

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 319/MP/2013

**Coram
Shri Gireesh B Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S.Bakshi, Member**

Date of Order :18.4.2016

In the matter of

Petition seeking a declaration that COD by the generating company was illegal and not in accordance with the terms of the PPA and prudent utility practices.

And

In the matter of

Tata Power Delhi Distribution Ltd
Grid Sub Station Building,
NDPL House, Hudson Lane,
Kingsway Camp, Delhi-110009

Petitioner

Vs

1. Jhajjar Power Limited
Bungalow No 1039, Sector 6
Bahadurgarh, District Jhajjar
Haryana – 124597

2. Tata Power Trading Company Ltd
Corporate Centre, A Block,
34, SantTularam Road,
Carnac Bunder, Mumbai – 400001

Respondents

Parties Present

1. Shri Alok Shankar, Advocate, TPDDL
2. Shri Vaibhav Choudhery, Advocate, TPDDL
3. Ms.Richa Shandiya, Advocate, TPDDL

4. Shri Sanjay Sen, Senior Advocate for JPL
5. Shri Ashim Gupta, Advocate JPL
6. Shri Aditya Jalan, Advocate for JPL
7. Shri Ashish Gupta, Advocate, JPL
8. Shri David Simmons, JPL
9. Shri Tarun Bajaj, JPL
10. Shri Naveen Munjal, JPL
11. Shri Venkatesh, Advocate, TPTCL
12. Shri V.P.Singh, Advocate, TPTCL
13. Shri Ankit Parsoon, Advocate, TPTCL

ORDER

Tata Power Delhi Distribution Limited, the predecessor of North Delhi Power Limited, is a joint venture of Tata Power Company Limited and Government of NCT of Delhi. The petitioner came into existence after implementation of the reform package by the Government of NCT of Delhi in July 2002 as a power distribution licensee. The Petitioner supplies power in the North and North-West areas of Delhi. The Delhi Electricity Regulatory Commission vide its order dated 31.3.2007 reassigned the PPAs of the generating companies with Delhi Transco Limited to the distribution licensees of Delhi, namely, New Delhi Power Limited, BSES Rajdhani Power Limited and BSES Yamuna Power Limited. Consequent to the reassignment, the responsibility of arranging power for their distribution areas was vested in the respective distribution licensees with effect from 1.4.2007.

2. Haryana Power Generation Company Limited (HPGCL) which was vested with the responsibility related to procurement and bulk supply of electricity by the Government of Haryana was authorised by Uttar Haryana Bidyut Vitaran Nigan Limited (UHBVNL) and Dakshin Haryana Bidyut Vitaran Nigan Limited (DHBVNL) to procure power on their

behalf. HPGCL conceived Mahatma Gandhi Thermal Power Plant (MGTPP) under Case 2 to be located at Matenheil, District Jhajjar, Haryana with fuel linkage to be procured from Government of India, Ministry of Coal. HPGCL conducted the International Competitive Bidding (ICB) in accordance with the 'Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees' (Bidding Guidelines) issued by the Government of India on 19.1.2005 under section 63 of the Electricity Act, 2003 (the Act). In accordance with the Guidelines, HPGCL incorporated Jhajjar Power Limited (JPL) as a Special Purpose Vehicle for setting up MGTPP which would be transferred to the successful bidder on conclusion of the bidding process. HPGCL initiated the process by issuing Request for Qualifications (RfQ) and Request for Proposal (RfP). As per Para 2.3 of the RfP issued by HPGCL, the power project would have a minimum capacity of 1000 MW and maximum capacity of 1320 MW at the generation bus bar. The RfP further provided that the Haryana Utilities would contract 90% of the Available Project Capacity or Contracted Capacity from the date of commercial operation of the power project and the seller would have to sell the balance 10% of the Available Project Capacity outside the State of Haryana. The RfP also provided that the power project would fall within the Mega Power Policy as notified by the Ministry of Power, Government of India.

3. China Light and Power Limited (CLP) submitted its bid on 10.3.2008. On conclusion of the bidding process, CLP emerged as the successful bidder and was awarded the project. Letter of Intent was issued on 23.7.2008. Thereafter, CLP acquired 100% equity shares in Jhajjar Power Limited and entered into PPA dated 7.8.2008 with DHBVNL and

UHBVNL (Haryana PPA) for supply of power from 90% net capacity of the power project. Jhajjar Power Ltd (JPL) negotiated sale of 10% of the net capacity to New Delhi Power Company Ltd (presently known as Tata Power Distribution Company Ltd or TPDDL) in order to meet the qualification requirement of a Mega Power Project. The sale was executed by JPL through an inter-State trading licensee, namely, Tata Power Trading Company Limited (TPTCL). Accordingly, JPL entered into a Power Purchase Agreement dated 20.1.2009 with TPTCL (referred to as "Tata PPA") for sale of 10% power at the tariff at same tariff as under Haryana PPA. TPTCL entered into a back to back Power Sale Agreement (PSA) dated 20.1.2009 with TPDDL at the same tariff for sale of the entire contracted capacity. Unit 1 of MGTPP achieved commercial operation on 29.3.2012 and Unit 2 achieved commercial operation on 19.7.2012.

4. The petitioner has submitted that supply of electricity from the power project of JPL had to commence from January 2012. As per clause 4.6 of the PSA, TPTCL is liable to pay the liquidated damages @ Rs.10,000 per MW per day for the first 60 days and thereafter @ Rs. 15,000 per MW per day in the event of failure to provide the contracted capacity by the Scheduled Commercial Operation Date (SCOD). The petitioner has submitted that similar provision was also incorporated in the Tata PPA. Therefore, in the event JPL failed to commission the units of the power project on or before the SCOD, it was liable to pay the liquidated damages as per the provisions of the Tata PPA and TPDDL was liable to claim the same from TPTCL under the PSA. Further, under the PSA, TPDDL was liable to reimburse the transmission charges incurred irrespective of the quantum of power flow or utilisation of open access facility for the entire term. The

petitioner has submitted that its liability to pay transmission charges would commence and JPL's liability to pay the liquidated damages to TPTCL would end only after the petitioner started receiving power from the power project consequent to the declaration of commercial operation of the units of the MGTPP. The petitioner has submitted that JPL did not have a Fuel Supply Agreement and was therefore not in a position to generate power. Notwithstanding the absence of Fuel Supply Agreement, JPL managed to procure coal and declared the commercial operation of the units of the generating station in March 2012 and July 2012 respectively. Thereafter, negligible power has been supplied to TPDDL and as a result, TPDDL had to incur transmission charges of Rs.33 crore as on 31.10.2013.

