

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Interlocutory Application No. 50/2022**

**Petition No. 128/MP/2022**

**Coram:**

**Shri I.S. Jha, Member**

**Shri Arun Goyal, Member**

**Shri P. K. Singh, Member**

**Date of order: 13<sup>th</sup> September 2022**

**In the matter of:**

Application under Section 94(2) of the Electricity Act, 2003 seeking urgent directions for compliance of order dated 17.6.2022 passed by the Commission

**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 Sajan Poovayya, Sr. Advocate, TPCL  
Shri Hemant Sahai, Advocate, TPTCL  
Shri Shreshth Sharma, Advocate, TPCL  
Ms. Nehul Sharma, Advocate, TPCL  
Shri M. G. Ramachandran, Sr. Advocate, GUVNL  
Shri Anand Ganesan, Advocate, GUVNL  
Ms. Swapna Seshadri, Advocate, GUVNL  
Ms. Srishti Khindaria, Advocate, GUVNL  
Shri Sanjay Mathur, 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  
Ms. Shikha Sood, Advocate, HPPC and PSPCL  
Shri G. Saikumar, Advocate, MSEDCL

Shri Rahul Sinha, Advocate, MSEDCL  
Shri Saahil Sood, Advocate, MSEDCL  
Ms. Nikita Choukse, Advocate, MSEDCL  
Shri Ishan Kumawat, Advocate, Rajasthan Utilities

## ORDER

M/s Tata Power Company Limited (hereinafter, "Petitioner/TPCL") has filed the Petition No. 128/MP/2022 under Section 11(2) read with Section 79 of the Electricity Act, 2003 (hereinafter, "the Act"), *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 the directions issued by Ministry of Power, Government of India (Respondent No.9) under Section 11(1) of the Act ("Section 11 directions") and a declaration/direction with regard to the rate/compensation at which such supply of power to Respondent Nos. 1 to 8 for the period between 6.5.2022 to 31.10.2022 is to be made.

2. In the said Petition, the Petitioner had made the following prayers for interim relief:

*"(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 5.5.2022 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 5.5.2022, issued by Respondent No. 9;*

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

3. After considering the detailed submissions advanced on behalf of the Petitioner and the Respondents, the Commission vide order dated 17.6.2022 passed the following directions (hereinafter, "Interim Order") with regard to the interim prayers made in the Petition:

*"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."*

4. The Petitioner has filed the Interlocutory Application No.50/2022 alleging that the Respondents No. 1 to 8 are not complying with and are in contravention of the directions issued by the Commission vide order dated 17.6.2022 under which the parties were directed to comply with the directions issued by MoP dated 5.5.2022 along with subsequent clarifications. The Petitioner has submitted that the Petitioner has acted bona fide and performed its part of the obligations; however, the Respondents have indulged in wilful and deliberate non-compliance of the express and unequivocal directions issued by virtue of the interim order. The Petitioner has submitted that it has made sincere efforts to mitigate the effects of substantial increase in the HBA derived coal prices to provide low cost coal benefits to the procurers during the currency of the Section 11 directions by importing coal from the countries other than Indonesia at spot prices on opportunistic basis to mitigate the cost of coal in the interest of the consumers, even though the Petitioner has the default obligations to offtake coal from PT Kaltim Prima Coal (KPC).

5. The Petitioner made the following allegations with regards to violation and non-compliance of the interim order of the Commission dated 17.6.2022 by Respondent Nos.1 to 8:

(a) GUVNL has made payment for invoices raised for the first three weeks (6.5.2022 to 27.5.2022) after unilaterally applying a rebate of 2.15% to 2.25% (as per the terms of PPA) and thereafter started payment on the fifth day after receipt of invoice reducing a rebate of 2.25% (as per terms of the PPA).

(b) Despite the Section 11 directions and the Clarifications issued by the MoP being clear that fixed charges are to be as per the PPA or as has been mutually agreed between the parties, GUVNL and MSEDCL are illegally deducting an

amount of INR 0.20/kWh from the fixed charges which is outside the ambit of the Section 11 directions.

- (c) While making payments towards the fixed charges, GUVNL has also been capping the fixed charge at normative availability, i.e. 80% of the capacity of the Petitioner's plant.
- (d) The Respondent Nos. 1 to 8 have failed to maintain LC commensurate to the rates determined by the Committee in compliance with the clarification dated 20.5.2022 issued by the MoP, and also taken note of by the Commission in the Interim Order.
- (e) Despite the provision of weekly payments as per the Section 11 directions, GUVNL has paid at the end of month for first 3 weeks and thereafter started making payments on fifth day after receipt of weekly invoice, while MSEDCL has been making payments on ad-hoc basis. Respondents No. 2 & 4 to 8 have not made any payments in lieu of fixed capacity charge for the power being scheduled to them by the Petitioner in terms of the Section 11 directions/Clarifications.
- (f) Partial and non-payment by Respondent Nos. 1 to 8 for power, supplied in terms of the Directions, has severely prejudiced the financial condition of the Petitioner, thereby grossly impacting the Petitioner's ability to meet its obligations under the Directions to maintain its coal stores and continuous supply of power. The outstanding amounts payable by Respondent Nos. 1 to 8 are demarcated hereinbelow for ready reference of the Commission:

(a) GUVNL (Respondent No.1)– INR 79.46 crore

- (b) PSPCL (Respondent No.2) – INR 30.4 crore
- (c) MSEDCL (Respondent No.3)– INR 134.8 crore
- (d) RUVNL (Respondent Nos.4,5 &6)– INR 24.3 crore
- (e) HPPC (Respondent Nos.7 &8) – INR 24.3 crore

6. The Petitioner has made the following prayers in the I.A.:

*“(a) Hold and declare that the action(s) of the Respondent Nos. 1 to 8 are in conflict with the Directions and the Interim Order and consequently, direct Respondent Nos. 1 to 8 to immediately comply (without any further delay) with the Interim Order dated 17.6.2022 passed by this Hon’ble Commission in the present proceedings and make all such payment along with carrying cost;*

*(b) Issue appropriate direction(s) to Respondent Nos. 1 to 8 to forthwith release the outstanding amount as per the invoices raised alongwith interest for the power supplied pursuant to Directions under Section 11.”*

7. The matter was heard through virtual mode on 28.7.2022. The Commission directed the Respondents to file their replies to the I.A. and the Petitioner to file its rejoinders thereto. Replies to the IA have been filed by all Respondents and Rejoinders to the replies have been filed by the Petitioner.

8. Gist of the replies of the replies of the Respondents are discussed in brief in the succeeding paragraphs.

**(A) Reply of Gujrat Urja Vikas Nigam Ltd (Respondent No.1):**

9. GUVNL through its reply to the IA has put forth the following objections and responses:

(a) GUVNL has been making payments of Energy Charges to the Petitioner in terms of the decision of the Committee appointed by the Central Government in pursuance to the policy decision taken by the Central Government in the order dated 5.5.2022 under Section 11 of the Act and subsequent clarifications issued by the Ministry of Power. In so far as fixed charges are concerned, GUVNL has been paying the same as it was making payment of fixed charges

for supply of electricity since January 2022. There have been no specific directions either in the decision of the Central Government under Section 11 directions or the Committee's decision or in the order dated 17.6.2022 passed by the Commission to pay the fixed charges in a different or varied manner. The Commission in its order dated 17.6.2022 only directed the Respondents to comply with the directions issued by the Central Government/Committee till final decision on the petition and the same has been complied with by GUVNL.

(b) As per paragraph 24 of the Interim Order, this Hon'ble Commission has itself noted that the procurers (including GUVNL) have been making payments as per the tariff worked out by the Committee/ Directions issued by the MoP and as such, the allegations made by Tata Power are wrong. Further, Tata Power had itself given up the alleged claim for interim prayers as set out in the Petition and it was decided that the matter be fixed for final hearing. Therefore, there is lack of bonafide on the part of Tata Power in filing the present Application and seeking interim orders instead of proceeding with the final hearing.

(c) Considering that Tata Power is procuring coal from PT Kaltim Prima Coal (hereinafter, "**KPC**") and has been in a position to have long-term arrangements and the ability to procure coal at the most competitive price, the ceiling price should be the published indices which represent the average price of coal on export from Indonesia of all nature, short term, long term, spot etc. As such, there exists no reason for supply of coal by the Indonesia Coal companies at higher market price of coal.

(d) GUVNL has been validly deducting INR 0.20/kWh from the fixed costs of Tata Power. Considering that in terms of clarification dated 20.05.2022, the fixed



charges are to payable in terms of the PPAs or '*as has been already agreed mutually*', the reduction of INR 0.20/kWh had already been agreed between the parties. In this regard, reliance has been placed by GUVNL on the HPC Report, Government Resolutions dated 01.12.2018 and 12.6.2020 and various Minutes of Meetings held under the aegis of MoP for execution of the draft SPPA.

