CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

IA No.64/2020
In Petition No. 614/MP/2020

Coram:
Shri P.K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri P.K. Singh, Member

Date of Order: 28th June, 2021

In the matter of:

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Article 3.2.4 of the Supplementary Power Purchase Agreement dated 5.12.2018 and Article 17.3 of the Power Purchase Agreement dated 6.2.2007 seeking adjudication of disputes qua unilateral amendment of the approved PPA/SPPA provisions and non-payment of actual cost incurred by Adani Power (Mundra) Limited to supply power to Gujarat Urja Vikas Nigam Limited.

And
In the matter of:

Adani Power (Mundra) Limited,
Shikhar, Near Mithakhali Circle, Navrangpura,
Ahmedabad-380 009. **... Applicant**

Vs

Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhawan,
Race Course Circle, Vadodara-390 007. **... Respondent**

Parties present:
Shri Amit Kapur, Advocate, APMuL
Ms. Poonam Verma, Advocate, APMuL
Shri Saunak Rajguru, Advocate, APMuL
Shri Ankitesh Ojha, Advocate, APMuL
Shri M. G. Ramachandran, Sr. Advocate, GUVNL
Shri Shubham Arya, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Shri M. R. Krishna Rao, APMuL
Shri Tanmay Vyas, APMuL
Shri Mehul Rupera, APMuL
Shri Sameer Ganju, APMuL

Shri Malav Deliwala, APMuL
Shri Kumar Gaurav, APMuL
Shri Hitesh Modi, APMuL
Shri Rahul Panwar, APMuL
Shri Sanjay Mathur, GUVNL
Shri Kripal Chudasama, GUVNL
Shr S. K. Nair, GUVNL

ORDER

The Applicant, Adani Power (Mundra) Ltd. (APMuL), has filed Petition No. 614/MP/2020 seeking emergent restrainment orders against the Respondent, Gujarat Urja Vikas Nigam Limited (GUVNL) for making unilateral and indiscriminate deductions from the monthly invoices for power supplied by APMuL contrary to the provisions of the Power Purchase Agreement dated 6.2.2007 (hereinafter referred to as "Bid-01 PPA") and the Supplementary PPA (hereinafter referred to as "SPPA") dated 5.12.2018 approved by the Commission on 12.4.2019 in Petition No. 374/MP/2018.

2. The Applicant has filed the present Interlocutory Application (IA) No. 64/2020 in Petition No. 614/MP/2020 along with the following prayers:

> *"25 …(b) Grant injunction restraining GUVNL from unilaterally deducting energy charges contrary to SPPA and refund INR 150 crores to APMuL in a time bound manner along with Late Payment Surcharge;*
>
> *(c) Direct GUVNL to pay to APMuL the entire energy charges owed for actual cost of coal incurred on account of spot procurement of coal without any deduction or adjustments, along with Late Payment Surcharge as per Bid-01 PPA, while the Petition is pending.*
>
> *(d) In the alternative to prayer (c), direct GUVNL that during the pendency of present petition, to pay full undisputed energy charges and 85% of the disputed energy charges amount in terms of Article 11.6.8 of the PPA including for the past period, along with Late Payment Surcharge as per the Bid-01 PPA subject to final outcome of this Petition.*
>
> *(e) Direct GUVNL to consider the per unit energy charges paid in the previous month by GUVNL to APMuL for Merit Order to the extent of payment being made by it, during the pendency of the Petition."*

Backdrop of the case

3. APMuL has submitted the following as the backdrop of the case:

(a) On 6.2.2007, APMuL executed Bid-01 PPA for generation and sale of electricity for a period of 25 years that was approved by Gujarat Electricity Regulatory Commission on 20.12.2007 under Section 63 of the Electricity Act, 2003 (hereinafter referred to as "Act") for supply of 2000 MW to GUVNL.

(b) On 11.4.2017, Hon'ble Supreme Court passed the judgment in *Energy Watchdog* vs. *CERC & Ors*. [(2017) 14 SCC 80] (In short, "the Energy Watchdog Judgment"). In the Energy Watchdog Judgment, one of the questions before the Hon'ble Supreme Court was whether the promulgation of Indonesian Regulations or change in Indian law inducing increase in coal prices was (i) a Force Majeure event and (ii) a Change in Law event. The Hon'ble Supreme Court held that the non-availability/ shortfall of domestic coal pursuant to changes in Indian government policies that resulted into procurement of alternate coal/ imported coal qualifies as Change in Law. However, no relief was granted with regard to the extent the PPAs were dependant on the imported coal.

(c) Subsequent to the Energy Watchdog Judgment, following sequence of events led to the amendments to Bid-01 PPA and its approval:

(i) On 16.4.2017, three generators based in Gujarat, namely APMuL, Coastal Gujarat Power Limited and Essar Power (Gujarat) Limited submitted representations to GUVNL explaining the financial hardship in continuing to supply power to GUVNL at the PPA tariff, seeking a resolution.

(ii) A Working Group was constituted for evaluating and recommending the options available for ensuring sustained operations of the thermal power projects of the three generators. The Working Group submitted its report on 10.1.2018 *inter alia* recommending that the PPA in respect of the thermal power projects of the three generators should be revised by addressing the issue of fuel cost.

(iii) On 3.7.2018, the Government of Gujarat ("GoG") through its Government Resolution ("GR") constituted a HPC (High-powered Committee) to resolve the hardships faced by thermal power projects operating on imported coal in coastal Gujarat area which included the APMuL's project.

(iv) HPC submitted its report on 3.10.2018 wherein the recommendations entailed undertaking financial and commercial restructuring which required amendments to the PPAs signed by the aforesaid three generating companies.

(v) In light of the recommendations of HPC, GoG and GUVNL filed Miscellaneous Application No. 2705-2706 of 2018 in Energy Watchdog Civil Appeal No. 5399-5400 of 2016, before the Hon`ble Supreme Court seeking, *inter-alia*, clarification in context of the Energy Watchdog Judgment as to whether they could proceed to amend PPAs (Bid-01 PPA and another PPA i.e. Bid-02 PPA) in light of the recommendations of HPC.

(vi) Hon`ble Supreme Court by order dated 29.10.2018 clarified that the Energy Watchdog Judgment will not come in the way of the proposed amendments to the PPAs.

(vii) GoG acted upon the recommendations of HPC and the Hon`ble Supreme Court order dated 29.10.2018 to issue GR dated 1.12.2018 that recommended amending the PPAs in consideration of larger public interest.

(viii) Pursuant to the aforesaid policy decision and the Hon'ble Supreme Court's Order dated 29.10.2018, APMuL and GUVNL, mutually agreed and signed SPPA with effect from 15.10.2018.