5. The petitioner has submitted that the act of JPL by declaring commercial operation without there being a coal linkage is a fraud in terms of section 17 of the Indian Contract Act, 1874. The petitioner has submitted that the act of JPL to declare commercial operation without availability of coal was intended to deceive its off-takers including the petitioner into believing that a firm supply of power from the generating station would commence. The petitioner has submitted that pursuant to the declaration of commercial operation, the petitioner has been incurring transmission charges without getting power and JPL has been discharged from its liability pay the liquidated damages due for delay in commissioning.

6. The petitioner has submitted that a generating company while entering into a PPA with a trader is insulated from the payment risks and similarly a distribution

licensee while entering into a PPA with a trader is insulated from any illegal and imprudent declaration by the generator. The petitioner has submitted that TPDDL entered into the PSA with TPTCL relying on the expertise of TPTCL to insulate TPDDL from any risks that may flow to TPDDL in the event JPL did not operate the generating station in accordance with the applicable law and prudent utility practices. The petitioner has submitted that the learned Delhi Electricity Regulatory Commission while approving the PSA entered into between TPTCL and TPDDL had specified a condition that clear demarcation in the obligations of the generator and trader must be made i.e. a trader in electricity cannot just act as intermediary between the generator and consumer but has more proactive role to play such as to ensure that both the generator and consumers are insulated from the risks originating from the other. The petitioner has submitted that TPTCL has failed to initiate any remedial steps against JPL which it was bound to undertake to safeguard the interest of the petitioner and the inaction lies in allowance to JPL to declare commercial operation in the absence of fuel supply agreement. The petitioner has submitted that TPTCL having not taken any remedial steps against JPL for the illegal declaration of COD by JPL has breached the fundamental premise of the PSA entered into with the petitioner and without serving any notice to TPDDL as envisaged under the PSA to avoid payment of damages to TPDDL under the PSA.

7. The petitioner has submitted that since the declaration of commercial operation is a fraudulent act, the same is nullity in the eyes of law. All benefits that JPL has assumed as a result of such illegal declaration and all losses that have been suffered by TPDDL

as a result of the same are required to be restored. The petitioner has made the following prayers, namely:

- “(A) Hold that the COD declaration was fraudulent and thus non-est;
- (B) TPTCL failed to discharge its duty under the PSA and failed to act as per prudent utility practices;
- (C) Direct refund of the entire amount paid by TPDDL as transmission charge with interest of 14% per annum from the date of payment; and
- (D) Pass any or such further order or orders as may be deemed just and proper in the facts and circumstances of this case.”

8. Replies to the petition have been filed by Jhajjar Power limited (JPL) and Tata Power Trading Corporation Limited (TPTCL).

9. JPL has raised a preliminary objection regarding the maintainability of the petition vis-à-vis JPL as according to JPL, there is no privity of contract between JPL and TPDDL. JPL has submitted that the only arrangement entered into by JPL was either with the Haryana Utilities or TPTCL. JPL has submitted that since the petitioner enjoys no privity of contract with JPL, the Commission ought not to entertain any claim made by the petitioner. JPL has submitted that TPTCL has not challenged the actions as claimed in the present petition nor raised any dispute under Tata PPA. According to JPL, TPTCL has been paying the tariff as per Tata PPA pursuant to the commercial operation of the Units of MGTPP and thereby has acted in a manner which conclusively waives the right to challenge the dates of commercial operation of the units of the power project. JPL has further submitted that TPDDL entered into PSA with TPTCL and any claim for

liquidated damages or for non-fulfilment of the contractual obligations can only be directed towards TPTCL.

10. On merit of the claims of the petitioner for compensation of transmission charges, JPL has made the following submissions:

(a) As regards the availability of coal and fuel supply agreement, JPL has submitted that TPTCL was aware and had acknowledged that JPL's obligations of executing the fuel supply agreement was subject to the approval of the Haryana Utilities. Moreover, declaration of COD is a technical requirement under Tata PPA and a valid fuel supply agreement or availability of coal stock is not a pre-requisite under the said PPA. JPL has kept TPTCL informed of all its activities in connection with the unavailability or shortage of fuel, entering into fuel supply agreement, commissioning of the units and declaration of COD. Pursuant to the COD, the petitioner has been supplied power and therefore, the petitioner cannot be allowed to now allege that the availability of fuel or lack thereof should have been considered by JPL before declaring COD or the declaration of COD is fraudulent or incorrect. Further, TPTCL and TPDDL have imposed penalty for non-achievement of 75% availability on JPL from 1.4.2012 and have thereby have admitted that COD was achieved during the contract year 2011-12.

(b) JPL has taken all measures proactively to ensure adequate supply of fuel for commissioning of Unit 1 of MGTPP by SCOD. However, failure on the part of

Haryana Utilities to grant timely approval and cooperate in obtaining fuel has resulted in non-availability of fuel.

(c) JPL had throughout made all reasonable efforts to procure coal from CIL/CCL for the commissioning of MGTPP by the SCOD. However, due to lack of timely approval by Haryana Utilities and due to inability of CIL/CCL to supply the quantities of coal contracted under the MoUs on time, JPL could not commission Unit 1 by SCOD. The inability on the part of CIL/CCL to provide the contracted coal in time was a clear instance of natural force majeure event under Article 12.3 of the Tata PPA and Article 4.5(b) of the Tata PPA provides that a reasonable period of time be provided to JPL to overcome the effects of force majeure event. JPL in its letter dated 4.1.2012 had given notice of force majeure to TPTCL in accordance with Article 12.5 of the Tata PPA on account of inability of Unit 1 from being commissioned by SCOD on account of non-supply of coal from CCL. Thereafter, JPL vide its letters dated 19.1.2012 and 16.2.2012 informed TPTCL of the consequent deferment of the SCOD. In accordance with Article 12.7 of the Tata PPA, JPL shall not be considered to be in breach of its obligations under Tata PPA to the extent the performance of its obligations was prevented, hindered and/or delayed due to force majeure events. Therefore, the allegations made by the petitioner regarding the liability of JPL to pay the liquidated damages for failure on its part to commission Unit 1 before SCOD does not arise as SCOD would be deferred due to Natural Event of Force Majeure.

