ascertain and factor in all relevant costs in its bid. The State Commission has rightly held that as per FSA only the charges payable by TSPL to MCL as Delivered Price of Coal are payable by PSPCL to TSPL.

v. Accordingly, this issue is decided against the Appellant.

h) Now on the next question of law raised in the present Appeal i.e. Question No 6. ix. -Whether the State Commission erred in holding that TSPL is not entitled to receive unloading charges as such charges are being paid by the 2nd Respondent as part of the Capacity Charges despite the fact that the PPA specifically provides for the payment of unloading charges as part of Energy Charges?, our observations are as follows;

i. The Appellant has submitted that it incurs costs towards unloading of coal at the TSPL site which includes the following:-

a. Diesel consumed for TSPL Loco for coal movement from transit point to wagon tippler and vice versa.
b. Operation charges for manpower operating TSPL loco.
c. Other rake handling and In-plant movement charges related to unloading including manpower.
d. Consumption of electricity for Wagon Tippler to unload the coal.
e. Manual unloading charges, if applicable.

ii. The State Commission at Page Nos. 128-129 of the Impugned Order has observed as below :-

"The Commission has considered the submissions of both the parties with regard to justification for payment of charges for unloading of coal at the project by PSPCL to TSPL. The Commission is convinced of the justification provided by PSPCL and agrees with its submissions implying that the charges for unloading of coal at the project are not payable in the instant case since the same are being paid as part of the capacity charges, the cost of loco(s), wagon tippler(s) etc. used for unloading of coal and the cost of coal handling plant, having been included in the project capital cost. The charges for operation of the same including diesel and electricity etc. would be covered in the operation & maintenance expenses.

Accordingly, the Commission disallows the prayer of TSPL that PSPCL be directed to pay unloading charges of coal at the project as PSPCL is not liable to pay the same. In view of the decision of the Commission hereinabove, the additional prayer of TSPL that PSPCL be directed to participate in the tender opening process for unloading of coal at the project becomes infructuous."

The State Commission has disallowed the cost incurred by the Appellant for unloading of coal at the project by holding that these cost elements form part of capital cost and O&M expenses.

iii. As per Schedule-7 , the price of coal 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). Hence the unloading charges for unloading of coal at the Project needs to be considered in cost of coal.

iv. The coal required for the project is to be transported from the linked coal mine using Indian Railway system. The fuel handling facility to handle the fuel and all the other equipments, plant and machinery at the plant are part of the power station.

v. The Respondent No 2 has put the argument that all heads of expenditure claimed by the Appellant are either after the unloading of the coal through wagon tippler or related to the work envisaged to be undertaken by equipment such as wagon tippler. These expenses are the part of the O&M Expenses and the capital cost to be serviced, hence not admissible for separately payable as cost of unloading of coal.

vi. As per the Appellant, the unloading charges claimed are not in respect of capital costs incurred on the unloading equipment but the activity of unloading itself like Diesel consumed for TSPL Loco for coal movement from transit point to wagon tippler and vice versa, operation charges for manpower operating TSPL loco, other rake handling and in plant movement charges related to unloading including manpower, consumption of electricity for Wagon Tippler to unload the coal and Manual unloading charges (if applicable).

vii. We are of the view that in a competitive bidding process, all the payments are to be made to the successful Bidder/ Seller as per terms and conditions of the PPA which has been entered into by both the parties. The schedule- 7 of PPA allows the consideration of unloading charges of coal in the cost of coal to be considered for calculation of energy charges.

viii. We have already observed earlier in this judgment that the Bidding documents do not provide any formulation for determination of capacity charges and it is the Bidders' bid specific strategy to quote capacity charges. Hence we find that while deciding on the issue the State Commission has erred in deciding that charges for unloading of coal at the project are not payable in the instant case since the same are being paid as part of the capacity charges, the cost of loco(s), wagon tippler(s) etc used for unloading of coal and the cost of coal handling plant, having been included in the project capital cost and the charges for operation of the same including diesel and electricity etc. would be covered in the operation & maintenance expenses.