(ix) GUVNL filed Petition No. 374/MP/2018 before the Commission seeking approval for the proposed amendments to Bid-01 PPA and Bid-02 PPA in terms of Article 18.1 of the respective PPAs. The said amendments were approved by the Commission vide order dated 12.4.2019 in Petition No. 374/MP/2018.

(d) In SPPA, it was agreed to incorporate Article 3.2.4 which states that the actual fuel cost would be compared with the benchmark prices and restricted to the lower of:

(i) Actual FoB price of consignment; or

(ii) HBA Price worked as per formula for billed GCV plus maximum 10% tolerance on HBA Price; or

(iii) HBA Price worked out on proportionate basis with reference to HBA Index for 6322 GCV coal.

(e) On 15.4.2019, APMuL through an invoice claimed the differential tariff for the period from 15.10.2018 to March, 2019 from GUVNL in terms of SPPA. Subsequently, APMuL kept claiming for differential tariff for each month as per provisions of SPPA.

(f) GUVNL paid energy charges to APMuL for more than one year (in respect of invoices for months from October 2018 to November 2019) without raising any dispute *qua* premium/ tolerance (over and above HBA indexed imported coal cost).

(g) On 27.1.2020, GUVNL for the first time objected to pay APMuL the premium/ tolerance over HBA indexed price pursuant to APMuL's invoice for December 2019.

(h) Subsequent to GUVNL's letter dated 27.1.2020, multiple correspondences were exchanged between GUVNL and APMuL.

(i) From February 2020 onwards, GUVNL started making unilateral deductions against APMuL's monthly invoices of December 2019 onwards.

(j) On 15.4.2020, GUVNL intimated its following decisions to APMuL: -

(i) GUVNL has decided to withdraw tolerance limit upto 10% allowed over HPB so as to align it with HPC recommendations and GR dated 1.12.2018.

(ii) GUVNL is restricting payment of energy charges to APMuL from October 2018 onwards considering coal price as lower of:

- Actual FOB price;

- HBA price worked out as per formula for billed GCV without allowing any tolerance/ premium;
- HBA worked out on proportionate basis.

(iii) APMuL to go for retendering for a prudent, competitive and cost effective sourcing of coal in line with the coal price as per the market trend.

(k) For all invoices issued for April 2020 onwards, in addition to making unilateral deduction for tolerance, GUVNL also unilaterally deducted payments towards (i) SHR, (ii) disallowance of 3% of CIF value towards other charges, (iii) disallowance of actual FoB price by comparing with Argus/ Coalindo and S & P Global Platts indices while SPPA stipulates comparison only with HBA index, and (iv) transit loss.

(l) On 13.5.2020, APMuL wrote to GUVNL refuting GUVNL's allegations and stated that unilateral decisions taken by GUVNL are contrary to law and terms of the Bid-01 PPA and SPPA.

(m) On 12.6.2020, GoG passed a resolution revoking the previous GR dated 1.12.2018.

(n) APMuL vide letters dated 13.7.2020, 14.7.2020, 21.7.2020, and 31.7.2020 requested GUVNL not to deduct the energy charges unilaterally.

(o) Against these unilateral deductions by GUVNL, APMuL approached the Commission through Petition No. 614/MP/2020 and the present IA for directions.

(p) On 5.3.2021, APMuL filed an affidavit to place subsequent developments on record on behalf of APMuL. It was, inter-alia, brought on record that from August 2020 onwards, GUVNL withheld payments towards ocean freight charges also citing the reason as non-submission of separate ocean freight invoices.

Submissions of APMuL

4. APMuL has made the following submissions in the IA:

(a) Article 3.2.4 of SPPA specifically allows for a 'tolerance of maximum 10% over HBA price derived for a quality of coal'. However, GUVNL on 15.4.2020 unilaterally withdrew the applicable tolerance over HBA price as envisaged under Article 3.2.4 of SPPA. By doing so, GUVNL has erroneously restricted the payment of energy charges to APMuL from October 2018 onwards considering coal price as lower amongst actual FoB price; HBA price worked out as per formula for billed GCV without allowing any tolerance or premium; and HBA worked out on proportionate basis.

(b) GUVNL had initially paid energy charges to APMuL as per SPPA for the period from October 2018 to November 2019 after verifying the invoices, certificates and documents independently by Auditor appointed by GUVNL itself. It was only on 27.1.2020 that GUVNL for the first time objected to the tolerance above HBA price and started making deductions. There was no occasion for GUVNL to deduct any amount unilaterally particularly when APMuL's conduct/ procurement did not undergo any change from October 2018. However, GUVNL has unilaterally modified and deducted amounts payable to APMuL violating the approved SPPA and causing financial injury to APMuL.

(c) SPPA was approved by the Commission in exercise of its statutory powers under Section 63 of the Act, Standard Bidding Documents issued by Ministry of Power under the Competitive Bidding Guidelines and regulatory powers pursuant to Section 79(1)(b) of the Act. Hence, as per the law laid down in All India Power Engineer Federation & Ors. vs. Sasan Power Ltd. & Ors. [(2017) 1 SCC 487], it was no longer open for GUVNL to revisit the terms of SPPA. GUVNL by making such untenable unilateral deductions is violating the settled position of law that a statutory contract cannot be unilaterally modified/ amended, especially so when SPPA has been approved by the Commission.

(e) Every provision of SPPA ought to be considered as the final expression and the exclusive statement of the terms of parties' agreement as per Article 18.5.1 of the Bid-01 PPA. The conduct of GUVNL is in violation of following provisions of Bid-01 PPA:

(i) Article 18.1 which necessitates prior written agreement between parties for amending SPPA and Bid-01 PPA;

(ii) Article 11.6.1 wherein if dispute pertaining to monthly/ supplementary bills are not raised within 90 days from the date of presentation, the bill shall be taken as conclusive; and

(iii) Article 11.6.9 whereby the procurer is liable to pay 100% of the undisputed amount along with 85% of the disputed amount within due date.

(f) Allowance of tolerance over HBA price partakes character of a 'fiscal decision' consciously taken by GUVNL and APMuL which ought not to be unilaterally altered by GUVNL. Action of GUVNL violates the settled principle of law that a change in circumstances, including a rise or fall in price cannot be a ground which necessitates amendment/ modification to a contract. Section 50 of the Indian Contract Act, 1872 provides that if statutory framework requires something to be done in a particular manner, it should be done either in the same manner or not at all.

