APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 285 of 2019

Dated : 28th September, 2020

Present: Hon'ble Mrs. Justice ManjulaChellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member (Electricity)

IN THE MATTER OF :

Lalitpur Power Generation Company Limited,
B-10,Sector -3, Jamnalal Bajaj Marg,
Noida - 201301 (U.P) …….Appellant

Versus

1. Uttar Pradesh Electricity Regulatory Commission,
   Through Secretary,
   Vidyut NiyamakBhawan,
   Vibhuti Khand, Gomti Nagar,
   Lucknow – 226010

2. Uttar Pradesh Power Corporation Ltd.
   ThroughitsChairmanandManagingDirector,
   Shakti Bhawan 14 -AshokMarg,
   Lucknow – 226001

3. Purvanchal Vidyut Vitran Nigam Limited
   Through ManagingDirector,
   132 KV Substation, Bhikaripur,
   Vidyut Nagar, Varanasi – 221004

4. Paschimanchal Vidyut Vitran NigamLimited
   Through Managing Director
   Victoria Park,
   Meerut – 250001

5. Madhyanchal Vidyut Vitran NigamLimited,
   Through ManagingDirector,
   4-A, Gokhale Marg,
   Lucknow – 226001

6. Dakshinanchal Vidyut Vitran Nigam Limited
   Through ManagingDirector,
   Gailana Road, Agra – 282007……….Respondents

Counsel for the Appellant (s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Upendra Prasad
Mr. Sanjeev Kumar Singh
Mr. Brij Mohan
Mr. Raj Pal Singh

Counsel for the Respondent(s) : Mr. C. K. Rai
Mr. Sachin Dubey
Mr. Sumit Panwar for R-1

Mr. Hemant Sahai
Ms. Puja Priyadarshini
Mr. Apoorva Mishra
Mr. Shreshth Sharma
Mr. Aditya Kumar Singh
Ms. Molshree Bhatnagar
Mr. Nived V. for R-2

JUDGMENT

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

1. The present Appeal has been filed by M/s. Lalitpur Power Generation Company Ltd.**(the Appellant)** under Section 111 of the Electricity Act, 2003 against order dated 28.05.2019 passedby theUttar Pradesh Electricity Regulatory Commission (hereinafter called the **'State Commission')** in Petition No. 1402 of 2019, whereby the State Commission has rejected the petition of the Appellant seeking loss of fixed charges on account of the lower plant availability of 54.78% only, during the year 2017-18, which was directly due to the Appellant being not able to declare capacity to the full extent wholly and exclusively due to the persistent non-payment of the bills in accordance with the terms of Power PurchaseAgreement{hereinafter referred to as the PPA} by the Respondent No. 2, Uttar Pradesh Power Corporation Limited (hereinafter called **UPPCL)** for the Electricity generated and supplied by the Appellant. The Appellant, as a direct result of such persistent nonpaymentof amounts in the range of Rs 545 to Rs. 1267 crores (total outstanding), was placed in a position of being unable to procure coal and maintain sufficient coal stock.

2. **FACTS OF THE CASE:-**

2.1 The Appellant, Lalitpur Power Generation Company Ltd., is a company existing under the provisions of the Companies Act, 2013 having its registered office at Village Mirchwara and Burogaon, PO- Burgaon (Chigloa), Pargana Banpur, Tehsil Mehroni, District Lalitpur,- 284123 in the State of Uttar Pradesh and Corporate Office at B-10, Sector-3,Jamnalal BajajMarg,Noida-201301(U.P).TheAppellantis a generating company within the meaning of Section 2(28) of the Electricity Act, 2003 having established a 3 x 660 MW power plant in villages Burogaon and

Mirchwara, Tehsil Mehroni, in the District Lalitpur in the State of UttarPradesh.

2.2 The Respondent No. 1 - State Commission is the Electricity Regulatory Commission for the State of Uttar Pradesh exercising powers and discharging its functions under the provisions of the Electricity Act, 2003. The tariff for the supply of electricity by the Appellant to the Respondent No 2/ Respondents 3 to 6 is determined and regulated by the State Commission under the provisions of the Electricity Act, 2003. The State Commission also exercises the powers to adjudicate and decide on any disputes that arises between the Appellant and UPPCL including in regard to the breach and consequences thereof of thePPA.

2.3 TheRespondentNo.2-UPPCL,istheApexBodyintheStateofUttar Pradesh which is overseeing the distribution and supply of electricity for and on behalf of the Distribution Companies, namely the Respondents 3-6 and is also entrusted with the responsibility of purchasing power in bulk from the generating Companies anditspayment against the bills raised by the sellers for the supply of electrical energy.

2.4 The Respondents. 3 to 6 are the Distribution Companies in the State of Uttar Pradesh. The Respondents 3 to 6 have authorized UPPCL to execute/sign the Power Purchase Agreements and also to carry out all necessary actions on their behalf in relation to the power purchase and supply. As such all obligations under the PPA are undertaken by the UPPCL on behalf of Respondents 3 to6.

2.5 The Appellant has established the 3 x 660 MW coal based thermal power plant at Lalitpur in the State of Uttar Pradesh. The generating station was established in pursuance of then existing policies of the Government of Uttar Pradeshduring 2009-10,For the establishment of the generating station, a Memorandum of Understanding (MoU) dated 22.04.2010 was entered into between the Government of

Uttar Pradesh (GoUP) and a consortium of companies led by Bajaj Hindusthan Sugar Limited (erstwhile Bajaj Hindusthan Limited) (hereinafter referred to as the BHSL). Pursuant to the above, BHSL set up the project, under a Special Purpose Vehicle (SPV), the Appellant herein which had already been incorporated by Respondent No.2.

2.6 The Appellant thereafter constructed and commissioned the 3 x 660 MW super critical thermal power plant in villages Burogaon and Mirchwara, in the District Lalitpur, in the State of Uttar Pradesh. The entire investment was to be brought in by the Appellant, whereas, the Government of Uttar Pradesh was required, inter-alia to facilitate the land acquisition required for setting up of the Power Plant in the district Lalitpur and arrange for water. The identified SPV was the Appellant, which was initially a subsidiary company of Respondent No. 2. BHSL acquired the Appellant Company in pursuance of the said MOU.

2.7 The Appellant and UPPCL have entered into a Power Purchase Agreement dated 10.12.2010 and thereafter a Supplementary Power Purchase Agreement dated 15.06.2011 (Collectivelyalso referred to as the PPA), inter-alia, for purchase by UPPCL of 100% Saleable Energy from 3x660 MW Thermal Power Generating Plant.

2.8 The generating station of the Appellant achieved commercial operation as under-

Unit No. 1	01.10.2015
Unit No. 2	14.10.2016
Unit No. 3	23.12.2016

The State Commission vide order dated 27.11.2015 has allowed

provisional tariff of Rs 1.88 towards fixed cost and Rs 2.95 as variable charge computed on capital expenditure of Rs. 12,868 crores incurred.. The said provisional tariff of fixed charges was further revised to Rs. 2.24 with effect from 07.03.2018.The final tariff of the Appellant is pending determination from the date of commercial operation.

2.9 The Appellant has supplied the entire capacity of the generating station to UPPCL in terms of the PPA and has been raising bills in terms of the tariff admissible to the Appellant. There have however been continued and substantial delays on the part of UPPCL in making payment of the Appellant's invoices as per the provisions of the PPA on routine basis. UPPCL had also not provided and maintained the payment security mechanism as per the terms of the PPA.

2.10 For the Financial Year 2017-18, UPPCL is said to have continuously defaulted in making payment of the monthly tariff bills raised by the Appellant. Details of monthly energy billed, collections made and month end receivables of Appellant from UPPCL for FY 2017-18 have been depicted in the Appeal.

The Appellant had received a total sum of Rs. 4,100 crore from UPPCL during 2017-18, out of which significant sum of Rs.1,267 crore was received in the months of Feb- March 2018 only. Further such payment was received only after the Appellant had filed a petition being Petition No. 1288 of 2018 before the State Commission seeking directions for payments of the outstanding dues.

2.11 The above petition was disposed of by the State Commission by order dated 23.03.2018, based on the undertaking of UPPCL to clear all the dues forthwith and that the escrow mechanism would be created at the earliest. The State Commission, inter-alia, held asunder:

"......... *2. UPPCL had filed their counter affidavit on 27.02.2018 and the Commission had fixed the hearing on 28.02.2018 in which the*

*Petitioner had sought adjournment. The case was again fixed for today on 23.03.2018. Sri I.M. Kaushal, CGM(F) appearing on behalf UPPCL informed that they have already made the payment of overdue bills and at present only Rs. 284 crore*is *outstanding which* is *not overdue.* ....

3. Sri SNM Tripathi informed the Commission that as per the provisions of PPA, the payment security mechanism in the form of escrow has not been established by UPPCL and prayed the Commissionforadirectioninthisregard.SriI.MKaushal,CGM (F), UPPCL informed that they are trying to provide the escrow mechanism.

4. The Commission decided to dispose of this Petition with instructions that the escrow mechanism as per the provisions of PPA should be arranged at theearliest."

2.12 This amount of Rs. 1,267 crore was paid by UPPCL in February-March, 2018. The amount was thus, not available to the Appellant during the year for the purchase of coal and the Appellant was left with only a sum of Rs. 2,833 crore out of which the Appellant had to meet its debt service obligations, working capital cost and O&M Charges including salary payment as essential and inevitable cash outgo prior to incurring any amount on procurement of coal. Despite the above constraints caused by UPPCL the Appellant was able to dispatch energy worth Rs. 2,257 crore. The further capacity of the Appellant to dispatch energy was severely impacted by the persistent and recurring non-payment by UPPCL.

2.13 The Appellant kept on financing the coal purchase during the period from working capital facilities to the extent best possible and finally consumed the entire working capital facilities limits as available from time to time. Further, the working capital could not be replenished due to non-payment by UPPCL and the Appellant became a defaulter of its lenders with respect to working capital facilities also in addition to default of payment of interest and instalments of its term loans. This forced the Appellant in a financially stressed situation and the lenders started adjusting the entire money they received towards their dues, owing to which there was no or very little money available with the Appellant and thus, it was not able to procure coal for consumption for

the entire month for full capacity resulting in loss of declaredcapacity.

2.14 The Appellant was required to pay for the coal to the coal companies in advance. The payments made by UPPCL were insufficient to even pay for the Banker's dues along with the operations of the plant, as a consequence whereof, the Appellant suffered shortage of coal. The little coal which the Appellant could purchase from the limited working capital available with it was not sufficient for declaring full capacity.

2.15 Owing to the cascading effect of persistent delays on the part of the UPPCL in making monthly payment, the Appellant could not, since the month of April, 2017, pay the coal supplier and procure coal in a timely manner to the full extent of the availability of the generating station. As mentioned above, the coal supplier is always required to be paid in advance in terms of the Fuel Supply Arrangement. The Appellant was also required to service its debt and pay for the operation and maintenance of the generating station, in addition to procuring coal for generation and supply of electricity to distribution licensees. The revenues recoverable by the Appellant from UPPCL has been the only source for the Appellant to meet all the above financial outflows and expenses of monthly recurringnature.

2.16 The delay in payment by UPPCL also resulted in reduction of drawing power of the Appellant because the outstanding bills beyond a certain period were not considered for the purpose of calculation of the drawing power by the lenders. This resulted in added financial misery for the Appellant and had further cascading impact on the financial stress that the Appellant faced during the period. Due to the above material breach on the part of the UPPCL the Appellant could not maintain the desired level of coal stock and was prevented from declaring availability from its power plant effective the month from May, 2017 to the targeted level.

2.17 It is alleged that UPPCL during financial year 2017-18 namely for the

same period when it had failed to pay the Appellant without any reason or justification had made payment to all other generators including Rosa Power, Sasan Power Limited & NTPC Limited. However, only the bills of the Appellant were not cleared. The above resulted in an extraordinary situation where in the Appellant was made to lose even its fixed costs for financial year 2017-18. The loss suffered by the Appellant has accrued to the tune of approximately Rs. 1108 crores.

2.18 The Appellant has indicated that it has been continuously raising the issue of delayed payment and the direct losses being suffered by the Appellant due to such delay in payment by UPPCL. The Appellant, in addition to raising this issue with UPPCL during various formal and informal meetings, had also written specific letters dated 29.08.2017, 11.09.2017, 26.09.2017, 27.09.2017, 04.10.2017, 12.10.2017, 24.10.2017, 01.11.2017, 28.11.2017, 12.01.2018, 15.02.2018, 26.02.2018 (two letters), 28.02.2018, 06.03.2018, 25.04.2018, 01.05.2018, 25.05.2018, 22.06.2018, 26.06.2018, 18.07.2018, 24.07.2018,01.08.2018, 31.08.2018 and 15.10.2018.

2.19 The non-payment of bills in a timely manner which even continue still date and the indifference on part of the UPPCL has directly caused such situation that the Appellant has been unable to meet out even the debt services and O&M requirements and the Appellant apprehends that it will lead to loss of availability in current year also as the Appellant is unable to procure coal for running the plant.

2.20 The generating station of the Appellant is of 1980 MW capacity of which 100% declared ex-bus capacity works out to 1866 MW at any point of time. As per the Generation Tariff Regulations, 2014 notified by the State Commission 85% cumulative annualised declared capacity by the Appellant is essential for recovery of total annualised fixed cost of the Appellant. Further, as per the Grid Code, day ahead available capacity is

to be declared on the daily basis, which, other things being in order, is dependent on technical availability of machines and the coal stock. In case the plant has no sufficient coal stock, the generator is compelled to declare lesser availability in spite of all the units being fully ready and technically available. As stated above, for making the coal available, 100% advance money has to be paid to the coal subsidiaries and also 100% advance payment of freight is to be made to Railways.

2.21 Due to UPPCL not making the required payment against the accepted and verified monthly bills to the Appellant in time, the Appellant was not able to pay the mandatory advances towards coal costs and railway freight and procure coal to run all the 3x660 MW units at full capacity and most of the time during the year 2017-18 the Appellant could declare the available capacity of only one or two units in spite of the fact that all the three units remained technically available for declaring the capacity and generating the power. As a consequence of the material breach on the part of UPPCL , the Appellant was prevented from declaring the capacity to the extent of 85% and could declare capacity of only 54.78% thereby suffering loss of 4939 MU equivalent availability. The financial consequences of such capacity which was prevented from being declared available is Rs.1108 crore of loss of fixed cost which the Appellant would have been able to recover had the monies being paid by UPPCL in terms of the PPA.

2.22 The bona fides of the Appellant and that the Appellant was in a position to operate the power plant to the requisite target level of 85% are evident by the fact that when the payments were received in the months of February and March, 2018, for the year 2018-19 the Appellant has been able to procure coal, maintain coal stock and declare availability at much higher levels.

2.23 In the circumstances mentioned above, on 28.12.2018, the Appellant filed a petition being Petition No. 1402 of 2019 before the State Commission

seeking compensation for the loss in availability during the year 2017-18. The Appellant also on 21.01.2019 filedan additional affidavit in the matter detailing its case and the legal basis for the claims made.

2.24 By the impugned order, the State Commission has rejected the petition of the Appellant. The State Commission has inter-alia, held that the Appellant was compensated in the form of late payment surcharge. Further, the State Commission has held that the Appellant did not recover higher fixed charges as it had delayed the tariff petition. The State Commission has further held that since the Appellant did not have a long term coal linkage, it was procuring coal at higher cost and therefore could not pay for thesame. Aggrieved by the aforesaid findings of the State Commission, the Appellant has preferred the instant Appeal.

3. **QUESTIONS OF LAW**

Following Questions of Law have been raised in the Appeal for our consideration:

3.1 Whether in the facts and circumstances of the case, the declaration of availability to the extent of 85% (normative availability for recovery of fixed cost) was not possible due to material and fundamental breach of the terms of the PPA by the Respondent UPPCL, the State Commission is right in disallowing the full fixed cost recovery on deemed availability at85%?

3.2 Whether in the facts and circumstances of the case, the Respondent UPPCL being fully aware of the special circumstances that the source of revenue to the Appellant for funding the generation and supply of electricity including and in particular procurement of coal and incurring of input cost is only the recovery of the revenue from generation and sale of electricity, whether the State Commission was right in not allowing and damages as the fixed charges for the difference between the availability at

54.78% to the normative availability at 85% in terms of the provisions of Sections 73 and 74 of the Indian Contract Act,1872?

3.3 Whether the State Commission is right in not appreciating that the Respondent UPPCL was responsible for the Appellant's inability to achieve the normative available of 85% for the financial year 2017-18 by reason of persistent recurring and continuous default in the payment of the money due for the generation and supply of electricity and, therefore, should be made liable for all direct consequences of such non-payment including non-generation of electricity for the capacity between 54.78% to85%?

3.4 Whether the Respondent UPPCL had committed a breach of the fundamental terms of the provisions of the PPA when the generation and sale of electricity on a continuous basis by the Appellant for the duration of the PPA is dependent on the recovery of the revenue from generation and sale of electricity and the Appellant has no other source to fund the generation including procurement of coal required for such generation ofelectricity?

3.5 Whether in the facts and circumstances of the case, the implied and fundamental term of the provisions of the PPA is that the Respondent UPPCL will consistently pay the monthly bills raised by the Appellant for generation and supply of electricity in order to enable the Appellant to meet the input cost including the cost of fuel to be procured and servicing of the payments due to the Lendersand, therefore, should be held liable for all direct consequences arising out of such non payment of the bills?

3.6 Whether the State Commission is justified in not exercising its jurisdiction to relax the normative availability of 85% to 54.78% for the year 2017-18 in the facts and circumstances of the present case as well as in the light of theprecedents?

3.7 Whether in the facts and circumstances of the case, the State Commission ought to have exercised its general regulatory powers under section 86(1) of the Electricity Act and the UPERC Tariff Regulations?

3.8 Whether in the facts and circumstances of the case where there has been recurring persistent and deliberate defaults on the part of UPPCL in making payments of monthly bills, the State Commission is justified in rejecting the claim of the Appellant on the ground that late payment surcharge is the only remedy for the delayedpayments made by theAppellant?

3.9 Whether the State Commission is justified in rejecting the claim of the Appellant on the ground that the Appellant did not claim higher fixed charges by delaying the filing of the final capital cost petition, in particular when the Appellant's claim for the present, is based on the provisional tariff decided by the State Commission and has no relation to claim higher fixedcharges?

3.10 Whether the State Commission is justified in rejecting the claim of the Appellantonthegroundthattheappellantwasprocuringcoalathigher cost than admissible and therefore could not procure coal when the matter relates to material breach by UPPCL in making the payment of the monthly bills and has no relation to the cost ofcoal.?

3.11 Whether the State Commission is justified in rejecting the claim of the Appellant observing that the Appellant could not conclusively prove that the sole cause for inadequacy of coal was the delay inpaymentsby UPPCL, when admittedly, the power project has been established on non-recourse basis and the recovery of money from generation and sale of electricity is the only source of servicing the funding and finances required for the operation of the power plant and generation and supply of electricity including procurement of inputcost?

3.12 WhethertheStateCommissionisjustified innot exercisingitspowers under the Regulations and also the regulatory powers under the Electricity Act to compensate the Appellant for the loss caused on account of non-payment of its dues byUPPCL?

4. Mr. Anand K. Ganesan, Learned Counsel for the Appellant has filed his Written Submissions for our consideration as under:-

4.1 The Appellant and Respondent No. 2- Uttar Pradesh Power Corporation Limited (**UPPCL**) entered into a Power Purchase Agreement dated 10.12.2010 and thereafter a Supplementary Power Purchase Agreement dated 15.06.2011(collectively referred to as the "**PPA**") for a term of 25 years for purchase for 100% saleable energy from 3x660 MW generating plant (thermal power) of the Appellant. The PPA is approved by the State Commission and specifically provides Payment Security Mechanism - establishment of Letter of Credit (LC) and for Escrow Arrangement by UPPCL and for payment of monthly tariff bills by UPPCL within 30 days.

4.2 The State Commission vide Order dated 27.11.2015 has allowed provisional tariff of Rs 1.88/- per unit towards the fixed cost and Rs 2.95/- per unit for the variable charges. The fixed charges have been computed on capital expenditure of Rs. 12,868 crores incurred by the Appellant. The said provisional tariff of fixed charges was further revised to Rs. 2.24 per unit with effect from 07.03.2018.The final tariff of the Appellant's generating station is pending determination before the State Commission.

4.3 The State Commission in the Impugned Order has rejected the Appellant's prayer for relaxation of Plant Availability Factor (PAF) of the generating station for FY 2017-18 for recovery of fixed charges (hereinafter referred to as the **"Disputed Period**") from 85% (Normative) to 54.78% (Actual achieved) by which the Appellant had sought to recover the loss of fixed charges which the Appellant would have recovered had UPPCL timely paid the monthly tariff/bills in accordance with the terms of the PPA.

4.4 The Appellant had achieved a plant availability of 54.78% during the year 2017-18 as against the target availability of 85% provided in the *UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014***["Tariff Regulations, 2014"].** The Appellant was unable to declare the plant availability to the full capacity wholly and exclusively due to the persistent defaults in payment of the monthly bills by UPPCL. Apart from continuous default in the payments, UPPCL has also failed to establish the Payment Security Mechanism (PSM) - Letter of Credit (LC) and Escrow arrangement as explicitly provided in Article 11.3 of PPA signed between the Appellant and UPPCL. This failure to establish the PSM till date is despite the clear direction of the State Commission vide Order dated 23.03.2018 passed in Petition No. 1288 of 2018

4.5 The PPA is a document providing for the reciprocal promises between the Appellant and UPPCL. Since UPPCL admittedly did not perform its obligations of paying the monthly tariff in a time bound manner, the Appellant cannot be expected to declare capacity to the extent of 85% as provided in the PPA and the Tariff Regulations.The non-payment of amounts by UPPCL increased progressively from Rs. 545 crores outstanding in the month of April 2017 and accumulated to Rs. 1267 crores in January, 2018 (total outstanding), whereas the cash outflow for each month for generation to achieve the normative availability of 85% was around Rs 498.crores**.** In such a situation, it was financially impossible for any power project established on non-recourse financing basis to sustain operation on month to month basis to the normative availability level.

4.6 As a result of continuous default in payments of the monthly bills during the FY 2017-18 by the UPPCL, the Appellant was not in a position to make advance payments against coal and railway freight on time and maintain the desired level of coal stock due to which there was shortage of coal during FY 2017-18. Consequently, the Appellant could declare the available capacity of

only one- or two-units despite the fact that all the three units remained technically available for declaring the capacity and generating the power.

4.7 As a direct consequence of the non-payment on the part of UPPCL, the Appellant was prevented from declaring the full capacity to the extent of 85% and could only achieve the declare capacity of 54.78%.The Appellant suffered a loss of 4939 MU equivalent availability that amounted/quantified to Rs.1108 crore of loss of fixed cost which the Appellant would have recovered had UPPCL timely paid the monthly tariff in accordance with the terms of the PPA. The table showing the details/bifurcation of loss of Rs. 1108 crore is as under:

LALITPUR POWER GENERATION COMPANY LIMITED - CALCULATION OF DC LOSS OF FY 18

S. No	Month	Capacity at 100% Availability		Capacity Actually Declared		Difference					
						Total		Coal Shortage		Technical Reasons	
		(MU)	%	(MU)	%	(MU)	%	(MU)	%	(MU)	%
1	Apr-17	1,344	100%	815	61%	528	39%	0	0%	528	39%
2	May-17	1,388	100%	788	57%	601	43%	74	5%	527	38%
3	Jun-17	1,344	100%	879	65%	465	35%	344	26%	121	9%
4	Jul-17	1,388	100%	771	56%	617	44%	477	34%	140	10%
5	Aug-17	1,388	100%	764	55%	625	45%	596	43%	29	2%
6	Sep-17	1,344	100%	756	56%	588	44%	561	42%	27	2%
7	Oct-17	1,388	100%	862	62%	527	38%	379	27%	148	11%
8	Nov-17	1,344	100%	646	48%	697	52%	668	50%	29	2%
9	Dec-17	1,388	100%	966	70%	422	30%	420	30%	2	0%
10	Jan-18	1,388	100%	717	52%	672	48%	562	41%	109	8%
11	Feb-18	1,254	100%	328	26%	926	74%	925	74%	1	0%
12	Mar-18	1,388	100%	664	48%	724	52%	695	50%	29	2%
	Total	**16,347**	**100%**	**8,957**	**55%**	**7,391**	**45%**	**5,701**	**35%**	**1,690**	**10%**

Summary	**(MU)**	**%**
Capacity at 100% Availability	16,347	100%

Capacity Actually Declared	8,957	55%
Difference	**7,391**	**45%**
Less: Loss Due to Technical Reasons	1,690	10%
Balance (Due to Coal)	**5,701**	**35%**
DC (assuming no coal shortage)	14,657	**90%**
Restricted to 85% Availability	13,895	**85%**
Capacity Actually Declared	8,957	**55%**
Loss Due to Coal Shortage (Restricted to 85% PAF)	4,939	**30%**
Value in Rs. Crs. (@ Rs. 2.24/kWh)	**1,108**	

4.8 The Appellant is required to pay the coal companies 100% of the cost of coal and also pay 100% of the railway freight in advance, for which the Appellant is required to be paid in time to ensure adequate working capital. While minor and occasional delays are to be taken care of in the working capital arrangements by the Appellant, these consistent and substantial delays in payments by UPPCL resulted in huge compounded outstanding during the FY 2017-18 which severely impacted the financials of the Appellant.