- (e) GUVNL is processing the weekly invoices considering the energy charges as notified by the MoP from time to time and Capacity Charges upto Normative Availability as per Schedule 7 of the PPA are recovered on achievement of cumulative normative availability. Tata Power is wrongly claiming capacity charge on full declared capacity without restricting it up to normative availability. Ministry of Power vide its letter dated 7.6.2022 has clarified that "no penalty will be imposed by the procurers, if the plant is available in terms of this Ministry's direction under Section 11 dated 5.5.2022 as per the normative availability mentioned in the PPA". Tata Power cannot on one hand claim that the PPA is not applicable with regard to normative availability and on the other hand claim applicability of the PPA with regard to payment of fixed charges, tariff etc.
- (f) As regards rebate, MoP vide Clarification dated 20.5.2022 and in continuation to Section 11 Directions and notification dated 13.5.2022 has stipulated that if payment is made within 5 days of presentation of weekly bill, then rebate of 0.375% on weekly basis as per CERC norms or as per PPA whichever is higher shall be applicable. Further, Article 11.3.5 of the PPA states that rebate of 2.25% would be applicable if payment of bill raised is made within 1 day, with a reduction of 0.05% for each subsequent day till five days. As per CERC (Terms and Conditions for Tariff) Regulations 2019 a rebate of 1.5% shall be

allowed if payment is paid within 5 days. Therefore, the rebate being higher as per terms of PPA, GUVNL is entitled to the same as per the clarification dated 20.5.2022. Further since Tata Power would receive their payments earlier than under the PPA (weekly instead of monthly) thus GUVNL should be entitled to additional rebate at the rate of 0.05% per day for each day of early/advance payment of weekly bills as per Article 11.3.5. Presently GUVNL has been making advance payment to Tata Power against their request and availing 0.05% additional rebate for each day of early payment as against the date of payment under PPA.

(g) GUVNL is maintaining letter of credit in line with the clarification dated 20.5.2022 of Ministry of Power and as per Clause 11.4 of the PPA and is making timely and complete payments towards invoices raised by Tata Power in accordance with PPA/directives/guidelines and there are no outstanding payments to Tata Power. However, Tata Power has not shared/passed any profit/gain received from selling power at Power Exchange to GUVNL and appropriate directions be issued by the Commission to Tata Power.

**(B) Reply of Punjab State Power Corporation Ltd. (PSPCL) (Respondent No.2)**

10. PSPCL in its reply to the IA has submitted as under:

(a) PSPCL has filed a substantive Petition (being Petition No. 85/MP/2022) against TPCL, seeking performance of obligations under the Power Purchase Agreement dated 22.4.2007 and the same may be heard along with the present Petition. The relief as prayed for by the Petitioner in the present Petition are misplaced and liable to be rejected in terms of the pleadings as filed through Petition No. 85/MP/2022.

(b) The rights and obligations of Tata Power and PSPCL are governed by the provisions of the Power Purchase Agreement dated 22.4.2007. The pre-condition for issue of directions under Section 11(1) of the Act is the existence of extraordinary situation where there is a need for the generating station to utilise its available generating capacity and such directions cannot be issued to rewrite or modify the terms of the PPA or compel the procurer to procure power at a price above the contracted price.

(c) PSPCL has submitted that as per para 4(b) of letter dated 5.5.2022 issuing directions under Section 11(1) of the Act, the right of supply in the first instance is given to the existing PPA holders and if the Procurer does not schedule as per the PPA, it is open to the generator to offer the quantum to others. There are no mandatory directions for the PPA holders to necessarily schedule power under the MoP directions under Section 11(1) or by failing to do so pay the deemed fixed charges.

(d) Para 4(f) of the letter dated 5.5.2022 issued by MoP provides for an option to the PPA holders to make payment to the generating company according to benchmark rate worked out by the Group or at a rate mutually negotiated with the generating company. If the PPA holder decides that it is not conducive to procure power at benchmark price and there is no mutual agreement on the price, then the generating company can offer the quantum of power to other procurers or sell it at power exchange. If the generator is not able to fetch the price from the power exchange transaction, there is no compulsion for the generator to necessarily generate and inject power into the grid. Section 11 directions do not provide for any obligation to pay the deemed fixed charges for the capacity which the PPA

holder has expressly decided not to avail. PSPCL has submitted that the directions in letter dated 13.5.2022 that the “fixed charge will be as per the power purchase agreements or as has already been agreed mutually between the Generating Company and Procurers” can only be applicable if the option is exercised by the Procurer to avail power under Section 11 directions. PSPCL has neither consented nor in any way conceded to off-take power under Section 11 dispensation from Tata Power and therefore, the claims raised by Tata Power against PSPCL in respect of non-payment of Rs. 30.4 crores as fixed charges are completely baseless.

(e) As per the clarification dated 20.5.2022 issued by MoP, LC has to be maintained only by the Procurers who opt for requisitioning power from Tata Power under Section 11 dispensation and the consequence of non-maintenance of LC by any procurer is limited to the sale of power of such procurer in the power exchange. As PSPCL is not willing to procure power under Section 11 dispensation, there can be no compulsion or requirement to maintain any LC in respect thereof.

**(C) Reply of Maharashtra State Electricity Distribution Company Limited (MSEDCL) (Respondent No.3):**

11. MSEDCL in its reply has put forth the following objections and responses on the grounds and reliefs prayed by the Petitioner in the IA:

(a) MoP, GoI vide Notification dated 13.5.2022 has laid down that “fixed charge will be as per the Power Purchase Agreements or has been already agreed mutually between the generating company and procurers”. The Petitioner had given offer to MSEDCL vide its letter dated 30.3.2022 and proposed to supply power at fixed charge of Rs.0.70/kWh. MSEDCL had accepted the said offer vide its letter dated

10.4.2022 and accordingly, Tata Power had started its supply of electricity from April 2022 till 25.6.2022. Tata Power and MSEDCL have mutually agreed to fixed charge of Rs. 0.70/kWh and accordingly, MSEDCL has paid to Tata Power as per MoP directions.

(b) MoP directions have mentioned that fixed charges are payable in such cases where power is scheduled by the procurer under Section 11 of the Act. Where power is not scheduled by the procurer, MoP directions dated 5.5.2022 provide that such powers would be sold by the generator in the power exchange and net profit would be shared with the procurer in the ratio of 50:50. In the absence of consent from the procurer for scheduling of power under Section 11 of the Act, there is no specific directives regarding payment of fixed by the procurer who is not procuring power. Since MSEDCL does not give consent to procure power as per Section 11 rates/directives, it cannot made liable for payment of fixed charges as demanded by CGPL. It is only in case when Tata Power is making power available at the rates provided in the PPA dated 22.4.2007 that MSEDCL will be liable for payment of fixed charges. Since Tata Power is not making power available as per PPA rates, MSEDCL is not liable for making payment of fixed charges to Tata Power.

(c) As per MoP notification dated 20.5.2022, LC is to be maintained by the Procurer for the contracted power purchased as per the PPA. Considering the PPA provisions that LC is to be provided for an amount equal to 1.1 times of average monthly tariff payment of the previous year, MSEDCL based on the average monthly payment for the year 2021-22 has maintained LC amounting to Rs.19.66

Crs in favour of Tata Power valid upto 31.3.2023. Accordingly, MSEDCL has complied with MoP directives regarding LC.

(d) MSEDCL has made payments towards weekly bills as per the energy charge rates notified by MoP from time to time and fixed charges as per mutually agreed rate of Rs.0.70/kWh for the period 6.5.2022 to 25.6.2022 during which power was scheduled to MSEDCL. MSEDCL has informed Tata Power vide its letter dated 25.7.2022 that considering the adjustment of past due amount, all weekly bills raised by Tata Power stand paid.

**(D) Reply of Rajasthan Urja Vikas Nigam Limited (on behalf of Respondent Nos. 4, 5 & 6)**

12. Rajasthan Urja Vikas Nigam Limited (RUVNL) on behalf of Ajmer Vidyut Vitran Nigam Ltd, Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Nigam Limited has submitted that as per para 4 of the Letter dated 5.5.2022 and Subsequent Clarification dated 20.5.2022, the Discoms have the option to buy power at tariff to be determined by the Committee constituted by MoP. Tata Power under the present petition is disputing the notification dated 5.5.2022 issued by MoP along with subsequent clarifications while through the IA, it is seeking direction to the Respondents for purchasing power from its plant at an interim tariff which is subject to change pursuant to the outcome of the petition. Thus, the Respondent discoms are being forced to purchase power without knowing the financial liability they would be incurring. RUVNL has submitted that there can be no mandate compelling the procurers to procure power from Tata Power at the tariff terms and conditions other than those specified in the PPA dated 22.4.2007. The Section 11 directions only direct the generating company to first offer the power to the PPA holders and the threshold criteria for applicability of Section 11 directions is the procurer consenting to the terms and

conditions contend therein. Since RUVNL is not availing power under Section 11 dispensation, there can be no liability on RUVNL under the terms contained therein. For the same reason, no LC has been opened as per MoP directions.