(g) GUVNL did not provide any supporting documents while undertaking arbitrary and indiscriminate deductions against monthly invoices raised by APMuL. The contents of GUVNL's letters dated 15.4.2020 and 29.7.2020 are declaratory as the letters clearly indicate that GUVNL has unilaterally decided to amend/ modify the terms of SPPA and undertake the deductions. GUVNL is approbating and reprobating at the same time. Having specifically defended the provision in SPPA allowing the tolerance over HBA price, GUVNL cannot now adopt shifting stands regarding APMuL's right to avail the benefit of 'tolerance of maximum 10% over HBA price derived for a quality of coal'. APMuL was assured of tolerance over the HBA price under Article 3.2.4 of SPPA and it acted upon assurance held out by GUVNL. Hence, GUVNL is estopped to unilaterally withdraw the benefit of tolerance over HBA price based on its whims and fancies. This is particularly when this Commission has held that this tolerance is in the interest of consumers and GUVNL itself had pleaded the same.

(h) There is no provision in the Bid-01 PPA/ SPPA that empowers GUVNL to unilaterally calculate and decide any disputed amounts between the parties. GUVNL has unilaterally deducted about Rs. 150 crore against monthly invoices

(as on date of filing of IA) citing retrospective withdrawal of the tolerance over HBA price with effect from October 2018 and towards other parameters.

(i) On one hand, GUVNL alleges that APMuL has been consistently procuring coal in spot market without following bidding process and on the other hand, GUVNL admittedly is delaying and/or cancelling the concluded ICB process for long term coal procurement as is evident from GUVNL's letters dated 15.4.2020 and 29.7.2020. APMuL had obtained approval of GUVNL in terms of Article 3.2.4(c) of the SPPA read with Article 7.9 of the Bid-01 PPA at every stage for the bidding process. As such, GUVNL is liable to pay late payment surcharge for delayed payments from the monthly invoices of October 2018 onwards on account of illegal deductions.

Hearing Dated 21.5.2021

5. The matter was listed for hearing on 21.5.2021 through video conferencing. During the hearing, learned counsel for APMuL informed the Commission that GUVNL has unilaterally withheld Rs. 476 crore till date negating the mutually agreed terms of SPPA. Further, learned counsel for APMuL and learned senior counsel for GUVNL made detailed submissions on the IA, which have been captured in Record of Proceedings for hearing dated 21.5.2021 and is covered in the reply and rejoinder filed by the respective parties as reproduced in subsequent paragraphs.

Reply of GUVNL

6. GUVNL vide its preliminary objections dated 7.4.2021 and reply dated 4.6.2021 has submitted as under:

(a) The instant application for interim order is liable to be rejected as APMuL is purporting to seek, in effect, mandatory directions against GUVNL to pay the monthly bills/ supplementary bills raised by APMuL that is not in accordance with GT of the Government of Gujarat dated 12.6.2020, Guidelines dated 12.6.2020 and the terms of SPPA dated 5.12.2018.

(b) Also, the mandatory directions sought for payment of bills raised by

APMuL in interim application would amount to grant of final relief which should be upon the final hearing of the parties and after considering the validity of the action of the parties. It is well settled that interim orders cannot be of the nature as relief to be considered and granted as final relief.

(c) There is no merit in the claim of APMuL for issuance of any interim orders as prayed for on the following grounds:

(i) Since APMuL has not raised the monthly bills for generation and sale of power to GUVNL as per the terms and conditions of SPPA, the bills issued are not valid or legal and no payment can be enforced under the said bills;

(ii) APMuL has with impunity and for making unlawful and excessive gain at the cost of public/ consumer interest, raised such excessive bills and is now claiming payment;

(iii) SPPA was executed in pursuance to the policy directions of the Government of Gujarat and not merely the results of any contractual rights or any other legal rights that could in any manner be enforced by APMuL against GUVNL. When consumer interest is being frustrated by actions of APMuL, it is entirely within the competence of Government of Gujarat to take a like policy decision vide GR dated 12.6.2020 to revoke the earlier GR dated 1.12.2018 for all intent and purposes. Government of Gujarat has authority to direct the modifications to some of the elements as an interim measure pending the decision in Petition No. 250/MP/2019 filed by GUVNL before this Commission. It is well settled that the power to take a decision includes the power to revoke or transcend a decision for all intents and purposes. Reliance has been placed on the decisions of Hon'ble Supreme Court in State of Rajasthan v. Mahaveer Oil Industries [(1999) 4 SCC 357]; Kasinka Trading v. UoI [(1995) 1 SCC 274] and Bannari Amman Sugars Limited v. CTO [(2005) 1 SCC 625].;

(iv) In terms of the express provisions of SPPA, as well as the context, objective and purpose for which SPPA was entered into amending the PPA dated 6.2.2007, the dominant consideration in the computation of energy charges and each of its elements is the actual cost incurred. It is incumbent

on APMuL to provide the details of actual cost of each element with authenticated documents and it cannot camouflage the actual costs, furnishing and claiming the ceiling provided qua the actual cost;

(v) APMuL has, deliberately and with ulterior motives, ceased to show that no coal from Bunyu Island from Adani Mines is being imported since June, 2019 thereby making a fundamental deviation from the core and intent of SPPA;

(vi) APMuL has been procuring imported coal of Indonesian origin through spot market contracts when the coal is required on a sustained basis and should have been brought through a transparent competitive bidding process; and

(vii) Cost of coal which APMuL has been claiming is higher than the price at which other Coastal Projects in Gujarat, namely, Coastal Gujarat Power Limited and Essar Power (Gujarat) Limited have been procuring coal of similar quality.

(d) The nature, scope, extent and implications of SPPA entered into between APMuL and GUVNL and the Commission's order dated 12.4.2019 is required to be considered in contextual manner and not in the manner sought to be interpreted by APMuL, which is contrary to the basic principles of construction of contract to make unlawful and unjustified gains. Sequence of events leading to execution of SPPA would show that the basic aspect was to provide relief to APMuL to meet the cost of imported coal to the extent the procurement price was in excess of the coal price covered under the quoted energy charges. SPPA was not certainly intended to provide APMuL an opportunity to make gain in the procurement of coal or otherwise use the same as an opportunity to procure coal without prudence and pass on cost of such procurement to GUVNL and to the end consumers.

(e) Stipulation of 'actual' with regard to each of the specific elements, namely, FOB price of coal, ocean freight, insurance, port/fuel handling charges, transit losses, other charges as well as GHR and auxiliary consumption, etc.

clearly establish contemporaneous intention and acceptance of both parties that each of the above component/ element could be actually lower than the alternative provided against each of them as ceiling. Since the parties had acknowledged and accepted that 'actual' can be lower than the alternative, the energy charges billing need not to be on identified indices or normative parameters.

(f) SPPA providing for FOB price as lower of actual price or the HBA price clearly establish that it is not open to APMuL to claim the HBA price for coal of GCV of 6322 kCal/kg notified with proportionate price for relevant GCV imported coal as the normative price, de hors the actual price. The reading of the Indonesian Regulations clearly indicates that particularly, in the context of coal of lesser GCV, the Indonesian Authorities had been allowing the export at a much lower price than the HBA index derived price.

