

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 128/MP/2022

Coram:

**Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of order: 17th June, 2022

In the matter of:

Petition under Section 11(2) of the Electricity Act, 2003 read with 79 of the Electricity Act, 2003, along with Regulation 111-113 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 inter alia seeking directions to Respondent Nos. 1 to 8 to procure the power generated and supplied by the Petitioner from 6.5.2022 onwards in terms of directions as issued by Ministry of Power on 5.5.2022 under Section 11 of the Electricity Act, 2003 and also seeking a declaration/direction with regard to rate/compensation at which such supply of power to Respondent Nos. 1 to 8 for the period between being 6.5.2022 to 31.10.2022, or such other period as extended by Ministry of Power from time to time, based on principles laid down with respect to Section 11(2) of the Electricity Act, 2003.

And

In the matter of

Tata Power Company Limited,
"Corporate Centre", 34,
Sant Tukaram Road,
Carnac Bunder,
Mumbai-400009, Maharashtra.

...Petitioner

VERSUS

1. Gujarat Urja Vikas Nigam Limited,
Through its Chairman
Sardar Patel Vidyut Bhavan,
Race Course,
Vadodara- 390 007, Gujarat

2. Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

3. Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9,
Bandra (East), Mumbai-400 051, Maharashtra

4. **Ajmer Vidyut Vitaran Nigam Limited,**
Hathi Bhata, Old Power House,
Ajmer, Rajasthan
5. **Jaipur Vidyut Vitaran Nigam Limited,**
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan
6. **Jodhpur Vidyut Vitaran Nigam Limited,**
New Power House, Industrial Area,
Jodhpur, Rajasthan
7. **Uttar Haryana Bijli Vitran Nigam Limited,**
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.
8. **Dakshin Haryana Bijli Vitran Nigam Limited,**
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005
9. **Union of India, Ministry of Power,**
Shram Shakti Bhawan,
Rafi Marg, New Delhi - 110001

...Respondents

Parties Present

Shri Sajjan Poovayya, Advocate, TPCL
Shri Shreshth Sharma, Advocate, TPCL
Ms. Nehul Sharma, Advocate, TPCL
Shri M. G. Ramachandran, Sr. Advocate, GUVNL
Shri Anand Ganesan, Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Ms. Srishti Khindaria, Advocate, GUVNL
Shri S. K. Nair, GUVNL
Shri Kripal Chudasama, GUVNL
Shri Shubham Arya, Advocate, HPPC and PSPCL
Ms. Poorva Saigal, Advocate, HPPC and PSPCL
Shri Ravi Nair, Advocate, HPPC and PSPCL
Shri Nipun Dave, Advocate, HPPC and PSPCL
Ms. Reeha Singh, Advocate, HPPC and PSPCL
Shri G. Saikumar, Advocate, MSEDCL
Shri Rahul Sinha, Advocate, MSEDCL

ORDER

The Petitioner, Tata Power Company Limited ('TPCL') has filed the present Petition under Section 11(2) of the Electricity Act, 2003 (hereinafter referred to as 'the Act'), seeking directions to Respondents 1 to Respondent 8 to procure the power generated and supplied by the Petitioner from 6.5.2022 onwards in terms of directions issued by Ministry of Power on 5.5.2022 under Section 11 of the Act and seeking declaration/direction with regard to rate/compensation at which such supply of power to Respondents 1 to Respondent 8 for the period between being 6.5.2022 to 31.10.2022, or such other period as extended by Ministry of Power from time to time, based on principles laid down with respect to Section 11(2) of the Act. The Petitioner has made the following prayers:

'a) Determine suitable rate/compensation payable (including cost of generation and supply of power along with reasonable return on equity off setting the adverse financial impact) to the Petitioner towards supply of power for period between 06.05.2022 to 31.10.2022 and for such further period as may be applicable, in terms and during the currency of the Directions dated 05.05.2022 issued by Respondent No. 9;

b) Issue such further orders and grant such further reliefs as appropriate to offset adverse financial impact, if any, upon the Petitioner, pursuant to and as a consequence of the generation and supply of power in terms of Directions dated 05.05.2022 issued by Respondent No. 9;"

2. The Petitioner, has also made the following interim prayers:

"(a) Grant an in-principle approval of generation and supply of power by the Petitioner to Respondent Nos. 1 to 8, in terms and during the currency of Directions dated 05.05.2022 issued by Respondent No.9;

(b) Pending the finalization of the rate/compensation by this Hon'ble Commission, direct Respondent Nos. 1 to 8 to make timely and complete payments for the power so supplied in terms of prayer (a) on a weekly basis, at the provisional rate/compensation of INR 9.11/kWh, (subject to revisions as appropriate under Section 11 of the Act and applicable law);

(c) Direct Respondent Nos. 1 to 8, to cumulatively pay an amount of INR 450 Cr. (as bifurcated inter-se in Para 23), in advance, each week, for the supply of power throughout the period of operation of the directions dated 05.05.2022, issued by Respondent No.9;

(d) Pass any such further other orders or order as this Commission may deem just and proper in the circumstances of the case.”