**(E) Reply of Haryana Utilities (Respondent No. 7 & 8)**

13. Haryana Utilities have submitted the following reply to the grounds and reliefs prayed for in the IA:

(a) Haryana Utilities have filed a substantive petition being Petition No. 123/MP/2022 as to the wilful, deliberate and consistent breach on the part of Tata Power in fulfilment of its obligations under PPA dated 22.4.2007 related to non-declaration of non-availability of contacted capacity of 380 MW to Haryana Utilities. The pleadings in the said petition would show that reliefs sought by Tata Power is misplaced and liable to be rejected.

(b) The Commission has specifically recognized in its order dated 17.6.2022 that supply of power has commenced only with respect to some of the procurers and therefore, the directions of the Commission are applicable only to the procurers who were procuring power at the relevant time when Section 11 dispensation payment operation and those who were desirous of sourcing power as per the terms and conditions contained in the Section 11 directions. Since Haryana Utilities have not availed any power pursuant to the directions of the MoP, there can be no question of Haryana Utilities acting in conflict of the interim order of the Commission and/or the MoP directions. The Section 11 direction cannot be construed in a manner so as to compel the Haryana Utilities to procurer power from Tata Power at the tariff, terms and conditions in deviation from the PPA or in the alternative, pay the capacity charges in respect thereof. Accordingly, the

claims raised by Tata Power against Haryana Utilities in respect of non-payment of Rs. 24.3 crore towards capacity charges is completely baseless as no power was scheduled by the Haryana Utilities for the relevant period.

(c) In terms of the clarifications dated 20.5.2022 issued by MoP, LC has to be maintained only by the procurers who opt for requisitioning of power from Tata Power under Section 11 dispensation. Further, the consequence of such non-maintenance of LC by any procurer is limited to the sale of power such procurer in the power exchange. Since Haryana Utilities have not been willing to buy power under Section 11 directions, there can be no compulsion or requirement to maintain any LC in respect thereof.

### **Rejoinder by Tata Power to the Replies of the Respondents**

14. In response to the reply of GUVNL, the Petitioner has submitted that GUVNL is misinterpreting the submission advanced during the hearing dated 7.6.2022 wherein it was stated that the Petitioner is seeking direction to the Respondents including GUVNL to make the payments for supply of power by the Petitioner in terms of the benchmark rates notified by the Committee constituted in terms of the directions without further deductions thereto, pending finalization of rate/compensation by the Commission under Section 11(2) of the Act. While the Petitioner's commitment to supply power under Section 11 directions is exhibited by the fact that the Petitioner is declaring the full capacity and is supplying power to GUVNL as per the contracted capacity, GUVNL's conduct of making unilateral, arbitrary and unjustifiable deduction is in the teeth of the Section 11 directions and the interim order passed by the Commission. Secondly, the allegation of GUVNL regarding the Petitioner raising extraneous issues in the IA, the Petitioner has submitted that GUVNL has made



ostensible deductions in absolute defiance of the directions passed by the Commission in the interim order which necessitated filing of the IA warranting interference by this Commission. Thirdly, GUVNL's reliance on the Notification dated 13.5.2022 issued by MoP and its contention that the deduction in fixed charges is on account of lenders' sacrifice is completely inadmissible, considering that the same formed part of the terms and conditions under the SPPA which is at the stage of negotiation and has not been executed till date. Further, GUVNL's reliance on the unexecuted terms of the SPPA ought to be rejected particularly when the terms of the agreement specified that it would come into force only upon its execution. Fourthly, GUVNL's reliance on the HPC report, Government Resolution dated 5.12.2018 and Minutes of the Meeting dated 17.3.2022 is selective and completely misplaced as they pertained to issue of guidelines and negotiations for execution of the SPPA which is yet to be signed. Fifthly, reliance by GUVNL to the generation and supply of power during the period prior to issuance of Section 11 directions by MoP is completely misplaced as it was part of reconciliatory efforts under the aegis of MoP. The generation and supply of power in terms of and during the currency of Section 11 directions and subsequent clarification is independent of the PPA, unexecuted SPPA and the reconciliatory efforts being undertaken under the aegis of MoP. Sixthly, the generation and supply of power is being done in terms of Section 11 directions whereunder the Petitioner has been directed to operate its plant at full capacity. Therefore, it is imperative that the capacity charges cannot be kept upto normal availability that is 80% and should be paid for the full capacity. Seventhly, as regards the deduction on account of rebate, GUVNL has wrongly referred and relied upon the provisions of the PPA. Since generation and supply of power under Section 11 directions is beyond the scope of the PPA and considering that the PPA does not

provide for payment on weekly basis, it would be unjust to apply the same parameters on the payments to be made on weekly basis. Lastly, GUVNL has failed to institute the LC for an amount commensurate to the rate determined by the Committee. Considering that LC is now the primary source of payment for procurement of power in terms of the directions, it is imperative that GUVNL must institute LC for the requisite quantum of INR 903 crore for the period of one month and INR 210.8 crore for the period of one week being commensurate to the rate determined by the Committee.

15. The Petitioner in response to the reply of PSPCL has submitted the rejoinder as under: -

(a) The scope of the present petition along with the IA is different from Petition No. 85/MP/2022 filed by PSPCL seeking specific performance of the obligations under the PPA. The scope of the present petition is limited to the extent of determination of appropriate compensation for offsetting of adverse financial impact caused to the petitioner owing to the issuance of direction under Section 11 of the Act. Further, the scope of the present interim application is to seek urgent direction for compliance of the interim order. Therefore, PSPCL cannot be allowed to make any claim for specific performance of obligations under the PPA during the adjudication of the captioned petition along with the IA.

(b) The allegation of PSPCL that the Commission's order dated 17.6.2022 does not apply to it as the said order created a distinction in favour of PSPCL after noting its submission is misconceived since the Commission through the interim order has consciously instructed all the parties to comply with the directions/clarifications issued by MoP in letter and spirit.

(c) By way of clarification dated 13.5.2022, MoP has clarified that the fixed charges for supply of power under Section 11 directions would be in terms of the PPA or as has been mutually agreed between the parties. Considering that obligations as regards the fixed charges remains within the purview of the PPA, such charges have been billed to PSPCL accordingly.

(d) The contention of PSPCL that it is not liable to pay the capacity charges when it has not consented to the supply of power from the Petitioner is incorrect and based on a false understanding of the directions. Section 11 directions provide that the power in terms thereof is to be offered to the PPA holders (being the procurers) at the first instance. In terms of the said directions, the Petitioner is required to generate and operate at full capacity and offer to supply powers to PPA holders. In furtherance of the said directions, the Petitioner was ready to schedule power to the procurers with effect from 25.5.2022 which is evident from the Regional Energy Account of the Petitioner. The provisions under the Section 11 directions/clarifications make it clear that in the absence of the procurer not scheduling power despite the plant being available, the generator may sell such unscheduled power on the power exchange and hence capacity charges are payable in such cases.

(e) As regards PSPCL's contention that the directions passed by the Commission in the interim order are applicable only on the procurers which were scheduling power at the relevant time when the directions came into operation, the Petitioner has submitted that a plain reading of the interim order passed by the Commission does not exclude any of the procurers.

(f) As regards the contention that LC has to be maintained only by the procurers who opt for requisitioning power from the petitioner under Section 11 directions/clarifications, the Petitioner has submitted that MoP through its clarification dated 20.5.2022 has clarified that LC has to be maintained by the procurers for the purchase of the contracted capacity.

(g)As regards the contention of PSPCL that the Commission's interim order dated 17.6.2022 does not apply to it since the said order has created a specific distinction in favour of PSPCL after noting its submission that it is not procuring power under Section 11 directions, the Petitioner has submitted that the interim order after taking into account the submissions of PSPCL has consciously instructed all parties to the petition to comply with the directions in letter and spirit.

16. The Petitioner in its rejoinder to the reply of the MSEDCL has submitted as under:

(a)MSEDCL's contention that the deduction in fixed charges on account of a prior arrangement between the parties is completely inadmissible, considering that deduction of INR 0.20/kWh formed part of the terms and conditions under the SPPA to be executed between the Petitioner and MSEDCL which has not been executed till date and is pending negotiations. The fixed charges payable by MSEDCL are to be computed in accordance with the method and principles set out in the PPA.

(b) As regards the contention that MSEDCL would not be liable to pay fixed charges in the absence of its consent for procurement of power under Section 11 directions, the Petitioner has submitted that Section 11 directions provides that the

power in terms thereof is to be offered to the PPA holders (being the procurers) at the first instance. In terms of the said directions, the Petitioner is required to generate and operate at full capacity and offer to supply powers to PPA holders. In furtherance of the said directions, the Petitioner was ready to schedule power to the procurers with effect from 25.5.2022 which is evident from the Regional Energy Account of the Petitioner. The provisions under the Section 11 directions/clarifications make it clear that in the absence of the procurer not scheduling power despite the plant being available, the generator may sell such unscheduled power on the power exchange and hence, capacity charges are payable in such cases.