(g) It is imperative for APMuL to provide in a transparent manner, with duly authenticated documents of the Government authorities in Indonesia and in India, the actual FOB price of coal as at the port in Indonesia at the time of loading, as well as the actual price of other components forming part of ocean freight and insurance, etc. Failure in proving this amounts to a material and fundamental breach on the part of APMuL and would render the bills raised to be non-est. Accordingly, GUVNL has right to not to consider the bill for payment till such time APMuL provides the necessary documents and details. In any event, in the case of such bill, GUVNL is entitled to treat the entire energy charge part of the bill to be disputed and not payable.

(h) Monthly invoices raised by APMuL related to energy charges computed and claimed shows that APMuL has purposively avoided giving the actual with supporting documents and arranged to claim, on a consistent basis the various charges, on the alternate ceiling charges.

(i) APMuL has been (i) constantly procuring coal from the spot market at higher prices compared with the average actual price of coal exported from Indonesia as per the indices of repute; (ii) failed to undertake a transparent process of competitive bidding for procurement of coal in prudent and least cost basis; (iii) not considering the coal availability at its Bunyu Mines which are under

operation by Adani Group companies for the purpose of import of coal; (iv) procuring coal from June, 2019 onwards from few limited trades from spot markets without considering the least cost purchase; (v) purchasing coal on CIF/CFR basis and submitting coal invoices from traders, providing the CIF price and the breakup of CIF price indicated by the traders i.e. FOB price of coal, ocean freight, other charges instead of providing the authenticated documents from the concerned authorities in Indonesia in support of actual FOB price at the place of loading in Indonesia, the actual ocean freight and other charges, etc. with supporting documents; (vi) claiming the components of ocean freight at substantially higher than the average freight price notified by indices/ publishers of repute on consistent basis; (vii) despite persistent demand from GUNVL, APMuL has not making efforts to take up with its coal traders to arrange for supply of actual FOB price of coal at the port of loading with supporting documents primarily the bill of lading together with certificate of origin, certificate of mine, certificate of weight, draft survey report and similarly in case of ocean freight invoices from the transporters; (viii) not acting as a prudent utility which has taken advantage of the increase in tariff as redressal for financial crisis.

(j) It is in fact APMuL that has committed a breach of the fundamental term of SPPA releasing GUVNL from obligations as provided in SPPA for payment of energy charges. Further, APMuL has to pay damages to GUVNL besides return of the excess amount paid with interest. In this regards, reliance has been placed on the judgment of Hon'ble Supreme Court in the case of Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd. [(2018) 3 SCC 133].

(k) Despite APMuL having failed to raise the monthly bulls in accordance with SPPA and GR of Government of Gujarat dated 1.4.2019, GUVNL has proceeded to pay the energy charges, *inter alia,* considering (i) not allowing 10% tolerance over HBA price claimed by APMuL consistently in all monthly bills, when the said margin was envisaged only for exceptional case in the event actual price paid is higher than HBA price, (ii) computing quantum of coal on the normative parameters such as SHR, as provided by APMuL as bid assumed parameter and recognized by GERC in its order dated 21.10.2011 in Petition No. 1080/2011 and 7.1.2013 in Petition No. 1210/2012, which has been adopted by

this Commission in Petition No. 235/MP/2015 and upheld by APTEL in Appeal No. 210/2017 vide order dated 13.4.2018 and policy decision of Government of Gujarat dated 12.6.2020, (iii) limiting the coal price to the published indices of S&P Global Platts and Argus/ Coalindo which are notifying price of even low GCV coal depicting the actual market trend of coal exported from APMuL and also as per GR of Government of Gujarat dated 12.6.2020 and (iv) limiting the ocean freight, subject to submission of invoices for ocean freight by APMuL as per clause Article (III)(iii) of SPPA as APMuL has been consistently claiming ocean freight higher than the ocean freight rate published by indices of repute.

(l) In the initial stages, GUVNL had proceeded to pay the bills raised by APMuL as such without seeking adjustment but it is not correct that GUVNL had not raised the said issue. GUVNL had starting from its letter dated 25.4.2019 raised the various issues. The deductions were made when GUVNL did not receive any satisfactory explanation from APMuL to discrepancies and APMuL was deflecting and avoiding to provide relevant documents.

(m) APMuL had been the beneficiary of the policy decision taken in GR dated 1.12.2018 of Government of Gujarat and APMuL did not have contractual or legal right to claim any compensatory tariff. Therefore, APMuL is equally bound by the policy decision vide GR dated 12.6.2020.

(n) Also, having filed 'recall order' passed in Petition No. 250/MP/2019 before this Commission and having intimated regarding the policy and directive of Government of Gujarat dated 12.6.2020, it is not necessary for an agreement to be entered into between APMuL and GUVNL to record the mutual agreement to further amend the SPPA dated 5.12.2018 for implementation of GR dated 12.6.2020.

(o) It is also wrong on part of APMuL to claim that it has been subjected to any financial injury and is entitled to have a legal redressal in the present proceedings. APMuL was given a redressal by the Government of Gujarat in a limited manner to come out of the finance distress and it cannot take advantage of the said decision to make unlawful and unwarranted gains.

(p) Contention that GUVNL is liable to pay 85% of the disputed amount in

term of Article 11.6.9 of the PPA is misplaced. APMuL is selectively reading Article 11.6.9 of the PPA without considering the obligations of APMuL specified in the previous provisions of the PPA, with regard to raising of monthly bills and provisions of documents in support thereof. Article 11.2 of the Bid-01 PPA dated 6.2.2007 provides for documents to be made available by APMuL along with the monthly bill. In this regard, the PPA deals with a position where the billing was to be of a quoted tariff in pursuance to the competitive bidding held under Section 63 of the Act where actual cost has no relevance. In case of SPPA, the billing has to be clearly on the basis of the actual cost. The actual cost of various elements is to be disclosed with authenticated documents. The bills raised by APMuL in the present case not being in accordance with the fundamentals of the provisions of SPPA, the same cannot be construed as monthly bills validly issued and should be considered as disputed by GUVNL in its entirety. In any event, GUVNL has made payment of more than 85% on aggregated basis since implementation of SPPA i.e. 15.10.2018 towards energy charges.

(q) The mere fact that APMuL's supply of electricity falls within the merit order considered by SLDC does not mean that GUVNL has acknowledged and accepted the liability for payment of the amount. In any event, such an issue would arise only if GUVNL has proceeded not to schedule the power from Units 1 to 4 of its Plant on the basis of energy bills raised by APMuL. During the relevant period, GUVNL has scheduled the power from APMuL. APMuL cannot claim that so long as it falls within the merit order despatch, the bills raised by APMuL should necessarily be paid by GUVNL without any reservation.