(d) Article 4.2(a) and Article 4.2(b) of Tata PPA clearly provide that the responsibility of obtaining open access to enable wheeling of the Allocated Transmission Capacity from the delivery point and payment of all transmission charges in connection thereof was that of TPTCL. Further, under Article 4.2.3 of the PSA, TPDDL is to reimburse TPTCL the transmission charges paid by TPTCL. Therefore, payment of transmission charges is an obligation of TPTCL under the Tata PPA and TPDDL has contractually agreed to reimburse TPTCL the transmission charges paid by it. In the absence of any provision in Tata PPA and in the light of the fact that the obligation of JPL for delivery of power at its bus bar, the allegations and claims by the petitioner of the losses due to transmission charges against JPL are not made out.

(e) TPTCL first raised the issue of payment of transmission charges vide its letters dated 19.7.2012 and 25.7.2012 and requested JPL to withdraw the COD or bear the transmission charges. JPL is stated to have rejected the claims of TPTCL vide its letters dated 1.8.2012 and 23.8.2012. JPL has submitted that it was not liable to pay the transmission charges incurred by TPTCL or the petitioner, including due to shortfall in availability. JPL has submitted that the transmission charges are costs of engaging in the business of purchase and sale of electricity which has been contractually agreed to be paid by TPTCL under Tata PPA including Article 9.2 thereof. JPL has further submitted that Tata PPA provides for adequate commercial arrangement for dealing with under-delivery or under-performance by JPL and JPL has already incurred huge

losses in terms of recovering less capacity charges from TPTCL despite the fact that shortage of fuel and consequent shortage of supply was due to no fault of JPL.

11. The petitioner has filed its rejoinder vide affidavit dated 4.8.2014. The petitioner has submitted that JPL has not shown any cause which disentitles the petitioner of the reliefs prayed in the petition. As regards the privity of contract, the petitioner has submitted that in terms of the judgement dated 15.5.2012 in OMP No. 677/2011 (PTC India Limited Vs. Jaiprakash Power Venture Limited), where a trader is procuring power from a generating station and supplying to a distribution licensee on back to back basis, then notwithstanding that the generating company and distribution licensee do not have direct contractual relationship, the tariff can be regulated by appropriate regulatory commission. Therefore, when a trader is merely acting as an intermediary between a generating company and the distribution licensee, then the generating company and distribution licensee are treated to have a direct relationship. Merely because there is a trader facilitating the transaction, the same would not mean that the distribution licensee has no recourse against the generating company. The petitioner has submitted that the agreements entered into between the parties establish that at all times, TPTCL was acting as a facilitator to the sale and purchase of electricity between the petitioner and JPL. In this connection reference has been made to the provisions of Articles 4.1.1 and 4.2 of Tata PPA and Articles 4.1 and 4.2 of PSA. The petitioner has submitted that learned Delhi Electricity Regulatory Commission while approving the PSA between the petitioner and TPTCL in its order dated 13.5.2010 has observed that “clear demarcation

between the obligations of the generator and the obligations of the trader needs to be made” which establishes a direct relationship between the petitioner and JPL. The petitioner has submitted that JPL’s inability to procure the coal on account of denial of approval by Haryana Utilities is not relevant for adjudication of the dispute in this petition and what is relevant is that JPL has declared the commercial operation without a firm fuel supply agreement. As regards the JPL’s contention that the petitioner has accepted the COD by scheduling power and making payment therefor, the petitioner has submitted that scheduling of power relying on the declaration of commercial operation, payment of monthly invoice raised for supply and claiming LDs for failing to maintain the threshold availability was on the basis of the certificate issued by the Independent Engineer, and without prejudice to the right of the petitioner to challenge the declaration of commercial operation. The petitioner has submitted that immediately after declaration of commercial operation of the units of MGTPP on 29.3.2012 and 19.6.2012, the petitioner vide its letter dated 19.7.2012 wrote to JPL raising objection to the declaration of commercial operation. As regards the JPL’s contention that transmission charges are routine business expenses, the petitioner has submitted that TPDDL is a regulated entity and any expenditure incurred by it which does not have commensurate benefits to the consumers can be disallowed by learned DERC as imprudent expenditure.

12. TPTCL has made its preliminary reply vide its affidavit filed on 14.7.2014. TPTCL has submitted that it has been erroneously made a party in the present petition as the main grievance of the petitioner is against JPL. Further, the petitioner has only alleged that TPTCL has been unable to take remedial steps or proactive steps to ensure that the

interests of the petitioner are protected and there is no substantive claim or allegation against TPTCL. It has been further submitted that as per Article 6.2 of the Tata PPA, the onus of commissioning is solely vested in JPL and TPTCL was only required to be an observer in the commissioning test. TPTCL has prayed that TPTCL may be deleted from the array of parties in the interest of justice.

12. We have heard the learned counsels for the petitioner, JPL and TPTCL and considered the materials on record. The following issues arise for our consideration?

(a) Whether TPTCL has been wrongly arrayed in the petition as a respondent and its name should be deleted?

(b) Whether there is privity of contract between the petitioner and JPL?

(c) Whether JPL has declared the commercial operation of MGTPP in accordance with the provisions of the PPA and PSA?

(d) Whether TPDDL is entitled to refund of transmission charges from JPL?

Issue No: 1: Whether TPTCL has been wrongly arrayed as a respondent in the present petition and its name should be deleted?

13. TPTCL in its preliminary submission has argued that it has been erroneously impleaded as a party in the present petition as the main grievance of the petitioner is against JPL. Further TPTCL has submitted that the petitioner has not made any substantive claim against TPTCL. Moreover, since there is no role of TPTCL in the commercial operation of the MGTPP, its name should be deleted from the array of parties.

14. The petitioner in paras 25 and 26 of the petition has explained role of TPTCL in the context of Tata PPA and PSA as under:

“25. A generating company while entering into a PPA with a trader is isolated from the payment risks and similarly a distribution licensee while entering into a PPA with a trader is insulated from any illegal and imprudent declaration by the generator.

26. TPDDL entered into a PSA relying on the expertise of TPTCL to insulate TPDDL from any risk that may flow to TPDDL in the event JPL did not operate the generating station in accordance with applicable law and prudent utility practices.”