(c) Contrary to the clarifications as issued by MoP, the quantum of LC as instituted by MSEDCL is to the tune of INR 19.66 Cr, which is in consonance with the PPA tariff. However, considering that in the interim, the Petitioner is liable to be paid benchmark rates as per the PPA, it is imperative that MSEDCL increase the quantum of LC to INR 380.30 Cr for the month and INR 88.74 Cr for the week, which is commensurate to the rate determined by the Committee.

(d) In complete abdication of the Section 11 directions by MoP as well as the interim order, MSEDCL has failed to make payments on a weekly basis to the Petitioner and has made partial payments on ad hoc basis.

(e) Contrary to the claims of MSEDCL that all weekly bills stand paid, the Petitioner has submitted that as on 28.7.2022, INR 129 crores is due to be paid to the Petitioner for supply in terms of MoP directions.

17. The Petitioner has submitted the following in response to the reply filed by RUVNL on behalf of Respondent Nos. 4, 5 and 6:

(a)As regards the maintainability of the IA, the Petitioner has submitted that it had modulated its interim prayers seeking a direction to the procurers to make complete payments for supply of power by the Petitioner in terms of the benchmark rates notified by the Committee constituted in terms of MoP directions dated 5.5.2022 without any further deductions. The Commission after noting the submission of the Petitioner and the Respondents had directed through the interim order dated 17.6.2022 to comply with the directions issued by MoP dated 5.5.2022 along with subsequent clarifications in letter and spirit. Since the Respondents have indulged in wilful and deliberate non-compliance with the express and unequivocal directions through the interim order, the Petitioner was constrained to approach the Commission by virtue of the IA.

(b) Generation and supply of power in terms of the directions issued under Section 11 of the Act is independent of the provisions of the PPA. It is a settled position that supply of power under Section 11 (1) of the Act is subject to restitutive principles enshrined under Section 11 (2) of the Act. This position has been reiterated by the APTEL in its decision dated 23.5.2014 passed in Appeal Nos. 37 of 2013 and 303 of 2013 titled “GMR Energy Limited Vs. Karnataka Electricity Regulatory Commission & Ors.”.

(c)The directions under Section 11 provides that the power is to be offered to the PPA holders being the procurers at the first instance. It is in consonance with the said order that the Petitioner has offered to supply power to PPA holders including Rajasthan Utilities. However, Rajasthan utilities have not availed of the supply of

power under Section 11 directions. Further, Rajasthan Utilities cannot be allowed to offtake power from the Petitioner under Section 11 directions on the one hand while on the other hand seek from the Petitioner the supply of same power in terms of the PPA.

(d) The directions/clarifications clearly state that the fixed charges will be as per the Power Purchase Agreements or are has been agreed mutually between the generating company and procurers. Further, in terms of the clarification dated 20.5.2022, the Petitioner was compulsorily obliged to make its plant available and schedule power to the procurers. In furtherance of the same, the Petitioner was ready to schedule capacity to Rajasthan Utilities w.e.f. 25.5.2022. Considering the obligations as regards the fixed charges remain within the purview of PPA, such charges have been billed to Rajasthan Utilities which are bound to be paid even in case Rajasthan Utilities do not procure power from the Petitioner.

(e) Rajasthan Utilities have failed to institute LC for an amount commensurate to the rate determined by the Committee/actual ECR as proposed by the Petitioner. Rajasthan Utilities must institute LC for the requisite quantum of INR 190 crore for one-month period and INR 44.37 for one-week period being commensurate to the rate determined by the Committee.

(f) The Directions and Clarifications issued by MoP stipulated that payment for the power generated and supplied in terms of the Directions are to be made on a weekly basis. However, in complete abdication of the Directions by the MoP as well as the Interim Order, Rajasthan Utilities have failed to make any payments towards the invoices raising capacity charges for availability w.e.f. 25.5.2022. towards this end, it may be pertinent to note that due to such inaction of the

Rajasthan Utilities, the cumulative outstanding in terms of the Directions issued under Section 11 of the Act is to the tune of INR 56 Cr.

18. The Petitioner has filed the following as rejoinder to the reply of Haryana Utilities:

(a) As regards the contention that HPPC has filed a substantive Petition (Petition No.123/MP/2022) seeking specific performance of the obligations under the PPA, the Petitioner has submitted that the scope of the present petition is different from the Petition filed by Haryana Utilities. Further, the IA has been filed for the wilful and deliberate non-compliance of the express and unequivocal directions issued by virtue of the Interim Order.

(b) With regard to HPPC's contention that the interim order dated 17.6.2022 does not apply to it as it is not procuring any power from the Petitioner, the Petitioner has submitted that the interim order of the Commission is applicable equally to all the procurers. The Commission in its interim order has directed the parties to comply with the direction issued by MoP dated 5.4.2022 alongwith subsequent clarifications in letter and spirit.

(c) As regards the liability to pay the capacity charges, the Petitioner has submitted that the generating stations had been directed vide MoP letter dated 5.5.2022 to supply power in the first instance to the PPA holders. By way of clarification dated 13.5.2022, the fixed charges for such supply of power would be in terms of the PPA or as has been mutually agreed between the parties. Further, in terms of clarification dated 20.5.2022, the Petitioner is obliged to make its plant available and schedule power to the procurers. Accordingly, the Petitioner was ready to schedule capacity to HPCC with effect from 20.5.2022. Considering that the



obligation as regards the fixed charges remains within the purview of the PPA, such charges have been billed to HPPC which is bound to pay the same even in case it does not procure power from the Petitioner.

(d) As regards HPPC's contention that the Petitioner has failed to offer un-requisitioned power to other procurers or sell it on power exchange, the Petitioner has submitted that it wrote letters dated 7.5.2022, 15.5.2022, 18.5.2022 and 20.5.2022 and requested HPPC to convey its consent to offtake power in terms of the directions/clarifications issued by MoP. Thereafter the Petitioner vide its letter dated 20.5.2022 offered the un-requisitioned capacity to GUVNL. Therefore, the Petitioner has complied with the directions and clarifications in letter and spirit.

(e) As regards opening of LC, the Petitioner has refuted the contention of HPPC that LC has to be maintained only by the procurers who opt for requisitioning power from the Petitioner under Section 11 dispensation and consequence of such non-maintenance of LC by the procurer is limited to the sale of power of such procurer in the power exchange. The Petitioner has submitted that LC has to be opened as per the contracted capacity, and not as per the quantity scheduled by the procurers which is commensurate to the ECR determined by the Committee. The Petitioner has further submitted that LC is required to be furnished towards the dues payable towards the fixed charge due upon HPPC.

### **Hearing of the IA**

19. The IA was heard on 17.8.2022. During the hearing, learned senior counsel for the Petitioner and learned senior counsel for the Respondent Nos. 1, 2, 7 & 8 made detailed submissions on the IA No.50/IA/2022 and reiterated the submissions made in the pleadings. Learned counsel for the Respondent No. 3, MSEDCL adopted the

submission made by the learned senior counsel on behalf of Respondent, GUVNL. Learned counsel for the Respondent Nos. 4 to 7, Rajasthan Utilities also adopted the submissions made by learned senior counsel on behalf of the Respondents, PSPCL and Haryana Utilities. Parties were directed to file their written submissions. The written submissions by the Petitioner and Respondents have been filed.

### **Analysis and Decision**

20. On perusal of the pleadings of the parties and oral submissions made during the hearing, the following issues arise for our consideration:

**Issue No.1: Preliminary Objections with regard to maintainability of the IA.**

**Issue No.2: Whether unilateral deduction of INR 0.20/kWh from the fixed charges by GUVNL and MSEDCL can be sustained in the course of implementation of the Section 11 directions and subsequent clarifications by MoP?**

**Issue No.3: Whether capping of capacity charges at 80% of availability by GUVNL can be sustained in the course of implementation of the Section 11 directions and subsequent clarifications by MoP?**

**Issue No.4: Whether deduction on account of rebate in terms of the PPA is in consonance with the clarification of MoP?**

**Issue No.5: Whether the Respondents have failed to open the letter of credit in terms of Section 11 directions and subsequent clarification by MoP?**

**Issue No. 6: Whether the Procurers who are not scheduling power are liable to pay fixed charges in terms of Section 11 directions and subsequent clarification by MoP?**

**Issue No.7: Reliefs to be granted to the Petitioner on the IA.**

21. The above issues have been discussed in the succeeding paragraphs.

**Issue No. 1: Preliminary Objections with regard to maintainability of the IA**

22. GUVNL has submitted in its written submission that the Commission in its Interim Order dated 17.6.2022 had taken note of the pleas raised by GUVNL against each of

the claims made by the Petitioner, analysed the position and observed in para 24 of the said order that the Petitioner and Respondents have now acted upon the Section 11 directions whereby the Petitioner had started supplying power and the Procurer GUVNL was making payments as per the tariff/rates worked out by the Committee and directed the parties to comply with MoP directions/clarifications in letter and spirit, till the time the Commission examines the claims of the Petitioner under Section 11(2) of the Act. The Petitioner despite being aware of the issues did not choose to seek interim relief in the main petition. The interim reliefs prayed in the main petition were on different aspects which were abandoned by the Petitioner which was recorded in para 23 of the order dated 17.6.2022. Therefore, it is patently erroneous and abuse of process of court on the part of TPCL to file the present Application, when the pleadings in the matter are complete in all aspects and the matter was ripe for final hearing to determine the adverse financial consequences. GUVNL has submitted that the Petitioner cannot be permitted to raise the same claims in the IA when there is no subsequent change or event after the hearing on 7.6.2022. Thus, the present Application is liable to be rejected on principles of res-judicata and constructive res-judicata.