(r) APMuL has no case, much less a prima facie case in its favour. GUVNL has been paying amounts in excess of the tariff admissible as per the PPA dated 6.2.2007 to which APMuL is legally and contractually entitled to. APMuL cannot claim the amount in excess thereof except in accordance with the policy decision of Govt. of Gujarat. The balance of convenience is in favour of GUVNL and the consumers in the State of Gujarat and not in favour of APMuL.

Rejoinder of APMuL

7. APMuL in its rejoinder dated 9.6.2021 has submitted as under:

(a) GUVNL has admitted the factum of its unilateral deduction against APMuL's monthly invoices. Since such deductions are de hors the Bid-01 PPA/SPPA, APMuL has a prima facie case for grant of interim reliefs as prayed. GUVNL has neither filed any Petition seeking amendment to the Bid-01 PPA/SPPA for approval of this Commission nor has sought APMuL's consent to amend the terms of SPPA as required in terms of Article 18.1 of the Bid-01 PPA. Still GUVNL has unilaterally proceeded with illegal deductions amounting to amending the SPPA on its whims and fancies. Also, as per Article 11.6.9 of the PPA, GUVNL is bound to pay 85% of disputed amounts and there is no provision under the Bid-01 PPA/SPPA which allows/gives right to GUVNL to deduct more than 15% of the disputed amount as has been done in the present case.

(b) Article 11.6.1 of the PPA stipulates that if a dispute pertaining to monthly/ supplementary bills is not raised within 90 days from the date of presentation, such bill is to be taken as conclusive. In the present case, APMuL raised invoices from time to time for the power supplied w.e.f. 15.10.2018 and GUVNL had paid against invoices raised for supply during the period from October, 2018 to November, 2019 without any dispute. It was only on 15.4.2020 that GUVNL decided to renege from its obligation to pay the 'tolerance of maximum 10% over HBA price derived for a quality of coal' envisaged under Article 3.2.4 of the SPPA and clawed back payment of energy charges to APMuL retrospectively from October, 2018, which is contrary to Article 11.6.1 of Bid-01 PPA since GUVNL had not disputed such invoices within the stipulated 90 days period.

(c) In case GUVNL intends to dispute a bill, Article 11.6.2 of the Bid-01 PPA requires GUVNL to issue a 'Bill Dispute Notice' setting out (i) details of the disputed amount, (ii) its estimate of what the correct amount should be, and (iii) all written material in support of its claim. In the present case, neither any dispute was raised by GUVNL within 90 days of receiving the invoices nor did GUVNL issue any 'Bill Dispute Notice' to APMuL.

(d) GUVNL's conduct runs contrary to Section 50 of the Indian Contract Act, 1872 which states that if the rule requires something to be done in a particular manner it should be done either in the same manner or not at all. In this regard,

reliance has been placed in the decision of Appellate Tribunal for Electricity in North-Eastern Electric Power Corp. Ltd. v. Tripura State Electricity Corp. Ltd. and Ors., [2006 ELR APTEL 291].

(e) GUVNL has expanded the scope of its impugned decision dated 15.4.2020 through its reply. In the reply, GUVNL has provided the erroneous basis on which it unilaterally deducted amounts against APMuL's monthly bills and the same was not a part of its impugned decision dated 15.4.2020. GUVNL cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned decision.

(f) No external aid can be used to give a different meaning to the document. It is also a settled position of law that the effect of any document ought to be ascertained on the basis of the document itself. Thus, the validity of the impugned decision dated 15.4.2020 ought to be tested on its own content. Reliance was placed on the decisions of Hon'ble Supreme Court in Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405] and United Air Travel Services v. UoI, (2018) 8 SCC 141]. Thus, by way of its reply dated 4.6.2021, GUVNL cannot expand the scope of impugned decision dated 15.4.2020 to better its case with the help of additional data/ documents alien to the contents of impugned decision being (i) Government of Gujarat GR dated 12.6.2020, (ii) GERC's order in Essar case and (iii) contentions regarding non-submission of supporting documents by APMuL along with invoices, etc.

(g) For verification of the invoices raised by APMuL, GUVNL had appointed an auditor and APMuL had submitted all relevant supporting documents along with its claims from time to time. The auditor of GUVNL had verified the claims of APMuL and after being satisfied that the claims made are in order and that APMuL had furnished all the supporting documents, had submitted the claim verification report to GUVNL, which was also shared with APMuL. On the basis of the said audited verification reports, GUVNL had released the payment to APMuL. Thus, the contention of GUVNL that APMuL has breached PPA conditions has no merit and it is misleading.

(h) Claims of energy charges of APMuL are in conformity with Article 3.2.4

of SPPA and other applicable provisions of the Bid-01 PPA and SPPA. APMuL has provided all relevant documents required for processing of claims of energy. APMuL has been submitting the information/ documents that are requested by GUVNL from time to time to the best of its ability, some of which are even beyond the requirements specified under Article 3.2.4(III)(iii) of the SPPA. Based on the very same documents submitted by APMuL, GUVNL has paid the energy charges to APMuL for more than one year (October, 2018 to November, 2019) without raising any dispute qua premium/tolerance or SHR or ocean freight invoices etc. There has been no change in the method/ conduct of APMuL's procurement pre- and post- November, 2019.

(i) GUVNL has *inter alia* contended that it is entitled to treat SPPA as void as per the decision of this Commission in Petition No. 250/MP/2019. This is a prima facie erroneous contention made by GUVNL as the said Petition is part-heard and no orders have been passed as on date by this Commission. GUVNL has proceeded to implement its own prayers as if this Commission has passed the order in its favour.

(j) During the proceedings in Petition No. 374/MP/2018, Prayas had raised certain concerns regarding 'tolerance of maximum 10% over HBA price derived for a quality of coal'. GUVNL had specifically defended the provision and had *inter alia* submitted adequate reasons necessitating the additional conditions in SPPA in form of (HBA +10%). Having defended the provision before this Commission, GUVNL cannot cast aspersions on APMuL for availing such tolerance. Article 3.2.4 of SPPA specifically allowing for a 'tolerance of maximum 10% over HBA price derived for a quality of coal' partakes a character of a 'fiscal decision' consciously taken jointly by the parties, which ought not to be unilaterally tinkered with by GUVNL. In this regard, reliance has been placed on the judgment of Hon'ble Supreme Court in Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Co. (India) (P) Ltd., [(2017) 16 SCC 498].

(k) GUVNL in its reply has primarily relied upon GR of Government of Gujarat dated 12.6.2020 to contend that (i) the said GR being a policy decision, such GR is binding on APMuL and GUVNL, and (ii) GUVNL has complied with said GR which requires GUVNL to follow directions of GERC qua (i) tolerance,

(ii) SHR, (iii) disallowance of 3% CIF, (iv) disallowance of transit loss, etc. However, the reliance thereon is misleading since the decision of GUVNL dated 15.4.2020 is dated prior to GR of the Government of Gujarat dated 12.6.2020 and GERC's order in Essar case.