ix. Hence on this count we differ with the view taken by the State Commission as clause 1.2.3 of Schedule 7 of the PPA clearly provides

that energy charges payable by the Respondent No.2 are to be calculated based on weighted average 'cost to the Seller' of purchasing, transporting and unloading the coal most recently supplied to and at the Project. We decide this issue in favour of the Appellant. The State Commission is directed to identify cost components for unloading of coal at the project site and necessary mechanism for allowing such coal unloading charges in coal cost.

x. Accordingly, this issue is decided in favour of the Appellant.

i) Now the last two questions of law raised in present Appeal pertain to claim of the Appellant related to Fuel Charge Components i.e. Question No 6. x.- Whether the State Commission failed to appreciate that the Fuel Charge Components claimed by TSPL fall squarely within the ambit of Clause 1.2.3 of Schedule 7 of the PPA? and Question No 6. xi.- Whether the State Commission was justified in disallowing payments towards the Fuel Charge Components to the Appellant, contrary to the terms of the PPA?, we observe as follows.

i. The Appellant has put its claim on reimbursement of following components for allowing payments towards Fuel Charge Components incurred by TSPL in respect of the Coal supplied to and at the Project (a) Transit losses, (b) Transportation charges – (i) surface transportation charges, (ii) Railway Freight (iii) Railway (Transportation) Shunting Charges, (c) advertisement & other related costs of alternate coal procurement tenders, (d) rake escorting charges, (e) GCV sampling and testing charges and (f) finance charges.

ii. While addressing on these issues, the State Commission at Page Nos. 134-136 in the Impugned Order has observed as below:-

" The Commission has considered the submissions of both the parties with regard to claims of TSPL raised in the additional affidavit dated 25.08.2015 in respect of 'charges for rake escorting', 'charges for GCV sampling and testing', `finance charges', 'advertisement & other related costs of alternate coal procurement tenders' and 'shunting charges'. TSPL has stated that the aforementioned charges are recoverable as part of the monthly energy charges. TSPL has stated that these charges could not be factored in the financial bid as the same were either not known or indeterminable at the time of bidding. PSPCL has stated that the project was allotted through competitive bidding process under section 63 of the Act and adopted by the Commission. The Commission is not determining the tariff on cost plus basis under section 62 of the Act. PSPCL further submitted that the monthly energy charges are to be computed in terms of the formula under clause 1.2.3 of Schedule 7 of the PPA wherein the cost of coal is to be taken as the cost of purchasing, transporting and unloading the coal most recently supplied to and at the project at the beginning of the particular month for which the energy charges are to be paid.

The Commission finds that there is no specific provision in the PPA for computing monthly energy charges considering any of the aforesaid charges.

The Commission notes that the charges for rake escorting have been claimed by TSPL in addition to the coal transportation charges for which, the Commission finds that there is no provision in the PPA. As regards charges for GCV sampling & testing claimed by TSPL, the Commission notes that clause 5.7 of the FSA specifically deals with coal sample collection, detailed modalities for collecting, handling, storage & preparation of samples, sample preparation and analysis etc. for testing GCV of coal meaning thereby that GCV testing and sampling is covered under the FSA signed between TSPL and CIL/MCL. Therefore, the Commission is of the view that such charges are not payable additionally by PSPCL. The Commission is further of the view that the finance charges and advertisement expenses for alternate coal procurement tenders are part of administrative expenses and hence not payable additionally by PSPCL. Even otherwise the Commission is of the opinion that the claim of TSPL for payment of advertisement expenses stated to have been incurred for inviting