23. The Petitioner has submitted that the reliefs sought by the Petitioner in the IA could not have been sought earlier in the main petition as no deductions were being made by the Respondents at that time. During the hearing on 7.6.2022, the Petitioner had modulated its prayers for interim relief by (a) seeking directions for generation and supply of power by the Petitioner in terms of Section 11 directions and subsequent clarifications; (b) directions to the Respondents procuring and willing to procure power from its plant to make payments in terms of the benchmark rates notified by the Committee in terms of the MoP directions dated 5.5.2022 without any deductions

thereto; and (c) directions to the Respondents to open LC considering the rates worked out by the Committee, pending finalisation of rate/compensation by the Commission under Section 11(2) of the Act. The Petitioner has further submitted that in furtherance of the modulated reliefs prayed by the Petitioner, the Commission directed the parties to comply with Section 11 directions and clarifications issued by MoP in letter and spirit. GUVNL despite the said directions made arbitrary deductions in the payments made towards the invoices raised by the Petitioner. In the circumstances, the Petitioner has filed the IA against the arbitrary and unilateral deductions made by GUVNL and other Respondents. Therefore, the filing of IA does not amount to abuse of procedure and the doctrine of res judicata or constructive res judicata is not applicable in the facts of the case.

24. We have considered the submissions of parties. Consequent to the issue of directions under Section 11(1) of the Act by MoP on 5.5.2022, the Petitioner filed Petition No. 128/MP/2022 on 10.5.2022 for determination of suitable rate/compensation in terms of Section 11(2) of the Act to cover the cost of generation for supply of power and adequate return on equity. In the said petition, the Petitioner had sought interim relief to direct the Respondent Nos.1 to 8 to pay provisional rate/compensation of INR 9.11/kWh and to cumulatively pay INR 450 crore in advance on weekly basis. Pursuant to the Section 11 directions, the Petitioner started supplying power with effect from 6.5.2022 and first weekly bills were raised on 14.5.2022 on Gujarat and Maharashtra. The payments of the bills were made thereafter. Therefore, as on the date of filing the application, the issues regarding deduction from fixed charges, non-opening of LC for the required amount, capping of capacity charges at 80% availability and deduction on account of rebate in terms of the PPA which constitute the subject matter of IA 50/2022 were not in existence and could not have

been raised by the Petitioner at the time of filing original petition. Since these issues arose after the payment of first bill in the first week of June 2022, the Petitioner raised these issues during the hearing on 7.6.2022 and sought the permission of the Commission to mould its prayers for interim relief which have been recorded in para 23 of the order dated 17.6.2022. After hearing the parties, the Commission issued the following interim directions:

*“24.....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 alongwith subsequent clarifications issued by MoP in letter and spirit.”*

The present IA has been filed alleging non-compliance with the directions/clarifications issued by MoP and the interim order of the Commission by the Respondents. Since the allegation of non-compliance of the directions of the Commission issued vide order dated 17.6.2022 has been raised for the first time before the Commission and the issues have not been adjudicated before, the doctrine of res judicata or constructive res judicata is not attracted in this case.

25. PSPCL and Haryana Utilities have raised an objection that the Petitioner has wrongly relied upon the interim order dated 17.6.2022 in Petition No.128/MP/2022 to seek payment of fixed charges from PSPCL and Haryana Utilities even though there are no directions vis-à-vis PSPCL and Haryana Utilities in the said order. It has been further submitted that In the interim order dated 17.6.2022, it has been clearly recognised that the supply of power has commenced with respect to only those procurers who were procuring power at the time when Section 11 directions came into operation and to those procurers who were desirous of sourcing power as per the terms and conditions contained in the said directions. PSPCL and Haryana Utilities

have not availed any power pursuant to the directions of MoP and therefore, there can be no question of PSPCL and Haryana Utilities acting in conflict of the interim order of the Commission and/or the MoP directions.

26. The Petitioner has submitted that perusal of the interim order makes it abundantly clear that the directions as issued by the Commission are applicable equally to all the Procurers and at no time PSPCL and HPPC have been excluded from the purview of the interim order. The Petitioner has further submitted that para 23 of the interim order simply records the submissions advanced by counsel for Respondent No 2 (PSPCL) and Respondent Nos. 7 and 8 (HPPC) that they have not scheduled/availed any supply of power in terms of the Section 11 directions and the request for directions that the interim order would not apply to the Petitioner. However, in para 24 of the interim order, all parties have been directed to comply with the Section 11 directions issued by MoP and subsequent clarifications in letter and spirit. Therefore, all procurers including PSPCL and HPPC are under obligation to comply with the directions and clarification issued by MoP.

27. We have considered the submissions of Respondent Nos. 2,7 and 8 and the Petitioner. The relevant portions of the interim order are extracted as under:

*“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.*

It is abundantly clear from para 23 of the order as quoted above that the Commission has recorded the submissions of the learned counsel for Respondent Nos. 2, 7 and 8 that these Respondents have not scheduled/availed any supply from the Petitioner in terms of directions under Section 11 of the Act. In para 24 of the order, the Commission has directed the parties to comply with the directions of MoP under Section 11 of the Act and subsequent clarifications in letter and spirit. No exception has been made in case of any of the Respondents. Accordingly, the preliminary objection of PSPCL and Haryana Utilities is rejected. The interim order is applicable in all force in respect of all procurers from the generating station of the Petitioner. Therefore, the Commission is of the view that IA is maintainable.

**Issue No.2: Whether unilateral deduction of INR 0.20/kWh from the fixed charges by GUVNL and MSEDCL can be sustained in the light of direction in the Interim Order to comply with the Section 11 directions and subsequent clarifications issued by MoP?**

28. GUVNL has submitted that as per MoP's notification dated 13.5.2022 and subsequent clarification dated 7.6.2022, the fixed charge shall be as per the PPA or as has been already agreed to between the parties. GUVNL has submitted that the reduction of INR 0.20/kWh from the fixed charge has been agreed to between the parties in the HPC report, the Government of Gujarat Resolutions dated 5.12.2018 and 12.6.2020, Minutes of the Meeting held in MoP on 17.3.2022 and Government of Gujarat Resolution dated 2.6.2022. GUVNL has submitted that the existence of agreement becomes clear from the Petitioner's own invoice dated 29.3.2022 for the months of January to March 2022 where INR 0.20/kWh reduction from the fixed charge has been implemented.

29. MSEDCL has submitted that the Petitioner had given offer to MSEDCL vide its letter dated 30.3.2022 and proposed to supply power at fixed charge as INR 0.70/kWh. MSEDCL had accepted the said offer vide its letter dated 10.4.2022 and accordingly, the Petitioner started supply of electricity from April 2022 till 25.6.2022. MSEDCL has submitted that the Petitioner and MSEDCL had mutually agreed to the fixed charge of INR 0.70/kWh and accordingly, MSEDCL has paid to the Petitioner in terms of MoP directions under Section 11 of the Act.

30. The Petitioner has submitted that MoP through its letter dated 13.05.2022 has clarified that the fixed charges are payable in terms of the PPA or as has been already agreed mutually between the parties. The Petitioner has submitted that the fixed charges payable by GUVNL and MSEDCL are to be computed in accordance with the methods and principle as set out in the PPA, particularly since no final agreement has



been reached as regards deduction in capacity charges through the unexecuted SPPAs. The Petitioner has submitted that by placing a misplaced and incorrect reliance on the terms of the unexecuted SPPAs and minutes of meeting reflecting reconciliatory efforts prior to the issue of Section 11 directions, GUVNL and MSEDCL have unilaterally and illegally reduced the capacity charges by INR 0.20/kWh. The Petitioner has submitted that from the very inception of the present petition, the Petitioner has made all necessary disclosures as regards the negotiations for execution of the draft SPPAs and the terms thereunder. As per the decision of the Appellate Tribunal for Electricity in the GMR judgement, the Petitioner is entitled to be compensated for the actual cost of generation for implementation of the Section 11 directions. Therefore, any reliance on the terms of an unexecuted SPPAs to make unilateral deduction by GUVNL and MSEDCL cannot be sustained.