(l) It is a settled position of law that approval of PPA/SPPA constitutes the primary statutory functions of this Commission in terms of Section 63 of the Act. Once SPPA is produced for approval at GUVNL's instance and has been approved by this Commission, the specialized functions of this Commission were exercised. In this regard, reliance has been placed on the judgment of APTEL dated 2.2.2018 in DB Power Ltd. v RERC in Appeal Nos. 191 and 295 of 2015 wherein it has been held that once the approvals are granted, then the PPA cannot be revisited resulting into sole disadvantage to generators/ suppliers.

(m) Role of the Government of Gujarat under the scheme of Act is limited and cannot be assumed as unbridled. Government of Gujarat is under a bounden duty not to adversely affect or interfere with the functions and powers of the Appropriate Commission. It is settled position of law that the Act has distanced the Government from all form of regulation. In this regard, reliance has been placed on the decisions of Hon'ble Supreme Court in (i) Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, [(2012) 2 SCC], and (ii) PTC India Ltd. v CERC, [(2010) 4 SCC 603], (iii) A.P Transco v. Sai Renewable Power (P) Ltd., [(2011) 11 SCC 34].

(n) GoG or GUVNL cannot adversely affect or interfere with this Commission's functions by revoking the GR dated 1.12.2018. GUVNL's reliance on GR dated 12.6.2020 to apply the methodology adopted by GERC's order dated 27.4.2020 in Essar case is mischievous and mala fide. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court in State of M.P. v. G. S. Dall and Flour Mills, [1992 Supp (1) SCC 150].

(o) It is equally settled position of law that corporate veil may be lifted to see real face behind the corporate structure. In the present case, admittedly, it is the Govt. of Gujarat which is behind the facade of the statutory body viz. GUVNL. Once the orders of the Hon'ble Supreme Court and this Commission have

resulted in the SPPA to fructify, Govt. of Gujarat cannot make an inroad into the process and seek to override the SPPA. Reliance has been placed on the judgment of APTEL in SEIL v. Punjab ERC, [2006 SCC OnLine APTEL 49], which has also been upheld by Hon'ble Supreme Court.

(p) GUVNL itself is aware that the Govt. of Gujarat has limited role under the scheme of the Act and it is only this Commission which is empowered to approve any amendment to the terms of PPA/SPPA. It is for this reason that GUVNL had rightly approached this Commission by filing Petition No. 374/MP/2018 for approval of the amendments made to the PPA dated 6.2.2007 by signing SPPA dated 5.12.2018 with mutual consent of APMuL. GUVNL ought to have adopted the same approach as it followed earlier.

Analysis and Decision

8. We have considered the submissions made by the parties. At the outset, we note that both the parties have made submissions, which touches upon the merits/ core issues involved in the matter as well. However, it is settled position that at the stage of considering the interim reliefs, it is not necessary to go into the merits of the case in detail. Accordingly, while considering the instant application for grant of interim relief, we confine ourselves to only the issues of deduction made by GUVNL on alleged non-compliance of SPPA by APMuL. Legality and other factual aspects of the case and the deduction made by GUVNL shall be dealt with in detail at the time when the matter will be heard on merits.

9. We have considered that it is the admitted case of both the parties that pursuant to approval of SPPA in order dated 12.4.2019 in Petition No 374/MP/2018, invoices were raised by APMuL for power supplied from October 2018 onwards and GUVNL kept paying the energy charges as per the SPPA till invoices of November 2019 without raising any dispute.

10. APMuL has submitted that GUVNL raised a dispute with regard to premium/ tolerance over HBA indexed price for the first time on 27.1.2020 against the invoice raised for the month of December 2019 and that from February 2020 onwards, GUVNL started making unilateral deductions against APMuL's monthly invoices for supply from the month of December 2019 onwards. On 15.4.2020, GUVNL unilaterally withheld the amounts corresponding to tolerance from the agreed and approved energy charge rate with retrospective effect for the period from October 2018 to November 2019 without giving any details, computation or explanation. It has been also submitted that for all invoices issued since April 2020, in addition to tolerance, GUVNL is also making unilateral deductions with respect to SHR, (2340 kcal/kWh approved by the Commission has been changed unilaterally to 2223.86 kcal/kWh giving overriding effect to GERC order in Essar case over this Commission's Order in the present case); disallowance of 3% of CIF value towards other charges (disallowed based on GERC order in Essar case); disallowance of actual FoB cost by comparing with Argus/ Coalindo and S & P Global Platts indices while the SPPA stipulates comparison only with HBA index; and transit loss (disallowed based on GERC order in Essar case). It has been also contended that since August 2020, GUVNL proceeded to unilaterally withhold and claw back legitimate payments towards ocean freight charges on the alleged basis of non-submission of separate ocean freight invoices.

11. *Per Contra*, GUVNL has submitted that APMuL has committed a fundamental breach of terms of SPPA and the same disentitles it to claim any relief against GUVNL. According to GUVNL, since APMuL has not raised the monthly bills for generation and sale of power to GUVNL as per the terms and conditions of SPPA, the bills purported to be issued are not legally valid and no payment can be enforced under the said bills. GUVNL has submitted that the monthly bill cannot be raised by

APMuL at its whims and fancies and that APMuL needs to provide supporting documents along with monthly invoices in terms of Article 11.2 of the Bid-01 PPA dated 6.2.2007. GUVNL has submitted that, in the initial stages, GUVNL had proceeded to pay the bills raised by APMuL as such without seeking adjustment but it is not correct that GUVNL had not raised the issue. GUVNL had, starting from the letter dated 25.4.2019 (when the supplementary bill was raised on 15.4.2019 by APMuL after this Commission's order dated 12.4.2019) raised various issues. The deductions were made when GUVNL did not receive any satisfactory explanation from APMuL to discrepancies and APMuL was deflecting and avoiding providing relevant documents. GUVNL has also submitted that it has also implemented the policy decisions and directives of Government of Gujarat vide GR dated 12.6.2020 to make deductions from the monthly invoices of APMuL.

12. We observe that GUVNL has not denied deduction of payment from the monthly invoices raised by the Applicant. On the contrary, vide its reply dated 4.6.2021, GUVNL has conceded to have disallowed an amount of around Rs. 113 crore claimed towards 10% tolerance over and above HBP price for the period from October 2018 to March 2020 and about Rs. 275 crore on account of Policy directives of Government of Gujarat vide GR dated 12.6.2020 for the period from April 2020 to March 2021.