Background of the case

3. On 5.5.2022, Ministry of Power ('MoP'), issued directions to imported coal-based power plants, including the Petitioner under Section 11 of the Act. Recognising that the existing Power Purchase Agreements do not have adequate provision for pass through of the entire increase in the international coal price, the MoP has, *inter-alia*, issued the following directions:

(i) All imported coal-based power plants are to operate and generate power to their full capacity;

(ii) The plants are required to supply power in the first instance to the procurers under the respective PPAs, and any surplus power can be sold in Power Exchanges;

(iii) In cases where the power plants have PPA with multiple distribution companies, and any distribution company do not schedule any quantity of power according to its PPA, such power will be offered to other beneficiaries and remaining quantity will be sold through power exchanges;

(iv) The rates at which power shall be supplied to beneficiaries is to be worked out by a Committee constituted by the MoP with representatives from MoP, Central Electricity Authority and Central Electricity Regulatory Commission. Such rate is to be worked out to meet all the prudent costs of using imported coal, including the present coal price, shipping costs and O&M costs etc. and a fair margin, and is subject to review every 15 days considering the change in price of coal, shipping costs etc.;

(v) In cases where generators/group companies own coal mines abroad, the mining profit would be set off to the extent of the shareholding of the generating/group company in the coal mine;

(vi) The beneficiaries shall have the option to make payment according to the benchmark rate worked out by the Committee or at a rate mutually negotiated with the generating company, and such payments are to be made on a weekly basis;

(vii) In case where a distribution company/ beneficiary is unable to enter into a mutually negotiated rate and not willing to procure power at the benchmark rate set by the Committee, or is unable to make weekly payment, then such quantity of power shall be sold on power exchange and profit realised from the same shall be shared between the generator and the distribution company/ beneficiary in the ratio of 50:50 on monthly basis.”

4. The above order is to remain valid till 31.10.2022.
5. In continuation of the above directions, MoP vide its letter dated 13.5.2022, has forwarded the recommendations of the Committee constituted by MoP regarding tariff/rate/compensation for imported coal based power plants, including the Petitioner. The Committee has given the following recommendations:

(a) Energy Charges Rate (ECR) calculated for the Petitioner is Rs. 6.05/kWh.

(b) The fixed charge will be as per the Power Purchase Agreements, or as has already agreed mutually between the generating company and Procurers.

(c) In case of the Petitioner, the mining profit has been deducted from ECR. In the mining profit calculation for the Petitioner, the applicable statutory taxes and duties, including income and their taxes, royalties and any other charges, taxes, or charges of like nature in Indonesia and in India on: (a) production, sale and/or supply of Indonesia coal; and (b) on distribution of profits and/or dividends from such production, sale and/or supply of such coal by PT Kaltim Prima Coal (KPC) to Tata Power have been considered. The Petitioner shall source 100% of coal from their own mines.

(d) The benchmark ECR, given above, is subject to revision every week or every fortnight, if required, on the basis of the updated prices of imported coal and shipping charges.

6. Subsequently, MoP vide clarification dated 20.5.2022, directed as under:

(a) As per the PPA, the Payment Security Mechanism (PSM) shall be maintained. Letter of Credit (LC) is to be maintained by the procurer for the contracted power to be purchased. In case there is no LC, advance payment shall be made. The Letter of Credit shall be unconditional. The LC shall be promptly encashed for payment and it should be timely recouped by the procurer for purchase of power from the generator. If there is no LC or advance payment or if the LC has not been recouped after encashment, then the

generator will not schedule power to the procurer and will be entitled to sell the power in power exchanges. No formal consent from the procurer will be required for such sale. The net profit, if any, from such sale on power exchanges shall be shared with the procurer(s) on monthly basis.

(b) Payment by the procurer will be made on weekly basis. If the payment is made within 5 days of presentation of weekly bill, then rebate of 0.375% on weekly basis in accordance with CERC norms or as per the PPA, whichever is higher, shall be applicable.

(c) If power is not scheduled by the procurer, the generator will bid the power in the Power Exchange at the tariff up to the tariff given under Section 11 of the Act or as mutually agreed tariff with the procurer. However, the bid will be cleared on MCP discovered on the Power Exchanges. In case, the average MCP is less than the tariff given under Section 11 of the Act or the mutually agreed tariff with the procurer, then the generator will not be bound to sell power in the Power Exchange. However, if the average MCP is more than the tariff given under Section 11 or the mutually agreed tariff with the procurer, then the generator will mandatorily sell power in the power exchange.