31. We have considered the submissions of the parties. MoP vide its letter dated 5.5.2022 issued the following directions:

*“4. In the light of the present emergent circumstances, the following directions are issued under Section 11 of the Electricity Act:*

- (a) All imported coal-based power plants shall operate and generate power to their full capacity. Where the imported coal-based plant is under NCLT. The Resolution Professional shall take steps to make it functional.*
- (b) These plants will supply power in the first instance to the PPA holders. Any surplus power left thereafter or any power for which there is no PPA will be sold in the Power Exchanges.*
- (c) Where the plant has PPA with multiple DISCOMs then in such cases, if one DISCOM does not schedule any quantity of power according to its PPA, that power will be offered to other PPA holder(s) and any remaining quantity thereafter will be sold through the Power Exchanges.*
- (d) Considering the fact that the present PPAs do not provide for the pass through of the present high cost of imported coal, the rates at which the power shall be supplied to PPA holders shall be worked out by a Committee constituted by the Ministry of Power (MoP) with representatives from MoP, CEA and CERC. This Committee shall ensure that bench mark rates of power so worked out meets*

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.

- (e) Where the generators/group companies own coal mines abroad, the mining profit will be set off to the extent of the shareholding of the generating/group company in the coal mine.
- (f) The PPA holders shall have an option to make payment to the generating company according to the bench mark rate worked out by the Group or at a rate mutually negotiated with the generating company.
- (g) Payment at the above rates shall be made to the Generating Company on a weekly basis.
- (h) Where any DISCOM/State is not able to enter into mutually negotiated rates with the generating company and is also not willing to procure power at the bench mark rate worked out by the Committee; or is not able to make weekly payment then such quantity of power shall be sold in the Power Exchanges.
- (i) The net profit, if any, by sale of power which is not sold to the PPA holder and is sold in the Power Exchanges, shall be shared between the generator and PPA holder in the ratio of 50:50 on monthly basis.
- (j) Bench mark rates worked out by the Committee shall be reviewed every 15 days taking into consideration the change in price of imported coal; shipping costs etc.
5. This order shall remain valid upto 31.10.2022.”

32. In continuation, MoP issued directions under Section 11 of the Act by its letter dated 13.5.2022. Relevant portion of the letter is extracted below:

“5. The Committee has given the following recommendations:

(a) The Energy Charges Rate (ECR) calculated for six plants have been worked out as under:

| <b>Plant</b>             | <b>Capacity</b> | <b>Benchmark ECR<br/>(Rs./kWh)</b> |
|--------------------------|-----------------|------------------------------------|
| Salaya (Essar)           | 2X600           | 6.88                               |
| CGPL Mundra (Tata)       | 5X800           | 6.05                               |
| JSW Ratnagiri            | 1X300           | 6.52                               |
| THAMMINAPATNAM (Meenaxi) | 2X150           | 7.03                               |
| MUTHIARA-COASTAL ENERGY  | 2X600           | 6.60                               |
| ITPCL                    | 2X600           | 6.60                               |

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

(c) In case of CGPL, Mundra, the mining profit has been deducted from ECR. In the mining profit calculation for CGPL. The applicable statutory taxes and duties,

*including income and other 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 Indonesian 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 in accordance with the CGPL letter dated 12.5.2022 to Gujarat and CEA. CGPL 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.”*

33. As per the Section 11 directions as quoted above, the fixed charges shall be as per the Power Purchase Agreements or as has been already agreed mutually between the generating company and the procurers. While the Petitioner is of the view that there is no mutual agreement between the Petitioner and the Procurers namely, GUVNL and MSEDCL, these Procurers have submitted that there have been negotiations with the Petitioner to revise the tariff to address the high cost of imported coal and as part of the package deal, the parties have agreed to discounting the fixed charge by INR 0.20/kWh and the same has been adopted while making the payment pursuant to the directions under Section 11 of the Act. The Commission is of the view that the Petitioner and the Respondents were negotiating for revision of PPA tariff in order to address the high cost of imported coal rendering generation of power at the PPA tariff unsustainable and as part of the package deal, the Petitioner had agreed to take a haircut of INR 0.20/kWh in the fixed charge. However, the parties have not yet entered into the SPPA to give final shape to the negotiated terms and conditions of supply. In the absence of concluded SPPAs between the Petitioner and Respondents 1 and 3 (GUVNL and MSEDCL), it cannot be said that the parties have mutually agreed to the reduction in fixed charge for the purpose of payment of fixed charges while supplying power in pursuance of directions under Section 11 of the Act. It is an admitted fact that the Petitioner has supplied power to GUVNL and MSEDCL at a negotiated tariff (which includes reduction in fixed charge of INR 0.20/kWh) prior to the

promulgation of directions by MoP under Section 11(1) of the Act. However, in the absence of concluded SPPAs, GUVNL and MSEDCL cannot reduce the fixed charge by INR 0.20/kWh while making payment to the Petitioner for supplying power under the Section 11 directions. Further, after issue of the Section 11 directions, there is no supplemental agreement between the Petitioner and Respondent Nos.1 and 3 for reduction of the fixed charge. Therefore, the Commission is of the view that in the absence of any finalized mutual agreement between the parties, the provisions of the PPA shall prevail and the Petitioner shall be entitled to the fixed charge as per the PPA rate during the period of operation of the directions under Section 11 of the Act.

**Issue No. 3: Whether capping of capacity charges at 80% of availability by GUVNL can be sustained in the course of implementation of the Section 11 directions and subsequent clarifications by MoP?**

34. The Petitioner has submitted that while making payments for the invoices raised for the power supplied from 6.5.2022 onwards, GUVNL has restricted the capacity charges upto normative availability i.e. 80%. The Petitioner has submitted that under the normal circumstances, the Petitioner declares only 80% declared capacity each year. However, as per the directions under Section 11 of the Act, the Petitioner is required to operate its plant at full capacity. Since the Petitioner has been specifically directed to operate the plant at full capacity, the capacity charges cannot be kept at normative availability of 80% and the Petitioner should be paid the capacity charges for the full declared capacity. The Petitioner has sought a direction for payment of capacity charge for the full capacity for compensating the Petitioner for the actual adverse financial impact suffered on account of maintaining and operating the generating station to make it available at full capacity in terms of the directions issued under Section 11 of the Act.



35. GUVNL has submitted that as per the provisions of the PPA, the fixed charges are recovered at 80% PLF. Since the PPA itself envisages a normative availability of 80%, there is no question of wrongly capping the fixed charges as alleged by the Petitioner. GUVNL has further submitted that the Petitioner's claim would in effect amount to seeking 10% additional fixed charges for availability at 90% or 15% at availability of 95% which is being claimed by the Petitioner to exploit the extraordinary circumstances and to make windfall gain. GUVNL has further submitted that para 3 of the clarification dated 7.6.2022 provides that no penalty shall be imposed by the procurers, if the plant is available in terms of the directions as per the normative availability mentioned in the PPA. Therefore, the Petitioner is entitled for full fixed charge on achievement of 80% availability and no further fixed charge is admissible if the plant is available above 80%.

36. The Petitioner has submitted that as per the provisions of the PPA if the availability declared by the Petitioner is beyond the normative availability of 80%, there is provision of incentive. As the Section 11 directions mandate operation of the Petitioner's plant at full capacity, payments must be made on actuals in order to meet the objective of ensuring supply of power and procurement of coal. As regards the para 3 of the Clarification dated 7.6.2022, the Petitioner has submitted that the said provision only provides reprieve to the generators in case of making their plants available as per the directions and does not in any manner provide that the fixed capacity charges are to be kept at normal availability of 80% and not on actual. The Petitioner has submitted that such capping of fixed capacity charges at 80% amounts to penalising the Petitioner for declaring an average availability of 94.16% (cumulative DC percentage for the period 6.5.2022 to 25.8.2022) towards GUVNL. The Petitioner has further submitted that Schedule 7 of the PPA also provisions for entitlement of the

Petitioner to claim incentive in case the availability declared by it is beyond 85%. Thus, the submissions of the Petitioner to the effect of being adequately compensated on the basis of actual supply of power, and not being compensated at a normative availability of 80% also finds place in the PPA. The Petitioner has prayed that it is entitled to be compensated adequately in terms of the directions/clarifications and statutory construct of Section 11(2) of the Act.

37. We have considered the submissions of the Petitioner and GUVNL. As per the provisions of the PPA, the Petitioner is entitled to recover the full capacity charges if it declares the availability of 80%. There is no provision for payment of enhanced capacity charges on account of declaration of availability beyond 80%. The PPA only provides that if the capacity is declared beyond the 85%, the Petitioner is entitled for payment of incentive. Since there is no direction under Section 11 that the Petitioner shall be paid any additional fixed charge or incentive for declaration beyond 80% and the Petitioner is recovering the full capacity charge on declaration of 80% availability, we do not find merit in the submission of the Petitioner to claim additional fixed charge for declaration beyond 80% of availability.

**Issue No.4: Whether deduction on account of rebate in terms of the PPA is in consonance with the clarification of MoP?**

38. The Petitioner has submitted that while making payments towards the invoices, GUVNL has also made wrongful deductions on account of rebate based on misconceived and distorted understanding of the directions and clarifications dated 13.5.2022 and 20.5.2022. As per the said directions/clarifications, payment is to be made on weekly basis, and even through encashment of LC, in case such payments are not made on weekly basis. The Petitioner has submitted that considering the intention of MoP that supply of power in terms of the directions is independent of the

terms of the PPA and payments are to be made within a period of 5 days from the presentation of the weekly bill, the rebate cannot be in terms of the PPA which does not provide for weekly payments.

39. GUVNL has submitted that as per the clarification dated 20.5.2022, it is availing rebate under the PPA and not as per the clarification since the rebate determined in terms of Article 11 of the PPA is higher. GUVNL has further contended that it is entitled to avail additional rebate at the rate of 0.05% per day, for each day of early/advance payment of the weekly bill in terms of the PPA over and above rebate of 2.25%. GUVNL has submitted that if rebate for weekly bills were to be calculated at one fourth the percentage of rebate for monthly bills, it would lead to under-recovery of bills.

40. The Petitioner has submitted that the Section 11 directions instruct that 0.375% rebate or the rebate under PPA (being 2.25% and reducing with each day as provisioned under Article 11.3.5 of the PPA), whichever is higher is to be applied on weekly basis. The Petitioner has submitted that since the weekly payments are instructed by the Section 11 directions and clarifications thereunder, the rebate as provisioned under the said directions/clarifications being 0.375% can only be made applicable since the PPA does not provide for weekly payments. If the rebate as provided in the PPA is to be made applicable, then for the weekly payments, 1/4<sup>th</sup> of the said value (being 0.5265%) should be made applicable. The Petitioner has submitted that the rebate of 2.25% can in no case be made applicable since the PPA itself provides for reducing rate of rebate till the fifth day.

41. We have considered the submissions of the Petitioner and Respondent No.1. Para 5 (b) of the Clarification dated 20.5.2022 provides as under:



*“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”.*

The provisions of the PPA with regard to the rebates is extracted below:

*“11.3.5 For payment of any Bill before Due Date, the following rebate shall be paid by the Seller to the Procurer in the following manner:*

- a) Provisional Bill will be raised by the Seller on the last working day of the Month where the Capacity Charges shall be based on the Declared Capacity for the full Month and the Energy Charges shall be based on the final implemented Schedule Energy upto 25<sup>th</sup> day of the Month. Rebate shall be payable at the rate of two point two five percent (2.25%) of the amount (which shall be the full amount due under the Provisional Bill) credited to Seller’s account on the first day of the Month and rebate amount shall reduce at the rate of zero point zero five percent (0.05%) for each day, upto fifth (5<sup>th</sup>) day of the Month.*
- b) Applicable rate of rebate at (a) above shall be based on the date on which payable has been actually credited to the Seller’s account. Any delay in transfer of money to the Seller’s account, on account of public holiday, bank holiday or any other reasons shall be to the account of the Procurers.*
- c) Two percent (2%) rebate for credit to Sellers account made within one (1) Business Day of the presentation of Monthly Bill for the Month for which the Provisional Bill was raised earlier.*
- d) For credit to Seller’s account made on other days, the rebate shall be as under:*

| <b>Number of days before Due Date of Monthly Bill</b> | <b>Rates of Rebate applicable</b>   |
|---|---|
| 29  | Two point two five percent (2.25%)  |
| 28  | Two point two zero percent (2.20%)  |
| 27  | Two point one five percent (2.15%)  |
| 26  | Two point one zero percent (2.10%)  |
| 25  | Two point zero five percent (2.05%)   |
| 24  | Two percent (2.00%)   |
| 23 and each day thereafter upto the Due Date          | 2% less [0.033% X {24 less number of days before Due Date when the payment is made by the Procurers}] |

*In case of presentation of Monthly bill beyond the sixth (6<sup>th</sup>) day of the Month, two percent (2%) rebate will be applicable only on the day of presentation of Monthly Bill and beyond that rebate will be applicable as per the table above.*

- e) Rebate of two point two five percent (2.25%) to two point zero five percent (2.05%) will be available only to those Procurers who credit one hundred percent (100%) of the Provisional Bill within first five (5) days of the Month to Seller’s account/designated account and balance amount, if any, based on Monthly Bill (as per REA) within the Month.*



- f) *In the event only part amount of Provisional Bill is credited to Seller's account, within first five (5) days and the balance amount is credited to Sellers account during other days of the Month, rebate will be paid on such part amount at the rate of two percent (2%) plus zero point zero three three percent (0.033%) per day for the number of days earlier than the 6<sup>th</sup> day when such part amount is credited to Sellers' account;*
- g) *The above rebate will be allowed only to those Procurers who credit to Seller's account the full Monthly Bill.*
- h) *No rebate shall be payable on the bills raised on account of Change in Law relating to taxes, duties and cess;*
- i) *If the Provisional Bill has not been paid by the date of receipt of the Monthly Bill then such Provisional Bill shall not be payable, provided in case the Provisional Bill has already been paid, then only the difference between the Monthly Bill and Provisional Bill shall be payable."*

*The term "Due Date" has been defined in the PPA dated 22.4.2022 as under:*

*"Due Date" means the thirtieth (30<sup>th</sup>) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by any Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such bill is payable by the said Procurer"*

42. It is evident from the above provisions of the PPA that for payment of any bill before the due date (i.e. 30<sup>th</sup> day after the monthly bill is received and acknowledged by the Procurer), rebate as per the provisions of Article 11.3.5(d) shall be made applicable. However, in the case of the Section 11 directions, billing and payment are on weekly basis with due date as 5 days of presentation of bill. By extrapolating the above quoted provisions in case of weekly Bill, the following shall be the rebate payable:

| <b>Number of days before Due Date of Weekly Bill</b> | <b>Rates of Rebate applicable</b>          |
|--|--|
| 5  | <i>Two point two five percent (2.25%)</i>  |
| 4  | <i>Two point two zero percent (2.20%)</i>  |
| 3  | <i>Two point one five percent (2.15%)</i>  |
| 2  | <i>Two point one zero percent (2.10%)</i>  |
| 1  | <i>Two point zero five percent (2.05%)</i> |
| 6  | <i>No rebate</i>                           |
| 7  | <i>No rebate</i>                           |

Payments made beyond 5 days i.e. on 6<sup>th</sup> day and 7<sup>th</sup> day, no rebate shall be payable. The directions/clarification says that the rebate of 0.375% on weekly basis in accordance with CERC norms or as per the PPA whichever is higher shall be applicable. Since the rate as per the provisions of the PPA as worked out above is higher, the same shall be applicable for payment of weekly bills by the Procurers during the period when Section 11 directions will remain in force. Seen in this context, action on the part of GUVNL to deduct 2.25% rebate irrespective of the date of payment cannot be sustained. GUVNL is directed to calculate the rebate accordingly and refund the excess rebate deducted within one *week or adjust the same against the weekly bill issued after the date of this order.*

**Issue No.5: Whether the Respondents have failed to open the letter of credit in terms of Section 11 directions and subsequent clarification by MoP?**

43. The Petitioner has submitted that despite the Directions/ Clarifications being very clear that LC being the primary source of payment, the modus operandi of advance payment/LC is being turned a blind eye to by Respondent Nos.1 to 8, particularly GUVNL and MSEDCL (who have/ had been procuring power in terms of the Directions) since they have failed to institute the LC for an amount commensurate to the rate determined by the Committee. The Petitioner has submitted that the existing LCs of GUVNL and MSEDCL are INR 105 Crore and INR 20 Crore in tune with the provisions of the PPA. The Petitioner has submitted that both GUVNL and MSEDCL are required to maintain the LC for the ECR determined by the committee and fixed charges payable as per the PPA.

44. GUVNL and MSEDCL have submitted that the MoP letter dated 20.5.2022 provides that as per the PPA, Payment Security Mechanism shall be maintained. Accordingly, they are maintaining the LC as per Article 11.4.1.8 of the PPA. Other

Procurers such as PSPCL, JUVNL and Haryana Utilities have submitted that since they were not willing to procure power under Section 11 dispensation, there can be no compulsion or requirement to maintain LC on their part. It has been further submitted that as per the Section 11 directions/clarifications, if there is no LC, then the generator is free to sell power at the power exchange.