13. We note that GUVNL has stated to have made deduction from monthly invoices on account of non-submission of supporting documents and clarifications by APMuL in response to the issues raised by GUVNL. According to GUVNL, it has been seeking supporting documents from APMuL from the beginning. In response to the supplementary bill raised by APMuL on 15.4.2019 i.e. the first bill after the SPPA was

approved by the Commission vide order dated 12.4.2019, GUVNL vide its letter dated 25.4.2019 had raised various issues. GUVNL in its reply dated 4.6.2021 has provided details about the correspondences that took place with APMuL in this regard.

14. We have gone through the correspondences submitted by the parties. One such correspondence is GUVNL's letter dated 15.4.2020 vide which GUVNL allegedly reneged from paying the tolerance of maximum 10% over HBA price derived for a quality of coal. This letter provides the relevant insight on the issue at hand. The relevant extract of the said letter is as under:

> "***Sub: Procurement of imported coal by M/s Adani Power (Mundra) Ltd. for supply of power to GUVNL under Supplemental PPA dated 5.12.2018 and PPA dtd 6.02.2007***
>
> ***Ref: 1. APMuL Letter dated 22.01.2019.***
>
> ***2. GUVNL Letter dated 25.09.2019.***
>
> ***3. APMuL e-mail dated 14.02.2020.***
>
> *Sir,*
>
> *This has reference to APMuL letter dated 27.02.2020 forwarding a synopsis of e-sourcing bidding event conducted on 25.02.2020 for procurement of imported coal on long term basis for supply of power to GUVNL under SPPA dated 5.12.2018 and conveying that M/s Taurus Commodities General Trading LLC has quoted L1 price (US$ 72.40 / MT) for Type 1 coal (5400 GAR) and M/s Pan Asia Coal Trading Pte Ltd has quoted L1 price (US$ 62.80 / MT) for Type 2 coal (4500 GAR). APMuL has sought GUVNL's approval to the price discovered as per SPPA.*
>
> *GUVNL is writing this letter without prejudice to GUVNL's rights and contentions in Petition No 250 of 2019 pending before the Central Electricity Regulatory Commission wherein GUVNL has sought recall of the order dated 12.04.2019 granting approval to Supplemental PPA dated 5.12.2018.*
>
> *From the documents submitted by APMuL through letter dated 27.02.2020 it is observed that the FOB price discovered for coal having GCV 5400 is 11.10% and for GCV 4500 is 9.81% above HBA index derived price (HPB price) for the quality of coal.*
>
> *In this regards it may be appreciated that the objective of the signing of SPPA was to mitigate the hardship stated by APMuL as faced by them i.e. allow recovery of actual fuel cost incurred in a prudent and reasonable manner as per the market trend and it was not to provide any undue benefits to the project developers at the cost of consumers at large. It is expected that project developers would follow a transparent mechanism for discovery of fair coal price*

through competitive bidding process. However, APMuL has been consistently procuring imported coal at a premium, which constitutes a major portion of the power plant operation cost, through enquiry from limited sources in spot market without following any transparent bidding process. APMuL has claimed the coal price in the range of 5.93% to 9.95% above the HPB price (HBA Index derived price) for the quality of coal consumed.

GUVNL has carried out the analysis of the Indonesian coal price index as published by Argus / Coalindo and Ws S&P Global Platts leading International Price Reporting Agencies notifying Indonesian Coal Price for different categories of coal based on GCV from October — 2018 onwards and it is observed that the FOB price of coal has consistently remained around / lower the HBA derived price (HPB) and coal is not exported at premium over the HPB price.

For reference, it is to mention that the coal price as per market trend during the months of February 2020 and March 2020 coal having GCV below 4200 Kcal / kg was available at price around USD 36.67 / MT and USD 31.84 / MT respectively. Moreover, the coal having GCV 5000 Kcal / Kg was available at price around USD 51.68 /MT & USD 46.61 / MT during February 2020 and March 2020 respectively whereas the coal having GCV 5800 Kcal / Kg was available at price around USD 61.05 /MT & USD 58.53 / MT respectively during same period. It is also observed that other project developers are procuring coal for supply of power to GUVNL at FOB price consistently below / around HPB price for the quality of coal without any premium.

Moreover, the HPC recommendations as accepted by Govt. of Gujarat through G.R. dated 1.12.2018 provides for considering coal price based on lower of (i) actual FOB price or (ii) HBA price adjusted for the coal quality consumed, however based on the representation from APMuL, GUVNL had allowed tolerance up to 10% above HBA derived price to cover an extraordinary situation of monthly variations. It was not for the purpose of allowing extra claims of APMuL on a consistent basis. However, since it is observed that the coal price in Indonesian market is consistently remaining around / lower than the HPB price for the relevant quality of coal from Oct-2018 onwards it is expected that generator should procure coal through prudent practice at least cost rather than paying premium over HPB price. GUVNL has decided to withdraw the tolerance up to 10% allowed above HBA Index derived price so as to align it with HPC recommendation and Govt. of Gujarat G.R. dated 1.12.2018. Further, since the price has remained consistently below / around HPB price and APMuL has not procured coal in a prudent, transparent and competitive manner in accordance with the prevailing market trend, GUVNL is restricting the payment of energy charges to APMuL from October 2018 onwards considering the coal price as lower of (i) actual FOB price (ii) HBA price worked out as per formula for billed GCV (HPB) without allowing any tolerance / premium and (iii) HBA price worked out on proportionate basis.

Since the imported coal price discovered in the bidding process carried out by APMuL is contrary to the market trend, GUVNL has decided not to accept the current price discovered in the tender and APMuL is requested to go for retendering for a prudent, competitive and cost effective sourcing of coal in line with the coal price as per the market trend.

This is without prejudice to GUVNL's rights and contentions under the PPAs and submissions made before various forum.

Thanking you."

15. It is evident from the above letter that tolerance of 10% was withdrawn and deductions were made by GUVNL retrospectively from the month of October 2018 so as to align the coal price with HPC recommendation and GR of Government of Gujarat dated 1.12.2018. The issue of non-submission of supporting documents do not find any mention in the letter anywhere. Therefore, it was GUVNL that raised the dispute which led to withdrawal of tolerance of 10% and deduction of monthly invoices.