tenders for arranging alternate coal does not fall within the purview of the present petition, which primarily is for matters pertaining to the linked coal to be supplied by CIL/MCL. Further, as regards the shunting charges claimed by TSPL, the Commission considers the same as part of operation and maintenance expenses and hence not payable by PSPCL. Accordingly, the Commission neither finds any justification nor any provision in the PPA to allow the aforesaid charges for payment as components of monthly energy charges purportedly payable as per clause 1.2.3 of Schedule 7 of the PPA. The argument of TSPL that these charges were not known or could not be estimated/ determined at the time of submitting the financial bid is not convincing. The Commission is of the considered opinion that allowing such 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 claim of TSPL in respect of `charges for rake escorting', 'charges for GCV sampling and testing', 'finance charges', 'advertisement & other related costs of alternate coal procurement tenders' and 'shunting charges' is not allowed by the Commission."

Hence the State Commission finds that there is no specific provision in the PPA for computing monthly energy charges considering any of the charges claimed by the Appellant in respect of `charges for rake escorting', 'charges for GCV sampling and testing', 'finance charges', 'advertisement & other related costs of alternate coal procurement tenders' and 'shunting charges'.

Similarly for transit losses also, the State Commission has disallowed the claim of the Appellant because of no specific provision in the PPA for computing energy charges considering transit loss of coal.

iii. Regarding 'unloading charges' we have already decided earlier in this Judgment in favour of Appellant. In regard to the claim of the Appellant for Railway (Transportation) Shunting Charges, these charges are paid to the Indian Railways by TSPL for the 'to and fro' movement of Indian

Railway's engine to and from the transit point of TSPL's project site. In our view these charges paid by the Appellant to Indian Railways form part of transportation charges which are payable by the Respondent No 2, in line with the provisions of Schedule-7 of the PPA.

iv. For the claim of the Appellant's claim on remaining components i.e. transit loss, charges for rake escorting', 'charges for GCV sampling and testing', 'finance charges' and 'advertisement & other related costs of alternate coal procurement tenders', we observe that as per the terms and conditions of the PPA, only the weighted average actual cost to the Seller for purchasing, transporting and unloading the coal most recently supplied to and at the Project has to be used for calculation of Energy Charges and none of the components (as discussed in this para) as claimed by the Appellant are eligible to be allowed under Energy Charges.

v. We do not find any infirmity in the decision of the State Commission on this count except on the issue of Railway (Transportation) shunting charges paid by the Appellant to Indian Railways. The State Commission is directed to allow the Railway (Transportation) shunting charges as allowed under Coal Transportation cost incurred by the Seller as per Schedule-7 of the PPA for calculation of energy charges.

vi. Hence the issue is decided accordingly.

j) The parties have quoted various judgments of the Hon'ble Supreme Court and this Tribunal on various issues like assignment of contract, admission by parties during hearings, compensation of entire cost, interpretation of contracts etc. The Appellant has also filed an Appeal No. 331 of 2016 before this Tribunal against the State Commission's

order dated 6.9.2016 related to signing of FSA by PSPCL with MCL and assignment of the same to TSPL. The matter in the said appeal is pending before this Tribunal. However, while discussing the questions of law raised by the Appellant and deciding the same, we do not find any specific need in discussing the said judgments in this appeal as all the issues raised in this Appeal have been decided based on the agreements entered between the parties i.e. PPA & FSA and RFP bid documents.

ORDER

We are of the considered opinion that most of the issues raised in the present Appeal are devoid of merit except on some issues which need fresh consideration by the State commission as deliberated and decided above and accordingly the Appeal is hereby partially allowed. The IA No. 91 of 2016 is disposed of as such.

The Impugned Order dated 23.11.2015 passed by the State Commission is hereby remanded to the State Commission for deciding cost components related to unloading of coal at the project site of TSPL & allowing the same in coal cost and for allowing Railway (Transportation) shunting charges under coal transportation cost to the Appellant.

No order as to costs.

Pronounced in the Open Court on this **3rd day of July, 2017.**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

√

REPORTABLE/NON-REPORTABLE

mk