TPTCL has not rebutted the above submission of the petitioner. Therefore, it is the understanding between the petitioner and TPTCL that any risk flowing from the non-operation of the generating station in accordance with the provisions of the applicable law and prudent utility practices shall be borne by TPTCL. The petitioner has further submitted that TPTCL having not taken any remedial steps against JPL regarding the declaration of COD has breached the fundamental premise of the PSA entered into between the petitioner and TPTCL. The petitioner has further alleged that TPTCL has not served a proper notice to the petitioner as envisaged under the PSA to avoid payment of damages to the petitioner under the PSA. In the prayer, the petitioner has prayed for a declaration that TPTCL failed to discharge its duties under the PSA and failed to act as per prudent utility practices.

15. In its written submission, TPTCL has clarified its role as under:

“It is humbly submitted that TPTCL has acted as a facilitator to the sale and purchase of power between TPDDL and JPL as in the context of the present transaction, it is required to act as a link between the ultimate distribution company (i.e. TPDDL) and the generator (i.e. JPL). Thus, TPTCL’s role at best may be construed as that of a facilitator between TPDDL and JPL and in such role, it is required to act as coordinator between TPDDL and JPL. While carrying out such coordination, TPTCL is discharging various

functions including but not limited to coordinating for scheduling despatching, billing, payments, resolving day to day operation issues etc.”

16. We have considered the submissions of the petitioner and TPTCL. We do not agree that in the whole chain of generation and supply of power by JPL to TPDDL, TPTCL is merely acting as a facilitator. Perusal of the Tata PPA and PSA reveals that though there is no direct contractual relationship between JPL and TPDDL, both Tata PPA and PSA are mirror images of each other with TPTCL being signatory to both these agreements. In Schedule 10 of the Tata PPA, it is clearly provided that TPTCL represents and warrants to and agrees with JPL that the agreement is enforceable against TPTCL in accordance with its terms. Similarly, JPL represents and warrants to and agrees with JPL that the agreement is enforceable against TPTCL in accordance with its terms. In case of the PSA, TPTCL represents and warrants to agrees with NDPL(TPDDL) that the agreement is enforceable against NDPL (TPDDL) in accordance with its terms. Similar representation and warranty have been given by TPDDL to TPTCL. Since there are specific obligations which can only be discharged by TPTCL in terms of the PPA as well as in terms of the PSA, we hold that TPTCL is a necessary party in the petition and its name cannot be deleted as prayed. Further, there are allegations by TPDDL against TPTCL and a specific prayer has also been made against TPTCL that TPTCL failed to discharge its duty under the PSA and failed to act as per prudent utility practices. In our view, for adjudication of disputes raised by TPDDL, TPTCL is a necessary party and its preliminary objection for being made a party to the petition is overruled.

Issue No.2: Whether there is privity of contract between the petitioner and JPL?

17. JPL in its reply has raised a preliminary objection that there is no privity of contract between TPDDL and JPL as JPL has entered into arrangement only with TPTCL. JPL has further submitted that TPTCL which has a PPA with JPL has not challenged the actions of JPL nor raised any dispute under Tata PPA and has in fact been paying the tariff as per Tata PPA pursuant to commercial operation of Unit-I of MGTPP. JPL has submitted that since TPDDL has entered into PSA with TPTCL, any claim for liquidated damages or for non-fulfilment of contractual obligations can only be directed against TPTCL. The petitioner has submitted that in terms of the judgment of Delhi High Court dated 15.5.2012 in OMP No. 677/2011, where the trader is procuring power from a generating station and supplying to distribution licensee on back to back basis, then notwithstanding absence of any direct contractual relationship between the generating company and the distribution licensee, tariff can be regulated by the appropriate Regulatory Commission. The petitioner has further submitted that TPTCL has been acting as a facilitator to the sale and purchase of electricity between the petitioner and TPDDL in terms of Article 4.1.1 and 4.2 of the Tata PPA and Article 4.1 and 4.2 of the PSA.

18. The question therefore arises as to whether JPL and TPDDL have privity of contract even though there is no direct contractual relationship between them. In other words, whether TPDDL can bring a claim against JPL for the latter's failure to discharge its obligations under the PPA. TPDDL in support of its contention has relied upon the judgment of Delhi High Court dated 15.5.2012 in OMP No. 677/2011. The judgement

was rendered in the context of the exercise of jurisdiction by this Commission where the trader is procuring power from a generating station and supplying to distribution licensee on back to back basis. In the present case, JPL is supplying power to TPTCL through a PPA and TPTCL is supplying power to TPDDL under the PSA. Let us consider some of the provisions of the PPA and PSA. A common provision in both the Tata PPA and PSA is the Recital E which reads as under:

“(E) The power station is conceptualized as a mega power project under the Mega Power Project Policy (“MPP Policy”) of the Ministry of Power, Government of India. The power station to be eligible for the benefits of the MPP Policy, has to sell a portion of the total electrical output of the power station outside the State of Haryana. The condition also includes that an electricity regulatory commission should be set up in the state where power from the project is being supplied and the distribution of electricity in cities having a population of more than one million should be privatized. The state of Delhi fulfils both of these requirements.”

Thus, the supply of power from MGTPP of JPL to TPDDL is for fulfilment of the requirements of Mega Power Project Policy of the Central Government which required 10% of the power to be sold to another State. In this case, JPL had entered into PPAs with Haryana Utilities and in order to meet the requirement of Mega Power Project Policy, JPL intended to supply 10% of the capacity to TPDDL through TPTCL. Recital H of the Tata PPA reads as under:

“(H) TPTCL has represented to JPL that pursuant to discussions between TPTCL and North Delhi Power Limited, a company incorporated under the Companies Act, 1956, with its corporate office at Sub Station Building, Hudson Lines, Kingsway Camp, Delhi-110009 (“NDPL”) who is a distribution licensee in Delhi, TPTCL has offered to sell the Allocated Contracted Capacity under a power sale agreement to NDPL at the delivery point for a period of 25 years from the COD of the Project (“NDPL PSA”) at the same rate and similar terms and conditions as agreed under the DISCOM PPA and this TPTCL PPA.”

Further Recitals G to K of the Power Sale Agreement provides as under:

“(G) Pursuant to mutual discussions, JPL and TPTCL have agreed that TPTCL shall purchase from JPL, and JPL shall sell to TPTCL the Allocated Contracted Capacity and corresponding Electrical Output (defined hereunder) from the Project at the Delivery Point or a period of 25 years from the Commercial Operation Date (defined hereunder) of the Project.