4.9 The findings of the State Commission dismissing the petition filed by the Appellant are as under –

*"**26. Commissions View**:*

After examining the contents of the Petition, additional submissions and after hearing the arguments of both the parties, the Commission is of the view that in this petition the Petitioner has attributed the short fall in the plant availability to delayed payments stating that it could not procure coal due to delayed payment by the procurer. The Petitioner has invoked the general powers of the Commission to relax the Generation Tariff 2014 to reduce the normative plant availability factor from 85 to 54.78%, the Commission finds that to cater to the situation of delayed payment both the Regulations and the PPA provide for the obligations of the procurer and in the event of shortage of coal also the provisions exists to reduce the normative plant availability factor form 85 % to 83%. In this case there have been delays in payments but the procurer has paid the Late Payment Surcharge to the petitioner. This is a project in which the tariff is determined under Section 62 and unless the Petitioner files the petition for final tariff, the provisional tariff is granted as per the UPERC (Terms & Conditions of Generation Tariff) Regulations 2014. The Petitioner has delayed filing of the final capital cost and also the final tariff petition which resulted into lower fixed cost.

The petitioner in order to meet its debt service obligation, utilized substantial portion of funds received thereby leaving Insufficient funds for coal procurement. Further the Petitioner did not have the long-term coal linkage as per the

provisions of PPA and was procuring coal from the open market at a higher cost than what was admissible in the variable charges.

27. From the arguments and documents submitted, the Commission is of the view that the delay in payments was not the sole cause for inadequacy of coal in the petitioner's plant. For delay in payment, the petitioner has been compensated by way of late payment surcharge as per the provisions of the Generation Tariff, Regulations 2014 and the PPA.

The Commission cannot exercise its 'General Power to Relax' to change the rules of the game, which are predetermined and well understood by both the parties. The Petitioner could not conclusively prove the sole cause for inadequacy of coal was delay in payments, Therefore the Commission does not find merit in the claim of the Petitioner.

28. The Petition is dismissed."

4.10 The UPPCL in the reply or in the Written Submission or even during the hearings have not disputed the fact that it has continuously defaulted in payment of the monthly bills of the Appellant for continuously 10 months in a row. In this regard, it has also failed to provide any substantial justification or adequate reason towards the prolong and continuous delay in payment of the monthly bills raised by the Appellant. In fact, UPPCL has accepted the fact that it has defaulted in regular and timely payments of the monthly bills raised by the Appellant. The only defense of UPPCL is that the Appellant is compensated by Late Payment Surcharge (**LPSC**). Further, UPPCL has used the method of 'averaging' of the total amount paid by including the onetime bullet payments made in the month of Feb-March 2018, which is merely statistical and show an incorrect representation of the financial deficit of the Appellant. In this regard, the relevant extract from reply submitted by the UPPCL is as under:

"4.3 Even if the data submitted by LPGCL was to be taken at face value (assuming but not admitting), it is glaringly evident that UPPCL had made payments more than the amount that was billed for the FY 2017-18. A summation of values of "Billed During Month" column of the Table 1 shows that LPGCL had billed an amount of Rs. 4047 crores during FY 2017-18. As against the same, a payment of Rs. 4100 Crores was made by UPPCL during FY 2017-18 (as is evident by summing up the values of the "Collection" column of Table 1)."

4.11 If the contention of UPPCL with regard to paying more amount because of LPSC and subsequent remedy available to the Appellant is taken, ex facie this will mean to legitimize their action of starving the Appellant for its money for 10 months in a row and exempt the default of UPPCL by allowing the bullet payments in the end of the financial year. This is prima facie against the fundamentals of the PPA signed between the Appellant and UPPCL.

4.12 The PPA provides for a very strict payment security mechanism and clearly establishes that 'timely payments' from UPPCL on a monthly basis is fundamental to sustain operation of the power plant. In this regard, the provisions of the PPA provides for a 'specific date' of payments by UPPCL, in order meet the financial expenditure and to effectively maintain the cash outflow of the Appellant. The PPA provides for the payment of the monthly bills by UPPCL within 30 days of receipt of the bills raised by the Appellant.

4.13 In view of the various Articles of the PPA, it can be seen that the PPA is premised on the central aspect of strict adherence by UPPCL towards the robust payments cycle as provided above. Irrespective of the same, UPPCL did not adhere to the payment mechanism and chose to financially strangulate the Appellant by not paying continuously for 10 months and thereby starving the Appellant of the legitimate fixed charges which the Appellant would have received had it been in a situation to provide the availability to SLDC.

4.14 Further, the perverse conduct of UPPCL is clear from the fact that while it was not paying to the Appellant, it was duly collecting the tariff of the Appellant in the monthly bills from its consumers on time and charging late payment surcharge even for a delay of one month. Similarly, UPPCL has paid other generators who were more expensive than the Appellant in full in FY 2017-18 but not paid the Appellant.

4.15 In January 2018, the Appellant had filed Petition No. 1288 of 2018 seeking payments of the monthly bills from UPPCL for the period August 2017 to December 2017 and for direction to be issued to UPPCL for providing the Payment Security Mechanism to the Appellant as per the PPA. After filing of

the said petition, UPPCL had paid Rs. 1,215 Crore till disposal of the said petition on 23.03.2018. While disposing off the said petition the State Commission had categorically directed UPPCL for establishment of the escrow mechanism as per the provisions of PPA. However, despite the same, even till today, UPPCL has not provided the LC or the Escrow arrangement to the Appellant.

> *"4. The Commission decided to dispose of this Petition with the instructions that the escrow mechanism as per the provisions of PPA should be arranged at the earliest.*
>
> *5. The Petition no.1288 of 2018 is accordingly disposed of."*

4.16 Further, the banks and financial institutions have funded the Appellant's project based on the terms of the PPA which provides for a strict Payment Security Mechanism. However, since the Letter of Credit and Escrow Account have not been established by UPPCL and taking in view the constant payment default from UPPCL, the Appellant is being subjected by its banks and financial institutions, for the existing debt taken, for increased cost of financing including higher interest rates and penalty. Further, since there is no payment security to the Appellant in case of default by UPPCL, the Appellant is constrained to persistently litigate before the State Commission / this Tribunal / the Hon'ble Supreme Court etc which is a long-drawn process and worsens the cash flow cycle of the Appellant.

4.17 The rights and obligations of the Appellant and UPPCL arising out the PPA qua each other are mutual. It cannot be that UPPCL does not perform its part of the obligation as provided under the PPA and expects the Appellant for maintaining the adequate coal stock, in absence of financial resources and payment security mechanism available to the Appellant. The primary nature of the PPA is 'reciprocal' in nature, where both the parties perform their part obligation qua each other. It is stated that parties in a reciprocal contract are dependent upon each other and one party cannot insist on the performance of a contract, wherein it has failed to perform its part of the obligations arising out

of the said contract. In this regard, the Hon'ble Supreme Court in *Sikkim Subba Associates vs. State of Sikkim (2001) 5 SCC 629)* has held as under:

> *"16. ….The agreement between parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of the appellants continued till even the passing of the Award in this case. So far as the defaults and consequent entitlement or right of the State to have had the lotteries either foreclosed or stopped further, the State in order to safeguard its own stakes and reputation has continued the operation of lotteries even undergoing the miseries arising out of the persistent defaults of the appellants."*

4.18 A similar case arose before this Tribunal in ***Raghu Rama Renewable Energy Ltd***. *v.* ***Tamil Nadu Generation and Distribution Corporation Limited*** (Appeal No. 181 of 2013), where TANGEDCO sought to recover penalty from a generator for not achieving target PAF / generation after delaying monthly payments to the said generator. This Tribunal held as under –

> *"40. In the present case also TANGEDCO did not comply with its obligation to make payment even after receiving contracted power supplies for four months from June 2011 to September 2011 and thereafter also delaying payment by 4 to 9 months despite Appellant's repeated requests, which had direct bearing on the performance of Appellant and the Appellant could not meet its obligation for supplying full contracted Appeal No. 181 of 2013 Page 45 of 47 quantum of power in the subsequent months from November 2011 onwards. TANGEDCO which had failed to perform into own reciprocal promise cannot claim for performance of the Appellant and claim damages for non-performance of the Appellant caused due to non receipt of payment.*
>
> *……………………...*
>
> *41. Appellant in the EPA had promised to supply the contracted power to TANGEDCO which is in turn had promised to make payment for the same by the due date which was agreed to be within 30 days of receipt of invoice. Appellant despite non-payment of any money kept its promise and supplied the contracted power for four months from June to September 2011 by arranging own finances or taking loans. Several requests by the Appellant for payment elaborating financial difficulties in arranging fuel did not elicit even a reply from TANGEDCO. When the payment was made belatedly by TANGEDCO at its own whims and fancy no surcharge for delayed payment was made. Payment for supplies made*

during the period November 2011 to March 2012 was made on 2.8.2012 well after the conclusion of the EPA, in lump sum after a delay of 4 to 9 months, after deducing the penalty for short supply without paying delayed payment surcharge. Even after the impugned order dated 4.6.2013 by the State Commission directing payment of interest for the delayed payment as per the EPA, the same has not been paid so far by TANGEDCO. The Appellant was also constrained in seeking termination of the contract as directions of the State Government u/s 11(1) to the generators in the State to supply to the State Grid were in vogue. We feel that in the circumstances of the case, TANGEDCO is not entitled to claim compensation for short supply of power when it had failed to perform its own reciprocal promise and creating circumstances leading to non-fulfillment of obligation of maintaining contracted supply on the part of the Appellant."

4.19 The reciprocity of the PPA is reflected from the fact that the PPA is on a non-recourse basis and the Appellant requires the adequate cash flow for each month to effectively run its generating stations to its full capacity. If a distribution licensee doesn't make adequate payments for 10 months at a stretch, it is financially impossible for any power project established on non-recourse financing basis to sustain operation on month to month basis to the normative availability level. Further, the Appellant by way of the present appeal is not seeking damages but is praying for specific relaxation in the norms of Plant Availability Factor in the Tariff Regulations 2014, which is directly arising from the failure to perform the obligations by UPPCL as provided under the PPA i.e. due adherence to the payment structure as agreed upon by the Appellant and UPPCL before entering the PPA and as mentioned in the PPA.

Re: Late Payment Surcharge (LPSC) is a sufficient remedy for delay in payments:

4.20 The State Commission and UPPCL have erroneously contended that the Appellant gets compensated by way of the Late Payment Surcharge (LPSC) as provided in the PPA and the Tariff Regulations, 2014 in case of delay in payments by UPPCL. This is wrong and perverse as LPSC is a deterrence mechanism and only takes the aspect of the time value for money and not a remedy for non-payment. In this regard, if one accepts the contention of State

Commission and UPPCL, then a generator would remain profitable in the books due to the LPSC component, however in reality it becomes bankrupt due to cash flow and non-payment.

4.21 Further, the continuous and chronic delays on part of UPPCL disentitles its contention that the LPSC was adequate for UPPCL to escape from the direct consequences of the loss of availability by the Appellant. UPPCL in its reply as well as written submissions has averaged out the payments made by it as if the Appellant received regular monthly payments. However, cash flow on a monthly basis is essential as the Appellant has to pay in advance for the coal and railway freight charges.

4.22 The State Commission and UPPCL cannot unilaterally read one provision pertaining to LPSC without referring to the other provisions of Tariff Regulations 2014 and the PPA which provide for the detailed Payment Security Mechanism as provided under Article 11.4 of the PPA. The PPA therefore envisages for establishing due payment and servicing of the capital cost and operating expenses on a 'monthly basis' as an essential and fundamental characteristic of the payment method to sustain operation of the generation of electricity, wherein the monthly bills are to be paid within 30 days of raising the same to UPPCL.

4.23 In the present case, the State Commission should not have ignored the perverse conduct of UPPCL's of taking shelter under the provision of LPSC as the loss occurred in the recovery of fixed charges on account of lower plant availability cannot in any manner be compensated by LPSC which at the most represent financing cost from alternate sources only, if at all the additional financing is available.However, the State Commission instead of noting the perverse conduct of UPPCL, it has above all rewarded UPPCL by holding that LPSC is sufficient compensation in the present case.

Re: Average delay in the payment cycle of UPPCL was not more than three months:

4.24 The contention of UPPCL that the average payment cycle of UPPCL of monthly bills raised by the Appellant was not more than three months is frivolous and has been made with an intention to mislead this Tribunal.The fundamental nature of the PPA provides for 'monthly payments' and there is no concept/methodology for 'averaging' out the payments of 12 months and equating it with condition of regular payments, either in the PPA or in the Tariff Regulations 2014. The 'averaging' method projected in the Written Submissions of UPPCL is misleading in nature and attempts to misrepresent by shielding the default of UPPCL in timely payments of the monthly bills. In this regard, the following are relevant:

(i) The average delay in payments by UPPCL was for more than three months and in fact, from November 2017- February 2018, the average delay was around 5 months.

(ii) UPPCL cannot make bullet payments in the end of the financial year and then contend to pull out the average within the said payments for the said financial year. In this regard, the table in the Written Submission provided by UPPCL is merely statistical and gives an incorrect representation to somehow divert the attention of this Tribunal towards the gross continuous defaults by UPPCL in payment of the monthly bills.

(iii) Averaging cannot be taken in situation when a distribution licensee makes the payment for the whole financial year at the end of it and contends to shield itself by taking the average of the total payment during the 12 months.

4.25 An analogy can be drawn from the RBI Circular dated 12.02.2018 which provides for a revised framework for Resolution of Stressed Assets which defines Default as *"means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be".*

4.26 The total outstanding of UPPCL accumulated to Rs. 1267 crores in January, 2018 whereas the cash outflow required for each month for generation at the normative availability of 85% was around Rs 498.crores. The financial condition of Appellant for the disputed period is summarized as under:

a) For the FY 2017-18, UPPCL has made a bullet payment of Rs. 1,267 crores at the fag end of the said financial year i.e. in the months of Feb-March 2018, that too after the Appellant had filed a petition being Petition No. 1288 of 2018 before the State Commission seeking directions for payments of the outstanding dues.

b) The Appellant had received a sum of total sum of Rs. 4,100 Crore from UPPCL during FY 2017-18. In this, a significant sum of Rs.1,267 crore was received in the months of Feb-March 2018. Therefore, for 10 months of FY 2017-18, the Appellant was financially strangulated and was only left with a sum of Rs. 2,833 crores out of which the Appellant had to meet its debt service obligations, working capital cost and O&M Charges including salary payment amounting to Rs. 207 Crore on a monthly basis as an essential and inevitable cash outgo prior to incurring any amount on procurement of coal.

c) Further, a generating station has to operate on actual amounts received by it in every month and not on averages after the year end is over. Cash Flow is the most important thing and UPPCL without providing an LC and Escrow Arrangement cannot contend that there were only short delays which get compensated by payment of LPSC.

d) As against the average monthly payments of Rs 295 Crores made by the UPPCL, the Appellant was only left with around Rs. 69.09 Crore after deducting the fixed monthly cost of Rs. 207 Crore towards debt service, O&M expenses and working capital costs. This average basis for purchase of fuel was sufficient for achieving declared of capacity of only 25.62 %. However, despite the financial constraints faced by the Appellant due to the irregular payments made by UPPCL, the Appellant

was able to dispatch energy worth Rs. 2,257 Crore to UPPCL and could somehow achieved the Actual PAF of 54.78% for FY 2017-18.

e) 4.27 The timely payments by UPPCL has a direct bearing on availability of plant and its operation. This is evident from the fact that PAF for the month of March 2018 was 55% and was increased to more than 95% in the month of April 2018 as Appellant had adequate financial resources since UPPCL had cleared its dues in the month of Month 2018. In fact, in FY 2018-19, the Appellant could achieve the PAF upto 85% since UPPCL did not delay the payments like FY 2017-18. The month wise PAF achieved by the Appellant in FY 2018-19 and the payment position by UPPCL is extracted below:

Sr. No.	Month	PAF (Month)	Bill passed by UPPCL (Rs. In cr)	Collection (Rs. In cr)	Excess or Deficit amount (Rs. In cr)
1	Feb-18 (*)	26%	334	413	-80
2	Mar-18 (**)	48%	137	854	-717
3	Apr-18	96%	278	153	125
4	May-18 (*)	82%	950	225	725
5	Jun-18	68%	523	271	252
6	July-18 (**)	63%	-	385	-385
7	Aug-18	91%	368	271	96
8	Sep-18	99%	381	139	242
9	Oct-18	100%	875	154	721
10	Nov-18	99%	537	150	387
11	Dec-18	100%	302	361	-59
12	Jan-19	64%	279	379	-100
13	Feb-19	87%	306	435	-129
14	Mar-19	81%	260	390	-130
	FY 18-19		**5,057**	**3,314**	**1,743**
	Feb 18-March 19		**5,528**	**4,581**	**947**

4.28 In view of the submissions made above, it is stated that 'averaging method' as submitted by UPPCL is nothing but an attempt to cover the disastrous financial impact that the Appellant had to undergo for the FY 2017-18 due to continuous non-payment by UPPCL.

Re: Co-relation between the coal shortages and non-payment /default in payments of monthly tariff:

4.29 The State Commission has held that the Appellant could not establish the co-relation between the default in the payments made by UPPCL and the coal shortage being faced by the Appellant which contributed to low PAF. The State Commission also held that the non-payment was not the sole cause for coal shortage faced by the Appellant in FY 2017-18. Further, UPPCL in its written submission has also submitted that there is no correlation between the coal shortage and default in payment of monthly tariff in accordance with the 'average' out formula provided by UPPCL in the Written Submission. UPPCL has laid great emphasis on the "Demurrer" argument and contended that the Appellant has to link each and every payment default to its lesser availability by providing working capital charts, cash flow statements etc. This is entirely incorrect.

4.30 The Appellant had already placed on record the substantial documents in support of its claim. Further, the bills raised by the Appellant during the FY 2017-18 have been accepted by UPPCL and verified by the State Commission while adjudicating Petition No. 1288 of 2018 wherein the State Commission directed the UPPCL to pay Rs. 1,267 crores to the Appellant for the defaulting months in the FY 2017-18. It is relevant to note that the Appellant before the State Commission has demonstrated the link between the non-payment by UPPCL and the loss in its plant availability, However, the State Commission has failed to take the note of the same and the contentions of the Appellant in regard to the direct connection between the same is herein under:

4.31 The fixed monthly expenditure of the Appellant in FY 2017-18 amounted to Rs.**207 Crores on monthly basis towards debt service, O&M expenses and working capital costs**as under :

(i) **Servicing of Debt Obligations (FY 2017-18)**: The State Commission and UPPCL failed to take note of the fact that the payments received from UPPCL was first being adjusted by the lenders/bankers towards debts servicing which worked out about Rs. **169 Crores per month** as per the Provisional Tariff Order dated 07.3.2018 passed in Petition No. 1075 of 2015.

(ii) **The operational and maintenance expenditure (FY 2017-18)**: The bare minimum O & M expenditure necessarily to be incurred by the Appellant amounted **Rs. 18 Crores per month** (after having excluded annual or overhaul expenses)

(iii) **Serving Cost of Working Capital (FY 2017-18)**: **Rs. 21 Crores** was required to be incurred in servicing the cost of working capital as allowed in the said provisional tariff.

4.32 Further, from the perusal of records, it can be seen that against the possible coal purchase Orders during April, 2017 to February, 2018, based on UPPCL payments (Order for receipt during the next month), totaling to 24.2 Lac MT, the Appellant had purchased 45.4 Lac MT of the coal by making extra efforts through infusion of funds by the promoters of the company or through their personal securities. I**t can also be seen that while UPPCL created situation for the Appellant to give DC only to the extent of 25.62.% on average basis during the year 2017-18, the Appellant had succeeded in giving DC to the extent of 54.78% solely on account of efforts made by it.** However, due to persistent funds shortage caused by UPPCL, the Appellant in spite of its best efforts could not achieve the target availability of 85% during the year 2017-18 and could not recover its full capacity charges for the reasons totally attributable to UPPCL.

4.33 The fact that coal was non-available solely due to non-payments by UPPCL during the FY 2017-18 is evident from the coal stock position of the Appellant as against payments made by UPPCL. In August, 2016 the Appellant had built up coal stock in excess of 5 lac MT. However, with non-payments mounting high, the coal stock was reduced to 30,379 MT by March, 2017.

4.34 The amounts paid by UPPCL for many months during the relevant period were not commensurate even with the energy scheduled by them from the station during the next month and the consequential fuel cost incurred by the Appellant even at such a reduced generation level. It is reiterated that Cash flow on a monthly basis is essential when the electricity is being supplied and bills are being raised on a monthly basis. Even, a delay of a few days adversely affects the financials of a generator.

Re: Absence of coal linkage:

4.35 The State Commission has erred in observing that Appellant is not entitled for relaxation of the PAF as the Appellant was procuring coal at a higher price than what was admissible because of the absence of the coal linkage. In this regard, it is stated that the State Commission has failed to take note of the fact that for the disputed period i.e. FY 2017-18, the Appellant was equating the cost of coal to the reserve price of the concerned mine, for which the dispensation was given by the State Commission itself in its Order dated 21.09.2016 passed in Petition No. 1101 of 2016.

4.36 It is relevant to note that in the Order dated 21.09.2016, State Commission had also allowed transportation charges equal to rail freight from a benchmarked mine, namely Amrapali mines till the Appellant's captive railway siding. Further, the impact of the said Order was not that significant to affect the liquidity of the Appellant as has been erroneously presumed by UPPCL. The State Commission has also erred in assuming that the inadmissible fuel cost due to the Appellant agreeing to bear the difference of reserve price and the e-auction price of coal would make substantial difference to the cash flows

of the Appellant without quantifying such difference during the relevant period vis-à-vis outstanding amounts payable by UPPCL.

4.37 Further, the allegation of UPPCL that one of the real reasons for coal shortage is absence of coal linkage is misleading. The Appellant had a coal linkage from the Ministry of Coal. UPPCL was well aware that due to the judgment of the Hon'ble Supreme Court in Manohar Lal Sharma vs The Principle Secretary & Others (2014) 9 SCC 516, the coal linkage granted were cancelled and coal not being supplied by coal India and/or by its subsidiaries. This was an industry wide problem and no FSAs were being signed. The policy gap has been recognized in the following documents –

(i) Central Electricity Authority letter 29.03.2010 to Coal India Ltd wherein it stated that committed quantity of supply would be 80% of ACQ for yet to be commissioned projects;

(ii) Office Memorandum for record notes of discussions held on 06.062011 to review NCDP, 2007 wherein Coal India stated that it is not in a position to meet the full requirements and there would be shortfall. A model FSA was circulated which stated that only 50% coal could be provided from domestic sources;

(iii) Communication dated 17.02.2012 from Ministry of Coal to Coal India Limited for execution of FSA with 80% as trigger level for disincentive;

(iv) Presidential Directive dated 04.04.2012 ratifying the above and stating that FSAs would be signed with a trigger level of 80% for disincentives;

(v) Ministry of Power directive dated 31.07.2013 recognizing that in February 2012, it was decided to reduce the coal supply commitment from Coal India to 80% and now as per NCDP, 2013 it is being further reduced to 65%, 67% and 75% in a phased manner;

(vi) Ministry of Power issued the National Tariff Policy on 28.01.2016 wherein the reduction in coal quantum by the New Coal Distribution Policy 2013 was recognized.

All the above constituted a Change in Law and the Appellant was entitled to procure alternate coal and get the increased coal cost from UPPCL.

4.38 The Appellant had procured alternate coal as per the Article 6.5 of the PPA that provides a right to the Appellant to procure alternate sources of coal. The Article 6.5 is produced herein under:

"6.5 Fuel

The responsibility for arrangement of Fuel shall be with the Developer who shall procure the Fuel under coal linkage granted to the Seller by the Central Government on the recommendations of GoUP . In case of any short supply , procurement of fuel indigenous / imported preferably through long term contract or on spot-purchase / short-term contract / E-auction basis from domestic and/or international suppliers /traders shall be within or outside India. The Seller shall obtain the prior consent of Lead Procurer about procurement of coal from any source other than coal linkage. In case the permission is not granted by the Lead Procurer within seven (7) working days from the date of receiving the application, it would be considered as deemed permission and if rejected then it would be considered as procurer's inability to procure which would make conditions of clause 4.4.3 of the agreed PPA applicable and loss of availability due to rejected fuel quantity shall be taken in to account while computing availability and fixed charges.

4.39 Further, Regulation 26(iv) of the Tariff Regulations 2014 also provides for alternate source of coal, which is provided as under:

"(iv) Cost of alternative coal supply

In case of part or full use of alternative source of fuel supply by coal based thermal generating stations other than as agreed by the generating company and beneficiaries in their power purchase agreement for supply of contracted power on account of shortage of fuel or optimization of economical operation through blending, the use of alternative source of fuel supply shall be permitted to generating station;

Provided further that the weighted average price of use of alternative source of fuel shall not exceed 30% of base price of fuel computed as per clause (v) of this regulation;

Provided also that where the energy charge rate based on weighted average price of use of fuel including alternative source of fuel exceeds 30% of base energy charge rate as approved by the Commission for that year or energy charge rate based on weighted average price of use of fuel including alternative sources of fuel exceeds 20% of energy charge rate based on weighted average fuel price for the previous month, whichever is lower shall be considered and in

that event, prior consent of the beneficiary shall be taken by the generator by serving a notice upon the beneficiary in writing not later than seven working days in advance.

Provided that if the beneficiary does not respond to the notice given by the generator in writing within the above stipulated time, the beneficiary shall be liable for payment of fixed charges to generator.