(d) The generator shall maintain coal stock as per the extant norms so that the plant operates at full capacity.

(e) Generator shall submit weekly report to MoP for the generation and sale from the ICB plants.

(f) If the plant is made available as per the directions issued under Section 11 of the Act, no penalty can be imposed by the procurer on account of availability under PPA.

(g) The plant will have to operate as per the directions, notwithstanding any prior outstanding dues of the generating company. Such outstanding dues shall be dealt with separately.

(h) The Committee have determined the tariff based on the Argus Index. However, some of the plants, to begin with, which are required to purchase coal from "High Seas" due to inadequate stock being available at plant shall

be given tariff accordingly for such imported coal to build stock up to three weeks requirement and subject to condition that plant is made operational within 15 days of such purchase. The generator shall submit the relevant documents for verification by the committee.

Submissions of the Petitioner

7. The Petitioner has mainly submitted as under:

(a) MoP through its direction has recognised that the present PPAs do not provide for pass through of the present high cost of imported coal and that at present price of imported coal, running of imported coal based plants and supply power at the PPA rates will lead to huge losses to the generators and therefore, the generators are not willing to run such plants. Accordingly, the directions provide for constitution of a Committee to work out benchmark rates of power to meet all the prudent costs of using imported coal for generating power including the present coal price, shipping costs and O & M costs, etc. and a fair margin. Further, the benchmark rates are to be reviewed every 15 days taking into consideration the change in the price of imported coal and shipping costs, etc.

(b) Section 11(2) of the Act entrusts this Commission with the responsibility for off-setting the adverse financial impact caused to the generating company as a consequence of a directions given by MoP, Government of India under Section 11(1) of the Act. Accordingly, the Petitioner has approached this Commission under Section 11(2) read with Section 79 of the Act.

(c) The grant of in-principle approval of generation and supply of power in terms of the direction dated 5.5.2022 is necessary in order to avoid prejudice to the reconciliation efforts being made under the aegis of MoP including the execution of the Supplemental PPA and the power being already supplied to certain procurers (Gujarat and Maharashtra). The above efforts have already been brought to notice of the Commission in Petition filed by one of the procurers, namely, PSPCL in Petition No. 85/MP/2022 wherein the Commission has directed the parties to attempt to resolve the issues in terms of discussions and the deliberations which took place under the aegis of MoP. The Petitioner has proposed the provisional rate/compensation @ Rs. 9.11/kWh by taking into

account the (i) landed coal cost computation at HBA of \$ 275/MT, (ii) fixed capacity charges as per the PPA dated 22.4.2017, and (iii) parameters based on norms laid down by the Commission. Such provisional rate/compensation sought by the Petitioner is, albeit, subject to the final determination by the Commission as per Section 11(2) of the Act.

8. The Petitioner vide its additional affidavit dated 16.5.2022 has submitted that the rate/tariff recommended by MoP in its letter dated 13.05.2022 for generation and supply of power from the Petitioner's plant to the procurers was inappropriate to not include/reflect the complete and correct factors. The letter dated 13.5.2022 does not take into the consideration the commercial parameters provided in directions dated 5.5.2022. Further, ECR of Rs. 6.05/kWh determined by the Committee has been arrived at by reducing the mining profit of the Petitioner, which ought not to have been reduced in respect of the generation and supply of power in terms of the directions issued under Section 11 of the Act. Passing of such benefits is relevant only in respect of SPPA that is currently being negotiated and not yet executed. The Committee has also incorrectly relied upon the Argus Index for determination of landed cost of coal instead of HBA Index.

Hearing dated 17.5.2022

9. The matter was heard on 17.5.2022 through video conferencing. Notice was issued the Respondents on the admissibility of the Petition and the Respondents were directed to file their reply also on the interim prayers of the Petitioner on or before 30.5.2022 with copy to the Petitioner who may file its rejoinder thereafter by 3.6.2022.

Reply dated 30.5.2022 filed by GUVNL

10. The Respondent 1, Gujarat Urja Vikas Nigam Limited ("**GUVNL**") vide its reply dated 30.5.2022 has filed its preliminary submission and has *inter alia* put forth

following objections and responses to the grounds and relief(s) as prayed for by the Petitioner including:

(i) The Petitioner cannot on one hand challenge the powers of the Central Government to issue the directions under Section 11(1) of the Act and at the same time invoke the jurisdiction of this Commission to determine the adverse financial consequences which flow from obeying such directions;

(ii) The directions and clarifications are issued in order to provide a provisional reprieve to the generating companies and the same cannot be modified by the Commission.

(iii) The directions and clarifications cannot over-ride the terms of the Power Purchase Agreement dated 22.4.2007 (“PPA”) and within the terms of the concluded PPA, CGPL has a legal and binding obligation to maintain supply of electricity from its Mundra Power Project and make available the contracted capacity to GUVNL. Further, as per the decision of the Hon’ble Supreme Court dated 11.4.2017 in the case of *Energy Watchdog* case, CGPL has not been held entitled to any tariff over and above the tariff quoted by CGPL in the competitive bidding process based on which the selection was made and the PPA was executed.