(H) Consequently, TPTCL and JPL have entered in to the Power Purchase Agreement on 20th January, 2009 to purchase 10% of the Available Capacity from the Project (“TPTCL PPA”)

(I) TPTCL has offered to sell the Allocated Contracted Capacity under a power sale agreement to NDPL at the delivery point for a period of 25 years from the COD of the Project (“NDPL PSA”) at the same rate and similar terms and conditions as agreed under the DISCOM PPA and TPTCL PPA plus TPTCL’s Trading Margin.

(J) In pursuant to this NDPL shall have to file a petition for approval of the NDPL PSA and the tariff for sale of Allocated Contracted Capacity, at the same rate and similar terms and conditions, as agreed in the DISCOM PPA and TPTCL PPA, before the Appropriate Commission and NDPL shall have the NDPL PSA, tariff and trading margin approved by such Appropriate Commission. The approved tariff shall be applicable for purchase of the Allocated Contracted Capacity by NDPL under the NDPL, PSA.

(K) Pursuant to NDPL’s desire to purchase the Allocated Contracted Capacity and based on the above mentioned representations, TPTCL and NDPL have agreed to execute this Agreement to record and set out the terms and conditions for sale and purchase of the Allocated Contracted Capacity from the project.”

One of the conditions subsequent to be fulfilled by TPTCL under the Tata PPA and by TPDDL under the PSA is to provide within 15 days from the effective date a copy of the NDPL PSA executed between TPTCL and TPDDL (formerly NDPL) filed with the Appropriate Commission and subsequently, the copy of the NDPL PSA duly approved by Appropriate Commission to facilitate JPL in procuring the mega project status under the Mega Power Project Policy. The purpose of both Tata PPA and PSA is to ensure sale of power from JPL to TPDDL so that JPL can avail mega power project status. Therefore, the nexus between generation of power and supply to the distribution company is established. Apart from the above provisions, Article 3 of the PSA provides

for fulfilment of the conditions subsequent by both TPTCL and JPL. Further, one of the obligations of TPTCL under the PSA is that it shall not terminate the PPA with JPL except with the prior consultation with NDPL (TPDDL).The above provisions in the TATA PPA and PSA lead us to the conclusion that there is privity of contract between JPL and TPDDL.

19. JPL has relied upon paras 21 to 23 of the judgement dated 6.8.2009 of the Appellate Tribunal for Electricity in Appeal No.7 of 2009 (Lanco Amarkantak Power Private Limited Vs Madhya Pradesh State Electricity Regulatory Commission) in support of its contention that both Tata PPA and PSA are separate and distinct agreements. The said paras are extracted as under:

“21. It was argued vehemently by both Learned Counsel for the R-2 and R-3 that the Madhya Pradesh State Commission has got jurisdiction over the present dispute by virtue of the fact that the PPA and PSA constitute back to back arrangements. This contention cannot be countenanced as these two agreements are separate and distinct. Further between the two different parties these two agreements had been entered into. The close reading of the PPA clearly establishes that the obligation of the Appellant to supply the power energy output under the PPA is solely to R-2 which is independently entitled to sell the said power to one or more purchasers and accordingly the R-2 is independently responsible and liable for the supply of power to such purchasers.

22. As pointed out by the Learned Senior Counsel appearing for the Appellant that Clause 16.2 of the PPA establishes the distinct and independent nature of the PPA and the PSA and expressly dis-applies any notion of third party rights in as far as it clarifies that the PPA is solely for the benefit of the parties thereto, namely, the Appellant and R-2.

23. The resale of power procured under PPA takes place under the Power Sale Agreement (PSA) between the R-2 and R-3. The Appellant is not a party to this transaction. As such the purchase of power under the PPA cannot be construed to be within the jurisdiction of the Madhya Pradesh State Commission since there is no certainty whatsoever that the power would be resold by R-2 to Madhya Pradesh. Therefore, the argument based on treatment of both agreements as one is not sustainable.”

In the light of the above judgement, JPL has submitted that Article 18.2 of the Tata PPA and Article 18.2 of PSA clearly establish that both are distinct and independent contracts

and do not give rise to third party rights. Provisions of Article 18.2 in both agreements are identical and are extracted below:

“18.2 Third Party Beneficiaries

This Agreement is solely for the benefits of the Parties and their respective successors and permitted assigns and shall not be construed as creating any duty, standard of care or liability to, any person not a party to this agreement.”

20. We have considered the submissions of JPL. In our view, the provisions of the Tata PPA and PSA need to be read in entirety in order to understand the true nature of contractual relationship emerging from these agreements. Perusal of the judgement of the Appellate Tribunal as quoted above reveals that the Appellate Tribunal held both the PPA and PSA as distinct and separate on consideration of the fact that the obligation of the generator (Lanco Amarkantak) to supply power under the PPA was solely to the trading licensee (PTC India Limited) who is independently responsible to sell power to one or more purchasers and accordingly independently liable to supply to such purchasers. In that case, though the sale of power was to take place between PTC India Limited and MP Power Trading Company Limited, the Appellate Tribunal came to the conclusion that there was no certainty that the power would be sold by PTC India Limited to Madhya Pradesh. The present case stands on a different footing. As already discussed in para 18 above, recitals in both Tata PPA and PSA refer to the supply of power from JPL to TPDDL. Both the Agreements further stipulate that TPDDL would get the PSA approved from the appropriate Commission and provide a copy of the same to JPL through TPTCL to enable JPL to claim the benefits under Mega Power Policy. Further, in the PSA, there are references to the obligations to be discharged by

TPTCL/JPL. In the PSA, Project has been defined as “the power station undertaken for design, financing, engineering, procurement, construction, operation, maintenance, repair, refurbishment, development and insurance by the JPL in accordance with the terms and conditions of this agreement.” Allocated contracted capacity has been defined as “the portion of the contracted capacity allocated to NDPL as provided in Schedule 13 subject to adjustment as per the terms of this Agreement”. Schedule 13 of the PSA shows the allocated contracted capacity to TPDDL is 61.86 MW each from Unit 1 and Unit 2 of MGTPP. Under Article 4.1.4 of the PSA, it is the obligation of TPTCL to sell the allocated contracted capacity to NDPL (TPDDL) at the delivery point. These provisions clearly establish that both Tata PPA and PSA are inextricably intertwined and there is a contractual relationship between JPL and TPDDL. Therefore, TPDDL can bring a claim against TPTCL/JPL in the event of failure of TPTCL under the provisions of the PSA or failure of JPL under the provisions of the Tata PPA to discharge their obligations for supply power to TPDDL.