16. Subsequently, GUVNL has admitted to have made deductions on account of removal of tolerance limit and implementation of other aspects in terms of policy directives of Government of Gujarat in GR dated 12.6.2020. The relevant portion of the submission made by GUVNL in Paragraph 62 of its reply dated 4.6.2021 is extracted as under:

> *"g. Further, the Government of Gujarat by the policy decision dated 12.06.2020 revoked the GR dated 01.12.2018 and directed that the order of the Gujarat Electricity Regulatory Commission in EPGL Case of rejecting the tolerance of 10% on grounds of not being in consumer interest be implemented. It therefore a policy decision binding on all to be implemented and Adani Power cannot plead to the contrary in the present proceedings in regard to the tolerance margin not being allowed in the Energy Charges;*
>
> *XXXXXX*
>
> *m. Pursuant to Government of Gujarat policy decision and directives dated 12.06.2020, GUVNL is considering the FoB price of coal as lowest of Actual, HPB price, as notified by S&P Global Platts and as notified by Argus/Coalindo for same quality of coal as consumed by Adani Power and operational parameters as approved by GERC for Adani Power in its change in law petition and also disallowed transit loss @ 0.2% & other charges @ 3% of CIF price. Accordingly, GUVNL has disallowed an amount of around Rs. 275 Crs for the period from April 2020 to March 2021."*

17. GUVNL has contended that the policy decision of Government of Gujarat is binding on all including APMuL. GUVNL has submitted that SPPA was a result of policy decision of the Government of Gujarat (GR Dated 1.12.2018) and not on the basis of any contractual or legal right vested in APMuL and that the Government of

Gujarat which had power to take a policy decision in public interest to direct GUVNL to enter into SPPA, equally has the power to take the policy decision to revoke the earlier GR dated 1.12.2018 and direct the modifications to the consideration of some of the elements as an interim measure pending the decision in Petition No. 250/MP/2019. It has also been submitted by GUVNL that having filed a recall Petition No. 250/MP/2019 before the Commission and having intimated regarding Policy and directive of Government of Gujarat dated 12.6.2020, it is not necessary for an agreement to be entered into between APMuL and GUVNL to record the mutual agreement to further amend the SPPA for implementation of GR dated 12.6.2020.

18. *Per contra,* APMuL has contended that GR of Government of Gujarat dated 12.6.2020 is not binding on the contracting parties and cannot override the provisions of Bid-01 PPA and SPPA which was approved by this Commission vide order dated 12.4.2019 in Petition No.374/MP/2018. It has been further submitted that the once SPPA is produced for approval at GUVNL's instance and has been approved by this Commission, it cannot be unilaterally revisited resulting into sole disadvantage to APMuL. It has been further submitted that role of Government of Gujarat under the scheme of Act is limited and cannot be assumed as unbridled and it cannot adversely affect or interfere with the functions of this Commission, which includes approval of any amendment to the terms of PPA/SPPA. GUVNL had rightly approached this Commission by way of Petition No. 374/MP/2018 for approval of the amendments made to the PPA dated 6.2.2007 by signing SPPA dated 5.12.2018 with mutual consent of APMuL and that GUVNL ought to have adopted the same approach as it followed earlier.

19. We observe that deductions made by GUVNL vide its letter dated 15.4.2020

germinates from a dispute raised by GUVNL. Similarly, the deductions made by GUVNL on account of implementation of GoG directives have been disputed by APMuL as illegal. Both these issues involve adjudication on merit in the proceedings of Petition No. 614/MP/2020. For the present IA, it is sufficient to note that the issue involves dispute as regards bills being raised by APMuL.

20. We note that as regards raising bills and disputes regarding bills, relevant extract from Article 11 of the Bid-01 PPA dated 6.2.2007 provides as under:

> **"Article 11.6.1: -**
>
> *If a Party does not dispute a Monthly Bill or a Supplementary Bill raised by the other Party within 90 days from the date of presentation of the bill notwithstanding the payment status of such bill, such bill shall be taken as conclusive.*
>
> ***Article 11.6.2:-***
>
> *If a Party disputes the amount payable under a Monthly Bill or a Supplementary Bill, as the case may be, that Party shall issue a notice (the "Bill Dispute Notice") to the invoicing Party setting out:*
>
> *i. the details of the disputed amount;*
>
> *ii. its estimate of what the correct amount should be; and*
>
> *iii. all written material in support of its claim.*
>
> ***Article 11.6.4: -***
>
> *If the invoicing Party does not agree to the claim raised in the Bill Dispute Notice issued pursuant to Article 11.6.2, it shall, within fifteen (15) days of receiving the Bill Dispute Notice, furnish a notice to the disputing Party providing:*
>
> *i. reasons for its disagreement;*
>
> *ii. its estimate of what the correct amount should be; and*
>
> *iii. all written material in support of its counter-claim.*
>
> ***Article 11.6.9: -***
>
> *Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date provided either party shall have the right to approach the GERC to effect a higher or lesser payment on the disputed amount."*

21. In terms of Article 11.6.2, either party may dispute the amount payable under monthly or supplementary bills. Article 11.6.9 provides that till the time the dispute is resolved, the procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date.

22. Admittedly, despite deductions being made by GUVNL, the power is being supplied by APMuL as per the provisions of the Bid-01 PPA and SPPA.

23. As power is being procured by GUVNL and is being supplied by APMuL as per the provisions of the Bid-01 PPA and SPPA, we are of the view that the parties are bound by terms of the Bid-01 PPA and SPPA and, therefore, raising of bill or any dispute thereon has to be in accordance with the terms and conditions as provided in the Bid-01 PPA and SPPA.

24. We note that GUVNL has been deducting amounts from the invoices raised by APMuL based on certain allegations against APMuL of not following a transparent mechanism for discovery of fair coal price through competitive bidding process and consistently procuring imported coal at a premium; on account of alleged non-furnishing of required documents by APMuL; and in compliance of the policy directives of Government of Gujarat in GR dated 12.6.2020.

25. We are of the view that whatever the reasons of dispute may be, the provisions of Article 11.6.9 of the Bid-01 PPA are clear in this regard that provides that "*Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date -----"*. APMuL has already approached the Commission for adjudication of the dispute by filing Petition No. 614/MP/2020, which the Commission shall adjudicate

in due course. However, in the interim till the dispute is adjudicated, as we have already held, both the parties, namely GUVNL and APMuL are bound by the provisions of the Bid-01 PPA and SPPA.

26. In view of the above discussions, we are of considered opinion that the Petitioner has a very strong *prima facie* case for getting a prohibitive order. The balance of convenience is in favour of the Petitioner, as it has been put to a recurring loss and the ingredient of irreparable loss is also in favour of the Petitioner. We have observed that the parties are bound to respect the contractual obligations, otherwise, it may lead to chaos in sector as the financial implications involved are huge. Accordingly it is ordered:

ORDER

27. GUVNL is directed to pay 100% of the undisputed amount and 85% of the amount as disputed for all the invoices raised since signing of the SPPA till the pendency of the main Petition No. 614/MP/2020. Payment must be made within thirty days of this order.

28. IA No. 64 of 2020 in Petition No. 614/MP/2020 is disposed of in terms of the above.

Sd/-	Sd/-	Sd/-
(Pravas Kumar Singh)	**(I.S. Jha)**	**(P. K. Pujari)**
Member	**Member**	**Chairperson**