Note

Alternative coal supply from CIL beyond the FSA must be done through e-auction route and for procurement of domestic open market coal and imported coal the generating companies shall follow a transparent competitive bidding process so as to identify a reasonable market price."

4.40 ThisTribunal in its Judgment dated 01.05.2019 in Appeal No. 365 of 2018 (*LPGCL v UPERC & UPPCL*) has also upheld the above with regard to obtaining alternate source of coal by the Appellant in absence of coal linkage. The relevant extract from the same is as under:

*"11.4 We have analysed the rival contentions of the learned counsel for the Appellant and learned counsel for Respondent No.1 & 2 and also taken note of the Tariff Regulations, 2014 of the State Commission. While Regulation 18(1)(a) defines the norms of operation, target availability for recovery of capacity charges etc., the Regulation 25 specifies the computations of the capacity charges and their recovery relating to target availability etc..**It is relevant to note that once COD of the plant/unit has been achieved and fuel as per Article 6.5 of the PPA is available, the Appellant is duly entitled for the capacity charges in lieu of the declared capacity."***

*12.13Learned counsel also drew our attention over the statement of objects and reasons of the Tariff Regulations on Return on Equity. Learned counsel further contended that the State Commission by holding that the Appellant would not get the ROE has acted against express terms of the PPA which require the State Commission to determine the Tariff as per its Regulations. Further, the issue of ROE is not related to the fulfillment of Article 3.1.2(ii) relating to coal linkage at all since the Appellant had arranged for alternate coal and was itself bearing incremental fuel cost towards alternate coal the arrangement vis.a.vis. the linkage coal. **The State Commission has itself observed on the same as "putting the procurers in same position in which they would have been had the linkage coal being obtained". We are unable to comprehend the decision of the Respondent Commission that how could ROE of the Appellant can be disallowed when alternate coal was arranged by the generator at same cost as that of linkage coal (absorbing the differential cost).***

*13.3 **Having procured alternate coal and absorbing differential cost as well as virtually putting the Respondent No.2 in same situation in which it would have been had coal linkage been obtained, the Return on Equity***

(RoE) is payable to the Appellant in accordance with the Regulations of UPERC and the PPA dated 10.12.2010.

[Emphasis Supplied]

The above judgement of the Tribunal has been upheld by the Hon'ble Supreme Court on 21.07.2020.

4.41 Regardless of the submissions made above, the source of coal is immaterial if the Appellant does not make advance payment to procure the same. If UPPCL does not make monthly tariff payments on time, even if it is assumed that the coal linkage was there, the Appellant could not have procured the coal since it had no financial resources to make said payments to the coal companies.

Re: Payment cycle to Coal India Limited is for 30-45 days:

4.42 UPPCL in the Written Submission has erroneously contended that the payment cycle of Coal India Limited (CIL) is 30-45 days for the Appellant's procurement process. It is stated that the payment cycle of 30-45 days doesn't apply to the IPPs like the Appellant. UPPCL is well aware of the fact that Coal India is required to be paid in advance in terms of the Fuel Supply Arrangement dated 15.01.2018 and 22.01.2018. The relevant extract from the Fuel Supply Arrangement dated 15.01.2018 is as under:

"12. MODALITIES FOR BILLING, CLAIMS AND PAYMENTS

12.1.2 The Purchaser shall make payment in accordance with either of the following payment mechanisms:

(i) The Purchaser shall make advance payment against SQ as per the payment schedule for the month notified by the Seller, prior to seeking consent in respect of rail programme(s) from the Seller and/or order booking/allocation in case of road/other modes.

(ii) *The Purchaser shall maintain with the Seller an Irrevocable Revolving Letter of Credit ("IRLC") issued by a bank in a format acceptable to the Seller and fully conforming to the conditions to be stipulated as Schedule III for an amount equivalent to As Delivered Price of Coal for the Coal quantities that is one-ninth (1/9") of the QQ concerned, as per Clause 4.4. The As Delivered Price of Coal in this context shall take into account the highest of Notified Prices of Grades mentioned in Schedule II. The amount of IRLC shall be suitably changed whenever there is a change in any component of the As Delivered Price of Coal.*

In addition to the IRLC, the Purchaser shall pay advance amount equivalent to seven (7) days Coal valuc by way of electronic fund transfer"

Similar provision has been given in FSA dated 22.01.2018.

4.43 **In view of the above, it is stated that UPPCL was aware of the fact that Appellant was consuming-forward auction coal, wherein the Appellant has to make 100 % payment in advance and the coal is transported/provided to the Appellant once the payments are made.**

4.44 The non-payment by UPPCL directly effects the Appellant's ability to procure and maintain the desired level of stock. Consequently, for FY 2017-18, the Appellant could declare the available capacity of only one- or two-units despite the fact that all the three units remained technically available for declaring the capacity and generating the power. Further, UPPCL was put into notice by way of several contemporaneous correspondences with regard to advance payments for procurement of coal and also that the Appellant could not achieve the target PAF due to coal shortage arising due to non-payment of monthly bills by UPPCL. **However, it is stated that not even a single letter was replied to by UPPCL**.

4.45 The first letter from the Appellant with regard to the above was sent in the month of August 2017 and a total of 16 letters thereafter sent to UPPCL till they finally made the part bullet payment in February 2018. A relevant extract from the one of the said letters dated 28.11.2017 is as under :

"*Dear Sir,*

As already apprised by our senior officers during meetings with your good-self followed with various letters to release sufficient payment against our monthly outstanding bills, LPGCL is facing acute liquidity crunch as a result of which we are not in a position to procure the required quantity of coal for running all three units at their full capacity. The position has deteriorated to the extent that we are not in position to pay further payment to Coal India subsidiaries against our bid quantity nor able to pay railway freights for the rakes whatever arrived. As a result, we have been compelled to shut down our two units leaving one unit running at present. The coal stock position is being reported to SLDC through email on daily basis and the balance stock sent as on date is close to NIL.

It is also worth noting that due to non- availability of coal for running the three units at their full capacity and having been compelled to shut downs the units for want of coal solely attributed to insufficient monthly payments against our outstanding bills, we have not been able to declare our full Availability which has caused huge loss till date and likely to cause further loss in case the payment position continues as such. LPGCL has been able to declare only 59% cumulative availability so far against the annual 85% admissible availability for recovery of full fixed cost in the current Financial Year in spite of having all the three units available. It is also worth mentioning that LPGCL will claim deemed availability towards the loss of availability caused by non-payment of monthly bills by the Procurer.

The PPA provides mechanism for payment of monthly bills through Letter of Credit supported by Collateral arrangements of Default Escrow Agreement. The UPPCL has not opened the LC account in compliance of PPA. However, the Tri-Partite Default Escrow "Agreement along with the Bankers designated as Escrow Agent for the establishment and operation of the Default Escrow Account in favor of Seller for Rs.34lcrore monthly revenue along with Agreement to Hypothecate Cum Deed of Hypothecation has already been executed allocating therein the units and duly registered. The payment through Default Escrow Account is also not being transferred in true sense for want of standing instructions (SI) to the concerned banks for auto transfer of the revenue collection from the allocated units to Seller's account. As a result, the total outstanding of LPGCL as on dale is Rs.1296.09crore out of which Rs.556.70Crore is overdue beyond 60days."

4.46 Similar letters like above were sent to the UPPCL wherein the Appellant had sought for urgent funds to be released for the specific purpose of payment to Coal India Limited for procurement of coal. The Appellant through these letters showed their financial condition and financial expenditure and the disastrous impact of non-payment by UPPCL towards the same However, despite the same, UPPCL gave no heed to the letters and made no efforts towards clearing the outstanding payments on time.

Re: Cash flow issue attributable to delay in filing the final tariff petition:

4.47 On the aspect of delay in filing of tariff petition, the findings of the State Commission is perverse as the State Commission has failed to provide any substantial reason for rejecting the claim of the Appellant for relaxation vis-a-vis delay in filing the final tariff petition. There is absolutely no relation between delay in filing the final tariff Petition and reduction in PAF of the Appellant's generating station for disputed FY 2017-18. It is stated that for the

disputed period i.e. FY 2017-18, the Appellant had billed UPPCL with regard to provisional tariff of Rs. 1.88/- for the fixed charges as there was no revision of provisional tariff by that time.

4.48 Secondly, the petition for revision of provisional tariff was filed on time, however, it remained pending before the State Commission. The Order for revision was finally passed after more than two years i.e in March 2018. Therefore, for the disputed period, UPPCL was charged with respect to the first provisional tariff and not even the revised provisional tariff of Rs. 2.24 per unit.In view of the above, there is no question of delay in filing the final tariff petition in regard to affecting the PAF of the Appellant's generating station for FY 2017-18. Further, delay in filing the tariff petition would only postpone the higher tariff that the Appellant would be entitled to. It is beyond comprehension as to how this is even relevant to the present case, wherein even the lower tariff was itself not paid to the Appellant.

4.49 Further, UPPCL in its written submissions, has laid great emphasis on the fact that the Appellant has delayed intentionally in filing its final tariff petition before the State Commission which according to UPPCL, is the main cause of all the sufferings of the Appellant. The counsel for UPPCL has also guessed that the Appellant is quite happy with the provisional tariff and so has not filed its final tariff petition. In fact, UPPCL has misled this Tribunal and completely diverted from the aspect of non-payment by wasting so much precious time on this aspect. However, since several allegations have been made against the Appellant, the same are being dealt with hereunder.

4.50 It is relevant to note that UPPCL at one instance is contending that the provisional tariff determined by the State Commission is not adequate for the Appellant and therefore, the Appellant has suffered in FY 2017-18. Thereafter, UPPCL is contending that the Appellant is happy with the provisional tariff and does not seek to get its final tariff determined. These two submissions of UPPCL are running contrary to each other. In any case, the time given to file the final tariff petition after determining the provisional tariff of Rs. Rs

2.24/unit, was in beyond the dispute/relevant year of 2017-18. Further, for the record with regard to final tariff petition, the Appellant has already filed tariff petition being Petition No 1431 of 2019 and the State Commission has directed for appointment of independent DIA for prudence check, which has not been appointed till date.

4.51 Further, UPPCL has wrongly alleged that Appellant is seeking a final tariff for a capital cost of INR 18,575 crores which had a deficit of INR 4000 Crores vis-à-vis the capital cost of INR 14,269 provisionally approved by the State Commission by way of order dated 07.03.2018 in Petition No. 1075 of 2015. In this regard, the contention of UPPCL has been that even if it had paid in time, the Appellant could not have declared proper availability since its tariff determined was not commensurate with the costs incurred by it. Nothing would be farther from the truth.

4.52 The contention of UPPCL that the Appellant has claimed Rs. 18,575 as the final capital cost is wrong and denied. As per the Petition No. 1431 of 2019 filed for determination of final tariff of Appellant's Plant before the State Commission, the Appellant has claimed a closing capital cost INR 15,625 Crores as on 31.03.2017, which is net of undischarged liabilities and exclusive of projected capital expenditure to be incurred subsequently. It is noteworthy that while the Appellant is required to plan for funding of such undischarged liabilities, projected capital expenditure etc that may be incurred at a later date which are not applicable during the relevant period (FY 2017-18). Therefore, the allegations of UPPCL on this account are totally misconceived.

4.53 In the revision of provisional tariff Order dated 07.03.2018, the State Commission has admitted a capital cost of Rs. 14,200 crores. This Order is final and has been accepted by UPPCL. The final tariff claimed is on the basis of Rs. 15,625 crores, out of which around Rs. 1600 crores is the IDC and IEDC for the period of delay caused by UPPCL itself by not setting up the transmission facility.

4.54 Therefore, if the amount of Rs. 1600 crores is deducted, the capital work works out to be around Rs. 14,200 crores only, for which the Appellant had already filed the Petition (being Petition No 1075 of 2015) in December 2015. This is only an example to show that the contention of UPPCL that the tariff determined by the State Commission was insufficient for want of filing the final tariff petition by the Appellant is a farce. The issue herein was the non-payment by UPPCL which resulted in the Appellant not achieving the target PAF and filing of the tariff petition has no relation for the disputed period i.e. FY 2017-18.

Re: Scope of 'Power to Relax' provided under the Tariff Regulations, 2014:

4.55 The State Commission has failed to appreciate that the powers to relax the norms of the Regulations are specifically provided under Regulation 13 (Deviation from Norms), Regulation 14(Power to Remove Difficulties) & Regulation 15 (Power to Relax) of the Tariff Regulations, 2014. However, the State Commission has refused to exercise this power stating that it cannot exercise its 'General Power to relax' as it will change the '*Rules of the Game'* which have been predetermined and understood by both parties.

4.56 The State Commission failed to take note of the fact that the 'Rules of the Game' also included UPPCL to make timely payment, establish Letter of Credit and also enter into Escrow Agreement. In this background, the specific provisions for LPSC has been made in the PPA. It cannot be that one party does not observe the Rules of the Game but the other party despite following the Rules cannot be compensated for the damage caused to it by the other Party.

4.57 The facts of the present case were fit for the State Commission to relax the plant availability factor to 54.78% instead of 85% for the year 2017-18, which was specifically prayed for by the Appellant. This power is available to the

State Commission de-hors the provisions of the PPA. The relevant extract from Tariff Regulations, 2014 is as under:

> ***"13. Deviation from norms:***
>
> *(1) Tariff for sale of electricity by a generating company may also be determined in deviation of the norms specified in these regulations subject to the conditions that:*
>
> *(a) The levelised tariff of electricity over the useful life of the project, calculated on the basis of the norms in deviation does not exceed the per unit tariff calculated on the basis of the norms specified in these regulations and upon submission of complete workings with assumptions to be provided by the generator at the time of filing of the application; and*
>
> *(b) Any such deviation shall come into effect only after approval by the Commission.*
>
> ***Explanation**: For the purpose of calculating the levelised tariff referred to in sub clause (a) of clause (1), the discounting factor shall be as notified by the CERC from time to time.*
>
> ***14. Power to Remove Difficulties:***
>
> *If any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an Order and after giving a reasonable opportunity to those likely to be affected by such Order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.*
>
> ***15. Power to Relax: `***
>
> *The Commission, for reasons to be recorded in writing, **may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person by an Order."***
>
> *[Emphasis Supplied]*

4.58 The 'Power to relax' is a judicial discretion and ought to be exercised for reasons for which such relaxation exists. The judgments relied on by the Appellant in this regard have been already handed over in a separate compilation. For ease of reference, the Appellant is also reproducing the relevant extracts from the said judgements:

(i) **Uttar Pradesh Power Corporation Limited v. Lanco Anpara Power Limited [Appeal No. 336 of 2017]:** This Tribunal in the said judgement had categorically upheld the decision of the State

Commission wherein it exercised its regulatory powers to adjudicate the loss caused on account of non-payment of tariff and also due to non-establishment of the payment security mechanism. The Tribunal held as under:

> "***9.18*** *The learned counsel appearing for the Appellant placed reliance on the judgments of Hon'ble Supreme Court to substantiate his submission. The learned counsel for the Appellant contended that, the payment security mechanism was established as per Article 10.9 of the PPA that normally stipulates that the default contingency agreement is the only payment security mechanism and the buyer standby Letter of Credit (LOC) is merely a standby payment mechanism. As such the decision of the State Commission is wrong in construing that the non-opening of LOC or non-timely payment constituted an important event for Lanco to perform. The relief granted by the State Commission as Rs.0.069 per unit to Lanco for the duration of PPA from 12/02/2013 on account of alleged default of non-establishment of payments security mechanism is, therefore, erroneous. On the other hand, the learned counsel for the Respondent reiterated that as a result of huge outstanding payments coupled with non-establishment of payments security mechanism, Lanco suffered on multiple accounts such as erosion of networth and equity, degradation of its credit ratings, higher interest rate on working capital, lowering of option for re-financing of debt etc. We note that based on the analysis and recommendations of the Expert Committee, the State Commission has considered the facts arising out of non-payment of dues and failure to establish payment security mechanism in a judicious manner.* ***We, accordingly, consider that there was a failure on the part of the Appellant as far as timely payment of dues as well as establishment of payment security mechanism are concerned and the State Commission has decided the issue in just and equitable manner. The State Commission after critical evaluation the material on records and after considering the submission of the counsel for both the parties by assigning valid reasons had decided the matter strictly in accordance with law. Therefore, interference by this Tribunal may not be justifiable nor we find any legal infirmity in the impugned order."***

[Emphasis Supplied]

(ii) **NTPC Limited v. Madhya Pradesh State Electricity Board & Ors [Appeal No. 89 of 2006]:** This Tribunal had allowed recovery of fixed charges due to non-availability of the fuel for the reasons beyond the control of the generator, even though such non-availability of fuel was not attributable in any manner to the procurers/discoms. The relevant findings of the Tribunal in the judgment are as under –

"21. We have considered the submissions of learned counsel for the parties.

22. ***The first issue which requires determination is whether the Commission is empowered to relax the norms laid down in the Regulations of 2004. The relaxation of the Target availability has been claimed by the appellant under proviso to sub-clause (2) of Regulation 2 and Regulation 13 of the Regulations. At this stage, it would be convenient to set out these Regulations for facility of reference:***

…………..

13. Power to Relax: The Commission for reasons to be recorded in writing may vary any of the provisions of these regulations on its own motion or on and application made before it by an interested person'.

23. It is clear from proviso to clause (2) of Regulation that CERC can prescribe the relaxed norms of operating including the norms of target availability in respect of a generating station only in a case, where the tariff was not determined in accordance with the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2001. It is however not necessary to examine the argument of the learned counsel for the appellant based on Regulation 2(2) of the Regulations of 2004 or to construe Regulation 2(2) and its implication ***as Regulation 13 of the Regulations of 2004 empowers the Commission to vary the provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax the rigor of the Regulations in appropriate cases****."*

[Emphasis Supplied]

(iii) **RGPPL vs CERC & Ors. (Appeal No. 130 of 2009):** This Tribunal has further elaborated on the 'Principle of Power to Relax' and held as under:

"10.6. This Tribunal in 2007 ELR APTEL 7 in the case of NTPC Ltd. Vs. Madhya Pradesh State Electricity Board has held as under:

"It must be held, that the power comprised in Regulation 13 is essentially the "power to relax". In case any Regulation causes hardship to a party or works injustice to him or application thereof leads to unjust result, the Regulation case be relaxed. The exercise of power under Regulation 13 of the Regulation is minimized by the requirement to record the reasons in writing by the Commission before any provision of the Regulation is relaxed. Therefore, there is no doubt that the Commission has the power to relax any provision of the Regulation."

*"10.7. The above Regulation and the decision give the judicial discretion to the Central Commission to relax norms based on the circumstances of the case. However, such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation. It has to be exercised only in exceptional case and where non-exercise of the discretion would cause hardship and injustice to a party or would lead to unjust result. In the case of relaxation of the Regulation the reasons have to be recorded in writing**. Further, it has to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming the relaxation.***

[Emphasis Supplied]

Submissions of the Appellant to the objections raised by UPPCL:

RE: APPEAL BEING BEREFT OF MATERIAL PARTICULARS:

4.59 UPPCL in its submissions has made efforts to project as if the Appellant has not placed any evidential documents to support the claim for default of UPPCL in reduction of the PAF. This is entirely incorrect. From the records, it is clear that the bills raised by the Appellant have remained unpaid/short paid by UPPCL, (which were duly accepted by UPPCL) and this has led to deficient cash flow in the hands of the Appellant affecting the sustained operation. In this regard, the Appellant had written several letters to UPPCL showing the fall in PAF and default in the payments by UPPCL. The evidence of the same has been clearly given and supported by documentary evidence in the memorandum of Appeal.

Re: Selective reliance on Praapti Portal and discrimination towards Appellant as compared to other generators:

4.60 UPPCL is erroneously contending that Appellant is selectively placing reliance on outstanding amount from Praapti Portal for the month of December 2017-Janaury 2018 to mislead this Tribunal. In this regard, it is stated that UPPCL has never disputed the entire 12 months Praapti Portal records from April 2017- March 2018 either before the State Commission or in the reply filed and

reliance on these records of the Praapti Portal clearly projects towards the gross discrimination towards the Appellant and its sister concern- Bajaj Energy Limited.

4.61 The graph for Appellant's share in the outstanding dues on the Praapti Portal increased gradually from April 2017 and was more than 45% for various months for FY 2017-18. It was lowered down in March 2018 after the payments were made to the Appellant. Further, the contention of UPPCL that information on Praapti Portal is uploaded by selective generators and therefore reflects a minute fraction of power purchase pool is misleading as UPPCL did not dispute the same before the State Commission at any instance or even in the subsequent petitions filed by the Appellant against the UPPCL. UPPCL cannot at this stage object on the reliance and reliability of Praapti Portal which is a Central Government run portal for payment statistics for Discoms and Generators for all States and Union Territories in India.

4.62 Above all, the discrimination towards the Appellant by UPPCL is acknowledged by the State Commission in a petition being Petition No. 1486 of 2019 filed by the Appellant for seeking outstanding monthly dues from UPPCL for the subsequent year - FY 2018. The relevant extract from the Order dated 09.12.2019 is as under:

> *"(a) The Respondent, UPPCL shall make regular timely payments for the future running bills of Petitioner, LPGCL as to other IPPS supplying power to U.P*
>
> *(b) The overdue outstanding amount of Rs. 1,274 Crs as on 30.06.2019 payable to the Petitioner, LPGCL, shall be paid by the Respondent, UPPCL within a period of 60 days from the date of this order. In case, UPPCL is unable to liquidate its entire overdues within a period of 60 days from date of this order, due to shortfall in revenue collection, it will ensure that the overdue payment to the Petitioner gets priority and under no circumstances, payment to any other IPP be made for supply of power for a later period and all overdue payments be made only on principle of 'First in First Out' till entire overdues as on 30.06 2019 of the Petitioner, LPGCL are liquidated."*

4.63 For FY 2017-18, if indeed UPPCL was having a cash deficit, it should have proportionally deducted the bills of all generators. However, UPPCL has paid

in full to some other generators and selectively chose to discriminate against the Appellant.

4.64 Further, for the purpose of merit Order, UPPCL has compared the full cost of the Appellant to the variable costs of other generators without considering POC charges, POC losses, etc., and thus kept the Appellant out of the merit Order. UPPCL ought to have compared the variable cost of Appellant vis-à-vis that of the other generators after including POC Charges and POC Losses, fuel adjustment charges along with the variable charges in respect of outside state (interstate private generators).Therefore, by not adhering to the same, and considering only the variable charges of the other generators (excluding POC charges/losses) vis-à-vis those of the Appellant, UPPCL has clearly discriminated and caused significant loss to the Appellant as well as to the consumer. The comparative cost of power of the Appellant vis-à-vis some of the other generators is as under:

Plant Name	Capacity Tied-up (MW)	Fixed Charges (Rs./kWh)	Variable Charges (Rs./kWh)	POC (transmission) Charges (Rs./kWh)	Change in Law Impact (Rs./kWh)	Total Landed Tariff	Nos. of months over dues (on average basis) payable by UPPCL
Alakhnanda Hydro (1)	297	4.46	4.46	-	-	8.92	1
KSK Mahanadi (2)	1000	2.00	2.66	0.50	0.70	5.86	0.25
MB Power (3)	361	2.70	1.83	0.50	0.70	5.73	0.5
RKM Powergen (4)	350	2.13	1.79	0.50	0.70	5.12	0.5
Lalitpur TPP	1980	2.24	2.85	-	-	5.09	3.4

4.65 The biased and the prejudice conduct of the UPPCL is shown from the above table that it has deliberately chose to discriminate towards the Appellant by favouring the other generators (wherein the tariff of these generators were costlier than the Appellant's tariff) in not just scheduling power but also timely payments as well. However, the State Commission has failed to appreciate

and consider the above aspect of gross discrimination towards the Appellant as against the other generators by UPPCL. This was specifically provided for in the communications sent to UPPCL by the Appellant, and also in the pleadings before the State Commission. However, the State Commission has failed to consider that the Impugned Order would allow the defaulting party-UPPCL, who did not perform its payment obligations under the PPA, in taking advantage of its own wrong which is contrary to established principles of equity and natural justice.

4.66 In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18. The Appellant also humbly prays to direct UPPCL to establish the Payment Security Mechanism- Letter of Credit and Escrow Arrangement as per the PPA in a time bound manner.

Additional submissions in compliance with the directions of the TRIBUNAL:

4.67 During the last hearing on 03.07.2020, the Tribunal had put the question as to what would have been the cash flow requirements of the Appellant in order to achieve Normative PAF of 85% for FY 2017-18 (**"Disputed Period"**). The Appellant is filing herewith, a chart showing the cash flow requirements/ financial expenditure which the Appellant would have required for achieving the Normative PAF of 85% for the FY 2017-18. The Appellant has taken the fixed charges as per tariff Order dated 07.03.2018 and computed the coal cost based on normative 85% requirement. The Chart is self-explanatory and shows that the Appellant would have required a much higher monthly recovery from UPPCL in order to achieve the 85% normative PAF.

4.68 The Appellant had demonstrated the actual cash flow situation of the Appellant on a monthly basis viz a viz what the Appellant required as a bare

minimum to cover its debt serving, O&M expenses and interest on working capital. This works out to an Amount of Rs. 207 Crore per month. The very same chart is attached herein. It is clear that the actual amounts received by the Appellant were not sufficient to achieve PAF of 85%. This chart also indicates that the Appellant arranged for additional funds which enabled it to give a annual PAF of54.78% as against 25.62.% which the Appellant would have achieved if it had only relied on the amounts received from UPPCL.