Issue No.3: Whether JPL has declared the commercial operation of MGTPP in accordance with the provisions of the PPA and PSA?

21. One of the main grounds for challenge of the petitioner is that JPL did not have a Fuel Supply Agreement before the date of commercial operation of the first unit of MGTPP and therefore, declaration of commercial operation of first unit of the generating station is a fraud committed by JPL on the petitioner in order to escape payment of liquidated damages. JPL has submitted that the basic elements of fraud have not been identified or established by TPDDL either in its pleadings or in the arguments advanced by it. JPL has further submitted that it has declared the COD entirely in accordance with the provisions of Haryana PPA and Tata PPA. As regards the Fuel Supply Agreement,

JPL has submitted that bare perusal of the Haryana PPA establishes beyond any doubt that neither execution of the FSA nor sustained fuel supply through the FSA is a pre-requisite to declaration of COD. JPL has also referred to the letters of CEA dated 20.8.2010 under which CEA informed that due to limited availability of indigenous coal, Fuel Supply Agreements would be signed once the unit was commissioned and its operation stabilised. Further vide letter dated 10.11.2010, CEA informed the Ministry of Coal that signing of FSAs be deleted from the milestones to be achieved by the power projects and FSAs would be signed in the year 2010-11 with those plants which had been commissioned during 2009-10 and MOUs would be signed with the plants commissioned/expected to be commissioned during 2010-11. JPL has further submitted that Haryana Utilities have vital role to play in the execution of the FSA as per Article 7.2.1 of the Tata PPA. If the Haryana Utilities provide their consent, then approval of TPTCL is not required. Further if TPTCL avails the allotted capacity, then TPTCL is deemed to have given its consent. In view of these provisions, JPL kept TPTCL abreast with developments on the issues pertaining to coal procurement while making efforts to seek consent from the Haryana Utilities to make sufficient coal arrangement to run the plant. JPL has further submitted that based on the instructions of the CEA and with the consent of the Haryana Utilities, it executed the MoUs with the coal companies to procure sustained coal in terms of Article 7.2.1 of Haryana PPA and Tata PPA and carried out the commissioning tests and based on the report of the Independent Engineer declared the CoD of first unit of MGTPP on 29.3.2012.

22. Let us consider the provisions of the Tata PPA and the PSA with regard to Fuel Supply Agreement. Article 7.2.1 of the Tata PPA provides as under:

“7.2.1 JPL shall enter into the Fuel Supply Agreement (“FSA”) on the basis of:

- (a) Advice of TPTCL;
- (b) With the express written consent of TPTCL, which shall not be unreasonably withheld, if JPL satisfies TPTCL that, the FSA intended to be entered into by JPL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;
- (c) Approval of DISCOMS under the DISCOM PPA and the Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required; and
- (d) Prudent Utility Practices.

Provided however that in the event that the DISCOMS provide their consent to JPL under the DISCOM PPA and TPTCL does not provide JPL with such written consent, JPL shall have a right to execute the FSA and the requirement of TPTCL’s consent shall no longer be applicable.

In the event:

- (a) TPTCL provides the written consent to JPL as mentioned in sub-article 7.2.1(b) above; or
- (b) TPTCL chooses to not provide such written consent to JPL but avails of the Allocated Contracted Capacity and the Electricity Output corresponding to the Available Capacity at the Delivery Point;

TPTCL shall be deemed to have given its consent to the execution of the FSA under this Agreement and provisions of Article 7.2.2 and Article 7.2.3 shall apply to TPTCL. It is further clarified that in the event TPTCL chooses not to provide its written consent to JPL and does not purchase the Allocated Contracted Capacity and the Electrical Output corresponding to the Available Capacity at the Delivery Point, the provisions of Article 7.2.2 and Article 7.2.3 shall not be applicable to TPTCL.”

Similarly, Article 7.2.1 of PSA provides as under:

“7.2.1 JPL/TPTCL shall enter into the Fuel Supply Agreement (“FSA”) on the basis of:

- (a) Advice of NDPL;
- (b) With the express written consent of NDPL, which shall not be unreasonably withheld, if JPL/TPTCL satisfies NDPL that, the FSA intended to be entered into by JPL/TPTCL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;

- (c) Approval of DISCOMS under the DISCOM PPA and the Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required; and
- (d) Prudent Utility Practices.

Provided however that in the event that the DISCOMS provide their consent to JPL under the DISCOM PPA and NDPL does not provide JPL/TPTCL with such written consent, JPL/TPTCL shall have a right to execute the FSA and the requirement of NDPL's consent shall no longer be applicable.

In the event:

- (a) NDPL provides the written consent to JPL/TPTCL as mentioned in sub-article 7.2.1(b) above; or

- (b) NDPL chooses to not provide such written consent to JPL/TPTCL but avails of the Allocated Contracted Capacity and the Electricity Output corresponding to the Available Capacity at the Delivery Point;

NDPL shall be deemed to have given its consent to the execution of the FSA under this Agreement and provisions of Article 7.2.2 and Article 7.2.3 shall apply to NDPL. It is further clarified that in the event NDPL chooses not to provide its written consent to JPL/TPTCL and does not purchase the Allocated Contracted Capacity and the Electrical Output corresponding to the Available Capacity at the Delivery Point, the provisions of Article 7.2.2 and Article 7.2.3 shall not be applicable to NDPL.”

23. As per the above provisions of the Tata PPA and PSA, if TPTCL/TPDDL does not provide consent to JPL, but Haryana Utilities provide the consent, then consent of TPTCL/TPDDL will not be necessary. If TPTCL/TPDDL does not give consent but avail the contracted capacity, then consent for signing of Fuel Supply Agreement is deemed to have been given. JPL had been pursuing with Haryana Utilities for approval for purchasing fuel from alternative sources in view of the shortfall in supply of coal by CIL/subsidiaries under the Letter of Assurance/Fuel Supply Agreement. The issue has been extensively discussed in order dated 25.1.2016 in Petition No.170/MP/2013. It is pertinent to mention that TPDDL was also a respondent in the said petition. After considering the submission of the parties and documents on record, the Commission came to the following conclusion:

“.....There is no provision in the PPA which suggests that COD of the unit of the power project can only be declared after signing of the FSA. Mere signing of the FSA does not assure sustained supply of coal by CIL/CCL to the extent of ACQ and in order to meet the shortfall, there is provision in the FSA to supply coal through importation to the extent of shortfall. We are therefore unable to agree with the Haryana Utilities and TPDDL that the petitioner should have deferred commercial operation of the Unit 1 of the generating station till it signed the FSA. Further, there is nothing on record which suggests that the Procurers had advised to the petitioner not to go ahead with the commercial operation of the Unit 1 till the FSA was signed.”