45. The Petitioner has submitted that the existing LCs of GUVNL and MSEDCL are in consonance with the tariff under the PPA i.e. INR 105 Crore and INR 20 Crore respectively. The Petitioner has submitted that considering that in the interim, the Petitioner is liable to be paid INR 5.27/kWh plus fixed charges, GUVNL and MSEDCL are required to open monthly LC amount of INR 802 Crore and INR 338 Crore respectively.

46. We have considered the submissions of the Petitioner and Respondents. Para 2(a) of the MoP letter dated 20.5.2022 provides as under:

*“2. MoP has received representations from the stakeholders. To resolve the issues raised by the stakeholders, directions on certain aspects are given below:*

- 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 the 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 procurers 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”*

On perusal of the PPA, it is revealed that PPA prescribes Payment Security Mechanism through Letter of Credit (Article 11.4.1), collateral arrangement in the form of Default Escrow Agreement (11.4.2) and Third Party Sales on Default (11.5). After fulfilment of Article 11.2.2.2, the letter of credit amount shall be as under:

*“11.4.1.8 Upon fulfilment of the conditions mentioned under Article 11.4.2.2 the Letter of Credit amount as mentioned in Article 11.4.1.1 shall be changed to one (1) time the average of the Monthly Tariff Payments of the previous Contract Year instead of one point one (1.1) times the average of the Monthly Tariff Payments of the previous Contract Year.”*

The Petitioner in its written submission has admitted that GUVNL and MSEDCL are maintaining LC in accordance with the PPA. However, the grievance of the Petitioner is that LC should be commensurate with the ECR determined by the Committee.

47. We are of the view that the present application is limited to compliance with the interim order of the Commission through which the Commission directed the Respondents to comply with the directions/clarifications issued by MoP under Section 11 of the Act in letter and spirit. MoP clarification in para 2(b) of letter dated 20.5.2022 provides that Letter of Credit (LC) shall be maintained by the Procurers for the contracted power to be purchased. However, no direction has been issued with regard to the amount of LC to be maintained. Since the payment will be made on weekly basis, it follows that the LC amount should be commensurate with the fixed charge and energy charge calculated as per Section 11 directions for one week. In our view, the Procurers shall henceforth maintain the LC commensurate with the contracted power equivalent to a period of one week in terms of the MoP letter dated 13.5.2022. The procurers who are not scheduling the power from the Petitioner under Section 11 directions shall be required to maintain LC commensurate with the fixed charges for

one week for their contracted power. Since the clarification regarding the amount of LC to be maintained is given through this order, we are not looking into the aspect of maintenance of LC by the procurers for the period prior to the issue of this order.

**Issue No.6: Whether the Procurers who are not availing power are liable to pay fixed charges in terms of Section 11 directions and subsequent clarification by MoP?**

48. The Petitioner has submitted that HPPC, PSPCL and RUVNL have contended that the reliefs claimed by the Petitioner in the IA against these Respondents are inadmissible since they have not procured any power from the Petitioner pursuant to the directions and subsequent clarifications issued by MoP. The Petitioner has submitted that such an interpretation is wrong as in terms of the directions, the generating station had been directed to supply power in the first instance to the PPA holders. Further, by way of clarification dated 13.5.2022, MoP has clarified that the fixed charges for such supply of power would be in terms of the PPA or as has been mutually agreed between the parties. Considering that the obligation as regards the fixed charges remains under the purview of PPA, such charges have been billed to these Respondents. The Petitioner has further submitted that in terms of the Clarification dated 20.5.2022, the Petitioner was compulsorily obliged to make its plant available and schedule power to the procurers. In furtherance of the same, the Petitioner was ready to schedule capacity to all procurers (including procurers who were not earlier procuring power) w.e.f. 25.5.2022 which is evident from the regional energy account of the Petitioner. Moreover, the MoP directions stipulate that where the procurer is not willing to procure power, such quantity of power shall be sold in the power exchange and net profit by sale of power shall be shared between the generator and PPA holder in the ratio of 50:50 on monthly basis. This provision regarding sharing of net profit in case the Petitioner sales power on the power exchange when the

procurer is not willing to schedule power makes it clear that in such cases where the generator is making its plant available for the procurer, capacity charges are payable. Moreover, as per Article 4.4.3 of the PPA, fixed charges are to be made even on cases where a procurer has not scheduled power and such power is sold in the power exchange.

49. The Respondents like PSPCL, HPPC and RUVNL have submitted that the Petitioner has a legal and contractual obligation to operate the power project and supply power and the tariff for such generation and sale of electricity by the Petitioner as per the quoted tariff. The Supreme Court in its order dated 11.4.2017 in case of Energy Watchdog Vs CERC [(2017) 14 SCC 80] has rejected the claim of CGPL for enhanced tariff on account of increase in imported coal price due to the Indonesian Regulations. The legal consequence of the said decision of the Hon'ble Supreme Court is that the Petitioner was obligated to generate and supply electricity under the PPA dated 22.4.2007 at the quoted tariff as per the PPA. Therefore, contractually and legally no additional tariff could be claimed by CGPL from PSPCL, HPPC and RUVNL, particularly the capacity charges when no power is scheduled by these Respondents from the Petitioner.

50. The Petitioner has submitted that subsequent to the passing of the Energy Watchdog judgment and passing of the Government of Gujarat Resolution dated 3.7.2018, the HPC was constituted for reviewing the report of the Working Committee Group. As per the HPC report, the suggested framework is based on the premise that the hardship faced by these projects are to be equitably shared by all stakeholders. Pursuance to the issuance of the recommendations of HPC, various meeting took place under the aegis of MoP to resolve the issue. The MoP has from time to time held

various meeting and passed directions to the developers as well as the procurers to reach an amicable settlement. The Petitioner and GUVNL are already at an advance stage of resolution of the issues which subsequently will be followed by other procurer states in terms of the MoP's directions. With regard to the MoP direction under Section 11, the Petitioner has been directed to supply power to the PPA holders. If some of the PPA holders do not offtake the power pursuant to the issue of Section 11 direction, they are liable to pay the fixed charges in terms of Article 4.4.3 of the PPA.

51. MoP has issued the Section 11 directions/clarifications directing the imported coal based power plants to generate power at their full capacity and offer the power to the PPA holders in the first instance. If the PPA holders do not avail the power, the generator is free to offer the said power to other PPA holders failing which it can sell the power at the Power Exchange. Para 4 (h) and (i) of the letter dated 5.5.2022 issued by MoP provides as under: -

*“(h) Where any DISCOM/State is not able to enter into mutually negotiated rates with the generating company and is also not willing to procurer power at the bench mark rate worked out by the Committee; or is not able to make weekly payment then such quantity of power shall be sold in the Power Exchanges.*

*“(i) The net profit, if any, by sale of power which is not sold to the PPA holder and is sold in the Power Exchanges, shall be shared between the generator and PPA holder in the ratio of 50:50 on monthly basis.”*

52. Article 4.4.3 of the PPA also provides as under: -

*“4.4.3 If a Procurer does not avail of power upto the Available Capacity by the Seller corresponding to such Procurer's Allocated Capacity, and the provisions of Article 4.4.2 have been complied with, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Concerned Procurer for such un-availed Available Capacity. In such a case, the sale realization in excess of Energy Charges shall be equally shared by the Seller with the Concerned Procurer.”*

53. It is clear from the above provisions that the share un-availed power of the PPA holder can be sold by the Petitioner in the Power Exchanges and the net profit if any

shall be shared between the Petitioner and the concerned PPA holder. When the generator is making its plant available to the PPA holder and the PPA holder does not avail the power, it has to bear the capacity charges. In case, the generator earns its profit by selling the said power in the Power Exchange, the said PPA holder is entitled to sharing of profit. Keeping the provisions of the PPA and the directions in view, the PPA holders who are not scheduling power from the generating station of the Petitioner shall be liable to pay the capacity charges and shall be entitled for sharing of profit in case sale of their share in the Power Exchanges fetches profit.

**Issue No. 7: Reliefs to be granted to the Petitioner.**

54. In the light of the above discussion, the following directions are issued:

- (a) GUVNL and MSEDCL cannot unilaterally deduct INR 0.20/kWh from the fixed charges. The said Respondents are directed to refund the fixed charges so deducted to the Petitioner within a period of one week.
- (b) Capping of capacity charges at 80% of availability by GUVNL is upheld.
- (c) The deduction of 2.25% rebate made by GUVNL is not correct. GUVNL is directed to calculate the rebate in accordance with para 41 of this order and refund the excess rebate deducted within one week or adjust the same against the weekly bill issued after the date of this order.
- (d) The Respondents are directed to maintain LC in terms of para 46 of this order.
- (e) The procurers who are not availing power from the Petitioner are liable to pay the fixed charges in accordance with the PPA.



55. I.A. No. 50/2022 in Petition No. 128/MP/2022 is disposed of in terms of the above.

**Sd/-  
(P.K. Singh)  
Member**

**sd/-  
(Arun Goyal)  
Member**

**sd/-  
(I.S. Jha)  
Member**