Re: Contention of UPPCL that the fixed monthly expenditure provided by the appellant was at Rs. 2.44 per unit:

4.69 During the hearing on 03.07.2020, the counsel for UPPCL had raised an objection with respect to the monthly expenditure of the Appellant's generating station for FY 2017-18 at Rs. 2.24 per unit. The contention of UPPCL is that the monthly expenditure for FY 2017-18 has been calculated at Rs. 2.24 per unit instead of Rs. Rs 1.88/ per unit towards the fixed charges. This objection is misleading and incorrect.

4.70 The Appellant in its Rejoinder, Written Note of Arguments/Submissions has constantly calculated its requirements from the Tariff Order dated 07.03.2018, which has determined the fixed charges at Rs. 2.24 per unit. This is the judicial recognition of the fact that the Appellant required fixed charges at Rs. 2.24 per unit to carry on its operation for FY 2017-18. The fact that the Appellant was constrained to bill the tariff of Rs. 1.88 per unit for April 2017-February 2018 as the State Commission did not revise the Appellant's tariff for FY 2017-18 on time. However, the same will not change the position that the Appellant actually required Rs. 2.24 per unit as fixed charges for FY 2017-18 to carry on its operations.

4.71 The Appellant had filed for revision of provisional tariff on 31.12.2015 itself and the State Commission only decided the matter vide Order dated 07.03.2018 i.e. at the end of FY 2017-18. The Appellant immediately revised its bills for FY 2017-18, which was also accepted by UPPCL. Further, while passing the revision tariff Order dated 07.03.2018, the State Commission

noted that the tariff of Rs. 2.24 per unit towards the fixed charges was applicable for FY 2017-18. However, UPPCL has presented as if the Appellant has misled this Tribunal on the above calculations. This is absolutely incorrect. The table now submitted was first given in the pleadings via the Rejoinder filed by the Appellant, wherein the Appellant had categorically given a note for the said table, which read as under:

> *"Note: (Basis of above computation)*
>
> *…….*
>
> *6. The amount for Interest on loan, O&M expenses and IWC has been taken from Provisional tariff approved by UPERC vide order dated 07.03.2018"*

4.72 During all the hearings, the Tribunal was duly apprised of the above for the calculation of monthly expenditure made at fixed charges tariff of Rs. 2.24 per unit as against UPPCL's contention that this was never brought to the attention of the Tribunal. This is misrepresentation by UPPCL towards what has transpired in the earlier hearings before this Tribunal.

Re: Allegation of UPPCL that the Appellant has introduced new documents in its rejoinder submissions

4.73 UPPCL has also raised the contention that the copy of the RBI Circular dated 12.02.2018 and FSA Agreement dated 15.01.2018 and 22.01.2018 were not the part of the pleadings filed in the present appeal. This is wrong as the RBI Circular dated 12.02.2018 is mentioned at Page No. 309 and 320 of the Vol II of Appeal Paper Book and FSA Agreements are at page 326 of Vol. II of the Appeal Paper Book.

Re: Allegation that the Appeal does not have any prayer relating to exercise of the "Power to Relax"

4.74 The Appellant has expressly prayed (by way of an Additional Affidavit) before the State Commission for exercise of the 'power to relax' in terms envisaged in the Tariff Regulations 2014, so as to allow recovery of full fixed cost on the

basis of actual PAF achieved. The State Commission has considered the said prayer and the submissions made by the Appellant and has rejected the said prayer, as is evident from the following paragraphs of the Impugned Judgment:

> *"27. From the arguments and documents submitted, the Commission is of the view that the delay in payments was not the sole cause for inadequacy of coal in the petitioner's plant. For delay in payment, the petitioner has been compensated by way of late payment surcharge as per the provisions of the Generation Tariff, Regulations 2014 and the PPA.* ***The Commission cannot exercise its 'General Power to Relax' to change the rules of the game, which are predetermined and well understood by both the parties.*** *The Petitioner could not conclusively prove the sole cause for inadequacy of coal was delay in payments, Therefore the Commission does not find merit in the claim of the Petitioner."*
>
> [Emphasis Provided]

4.75 In its challenge to the impugned Order, the Appellant has specifically pleaded grounds in the Appeal wherein it has urged that the State Commission was wrong in not accepting the said submissions and prayer for relaxation of norms for recovery of full fixed cost. Therefore, UPPCL cannot now say that the submissions of the Appellant as regards to the issue of "power to relax" is outside the scope of the present appeal and / or that there should be a specific prayer on this issue in the Memorandum of Appeal. UPPCL has completely failed to appreciate the difference between an appellate proceeding and an original proceeding. In the appellate proceeding, the Appellant has sought for setting aside of the entire Impugned Order on the grounds that are fully set out in the Memorandum of Appeal. Surely, there is no need to have a separate prayer on the issue "power to relax", more so when the impugned Orders deals with it. The appellate proceeding is always a continuation of the original proceeding and there is no need to make any original prayer in the appellate proceedings (for which prayer has been otherwise made before the original forum and dealt with in the Impugned Order under the consideration).

RE: Judgments cited by the Appellant

4.76 While UPPCL has not dealt with the judgements cited by the Appellant on the 'power to relax', UPPCL sought to distinguish the judgment dated 11.07.2014 passed in *Raghu Rama Renewable Energy Ltd. v. Tamil Nadu Generation and Distribution Corporation Limited* (Appeal No. 181 of 2013), on the basis that in this matter, the PPA was only for one year as against the present matter where the PPA is for 25 years and also that TANGEDCO did not pay to the generator at all for five months in row whereas UPPCL has made substantial payments to the Appellant.

4.77 These are artificial distinction since the principle remains that the Appellant was unable to fulfil its part of the promise of achieving 85% PAF due to the reciprocal default of UPPCL in making the monthly tariff payments on time and failure to provide the payment security mechanism.

4.78 In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18. The Appellant also humbly prays to direct UPPCL to establish the Payment Security Mechanism- Letter of Credit and Escrow Arrangement as per the PPA in a time bound manner.

5. Shri Hemant Sahai, Ld. Counsel for the Respondent No. 2 (UPPCL) has filed the Written Submissionsfor our consideration as under :

5.1 In terms of the submissions & prayers set out in its Appeal,LPGCL's case is that due to the delay in payments made by UPPCL,LPGCLcould not procure the coal and, as a corollary, was not in a position to declare the desired availability.Hence, LPGCL has claimed that it is entitled to compensation for loss of fixed charges and deemed availability. In this regard, the relevant

prayers under the present Appeal are extracted herein below for ready reference-

"21. RELIEFS SOUGHT.

In view of the facts mentioned in para 7 above, points in dispute and questions of law set out in para 8 and the grounds of appeal stated in para 9, the Appellant prays for the following reliefs:

(a) …

(b) Direct UPPCL to pay the bills of the Appellant for the loss of declared availability during the financial year 2017-18.

(c) Direct UPPCL to pay interest at the rate of 15% per annum from the date of the capacity lost till date of actual payment; and

(d) …"

Therefore, in terms of the prayers sought by LPGCL in its Appeal, the conspectus of the present appeal is limited to the singular issue of deciding its entitlement to deemed generation charges. Notably, the "bills" referred under prayer (b) above, have not been annexed to the present appeal nor were they filed before the UPERC in the proceedings from which this appeal has been preferred.

Re: LPGCL's attempt to change its prayers-

5.2 In sharp contrast to the case set upin its Appeal, during the course of hearing on 03.07.2020 (by way of filing its Short Rejoinder Note & Final Written Submissions dated 02.07.2020),LPGCL has completely changed its prayers and opened up a new case which was never argued by it before this Tribunal during the course of final arguments on 28.02.2020, 05.03.2020 and 23.06.2020. The relevant extracts of the prayers sought by LPGCL in its Short Rejoinder Note and Final Written Submissions dated 02.07.2020 are reproduced herein below for ready reference-

A. LPGCL's Prayers under Short Rejoinder Note-

"58. In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and ***PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18. The Appellant also humbly prays to direct UPPCL to establish the***

Payment Security Mechanism and Escrow arrangement as per the PPA in a time bound manner.*"*

(Emphasis supplied)

B. LPGCL's Prayer in its Final Written Submissions dated 02.07.2020-

"*87. In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and* ***PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18.The Appellant also humbly prays to direct UPPCL to establish the Payment Security Mechanism- Letter of Credit and Escrow Arrangement as per the PPA in a time bound manner.***"

(Emphasis Supplied)

5.3 A comparison of LPGCL's prayersas set out herein above, reveals that LPGCL at the rejoinder stage of arguments has soughtadditional reliefs which were neither claimed nor argued by it before this Tribunal prior to 02.07.2020. Hence, to such an extent, it is humbly submitted that LPGCL's Short Rejoinder Note and Final Written Submissions dated 02.07.2020 ought to be disregarded by this Tribunal as being impermissible.Notably, it is also relevant to point out that the prayer for relaxation in PAF and prayer for compensation on account of loss in deemed availability are mutually destructive and cannot be claimed by LPGCL in the same breath.

5.4 LPGCL's conduct of constantly shifting its stand is also evident from the prayers which were sought by it before UPERC.Pertinently, LPGCL had initially filed Petition No. 1402 of 2019 before the UPERC claiming the following reliefs-

"*i. Direct UPPCL to compensate the Petitioner for the Loss Fixed charges and Availability to the extent of Rs. 1108 crore, which the Petitioner could not avail due to non-release of timely payment by UPPCL, as a consequence of which the Petitioner could not purchase coal in time and thus not declare full capacity;*

Ii Direct UPPCL to accept the bills for the declared capacity lost by the Petitioner due to the delayed payment by UPPCL in the manner stated in the Petition;

iii. Direct UPPCL to make timely payment of the amount against the monthly bills raised and pending as on date;

iv. Direct the Respondent No. 1 to strictly follow the relevant provisions of the PPA regarding timely payment of monthly bills and to continuously make payment of monthly bills for the full amount either through Escrow mechanism duly supplemented by direct payments, as may be required;

v. Direct the Respondent No. 1 to ensure making of all future payments by Escrow Arrangements provided under clause 11.4.2 of the PPA maintaining the status of allocated units as agreed in Escrow Arrangement and supplement the balance through direct payments;

vi. Evolve a mechanism to hold that in future, if UPPCL delays payment beyond 60 days,

vii. Grant any other suitable and effective relief to the Petitioner as this Commission may deem just and proper under facts and pressing circumstances of the case."

Thereafter, by way of Additional Submissions dated 21.01.2019, LPGCL sought to add the following additional reliefs underits petition-

"*(i) The Petitioner be allowed PAF of 54.78% in place of 85% relaxing the norm in accordance with the powers vested in it under the Tariff Regulations; and*

(ii) The Petitioner be further granted permission to claim other damages/ losses caused by UPPCL and not specifically claimed therein;

(iii) These submissions may be read along with the main Petition."

5.5 Notably,such additional relief which was claimed by LPGCL before the UPERC has been specifically addressed by UPERCunder the Impugned Order. The relevant extract of the Impugned Order is reproduced herein below for ready reference-

"*26. COMMISSIONS VIEW*

After examining the contents of the Petition, additional submissions and after hearing the arguments of both the parties, the Commission is of the view that in this petition the Petitioner has attributed the short fall in the plant availability to delayed payments stating that it could not procure coal due to delayed payment by the procurer. ***The Petitioner has invoked the general power of the Commission to relax the Generation Tariff 2014 to reduce the normative plant availability factor from 85 to 54.78%. the Commission finds that to cater to the situation of delayed payment both the Regulations and the PPA provide for the obligations of the procurer and in the event of shortage of coal also the provisions exists to reduce the normative plant availability factor form 85 % to 83%.*** *In this case there have been delays in payments but the procurer has paid the Late Payment Surcharge to the petitioner. This is a project in which the tariff is determined under Section 62 and unless the Petitioner files the petition for final tariff, the provisional tariff is granted as per the UPERC (Terms & Conditions of Generation Tariff)*

Regulations 2014. The Petitioner has delayed filing of the final capital cost and also the final tariff petition which resulted into lower fixed cost. The petitioner in order to meet its debt service obligation, utilized substantial portion of funds received thereby leaving insufficient funds for coal procurement. Further the Petitioner did not have the long term coal linkage as per the provisions of PPA and was procuring coal from the open market at a higher cost than what was admissible in the variable charges.

27. From the arguments and documents submitted, the Commission is of the view that ***the delay in payments was not the sole cause for inadequacy of coal in the petitioner's plant. For delay in payment, the petitioner has been compensated by way of late payment surcharge as per the provisions of the Generation Tariff, Regulations 2014 and the PPA. The Commission cannot exercise its 'General Power to Relax' to change the rules of the game, which are predetermined and well understood by both the parties. The Petitioner could not conclusively prove the sole cause for inadequacy of coal was delay in payments.*** *Therefore the Commission does not find merit in the claim of the Petitioner."*

(Emphasis supplied)

Despite the fact that LPGCL's prayer for relaxation of PAF was rejected by UPERC in the Impugned Order, LPGCL in its Appeal elected not toassail such findings as it has not made a prayer for relaxation of PAF before this Tribunal. Thus, having consciously accepted the Impugned Order to such extent, LPGCL at this stage cannot be allowed to change its prayers.

5.6 In the above context, it is a very well settled position of law that if certain prayers have been specifically omitted by a party, such party would subsequently not be allowed to sue for such relief so omitted or relinquished. In this regard, reliance is placed uponthe Hon'ble Supreme Court in the case of ***Bharat Amratlal Kothari v. DosukhanSamadkhan Sindhi***reported as**(2010) 1 SCC 234.** The relevant extracts of the said judgment are reproduced herein below for ready reference-

"29. ***The approach of the High Court in granting relief not prayed for cannot be approved by this Court****. Every petition under Article 226 of the Constitution must contain a relief clause.* ***Whenever the petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs. Under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits, except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished.***

30. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. ***Normally, the court will grant only those reliefs specifically prayed for by the petitioner. Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner.***

31. In Krishna Priya Ganguly v. University of Lucknow [(1984) 1 SCC 307], overlooking the rule relating to grant of admission to postgraduate course in Medical College, the High Court in the exercise of powers under Article 226 of the Constitution directed the Medical Council to grant provisional admission to the petitioner. This Court set aside the order passed by the High Court observing that: (SCC p. 319, para 26)

"26. … in his own petition in the High Court, the respondent had merely prayed for a writ directing the State or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the MS course and thus granted a relief to the respondent which he himself never prayed for and could not have prayed for."

32. Again, in Om Prakash v. Ram Kumar [(1991) 1 SCC 441] , this Court observed: (SCC p. 445, para 4)

"4. … A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute."

33. ***Though a High Court has power to mould reliefs to meet the requirements of each case, that does not mean that the draftsman of a writ petition should not apply his mind to the proper relief which should be asked for and throw the entire burden of it upon the court.***

34. It is relevant to notice that the ***High Court was not exercising powers under Article 226 of the Constitution suo motu but was examining the validity of the order passed by the Additional Chief Judicial Magistrate refusing to grant custody of goats and sheep to Respondents 1 to 6, in the special criminal application, which was filed by them under Article 226 of the Constitution through a seasoned lawyer. Respondents 1 to 6 were represented by a Senior Counsel practising in the Gujarat High Court and having regard to the facts of the case, the learned lawyer was justified only in claiming those reliefs to which reference is made earlier****."*

(Emphasis supplied)

Re: Analysis of the data relied upon by LPGCL in its Appeal to claim loss in fixed charges and availability-

5.7 LPGCL in its Appeal isclaiming loss in fixed charges and deemed availability. In order to substantiate its claim of Rs. 1108 Crores towards such loss, LPGCL has placed reliance on the data and analysis submitted by it in its Appeal, depicting billing and payment and corresponding D.C. loss.

5.8 Pertinently,LPGCL has claimed that on account of non-payment of invoices by UPPCL for the FY 2017-18, LPGCL could not procure the coal and, as a corollary, it was not in a position to declare the desired availability. On this pretext, LPGCLis seeking compensation from UPPCL to the tune of INR 1108 crores for the alleged loss of fixed charges for FY 2017-18. However, evidently, LPGCL failed to establish any co-relation between the delay in payments and its failure to procure coal.

5.9 Even if the data submitted by LPGCL was to be taken at face value (assuming but not admitting), it is glaringly evident that UPPCL had made payments more than the amount that was billed for the FY 2017-18. A summation of values of “Billed During Month” column shows that LPGCL had billed an amount of Rs. 4047 crores during FY 2017-18. As against the same, a payment of Rs. 4100 Crores was made by UPPCL during FY 2017-18.

5.10 Without prejudice to the contention that LPGCL has failed to supplement its data with adequate evidence, even on demurrer and without getting into the veracity of the tables provided, it is humbly submitted that an analysis of the billing and payment data submitted by LPGCL itself reveals that:

AVERAGE MONTH END OUTSTANDINGS

*Compare with "Month end receivables within 60 days" extracted from LPGCL's Table 1. Both the figures are approximately same and consistent.

	Sales (A)	Collection (B)	Outstanding (C)	60 Days (D) = A x 2	60-90 Days (C)– (D)	More Than 90 days (E) = (C) – (A) x 3
Average 6 months for supply from Apr, 2017 to Sep, 2017	357	273	883	714 *712	169	Nil (Ax3 =1071)
Average 7 months for supply from Apr, 2017 to Oct, 2017	356	273	916	712 *709	204	Nil (Ax3=1068)
Average 8 months for supply from Apr, 2017 to Nov, 2017	360	269	960	720 *713	240	Nil (Ax3=1080)
Average 9 months for supply from Apr, 2017 to Dec, 2017	353	278	987	706 *710	281	Nil (Ax3=1059)
Average 10 months for supply from Apr, 2017 to Jan, 2018.	356	283	1014	712 *707	302	Nil (Ax3=1068)

	Sales (A)	Collection (B)	Outstanding (C)	60 Days (D) = A x 2	60-90 Days (C) – (D)	More Than 90 days (E)=(C)–(A) x3
Average 11 months for supply from Apr, 2017 to Feb, 2018.	354	295	1030	708 *708	322	Nil (Ax3=1062)
Average 12 months for supply from April, 2017 to March 2018.	337	342	984	674 *688	310	Nil (Ax3=1011)

(a) The average payment cycle of UPPCL was not more than 3 months as against the 2-month payment cycle provided under the UPERC Tariff Regulations, 2014.

(b) For the delays in payment beyond 60 days as above, LPGCL had been paid Late Payment Surcharge ("**LPSC**"), which is the remedy prescribed under Regulation 30 of the UPERC Tariff Regulations, 2014. The relevant provisions of the UPERC Tariff Regulations, 2014 are reproduced herein below for ready reference:

"30. Late Payment& Default in Payment:

(1) In case the payment of bills of capacity charges and energy charges by the beneficiary (ies) is delayed beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company.

(2) The generating company may approach the Commission, for default in payments for necessary relief including proposal for regulation of supply to the concerned beneficiary, associated with alternative sale potential of such regulated power."

(c) The average one-month delay in the payment cycle was not as severe as sought to be portrayed by LPGCL and in any case, LPGCL had been adequately restituted for the same in the form of LPSC as above.

(d) UPPCL has made extra-ordinary efforts to ensure that the cash flow of LPGCL is kept as optimal as possible considering UPPCL's own collections and financial situation. Hence, UPPCL has demonstrably made *bonafide* and best effortsto ensure reasonable cash flows for LPGCL.

(e) The grievance of LPGCL, if any, placed at the highest pedestal, can at best be that UPPCL has contributed to LPGCL's inefficient cash flows. Without admitting this allegation, it is in any event submitted that (i) The remedy for the same is not in claiming some assumed increase in availability on a deeming basis, and (ii) In any event, it is incontrovertible that LPGCL itself hadcontributed to its own cash flow inefficiencies and mismatches by not taking timely steps for determination of final tariff for the Project. These are explained in detail hereinafter.

(f) The entire argument of LPGCL dependson co-relation of the table 1 and 2, that is, as if such co-relation is self-evident and a natural consequence. Such assumption by LPGCL is erroneous as-

    (i) There is no fact, documents or other pleadings which have been placed on record to establish such co-relation;

    (ii) UPPCL's analysis above completely negates such assertion.

(g) The average billingwas around Rs. 337 Crores. Typically, the payment cycle to Coal India Limited and receipt of coal is 30-45 days i.e. the coal is received 30-45 days after advance payments. Assuming that the payment cycle to the coal company is 45 days, if the contentions raised

by LPGCLwereto be regarded as true, then, the payment in any month 1 should ordinarily result in coal shortage in month 3.

Testing the contentions ofLPGCL on the anvil of the data submitted by it (under Table 1 and 2), reveals the following gross inconsistencies:

(a) For June 2017, the consequent coal impact ought to have been in August 2017

Payment in June 2017 - Rs. 340 Crores

(i.e. more than average monthly billing)

Impact on Coal in August - 43%

(i.e. coal shortage despite full payment made in June 2017)

(b) **Payment in July2017** - Rs. 351 Crores

(i.e. more than average monthly billing)

Impact on Coal in September 2017 - 42%

(i.e. coal shortage despite full payment made in July 2017)

(c) **Payment in August 2017** - Rs. 304 Crores

(i.e. more than average monthly billing)

Impact on Coal in October 2017 - 27%

(i.e. coal shortage despite full payment made in August 2017)

(d) **Payment in December 2017** - Rs. 357 Crores

(i.e. more than average monthly billing)

Impact on Coal in February 2018 - 74%

(i.e. coal shortage despite full payment made in December 2017)

(e) **Payment in January 2018** - Rs. 582 Crores

(i.e. more than average monthly billing)

Impact on Coal in March 2018 - 50%

(i.e. coal shortage despite full payment made in January 2018)

A bare perusal of the data submitted by LPGCLin itsAppeal itself reveals that there is no co-relation between the coal shortage and the alleged delay in payments. If the payment made by UPPCL was more than average billing in month 1, the impact on coal should have been "nil" in the 3rd month. However, LPGCL's own data does not co-relate and demonstrate such logic.

5.11 Pertinently, LPGCL under the present appeal has repeatedly contended that there has been a "persistent" and "consistent" default or delay on the part of UPPCL without discharging the burden of proof. Pertinently, the nature of allegation demands that the data put forth by LPGCL be analyzed basis the accepted methodology of 'linear trend estimation' which is a recognized statistical technique to aid interpretation of data and involves the analysis of data basis "averaging" to ascertain and analyse the trend or pattern.

5.12 It is noteworthy that LPGCL procured assured coal linkage under the SHAKTI scheme only in March, 2018.For the relevant period of FY 2017-18,for which present Appeal has been filed, LPGCL did not even have a firm and assured coal linkage.In fact, the real reasons for the coal shortage during the relevant time were:

(i) Absence of a coal linkage; and

(ii) Cashflow issues attributable to delay in filing final tariff Petition by LPGCL itself.

5.13 LPGCL, by way of its Short Rejoinder Note and Final Written Submissions dated 02.07.2020 has erroneously placed reliance upon the Order dated 21.09.2016 passed by UPERC in Petition No. 1101 of 2016 to contend that it was equating the cost of coal procured by it under E-auction with the reserve price of the said mine. It is humbly submitted that such contentions of LPGCL do not support its case in any manner. In fact, such submissions only fortify UPPCL's arguments that LPGCL during the relevant period of time was, in fact, procuring coal at much higher price from the open market than what

was admissible to it. Such being the case, LPGCL was solely responsible for its own cashflow mismatch resulting in lower procurement of coal. While LPGCL has submitted that it was erroneous for UPERC to assume that LPGCL's concession of absorbing the additional coal costs had any substantial impact on its cash flows, it has not placed on record any evidence such as bank statements, working capital arrangements, etc. to substantiate its bald assertions.

5.14 LPGCL, by way of its Short Rejoinder Note and Final Written Submissions dated 02.07.2020 has erroneously placed reliance upon Article 6.5 of the PPA and Regulation 26(iv) of the UPERC Tariff Regulations, 2014 to contend that by procuring coal from alternative sources, LPGCL was in sufficient compliance with its obligation to arrange for coal under the PPA.At the outset, it is relevant to note that this issue is pending adjudication before the Hon'ble Supreme Court (Civil Appeal No. 5530 of 2019 filed by UPPCL) and there is a stay operating in UPPCL's favour. In this regard, it is further submitted that Article 6.5 of the PPA only authorizes LPGCL to resort to procurement of coal from alternate sources (such as E-auction coal) only in the case of short supply of coal under linkage, which, LPGCL admittedly failed to secure until the fag end of FY 2017-18. Such an understanding has already been clarified by UPERC long back in its Order dated 03.11.2014 in Petition No. 830 of 2012 & batch. The relevant extract of the said order is reproduced herein below for ready reference-

> *"7. Now, let us discuss issues as mentioned at 5 above, one by one alongwith the Commission's decision on these issues.*
> *a. Fuel Supply Agreement*
> *As per the Commission's order dated 18.11.2010,*
>
> *"**The responsibility for arrangement of fuel shall be with the developer who shall procure the fuel under coal linkage granted to the Seller by the Central Government on the recommendations of GoUP.** In case of any short supply, procurement of fuel indigenous / imported preferably through long term contract or on spot-purchase / short-term contract / E-auction basis from domestic and/or international suppliers /traders shall be within or from outside India. The Seller shall obtain the prior consent of Lead Procurer about*

procurement of coal from any source other than coal linkage. In case the permission is not granted by the Lead Procurer within seven (7) working days from the date of receiving the application, it would be considered as deemed permission and if rejected then it would be considered as procurer's inability to procure which would make conditions of clause 4.4.3 of the agreed PPA applicable."