In view of the above findings and detailed reasons given in the order dated 25.1.2016, the contention of the petitioner that JPL declared COD without having a sustained supply of coal cannot be sustained.

24. Next we consider whether CODs of the units of MGTPP were declared in terms of the PPAs and PSA or not. COD has been defined in the Tata PPA as under:

“Commercial Operation Date or COD means, in relation to a Unit, the date one day after the date when TPTCL receives a Final Test Certificate of the Independent Engineer as per the provisions of article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3 are received by the TPTCL for all Units.”

In the PSA, COD has been defined as under:

“Commercial Operation Date or COD means, in relation to a Unit, the date one day after the date when NDPL receives a Final Test Certificate of the Independent Engineer as per the provisions of article 6.3.1 and in relation to the Power Station means the date by which such Final Test Certificates as per Article 6.3 are received by NDPL for all Units.”

In the Haryana PPA, COD has been defined as under:

“Commercial Operation Date or COD means, in relation to a Unit, the date one day after the date when each of the Procurers receive a Final Test Certificate of the Independent Engineer as per the provisions of article 6.3.1 and in relation to the Power Station shall mean the date by which such Final Test Certificates as per Article 6.3 are received by the Procurers for all Units.”

26. As per the above provisions, the COD shall be declared after the Haryana Utilities and TPTCL/TPDDL get a copy of the Final Test Certificate issued by the Independent Engineer in terms of Article 6.3 of the PPAs and PSA. Further Article 6.3.1 in Haryana PPA, TPTCL PPA and PSA provide that the Final Test Certificate issued by the Independent Engineer shall state that commissioning tests have been carried out in accordance with the provisions of Schedule 5 of Haryana PPAs and are acceptable to the Independent Engineer and the results of the performance test so that the unit's tested capacity is not less than 95% of the contracted capacity under the Haryana PPAs. The Commission in order dated 25.1.2016 in Petition No.170/MP/2013 after considering the Final Test Certificate issued by the Independent Engineer and the submission of the parties including the petitioner herein came to the conclusion that COD of MGTPP has been declared as per the provisions of the PPAs. Relevant para of the said order is extracted hereunder:

47. In terms of Article 6.3.1, the petitioner shall commission the plant on the day after the date the procurers have received the Final Test Certificate. Both Haryana Utilities and TPTCL received the Final Test Certificate on 28.3.2012 and the petitioner has declared the COD of Unit 1 on 29.3.2012. In para 34 of the affidavit dated 2.12.2013, Haryana Utilities have submitted that "the petitioner having conducted the performance and commissioning test and obtained the certificate of the Independent Engineer in support of the successful completion of the Performance Test and commissioning, ought not to have proceeded to declare the commercial operation from 29.3.2012 in the absence of the coal availability for sustained operation." TPDDL vide its letter dated 18.7.2012 raised the issue of COD of the project only in the context that the project would not be able to operate for any reasonable period of time after declaration of commercial operation. Thus, the procurers have raised the objection that even after successful Performance and Commissioning Test, the petitioner should not have declared the commercial operation as it did not have sufficient quantity of coal to generate electricity on sustained basis. The petitioner has submitted that pursuant to the declaration of COD, the petitioner scheduled power based on such declaration which was accepted by SLDC Haryana and procured by Haryana Utilities and TPTCL. In support, the petitioner has placed on record the declared capacity and scheduled

generation between 29.3.2012 and 1.4.2012. The petitioner in its rejoinder has submitted that in terms of the MoUs executed with CCL, Unit 1 of MGTTP achieved availability of 25.62% and supplied 188.0388 MUs to the procurers between 29.3.2012 and 7.6.2012 when the FSA was signed. The petitioner has further submitted that improvement in supply of coal after execution of the FSA was only marginal which enabled the petitioner to achieve availability of 31.05% in FY 2012-13. In our view, neither Haryana Utilities nor TPTCL/TDPPL have, after receipt of the Final Test Certificate and the intimation of the petitioner regarding declaration of COD of Unit 1 with effect from 29.3.2012, raised any objection with regard to the said declaration or have advised the petitioner to defer the COD till the FSA is signed. Further, the petitioner has achieved availability of 25.62% till the date of signing of FSA compared to the availability of 31.05% for the FY 2012-13. Therefore, the availability of Unit 1 has been affected due to non-availability coal from CIL/CCL both under the MoU route and the FSA which were beyond the control of the petitioner. For non-availability of sufficient coal to generate power upto the contracted capacity, declaration of COD of Unit 1 as 29.3.2012 cannot be held as invalid as contended by the Haryana Utilities and TPTCL/TPDDL. In the light of the above discussion, it is held that the Commercial Operation Date of Unit 1 of MGTTP has been correctly declared as 29.3.2012 after following the provisions of the PPAs.”

27. In view of the above finding, we reject the contention of the petitioner that the COD of the first Unit of the MGTTP was declared in a fraudulent manner by JPL.

Issue No. 4: Whether TPDDL is entitled for compensation for loss on account of payment of transmission charges?

28. The petitioner has submitted that it has paid transmission charges without any corresponding benefit to TPDDL and/or its consumers as the contracted capacity was not supplied to TPDDL. JPL has submitted that power was supplied by JPL to TPTCL at the bus bar and thereafter, TPTCL is responsible for further transmission of power at its own cost. JPL has further submitted that any obligation of JPL for supply of power ceases to exist once the power is supplied at bus bar and all cost thereafter including transmission charges have to be incurred by TPTCL. JPL has submitted that in the

absence of any provision in TATA PPA for payment of transmission charges by JPL, either to TPTCL or to TPDDL and in the light of the fact that the obligation of JPL for delivery of power is at its bus bar, the allegations and claims by TPDDL for payment of losses due to transmission charges against JPL does not arise. JPL has also submitted that TPDDL has claimed the said transmission charges and losses as part of its annual revenue requirement for the period 2012-13 from Delhi Electricity Regulatory Commission (DERC) and DERC has allowed the claim vide its orders dated 13.7.2012 and 31.7.2013.