(iv) As per the extant regulations notified by the Government of Indonesia, the export of coal has not been prohibited at discounted prices by way of mutual agreement between the Indonesian coal mines and procurer of coal from outside.

(v) Considering that the Petitioner was having a significant interest in coal mining company in Indonesia, CGPL can procure coal at a lower rate than mandated under the applicable Indonesian regulations.

(vi) Further, the directions and clarifications correctly relies upon Argus/Coalindo and S&P Global Platts indexes, which have also been recognised and acted upon by this Commission to determine the escalation applicable on imported coal;

(vii) GUVNL, based on the recommendations of High Powered Committee (hereinafter, “HPC”) has agreed to amend the terms and conditions of the tariff

under the PPA, but the proposed amendment [through a Supplementary PPA (“SPPA”)] has not fructified. In case, TPCL and GUVNL proceed to execute the SPPA, the terms and conditions can be substituted and TPCL would be provided tariff as per the SPPA.

(viii) The Petitioner cannot be entitled to any interim reliefs as prayed for or otherwise, which cannot be granted without final hearing on the matter.

Rejoinder dated 4.6.2022 to reply filed on behalf of Petitioner

11. The Petitioner vide its rejoinder dated 4.6.2022 has submitted that the objections raised by GUVNL are completely baseless and devoid of any merits and *inter alia*, has submitted the following:

(a) In the present Petition, the Petitioner has not laid a challenge to the jurisdiction / maintainability of the directions but has rather presented its case before the Commission as to how the said directions cannot be performed for its contents causing a grave / adverse financial impact upon the Petitioner. The Petition through its contents, reasoning and data establishes as to how the said directions fail to take into cognizance the material considerations it ought to have taken into account in order to enable the Petitioner to perform the same. It cannot be in dispute that the Petitioner has the lawful right as provisioned under Section 11(2) of the Act and it is within the undisputable powers of the Commission to adjudicate upon the issues as raised by the Petitioner in the present Petition. Under the applicable legal framework including the Constitution of India, it has the legitimate right to challenge the jurisdiction / maintainability and it is to that effect that it has reserved its right which cannot be read against the Petitioner under any circumstances. Hence, GUVNL has grossly erred in not understanding that the present Petition has itself been filed in order to enable it to perform supply power to the Procurers, which is the underlying objective of said directions.

(b) GUVNL’s understanding that this Commission by way of an Interim Order cannot modify the directions/ clarifications is palpably false on account of not only undermining the majesty of the Commission but also against the well settled principle of law that the Court which is empowered in law to grant a final relief (being this Commission in the present case), has the inherent power to

grant interim relief at its discretion. It is also the case of the Petitioner that GUVNL through its reply has failed to raise any objections whatsoever on the provisional rate/compensation corresponding to actual cost of generation at Rs 9.11/kWh (supported through detailed data and calculations) but has rather made certain bald assumptions alleging that the cost of import of coal can be below the HPB (HBA derived) and hence the requisite cost of Rs. 9.11/kWh cannot be considered. In specific, the Petitioner has submitted as under:

(i) GUVNL has failed to provide any data/ documents / basis to substantiate its alleged objections regarding grant of the said provisional rate/compensation of INR 9.11/kWh.

(ii) The Petitioner in the present Petition, has placed detailed calculations/ data to show that the said provisional rate/compensation has been arrived at, after taking into account the applicable parameters and to how the said rate/compensation of Rs. 9.11/kWh has been calculated.

(iii) Reliance placed by GUVNL on the provisions of the PPA, particularly qua the power to be generated and supplied in terms of and during the currency of the directions, is completely misplaced since, the supply of power in terms of directions is independent of the terms of the PPA, which is itself acknowledged and duly accepted in the directions and hence any reliance to that effect is unsustainable and liable to be dismissed at the threshold. The Petitioner evidently being put to an adverse financial position has approached the Commission to grant interim relief in terms of the directions at a provisional rate/compensation of Rs.9.11/kWh and directions to the procurers for making the advance payments to enable it to procure coal (which is also recommended through the clarifications) all being subject to the final adjudication of the present Petition. Hence, in absence of raising any fundamental / concrete and cogent reasons, reply filed by GUVNL is liable to be dismissed.

(c) GUVNL has selectively read the provisions of the Indonesian Regulations to state that coal can be procured by the Petitioner at a price lesser than the benchmark price- HPB, being HBA Index derived price. The claim made by GUVNL is liable to be rejected on account of the following reasons:

(i) GUVNL has misinterpreted Article 85(1) of Regulation No. 23 of 2010, Article 2(1) of Ministerial Decree No. 17/2010 and Article 2 of Ministerial Decree No. 7 of 2017 to contend that the benchmark prices are merely recommendatory and not mandatory in nature. It is the case of the Petitioner that coal cannot be exported at any price below the benchmark price.

(ii) GUVNL has failed to disclose that an exception to the above said is in Ministerial Decree No. 17/2010 through Article 21 which provisions as to when only a 'certain type' of coal and coal used for 'certain purposes' can be exported from Indonesia at a price below the benchmark price. As such, the said exemption is not applicable in the case of the Petitioner.

(iii) Article 11 of the Ministerial Decree No. 17/2010 specifically provides that the HBA derived benchmark price of coal shall be used as a reference of coal price. Considering that GUVNL has been aware since the inception of the Project that power from CGPL would be generated using coal imported from Indonesia (and hence being bound by laws governing such export from Indonesia), it cannot now claim that Argus Index be used for the supply of power under the directions, when evidently, the Petitioner cannot procure coal in deviation of the extant regulatory / legal framework in Indonesia.

(iv) GUVNL's reliance on the composite index for imported coal for payment purposes to state that Argus Index should have been preferred, is also misplaced as the same is for the purpose of determining the escalation rates for imported coal. However, it has failed to take into account that HBA Index is used to determine the base price of coal imported from Indonesia, and the present issue not being related to the escalation index notified by this Commission.

(v) GUVNL has selectively read the recommendations of HPC and failed to take into account that the HPC Report, through Annexure-2 clearly reiterates the mandate under Indonesian Regulations as regards the exception to sale of coal at HPB (HBA Index derived) price and notes

that sale of coal below HPB cannot be undertaken in terms of the Indonesian Regulations.

(d) While on one hand, GUVNL seeks to place reliance on the terms and conditions under the Supplemental PPA to be executed with the Petitioner, on the other, it is seeking a clear departure from the same by applying Argus Index instead of HBA Index, which forms the basis of the rate determination under the Supplemental PPA.

(e) The claim of GUVNL regarding deduction of mining profit, is liable to be rejected as the issue of mining share arises from the ongoing negotiations regarding the Supplemental PPA, which are outside the scope of the present Petition. Therefore, the said benefit which by their own version has not fructified cannot have any relevance in respect of the present proceedings.

(f) No merit whatsoever arises from the contents of the preliminary reply, especially when the Petitioner has placed detailed calculations which have not been conveniently responded to by GUVNL. While the Petitioner is expected / instructed to supply power in terms of Section 11 of the Act, it cannot be put to a financially disadvantaged position which resultantly puts it in a worse off situation. Should GUVNL be disagreeable to the same, the Petitioner offers GUVNL to procure coal of the same grade and quality as appropriate for production of power at the plant of CGPL, in order to enable the Petitioner to generate and supply in the larger interest of the consumers.

(g) In-principle approval of generation and supply of power in terms of the directions be granted, in the interim, in order to avoid prejudice to the reconciliatory efforts being made under the aegis of MoP including the execution of the Supplemental PPA and power already being supplied to certain procurers, including GUVNL and other procurers.

(h) Should the Petitioner be expected to adequately comply with the directions, it is also imperative that it be paid in the interim, a cumulative payment of Rs 450 crore on a weekly basis in advance being proportionate to the quantum of power to be procured by each such procurer, particularly in order to enable the Petitioner to procure the said coal, especially when the said advance can be

adjusted against the payments to be made by GUVNL and other procurers (and all such payments being directed to the Petitioner being subject to the final outcome of the Petition).

Hearing dated 7.6.2022

12. The matter was called out for virtual hearing on 7.6.2022. During the course of hearing learned senior counsel for the Petitioner submitted the following:

(a) The Petitioner has already started supply of power in terms of MoP directions dated 5.5.2022 issued under Section 11 of the Act.

(b) Accordingly, the interim reliefs prayed for by the Petitioner may be appropriately moulded. The Petitioner is now no longer seeking grant of an in-principle approval of generation of supply of power by the Petitioner to the Respondents. However, in lieu of above, the Commission may pass a direction that for supply of power by the Petitioner under the Section 11 of the Act, the parties will be governed by the provisions of the said Section and not by the terms and conditions of the PPA or the draft SPPA, which is still under negotiation.

(c) The Petitioner is not insisting upon the provisional rate of Rs. 9.11/kWh at this stage and instead a direction may be issued to the Respondents to make the payments for supply of power by the Petitioner in terms of the benchmark rates notified by the Committee constituted in term of MoP's directions 5.5.2022 without any further deductions thereto, pending finalisation of rate/compensation by the Commission under Section 11(2) of the Act.

(d) Despite the Petitioner having raising the invoices for supply of power in terms of rates worked out by the Committee, the Respondent, GUVNL has proceeded to deduct an amount 20 paise/kWh from the fixed charges therein on the basis of terms and conditions being negotiated for the draft SPPA, which is yet to be executed. GUVNL has made further deduction by applying the rebate @ 2.15%. Such deductions by the Respondents are untenable and against the directions of the MoP under Section 11 of the Act.

(e) Similarly, instead of direction to the Respondents to cumulatively pay an amount of Rs. 450 crore in advance, each week for supply of power as per the

direction dated 5.5.2022, a direction may be issued to the Respondents to open the Letter of Credit ('LC') considering the rates worked out by the Committee.

(f) On 20.5.2022, MoP has issued certain clarifications to the directions dated 5.5.2022, wherein the MoP has further directed that LC is to be maintained by the procurer for contracted power to be purchased and in case of no LC, advance payment is required to be made. It has also been directed that LC shall be promptly encashed for payment and it should be timely recouped by the procurer for purchase of power from the generator. If there is no LC or advance payment or if the LC has not been recouped after encashment, then the generator will not schedule power on the procurer and will be entitled to sell the power in power exchange.

(g) Accordingly, the procurers are now required either to pay for supply of power in advance or to open the LC for such supply considering the rates as worked out by the Committee. The said LC is the primary source of payment for supply of power under the directions dated 5.5.2022. LC amount in terms of the rates worked out by Committee would be Rs. 903 crore (for GUVNL) as against Rs. 105 crore as per the PPA rates.

(h) The Respondent, GUVNL in its reply has, inter-alia, contended that the Indonesian Regulations do not prohibit the export of coal at a price less than HBA derived price for relevant quality of coal. While the Petitioner strongly objects to the said submission, it is not necessary to go into the aforesaid aspect at this stage of the grant of interim reliefs to the Petitioner.

(i) Thus, the interim reliefs prayed for by the Petitioner may be granted as it has strong prima facie case and the balance of convenience is also in its favour. Moreover, in absence of such reliefs, it would suffer irreparable loss in supply of power in term of directions dated 5.5.2022 issued under Section 11 of the Act.

(j) It was prayed that aforesaid prayers are without prejudice to its rights to seek determination rate/ compensation under Section 11(2) of the Act to offset the adverse financial impact of the directions dated 5.5.2022 under Section 11(1) of the Act.

13. Learned counsel for the Respondent, GUVNL mainly submitted as under:

(a) The Respondent is complying with the directions issued by MoP and has paid the Petitioner for supply of power under Section 11 of the Act strictly as per the directions of MoP dated 5.5.2022.

(b) Energy charge rate has been paid by the Respondent in accordance with the rate worked out by the Committee constituted under the directions dated 5.5.2022.

(c) As regards fixed charges, the Committee has stated that it will be as per the PPA or as has been already agreed mutually between the generating company and the procurers. Thus, the mutually agreed rate between the generating company and the procurer has been specifically recognised therein.

(d) As regards deduction of Rs.0.20/kWh from fixed charge, such deduction as hair cut by lenders has been specifically agreed between the parties as recorded in the minutes of the meeting held on 17.3.2022.

(e) Similarly, clarification issued by MoP on 22.5.2022 provides for rebate of 0.375% on weekly basis in accordance with CERC norms or as per the PPA, whichever is higher. Accordingly, the rebate provided in the PPA has been applied on the invoices raised by the Petitioner.

(f) The Respondent may also be permitted to file its submission on the aspects of the payment of fixed charge and rebate as raised by the Petitioner only during the course of hearing.

14. Learned counsel for the Respondent, MSEDCL adopted the submission made by the learned counsel for GUVNL and sought liberty to file its reply in the matter. The learned counsel further submitted that as far as the rate of rebate is concerned, its impact would remain same irrespective of billing cycle whether on monthly or weekly basis.

15. Learned counsel for the Respondents, PSPCL and Haryana Utilities submitted that the Respondents have not scheduled/availed any supply from the Petitioner in

terms of the directions under Section 11 of the Act. Accordingly, the learned counsel requested that if at all the Commission considers it appropriate to allow any interim relief as prayed for by the Petitioner, the Commission may clarify that they would not apply to the Respondents.

Analysis and Decision

16. We have considered the submissions of the Petitioner and Respondents. The present Petition has been filed, *inter alia*, seeking directions to Respondents 1 to Respondent 8 to procure power generated and supplied by the Petitioner from 6.5.2022 onwards in terms of directions issued by the Ministry of Power ('MoP') on 5.5.2022 under Section 11 of the Act and also a declaration/direction with regard to rate/compensation at which such supply of power to Respondents 1 to 8 for the period between 6.5.2022 to 31.10.2022 is to be made.

17. Section 11 of the Act provides as under:

“Section 11. (Directions to generating companies): (1) Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.

Explanation. - For the purposes of this section, the expression “extraordinary circumstances” means circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in the public interest.

(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate.

Thus, in terms of Section 11(2) of the Act, this Commission has been entrusted with the responsibility for offsetting of adverse financial impact caused to the generating company as a consequence of a direction given by the Appropriate Government.

18. Ministry of Power, Government of India in view of the energy crisis being faced by the country, has issued directions dated 5.5.2022. By way of the said directions, Ministry of Power has taken notice of severity of energy deficit in the country due to shortage of domestic coal and issued directions to certain generating companies (including CGPL) under Section 11 of the Act. MoP has recognised that the existing Power Purchase Agreements do not have adequate provision for pass through of the entire increase in the international coal price.

19. In continuation of the above directions, MoP vide its communication dated 13.5.2022, has forwarded the recommendations of the Committee constituted by MoP as regards tariff/rate/compensation for imported coal based power plants, including the Petitioner.

20. A conjoint reading of the directions and the clarifications issued by the MoP makes it clear that the MoP has taken notice of severity of energy deficit in the country due to shortage of domestic coal and has issued directions to certain generating companies (including TPCL) under Section 11 of the Act. Subsequently, MoP had instituted the Committee to determine a rate/tariff to meet all the prudent costs of using imported coal, including the present coal price, shipping costs and O&M costs etc. and a fair margin, which is subject to review every 15 days considering the volatility in the price of coal and shipping costs, etc.

21. However, the Petitioner has asserted that the rate/tariff determined by the Committee is inadequate towards the rate/compensation at which the Petitioner can supply power to the procurers and it is liable to be compensated for actual cost of generation in addition to reasonable return subject to prudence check. According to

the Petitioner, at the current prevailing price of coal, the provisional rate of tariff/compensation works out to Rs. 9.11/kWh, which is subject to further revisions as necessary. TPCL while determining the per unit rate of Rs. 9.11/kWh has included factors such as total landed cost of coal procurement, fixed capacity charges of Rs.0.90/kWh as per the PPA and the norms of the this Commission. In this regard, the Petitioner has also placed reliance on the supporting calculations submitted by it in the Annexure P-6 to the Petition. The Petitioner has also placed the reliance on the decision of Appellate Tribunal for Electricity (APTEL) dated 23.5.2014 passed in Appeal Nos. 37 of 2013 and 303 of 2013 in the case of “*GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors.*” and has submitted that in the said judgment, the APTEL has held that only the Appropriate Commission has the power to offset the adverse financial impact of directions issued by the government under Section 11(2) of the Act. Further, as per APTEL, the compensation to be granted to the generating company under Section 11(2) of the Act is to be based on the actual cost of generation (including reasonable return on equity) of power from the generation project.

22. We have considered the submissions made by the parties in their pleadings and also during the course of hearings. As noted above, in terms of Section 11(2) of the Act, this Commission has been entrusted with the responsibility for offsetting of adverse financial impact caused to the generating company as a consequence of a direction given by the Appropriate Government under Section 11(1) of the Act. In the instant case, such direction issued by the MoP under Section 11(1) of the Act on 5.5.2022, *inter alia*, also provides for a Committee constituted by MoP to work out the benchmark rate at which the power is to be supplied to the PPA holders and such rate is to be worked out to meet all the prudent costs of using imported coal for generating

power, including present coal price, shipping costs, O & M costs, etc. and a fair margin, which is to be reviewed every 15 days. Further, the direction also provides that the PPA holders shall have an option to make payment to the generating company according to the benchmark rate worked out by the Committee or at a mutually negotiated with the generating company. Accordingly, the MoP vide its communication dated 13.5.2022 has forwarded the recommendations of the Committee as regards the tariff/compensation for imported coal based plants including the Petitioner's Project. However, it is the case of the Petitioner that such tariff/compensation as determined by the Committee is inadequate towards supply of power to procurers and does not correctly provide for complete pass through of costs of using imported coal for generating power, shipping costs and O&M costs, etc. and accordingly, has approached this Commission invoking the remedy available under Section 11(2) of the Act which enjoins upon this Commission to examine and offset the adverse financial impact to the generating company for the supply of power in terms of the directions issued by MoP under Section 11(1) of the Act.

23. Insofar as the interim prayers made by the Petitioner including the direction to the Respondents to make the payment for the supply of power at the provisional rate of Rs.9.11/kWh, the learned senior counsel for the Petitioner during the course of hearing on 7.6.2022 fairly submitted that the Petitioner is no longer praying for the interim reliefs as made out in the Petition and sought to appropriately mould the interim reliefs in terms of the subsequent development and the clarifications issued by the MoP. As already captured above, the learned counsel, in lieu of the interim reliefs made out in the Petition, prayed for (i) direction that for supply of power by the Petitioner under Section 11 of the Act, the parties will be governed by the provisions

of the said Section and not by the terms and conditions of the PPA or the draft SPPA, which is still under negotiation and yet to be executed, (ii) direction to Respondents to make the payments for supply of power by the Petitioner in terms of the benchmark rates notified by the Committee without any further deductions thereto (in reference to the deductions made by GUVNL towards rebate & fixed charges) and (iii) direction to the Respondents either to pay for supply of power in advance or to open the LC for such supply considering the rates as worked out by the Committee. *Per contra*, the learned counsel for the GUVNL submitted that the deductions made by the Respondents are in terms of the direction issued by the MoP and the recommendations of the Committee and that the Respondent is complying with the said direction. The learned counsel for the Respondent, MSEDCL also adopted the submissions made by the learned counsel for GUVNL. However, upon the query of the Commission, it was informed by MSEDCL that they were yet to pay the invoices for supply of power by the Petitioner under Section 11(1) of the Act. Whereas, the learned counsel for the Respondents 2, 7 & 8 submitted that they have not scheduled/availed any supply from the Petitioner in terms of the direction issued under Section 11 of the Act and accordingly, the Commission may clarify that the interim reliefs/directions, if any, allowed to the Petitioner would not apply to the Respondents.

24. We have considered the submissions made by the parties. Since the Petitioner is no longer insisting upon/ praying for the interim reliefs as prayed in the Petition, the question of granting such reliefs is no longer relevant. The Commission also notes that the Petitioner and the Respondents have now acted upon the direction issued by the MoP inasmuch as the Petitioner has started supplying the power to the Procurers (barring the Procurers which are not availing such supply from the Petitioner under Section 11 of the Act) and the Procurers (as stated presently only GUVNL) are making

payment as per the tariff/ rate worked out by the Committee constituted in terms of direction of MoP dated 5.5.2022. Accordingly, till the time the Commission examines the claims of the Petitioner under Section 11(2) of the Act in the present case, the parties are directed to comply with the direction issued by MoP dated 5.5.2022 along with subsequent clarifications issued by MoP in letter and spirit.

25. Accordingly, the present Petition is admitted. The Respondents are directed to file their reply on merits, to the Petition and information/details to be submitted by the Petitioner, within two weeks with copy to the Petitioner who may file its rejoinder, if any, within two weeks thereafter.

26. The Petitioner is directed to submit the information/details on affidavit within a week as per Annexure attached to this order.

27. The Petition shall be listed for hearing in due course for which separate notice will be issued.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

Annexure

A] Details of Coal received - Shipment -wise

Sr No	Vessel Name	Vessel Invoice date/Bill of Lading date	Vessel Qty (MT)	GCV AT LOAD PORT kCal/kg	GCV at Discharge/Mundra Port kCal/kg	TM %	Ash %	Sulphur %	FOB Cost in [USD/MT]	Other Charges [USD/MT]	Ocean Freight [USD/MT]	Insurance [USD/MT]	Total CIF Value [USD/MT]	Exchange rate & its basis [USD to INR]	Total CIF Value [INR/MT]	Port/Fuel Handling Charges [INR/MT]	Transit Loss % - Actuals	Accounted for in Coal stores Ledger on date

NOTE:

- GCV at Load Port and Discharge Port to be supported by CERTIFICATE OF ANALYSIS.
- In case of Ocean Freight and Port Handling charges breakup depicting Fixed and escalable component, if any.

B] Consumption and Other Details

Sr No	Week		Generation achieved [Mus]	Generation Supplied [Mus]			Sold at Exchange [Mus]	Sale value in Rs/kWh	Energy Charge Rate - Rs/kWh	Coal Quantity Consumed in MT	GCV of coal consumed - kCal/kg	Technical Particulars as achieved		Weighted Average Price of Coal for ECR in Rs/MT
	From	To		Gujarat	Maharashtra	Others (details)						Gross Station Heat Rate [kCal/kWh]	Auxiliary Consumption %	
1	06-05-2022	12-05-2022												
2	13-05-2022	19-05-2022												
3	20-05-2022	26-05-2022												
4	27-05-2022	02-06-2022												
5	03-06-2022	09-06-2022												
6	10-06-2022	16-06-2022												

NOTE:

- In case Coal consumed is by way of blending for the purpose of generation achieved in that case details of each such coal GCV and its quantity used be provided.

C] Detailed computation of Mining Profit to the extent of share of ownership in Mines and its weekly allocation in case of above weeks. Submit copy of letter dated 12.5.2022 shared with GUVNL.

D] Stores Priced Ledger (Coal) as on 5.5.2022 [more precisely before supplies started under Section 11 of the Act] indicating opening quantity available in stock, its weighted average GCV and its weighted average price.

All above information be provided duly audited by an Auditor. Indicate status of opening of LCs by procurers as per directions issued under Section 11 of the Act by MoP.