From the submissions, ***it has been observed that some developers have initiated the process for the environmental clearance with the alternate provision of imported coal which is not congruent to the Commission's view as mentioned above.As the projects have been envisaged in a State like Uttar Pradesh having no coastal connection, any alternate arrangement of imported coal would not be a feasible proposition****. It is also pertinent with the fact that per capita income and per capita consumption of electricity, both are quite low in comparison to the national figures.*

Therefore, the Commission reaffirms that the projects would be feasible only on Indian coal however, the shortage in the due quantities due to coal policies, may be compensated through procurement of fuel indigenous / imported preferably through long term contract or on spot-purchase / short-term contract / E-auction basis from domestic and/or international suppliers /traders within or from outside India as per the Commission's order dated 18.11.2010 and the applicable regulations*."*

(Emphasis Supplied)

Pertinently, the above order has never been challenged by LPGCL and has attained finality. Thus, LPGCL having accepted this position long back in 2014 cannot at this belated stage contend that it had arranged for coal in compliance with the PPA and the UPERC Tariff Regulations, 2014.

5.15 In addition to the above, LPGCL has also erroneously placed reliance upon the judgment passed by this Tribunal in**Appeal No. 365 of 2018**titled as***LPGCL v. UPERC&Ors.***to contend that even this Tribunal has endorsed its understanding that LPGCL's arrangement of alternate coal is sufficient compliance of Article 6.5 of the PPA. In this regard, it is most respectfully submitted that the said judgment of this Tribunal has been stayed by the Hon'ble Supreme Court of India, by way of its order dated 29.07.2019 in Civil Appeal No. 5530 of 2019 filed by UPPCL. Thus, LPGCL's reliance is wholly misplaced and is a mere attempt to mislead this Tribunal.

Re: Appeal being bereft of material particulars-

5.16 Sections 101 to 103 of the Evidence Act provide that the onus for proving the contents of the Appeal are on the Appellant. As explained in the preceding paragraphs, LPGCL in its Appealhas advanced its own calculations and bald assertions without adducing any proof in support thereof. In this regard, it is pertinent to note that the Hon'ble Supreme Court in the case of ***Anil Rishi v. Gurbaksh Singh*****, (2006) 5 SCC 558**held as follows:

*"8. The **initial burden of proof would be on the plaintiff** in view of Section 101 of the Evidence Act, which reads as under:*

"101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

*10. **Pleading is not evidence, far less proof.** Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.*

…

19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the

initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same".

(Emphasis supplied)

Re: Cashflow issues of LPGCL-

5.17 The incontrovertible fact is that LPGCL had itself contributed to its own cash flow inefficiencies and mismatches by not taking timely steps for determination of final tariff for the Project. Further, LPGCL should have prioritized payments received, towards procurement of coal, which would have increased its availability resulting in higher recovery of capacity charges, whichwould consequently have been adequate for meeting its debt servicing obligations.

5.18 Pertinently, the fact that LPGCL delayed its final tariff petition is of utmost relevance and significance to the present Appeal as LPGCL before the UPERC itselfadmitted that even the revised provisional tariff determined by UPERC(as determined inMarch'2018) was not sufficient for LPGCL to meet its debt service obligations and O&M expenses.In this regard, the UPERC order dated07.03.2018*,* unambiguously records LPGCL's submission/admission that *"the fixed cost determined is not sufficient to meet even debt service obligation and O&M expenses"*.Further, it is an indisputable fact that UPPCL had, in fact, made payments to LPGCL over and above the entire billed amount for FY 2017-18. Hence, had LPGCL's tariff been determined on time, it would have been able to bill higher and collect a higher amount which in turnwould have ensured that LPGCL had sufficient money to procure coal.

5.19 The following dates are relevant to show that LPGCL itself caused its own cash flow problems. The CoD of LPGCL's project and determination of provisional tariff is as under-

COD Dates		**Tariff Determination Dates**
(i)	Unit 1- 01.10.2015	Provisional Tariff 27.11.2015 (revised in March, 2018)
(ii)	Unit 2 – 14.10.2016	Provisional Tariff 07.03.2018
(iii)	Unit 3 –23.12.2016	Provisional Tariff 07.03.2018

In this regard, there have been substantial delays by LPGCL in filing the petitions for provisional as well as final tariff. In fact, LPGCL filed its petition for final tariff only on 25.03.2019 and that too after UPPCL pointed out during the course of arguments, that LPGCL had failed to file such petition, even though significant time had elapsed since the COD of its Units. It is pertinent to note that UPERC's Order dated 07.03.2018 in Petition No. 1075 of 2015itself notes the undertaking given by LPGCL that it would be filing its petition for final tariff within 3 months of the order. However, despite such undertaking, LPGCL filed its petition for determination of final tariff only on 25.03.2019. This petition is pending adjudication before the UPERC.According to the UPERC Tariff Regulations, 2014, a generator is entitled to file an application for provisional tariff 180 days prior to the anticipated COD of a Unit and petition for final tariff as soon asdetails of actual capital expenditure incurred up to the date COD as certified by the statutory auditors is available.

5.20 Notably, LPGCL in its Appeal has averred that UPERC in the Impugned Order grossly erred in observing that there wasa delay in filing of final capital cost and tariff determination petition which had resulted in lower tariff. In this regard, it is humbly submitted that such observation by the UPERC was of utmostrelevance and was in fact borne out of LPGCL's own submissions that it had set up the Project with an investment of about INR 18,575 crores, which is financed by a consortium of Banks led by State Bank of India and that the Term Loan outstanding for the Project as on the date of filing of the Petition was INR 13,195 Crores.

5.21 Pertinently, a capital cost of INR 11,581 (i.e. 90% of the amount claimed by LPGCL in accordance with the tariff regulations) was provisionally approved by the UPERC by way of order dated 27.11.2015 in Petition 1017 of 2015 (applicable for the period of dispute under the present appeal).Thereafter,a revised capital cost of INR 14,269 had provisionally been approved by the UPERC by way of order dated 07.03.2018 in Petition No. 1075 of 2015 at the fag end of FY 2017-18 (which is after the period of dispute relevant to the present adjudication), subject to prudence check at the stage of final determination. As set out above, this order unambiguously records LPGCL's own admission that even the revised provisional tariff was not enough to meet its debt service obligations, O&M expenses etc.Hence, if LPGCL's submissions in its petitionbefore the UPERC regarding capital investment of INR 18,575 crores were to be taken at face value for the sake of argument, then, there was a clear deficit of INR 8000 crores approximately (i.e. INR 18,575 – INR 11,581). The remedy for resolving such financial stress being faced by LPGCL, if at all, wastimely filing of a petition for final determination of tariff before the UPERC, which LPGCL had done only on 25.03.2019. Pertinently, all the units of LPGCL's Project were commissioned by December 2016. It is noteworthy that UPPCL had time and again highlighted that expeditious determination of final tariff is in the best interest of its consumers and would insulate them from a tariff shock. Hence, it is humbly submitted that at this stage, UPPCL cannot be blamed for the cash flow mismatch of LPGCL nor its non-fulfilment of debt service obligations. Further, UPPCL cannot be held liable for any consequences including payment of carrying costs, arising as a result of such delay on the part of UPPCL.

5.22 The allegation by LPGCL that the payments made to it were insufficient to meet the dues towards its lenders is belied by its own submissions.For the period FY 2017-18, LPGCL was claiming payments based on the provisional tariff approved for Unit-1 of the Project by the UPERC by way of order dated 27.11.2015 in Petition 1017 of 2015.Vide this order, UPERC had approved

capital cost of Rs. 11581 crores (90% of 12868 crores) for determination of provisional tariff.

5.23 UPERC vide Order dated 21.09.2016, 18.01.2017 and 17.10.2018 disallowed RoEfrom date of applicability of order dated 18.01.2017 uptoattainment of long-term coal linkage i.e. 18.01.2017 to 18.03.2018.Ref - Order dated 27.11.2015 in Petition No. 1075 of 2015 r/w order dated 21.9.2016 in Petition No. 1101/2016 passed by UPERC This is a subject matter of a separate dispute that is currently pending before the Hon'ble Supreme Court. There is a stay in favour of UPPCL in this regard. Therefore, AFC chargeable for one unit is INR 582.4 crores (i.e. INR 724.46 cr.– INR 142.06 cr.). The AFC for three Units, for the relevant year 2017-18, based on the provisional tariff determined by UPERC order dated27.11.2015,would accordingly be INR 1,747.2 Cr (582.4 Cr x 3).

5.24 LPGCL had sufficient funds to meet its obligations towards the lenders as they had sufficient fixed charges. Also, it is evident from submissions of LPGCL that the AFC requirement of LPGCL (excluding the RoE) is INR 1747.2 crore on a yearly basis which translates to INR 145 crores on a monthly basis (i.e. 1747.2 divided by 12). Therefore, LPGCL's submissionregarding its monthly cash outflows amounting to INR 498 crores (where fixed cost requirement towards O&M, IoWC and Debt servicing has been shown as INR 207 crores) and its supporting calculations under LPGCL's Note for Arguments are completely false and misleading.

Re: Analysis of erroneous calculations put forth by LPGCLunder its Rejoinder& Final Written Submissions

5.25 LPGCLhas placed on record certain erroneous calculations to claim that its monthly cash outflow for each month for generation at the normative availability is around INR 498 crores. The relevant extracts of its submissions are reproduced herein below for ready reference-

Extracts from the Note of Arguments filed by LPGCL

"7. The non-payment of amounts by UPPCL ceased progressively from Rs. 545 crores outstanding in the month of April 2017 and accumulated to Rs. 1267 crores in January, 2018 (total outstanding), ***whereas the cash outflow for each month for generation at the normative availability of 85% was around Rs. 498 crores*** *[the Statement of such increase in the outstanding amount is @ Page 45 of the Rejoinder]. In such a situation, it was financially impossible for any power project established on non-recourse financing basis to sustain operation on month to month basis to the normative availability level."*

(Emphasis supplied)

Extracts from the Rejoinder dated 28.01.2020 filed by LPGCL

"3. The Appellant was not able to declare availability of generation capacity to the full extent wholly and exclusively due to the persistent defaults of non-payment of the bills in accordance with the terms of Power Purchase Agreement (hereinafter referred to as the PPA) by UPPCL and on account of fundamental breach of the terms of the PPA. Their non-payment of amounts by UPPCL ceased progressively from Rs. 545 crores outstanding in the month of April 2017 to Rs. 1262 crores in January, 2018. (total outstanding), ***whereas the cash outflow for each month for generation at the normative availability of 85% was in the region of Rs. 498 crores.*** *The Statement of such increase in the outstanding amount is attached hereto and marked as Appendix A. In such a situation it was financially impracticable for any power project established on non-recourse financing basis to sustain operation on month to month basis to the normative availability level."*

(Emphasis supplied)

Extracts from LPGCL's Final Written Submissions dated 02.07.2020

"*42.* ***The fixed monthly expenditure of the Appellant in FY 2017-2018 amounted to Rs. 207 Crores on monthly basis*** *towards debt service, O&M expenses and working capital costs. A document showing fixed monthly expenditure of the Appellant is @ Page No. 82 of the Rejoinder and also being attached as Appendix-4 in the present submissions. The table attached at Appendix 4 is summarized as under:*"

(Emphasis Supplied)

5.26 **UPPCL's analysis of Cashflow computations of LPGCL-**

- It is LPGCL's case that the monthly expenditure of LPGCL is INR 498 crores, the break-up of which is given below:

Debt Servicing + O&M + IoWC	INR 207 crores
Funds required to procure coal to achieve 85% availability	INR 291 crores
Total	**INR 498 crores**

- As is evident that the amount for components such as Interest on Loan, O&M expenses and Interest on Working capital have been taken from the revision to the provisional tariff approved by UPERC vide its order dated 07.03.2018 (in Petition No. 1075 of 2015). Therefore, LPGCL has taken numbers from a subsequent order passed in March 2018 and applied the same for a previous period of 2017-18. Not only is this misleading, it is a deliberate attempt at obfuscating the issues. The basis of claims in the present appeal are based on the ***actual cash flows*** for the period 2017-18 and the tariff applicable for this period was based on UPERC's provisional tariff order dated 27.11.2015. The provisional tariff for Unit 1 was revised and provisional tariff for Unit2 and 3 was fixed, by UPERC vide order dated 07.03.2018 and these numbers cannot be applied retrospectively to adjudicate on the ***actual*** issues for the previous period 2017-18.

5.27 Whereas, as per LPGCL's own admission, billing for FY 2017-2018 was done based on the provisional tariff determined by UPERC vide its order dated 27.11.2015 in Petition Nos. 975 of 2014 and 1017 of 2015. The relevant extract of LPGCL's pleadings in the present Appeal are reproduced herein below for ready reference-

> "*14. The State Commission vide Order dated 07.03.2018 had decided Petition no. 1075 of 2015 wherein, the Commission had allowed the provisional tariff of Rs. 2.24p/kwh (fixed charges) on normative availability of 85%.* ***It is relevant to note that during the year 2017-18 the unpaid amounts mentioned by the Appellant pertains to the bills raised by Appellant in accordance with first provisional tariff 1.88/kwh and not on the basis of fixed charges of 2.24/kwh which was amended and raised after end of the financial year 2017-18.*** *Therefore, the contention raised by UPPCL that Appellant itself had contributed to its cash flow mismatch by not taking timely steps for*

determination of tariff for the project is completely baseless and without any merit."

5.28 Notably, the scope of the present Appeal is ***limited to bills raised and payments made in FY 2017-18*** during which the provisional tariff determined by way of order dated 27.11.2015 in Petition Nos. 975 of 2014 and 1017 of 2015, is applicable. The undeniable fact is that for FY 2017-18, UPPCL made payments to LPGCL over and above the bills raised by it. Pertinently, as per LPGCL's own submissions, bills in terms of the revised provisional tariff order dated 07.03.2018 were raised only after end of FY 2017-18. Hence, LPGCL's above chart which is premised and based on figures picked up from UPERC's tariff order dated 07.03.2018 is wholly irrelevant and an attempt to misguide this Tribunal.

5.29 If the above computations were to be reworked in terms of the UPERC's provisional tariff order dated 27.11.2015, the monthly expenditure for debt service, O&M and IWC works out to Rs. 139 Crores as against Rs. 207 Crores claimed by LPGCL. This postulates that LPGCL is merely attempting to misguide this Tribunal by quoting inflated figures ***which were not even billed by it during FY 2017-2018***. It is submitted that in each month of FY 2017-18, LPGCL appears to have diverted funds relating to coal purchase, thereby, resulting in lower availability. Hence, a collective reading of the above calculations in fact substantiates UPPCL's submissions that LPGCL's cash flow inefficiencies and mismatches were actually caused due to LPGCL's own faults including delay in filing petition for final tariff determination in a timely manner.

5.30 It is also relevant to note that **as against a monthly fund requirement of 139 Crores** towards Debt Servicing, O&M Expenses and Interest on Working Capital, **UPPCL has in fact paid an average of Rs. 342 Croresper month**. Thus, LPGCL's failure to procure coal is solely attributable to its own defaults.Further, LPGCL has completely failed to address or deny the allegation that it has portrayed inflated figures before this Tribunal.

5.31 LPGCL, by way of its Additional Written Submissions dated 10.07.2020, hassubmitted that the billing for FY 2017-18 was done by it basis UPERC's Tariff Order dated 27.11.2015, whereas, it actually required tariff payments as per the subsequent UPERC Tariff Order dated 07.03.2018. The relevant extract of LPGCL's Additional Written Submission is reproduced herein below for ready reference-

> "*7. The Appellant in its Rejoinder, Written Note of Arguments, Final Written Submission has constantly calculated its requirements from the Tariff Order dated 07.03.2018, which has determined the fixed charges at Rs. 2.24 per unit. This is the judicial recognition of the fact that* ***the Appellant required fixed charges at Rs. 2.24 per unit to carry on its operation for FY 2017-18****.* ***The fact that the Appellant was constrained to bill the tariff of Rs. 1.88 per unit for April 2017- February 2018*** *as the State Commission did not revise the Appellant's tariff for FY 2017-18 on time, will not change the position that the Appellant actually required Rs. 2.24 per unit as fixed charges for FY 2017-18 to carry on its operations.*
>
> *8. The Appellant had filed for revision of provisional tariff on 31.12.2015 itself and the State Commission only decided the matter vide Order dated 07.03.2018 i.e. at the end of FY 2017-18.* ***The Appellant immediately revised its bills for FY 2017-18****, which was also accepted by UPPCL. Further, while passing the revision tariff Order dated 07.03.2018, the State Commission noted that the tariff of Rs. 2.24 per unit towards the fixed charges was applicable for FY 2017-18.*"
>
> (Emphasis Supplied)

Notably, the revised billswere only raised on 04.05.2018 which is beyond the period of dispute under the present Appeal i.e. FY 2017-18. Further, it is an admitted position between the parties that as against the billed amount of Rs. 4047 Crores by LPGCL, an amount of Rs. 4100 Crores was paid by UPPCL for FY 2017-18. Hence, LPGCL's admission that it was constrained to bill UPPCL a lower tariff, despite requiring a higher tariff to operate,only fortifies UPPCL's submissions that the actual reason for under procurement of coal by LPGCL was its own cash flow mismatch which was occasioned due to LPGCL's default in obtaining final tariff determination.

Re: Erroneous & ad-hoc data put forth by LPGCL in its Additional Written Submissions dated 10.07.2020 as fund requirement for FY 2017-18-

5.32 LPGCL, by way of its Additional Written Submissions dated 10.07.2020, has put forth certain data claiming to be its fund requirement for FY 2017-18 to achieve 85% normative PAF. It is humbly submitted that the data put forth by LPGCL, by way of the above table, is wholly erroneous due to the following reasons-

- LPGCL has computed the above table basis the costs which were allowed to it only in a subsequent Tariff Order dated 07.03.2018. Thus, considering that LPGCL for the relevant period under dispute (i.e. FY 2017-18), was not even allowed to bill such costs, the data put forth by it is completely irrelevant and devoid of merit.
- While UPERC's Tariff Order dated 07.03.2018 was retrospective in nature, LPGCL had only raised the bills for differential tariff on 04.05.2018 which is after the conclusion of the period under dispute (i.e. FY 2017-18).
- In the above calculation put forth by LPGCL, LPGCL has admitted that *"<u>Fund requirement towards Fixed Charges has been considered as per tariff order of UPERC dated 07.03.2018</u> and is inclusive of debt servicing (repayment of term loan and interest thereon and also interest on working capital loan) and O&M expenses which needs to be serviced compulsorily. <u>However during the year FY 2017-18, billing has been done to UPPCL as per tariff order of UPERC dated 27th November'2015.</u>"* It is most humbly submitted that in terms of the submissions & prayers set out in its Appeal, LPGCL's case is that due to the delay in payments made by UPPCL, LPGCL could not procure the coal and, as a corollary, was not in a position to declare the desired availability and further that it is entitled to compensation for loss of fixed charges and deemed availability. Therefore, LPGCL cannot be allowed to base its arguments on figures which were not billed to UPPCL during the period of dispute.

- LPGCL cannot base its claims on figures which it was not permitted to recover as per the applicable tariff order. LPGCL erroneously claims that there was a delay on the part of UPERC to approve the revised provisional costs by way of its subsequent order dated 07.03.2018 and, therefore, it is entitled to calculate the above table basis the tariff order dated 07.03.2018 while ignoring the applicable tariff order dated 27.11.2015. Notably, this does not justify LPGCL's claim for deemed generation charges for FY 2017-18 during which period LPGCL was billing and UPPCL was paying as per the tariff order dated 27.11.2018. Further, there is no evidence put on record by LPGCL to show that it had taken adequate steps to expedite the proceedings before the UPERC. Even otherwise, UPPCL cannot be penalized for delay(s) on the part of UPERC, if any and the present case ought to be adjudged on the basis of bills raised as per the applicable tariff order dated 27.11.2015.
- Per the above data, LPGCL claims that it has an annual fund requirement of Rs. 3,117 Crores for catering to the fixed charges. It is further an accepted position by LPGCL that during the year FY 2017-18, billing has been done to UPPCL as per tariff order of UPERC dated 27.11.2015. Notably, under the said order dated 27.11.2015 read with the subsequent order of UPERC dated 21.09.2016 in Petition No. 1101/2016 (as set out in detail in the above paragraphs), UPERC had approved an amount of Rs. 1747.2 Crores only as permissible fixed charges. Hence, even taking such inflated figures quoted by LPGCL on its face value,it is evident that the expenses of LPGCL were far greater than what it was allowed to recover as per the applicable tariff order.
- The above table erroneously assumes that LPGCL's Project would be available at a constant rate of 85% throughout the year. Whereas, as per LPGCL's own data at Page Nos. 13-14 of its Appeal, there were numerous months wherein its availability was reduced purely due to

technical reasons. Hence, the above data is completely ad-hoc and based on irrelevant assumptions.

- The above data also assumes that the entire availability declared by LPGCL would be off taken leaving it with no remaining coal stock whatsoever. Pertinently, LPGCL's Project during the relevant period fell within the lower 1/3rd percentile of the Merit Order Despatch list. Hence, it was very much possible that LPGCL's Project would have been scheduled in a way that some coal is left over for utilization in the next month. However, the above table fails to factor in such realities which renders the data illusory and devoid of any merits.

Re:Claims of LPGCL for compensation for fundamental breach of contract-

5.33 LPGCL in its Appeal loosely made contentions that UPPCL "defaulted" under the PPA and that there is "material breach" on UPPCL's part. It is humbly submitted that LPGCL has completely failed to establish that UPPCL has breached the terms of the PPA. Article 14.2 of the PPA provides for the Procurers' event of default. The relevant extract is reproduced herein below for ready reference:

> "***14.2 Procurer Event of Default***
>
> *The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majerure Event or a breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of the defaulting Procurer:*
>
> *i) a defaulting Procurer fails to pay (with respect to a Monthly Bill or a Supplementary Bill) an amount exceeding fifteen (15%) of the undisputed part of the most recent Monthly/Supplementary Bill* ***for a period of ninety (90) days after the Due Date*** *and the Seller is unable to recover the amount outstanding to the Seller through the Collateral Arrangement and Letter of Credit; or* "
>
> [Emphasis Supplied]

LPGCL in its own data failed to show that UPPCL defaulted on any payments beyond 90 days after the due date (i.e. failed to pay any invoice beyond 60 + 90 i.e. 150 days i.e. beyond 5 months). Therefore, UPPCL has not breached

the terms of the PPA.Further, LPGCL had also made claims for compensation for fundamental breach of contract which is an issue covered under Section 73 of the Indian Contract Act, 1872. It is most humbly submitted that Section 73 is only applicable if there is breach of the terms of the agreement.

5.34 Assuming for the sake of argument but not admitting that UPPCL's insignificant delay in making payments amounted to a breach, it is humbly submitted that, as set out in detail above, the PPA (Article 11.3.4) and UPERC Tariff Regulations, 2014 (Regulation 30) expressly provide for specific remedies for delay in payments by UPPCL. It is a settled principle of law that in cases wherein the contract expressly provides for damages the damages payable would not exceed the amount as stipulated (i.e. LPSC in the present case). The scope of damages under Indian Contract Act has been adequately explained by the Hon'ble Supreme Court in the case of ***ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705.**

5.35 Without prejudice to the contention that there has been no "default" in payments by UPPCL, it is humbly submitted that the consequences for default under the PPA are provided under Articles 11.5 (Third Party Sales on default). The relevant extracts of the PPA provision are reproduced herein below for ready reference:

> *"**11.5 Third Party Sales on default***
>
> *…*
>
> *11.5.3 If all the non defaulting Procurers do not make the election to receive the Default Electricity or a part thereof, within two (2) Business Days of it being so offered under and as per Article 11.5.2, or all such Procurers expressly waive their first right to receive the same, the Seller shall have the right (but no the obligation) to make available and sell the Default Electricity or a part thereof to a third party, namely:*
>
> *(a) any consumer, subject to applicable Law; or*
>
> *(b) any licensee under the Electricity Act, 2003"*

Hence, if LPGCL was of the view that UPPCL had defaulted under the PPA, it should have resorted to third party sales for mitigation of its losses as mandated by Section 73 of the Indian Contract Act.

5.36 Further, LPGCL, in its Appeal as well as its submissions before the UPERC placed reliance on the principle *“nulluscommodumcaperepotest de injuria sua propria”* meaning “no man can take advantage of his own wrong”. In this regard it is humbly submitted that such reliance placed by LPGCL was completely misplaced. In the present case, LPGCL had failed to establish as to how UPPCL had taken advantage of its own wrongs. Rather, it is an admitted fact that UPPCL has suffered the statutory consequence of paying LPSC to LPGCL.

In fact, the above-mentioned principle read with the decisions quoted by LPGCL support the contentions of UPPCL that LPGCL’s failure to declare availability had arisen due to the following defaults attributable to it:

(i) That LPGCL was unable to procure coal as it did not have a firm coal linkage;

(ii) That the cashflow mismatch has arisen due to LPGCL’s delay inordinate in filing for final tariff.

Hence, LPGCL having substantially contributed to its own loss was not allowed to take advantage of the same and blame UPPCL for its cash flow mismatch and its inability to declare availability. It is humbly reiterated that UPPCL made extra-ordinary efforts to ensure that the cash flow of LPGCL is kept optimal considering its own collections and financial situation.

Re: Inconsistency in claims of LPGCL with provisions of the PPA and the UPERCTariff Regulations, 2014-

5.37 The responsibility for arranging fuel as per the terms of the PPA rests solely upon LPGCL. The relevant provision of the PPA is extracted herein below for ready reference-

> *"**6.5 Fuel***
>
> *The responsibility for arrangement of Fuel shall be with the Developer who shall procure the Fuel under coal linkage granted to the Seller by the Central Government on the recommendations of GoUP. In case of any short supply , procurement of fuel indigenous / imported preferably through long term contract or on spot-purchase / short-term contract / E-auction basis from domestic and/or internal suppliers /traders shall be within or outside India. The Seller shall obtain the prior consent of Lead Procurer about procurement coal from any source other than coal linkage. In case the permission is not granted by the Lead Procurer within seven (7) working days from the date of receiving the application, it would be considered as deemed permission and if rejected then it would be considered as procurer's inability to procure which would make conditions of clause 4.4.3 of the agreed PPA applicable and loss of availability due to rejected fuel quantity shall be taken in to account while computing availability and fixed charges."*

5.38 Further, as a remedy for the alleged delay in payments by UPPCL, LPGCL has sought for an increase in its availability on a deemed basis. The UPERC in the Impugned Order rightly dismissed the Petition filed by LPGCL as such a relief is not provided for either under the UPERC Tariff Regulations, 2014 nor under the PPA.

5.39 In this regard, it is further submitted that the Hon'ble Supreme Court in the case of ***Energy Watchdog v. CERC*, (2017)14 SCC 80**has held that-

> *"20. …It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.*

In the present case the "guidelines" are UPERC Tariff Regulations, 2014 which provide for payment of LPSC for any delay in payment. Hence, LPGCL cannot contend that it is entitled to any other remedies. As discernible, the regulatory powers of the UPERC could not have been exercised *de-hors* the UPERC Tariff Regulations and the PPA.

5.40 It is pertinent to note that, LPGCL in the present Appeal has prayed for interest to be paid at 15% per annum for the capacity lost. In this regard, it is humbly submitted that such prayer of LPGCL is unsustainable as LPSC which is the contractual remedy for any delay in payments has already been paid at 1.25%. The Hon'ble Supreme Court in the cases of ***State of Gujarat &Anr. v. DevrajbhaiChhanganbhai&Ors.*** (1996)10 SCC 273 and ***PSEB &Anr. v. Raj & Sandeep Ltd.*** (2004)13 SCC 584 has held that a party cannot seek interest above and beyond the rate prescribed and agreed under the contract.

Re: Reduction of PAF from 85% to 54.78%-

5.41 LPGCL has contended that UPERC ought to have exercised its power to relax the target PAF from 85% to 54.78%. In this regard, it is imperative to note that this prayer has only been introduced at the rejoinder argument stage. Without prejudice to this submission, it is further noteworthy that LPGCL's prayers in its Petition before the UPERC were as follows-

> *"i. Direct UPPCL to compensate the Petitioner for the Loss Fixed charges and Availability to the extent of Rs. 1108 crore, which the Petitioner could not avail due to non-release of timely payment by UPPCL, as a consequence of which the Petitioner could not purchase coal in time and thus not declare full capacity;"*

Further, by way of the Additional Submissions dated 21.01.2019, LPGCL sought the following **<u>additional</u>** relief from the UPERC-

> *"51. The circumstances are such that this Hon'ble Commission needs to give directions to find a suitable regulatory remedy for the Petitioner. In this view of the matter, **<u>the Petitioner further prays this Hon'ble Commission to grant leave to the Petitionerto add the following new prayer after the existing prayer v. in the Petition</u>**:*
>
> *(i) The Petitioner be allowed PAF of 54.78% in place of 85% relaxing the norm in accordance with the powers vested in it under the Tariff Regulations;"*
>
> (Emphasis supplied)

5.42 As evident, under the garb of Additional Submissions before the UPERC, LPGCL sought to amend its original petition to include additional prayers including the one reproduced above. In this regard, it is humbly submitted

that prayers in the original petition and Additional Submissions were mutually contradictory and destructive of each other and could not have co-existed in law. LPGCL could not have sought payment on account of deemed generation and reduction in PLF in the same breath. It is respectfully submitted that even assuming for the sake of argument that said prayer held any merit, the inclusion of latter prayer by way of Additional Submissions could not have been permitted unless the former prayer (as sought under the Petition) was renounced.

5.43 Even assuming but not admitting that such a prayer warranted any consideration by UPERC in passing the Impugned Order, it is noteworthy that the UPERC Tariff Regulations, 2014 provide as under-

> *"**18. Norms of Operation:***
>
> *(i) Target Availability(NAPAF) for recovery of full Capacity (Fixed) charges*
>
> *(a) All thermal power generating stations, except those covered under clause (b) below - 85%*
>
> *Provided that in view of shortage of coal and uncertainty of assured coal supply on sustained basis experienced by the generating stations, the target availability for recovery of fixed charges may be reduced to 83% based on the submissions made by the generating station and approval of the Commission. "*

Upon a bare perusal of the UPERC Tariff Regulations, 2014 quoted above it is discernible that the regulations expressly provide for such an exigency. The UPERC Tariff Regulations, 2014 unequivocally provided that the target availability may be reduced to 83% insituations of shortage of coal. Hence, LPGCL's submissions that the UPERC must have reduced the PAF from 85% to 54.78%, is unsustainable in law.

5.44 In this regard it is pertinent to note that the Hon'ble Supreme Court in the case of ***Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Co. (India) (P) Ltd.*, (2017) 16 SCC 498** has held that-

> ***"**34. Regulations 80 to 82 are instances of such powers specified by the Commission. Regulation 80 has provided for the inherent power of the*

Commission to the extent of making such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Commission. It has to be borne in mind that such inherent powers are to be exercised notwithstanding only the restrictions on the Commission under the Conduct of Business Regulations, meaning thereby that there cannot be any restrictions in the Conduct of Business Regulations on exercise of inherent powers by the Commission. But the specified inherent powers are not as pervasive a power as available to a court under Section 151 of the Code of Civil Procedure, 1908:

> *"151. Saving of inherent powers of court.—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the court."*

However, the Commission is enjoined with powers to issue appropriate orders in the interest of justice and for preventing abuse of process of the Commission, to the extent not otherwise provided for under the Act or Rules. In other words, the inherent power of the Commission is available to it for exercise only in those areas where the Act or Rules are silent.

35. Under Regulation 81, the Commission is competent to adopt a procedure which is at variance with any of the other provisions of the Regulations in case the Commission is of the view that such an exercise is warranted in view of the special circumstances and such special circumstances are to be recorded in writing. However, it is specifically provided under Section 181 that there cannot be a Regulation which is not in conformity with the provisions of the Act or the Rules.

36. Under Regulation 82, the Commission has powers to deal with any matter or exercise any power under the Act for which no Regulations are framed meaning thereby where something is expressly provided in the Act, the Commission has to deal with it only in accordance with the manner prescribed in the Act. ***The only leeway available to the Commission is only when the Regulations on proceedings are silent on a specific issue. In other words, in case a specific subject or exercise of power by the Commission on a specific issue is otherwise provided under the Act or the Rules, the same has to be exercised by the Commission only taking recourse to that power and in no other manner. To illustrate further, there cannot be any exercise of the inherent power for dealing with any matter which is otherwise specifically provided under the Act. The exercise of power which has the effect of amending the PPA by varying the tariff can only be done as per statutory provisions and not under the inherent power referred to in Regulations 80 to 82. In other words, there cannot be any exercise of inherent power by the Commission on an issue which is otherwise dealt with or provided for in the Act or the Rules.***

…

39. ***The Commission being a creature of statute cannot assume to itself any powers which are not otherwise conferred on it. In other words, under the guise of exercising its inherent power, as we have already noticed above, the Commission cannot take recourse to exercise of a power, procedure for which is otherwise specifically provided under the Act****.*

…

57. Under Regulations 80 to 82, the inherent powers of the State Commission are saved. Under Regulation 80, which is akin to Section 151 CPC, the power of the State Commission is only intended to regulate the conduct of the Commission, that is, to regulate its own procedure. ***That power cannot travel beyond its own procedure so as to alter the terms and conditions of the PPA entered into between the parties to grant substantive relief*** *to the first respondent by extending the control period of Tariff Order, 2010 beyond 28-1-2012.*

58. By a reading of Regulation 80, it is clear that inherent powers of the State Commission are saved to make such orders as may be necessary: (i) to secure the ends of justice; and (ii) to prevent abuse of process of the Commission. The inherent powers being very wide and incapable of definition, its limits should be carefully guarded. Inherent powers preserved under Regulation 80 (which is akin to Section 151 of the Code) are with respect to the procedure to be followed by the Commission in deciding the cause before it. ***The inherent powers under Section 151 CPC are procedural in nature and cannot affect the substantive right of the parties. The inherent powers are not substantive provision that confers the right upon the party to get any substantive relief. These inherent powers are not over substantive rights which a litigant possesses****.*

59. The inherent power is not a provision of law to grant any substantive relief. But it is only a procedural provision to make orders to secure the ends of justice and to prevent abuse of process of the Court. It cannot be used to create or recognise substantive rights of the parties….

60. ***In the case at hand, rights and obligations of the parties flow from the terms and conditions of the Power Purchase Agreement (PPA). PPA is a contract entered between Guvnl and the first respondent with clear understanding of the terms of the contract. A contract, being a creation of both the parties, is to be interpreted by having due regard to the actual terms settled between the parties.*** *As per the terms and conditions of the PPA, to have the benefit of the tariff rate at Rs 15 per unit for twelve years, the first respondent should commission the solar PV power project before 31-12-2011.* ***It is a complex fiscal decision consciously taken by the parties. In the contract involving rights of Guvnl and ultimately the rights of the consumers to whom the electricity is supplied, the Commission cannot invoke its inherent jurisdiction to substantially alter the terms of the contract between the parties so as to prejudice the interest of Guvnl and ultimately the consumers.***

61. As pointed out earlier, the Appellate Tribunal has taken the view that the control period of the Tariff Order was fixed by the State Commission itself and hence the State Commission has inherent power to extend the control period of the Tariff Order. It may be that the tariff rate as per Tariff Order, 2010 as determined by the Committee has been incorporated in Clause 5.2 of the PPA. But that does not in any manner confer power upon the State Commission to exercise its inherent jurisdiction to extend the control period to the advantage of the project proponent, first respondent and to the disadvantage of Guvnl who are governed by the terms and conditions of the contract. ***It is not within the***

<u>powers of the Commission to exercise its inherent jurisdiction to extend the control period to the advantage of any party and to the disadvantage of the other would amount to varying the terms of the contract between the parties.</u>"

(Emphasis Supplied)

Hence, while the UPERC Tariff Regulations, 2014 already provided for such an exigency, LPGCL could not have insisted upon a relief in derogation of the law. The said principle has also been affirmed by the Hon'ble Supreme Court in the case of ***PTC India Limited v. CERC*** reported as (2010)4 SCC 603.

5.45 LPGCL in its Appeal has erroneously relied on the judgements of this Tribunal in Appeal No. 89 of 2006 ***NTPC v. MPSEB &Ors.*** to contend that there are precedents to reduce the PAF. In this regard, it is most respectfully submitted that such decision of this Tribunal is not applicable in the facts and circumstances of the present case as the relief in Appeal No. 89 of 2006 was given in the peculiar facts and circumstances of that case where there was nation-wide scarcity of gas and the generator could not perform despite its best efforts and for reasons not attributable to it. This is clearly distinguishable because, in the present case- (a) there was no scarcity of coal; (b) there existed clear lapses on the part of LPGCL in terms of cash flow management and non-fulfilment of material term of the PPA i.e. coal linkage; and (c) the findings in Appeal No. 89 of 2006 were basis the provisions of CERC Tariff Regulations, 2004 which specifically permitted reduction of PAF/PLF norms for a generating station. In contrast, the UPERC Tariff Regulations, 2014 only permitted reduction of PLF from 85% to 83%.

5.46 It is also relevant to point out that the 'Power to relax' and 'Deviation from norms' as contained in the UPERC Tariff Regulations, 2014 were admittedly discretionary powers of the UPERC. In this regard, it is a very well settled position of law that when a court rightly and reasonably refuses to exercise its discretionary powers, the Appellate forum will not interfere with such court

of first instance and substitute its own discretion. In this regard, reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of ***Wander Ltd. &Anr. v. Antox India Pvt. Ltd.*** reported as **1990 (Supp) SCC 727** wherein it has been held that the Appellate forum would not be justified in interfering with exercise of discretion solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion.

Re: Payment Security Mechanism-

5.47 LPGCL has also advanced submissions that UPPCL has not established Payment Security Mechanism ("**PSM**") envisaged under the PPA till date. Notably, there was no prayer in this regard sought under the appeal and/or argued during the course of final arguments and was introduced by LPGCL only during the course of rejoinder arguments on 03.07.2020. In this regard, it is relevant to note that the genuine difficulties faced by distribution licensees all over the country in establishing PSM, in terms of the respective PPAs executed by them, has already been taken into consideration by the Ministry of Power and it has issued various notifications dated 28.06.2019, 17.07.2019, 27.03.2020 and 06.04.2020 which have generally been complied with by UPPCL. Hence, such contentions made by LPGCL are wholly irrelevant for the present Appeal.

5.48 LPGCL, in its Appeal, has also erroneously placed reliance upon an order passed by this Tribunal in the case of ***Uttar Pradesh Power Corporation Limited v. LancoAnpara Power Limited*** bearing Appeal Nos. 336 of 2017 & No. 359 of 2017. In this regard, it is humbly submitted that the said judgment was passed in view of the specific facts and circumstances contained therein and is inapplicable in the present case. Notably, the said judgment was passed on 07.10.2018, which is much prior to the orders issued by the Ministry of Power. Hence, in view of change in the statutory framework, LPGCL in the present case cannot be permitted to placed

reliance upon the judgment passed by this Tribunal in LancoAnpara Power Limited's case.

Re: Erroneous claims of entitlement to draw upon Letter of Credit within 60 days-

5.49 LPGCL, during the course of hearing of the present Appeal on 03.07.2020, for the first time has contended that the relief available to it for delay in payment between 30-60 days was to draw upon the Letter of Credit which was supposed to be provided by UPPCL. In support of its contentions, LPGCL has placed reliance upon the definition of the term 'Due Date' and Articles 11.4.1 & 11.4.1.4 of the Power Purchase Agreement dated 10.12.2010 executed between LPGCL and UPPCL ("**PPA**").

5.50 The contentions raised by LPGCL are completely erroneous and contrary to the settled position of law. While the PPA defines the Due Date as being 30 days from the date on which the Monthly Bill is acknowledged and accepted by UPPCL, it is relevant to note that the UPERC (Terms & Conditions of Generation Tariff) Regulations, 2014 ("**UPERC Tariff Regulations, 2014**") which have an overriding effect on the PPA explicitly allow for a 60 day payment cycle i.e. contemplate the Due Date to be 60 days. The relevant extracts of the UPERC Tariff Regulations, 2014 are reproduced herein below for ready reference-

"2. Scope and extent of application:

…

*(4) **<u>In case of any conflict between provisions of these regulations and a power purchase agreement signed between a generating company and distribution licensee(s)/beneficiary (ies), the provisions of these regulations shall prevail.</u>***

…

30. Late Payment& Default in Payment:

*(1) **<u>In case the payment of bills of capacity charges and energy charges by the beneficiary (ies) is delayed beyond a period of 60 days from the</u>***

<u>date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company.</u>"

(Emphasis Supplied)

As set out in the UPERC Tariff Regulations, 2014 quoted above, UPPCL is allowed a 60-day time period for making payments to LPGCL. Beyond 60 days, if a payment remains due, LPGCL becomes entitled to Late Payment Surcharge. Thus, the 'Due Date' or time period for making payments under the PPA having been extended by virtue of the UPERC Tariff Regulations, 2014, it is impermissible for LPGCL to contend that it had a relief to draw upon the Letter of Credit for a delay beyond 30 days. Notably, as per express terms of the PPA signed between LPGCL and UPPCL, LPGCL can only draw upon the Letter after the expiry of Due Date i.e. after expiry of 60 days. The relevant portion of the PPA is reproduced herein below for ready reference-

> *"11.4.1.4. If any Procurer fails to pay a Monthly Bill or part thereof within and including the Due Date, then, subject to Article 11.6.7, the Seller may draw upon the Letter of Credit…"*

5.51 Before the UPERC as well as before this Tribunal (at the time of filing the appeal and during the course of hearings), LPGCL had always maintained that the Due Date for payment is 60 days and that the amounts become overdue only after expiry of 60 days. However, it is only at the stage of rejoinder arguments that LPGCL changed its stand to now aver that the Due Date as per the PPA is 30 days. This change in stance is impermissible and especially because it contradicts the provisions of the tariff regulations which is applicable across all generators operating in the State of Uttar Pradesh. LPGCL cannot seek a preferential treatment over the other generators.

5.52 In this regard, it is pertinent to note that the issue of Tariff Regulations having an overriding effect on the terms of PPAs is no longer an issue which is *res-integra*. A constitutional bench of the Hon'ble Supreme Court in the case of ***PTC India Limited v. CERC*** reported as **(2010)4 SCC 603**has held that

regulations framed by electricity regulatory commissions under the Electricity Act, 2003 being a part of the regulatory framework intervene and override existing contracts. The relevant extract of the said judgment is reproduced herein below for ready reference-

> "*Summary of our Findings*
>
> *92. …*
>
> *(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.*"

Re: Alleged discrimination as compared to other generators-

5.53 LPGCL alleges that it is being discriminated as against the other generators, namely, M/s Rosa Power Supply Company Limited ("**RPSCL**"), etc. It has alleged that RPSCL is being accorded a preferential treatment. At the outset, it is most humbly submitted that given the severe cash crunch faced by UPPCL and the recognized regulatory assets, UPPCL had been making its best endeavors to timely pay all its generators. Even assuming for the sake of arguments that LPGCL's submissions were to be regarded as true, the same were, at best, bald assertions without appreciation of ground facts. UPPCL vehemently denies any preferential treatment in favour of other generators or any bias or discrimination against LPGCL, as alleged or at all.

5.54 In this regard it is pertinent to note the following stark distinguishing factors between RPSCL and LPGCL during the relevant period.

(i) RPSCL had a firm coal linkage and assured coal supply.

(ii) Due to LPGCL's failure to procure a coal linkage within the stipulated time under the PPA, it had entered into various Supplementary PPAs ("**SPPA**") with UPPCL for extension of the timeline to procure the coal linkage amongst other things. The scheduling of LPGCL was being done as per the

consensus reached between LPGCL and UPPCL under the SPPA dated 04.01.2017 read with the PPA dated 04.11.2015.

(iii) The MOD list clearly shows that LPGCL's plant was much lower in merit order and therefore LPGCL cannot make any grievance of any discriminatory treatment as alleged or at all.

5.55 Further, LPGCL's power on aggregate cost basis too, is costlier than the other TPPs in Uttar Pradesh, including LancoAnpara C, MB Power, KSK Mahanadi, etc – evident from the Merit Order Despatch list.

Re:Erroneous and selective reliance upon PRAAPTI Portal data to mislead this Tribunal-

5.56 LPGCL has erroneously placed reliance upon certain PRAAPTI Portal data to substantiate its claims that UPPCL was discriminating against LPGCL for payments vis-à-vis other generators in the State of Uttar Pradesh. It is relevant to note that the PRAAPTI Portal data placed on record by LPGCL is misleading and erroneous. While the title reads as '*Summary of Overdue Outstanding Amount*', it is relevant to note that the data portrayed is the entire due amount and is not limited to the overdue outstanding amount (i.e. amounts which have remained unpaid for more than the 60 days threshold prescribed under the UPERC Tariff Regulations, 2014).

5.57 In this regard, it is also relevant to note that all of the data on the PRAAPTI Portal is uploaded solely by the generators themselves. Notably, the PRAAPTI chart/data submitted by LPGCL takes into consideration the comparative data for only 7-8 generators who constitute only a minute fraction of the power purchase pool/sources maintained by UPPCL. There are certain generators which do not even update the payment data on the PRAAPTI Portal. Such being the case, PRAAPTI Portal data cannot be taken as sacrosanct evidence reflecting an accurate picture of the entire outstanding payments position for

the State of Uttar Pradesh and certainly this data does not establish any bias or discrimination, as alleged by LPGCL.

5.58 To test LPGCL's contention of discrimination in payments made by UPPCL, it is imperative that LPGCL which operates a 1980 MW Thermal Power Plant is compared to a generator of like capacity. As stated in the foregoing paragraphs, there are various generators which do not upload any data on the PRAAPTI Portal. Notably, during the course of arguments, LPGCL had alleged that the outstanding of LPGCL is more than that of NTPC. In this regard, it is most humbly submitted that while LPGCL's present Appeal pertains to FY 2017-18, it has selectively placed reliance upon the data for the months of December 2017 and January 2018 only to mislead this Tribunal. An analysis of the PRAAPTI Portal data for the entire FY 2017-18 shows that for 8 months out of the 12 months in the said financial year, the due amount for NTPC was higher than that of LPGCL. Hence, LPGCL's submissions that it was discriminated by UPPCL in making payments, in unsustainable.

Re: LPGCL's misplaced & irrelevant submissions on contractual reciprocity-

5.59 LPGCL in its Short Rejoinder Note & Final Written Submissions dated 02.07.2020 has erroneously contended that reciprocal nature of the PPA was violated as UPPCL had allegedly failed to make timely payments to LPGCL to enable it to procure coal. In this regard, LPGCL has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Sikkim Subba Associates v. State of Sikkim*** reported as **(2001)5 SCC 629** and this Tribunal's judgment in the case of ***Raghu Rama Renewable Energy Limited v. TANGEDCO &Ors.*** titled as **Appeal No. 181 of 2013**.

5.60 LPGCL's reliance upon the above judgments in completely misplaced as the said judgments do not apply to the facts and circumstances of the present Appeal. In the case of ***Sikkim Subba Associates v. State of Sikkim***

reported as **(2001)5 SCC 629** the Hon'ble Supreme Court was dealing with a challenge to an arbitral award which granted a defaulting party entitlement to damages at a huge sum.

Indisputably, the present case is not a matter wherein UPPCL has claimed some damages from LPGCL. Hence, the said case is not applicable in the facts and circumstances of the present case. In any case, LPGCL has failed to demonstrate that UPPCL has breached the PPA in any manner. Rather, strictly in accordance with the PPA, UPPCL has suffered the consequence of paying Late Payment Surcharge.

5.61 LPGCL has also erroneously placed reliance upon the judgment of this Tribunal in the case of ***Raghu Rama Renewable Energy Limited v. TANGEDCO &Ors.*** titled as **Appeal No. 181 of 2013**. It is most respectfully submitted that such reliance by LPGCL is completely misplaced as the said judgment is inapplicable to the facts and circumstances of the present case. Notably, the said case pertained to an Appeal which was filed by TANGEDCO, whereby, TANGEDCO after delaying payments to M/s Raghu Rama Renewable Energy Ltd. for 4 to 9 months had chosen make a lumpsum payment after conclusion of the PPA along with deducting a penalty for short supply and the Late Payment Surcharge.

In the present case, the PPA is still subsisting and there was a continuous flow of cash every month from UPPCL to LPGCL which was sufficient to ensure coal procurement. Further, for any delay in payments UPPCL has duly compensated LPGCL for same by way of paying Late Payment Surcharge. Hence, the said judgment which has been relied upon by LPGCL is wholly misplaced and inapplicable to the facts and circumstances.

5.62 LPGCL, by way of its Additional Submissions dated 10.07.2020, has submitted that UPPCL has not sufficiently distinguished the reliance placed by LPGCL upon the judgment of this Tribunal in the case of ***Raghu Rama***

Renewable Energy Limited v. TANGEDCO &Ors. titled as **Appeal No. 181 of 2013**. It is humbly submitted that such contentions are completely misplaced. One major distinguishing factor between the facts of the said case and the present case is that TANGEDCO had failed to make the payments to Late Payment Surcharge. This fact had been highlighted by UPPCL during the course of hearing on 03.07.2020 as well. Hence, such submissions made by LPGCL do not merit any consideration.

Re: LPGCL's Petition before UPERC was pre-mature-

5.63 It is pertinent to note that that LPGCL's Petition before the UPERCwas pre-mature as LPGCL had directly approached the UPERC without adhering to the amicable settlement procedure provided for under the PPA. The relevant extracts Article 17 of the PPA are reproduced hereinbelow for ready reference-

> ***"ARTICLE 17 : GOVERNING LAW AND DISPUTE RESOLUTION***
>
> ***...***
>
> ***17.2 Amicable Settlement***
>
> *17.2.1 Either Partyis entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively "Dispute" by giving a written notice to the other Party, which shall contain:*
>
> *(i) a description of the Dispute;*
>
> *(ii) the grounds for such Dispute; and*
>
> *(iii) all written material in support of its claim.*
>
> *17.2.2 The other Party shall, within thirty (30) days of issue of dispute notice issued under Article 17.2.1, furnish:*
>
> *(i) counter-claim and defences, if any, regarding the Dispute; and*
>
> *(ii) all written material in support of its defences and counter-claim.*
>
> *17.2.3 Within thirty (30) days of issue of notice by any Party pursuant to Article 17.2.1 or Article 17.2.2, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty*

(30) days of receipt of the notice referred to in the preceding sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article 17.3"

Re: Erroneous reliance upon new documents such as FSA & RBI Circular-

5.64 LPGCL, by way of the Short Rejoinder Note and Final Written Submissions dated 02.07.2020, has for the first time placed on record new documents such as Fuel Supply Agreements dated 15.01.2018 & 22.01.2018 ("**FSAs**") and the RBI Circular dated 12.02.2018. By belatedly placing on record these documents, LPGCL has obliquely attempted to patch up the weak parts of its case at the appellate stage which is impermissible. In this regard, a constitutional bench of the Hon'ble Supreme Court in the case of ***State of U.P. v. Manbodhan Lal Srivastava*** reported as **AIR 1957 SC 912**, has observed as follows-

> *"3. Before dealing with the merits of the controversy raised in these appeals, it is necessary to state that Mr Mathur appearing on behalf of the appellant, proposed to place before this Court, at the time of the argument, the original records and certain affidavits to show that, that as a matter of fact, all the relevant facts relating to consultation between the State Government and the Commission had not been placed before the High Court and that if the additional evidence were taken at this stage, he would satisfy this Court that the Commission was consulted even after the submission of the respondent's explanation in answer to the second show-cause-notice.* ***Without looking into the additional evidence proposed to be placed before us, we indicated that we would not permit additional evidence to be placed at this stage when there was sufficient opportunity for the State Government to place all the relevant matters before the High Court itself.*** *We could not see any special reasons why additional evidence should be allowed to be adduced in this Court. It was not suggested that all that matter which was proposed to be placed before this Court was not available to the State Government during the time that the High Court considered the writ petitions on two occasions.* ***It is well-settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage, and to fill in gaps.*** *Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties. In this case, therefore, we have proceeded on the assumption that though the Commission was consulted as to the guilt or otherwise of the respondent and the action proposed to be taken against him after he had submitted his explanation in answer to the first show-cause-notice, there was no consultation with the Commission after the respondent had submitted his more elaborate explanation in answer to the second show-cause-notice."*

(Emphasis supplied)

Pertinently, UPERC in the Impugned Order had arrived at a categorical finding that LPGCL had failed to demonstrate any co-relation between the delay in payments made by UPPCL and LPGCL's alleged inability to procure coal on this count. Thus, similar to the highlighted portion above, it is improper and impermissible for LPGCL to try and remove the lacunae in presentation of its case.

5.65 Additionally, such documents placed on record by LPGCL deserve to be rejected at the threshold itself and merit no consideration by this Tribunal as both the FSA and the RBI circular are dated towards the fag end of the Financial Year 2017-2018. Hence, for most of the relevant period of dispute which is admittedly FY 2017-18, neither the FSAs nor the RBI circular were even applicable.

Further, the said RBI circular which has been relied upon by LPGCL has been set aside by the Hon'ble Supreme Court in the case of ***Dharani Sugars & Chemicals Limited v. Union of India &Ors.*** reported as **(2019)5 SCC 480**. Hence, any reliance/ inference attempted to be drawn by LPGCL is wholly misplaced and unsustainable. In any case, as detailed in the paragraphs below, it is most humbly submitted that even at this stage LPGCL has completely failed to demonstrate any co-relation between the alleged delay in payments by UPPCL and its inability to procure coal.

5.66 LPGCL, by way of its Additional Written Submissions dated 10.07.2020, has averred that the RBI Circular dated 12.02.2018 and FSA Agreements dated 15.01.2018 and 22.01.2018 are not new documents which have been placed by it before this Tribunal at the rejoinder stage. In order to substantiate its erroneous claims, LPGCL has averred that a reference in its pleadings before the UPERC was made to such documents. In any case, it is relevant to note that LPGCL has not denied the fact that these documents were never filed by it before thisTribunal prior to the rejoinder stage. Hence, it is humbly reiterated that such documents merit no consideration by this Tribunal,

particularly, considering that the said documents were not even applicable for a substantial period of FY 2017-18.

5.67 LPGCL, by way of its Additional Submissions dated 10.07.2020, has made a sweeping statement that UPPCL has not dealt with the judgments cited by it in respect of 'Power to relax'. In this context, it is most humbly submitted that such contentions are wholly misplaced. All the judgments cited by LPGCL, despite its constant shift in stands, have been specifically dealt with in UPPCL's earlier pleadings.

In view of the above it is humbly prayed that the present Appeal is devoid of any merit and may be dismissed.

6. We have heard Mr. Sanjay Sen., Learned Senior Counsel appearing for the Appellant, Mr. C.K. Rai, Learned Counsel appearing for the Respondent No. 1 and Mr.HemantSahai, Learned Counsel appearing for the Respondent No. 2 at considerable length. We have also gone through the written submissions given by them and also perused the relevant material available on records during the proceedings. The following principal issues emerge in the instant Appeal for our consideration:-

Issue No. 1: Whether the Appellant has changed its prayers during the course of the proceedings in the matter and if so, should the change of prayer be allowed?

Issue No. 2: Whether Second Respondent has paid the outstanding amounts to the Appellant in accordance with the terms of the PPA and the Regulations specifically in light of the contention of UPPCL that the average payment made during the period was never more than 90 days;

Issue No. 3: If not, whether the Appellant has actually suffered losses solely due to the non-payment of its outstanding dues in time;

Issue No. 4: Whether the Regulations can be relaxed to allow the Appellantto recover its full fixed cost for the impugned period and as a consequence, can the PAF of Appellant be reduced to 54.78% from 85%;

Issue No. 5: Whether late payment surcharge as envisaged in the Regulations and PPA are adequate to compensate the loss;

Issue No. 6: Whether in facts and circumstances of the case, the Appellantis entitled to carrying cost?

7. <u>Our Analysis and Findings :</u>

<u>Issue No. 1</u>: -

7.1 The learned counsel for the Second Respondent/UPPCL (R2) has categorically stated that the main prayer of the Appellant as stated in prayer (b) is "*Direct UPPCL to pay the bills of the Appellant for the loss of declared availability during the financial year 2017-18*", and the said bills have not been annexed with the Appeal by the Appellant in the present appeal nor were these filed before the State Commission. The learned counsel for R2 further submitted that during the course of hearing on 03.07.2020, the Appellant, through Short Rejoinder Note and Final Written Submissions completely changed the prayer and opened up a new case, which was never argued before. The learned counsel for R2 drew our attention towards the two prayers in the Short Rejoinder Note and Final Written Submissions filed by the Appellant, which are as under:

LPGCL's Prayers under Short Rejoinder Note-

"58. *In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18. The Appellant also humbly prays to direct UPPCL to establish the Payment Security Mechanism and Escrow arrangement as per the PPA in a time bound manner*."

LPGCL's Prayer in its Final Written Submissions dated 02.07.2020-

"*87. In view of the above submissions made, the Impugned Order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019 is liable to be set aside and PAF of the Appellant's generating station ought to be relaxed from 85% (Normative) to 54.78% (Actual achieved) by the Appellant for FY 2017-18. The Appellant also humbly 2 prays to direct UPPCL to establish the Payment Security Mechanism- Letter of Credit and Escrow Arrangement as per the PPA in a time bound manner*."

7.2 After thoroughly examining the pleadings in the matter, we are of the opinion that the Appellantin fact added the above new prayers in its Short Rejoinder Notes dated 03.07.2020 and also in the Final Written Submissions dated 02.07.2020, both virtually meaning the same.We have also gone through texts of the Appeal and the reply submitted by UPPCL as well as the proceedings before the State Commission. It is observed that in the Additional Submissions dated 21.01.2019, the Appellantmade the following prayers before the State Commission in Petition No. 1402 of 2019:

(i) The Petitioner be allowed PAF of 54.78% in place of 85% relaxing the norm in accordance with powers vested in it under the Tariff Regulations; and

(ii) …………………...

(iii) These submissions may be read along with the main Petition.

7.3 The factum of the Appellantmaking additional submissions was duly recorded by the State Commission in its order dated 28.05.2019. State Commission in its order also recorded the objections of the UPPCL in Para 20 of the said order in the following words:

"*20. The Learned Counsel for the Respondents has stated that the Petitioner has amended the original petition to include additional prayers and the prayers in the original petition and the amended Petition are mutually contradictory and*

destructive of each other and cannot co-exist in law. The Petitioner cannot seek payment on account of deemed generation and reduction in PLF (sic PAF) in the same breadth. He further stated that as per Generation Tariff (Regulations) 2014, the normative availability is 85% which in case of shortage of coal and uncertainty of coal supply on actual, may be reduced to 83% on the submissions made by generation station by approval of the Commission. Since the Generation Tariff Regulations, 2014 unequivocally provide that the target availability and its reduction to 83% is given in a situation of shortage of coal, the petitioner's submission to reduce PAF from 85% to 54.78% is unsustainable in law."

The State Commission further recorded in the same order:

"*26. Commission's view*

After examining the contents of the Petition, additional submissions and after hearing the arguments of both the parties, the Commission is of the view that in this petition, the Petitioner has attributed the short fall in the plant availability to delayed payments stating that it could not procure coal due to delayed payment by the procurer, the Petitioner has invoked the general powers of the Commission to relax the Generation Tariff (Regulations) 2014 to reduce the normative plant availability factor form 85% to 54.78% …….."

The State Commission also stated in the same order:

"*28. ………….. For delay in payment, the petitioner has been compensated by way of late payment surcharge as per the provisions of the Generation Tariff Regulations 2014 and the PPA. The Commission cannot exercise its 'General Power to Relax' to change rules of the game, which are predetermined and well understood by both the parties…….*"

7.4 In the present Appeal itself, the Appellanthas pleaded its case for relaxation of the Regulations right in the Synopsys, Facts of the Case, Questions of Law and Grounds for Appeal. In the "Reliefs Sought" clause, it has also prayed for allowing the appeal and setting aside the order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019.

Our Findings :

7.5 We note from the various documents mentioned hereinabove that the prayer for relaxation of the norms to allow the target availability to 54.78% was duly pleaded for by the Appellant through its Additional Submissions before the State Commission even before the second Respondent (R2) filed its reply. The said additional submissions were duly considered by the State

Commission, which rejected the same. In our opinion, the additional submissions made by the Appellant had the effect of changing the original petition even before the proceedings could start and therefore, the prayer was not changed in the middle of the proceedings.

7.6 In the current appeal before us, the Appellant's first prayer is:

> ***"(a) Allow the appeal and set aside the order dated 28.05.2019 passed by the State Commission in Petition No. 1402 of 2019."***

In our opinion, the above prayer is sufficient to encompass the so called newly inserted prayers in the Appeal. The State Commission has rejected, *inter-alia*,the contention of the Appellant to exercise its general regulatory powers to relax and reduce the PAF of the Appellant to 54.78% for the year 2017-18 as a special case so as to enable the recovery of its fixed charges.

7.7 Accordingly, it is clear that the Appellant did not change prayer through its Short Rejoinder Note and Final Written Submissions dated 02.07.2020 and merely became specific to make this Tribunal understand and take note of its prayer.Therefore, we reject the allegations of R2that the Appellanthas tried to change prayer during the course of the pleadings.

We thus answer Issue No. 1: Whether the Appellant has changed its prayers during the course of the proceedings in the matter in the negative. The second part of the issue "and if so, should the change of prayer be allowed" becomes irrelevant.

<u>Issue No. 2</u>:-

7.8 The Appellant, in its Appeal submitted the following table in support of its pleadings to show how the month end receivables grew during the financial year 2017-18:

Analysis of month end receivables (Rs. In Cr)

Month	Billed during month	Collection	Month end receivables			Outstanding pertains to month of generation
			Total	Within 60 days	Beyond 60 days	
Opening Balance			545	545		Jan'17 & Feb'17
Apr-17	367	203	704	692	12	**Jan'17,** Feb'17 & Mar'17
May-17	348	201	851	716	136	**Feb'17,** Mar'17 & Apr'17
Jun-17	353	340	865	702	163	**Mar'17,** Apr'17 & May'17
Jul-17	391	351	903	744	159	**Apr'17,** May'17 & Jun'17
Aug-17	338	304	936	729	207	**May'17,** Jun'17 & Jul'17
Sep-17	346	241	1,039	684	355	**Jun'17,** Jul'17 & Aug'17
Oct-17	348	273	1,112	694	418	**Jun'17, Jul'17,** Aug'17 & Sept'17
Nov-17	391	235	1,267	739	528	**Jul'17, Aug'17,** Sept'17 & Oct'17
Dec-17	296	357	1,205	687	518	**Aug'17, Sept'17,** Oct'17 & Nov'17
Jan-18	384	328	1,262	680	582	**Sept'17, Oct'17,** Nov'17 & Dec'17
Feb-18	334	413	1,181	718	464	**Oct'17, Nov'17,** Dec'17 & Jan'18
Mar-18	151	854	478	478	-	Feb'18 & Mar'18

The above table clearly shows that the month-end receivables grew upto Rs. 1267 crore in the month of Nov. 2017 and the overdue amounts beyond 60 days grew upto Rs. 528 crore in the same month.

7.9 The Appellant further gave the following table to plead how its DC loss grew and also analysed reasons for the said DC loss:

Lalitpur Power Generation Company Limited - Calculation of DC Loss of FY 2017-18

Sl. No.	Month	Capacity at 100% Availability		Capacity Actually Declared		Difference					
						Total		Coal Shortage		Technical Reasons	
		(MU)	%	(MU)	%	(MU)	%	(MU)	%	(MU)	%
1	Apr-17	1,344	100%	815	61%	528	39%	0	0%	528	39%
2	May-17	1,388	100%	788	57%	601	43%	74	5%	527	38%
3	Jun-17	1,344	100%	879	65%	465	35%	344	26%	121	9%
4	Jul-17	1,388	100%	771	56%	617	44%	477	34%	140	10%
5	Aug-17	1,388	100%	764	55%	625	45%	596	43%	29	2%
6	Sep-17	1,344	100%	756	56%	588	44%	561	42%	27	2%
7	Oct-17	1,388	100%	862	62%	527	38%	379	27%	148	11%
8	Nov-17	1,344	100%	646	48%	697	52%	668	50%	29	2%
9	Dec-17	1,388	100%	966	70%	422	30%	420	30%	2	0%
10	Jan-18	1,388	100%	717	52%	672	48%	562	41%	109	8%
11	Feb-18	1,254	100%	328	26%	926	74%	925	74%	1	0%
12	Mar-18	1,388	100%	664	48%	724	52%	695	50%	29	2%
	Total	**16,347**	**100%**	**8,957**	**55%**	**7,391**	**45%**	**5,701**	**35%**	**1,690**	**10%**

Summary	**(MU)**	**%**
Capacity at 100% Availability	16,347	100%
Capacity Actually Declared	8,957	55%
Difference	**7,391**	**45%**
Less : Loss Due to Technical Reasons	1,690	10%
Balance (Due to Coal)	**5,701**	**35%**
DC (assuming no coal shortage)	14,657	90%
Restricted to 85% Availability	13,895	85%
Capacity Actually Declared	8,957	55%
Loss Due to Coal Shortage	4,939	30%
(Restricted to 85% PAF)		
Value in Rs. Crs. (@Rs. 2.24/kWh)	**1,108**	

7.10 Learned Counsel for R2 used the above data, meaning thereby that it has accepted the same and provided its analysis as under:

	Sales (A)	Collection (B)	Outstanding (C)	60 Days (D)= Ax2	60-90 Days (C)–(D)	More than 90 days (E)=©-(A) x3
Average 10 months for supply from Apr, 2017 to Jan 2018	356	283	1014	712.40	302	NiL
Average 11 months for supply from Apr, 2017 to Feb 2018	354	295	1030	708.36	321.18	Nil
Average 12 months for supply from Apr, 2017 to March 2018	337	342	984	674	309.08	Nil

7.11 In support of his contentions, thelearned counsel for R2 pleaded, inter-alia, that the average payment cycle was not more than 3 months as against the 2-month payment cycle provided under the UPERC (Terms and Conditions of Generation Tariff) Regulations, 2014. It is further stated that LPSC was given to the Appellant in payments beyond 60 days as prescribed under the said Tariff Regulations. Learned counsel further stated that the average one-month delay in the payment cycle was not as severe as sought to be portrayed by the Appellant. In fact, R2 made extra-ordinary efforts to ensure that the cash flow of the Appellant is kept as optimal as possible, **keeping its own collections and financial situation**. The R2 at the best only contributed to the inefficient cash flows of the Appellant.

7.12 Learned counsel for R2 further contended that taking average payment cycle of Coal India Limited and receipt of coal being 30-45 days, following analysis is submitted in support of its arguments:

(i) For June 2017, the consequent coal impact ought to have been in August 2017

Payment in June 2017 - Rs. 340 Crores

(i.e. more than average monthly billing)

Impact on Coal in August, 2017 - 43%

(i.e. coal shortage despite full payment made in June 2017)

(ii) **Payment in July 2017** - Rs. 351 Crores

(i.e. more than average monthly billing)

Impact on Coal in September 2017 - 42%

(i.e. coal shortage despite full payment made in July 2017)

(iii) **Payment in August 2017** - Rs. 304 Crores

(i.e. more than average monthly billing)

Impact on Coal in October 2017 - 27%

(i.e. coal shortage despite full payment made in August 2017)

(iv) **Payment in December 2017** - Rs. 357 Crores

(i.e. more than average monthly billing)

Impact on Coal in February 2018 - 74%

(i.e. coal shortage despite full payment made in December 2017)

(v) **Payment in January 2018** - Rs. 582 Crores

(i.e. more than average monthly billing)

Impact on Coal in March 2018 - 50%

(i.e. coal shortage despite full payment made in January 2018)

7.13 The learned Counsel for the Appellant in its arguments vehemently rejected the concept of average monthly payment criteria and stated that the PPA provides for a very strict payment security mechanism and clearly establishes that ‘timely payments’ from R2 on a monthly basis is fundamental to sustain operation of the power plant. In this regard, the provisions of the PPA provides for a ‘specific date’ of payments by R2, in order to meet the financial expenditure and to effectively maintain the cash outflow of the Appellant. The PPA provides for the payment of the monthly bills by the Respondent within 30 days of receipt of the bills raised by the Appellant. The learned

Counselquoting references from various Articles of the PPA, submitted, inter-alia, that Article 11.3 of the PPA specifically mandates R2 to pay the monthly bills on the due date i.e., within 30 days. He further stated that in view of the Articles of PPA, it can be seen that the PPA is premised on the central aspect of strict adherence by UPPCL towards the robust payments cycle as provided therein. Irrespective of the same, UPPCL did not adhere to the payment security mechanism and chose to financially discriminate the Appellant by not paying continuously for 10 months and thereby deprived the Appellant of the legitimate fixed charges which the Appellant would have received had it been in a situation to provide the availability to SLDC.

7.14 Learned Counsel for the Appellant further contended that during this period R2 kept collecting the monthly payments from its consumers, which in fact, has not been denied by R2. The Counselwas quick to point out that during January 2018, it had to file recovery petition before UPERC being petition no. 1288 of 2018, in response to which, R2 made the entire overdue payment of Rs. 1,267 crore during the months of Feb and March 2018. The Appellant further submitted that despite categorical orders from the State Commission to establish Payment Security Mechanism, R2 has not established the same so far.

Our Findings:

7.15 Having regard to the facts and figures stated above, we are not inclined to accept the contentions of the learned counsel for R2 that the Appeal should be considered at all with the concept of averaging the outstanding dues of the Appellant. It is relevant to note from the arguments of Appellant that the plant requires coal continuously because the boiler is required to be fed with coal uninterruptedly. Thus, we find no rationale in the argument of R2 that, on an average basis, there were no outstanding dues for more than 90 days qua the Appellant. Further since in its Counter-Affidavit, R2 has drawn the conclusions admittedly from the table of the Appellant exhibiting outstanding dues and

achievement of availability only to the extent of 54.78%, we are of the view that the facts and figures submitted by the Appellant are factually correct. Accordingly, we are of the opinion that R2 has not paid outstanding bills of LPGCL in accordance with the terms of PPA. We do not agree with the 'averaging out formula'projected by UPPCL to justify their continuous default in making regular payments. In fact, payments have to be made as per terms of PPA alone being a legal binding document between the Parties

We further disagree with the analysis of impact of coal carried out by the second Respondent because the same are again based on the average concept evolved by it to support its contentions. The average concept is not at all a valid concept because the obligations of R2 is to make regular monthly payment and not "average payments".

It is also relevant to mention that the Second Respondent (UPPCL) despite repeated directions given by the State Commission, has not yet established the Payment Security Mechanism (PSM) which among others, has mainly contributed to delayed payment and in turn, loss of DC to the Appellant. While disposing a Petition (No. 1288 of 2018), the Commission in its Order dated 23.03.2018 directed as under :

> *3. Sri SNM Tripathi informed the Commission that as per the provisions of PPA, the payment security mechanism in the form of escrow has not been established by UPPCL and prayed the Commissionforadirectioninthisregard.SriI.MKaushal,CGM (F), UPPCL informed that they are trying to provide the escrow mechanism.*
>
> *4. The Commission decided to dispose of this Petition with instructions that the escrow mechanism as per the provisions of PPA should be arranged at theearliest."*

We thus answer Issue No.2: Whether R2 has paid the outstanding amounts to LPGCL in accordance with the terms of the PPA and the Regulations specifically in light of the contention of R2 that the average payment made during the period was never more than 90 days, in the negative

Issue No. 3:-

7.16 Learned Counsel for the Appellant submitted that the total outstanding dues on UPPCL accumulated to Rs. 1267 crores in January, 2018 whereas the cash outflow for each month for generation to meet the normative availability of 85% was around Rs 498 crores. The counsel has summarised the financial stress caused due to non payment by R2 as under:

(a) For the FY 2017-18, R2 made a bullet payment of Rs. 1,267 crores at the fag end of the said financial year i.e. in the months of Feb-March 2018, that too after the Appellant had filed a petition being Petition No. 1288 of 2018 before the State Commission seeking directions for payments of the outstanding dues.

(b) The Appellant had received a sum of total sum of Rs. 4,100 Crore from UPPCL during FY 2017-18. In this, a significant sum of Rs.1,267crore was received in the months of Feb-March 2018. Therefore, for earlier 10 months of FY 2017-18, the Appellant was financially stressed and was only left with a sum of Rs. 2,833 crores out of which the Appellant had to meet its debt service obligations, working capital cost and O&M Charges including salary payment amounting to Rs. 207 Crore on a monthly basis as an essential and inevitable cash outgo prior to incurring any amount on procurement of coal.

(c) Further, a generating station has to operate on actual amounts received by it and not on averages after the year end is over. Cash Flow is the most important input for running a power plant and UPPCL without providing an LC and Escrow Arrangement cannot contend that there were only short delays which get compensated by payment of LPSC.

(d) As against the average monthly payments of Rs 295 Crores made by the UPPCL, the Appellant was only left with around only Rs. 69.09 Crore after deducting the fixed monthly cost of Rs. 207 Crore towards debt service, O&M expenses and working capital costs. This average basis for purchase of fuel was sufficient for declaration of capacity of only 25.62 %. However, despite

the financial constraints faced by the Appellant due to the irregular payments made by UPPCL, the Appellant was able to dispatch energy worth Rs. 2,257 Crore to UPPCL and could somehow achieve the Actual PLF of 54.78% for FY 2017-18.

7.17 Learned counsel for the Appellant submitted that the above facts have not been disputed by R2. The counsel further stated that when R2 made payment to it during March 2018, when the PLF was 55%, its PLF immediately rose to more than 95% in the month of April 2018 as the Appellant had adequate financial resources due to R2 clearing its dues in March 2018. The Appellant also recorded a PLF upto 85% during the year 2018-19since R2 did not delay payments as it did in the year 2017-18. These facts have also not been disputed by R2.

7.18 The Appellant has further been able to establish correlation between the default in payment by R2 and the procurement of coal by it. It stated that its monthly outflow towards debt service, O & M Expenses and working capital cost was about Rs. 207 crore, which inter-alia includes debt servicing of about Rs. 168 crore, O&M expenditure of about Rs. 18 crore, servicing cost of working capital of about Rs. 21 crore respectively. It also stated that while R2 created a situation that it could declare a capacity of 25.62% only, it was still able to declare and achieve capacity of 54.78%, primarily due to its own efforts. It further added that the energy charges paid during the period was not even commensurate with the energy scheduled.

7.19 Learned counsel for R2 contended that the Appellant did not have a coal linkage during the period due to which there was no reliable source to ensure continuity of coal. Against this argument, the learned counsel for the Appellant contended that coal was available during the period through e-forward auction and the Appellant had agreed to equate the cost of coal to cost of coal linkage by absorbing the premium on coal itself and also equating the rail freight to be equal to the rail freight from Amrapali Mines upto its plant. Thus, the

inadmissible coal costs also created a stress on cash flow. The learned counsel for the Appellant also submitted that in view of the judgment of the Hon'ble Supreme Court in *ManoharLal Sharma vs The Principle Secretary & Others* (2014) 9 SCC 516, the coal linkage granted were cancelled and the coal was not being supplied by coal India and/or by its subsidiaries. This constituted a Change in Law and the Appellant was entitled to procure alternate coal and get the increased cost from UPPCL.

7.20 Learned counsel for R2 further contended that Article 6.5 of the PPA, provided that fuel shall be procured under the coal linkage and only in the event of there being any shortage can coal be procured from alternate sources. Therefore, in absence of there being coal linkage with the Appellant, reliability of fuel could not be ensured.

Our Findings:

7.21 In view of the factual matrix brought before us, we are unable to accept the arguments of learned counsel for R2 that coal is to be obtained only through coal linkage even if coal linkage was a legal impossibility. In our view, the shortage of fuel mentioned in Article 6.5 of the PPA is envisaged to cover the then prevailing situation of coal linkage not at all being available, specifically in light of the situation that procurement of fuel through e-forward auction was duly approved by the State Commission and thus by R2 also. The Appellant should not be penalised through non-payment of its legitimate dues in time on this pretext and the view taken by R2 for coal linkage is not at all justified for delaying payment. Hence, non-availability of fuel linkage cannot be ground for delay in making payment by R2. It may further be added that this Tribunal in Appeal no 365 of 2018 between the same parties, held as under:

> *"11.4 We have analysed the rival contentions of the learned counsel for the Appellant and learned counsel for Respondent No.1 & 2 and also taken note of the Tariff Regulations, 2014 of the State Commission. While Regulation 18(1)(a) defines the norms of operation, target availability for recovery of capacity charges etc., the Regulation 25 specifies the computations of the capacity*

*charges and their recovery relating to target availability etc..**<u>It is relevant to note that once COD of the plant/unit has been achieved and fuel as per Article 6.5 of the PPA is available, the Appellant is duly entitled for the capacity charges in lieu of the declared capacity."</u>***

*12.13Learned counsel also drew our attention over the statement of objects and reasons of the Tariff Regulations on Return on Equity. Learned counsel further contended that the State Commission by holding that the Appellant would not get the ROE has acted against express terms of the PPA which require the State Commission to determine the Tariff as per its Regulations. Further, the issue of ROE is not related to the fulfillment of Article 3.1.2(ii) relating to coal linkage at all since the Appellant had arranged for alternate coal and was itself bearing incremental fuel cost towards alternate coal the arrangement vis.a.vis. the linkage coal. **<u>The State Commission has itself observed on the same as "putting the procurers in same position in which they would have been had the linkage coal being obtained". We are unable to comprehend the decision of the Respondent Commission that how could ROE of the Appellant can be disallowed when alternate coal was arranged by the generator at same cost as that of linkage coal (absorbing the differential cost).</u>***

*13.3 **<u>Having procured alternate coal and absorbing differential cost as well as virtually putting the Respondent No.2 in same situation in which it would have been had coal linkage been obtained, the Return on Equity (RoE) is payable to the Appellant in accordance with the Regulations of UPERC and the PPA dated 10.12.2010.</u>***

The above judgment of this Tribunal has been upheld by the Hon'ble Supreme Court on 21.07.2020.

7.22 Therefore, it is clear that the Appellant had put R2 virtually in the same position as if coal linkage had been obtained, absorbing the extra cost itself. In our opinion, R2 should have appreciated this gesture of the Appellant and the least it could have done was that it would have made timely payment, thus honouring its contractual obligations under the PPA. This became more important because R2 knew about the cash flows of the Appellant, the fact that 100% advance payment was required to be paid to the coal companies and by its own averment that the coal procurement cycle was 30-45 days after making 100% advance to the Coal Companies. We therefore do not

concurthe arguments of learned counsel for R2 that the real reason for coal shortage was absence of coal linkage.

7.23 Learned counsel for R2 attributed the delay in filing final tariff petition by the Appellant as one of the reasons for shortage of cash flow. He stated that the Appellant filed its final tariff petition on 25.03.2019 only, whereas its 3rd unit became operational in December 2016 itself, and hence, the Appellant was not able to claim full expenses as tariff.

7.24 In response to the above contentions of R2, the learned counsel for the Appellant submitted that it had filed its provisional tariff petition in December 2015 itself, which was decided by the State Commission only on 07.03.2018. The Petition for provisional tariff was in fact, not decided earlier due to delayed pleadings by R2 itself. The State Commission had further directed the Appellant to file the final tariff petition within a period of six months, however, the Appellant filed the same on 25.03.2019, even after six months from the directed time. The learned counsel for the Appellant contendedthat it billed only at the rate of the determined tariff, however, it was incurring expenditure in terms of revised tariff petition decided on 07.03.2018. It further submitted that R2 did not pay it even in terms of the billed amount, which were billed at the rate of old tariff rates. It also stated that R2 made only that much payment as much was sufficient to declare only 23.62% capacity, still the Appellant was able to declare 54.78% capacity. As per Appellant, this shows that had R2 paid even in terms of bills raised at the then approved rates of tariff, but in time, the gap between the declared capacity and normative capacity would have been negligible.

7.25 Whilewe refrain from making any comment on the final tariff petition at this stage because the same is pending for determination before the State Commission, we find substance in the arguments of the learned counsel for the Appellant. It is clear that the Appellant is not challenged in its skills of financial management, which claim is being stressed often by R2. We also

find that the provisional tariff petition was not decided by the State Commission for a period of almost 26 months after it was filed. However, we find it obvious that R2 did not pay in time even the bills raised on the basis of the then prevailing tariff. Thus, R2 virtually stressed the Appellant for funds is crystal clear. Hence a clear correlation is establishedbetween the delayed payments by R2 and shortage of coal and thus loss of declared capacity.

7.26 The Appellant has been able to demonstrate that its losses are attributed to non-declaration of full availability due to shortage of coal which in turn, was solely caused by non payment by R2. As per the Regulations, availability of 85% is required to be declared to enable the Appellant recoverfull fixed charges. It has been demonstrated by the Appellantthat it was not able to declare 85% availability due to shortage of coal. The contention of R2 that the coal shortage, was not exclusively due to non-payments by it have been rebutted. The Appellant had no other source of revenue except for the payments of electricity charges against the bills raised by it and hence, itwas made to suffer shortage of funds due to non-payment by R2and at times, its outstanding dues exceeded even five months. R2paid substantial money to the Appellant only at the fag end of the financial year 2017-18 making the Appellantstressed for funds throughout the year. The mere fact that the Appellantdid not have any other source of income is sufficient to prove that it was not able to procure coal due to non-payment by R2during the substantial part of the year and thus could declare capacity to the tune of 54.78% only and hence, suffered loss. It is the express provision that the entire fixed cost should be recovered through 85% of the declared capacity and capacity declaration being dependent on availability of coal, deficiency of which arose to the Appellantdue to shortage of funds caused by R2is sufficient enough to prove that the losses were suffered by LPGCL due to non-payment by UPPCL in time. The loss of capacity to the extent of 30.22% was therefore suffered by Appellant due to non-payment of bills raised by it in time as per PPAby R2.

7.27 It is the contention of R2that the Appellantwas entitled to capacity charges at rate of 1.88 per kWh whereas in its calculation, it showed expenses on the basis of capacity charges @ Rs. 2.24 per month, is not justified. The Appellant' counsel submitted that the tariff petition no. 1075 of 2015 was pending with the State Commission since 31.12.2015 and it was incurring expenditure on the basis of capacity charges @ Rs. 2.24 only, which was a further hit on itbecause even in absence of revision of tariff, the Appellantwas still incurring capacity charges at the rate of Rs. 2.24 per kWh only, although it was billing at the rate of Rs. 1.88 only. This made the conditions still more miserable for LPGCL. However, the Appellant had the capacity to manage its funds well, which is clear from the fact that against the resources provided by R2 to enable the Appellant declare capacity of only 25.62%, it could still achieve 54.78% PAF.

We thus answer Issue No.3: Whether the Appellant has actually suffered losses solely due to the non-payment of its outstanding in time, in affirmative.

Issue No.4:-

7.28 The Appellant' counsel referred to the relevant provisions of the Tariff Regulations, 2014, which reads as under:

> ***"13. Deviation from norms:***
>
> *(1) Tariff for sale of electricity by a generating company may also be determined in deviation of the norms specified in these regulations subject to the conditions that:*
>
> *(a) The levelised tariff of electricity over the useful life of the project, calculated on the basis of the norms in deviation does not exceed the per unit tariff calculated on the basis of the norms specified in these regulations and upon submission of complete workings with assumptions to be provided by the generator at the time of filing of the application; and*
>
> *(b) Any such deviation shall come into effect only after approval by the Commission.*

***Explanation**: For the purpose of calculating the levelised tariff referred to in sub clause (a) of clause (1), the discounting factor shall be as notified by the CERC from time to time.*

14. Power to Remove Difficulties:

If any difficulty arises in giving effect to these regulations, the Commission may, of its own motion or otherwise, by an Order and after giving a reasonable opportunity to those likely to be affected by such Order, make such provisions, not inconsistent with these regulations, as may appear to be necessary for removing the difficulty.

15. Power to Relax: `

The Commission, for reasons to be recorded in writing, may vary any of the provisions of these regulations on its own motion or on an application made before it by an interested person by an Order."

7.29 Learned counsel for the Appellant vehemently submitted that 'Power to Relax' is a judicial discretion and is ought to be exercised in the interest of justice where sufficient grounds for exercise of the same exist. The counsel for the Appellant has drawn our attention to the following judgments of this Tribunal:

(i) Uttar Pradesh Power Corporation Limited v. LancoAnpara Power Limited [Appeal No. 336 of 2017]:

"*9.18* *The learned counsel appearing for the Appellant placed reliance on the judgments of Hon'ble Supreme Court to substantiate his submission. The learned counsel for the Appellant contended that, the payment security mechanism was established as per Article 10.9 of the PPA that normally stipulates that the default contingency agreement is the only payment security mechanism and the buyer standby Letter of Credit (LOC) is merely a standby payment mechanism. As such the decision of the State Commission is wrong in construing that the non-opening of LOC or non-timely payment constituted an important event for Lanco to perform. The relief granted by the State Commission as Rs.0.069 per unit to Lanco for the duration of PPA from 12/02/2013 on account of alleged default of non-establishment of payments security mechanism is, therefore, erroneous. On the other hand, the learned counsel for the Respondent reiterated that as a result of huge outstanding payments coupled with non-establishment of payments security mechanism, Lanco suffered on multiple accounts such as erosion of networthand equity, degradation of its credit ratings, higher interest rate on working capital, lowering of option for re-financing of debt etc. We note that based on the analysis and recommendations of the Expert Committee, the State Commission has considered the facts arising out of non-payment of dues and failure to establish payment security mechanism in a judicious manner.* ***We, accordingly, consider that there was a failure on the part of the Appellant as far as timely payment of dues as well as establishment of payment security mechanism are concerned and the State Commission has decided the issue in just and equitable manner. The State Commission after critical evaluation the***

material on records and after considering the submission of the counsel for both the parties by assigning valid reasons had decided the matter strictly in accordance with law. Therefore, interference by this Tribunal may not be justifiable nor we find any legal infirmity in the impugned order.”

[Emphasis Supplied]

(ii) NTPC Limited v. Madhya Pradesh State Electricity Board &Ors [Appeal No. 89 of 2006]:

“21. We have considered the submissions of learned counsel for the parties.

22. ***The first issue which requires determination is whether the Commission is empowered to relax the norms laid down in the Regulations of 2004. The relaxation of the Target availability has been claimed by the appellant under proviso to sub-clause (2) of Regulation 2 and Regulation 13 of the Regulations. At this stage, it would be convenient to set out these Regulations for facility of reference:***

…………….

13. Power to Relax: The Commission for reasons to be recorded in writing may vary any of the provisions of these regulations on its own motion or on and application made before it by an interested person’.

23. It is clear from proviso to clause (2) of Regulation that CERC can prescribe the relaxed norms of operating including the norms of target availability in respect of a generating station only in a case, where the tariff was not determined in accordance with the Central Electricity Regulatory Commission (Terms and Condition of Tariff) Regulations, 2001. It is however not necessary to examine the argument of the learned counsel for the appellant based on Regulation 2(2) of the Regulations of 2004 or to construe Regulation 2(2) and its implication ***as Regulation 13 of the Regulations of 2004 empowers the Commission to vary the provisions of the Regulations on its own motion or on an application made before it. This power has been conferred on the Commission to relax the rigor of the Regulations in appropriate cases****.”*

[Emphasis Supplied]

(iii) RGPPL vs CERC &Ors. (Appeal No. 130 of 2009):

“10.6. This Tribunal in 2007 ELR APTEL 7 in the case of NTPC Ltd. Vs. Madhya Pradesh State Electricity Board has held as under:

“It must be held, that the power comprised in Regulation 13 is essentially the “power to relax”. In case any Regulation causes hardship to a party or works injustice to him or application thereof leads to unjust result, the Regulation case be relaxed. The exercise of power under Regulation 13 of the Regulation is minimized by the requirement to record the reasons in writing by the Commission before any provision of the Regulation is relaxed. Therefore, there is no doubt that the Commission has the power to relax any provision of the Regulation.”

*"10.7. The above Regulation and the decision give the judicial discretion to the Central Commission to relax norms based on the circumstances of the case. However, such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation. It has to be exercised only in exceptional case and where non-exercise of the discretion would cause hardship and injustice to a party or would lead to unjust result. In the case of relaxation of the Regulation the reasons have to be recorded in writing**. Further, it has to be established by the party that the circumstances are not created due to act of omission or commission attributable to the party claiming the relaxation.***

7.30 Learned counsel for R2 on the other hand submitted that 'Power to relax' i.e. Regulation 15 of the UPERC Tariff Regulations, 2014 was discretionary in nature which could be exercised reasonably and in exceptional cases with circumspection keeping in view the facts and circumstances of each case. Further, it has to be established by the party seeking exercise of this power that the circumstances were not created due to an act of omission or commission attributable to the party claiming the relaxation. The counsel for R2 further drew our attention to the decision in *R.K. Khandelwal v. State of Uttar Pradesh &ors*. reported as (1981)3 SCC 592:

"6. Dr Singhavi, who appears on behalf of the appellant, raised a further contention that the ratio 1:1was relaxed from time to time by the University and that the appellant was discriminated against by the arbitrary refusal of the authorities to relax the ratio in his favour. We are prepared to accept that if there is a power to relax the ratio, that power must be exercised reasonably and fairly. It cannot be exercised arbitrarily to favour some students to disfavour some others, But the difficulty in the way of the learned counsel is that this point of discrimination was not taken in the writ petition which was filed in the High Court, it was not argued in the High Court and is not even mentioned in the special leave petition before us. The question as to whether that power has been exercised arbitrarily in this case raise new points into which it is difficult for us to enquire for the first time. We are therefore unable to entertain the submission made by the counsel."

7.31 Learned counsel for the Appellantwas quick to point out that R2 has however not referred to the para 7 of the same judgement, which reads as under:

"*7. The appellant has thus failed to make out a case of injury to any of his legal rights, for which reason the appeal must fail…..*"

Therefore, it is clear that exercise of power to relax in favour of a party, who has not been able to prove injury to its legal rights must not be done.

However, on the contrary, if it is established that a party has been deprived of its legal rights, and as a result of its deprivation, some legal injury has been caused to it, such injured party deserves relief in the shape of exercise of power to relax, if it is available under the Regulations.

Our Findings :

7.32 In our view, and as has been discussed in the foregoing paragraphs, R2 by delaying payment, has caused considerable injury to the legal rights of the Appellant. Such legal rights lie in favour of the Appellant in the shape of its right to receive payment and procure coal and thus declare capacity upto 85% of its installed capacity so that its entire fixed cost may be recovered. We have also held, against the allegations of R2, in the preceding paragraphs that the Appellant despite erratic and low payments by R2 which was just sufficient to declare only 25.62% capacity, it was able to declare a capacity of 54.78% during the financial year 2017-2018.

7.33 As brought out by the learned counsel for the Appellant in its submissions (supra), we note that there are several precedentson relaxing the norms to enable the suffering parties for no fault of themselves to recover their fixed costs. Among others, this Tribunal itself in the Appeal No. 89 of 2006 in case NTPC vs MPSEB relaxed the target availability for the year April 1 2004 to March 31 2005 for recovery of full capacity charges for Kawas and Gandhar at 72% PAF.There are other precedents with the CERC also relaxing the target availability in the several cases.

7.34 Accordingly, we are of the opinion that because the Appellant has suffered injury due to the action of R-2 by not making the full payment in time and that Appellant has acted bona-fide and also took action of filing recovery petition no. 1288 of 2018 before the State Commission to recover its dues, it was a fit case for ‘exercise of powers to relax’ by the State Commission. The State Commission being fully aware of the facts of delayed payments and non-

establishment of Payment Security Mechanism by Respondent no.2 despite several categorical directions, ought to have exercised the discretionary powers conferred on it to relax the norms in such a circumstance wherein the Appellant is made to suffer on account of Respondent's fault. Thus, it was a fit case for exercise of 'powers to relax' by the State Commission in the interest of equity and justice.

We therefore answer the issue no.4: Whether the Regulations can be relaxed to allow Appellant to recover its full fixed cost for the impugned period and as a consequence, can the PAF of the Appellant be reduced to 54.78% from 85% in the affirmative.

Issue No.5:-

7.35 The PPA as well as the Tariff Regulations provide for payment of late payment surcharge @1.25 % per month, which as per the contentions of UPPCL is the only remedy provided in the PPA as well as the Regulations and excludes any other payment or compensation.

7.36 Learned counsel for the Appellant contended that the late payment surcharge is only to compensate for the delay in the payment of the tariff for the availability declared. The issue raised herein was the loss in fixed charges for the availability, which the Appellant was unable to declare on account of inability to procure coal due to the cash flow constraints solely caused by R2. This is not in any manner compensated by the late payment surcharge, which at the most represent financing cost from alternate sources only, if at all additional financing is available. The learned counsel further submitted that continuous defaults by the R-2 caused shortage of coal and thus loss of capacity to the Appellant, which could not be compensated by late payment surcharge alone because with payment at the fag end of the year, there was no time for the Appellant to procure coal in the same financial year and declareits full normative capacity. The Appellant'scounsel further

submittedthat the late payment surcharge would be sufficient remedy only in case adequate finance was available to the Appellant through alternate sources since it compensates only the time value of the money and does not account for other direct damages caused by late payments.

7.37 Learned Counsel of the Appellant further submitted that the LPSC would have been a sufficient remedy had the payment security mechanism as provided in the PPA would have been in operation. He further added that mere description "@ 1.25% per month" makes it sufficiently clear that the delay must be monthly which must not reach even a quarter of a year because had the intent of legislature been to make it quarterly, half yearly or annually, it must have stated so.

7.38 Learned Counsel for R2, on the other hand,contended that the UPERC Tariff Regulations, 2014 provide for LPSC to be the only remedy for delays in making payments, which have been made to the Appellant and hence the Appellant does not have any other remedy. Apart from this generic statement, R2 has pleaded nothing.

<u>Our Findings :</u>

7.39 We find ourselves unable to agree to the above contentions of R2. As discussed supra, LPSC is of the nature of carrying cost, which is payable in terms of the Tariff Regulations and in terms of PPA on a monthly basis and not on quarterly basis or a half yearly basis or on yearly basis. The very nature of this monthly payment makes it clear that it firstly covers up the carrying cost of funds upto and including a period of maximum three months otherwise the regulations would have provided payment terms on a quarterly basis or half yearly basis or annual basis. This makes crystal clear that the LPSC is not intended to cover up the defaults beyond a period of three months. Therefore, LPSC cannot be allowed to continue indefinitely without the defaulter taking

onus of consequential losses caused to other party for not making regular payments in time.

7.40 In fact, a generator has to recover its fixed cost through tariff, which can be recovered only if it is able to declare capacity to the extent of 85%. Delays in payment beyond a period of three months therefore are not at all intended to be recovered through LPSC, specifically, when it causes extra losses to the generator. We note from the records placed before us that the overdue amount beyond 60 days has been in the range of Rs. 12 crore to Rs.528 crore and the total outstanding has ranged from Rs.704 cores to Rs.1267 crore. Thus, excepting the month of March 2018, in all months, UPPCL had created an overdue situation causing LPGCL the loss of declared capacity which cannot be compensated merely by LPSC.

7.41 It has also emerged from the discussions in preceding paragraphs that the situation of loss of DC was solely at the fault of R-2 by causing shortage of coal triggered by late payments by it. Thus, we are of the opinion that when loss of DC has been caused due to a breach of a material conditions of the contract by R-2, it cannot be compensated in full merely by LPSC.

7.42 Having established that the loss of DC was caused by late payment by R2, now R2 is obliged to put the Appellant in the same situation in which it would have been had the breach not been committed by it. This principle originally founded in 1848 itself in *Robinson v Harman* continues to support innocent parties in the event of breach of contract still today and we find no reason why this principle should not be applied in the instant case. We are therefore, of the opinion that in the specific case of LPGCL, LPSC is not meant for or otherwise, sufficient to compensate the Appellant for the loss caused to it. Resultantly, loss of DC can be compensated only by reducing the Target Availability of the Appellant for the year 2017-18 to the extent prayed for.

We therefore answer Issue No. 5: Whether late payment surcharge as envisaged in the Regulations and PPA are adequate to compensate the loss in the negative.

Issue No. 6:-

7.43 The Appellant has specifically prayed (under prayer 'c') for interest at the rate 15% per annum from the date of the capacity lost till date of actual payment. The said prayer has been contested by R2 on the ground that the prayer of the Appellant is unsustainable because the LPSC, which is the contractual remedy for any delay in payment as per PPA has already been paid at the rate of 1.25% per month and a party cannot seek payment above and beyond the rate prescribed and agreed under the contract. Learned counsel for UPPCL submitted that R2 cannot be held responsible for any compensation including the carrying cost. Learned counsel for the Appellant pointed out that the Commission has failed to appreciate that LPSC is only for the payments which were delayed by R2 and not for any other purpose. It is only for time value of money. Therefore, the LPSC clause would not in any manner restrict the claim of the Appellant for other direct damages caused by the late and partial payments. In fact, the current measurement of the damages in the present case is the liability to pay fixed charges. Further, on account of the delayed payment of the fixed charges, the Appellant is entitled to interest in form of carrying cost. To substantiate his contentions, learned counsel placed reliance on the recent judgement of the Hon'ble Supreme Court in Uttar Haryana Bijli Vitaran Nigam Ltd. Vs. Adani Power Ltd. and Ors. (Order dated 25.02.2019 in CA No. 5865 of 2018) which has settled down the principles of restitution and payments of such interest/carrying cost.

7.44 In view of our deliberations & analysis, stated supra, we are unable to agree with the contentions of the R2 because what the respondent is pleading about is late payment surcharge, which is applicable in case of bills raised by generators and is payable after 60th day of the date on which bill is raised. In

the instant case, the Appellant has prayed for interest on the amount which it could not claim/ bill due to non-availability of coal on account of non payment, from the date of capacity lost till the date of actual payment.

7.45 We are of the opinion that as has already been established in the foregoing paragraphs that R-2 has caused loss of capacity to the Appellant by its action, such action is a substantial breach of contract on the part of R2. Accordingly, R-2 is legally bound to put the Appellant in the same situation it would have been had the breach not occurred. The several rulings of this Tribunal and Hon’ble Apex Court affirm the above print of view beyond doubt.

7.46 We therefore hold that in addition to recovery of its legitimate fixed charges by reducing the normative capacity of the Appellant to 54.78%, the interest/carrying cost of the amounts thus lost by the Appellant shall also be paid. However, the carrying cost shall be payable in accordance with UPERC Tariff Regulations 2014-19 based on prevailing bank interest rates and not 15% as prayed for by the Appellant. The same shall be allowed by the State Commission from the date the Appellant lost its capacity till the date of actual payment as per its Tariff Regulations.

We therefore decide Issue No. 6: Whether the Appellantbe entitled to carrying cost in the affirmative

8. **Summary of Findings :**

In light of the above analysis and findings, we conclude as under:

8.1 Issue No. 1: We hold that the Appellant has not changed its prayer during the course of the proceedings either through its short Rejoinder Note or in Final Written submissions dated 02.07.2020, as alleged by the Second Respondent.

8.2 Issue No. 2: We hold that the second Respondent (UPPCL) has not paid the outstanding amounts to the Appellant in accordance with the terms of the PPA

and the Regulations. We dismiss the concept of average payments introduced by R2 to justify its default of non payment. We further observe that the outstanding of the Appellant remained substantial during most of the period in financial year 2017-18. Further, Respondent UPPCL has failed to establish Escrow/ Payment Security Mechanism as yet despite repeated categorical directions by the State Commission in its various orders.

8.3 **Issue No. 3:** Having established a clear correlation between delayed payments and coal shortage, we hold that the Appellant has actually suffered losses solely due to the non-payment of its outstanding dues in time by R-2. As a result, the applicant was not able to procure sufficient coal to declare full Capacity in spite of its generating units being technically available.

8.4 **Issue No. 4:** Having regard to various rulings ofthis Tribunal and the Hon'ble Apex Court, we are of the view that the instant case is a fit case to relax the Norms to allow the Appellant to recover its full fixed cost for the impugned period at actual PAF of 54.78% instead of normative 85% in the interest of justice and equity.

8.5 **Issue No. 5:** We hold that in view of the facts& circumstances of the matter, late payment surcharge as envisaged in the Regulations and PPA is not meant for or otherwise, adequate to compensate the consequential loss suffered by the Appellant in full. Hence, it is entitled for further relief over and above LPSC.

8.6 **Issue No. 6:** We hold that as per the settled principles of law, the Appellant is entitled for restitution and thus, to carrying cost from the date of capacity lost till date of actual payment at the prevailing rate of interest in accordance with UPERC Regulations.

ORDER

Having regard to the factual and legal aspects of the matter as discussed supra, the issues raised in the instant Appeal filed by the Appellant being Appeal no 285 of 2019 have merits. Hence Appeal is allowed.

The impugned order dated 28.05.2019 passed by Uttar Pradesh Electricity Regulatory Commission in Petition No. 1402 of 2019 is hereby set asidein line with our findings stated under Para 8.1 to 8.6 above.

The State Commission is directed to issue consequential orders as expeditiously as possible within a period of 3 months from the date of receipt of a copy of this Judgement/order in accordance with law and our directions set out as above.

No order as to costs.

Pronounced in the Virtual Court on this **28th day of September, 2020.**

(S.D. Dubey)
Technical Member

(Justice ManjulaChellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

mkj