29. We have considered the submissions of the parties. In the TATA PPA, delivery point or inter-connection point has been defined as the final gantry of the power station 400 kV switchyard bus for delivery to TPTCL. In the PSA, the delivery point or inter-connection point has been defined as final gantry of the power station 400 kV switchyard bus for delivery to NDPL. In terms of TATA PPA, it is the responsibility of TPTCL for procuring the Open Access facility and adequate transmission capacity from State Transmission Utility/Central Transmission Utility to enable wheeling of the allocated contracted capacity from the delivery point. Further, Article 5.3 of the TATA PPA provides that TPTCL shall provide to JPL on timely basis all information with regard to Open Access facility or inter-connection facility proposed to be availed by TPTCL as is necessary to enable JPL to design, install and operate all inter-connection plants and apparatus at the JPL side of delivery point. In terms of Article 4.1.1 (2) of the PSA, TPTCL shall be responsible for procuring in the name of TPDDL the Open Access facility and adequate transmission capacity from the STU/CTU for wheeling the

allocated contracted capacity from the delivery point. Article 4.2.3 of the PSA deals with reimbursement of transmission charges which is extracted as under:

“Subject to terms and conditions of this agreement, NDPL shall be responsible to reimburse TPTCL for all costs and expenses paid by TPTCL to CTU/STU on behalf of NDPL, including but not limited to wheeling and any other charges to the STU/CTU and any other entities that may be involved, including all charges applicable pursuant to SERC/CERC Inter-State Transmission Regulations for evacuation of the Electrical Output corresponding to the available capacity from the Delivery Point. NDPL shall reimburse TPTCL all the costs and expenses incurred by TPTCL on its behalf irrespective of the quantum of power flow or utilisation of open access facilities for the entire term for which these charges are payable by TPTCL to CTU/STU.”

Through the above provisions of the PSA, TPDDL has accepted the liability to bear and reimburse the cost and expenses incurred by TPTCL on its behalf irrespective of quantum of flow or utilisation of open access facilities for the entire term for which charges are payable by TPTCL to STU/CTU. Para 1.2.7 of the Tata PPA clearly provides that “the payment of transmission/wheeling charges shall be settled between the CTU/STU and TPTCL. The payment of scheduling charges to the respective nodal agency (RLDC or SLDC) shall be the responsibility of TPTCL.” Further, para 1.2.7 of the PSA provides that “payment of transmission or wheeling charges shall be settled between CTU/STU and TPTCL on behalf of NDPL and NDPL shall reimburse the same to TPTCL. The payment of scheduling charges to the respective nodal agency (RLDC or SLDC) shall be the responsibility of TPTCL on behalf of NDPL and NDPL shall reimburse the same to TPTCL.” There is no provision either in the Tata PPA or in the PSA which fastens the liability of payment of transmission charges on JPL or TPTCL in the event of non-delivery of the full allocated contracted capacity to TPDDL. On the other hand, Article 4.2.3 of the PSA clearly provides that “NDPL shall reimburse to

TPTCL all costs and expenses incurred by TPTCL on its behalf irrespective of the quantum of power flow or utilisation of Open Access Facility for the entire term for which these charges are payable by TPTCL to CTU/STU". It is evident that TPDDL has accepted the contractual obligations to reimburse transmission charges and open access charges to TPTCL irrespective of the quantum of power flow or utilisation of open access facilities. In other words, neither JPL nor TPTCL have any contractual liability to compensate for the loss suffered by TPDDL on account of payment of transmission charges. In our view, TPDDL having accepted the liability to reimburse the transmission charges from the bus bar of MGTPP irrespective of the quantum of power flow cannot make any claim for losses on account of transmission charges either on JPL or on TPTCL.

30. In terms of Article 4.4.1 of the Tata PPA, the entire Allocated Contracted Capacity shall at all times be for the exclusive benefits of TPTCL and TPTCL shall have the exclusive right to purchase the entire Allocated Capacity from JPL. Similarly, as per Article 4.4.1 of the PSA, the entire Allocated Contracted Capacity shall at all times be for the exclusive benefits of NDPL (TPDDL) who shall have the exclusive right to purchase the entire Allocated Capacity from JPL. Further, as per Schedule 7 of both Tata PPA and PSA, full capacity charges shall be payable based on the contracted capacity at normative availability which has been defined as 80% availability at delivery point on contract year basis. If the availability from MGTPP is less than 80% in a contract year, capacity charges shall be payable on proportionate basis, in addition to the penalty as per para 1.2.5 of the Tata PPA as well as PSA. Article 1.2.5 provides that if the

availability is less than 75%, penalty shall be payable at the rate of 20% of the simple average capacity charge for all months in a contract year applied on energy corresponding to difference between 75% and availability during the contract year. Accordingly, for the shortfall of allocated contracted capacity received by TPDDL during 2012-13, TPDDL shall be entitled for payment of penalty in terms of para 1.2.5 of Schedule 7 of PSA read with the corresponding provisions of Tata PPA, apart from the liability to pay the capacity charges proportionate to the target availability achieved. In our order dated 25.1.2016 in Petition No.170/MP/2013, we have held that the availability of MGTPP for the year 2012-13 would be considered as 55.05% for the purpose of payment of capacity charges as well as penalty. The said finding will also be applicable in case of supply of power by JPL to TPTCL/TPDDL. The parties are directed to settle their claims accordingly.

31. The summary of our decisions in this order is as under:

- (a) TPTCL is a necessary party in the dispute between JPL and TPDDL in the present petition and hence, its name cannot be deleted.
- (b) Tata PPA and PSA are inextricably intertwined and there is contractual relationship between JPL and TPDDL.
- (c) The commercial operation of the units of the MGTPP has been declared in accordance with the provisions of the Haryana PPA, Tata PPA and TSA and is therefore valid.
- (d) The petitioner is not entitled for compensation for the losses suffered on account of payment of transmission charges.

(e) For the shortfall in supply of power from MGTPP to the petitioner during 2012-13, the petitioner is liable to pay the capacity charges proportionate to the availability and is entitled to claim penalty in terms of para 1.2.5 of Schedule 7 the PSA read with corresponding provisions of Tata PPA. The Commission has determined the availability of MGTPP during 2012-13 as 55.05% for the purpose of payment of capacity charges as well as penalty in order dated 25.1.2016 in Petition No.170/MP/2013 which shall also be applicable for supply of power by JPL to TPTCL/TPDDL.

32. Petition No.319/MP/2013 is disposed of in terms of the above.

Sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson