CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 128/MP/2022
and
I.A. No. 64/2022

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

Date of order: 3rd January 2023

In the matter of:

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

And
In the matter of

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

...Petitioner

VERSUS

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

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

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

4. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

5. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

6. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

7. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.

8. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005

9. Union of India, Ministry of Power,
Shram Shakti Bhawan,
Rafi Marg, New Delhi – 110001

…Respondents

Parties Present

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

ORDER

Tata Power Company Limited (hereinafter, "**Petitioner/TPCL**") has filed the present petition under Section 11(2) read with Section 79 of the Electricity Act, 2003 (hereinafter, "**the Act**"), *inter alia* seeking (i) directions to the 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 (hereinafter, "**MoP**") on 5.5.2022 under Section 11 of the Act (hereinafter, **"Section 11 Directions**") and (ii) declaration/ direction with regard to the 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 is to be made for offsetting the adverse financial impact caused to the Petitioner as a consequence of the Section 11 Directions.

2. The Petitioner has submitted that the MoP vide its letter dated 5.5.2022 issued the following Section 11 Directions to the Petitioner and other imported coal-based power plants:

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

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

(iii) In cases where the power plants have PPA with multiple distribution companies, and if one distribution company does not schedule any quantity of power according to its PPA, that power will be offered to other beneficiaries and remaining quantity will be sold through Power Exchanges;

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

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

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

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

3. The Petitioner has submitted that considering the enormity of situation as a result of power crisis being faced by the country, various meetings took place under the aegis of MoP to resolve the issues faced by the generating companies, including

those based on imported coal. The MoP has from time to time held various meetings and passed directions to the developers as well as the procurers to reach an amicable settlement. CGPL and the Procurer States (mainly GUVNL) are already at an advanced stage of resolution of issues which subsequently would be followed by other Procurer States. Pending resolution of the issue and formal executuon of the Supplementary PPA between CGPL and the Procurers, the MoP in view of the energy crisis being faced by the country, has issued Directions dated 5.5.2022 to all imported coal based power plant including CGPL under Section 11 of the Act.

4. The Petitioner has further submitted that supply of power under Section 11(1) of the Act is subject to the restitutive principles enshrined under Section 11(2) of the Act. In the interest of having regulatory certainty, the rate/compensation for such supply of power may be determined in terms of Section 11(2), which entrusts the Commission to offset the adverse financial impact to the generating company. The Petitioner has submitted that the Appellate Tribunal for Electricity (hereinafter, "**APTEL**") in its decision dated 23.05.2014 passed in Appeal Nos. 37 of 2013 and 303 of 2013 titled *"GMR Energy Limited v. Karnataka Electricity Regulatory Commission & Ors."* (hereinafter, "**GMR Judgment**") has held that only the Appropriate Commission has the power to offset the adverse financial impact of direction under Section 11(2) of the Act. Further, as per the said judgement, the compensation to be granted to the generating company under Section 11(2) of the Act is to be based on the actual cost of generation (including return on equity) of power from the Project. Since the said judgement has attained finality in terms of dismissal of the Civil Appeal filed against the judgement by the Hon'ble Supreme Court, the Petitioner has submitted that the Commission has the power to determine the appropriate rate/compensation for generation and supply of power from the

Petitioner's project to Respondent Nos. 1 to 8 in terms of Order dated 05.05.2022 issued by MoP, under Section 11(1) of the Act.

5. The Petitioner has submitted that the following indicative factors may be taken into consideration while determining the rate/compensation in terms of Section 11(2) of the Act to cover the cost of generation for supply of power and an adequate returnn on equity:

(a) Total landed cost of coal as pass through;

(b) Capacity Charge of Rs.0.90/kWh as per the provisions of the PPA.

The Petitioner has worked out the provisional rate/compensation of Rs. 9.11/kWh by taking into account (i) the landed cost of computation of HBA of $ 275/MT; (ii) fixed capacity charge as per the PPA dated 22.4.2007; and (iii) parameters based on norms laid down by the Commission.

6. The Petitioner vide its affidavit dated 16.5.2022 has placed on record the copy of the MoP letter dated 13.5.2022 deciding the rate/compensation as recommended by the Committee. In the said affidavit, the Petitioner has submitted that (i) the Energy Charge Rate (ECR) of INR 6.05/kWh determined by the Committee is inadequate towards the rate/compensation for supply of power to the Respondents; (ii) the mining profit of the Petitioner ought not to have been reduced in respect of the generation and supply in terms of the Section 11 Directions; and (iii) the Committee has incorrectly relied upon the Argus (I13) Index for determination of landed cost of coal instead of the HBA index. Though the Petitioner reiterated its contention with regard to rate/compensation of INR 9.11/kWh, the learned Senior Cousel appearing for the Petitioner submitted during the hearing on 7.6.2022 that it was no longer

praying for the interim relief prayed in the Petition and sought a direction to the Respondents to pay the tariff determined by the Committee without any deduction. The Commission in its order dated 17.6.2022 directed the Respondents to comply with the directions of MoP vide letter dated 5.5.2022 and subsequent clarifications till the time the Commission examines the claims of the Petitioner under Section 11(2) of the Act.

7. The Commission vide the said order dated 17.6.2022 also directed the Petitioner to submit (i) the details of coal received shipment wise; (ii) Consumption of coal and other details on weekly basis between 6.5.2022 till 16.6.2022; (iii) detailed computation of mining profit to the extent of share of ownership in mines and its weekly allocation during 6.5.2022 till 16.6.2022; (iv) Stores Priced Ledger (Coal) as on 5.5.2022 indicating opening quantity available in stock, its weighted average GCV and its weighted average price. The Petitioner vide its affidavit dated 1.7.2022 has placed the required information on record. The Petitioner's submissions are briefly as under:

(a) Tabulated statement of the details of coal received by the Petitioner (shipment-wise) is at Annexure A-I of the affidavit and the copies of certificate analysis supporting Gross Calorific Value at Load Port and Discharge Port for the shipments received is at Annexure A-2 of the Affidavit. The coal consumed for generation and supply of power during the period between 6.5.2022 to 24.6.2022 have been utilised from the coal received by the Petitioner from February 2022 onwards (USD 188 per MT) when the HBA price was lower than in May 2022 (USD 276 per MT). Out of 13 shipments of coal procured, 9 shipments of coal have been procured from PT Kaltim Prima

Coal based on HBA derived price. Four (4) shipments of coal have been procured from coal mines in other countries being Australia, South Africa and Russia at spot price. The Petitioner has submitted that the estimated savings to the Procurers during May and June 2022 on account the mitigation measures (blending of coal on spot basis from different geographies with coal previously purchased at lower price) were INR 1.93/kWh and INR 2.30/kWh respectively as compared to the coal price in May and June 2022. Estimated ECR for the power generated and supplied for the months of May 2022 and June 2022 are INR 6.28/kWh and INR 7.16/kWh respectively.

(b) The calculation of mining profit has been done in accordance with the methodology envisaged in para 73 of the order of the Commission dated 21.2.2014 in Petition No.159/MP/2012 (Coastal Gujarat Power Limited Vs Gujarat Urja Vikas Nigam Limited & Ors). Mining profit to the extent of the Petitioner's shareholding in the mines works out to INR 0.27/kWh for the month of May 2022 and INR 0.29/kWh for the month of June 2022. The Petitioner however has submitted that the proposed sharing of mining profit ought not to be taken into account for determination of compensation in terms of Section 11(2) of the Act.

(c) Details of shipment-wise coal stock, its GCV and landed cost has been placed on record as Annexure A-7 to the affidavit dated 1.7.2022. As on 5.5.2022, opening quantity of coal was 5.69 lakh MT, Discharge Port Weighted Average GCV was 5005 kCal/kg and Weighted Average landed cost of coal was INR 12253/MT.

8. The Commission, vide RoP for the hearing dated 28.7.2022, directed the Petitioner to file information regarding the basis of arriving at the weekly value of Blend-GCV of consumed coal as furnished in the Additional Affidavit dated 1.7.2022. The Petitioner vide its affidavit dated 4.8.2022 has explained the basis of GCV calculation adopted by TPCL as under:

(a) Coal stock is initially maintained shipment-wise and coal GCV grade wise. However, the consumption is recorded at coal grade level since coal of a particular grade is stored in adjacent stockpile.

(b) Coal inventory physical verification and final reconciliation is done at month end by an independent third party.

(c) After completion of verification and final reconciliation, shipment-wise monthly reconciled consumption is ascertained.

(d) Reconciled coal grade wise consumption is recorded in SAP system and used for computing Weighted Average Consumption GCV of each of the grades.

9. The Petitioner has explained that the Blend-GCV of consumed coal on weekly basis for the period between 6.5.2022 to 26.5.2022 as submitted vide Annexure A-3 of the Affidavit dated 1.7.2022 is based on the above methodology. The Petitioner has submitted the following information:

Ser No.	Week		Coal Quantity Consumed in MT	Blend-GCV of Consumed Coal (kCal/kg)
	From	To		
1	6-May-22	12-May-22	149146	5014
2	13-May-22	19-May-22	142926	5003
3	20-May-22	26-May-22	92470	5012

The Petitioner has submitted the reconciled weekly blend of GCV for the period 6.5.2022 to 12.5.2022 based on four shipments.

10. MoP vide its letter dated 20.5.2022 issued clarification on the directions issued under Section 11(1) of the Act on 5.5.2022. One of the clarifications is that if the power is not scheduled by the procurer, the generator will bid the power in the power exchange at the tariff upto the tariff given under Section 11 or the mutually agreed tariff with the procurer. If the average MCP is more than the tariff given under Section 11 or the mutually agreed tariff with the procurers, then the generator will mandatorily sell power in the exchange. The Petitioner vide its affidavit dated 25.8.2022 has submitted that in terms of the said directions, the Petitioner started selling power in the Power Exchange from 26.5.2022. The Petitioner has placed on record the details of the power sold on the exchange under Real Time Market and Day Ahead Market from 26.5.2022 till 28.7.2022.

11. As a follow up to the directions of the Commission dated 17.6.2022, the Petitioner vide its affidavit dated 9.9.2022 has placed on record the consolidated consumption and other details for the period from 6.5.2022 to 25.8.2022 as Annexure A-3 to the Affidavit which include the total power generated and supplied by the Petitioner on a weekly basis, a comparative of ECR based on actual blend consumption, quantity of coal consumed, GCV of coal (heat value), operational parameters (Heat Rate and APC), weighted average price of coal (Landed cost), and blend ratio maintained as per type of coal to optimise monthly cost of generation. The Petitioner has submitted that based on the available parameters including the actual coal consumption and the landed cost of coal, the actual ECR payable to the

Petitioner for the power generated and supplied for the months of May to July and August 2022 (estimated) are as under:

ECR for May 2022	INR 6.28/kWh
ECR for June 2022	INR 7.03/kWh
ECR for July 2022	INR 7.62/kWh
ECR for August 2022 (Estimated)	INR 7.47/kWh

12. The Petitioner has submitted that it utilised the opportunity to source coal on spot basis from different geographies and also blending of coal with coal purchased previously at lower price to mitigate the blend-based coal cost to INR 13565/MT in May 2022, INR 16149/MT in June 2022, INR 17465/MT in July 2022 and INR 17346/MT in August 2022. The Petitioner has further submitted that on account of the said mitigation measures, the Petitioner has saved INR 231 crore in May 2022, INR 288 crore in June 2022, INR 178 crore in July 2022 and INR 219 crore in August 2022, the benefit of which has been passed on to the procurers in proportion to the power supplied during the month. The Petitioner has further submitted that the Petitioner has sold 100.5 MU of power on the Power Exchanges during the period between 6.5.2022 to 25.8.2022.

Replies of the Respondents

13. The Commission vide order dated 17.6.2022 admitted the Petition and directed the respondents to file their replies and the Petitioner to file rejoinders to the replies. The replies of the Respondents are briefly discussed in the succeeding paragraphs.

(A) Reply of Gujarat Urja Vikas Nigam Limited (GUVNL/Respondent No.1):

14. GUVNL in its preliminary reply dated 30.5.2022 has submitted that there exists a concluded and binding PPA dated 27.4.2007 between Tata Power and GUVNL as

well as other State Procurers for Tata Power to generate and supply electricity at the tariff terms and conditions contained therein. The rise in imported coal price including on account of promulgation of Indonesian Regulations do not alter the obligations assumed by CGPL/Tata Power which position stands settled by the decision of the Hon'ble Supreme Court in Energy Watchdog Case. GUVNL has further submitted that the terms of the PPA can only be amended by agreement between the parties and approved by the Commission in terms of Article 18.1 of the PPA. GUVNL has agreed to amend the tariff terms and conditions based on the recommendations made by the HPC and Government of Gujarat Resolutions but the proposed amendment has not fructified as Tata Power/ CGPL had not agreed to all the terms. If Tata Power proceeds to finalise the Supplementary PPA as proposed by GUVNL and Government of Gujarat, the tariff terms and conditions can be substituted and Tata Power will be provided the tariff as per the Supplemental PPA. If SPPA is not finalised as above, GUVNL's obligation will be only as per the terms and conditions contained in the PPA dated 22.04.2007. GUVNL has further submitted that the implications of the notification dated 05.05.2022 of the Ministry of Power, Government of India and the determining of Rs. 6.05/kWh is binding as a provisional measure pending the final decision by the Commission as to adverse financial implications to Tata Power. The adverse financial implications has to be decided by the Commission after considering all relevant aspects including the working of the rate of Rs. 6.05/kWh, the provisions of the PPA as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog case. Further, as Tata Power/CGPL has been procuring coal from PT Kaltim, a group company 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 Argus Indices which represents the

average price of coal on export from Indonesia of all types - short term, long term, spot etc.

15. GUVNL in its reply dated 15.6.2022 has made additional submissions with regard to reduction of 20 paise/kWh from the fixed charges by GUVNL and rebate of 2.15% availed by GUVNL on the payments made by GUVNL. The submissions have not referred to in detail in this order as the same have been dealt with in order dated 13.9.2022 in IA No.50/2022 in Petition No.128/MP/2022.

16. In response to the Petitioner's affidavit dated 1.7.2022, GUVNL has submitted the following in its affidavit dated 14.7.2022:

(a) Tata Power vide affidavit dated 1.07.2022 has submitted the certificates of its Chartered Accountants certifying the vessel wise coal data i.e., coal quantity, GCV of coal, Ocean freight, Port handling charges, taxes & duties etc. which was consumed during May 2022 and June 2022 (between 06.05.2022 to 24.06.2022). However, Tata Power has not submitted copy of any of the documents like coal invoice copy, Bill of lading, documents related other charges, invoice of ocean freight, Port Handling Agreement & Bills thereto, documents related to taxes and duty actually incurred, Bills of Entry submitted to customs departments etc. Further, Tata Power has also not disclosed the information regarding third party sale of coal from the PT Kaltim Prima Coal mine located in Indonesia in which it has a shareholding of 30%.

(b) Tata Power has submitted vessel wise coal details of 13 vessels which was consumed during May and June 2022. In its own admission, Tata Power has procured coal from 9 vessels of the total 13 vessels from its Indonesian

mine i.e. PT Kaltim Prima Coal on HBA derived price. Ministry of Power, Government of India vide Clarification dated 20.05.2022 has stated that it has used the Argus Index to determine the tariff in terms of the Section 11 Directions. GUVNL has compared the FOB price of coal procured from Indonesia along with Market Index published by Argus/ Coalindo and has found that coal procurement of Tata Power from its own mine in Indonesia on HBA derived price is on a premium of 16% to 33% and without following competitive bidding process. FOB coal price should be considered lower of actual or price derived from Market index while working out tariff ECR under Section 11 of the Act. Further, coal procurement from mines other than in Indonesia should also be linked with appropriate index and only prudent FOB price should be considered.

(c) Tata Power has submitted that it has procured coal on FOB, CFR and DAP basis. Since other charges are a part of procurement on FOB, CFR and DAP basis, they cannot be claimed separately. Tata Power has not submitted any details / documents regarding component of the other charges. Moreover, from January to April 2022, Tata Power has claimed energy charge on actual basis and the calculation thereof, wherein Tata Power had claimed Other Charges as ‘Zero’ or around ‘1 $/MT’ for the same vessels from which coal is also consumed/allocated in the months of May and June 2022 where Tata Power has claimed Other Charges between $4/MT to $6 / MT.

(d) Tata Power has claimed different ocean freight for the same vessel, under the invoices for the respective months and under Section 11. Tata Power may be directed to clarify that ports charges at Load Port & Discharge Port and

Charterers liability insurances have not been included in the Ocean freight component.

(e) Under the PPA, Tata Power has quoted Escalable & Non Escalable Port Handling Charges. However, Tata Power in the present petition is claiming charges higher than the negotiated charges. The claim of Tata Power is not tenable, as there is no independent implication of such charges on account of the circumstances for which directions under Section 11 were issued.

(f) The operational/technical parameters with respect of Tata Power should be considered in terms of the Order dated 06.12.2016 of the Commission in Petition No. 159/MP/2012 i.e. SHR of 2050 and Auxiliary Consumption of 4.75%. In any case, technical parameters should not be allowed higher than parameters applicable as per the Tariff Regulations of the Hon'ble Commission.

(g) Tata Power has not provided documents with regard to the taxation paid and bifurcation for the same.

(h) Ministry of Power in the direction dated 5.05.2022 under Section 11 has directed that generator shall share mining profit from mine owned by its group companies to the extent of the shareholding of the generating / group company in the coal mine. Tata Power has wrongfully restricted the mining profit only on coal consumed from its mine i.e., PT Kaltim Prima Coal. Mining profit should be worked out on total coal consumption and Tata Power ought to share 100% of the mining profit earned by it with GUVNL/Procurers.

(i) GUVNL has computed the ECR as per data submitted by Tata Power considering (1) FOB price lower of claimed or Argus Derived Price, (2) Excluding other charges, (3) Quoted Port Handling Charges, (4) Technical Parameter as approved by the Hon'ble Commission vide order dated 6.12.2016 (4) Mining profit @ 100% with taxation at 43.8% (Royalty & Corporate Income tax subject to actual applicability subject to verification, on total coal consumption. Based on the said calculation, Net ECR payable to Tata Power under Section 11 for the months of May and June 2022 works out to INR 3.85/kWh and INR 4.26/kWh respectively (revised to INR 3.50/kWh and INR 3.67/kWh for May and June respectively) vide affidavit dated 23.9.2022). Tata Power's claim for ECR of Rs. 6.28/kWh for May, 2022 and Rs. 7.16/kWh for June, 2022 is unsubstantiated and highly excessive.

(j) Under the Ministry of Power's direction dated 05.05.2022 under Section 11, except O&M charges, no other charges are payable as a fixed charge component. As per the 2019 Tariff Regulations of the Commission for the 2019-24 period, O&M cost for 800 MW & above series is Rs 20.22 lakh/MW for FY 2022-23 and accordingly, per unit rate works out for Tata Power's 3800 MW @ 80% availability is around Rs. 0.29/Unit. Further, the entire annual fixed cost of the plant is recovered on achievement of @ 80% normative cumulative availability. However, Tata Power is intentionally claiming Capacity Charge on full declared capacity without restricting it upto normative availability as per the Power Purchase Agreement and trying to recover additional capacity charge, particularly when, Ministry of Power in its clarification dated 20.05.2022 has clarified that no penalty can be imposed by the procurer on account of availability under the PPA.

17. GUVNL, in its additional Affidavit dated 23.9.2022, has submitted as under:

(a) Consequent to issue of Section 11 Directions, GUVNL proceeded to pay on an ad-hoc basis the HBA Derived price as the FOB price of coal subject to its right to claim that the FOB price of coal should be actual or HBA derived price, whichever is lower. In other words, the FOB price based on HBA derived price claimed by Tata Power or the actual price at which coal was available to Tata Power from Indonesia as per Argus indices which is lower should be adopted for calculation of ECR.

(b) In terms of the directions of the Central Government under Section 11(1) of the Act, all plants are required to 'operate and generate power to their full capacity' and the power to be supplied at the first instance to the PPA holders. in terms of the Power Purchase Agreement dated 22.4.2007, the allocated contracted capacity to GUVNL from Tata Power's plant is 1805 MW. However, Tata Power has failed to adhere to the Section 11 Directions and has been making available lesser quantum of power to GUVNL. In terms of the entitlement report for 19.09.2022 downloaded from WRLDC's website, it can be observed that GUVNL's on-bar ability to draw was 698 MW and off- bar quantum was 722 MW. Therefore, SLDC, Gujarat could schedule power only up to 698 MW and un-requisitioned surplus power from other states, if available. Due to non-availability of full schedule from Tata Power, GUVNL has been constrained to purchase costlier power at around Rs. 12/kWh from power exchanges, and at times power is not available in the power exchanges as well which adversely impacts the uninterrupted supply of power to the consumers of the state. This has frustrated the entire purpose for which the Section 11

Directions were issued and GUVNL had agreed to pay the variable charges on a provisional basis at rate higher than the amount payable as per the agreement reached as up to the Minutes of Meeting dated 28.02.2022 before the Minister of Power, Government of India.

(c) GUVNL has calculated the ECR as per the parameters given in its affidavit dated 14.7.2022 and as per the said calculation, the ECRs for May 2022, June 2022, July 2022 and August 2022 work out to INR 3.50/kWh, INR 3.67/kWh, INR 3.40/kWh and INR 3.51/kWh respectively. Tata Power's claim for ECR of INR 6.28/kWh for May, 2022, INR 7.03/kWh for June, 2022, INR 7.62/kWh for July 2022 and INR 7.47/kWh for August 2022 is unsubstantiated and highly excessive.

(B) <u>Reply of Punjab State Power Corporation Limited (PSPCL/Respondent No.2)</u>

18. PSPCL vide their affidavit dated 17.6.2022 has submitted as under:

(a) There exists a concluded and binding Power Purchase Agreement dated 22.4.2007 between Tata Power and PSPCL and Tata Power as well as other State Procurers for Tata Power to generate and supply electricity at the tariff terms and conditions contained therein. The rise in Imported coal price including on account of promulgation of Indonesian Regulation do not alter the obligation assumed by CGPL/Tata Power under the PPA. This position stands settled by the decision of the Hon'ble Supreme Court in Energy Watchdog case. Tata Power cannot claim any additional tariff on grounds of the contract/PPA becoming onerous to perform and the same is not a valid ground

to allow the Tata Power to resile from its obligations to generate and supply power;

(b) CGPL has now been amalgamated with Tata Power Company Limited and is currently a profit-making company. There can therefore, be no question of financial distress affecting the viability of the CGPL;

(c) The implications of the notification dated 5.5.2022 of the Ministry of Power, Government of India and the determination of Rs. 6.05/kWh by the Committee etc. is binding only on CGPL/Tata Power. There can be no mandatory condition on PSPCL to procure power under the Section 11 dispensation;

(d) PSPCL has already filed a Petition No. 85/MP/2022 before the Commission seeking damages and commencement of supply in terms of the PPA dated 22.4.2007;

(e) PSPCL has not consented to off take of power under the Section 11 dispensation and therefore, there can be no liability on PSPCL to pay any charges (capacity or energy) for the power declared available/supplied by Tata Power under the Section 11 dispensation;

(f) The adverse financial implications on CGPL/Tata Power (if any) of the Section 11 Directions, has to be decided by the Commission after considering all relevant aspects including the working of the rate of Rs. 6.05/kWh at the appropriate stage, Petition No. 85/MP/2022, the provisions of the PPA as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog case.

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

19. MSEDCL in its affidavit dated 25.7.2022 (filed on 10.8.2022) has made the following submissions:

(a) There exists a concluded and binding Power Purchase Agreement dated 22.4.2007 between Tata Power and MSEDCL as well as other State Procurers for Tata Power to generate and supply electricity at the tariff terms and conditions contained therein. The rise in Imported coal price including on account of promulgation of Indonesian Regulation do not alter the obligation assumed by CGPL/Tata Power under the PPA. This position stands settled by the decision of the Hon'ble Supreme Court in Energy Watchdog case (Supra). Tata Power cannot claim any additional tariff on grounds of the contract/ PPA has become onerous to perform and the same is not a valid ground to allow the Tara Power from its obligations to generate and supply power;

(b) The PPA terms can only be amended by agreement between the parties and approved by the Commission in terms of Article 18.1 of the PPA. MSEDCL, though not legally obligated to do so, has agreed to amend the tariff terms and conditions based on the recommendations made by the HPC and Government of Maharashtra Resolution but the proposed amendment has not fructified. If Tata Power proceeds to finalise the Supplementary PPA as proposed by MSEDCL and Government of Maharashtra, the tariff terms and conditions can be substituted and Tata Power will be provided the tariff as per the Supplemental PPA. If SPPA is not finalised as above, MSEDCL's obligation will be only as per the terms and conditions contained in the PPA dated 22.4.2007;

(c) The implications of the notification dated 5.5.2022 of the Ministry of Power, Government of India and the determining of Rs. 6.05/kWh is binding as a provisional measure pending the final decision by the Commission as to adverse financial implications to Tata Power. The adverse financial implications have to be decided by the Commission after considering all relevant aspects including the working of the rate of Rs. 6.05/kWh, the provisions of the PPA as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog case.

(d) As Tata Power/CGPL has been procuring coal from PT Kaltim, a group company 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 Argus Indices which represents the average price of coal on export from Indonesia of all nature, short term, long term, spot etc.

(e) As regards energy charge, MSEDCL has submitted that it has paid the Petitioner as per proposed Supplementary PPA from 12.4.2022 to 5.5.2022 and from 6.5.2022 to 25.6.2022 as per the Notification dated 5.5.2022 and Energy charge rate as discovered by the committee time to time.

(f) The Petitioner and MSEDCL had already agreed mutually regarding the fixed charge being ₹0.70/kWh and thus, the same is applicable to MSEDCL for payment against the said supply of power by Petitioner from 12.4.2022 to 15.6.2022.

(g) The impact of rebate would remain the same even if the bills are raised on a weekly basis or monthly basis, since the rate for rebate specified is a percentage of the invoice raised, and not an absolute amount.

(h) The Petitioner has scheduled power to MSEDCL upto 25.6.2022. As MSEDCL has not scheduled power from Tata Power since 26.6.2022 in terms of directives of MoP under Section 11, MSEDCL may not be made liable for payment of capacity charges from 26.06.2022 as MSEDCL has not scheduled power from petitioner since 26.6.2022 in terms of directives of MoP under Section 11 of the Act.

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

20. RUVNL on behalf of Respondent Nos.4, 5 & 6 have made submissions similar to the submissions of PSPCL recorded in Para 18(a) to (c) of this order and the same is not further recorded for the sake of brevity. In addition, RUVNL has submitted that since there is no liability on RUVNL to pay any charges under the Section 11 dispensation, RUVNL is currently not dealing with the computation of the Rs 6.05/kWh or Rs 9.11/kWh at this stage. RUVNL reserves the right to make appropriate submissions as regards the applicable rate, adverse financial impact, mining profit etc. if it consents to offtake power pursuant to the Section 11 Directions.

(E) Haryana Utilities (Respondent Nos. 6, 7 & 8)

21. Haryana Utilities in their reply dated 15.6.2022 have made submissions similar to the submissions of PSPCL recorded in Para 18(a) to (c) of this order and the same is not further recorded for the sake of brevity. The Haryana Utilities have further submitted that they have already filed Petition No.123/MP/2022 before the

Commission seeking damages and commencement of supply in terms of the PPA dated 22.04.2007. Haryana Utilities have further submitted that the adverse financial implications on CGPL/Tata Power (if any) of the Section 11 Directions, has to be decided by the Commission after considering all relevant aspects including the working of the rate of Rs. 6.05/kWh at the appropriate stage, Petition No. 123/MP/2022, the provisions of the PPA as interpreted and decided by the Hon'ble Supreme Court in Energy Watchdog case.

Rejoinders of the Petitioner to the replies of the Respondents

22. The Petitioner in its rejoinder dated 4.6.2022 to the preliminary objections of GUVNL has submitted that by way of issuance of the Section 11 Directions, MoP has itself recognized that the existing Power Purchase Agreements do not have adequate provision for pass through of the entire increase in the international coal price and has directed that the rate at which power shall be supplied to the beneficiaries is to be worked out to meet all prudent costs of using imported coal, including the present coal price, shipping costs and O&M costs etc. and a fair margin. Therefore, 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 the Act, which have also been reiterated by the Hon'ble APTEL in "GMR Judgment", wherein, it has been held that the cost of supply under Section 11 should be such as it recovers the cost of generation of power, in addition to a reasonable return on equity. The Petitioner has further submitted that supply of power to the Procurers in terms of and during the currency of the Section 11 Directions are extraneous to the provisions of the PPA and the proposed terms of SPPA based on HPC recommendations, Government of Gujarat Resolutions and the

directions issued by MoP from time to time in this regard and hence, GUVNL's reliance on the facts relating to the PPA are outside the purview of the present Petition and in particular, the determination of rate/compensation for supply of power in terms of the Section 11 Directions. The Petitioner has also submitted that subsequent to passing of the Energy Watchdog Judgment, the Hon'ble Supreme Court has allowed in a subsequent Petition that the parties (being the generators and the procurers) can enter into mutually agreeable arrangements to alter the terms of the PPA. GUVNL by its own actions has demonstrated that since October, 2021, it had agreed to procure power from CGPL at a tariff agreed as part of a temporary arrangement, being at variation from the tariff specified in the PPA. Thus, considering that the parties have progressed ahead of the Energy Watchdog Judgment, particularly through their actions de-hors the terms of the PPA, any reliance on the said Judgment is completely out of context and beyond the scope of the present Petition.

23. In response to GUVNL's reply dated 14.7.2022, the Petitioner has submitted as under:

(a) As regards GUVNL's contention regarding non-supply of copies of the documents like invoice copy, Port Handling Agreements, etc., the Petitioner has submitted that the said documents did not form a part of the Annexure to the Order dated 17.06.2022 passed by the Commission and as such, were not placed before the Commission. The Petitioner has further submitted that the information/ details furnished by the Petitioner is duly audited by the auditor and is adequate for the purpose of determination of rate/compensation for off-setting the adverse financial impact owing to the issuance of the Directions/ Clarifications issued by the MoP under Section 11 of the Act.

(b) In response to GUVNL's contention that the coal can be procured by the Petitioner at a price lesser than the benchmark price- HPB, being HBA Index derived price, the Petitioner has submitted that Article 11 of the Ministerial Decree No. 17/2010 specifically provides that the HBA derived benchmark price of coal shall be used as a reference of coal price. The Petitioner has further submitted that Article 21 of Ministerial Decree No. 17/2010 carves out an exception in favour of only a 'certain type' of coal and coal used for 'certain purposes' which can be exported from Indonesia at a price below the benchmark price. However, the said exemption is not applicable in case of the Petitioner. The said position has been settled by the Commission in the Order dated 13.06.2022 passed in Petition No. 111/MP/2022 titled "Gujarat Urja Vikas Nigam Limited v. Adani Power (Mundra) Limited" (hereinafter, "Adani Judgment"), wherein it has been held that it is impermissible to export coal below the benchmark price failing which the coal company shall be subject to administrative sanctions.

(c) With regard to GUVNL submission that HBA derived price is on a premium of 16% to 33% compared to FOB price of coal as per the index published by Argus/Coalindo, the Petitioner has submitted that since the inception of the power project, TPCL has been procuring coal from KPC on the long-term arrangement and historically, it has been seen that both HBA linked HPB and ICI3 have closely followed each other. However, GUVNL has compared HBP prices with ICI3 selectively where the aberration between HPB and ICI3 has started appearing in 2022 due to the sudden unprecedented geopolitical events across the globe such as Chinese import ban of Australian coal,

Indonesian coal export embargo in January 2022, Russia-Ukraine conflict, various sanctions across and between the world majors etc.

(d) As regards GUVNL's claims that other charges claimed by the Petitioner are higher for the months of May and June 2022 as compared to other charges for the supply of power during the period January to March, 2022 even though coal used during both periods was from the same vessels, the Petitioner has submitted that power for the period prior to issuance of Section 11 Directions was being supplied in terms of a separate arrangement wherein Other Charges were restricted and were not on actual basis. Since data/information were sought by the Commission on actual basis, duly audited by an auditor, the same is liable to be considered for the purpose of computation/determination of rate/compensation for supply of power in terms of the Directions and the subsequent clarifications.

(e) As regards GUVNL's allegations that port handling charges are more than the quoted Escalable and Non-Escalable Port Handling Charges as per the PPA, the Petitioner has submitted that the generation and supply of power in terms of the Directions and the subsequent clarifications is independent of the commercials being agreed under the PPA. Further, the Petitioner has only submitted the actual data with respect to port handling charges, which are subject to escalation as per the Port Supply Agreement and such figures are also duly supported by the audited certificate for all the actual cost.

(f) As regards GUVNL's contention that the operational/technical parameters should be considered in terms of the Order dated 6.12.2016 in Petition No.159/MP/2012, i.e., Station Heat Rate of 2050kCal/kWh and Auxiliary

Power Consumption of 4.75%, the Petitioner has submitted that these values used in the Order dated 6.12.2016 were in a different context and cannot be considered for the purpose of present Petition, which is in the context of Section 11 Directions. In this regard, it is submitted that by way of the Additional Affidavit dated 01.07.2022, the Petitioner has placed on record the reasons for the variation in the operating/ technical parameters, i.e. due to load related volatility. Further, vide order dated 17.06.2022, this Hon'ble Commission directed the Petitioner to furnish the actuals of the operational and technical parameters, considering that the tariff rate and compensation is to be determined on the basis of the actual SHR and APC of the Petitioner's Project.

(g) With respect to GUVNL's contentions regarding sharing of mining profit and its computation, the Petitioner has submitted that sharing of mining profit being offered to the Procurers was for the purpose of execution of the Supplemental PPA (SPPA) and since the terms of the SPPA have not been fructified by GUVNL's own admission, the same bear no relevance whatsoever for the purposes of this Petition. Accordingly, GUVNL's submission that 100% of mining profit is to be given as pass through is also inconsequential insofar as the determination of rate/compensation for generation and supply of power in terms of and during the currency of Section 11 Directions is concerned.

(h) With regard to GUVNL's action to restrict the capacity charges upto Normative Availability, i.e. 80%, the Petitioner has submitted that the imposition of 80% capping on Declared Capacity cannot be made to the

power supplied in terms of the Directions, especially when the Petitioner has been directed to operate its plant at full capacity. Further, considering the generation and supply of power is being undertaken outside the scope of PPA, it is imperative that the capacity charges cannot be capped up to Normative Availability, i.e., 80% and be paid for full declared capacity.

24. The Petitioner in its rejoinders dated 24.6.2022 and 10.8.2022 to the replies of PSPCL has submitted as under:

(a) The present Petition has been filed in order to enable the Petitioner to perform power supply to the Procurers, which is the underlying objective of Section 11 Directions. By way of the present Petition, the Petitioner has not laid a challenge to the jurisdiction / maintainability of the Section 11 Directions but has rather presented its case before the Commission as to how the said Directions cannot be performed for its contents causing a grave/adverse financial impact upon the Petitioner. The Petition through its contents, reasoning and data establishes as to how the said Directions fail to take into cognizance the material considerations it ought to have taken into account in order to enable the Petitioner to perform the same.

(b) The Petitioner has been complying with the Section 11 Directions and the subsequent Clarifications issued by the MoP, whereunder, the Petitioner amongst other imported coal-based power plants, has been directed to generate and supply power in terms of the Directions. Further, by way of Clarification dated 13.5.2022, the MoP clarified that fixed charges for such supply of power would be in terms of the PPA, or as has been mutually agreed between the parties. Thus, considering that the obligation as regards

the fixed charges remains under the purview of PPA, as has been categorically directed by MoP, such charges have been billed to PSPCL, which are bound to be paid even in case PSPCL does not procure power from the Petitioner. Therefore, the submission of PSPCL that levy of capacity charges is not envisaged under the Directions is erroneous and must be set aside.

(c) PSPCL cannot on the one hand insist for the supply of power under the PPA terms and on the other contend that it has not given consent to supply power as per contracted capacity under PPA as per the terms of Directions under Section 11. The Petitioner has submitted that as the Section 11 Directions, the power is to be offered to the PPA holders (being the procurers) at the first instance. It is in consonance with the said direction that the Petitioner offered to supply power to PPA holders including PSPCL. When the Directions under Section 11 are in force, it cannot be PSPCL's case that power is supplied to it, not in terms of the directions but under the PPA, particularly when MoP has itself recognized that the existing provisions of the PPA are inadequate insofar as the pass through of complete cost of coal procurement is concerned. Further, the Section 11 Directions envisages for sharing of 'net profit' in case the Petitioner sells power on the power exchanges when the procurer is not willing to schedule power. Therefore, PSPCL cannot claim any share in such net profits without payment of capacity charges.

(d) As regards PSPCL's contention that CGPL after amalgamation with TPCL is currently a profit-making company, the Petitioner has submitted that the

financially precarious situation of the Petitioner has been duly recognized by the High Power Committee and the Directions issued by the MoP itself and the Petitioner is merely seeking to get adequately compensated for the adverse financial impact caused to it by issuance of the Directions under Section 11 of the Act. PSPCL's allegation that under the garb of Section 11(2), the Petitioner is attempting to make profits or any margin over and above the admissible cost of coal in terms of the PPA is completely baseless and is not supported by any evidentiary data.

(e) As regards the contention of PSPCL regarding pendency of its Petition No.85/MP/2022 seeking damages and commencement of supply of power in terms of the PPA, the Petitioner has submitted that 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 Directions under Section 11 of the Act. Since the generation and supply of power in terms of and during the currency of Directions is independent of the provisions envisaged under the PPA, PSPCL cannot be allowed to make any claims for specific performance of obligations under the PPA during the adjudication of the present Petition.

25. The Petitioner, in its rejoinder dated 11.8.2022 to the reply of MSEDCL, has submitted as under:

(a) MSEDCL has grossly erred in not understanding that the present Petition has been filed in order to enable continuous supply power to the Procurers, which is the underlying objective of Section 11 Directions.

(b) The supply of power in terms of the Section 11 Directions is independent of the terms of the PPA, which is itself acknowledged and duly accepted in the Directions and hence any reference to that effect is unsustainable and liable to be dismissed at the threshold.

(c) The reliance made by MSEDCL to the generation and supply of power during the period prior to issuance of the Directions by MoP is completely misplaced. The issue in the present Petition pertains to determination of compensation to suitably off set the adverse financial impact caused to the Petitioner owing to the issuance of the Section 11 Directions and has no relation whatsoever to the supply of power that was being undertaken prior to issuance of the Directions. Further, the meetings held under the aegis of MoP are independent and part of re-conciliatory efforts between the parties. Further, it is Petitioner's case that the generation and supply of power in terms of and during the currency of the Directions and subsequent clarifications is independent of the PPA, unexecuted SPPA and the reconciliatory efforts being undertaken under the auspices of MoP.

(d) MSEDCL's reliance on the Energy Watchdog Judgment is also wrong since it has not taken into account that much water has flown since the passing of the said judgment. After the issuance of the recommendations of the HPC and the enormity of the financial crisis being faced by CGPL, various meetings took place under the aegis of MoP to resolve the issues faced by the generating companies, including those based on imported coal. The MOP has from time to time held various meetings and passed directions to the developers as well as the procurers to reach an amicable settlement. The

composition of HPC, its recommendations and the respective State Resolutions to this effect clearly demonstrate that since the passing of the Energy Watchdog Judgment many reasoned, transparent and mutually benefitting steps have been taken by stakeholders and reliance of MSEDCL on particular provisions of the PPA with regard to obligations of TPCL to generate and supply power at the quoted tariff, regardless of its financially precarious situation is selective and completely misplaced.

(e) As regards the deduction of INR 0.20/kWh in fixed capacity charges, MSEDCL's reliance on the Notification dated 13.05.2022 issued by the MoP is completely misplaced, wherein the MoP has recommended that in addition to the ECR, the fixed charges will be as per the Power Purchase Agreements, or as has been agreed mutually between the generating company and procurers. 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 a 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.

(f) The contention of MSEDCL that it is not liable to pay capacity charges as it has not consented to the supply of power from the Petitioner is based an erroneous understanding of the Section 11 Directions. The said Directions envisage 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 Clarification dated 20.5.2022, the Petitioner was compulsorily obliged to make its plant available and schedule power to the procurers. It is in furtherance of the same that the

Petitioner was ready to schedule power to the procurers, which is also evident from the Regional Energy Accounts of the Petitioner. Further, the Directions/ Clarifications mandate that in case the Petitioner sells power on the power exchanges when the procurer is not willing to schedule power, the net profits are to be shared in the ratio of 50:50. which makes it clear that in such cases where the generator is making its plant available for the procurer, capacity charges are payable. Thus, MSEDCL cannot claim any share in such net profits without payment of capacity charges.

(g) As regards the deduction on account of rebate, MSEDCL has wrongly referred and relied upon the provisions of the PPA. While the generation and supply of power under the Section 11 Directions is outside the scope of the PPA, the Clarification dated 20.5.2022 itself provides that 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. For supply made by the Petitioner in terms of the Directions, rebate, if any, shall be allowed as per the provisions of the MoP Clarifications.

26. The Petitioner, in its rejoinder dated 11.8.2022 to the reply of Rajasthan Utilities, has submitted as under:

(a) Rajasthan Utilities have grossly erred in not understanding that the present Petition has itself been filed in order to enable continuous supply power to the Procurers, which is the underlying objective of said Directions. Since the Section 11 Directions failed to take into cognizance the material considerations it ought to have taken into account in order to offset the

adverse financial impact, the Petitioner has the lawful right under Section 11(2) of the Act and it is within the undisputable powers of the Commission to adjudicate upon the issues as raised by the Petitioner in the present Petition.

(b) Considering that as per the Section 11 Directions, the obligation as regards the fixed charges continue to remain under 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. Moreover, Rajasthan Utilities cannot claim any share in such net profits if the Petitioner sells power at the power exchange without complete payment of capacity charges.

(c) The reference and reliance of Rajasthan Utilities to the provisions of the PPA, particularly qua the power to be generated and supplied in terms of and during the currency of the directions, is completely misplaced since the supply of power in terms of the directions is independent of the terms of the PPA, which is itself acknowledged and duly accepted in the directions.

(d) Rajasthan Utilities have contended that CGPL after being amalgamated with TPCL is currently a profit making company and there cannot be any question of financial distress affecting the viability of CGPL. In response, the Petitioner has submitted that the financially precarious situation of the Petitioner has been duly recognized by the High Powered Committee and the directions issued by the MoP itself. The Petitioner is not making any profit on the admissible cost of coal but is merely seeking to be adequately

compensated for the adverse financial impact caused to it by issuance of the directions under Section 11 of the Act.

27. The Petitioner in response to the reply of Haryana Utilities vide affidavits dated 24.6.2022 and 10.8.2022 has submitted as under:

(a) The submission of HPPC that levy of capacity charges is not envisaged under the Section 11 Directions is erroneous. The Petitioner has been complying with the directions and the subsequent Clarifications issued by the MoP, whereunder, the Petitioner amongst other imported coal-based power plants, has been directed to generate and supply power in terms of the directions. Further, by way of Clarification dated 13.05.2022, the MoP clarified that fixed charges for such supply of power would be in terms of the PPA, or as has been mutually agreed between the parties. Thus, considering that the obligation as regards the fixed charges remains under the purview of PPA, as has been categorically directed by MoP, such charges have been billed to HPPC, which are bound to be paid even in case HPPC does not procure power from the Petitioner.

(b) The contention of HPPC that it has not consented to the supply of power from the Petitioner in terms of the directions, is an incomplete narrative. By way of its letters, HPPC has consistently requested the Petitioner to supply power based on the terms of the PPA. When the Section 11 Directions under Section 11 are in force, it cannot be HPPC's case that power is supplied to it, not in terms of the directions but under the PPA, particularly when MoP has itself recognized that the existing provisions of the PPA are inadequate insofar as the pass through of complete cost of coal procurement is concerned.

Therefore, HPPC cannot on the one hand insist for the supply of power under the PPA terms and on the other hand, contend that it has not given consent to supply power as per contracted capacity under PPA as per the terms of directions under Section 11.

(c) As regards HPPC's contention that CGPL after being amalgamated with TPCL is currently a profit making company and therefore, there cannot be any question of financial distress affecting the viability of CGPL, the Petitioner has submitted that it is not making any profit on the admissible cost of coal but is merely seeking to get adequately compensated for the adverse financial impact caused to it by issuance of the directions under Section 11 of the Act.

IA No.50 of 2022

28. The Commission in its order dated 17.6.2022 had directed that till the time the Commission examines the claims of the Petitioner under Section 11(2) of the Act, the parties were directed to comply with the directions issued by MoP dated 5.5.2022 along with subsequent clarifications issued by MoP in letter and spirit. The Petitioner filed IA No.50 of 2022 alleging that Respondent Nos.1 to 8 are not complying with and are in contravention of the directions issued vide order dated 17.6.2022. The Commission after detailed examination of the issues raised in the said IA and hearing the parties disposed of the IA and issued certain directions vide order dated 13.9.2022. The following directions were issued:

(a) It was held that GUVNL and MSEDCL cannot unilaterally deduct INR 0.20/kWh from the fixed charges. The said Respondents were 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 was upheld.

(c) Action on the part of GUVNL to deduct 2.25% rebate irrespective of the date of payment cannot be sustained. GUVNL was directed to calculate the rebate in accordance with para 41 of the order dated 13.9.2022 and refund the excess rebate deducted within one week or adjust the same against the weekly bill issued after the date of the said order.

(d) The Respondents were 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.

Hearing of Main Petition

29. The Petition was heard on merit on a number of days and after conclusion of the arguments, the Petitioner as well as the Respondents have filed their written submissions. The contents of the written submissions made by the Petitioner and Respondents are discussed in brief in the succeeding paras.

Written Submissions of the Petitioner

30. The Petitioner has submitted that its Petition raised the issues such as: (a) the Energy Charge Rate as determined by the Committee in terms of the directions was inappropriate to not include/reflect the complete and correct factors as submitted by the Petitioner, and has been arrived at by reducing the mining profit of TPCL, which ought not be reduced in respect of the generation and supply of power in terms of the directions, since the passing on of such benefit is relevant only in respect of the Supplementary Power Purchase Agreement ("SPPA"); (b) the procurers which are availing/ not availing power in terms of the directions, failed to make payment of the

due fixed charges as per the PPA, as mandated under the directions/clarifications; (c) GUVNL while making payments for the invoices raised by the Petitioner, despite making unilateral deductions, also applied rebate as per the terms of the PPA; (d) Respondent Nos. 1 to 8 have failed to maintain Letter of Credit ("LC") commensurate to the rates determined by the Committee in compliance with the clarification dated 20.05.2022. The Petitioner has further submitted that by way of Order dated 13.9.2022 passed by this Commission in I.A No. 50 of 2022, certain directions have been issued to the Respondents (as quoted in para 28 of this order). The Petitioner has submitted that the said observations passed in favour of the Petitioner through Order dated 13.9.2022 be passed as final relief in favour of the Petitioner (with certain modulations in favour of the Petitioner on the issue of Rebate and capping of capacity charges at 80% of normative availability).

31. As regards sharing of mining profit, the Petitioner has submitted that for the supply of power in terms of directions and the subsequent clarifications, the Petitioner is under no obligation to share mining profit, on account of the following reasons:

(a) Sharing of mining profit being offered to the Procurers for the purpose of execution of the SPPA and since the terms of the SPPA have not been fructified by GUVNL's own admission, the same bear no relevance whatsoever for the purposes of this Petition.

(b) Considering that the Commission in its Interim Order dated 13.09.2022, has observed that there exists no prior mutual agreement (w.r.t deduction of INR 0.20/kWh in fixed charges), the same applies to the sharing of mining profit, since, the reduction of such fixed charges and sharing of mining profit

have their genesis to the execution of SPPA, which has not occurred. The issue of mining profit was conceptualized in relation to recommendations under the HPC Report and mining profit was to be passed on so as to align with HPC Report recommendations. Thus, the element of Mining Profit cannot be disconnected from the other aspects contained in the HPC Report and imposed upon the Petitioner for it would not only take away its rightful financial compensation but also impose an artificial restraint, disconnected to the HPC recommendations which are to be considered cumulatively and were to be executed through the SPPA.

(c) Whilst MoP has directed consideration of mining profit deductions, such directions cannot and do not limit the Commission's power to grant the offset of such adverse financial impact under Section 11(2) of the Act. The statutory power granted under Section 11(2), for this Commission to grant offset reliefs, is plenary and no limitations can be imposed upon such power through directions granted by the Central Government under Section 11(1). The offset relief being granted by the Hon'ble Commission under Section 11(2) should consider all aspects that impact the cost of generation, in addition to considering a reasonable return to the generator. These considerations cannot be truncated by the MoP even in the direction issued under Section 11(1). The above has also been upheld by the Hon'ble APTEL in the GMR Judgment. It is respectfully submitted that within the statutory framework of Section 11 of the Act, Government (through Committee in the present case) has merely prescribed bench mark rates (ECR), which are to be finally determined by the Commission. Mining profit deduction hence is an ingredient / element of such ECR. By virtue of such deduction there has been arrived an

ECR rate, which in-effect adversely affects the financial compensation ought to be received by the Petitioner. Hence, if mining profit element has been wrongly applied and forms part of ECR, the Commission has the statutory power and reciprocally the adjudicatory function to ensure that relief under Section 11(2) should "actually offset" the prejudicial impact on the generator.

(d) Arguendo, if sharing of mining profits is granted in terms of the proposed SPPA, in that case, the procurers may not be allowed to avail the incentive of rebate for timely payment. Considering that the sharing of mining profit is envisaged in the SPPA, it may be noted that the SPPA does not have provision for entitlement of rebate, since the same shall lead to huge under-recovery of the energy charges to the Petitioner.

(e) in case the sharing of mining profits is granted, the Petitioner would be in a worse off situation by complying with the mandate of the directions/ clarifications by declaring 100% availability. Notably, in case the Petitioner did not declare the availability, the only recourse under the PPA would have been the imposition of penalty on account of availability lower than 75%, which would have been lesser than the mining profits as may be shared by the Petitioner. Considering that the directions were issued in the background of inadequacy of the existing PPAs to provide complete pass through of actual cost of generation and the settled position of law as regards the principles of compensation enshrined under Section 11(2) of the Act, there cannot be a situation where the Petitioner is put in a financially worse situation.

32. The Petitioner has submitted that throughout its pleadings and during the submissions advanced during the proceedings, GUVNL has submitted that TPCL is

under an obligation to share 100% profits as accrued from its shareholding in KPC mines and has also placed reliance on certain documents. Without prejudice to the Petitioner's contention that mining profit should not be shared, the Petitioner has made the following submissions with regard to sharing of mining profit:

(a) GUVNL has misinterpreted the content and recommendations made by HPC in order to state that TPCL is under an obligation to share 100% of mining profit from KPC. HPC clearly states that mining profit will be shared proportionate to the quantum of coal being supplied from such owned mines.

(b) Further, Para 8.7.2 of the HPC Report itself clarifies to this extent and para 73 of Commission's Order dated 21.2.2014 on the methodology of calculating mining profits has been adopted in the HPC Report. Further, Annexure V of HPC Report providing the formula to share mining profits also subjects such sharing to the limit of the share of the seller/affiliate in the total production from the Indonesian coal mines.

(c) Profits limited to supply of coal to TPCL proportionate to the quantum of coal being supplied from such owned mines to the extent of shareholding (30%) of TPCL in KPC mines can only be factored in and not 100% of TPCL's profit in KPC Mines, as per the formula : [Quantity of Coal Supplied from KPC Mines to CGPL in MT × Incremental Post Tax Profit per MT on notional Basis × 30%].

(d) MoM dated 17.3.2022 as relied by GUVNL is unsustainable in law and logic, especially, when the SPPA till date is unexecuted and was shared by Tata Power with GUVNL on 4.7.2022. Government of Gujarat (GoG)

Resolution dated 1.12.2018 is unsustainable since the same in fact reads in favour of TPCL.

(e) No reliance can be placed on supply prior to 6.5.2022, as the issue in the present Petition relates to supply under directions under Section 11 of the Act and such supply is also subject to the execution of the SPPA. Considering that SPPA is unexecuted and there being mutually no agreement to this effect, no reliance can be placed on the same.

(f) The Commission in its order dated 15.4.2013 passed in Petition No.159/MP/2022 provided for calculation of net incremental profit from the mines owned by the petitioner proportionate to the coal supplied to the Petitioner's Project which has accrued on account of the Indonesian Regulations requiring the long term contract to be aligned with the market price and adjustment of the same in the compensatory tariff. Further, in the final order dated 6.12.2016 passed in the said Petition, the Commission has calculated Mining Profit as actual profit from coal mining operations in Indonesia based on the total incremental revenue after payment of taxes and royalty as per Indonesian Regulations. Ultimately, the Commission allowed the sharing of the profits from sale of coal from the mines in which Petitioner has the stake to the extent of off-take of coal from these mines for Petitioner's Project, and accordingly, the profit from mines pro-rata to the offtake of coal by Petitioner's Project has been adjusted against the relief given to CGPL. Thus, considering that the Petitioner has a 30% stake in PT Kaltim Prima Coal ("KPC") in Indonesia, if the mining profit is to be shared,

the same has to be shared to the extent of Petitioner's ownership in the said Indonesian mine on quantity of coal supplied from these mines to CGPL.

(g) In compliance with the directions passed by the Commission through its Interim Order dated 13.9.2022 in IA No.50/2022, the Petitioner has already issued credit notes pertaining to fixed charges (in excess of availability declared beyond 80%) to the respective procurers. The above has been done without prejudice to the Petitioner's right under Section 11(2) of the Act and remedies available in law.

33. As regards the liability of the Respondents for payment of fixed charges, the Petitioner has submitted as under:

(a) The fixed charges payable by GUVNL are to be computed in accordance with the method and principle as set out in the PPA, particularly since TPCL and GUVNL had not reached a final agreement owing to the unexecuted SPPA.

(b) Interim Order dated 13.9.2022 in IA 50/2022 has clearly held that parties have not yet entered into the SPPA to give final shape to negotiated terms and conditions of supply and in the absence of such concluded SPPA, it cannot be said that parties have mutually agreed to the reduction in fixed charge. The Petitioner has submitted that this finding of fact be replicated through the final order of the Commission in the present petition.

(c) Resolutions dated 5.12.2018 and 12.6.2020 as relied upon by the Respondents be examined in view of the purpose, intent and circumstances in which those documents have been issued. Though the resolutions are

constructive steps for execution of the SPPA, placing reliance on such resolutions which were to ultimately culminate in execution of SPPA cannot be the basis of unilateral deduction causing undue prejudice and adverse financial effect to TPCL.

(d) Reliance by the Respondents on the MoM dated 17.3.2022 ought to be rejected by the Commission since the said MoM and the discussions held therein are to culminate through the SPPA which is not executed till date.

34. As regards capping of Fixed Charges at 80% availability as urged by GUVNL, the Petitioner has submitted as under:

(a) Under normal circumstances, TPCL declares only 80% Declared Capacity each year. Considering the generation and supply of power is being undertaken outside the scope of PPA and TPCL has been specifically directed to operate the Project at full capacity, it is imperative that the capacity charges should not be capped up to Normative Availability, i.e. 80% and be paid for full declared capacity.

(b) The PPA itself through Schedule 7 provides for an incentive in case availability declared by it is beyond 85%. The Commission through Order dated 13.9.2022 in IA No.50/2022 held that since Section 11 Directions do not provide for the payment of enhanced capacity charges or incentives on account of declaration of availability beyond 80%, the Petitioner cannot be granted additional fixed charge for declaration beyond 80% of availability. However, it is the case of the Petitioner that since the capping of capacity charges at normative availability of 80% has been applied as per Article 1.2.2 of Schedule

7 of the PPA, in such a case the Petitioner should be granted the incentive as provided under Article 1.2.4 of the PPA at the rate of 40% of Quoted Non Escalable Capacity Charges (in Rs./kWh) for such contract year, subject to a maximum of INR 0.25/kWh on the energy corresponding to the availability in excess of 85%.

35. With regards to the contention of some Procurers that they should not be saddled with fixed charges since they are not procuring power from the project, the Petitioner has submitted as under:

(a) The Commission through Order dated 13.9.2022 in IA No.50/2022 has clearly held that the procurers not scheduling power when TPCL is making its plant available to the PPA holders ought to pay capacity charges in terms of the PPA and Directions. It has been further held that in case sale of procurer's share in the power exchanges fetches profit, such procurer who are not scheduling power from TPCL shall be liable to pay capacity charges.

(b) In terms of the MoP Clarification dated 20.5.2022, TPCL was compulsorily obliged to make its plant available and schedule power to the procurers. In furtherance of the same, TPCL was ready to schedule capacity to all procurers w.e.f. 25.5.2022, which is also evident from the Regional Energy Accounts of TPCL. In the ordinary course of events, if the Generator is willing to supply the power to a procurer who is unwilling to schedule the same power for offtake, in such a case, the Generator would be allowed to levy fixed charge / capacity charge from the procurer. The same is also the scheme under the PPA.

(c) Further, the provision envisaged under the Section 11 Directions as regards sharing of 'net profit' in case the TPCL sells power on the power exchanges 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.

36. As regards the Energy Charge Rate (ECR) payable for supply of power under Section 11 Directions, the Petitioner has submitted as under:

(a) TPCL through its Additional Affidavit dated 1.7.2022 has furnished the information as directed by the Commission as regards the determination of ECR for the period 6.5.2022 to 24.6.2022. TPCL has also filed an Additional Affidavit dated 9.9.2022 to place on record the data for the period 6.5.2022 to 25.8.2022 and the actual ECR computation for the months of May to August, 2022 as under:

(i) ECR for May,2022- INR 6.28/kWh

(ii) ECR for June,2022- INR 7.03/kWh

(iii)ECR for July, 2022- INR 7.62/kWh

(iv) Estimated ECR for August, 2022- INR 7.47/kWh

(b) In response to the objections raised by GUVNL as regards the computation of ECR and the details as furnished, the Petitioner has submitted that TPCL is in complete compliance of the directions of the Commission as requisitioned in Annexure to the Order dated 17.6.2022 and the documents elaborated by GUVNL did not form a part of the said Annexure and as such were not filed. Further, the information/ details furnished by TPCL is duly audited by the auditor and is adequate for the purpose of determination of rate/compensation

for off-setting the adverse financial impact owing to the issuance of the Section 11 Directions/ Clarifications issued by the MoP under Section 11 of the Act.

(c) As regards the Other Charges, the Petitioner has submitted that TPCL is in compliance with the Incoterms 2010 for the procurement of coal. The 'Other Charges' as claimed by TPCL are verified and certified by the Auditor. Further, for the power generated and supplied during the period between January to April, 2022, TPCL had claimed Other Charges as Zero or "$1/MT" as the power was being supplied under a separate and temporary arrangement, whereunder GUVNL had itself restricted the claim with respect to 'Other Charges' under the proposed SPPA and as such, TPCL was constrained to supply power considering the restricted costs. However, for supply in terms of and during the currency of the Section 11 Directions/Clarifications, TPCL is entitled to be compensated based on the actual costs incurred by it.

(d) As regards the technical and operational parameters, TPCL is to be compensated on the basis of actual cost of generation, which is based on landed cost of coal procurement as has been upheld by the APTEL in GMR Judgment. Further, Vide Order dated 17.6.2022, the Commission had directed TPCL to furnish the actuals of the operational/technical parameters, considering that the rate/compensation is to be determined on the basis the actual SHR and APC of the TPCL's Project. The slight variance in the operational/ technical parameters of TPCL's Project during the currency of the Directions is due to the volatility of the load due to Procurers' demand and has been duly explained by TPCL in the Additional Affidavit dated 1.7.2022.

37. As regards the applicability of HBA rates for purchase of coal for generation and supply of power during Section 11 Directions, the Petitioner has submitted as under:

(a) This issue is no more res-integra since the Commission has decided the same through its order dated 13.6.2022 passed in Petition No. 111/MP/2022 in which It has been held that a perusal of the Indonesian Regulations makes it clear that coal from Indonesia cannot be procured at a price lesser than the HBA derived price.

(b) GUVNL has misinterpreted the provisions of the Indonesian Regulations to state that coal can be procured by TPCL at a price lesser than the benchmark price. A perusal of the Indonesian Regulations makes it clear that coal cannot be exported from Indonesia at a price lesser than HBA derived price, failure of which shall attract administrative sanctions.

(c) MoM dated 17.3.2022 clearly stipulates that actual or HBA Index derived price whichever lower is applicable.

(d) HPC Report itself through Para 2.6.6 recommends applicability of HBA Index for import of coal from Indonesia. Recommendations of the HPC have been selectively read by GUVNL to mislead the Commission.

(e) GUVNL's reliance on the Composite Index for Imported Coal for payment purposes to state that Argus Index should have been preferred, is also misplaced as the same is for the purpose of determining the escalation rates for imported coal. Further, the Commission in order dated 13.6.2022 passed in Petition No. 111/MP/2022 has taken into account the said Composite Index for

determination of a Base Rate which is not applicable to the issue at hand in the present Petition.

38. As regards sharing of profits from sale on power exchange, the Petitioner has submitted that TPCL through its Additional Affidavit dated 30.8.2022 has filed the details of sale of un-requisitioned power on power exchanges for the consolidated period 6.5.2022 to 28.7.2022. However, it is submitted that the exact share of profit to be shared with each procurer can only be computed pursuant to the determination of ECR by the Commission and expiry of directions on 31.12.2022 enabling TPCL to calculate the actual profit accrued. It is categorically submitted that TPCL is committed to share the profits as payable as they become due to the concerned procurers and in its commitment to do so, it has timely filed the details of power sold on power exchanges. Further, the Petitioner has craved leave of the Commission to submit the latest data/ information with respect to the sale of such power on exchange, as and when directed by the Commission.

39. As regards the mechanism of rebates, the Petitioner has submitted that considering that the PPA executed between the parties does not contain a specific provision as regards the weekly payments, the application of rebate as per the PPA does not come into question. The genesis of 0.375% as the rate of rebate prescribed under the Clarification dated 20.5.2022 is the CERC (Terms and Conditions of Tariff) Regulations, 2019. However, the Commission vide Order dated 13.9.2022 in IA No.50/2022 has set out the rebate as 2.25% for invoices paid on 1st day which will reduce to 2.05% on the 5th day and rejected GUVNL's action to deduct 2.25% rebate irrespective of the date of payment. The Petitioner has, however, submitted that the applicable rebate should be 0.567% on the 1st day since 0.567% is corresponding to

be 1/4th of the 2.25%). The Petitioner has further submitted that it cannot be burdened with rebate and reduction of mining profits from ECR as the same would lead to causing undue financial adverse impact upon the Petitioner and such scenario will be against the principles of restitution under Section11 (2) of the Act.

40. As regards the scope of Section 11(2) of the Act, the Petitioner has submitted that during the course of final hearings, learned Senior Counsel for GUVNL placed reliance on the decision of the APTEL in Judgment dated 3.10.2012 in Appeal Nos. 141, 142 of 2011 (Himatsingka Seide Limited v. KERC & Ors.), wherein it was observed that for the power capacity tied up under existing PPAs with the distribution licensees, only the supply over the normal supply under the PPA will be subjected to the rate determined under Section 11(2). In that connection, the Petitioner has submitted as under:

(a) The MoP Directions dated 5.5.2022 themselves take into consideration that the existing PPAs are inadequate to give a complete pass through of the cost of generation, and have thus recommended that full pass through of the fuel cost and actual generation be allowed to the generators. Considering that GUVNL has not challenged the directions, it cannot be now allowed to challenge the same in the present Petition.

(b) The reconciliatory efforts being made at various forums, i.e., through HPC recommendations, Minutes of Meetings under the aegis of MoP and through the execution of the draft SPPA evince that power cannot be supplied at the tariff as envisaged under the PPA.

(c) The intent of Section 11(2) of the Act is to provide the Appropriate Commission with the power to offset the adverse financial impact caused to the generators owing to issuance of directions under Section 11 of the Act.

(d) TPCL by seeking the determination of compensation, is not in any manner, trying to profiteer and seek tariff higher than the cost on actuals (plus reasonable return).

Written Submissions of GUVNL

41. GUVNL in its written submission has submitted that TPCL is in flagrant violation of the Section 11 Directions for the following reasons:

(a) TPCL has deliberately not been making available the maximum quantum of power admissible to GUVNL. TPCL had declared only around 60% contracted power (1085 MW) under on-bar entitlement till 12.9.2022 and which was further reduced to 40%-30% (490 -700 MW) for period after 13.9.2022. Therefore, GUVNL can schedule power upto on bar entitlement plus URS of other beneficiaries, if available. Despite repeated requests from GUVNL to schedule the entire contracted capacity qua GUVNL, i.e., 1805 MW, the quantum made available is less to the extent of 45% in the months of May 2022 to September 2022 which defeats the very purpose and objective of such directions.

(b) The Central Government had issued the directions under Section 11 (1) of the Act to provide for immediate redressal from the extraordinary circumstances and in aid thereof had made an ad hoc arrangement for payment of charges by appointing a committee. However, the power to determine such adverse financial consequences under Section 11 (2) of the

Act is a judicial power to be independently exercised by the Commission in accordance with law. In dealing with the determination of the adverse financial consequences, the Commission has necessarily to consider the valid and binding Agreement existing between Tata Power and GUVNL namely (a) the PPA dated 22.04.2007; and (b) the subsequent arrangement between Tata Power and GUVNL implemented during the period January 2022 to April 2022. Accordingly, the adverse financial consequences be considered by taking into account the terms of the PPA dated 22.4.2007 read with the arrangement implemented from January 2022 to April 2022 which is evidenced by (i) HPC Report; (ii) GR dated 5.12.2018; (iii) GR dated 12.6.2020; (iv) the Minutes of Meeting dated 17.3.2022 (conveyed by O.M. dated 29.3.2022 of the Ministry of Power); and (v) the final invoice raised by TPCL for January to March 2022 with reduction in capacity charges.

(c) The stand taken by TPCL to the effect that only when there is a formal Supplementary PPA, the agreement comes into force, in the facts and circumstances of the present case is preposterous. TPCL cannot defer the execution of the SPPA and bring about a self-induced frustration to gain advantage under section 11 (2) proceedings. The consequences of such a claim by TPCL is self-defeating as TPCL should first account for and return with interest the extra price over and above the tariff admissible under the PPA dated 22.4.2007.

(d) The Commission while considering the ‘adverse financial consequences’, if any, admissible to TPCL under Section 11(2) has to consider the following:

(i) Capacity/Fixed Charges: Reduction of 20 paise per unit from the fixed charges and Capping of capacity charges at 80% availability;

(ii) Coal consumption details submitted by TPCL for the purpose of computing energy charges such as FOB Price of Coal, Other Charges, Ocean Freight and Port/Fuel handing charges, Technical Parameters; and Taxes and Duties;

(iii) Adjustment for Mining Profit;

(iv) Rebate; and

(v) Letter of Credit to be maintained by GUVNL.

(e) As regards the admissibility of capacity charges, GUVNL has submitted as under:

(i) TPCL cannot bill the entire fixed cost and has to reduce 20 paise per unit;

(ii) In terms of PPA, the entire annual fixed cost of the plant is recovered on achievement of @ 80% normative cumulative availability. TPCL cannot claim Capacity Charge on full declared capacity without restricting it up to normative availability.

(f) As regards the energy charges admissible, GUVNL has submitted as under:

(i) Energy Charge Rate ('ECR'): TPCL has not submitted a copy of any of the documents like coal invoice copy, Bill of lading, documents related other charges, invoice of ocean freight, Port Handling Agreement & Bills thereto, documents related to taxes and duty actually incurred, Bills of Entry submitted to customs departments etc. TPCL has also not disclosed the information regarding third party sale of coal

from the PT Kaltim Prima Coal mine located in Indonesia (which it is a 30% shareholder of).

(ii). FOB Price of Coal: FOB coal price should be considered lower of actual or price derived from Market index while working out ECR under Section 11. Further, Coal procurement from mines other than in Indonesia should also be linked with appropriate index and only prudent FOB price should be considered.The Central Government vide Clarification dated 20.05.2022 has stated that it has used the Argus Index to determine the tariff under Section 11.

(iii) Other Charges: TPCL has procured coal on FOB, CFR and DAP basis. Since other charges are a part of procurement on FOB, CFR and DAP basis, other charges cannot be claimed separately.

(iv) Other Components of ECR: Other components of ECR admissible to TPCL like, ocean freight, port/fuel handling charges, taxes and duties should be as per the PPA.

(g) Mining Profit: TPCL owns 30% share in the Indonesian Mining Company PT Kaltim Prima Coal and is liable to share the mining profits earned by it from the said company to that extent. TPCL is however claiming that it will not share 100% mining profit earned by its mining company and wrongfully seeking to restrict the same only on coal consumed from its mine. Mining profit should be worked out on total coal consumption.

(h) Rebate: The contention of TPCL that rebate has to be calculated at one fourth the specified percentage is erroneous. There would be no change in the amount of rebate levied if the same percentage is applied for weekly payments or monthly payments.

(i) Letter of credit: GUVNL has been maintained adequate letter of credit in terms of the directions of the Ministry of Power, and further without prejudice to its rights, has also enhanced the Letter of Credit value to 205 crores as sought by TPCL. However, TPCL has failed to supply the entire contracted quantum of 1805 MW to GUVNL.

Written Submissions by PSPCL

42. PSPCL in its written submission has submitted as under:

(a) Section 11 (1) Directions cannot be issued to rewrite or modify the terms of the PPA entered into between the generating company and the procurer. There is an obligation on the part of the generator to fulfil its commitment to generate and supply power to the procurers with whom it has a valid and binding PPA at the agreed tariff terms and conditions. In any event, the generator cannot be allowed to compel the procurers having the PPA to pay higher tariff and purchase power under Section 11 dispensation de hors the PPA. Reliance was placed on the judgements of the APTEL dated 23.05.2014 in Appeal No. 37 of 2013 (GMR Energy Ltd. v. KERC), dated 03.10.2012 in Appeal No. 141 of 2012 and Batch in Himatsingha Seide Ltd. v. KERC and Judgment dated 18.9.2017 passed by the Hon'ble Karnataka High Court in the matter of Star Metallics and Power Private Limited v. State of Karnataka.

(b) There cannot be a mandate compelling the procurers such as PSPCL to procure power from Tata Power at the tariff terms and conditions other than those specified in the PPA. This is particularly when the validity of the PPA tariff has been upheld by the Hon'ble Supreme Court in the case of Energy

Watchdog v Central Electricity Regulatory Commission and Ors [(2017) 4 SCC 80].

(c) 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. Para (i) of the Section 11 Directions only provides that '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'. The above directions are in regard to the fixed charges if the option is exercised by the PPA holders to avail power under Section 11 Directions. It does not refer to deemed fixed charges in situations where the PSPCL has clearly notified its unwillingness to avail power for the entire duration of Section 11 Directions and cannot be saddled with additional fixed charges for the power made available dehors the PPA.

(d) Tata Power neither offered the non-scheduled power of procurers including PSPCL to the other procurer nor did it attempt to sell the said un-requisitioned power in the energy exchange. The same is evident from the data provided by Tata Power stating that less than 30 MUs (29.17 MUs) of power was sold in the exchange for the period from 20.5.2022 to 23.6.2022. If it is the case of Tata Power that it is not possible to sell power on power exchange on account of the lack of demand, there is no compulsion on Tata Power to generate. The obligation to generate on Tata Power will arise only if the contract on the power exchange platform matures and not otherwise.

(e) In terms of the Clarification dated 20.05.2022, the LC has to be maintained only by the procurers who opt for requisitioning power from Tata Power under the Section 11 dispensation. Therefore, the consequence of such non-maintenance of LC by any procurer is limited to the sale of the power of such procurer in the power exchange.

(f) As per the Order dated 31.3.2022 passed by the Hon'ble National Company Law Tribunal, Mumbai, CGPL stands merged with Tata Power. Post-merger, Tata Power is currently a profit-making company.

Written Submissions of MSEDCL

43. MSEDCL has submitted the following in its written submission:

(a) The Petitioner was supplying power to MSEDCL up to September 2021 as per the PPA rates decided by virtue of the PPA entered into between the Petitioner and MSEDCL dated 22.4.2007. However, due to increase in the price of the imported coal, the Petitioner from 18.9.2021 has withdrawn all five of its units and stopped supplying power to MSEDCL. The Petitioner vide its letter dated 30.3.2022 informed MSEDCL of its proposed Supplemental PPA being finalized with GUVNL and supply of power to GUVNL in the months of January 2022, February 2022, and March 2022 at an approximate variable cost of Rs.4.5/kWh and Rs.4.9/kWh respectively plus fixed cost of Rs.0.70/kWh based on the SPPA terms. MSEDCL, considering the increasing demands/needs of its consumers in the state of Maharashtra, vide its letter dated 10.4.2022 requested the Petitioner to commence supply of 760 MW of power with immediate effect, purely on

temporary basis for the period upto 15.6.2022 at the rate which was in line with the proposed supplementary PPA terms. The Petitioner started supplying power to MSEDCL from 12.4.2022.

(b) MSEDCL has paid to the Petitioner as per mutually agreed rates at par with the proposed Supplementary PPA from 12.4.2022 to 5.5.2022 and from 6.5.2022 to 25.6.2022 as per notification dated 5.5.2022 and Energy charge rate as discovered by the committee time to time.

(c) Ministry of Power vide its notification dated 13.5.2022 laid down that the fixed charge will be as per the Power Purchase Agreements, or as has been already agreed mutually between the generating company and Procurers. MSEDCL has purchased power from Petitioner since April 2022 at a mutually decided reduced fixed rate, i.e. 0.70/kWh as per proposed Supplementary PPA, which is 0.20/kWh less than that agreed to in the PPA subsisting between MSEDCL and CGPL.

(d) The PPA specifies a monthly percentage of rebate. Though the Petitioner is raising weekly bills, the impact of rebate would remain the same even if the bills are raised on a weekly basis or monthly basis, since the rate for rebate specified is a percentage of the invoice raised and not an absolute amount.

(e) MSEDCL has a right in law to recover its previous dues from the prospective bills of the Petitioner. MSEDCL has justly appropriated the dues owed by CGPL to MSEDCL vide previous PPA in the prospective bills of

CGPL and has preferred a petition before the Commission being Petition No.246/MP/2022.

(f) The monetary relief to be allowed for the aspects of the adverse financial consequences is to be considered by the Commission by factoring the sharing of mining profits as provided for by the Ministry of Power under the section 11 Directions as also other factors for calculating derived cost of imported coal. Further, FOB price of coal should be considered lower of the actual or price derived from market index while working out tariff under section 11.

Written Submissions of Rajasthan utilities

44. Rajasthan Utilities in their written submissions have made the submissions similar to those of PSPCL which is not repeated for the sake of brevity.

Written Submission by Haryana Utilities

45. Haryana Utilities have submitted the following in their written submission:

(a) Section 11 direction dated 13.5.2022 in the context of the Committee recommended rate prescribed 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'. The same cannot be read in isolation as these are in continuation of the Direction dated 5.5.2022. Further, on 28.6.2022, the Central Government has issued a clarification for optimum utilization of generation from imported coal-based plants, wherein it has been specifically stated that the PPA holder shall not be liable to pay fixed charges for the duration of sale of power to any other distribution licensee. The above directions are in regard to the fixed charges if the option is

exercised by the PPA holders to avail power under Section 11 Directions. It does not refer to deemed fixed charges in situations where the Haryana Utilities have clearly notified their unwillingness to avail power for the entire duration of Section 11 Directions.

(b) The liability to pay deemed fixed charges stems from Article 4.4.3 of the PPA when there is a declaration of availability made by Tata Power as per the tariff terms and conditions of the PPA and there is no scheduling by the PPA holders. However, Tata Power itself has stated that the quantum of power offered by Tata Power is under Section 11 Directions and outside the ambit of the PPA. Tata Power cannot seek to rely on the provisions of the PPA for claiming deemed fixed charges when admittedly the supply of power is not being offered at the tariff terms and conditions contained in the PPA. In the absence of any stipulation in the Section 11 Directions for payment of deemed fixed charges for not availing the power offered, there cannot be any claim admissible.

(c) Section 11 Directions dated 5.5.2022 read with subsequent clarifications provided for mitigating steps that could have been opted by Tata Power in case of non-procurement of power by a particular Procurer. Tata Power neither offered the non-scheduled power of procurers including the Haryana Utilities to the other procurer, nor did it attempt to sell the said un-requisitioned power in the energy exchange. If it is the case of Tata Power that it is not possible to sell power on power exchange on account of the lack of demand, there is no compulsion on Tata Power to generate. The

obligation to generate on Tata Power will arise only if the contract on the power exchange platform matures and not otherwise.

(d) In terms of the Clarification dated 20.5.2022, the LC has to be maintained only by the procurers who opt for requisitioning power from Tata Power under the Section 11 dispensation. Therefore, the consequence of such non-maintenance of LC by any procurer is limited to the sale of the power of such procurer in the power exchange.

Analysis and Decision

46. In the light of the documents on record and submissions of the parties, the following issues arise for our consideration:

(a) Issue No.1: The Scope of jurisdiction of the Commission under Section 11(2) of the Act?

(b) Issue No.2: What should be the principles to determine the Adverse Financial Impact under Section 11(2) of the Act?

(c) Issue No.3: Whether the Petitioner is entitled for fixed charges as per the PPA or the rate paid prior to the issue of the directions under Section 11(1) of the Act?

(d) Issue No.4: Whether the capacity charges shall be based on the declared availability or capped at 80% of availability during the operation of Section 11 Directions?

(e) Issue No.5: Whether deduction on account of rebate shall be in terms of the PPA during operation of the Section 11 Directions?

(f) Issue No.6: Whether the Procurers who are not availing power are required to pay the fixed charges and open the required LC?

(g) Issue No.7: How the energy charge shall be computed during the operation of Section 11 Directions?

(h) Issue No.8: Whether the mining profit shall be shared by the Petitioner while determining the adverse financial impact and to what extent?

47. The Commission vide its order 13.9.2022 in IA No.50/2022 in the present Petition has decided the issues mentioned at sub-paras (c), (d), (e) and (f) of para 45 of this order. However, the Petitioner and the Respondents have expressed their reservation/objections with regard to some of the decisions in the said order and have sought modification/clarification on those issues. The Commission has dealt with the observations/objections while examining the relevant issues. The issues framed in para 46 of this order has been dealt with in the subsequent paragraphs.

(A) Issue No.1: Scope of jurisdiction of the Commission under Section 11(2) of the Act?

48. Section 11(1) of the Act provides that the Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government. The Explanation under Section 11(1) of the Act explains the extraordinary circumstances as arising out of threat to security of the State, public order or a natural calamity or such other circumstances in the public interest.

49. MoP, vide its Letter No.23/13/2021-R&R(Pt-1) dated 5.5.2022 issued directions under Section 11 of the Act to all imported coal based power plants to operate and generate power to their full capacity which included the power plant of the Petitioner at Mundra, Gujarat. The directions under Section 11 was originally valid till 31.10.2022 which has been extended till 31.12.2022. The circumstances leading to the issue of directions under Section 11 have been mentioned as under:

> *"The demand for power has gone up by almost 20% in energy terms. The supply of domestic coal has increased but the increase in the supply is not sufficient to meet the increased demand for power. This is leading to load shedding in different areas. Because of the mismatch between the daily consumption of coal for power generation and the daily receipt of coal at the power plant, the stocks*

of coal at the power plant has been declining at a worrisome rate. The international price of coal has gone up in an unprecedented fashion. It is currently around 140 US Dollars per tonne. As a result of this, the import of coal for blending, which was of the order of 37 Million Tonnes in 2015-16 has gone down, leading to more pressure on domestic coal. The imported coal based generation capacity is around 17,600 MW. The PPAs for imported coal based plants do not have adequate provision for pass through of the entire increase in the international coal price. At the present price of imported coal, running of imported coal based plants and supply of power at the PPA rates will lead to huge losses to the generators and therefore the generators were not willing to run those plants.

3. In order to ensure that all power plants based on imported coal start functioning; the States have been advised that the price of coal should be a pass through. Most states have done that and about 10,000 MW out of 17,600 MW imported coal based generation capacity has started operating. However, some imported coal based capacity is still not operating."

50. The following directions have been issued under Section 11 of the Act by MoP, vide letter dated 5.5.2022:

"4.In the light of the present emergent circumstances, the following directions 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 ration 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 the price of imported coal; shipping costs etc."*

51. In terms of para 4(d) of the letter dated 5.5.2022, MoP appointed a Committee to work out the rates at which power is to be supplied to the PPA holders. Based on the recommendation of the Committee, MoP vide its letter dated 13.5.2022 issued the proposed tariff to be paid by the PPA holders to the generating companies including the Petitioner. Relevant portion of the said letter is extracted as under:

"5. The Committee has given the following recommendations:

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

Plant	***Capacity***	***Benchmark ECR (Rs./kWh)***
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 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 Indonesia coal; and (b) on distribution of profits and/or dividends from such production, sale and/or supply of such coal by PT Kaltim Prima Coal (KPC) to Tata Power have been considered in accordance with the CGPL letter dated 12th May, 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.

52. MoP has been issuing the rates for supply of power from time to time based on the recommendations of the Committee.

53. Based on the representations received from various stakeholders, MoP vide its letter dated 20.5.2022 has issued the following clarifications:

"2.MoP has received representations from some stakeholders. To resolve the issues raised by the stakeholders, directions on certain aspects are given as under:

(a) As per the PPA, the Payment Security Mechanism (PSM) shall be maintained. Letter of Credit (LC) is to be maintained by the procurer for the contracted power to be purchased. In case there is no LC, advance payment shall be made. The Letter of Credit shall be unconditional. The LC shall be promptly enchased for payment and it should be timely recouped by the procurer for purchase of power from the generator. If there is no LC or advance payment or if the LC has not been recouped after encashment, then the generator will not schedule power to the procurer and will be entitled to sell the power in power exchanges. No formal consent from the procurer will be required for such sale. The net profit, if any, from such sale on power exchanges shall be shared with the procurer(s) on monthly basis.

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

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

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

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

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

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

(h) The committee have determined the tariff based on the Argus index. However, some of the plants, to begin with, which are required to purchase coal from "High Seas" due to inadequate stock being available at plant shall be given tariff accordingly for such imported coal to build stock up to three weeks requirement and subject to condition that plant is made operational within 15 days of such purchase. The generator shall submit the relevant documents for verification by the Committee."

54. It is apparent from the above that the MoP has not only issued directions under Section 11(1) of the Act but has also constituted a committee for recommending the rates to be charged by the concerned generating companies for supply of power to the beneficiaries during the period of operation of the directions under Section 11(1) of the Act. As stated before, MoP has been issuing rates for supply of power from time to time based on the recommendations of the Committee. The notified rates encompass such aspects as capacity charge, energy charge, maintenance of Letter of Credit (LC), weekly payments and rebates etc. In other words, MoP directions

under Section 11(1) also include rates and terms and conditions under which power may be supplied during the operation of Section 11 Directions.

55. The Petitioner has filed the present petition under Section 11(2) of the Act which entrusts the Appropriate Commission with the responsibility for offsetting the adverse financial impact caused to the generating company as a consequence of the directions given by the Appropriate Government. The Petitioner has further submitted that supply of power under Section 11(1) of the Act is subject to the restitutive principles enshrined in the Act. The Petitioner has submitted that APTEL in its judgement dated 23.5.2014 in Appeal No. 37 of 2013 and 303 of 2013 (GMR Energy Limited V. Karnataka Electricity Regulatory Commission & Ors) (hereinafter referred to as "the GMR judgement") has laid down the principle that only the Appropriate Commission has the power to offset the adverse financial impact of directions under Section 11(2) of the Act. The Petitioner has submitted that in terms of the said judgement, the compensation to be granted to the generating company under Section 11(2) of the Act is to be based on the actual cost of generation in addition to a reasonable return on equity. The Petitioner has submitted that since the said judgement has attained finality in terms of dismissal of civil appeal filed against the judgement by Hon'ble Supreme Court, the Commission has the power to determine the appropriate rate/compensation for the generation and supply of power from the project of the Petitioner to Respondent Nos.1 to 8 in terms of the order dated 5.5.2022 issued by MoP under Section 11(1) of the Act.

56. Some of the Respondents have submitted that Section 11 Directions cannot be issued to re-write or modify the terms of the PPA between the generating company and its Procurers. It has been submitted that the generating company has

an obligation to fulfil its commitments to generate and supply power to the Procurers at the agreed terms and conditions of the PPA. The generating company cannot be allowed to compel the Procurers having the PPA to pay higher tariff and purchase power under Section 11 dispensation de hors the terms and conditions of the PPA.

57. We have considered the submissions of the Petitioner and Respondent Procurers. The present petition has been filed for determination of adverse financial impact on the Petitioner under Section 11(2) of the Act on account of the directions issued by MoP under Section 11(1) of the Act. Section 11 of the Act is extracted as under:

> *"11. Directions to generating companies.- (1) The Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government.*
>
> *Explanation- For the purposes of this section, the expression "extraordinary circumstances" means the circumstances arising out of threat to security of the State, public order or a natural calamity or such other circumstances arising in public interest.*
>
> *(2) The Appropriate Commission may offset the adverse financial impact of the directions referred to in sub-section (1) on any generating company in such manner as it considers appropriate."*

Thus, power has been vested in the Appropriate Commission, in this case the Central Electricity Regulatory Commission, to offset the adverse financial impact of the directions under Section 11(1) on the generating company of the Petitioner in such manner as the Commission may consider appropriate. However, in the present case, the Central Government has not only issued directions under Section 11(1) of the Act but has also been issuing orders from time to time with regard to the rates to be paid by the Respondent Procurers to the Petitioner during the operation of Section 11 Directions based on the recommendations of the committee constituted

for the purpose. It is the case of the Petitioner that the rates of supply of power determined by the Committee are not adequate to even cover the cost of generation and the Petitioner has accordingly sought determination of adverse financial impact by this Commission under Section 11(2) of the Act.

58. The question arises with regard to the legal sanctity of the rates determined by MoP for supply of power during the operation of Section 11 Directions. In this connection, the following observations of the APTEL in GMR Judgement are relevant:

> *"28. Thus, the State Government can only give directions under Section 11(1) for operation and maintenance of the generating station in accordance to its directions. The State Commission alone has been empowered under Section 11(2) of the Electricity Act to offset the adverse financial impact on the generating company as a result of operating and maintaining the power plant as per the directions of the State Government under Section 11(1). The State Government is not empowered to determine the rate or terms and conditions at which the generating companies will supply power to the State Grid against directions u/s 11(1) of the Act. The rate specified by the State Government in the order regarding direction under Section 11(1) is only a rate at which the distribution licensees have to make payment to the generating company in the interim period till the State Commission under Section 11(2) decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions of the State Government under Section 11(1)."*

In the light of the above observations of APTEL, the rates specified by MoP on the recommendations of the Committee are the rates at which the Respondent Procurers have to make payment to the Petitioner in the interim period till the Appropriate Commission, in the present case this Commission, decides the compensation to be given to the generating company, if any, to offset the adverse financial impact of the directions issued under Section 11(1) of the Act.

59. The Commission while admitting the present petition vide its order dated 17.6.2022 had observed as under:

"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 payments 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 directions issued by MoP dated 5.5.2022 along with subsequent clarifications issued by MoP in letter and spirit."

Thus, the Commission issued the above interim directions directing the Respondent Procurers to make payment as per the rates determined by the MoP till the claims of the Petitioner are examined and decided by the Commission. The Commission vide its second interim order dated 13.9.2022 in I.A. No. 50/2022 adjudicated the disputes between the Petitioner and the Respondent Procurers with regard to some aspects of the rates to be paid in compliance with the first interim directions issued vide order dated 17.6.2022. Therefore, it follows that the rates decided by the MoP read with the clarification of the Commission thereon vide order dated 13.9.2022 are interim in nature and are subject to determination of adverse financial impact by the Commission under Section 11(2) of the Act.

(B) Issue No.2: What should be the principles to determine the Adverse Financial Impact under Section 11(2) of the Act?

60. The next question that arises is how the adverse financial impact of the Section 11 Directions is to be determined, particularly against the background that (i) there is a subsisting PPA between the Petitioner and Respondent Procurers; (ii) on account of unviability to supply power at PPA rates due to exponential increase in

the cost of imported coal; and (iii) the parties are in the process of negotiation to finalise Supplementary PPA.

61. The term “Adverse financial impact” has not been defined. However, both the Petitioner and the Respondent Procurers have placed strong reliance on some of the decisions of APTEL namely, judgement dated 3.10.2012 in Appeal Nos. 141, 142 of 2011 & 10 of 2012 (Himatsigka Seide Limited Vs. KERC & Others, M/s J.K. Cement Limited Vs. KERC & Ors and MPPL Renewable Energy Private Limited Vs KERC & Ors) and judgement dated 23.5.2014 in Appeal No. 37 of 2013 (G.M.R. Energy Limited Vs KERC & Ors) and Appeal No. 303 of 2013 (Bangalore Electricity Supply Company Limited & Ors Vs G.M.R. Energy Limited & Ors) with regard to the factors which should be considered for determining adverse financial impact of the directions issued under Section 11(1) of the Act.

62. To capitulate the background leading to filing of the Appeal Nos.141 and 142 of 2011 and 10 of 2012, the Government of Karnataka by an order dated 1.4.2010 approved purchase of power by the distribution licensees as short term arrangement for the period from 8.4.2010 to 30.6.2010 from co-generation sugar factories at a provisional rate of Rs.5.50/kWh during the months of April and May 2010 and Rs.5/kWh during June 2010 for generators who did not have or had PPAs with the distribution licensees, subject to the approval of the State Commission. The Government of Karnataka issued a similar order on 6.4.2010 for procurement of power from biomass generating companies at the rate of Rs.5/kWh. Government of Karnataka issued order dated 3.4.2010 in exercise of powers under section 11(1) of the Act directing all the generating companies in the State to operate and maintain their generating stations at maximum exportable capacity and supply to the State

Grid till 30.6.2010. The generating companies and distribution licensees filed petitions before Karnataka Electricity Regulatory Commission (KERC) to approve the rates for bagasse/biomass plants and captive power plants. KERC after hearing the parties passed a common order on 24.3.2011 fixing a rate of Rs.5/kWh for all categories of generators for the entire period. KERC while fixing the rates under Section 11(2) of the Act was guided by the following observations of the Hon'ble High Court of Karnataka in its judgement in Writ Petition No.590 & 591 of 2009:

> *"Adverse financial impact means the electricity generated by virtue of directions issued by the Government is not fetching the generating company the price which it would have fetched in the event of their supplying to the licensee or customer, i.e. less than the same".*

Interpreting the said directions, KERC in its order dated 24.3.2011 came to the conclusion that "offsetting adverse financial impact of a generator would mean fixing a rate keeping in view both the revenue that a generator could have realized by selling the power in the short term market, subject to the said rate covering the cost of generation, so that the generating company does not incur a loss." KERC further observed that "for the present purpose, it would be adequate if the rates determined are generally what the generating companies could realize from the market when they are generating power without being compelled by orders under Section 11 of the Act." KERC proceeded to hold that "*in our view, the price of power supplied through bilateral contracts and traders offers a better indication of the price that a generating company could have realized for its power for short term sales of a few weeks or months. Even these prices vary from month to month. Further, there are costs associated with marketing of power through traders and transmission costs which need to be suitably discounted to arrive at the revenues realized by the generating companies.*" After considering the average price of power traded during

April, May and June 2010 as Rs.5.58/kWh, Rs.6.26/kWh and Rs. 5.57/kWh respectively as per the report published by this Commission and discounting for the market expenses and transmission charges, KERC vide its order dated 24.3.2011 decided that "the power supplied in compliance of the orders issued by the Government under Section 11(1) of the Act, 2003 in April 2010 by co-gen power suppliers including sugarcane co-gen generators and biomass based generators and also others who do not have PPA governing the supplies during the said period shall be paid for at Rs.5.00 per kWh". In case of the generators having existing PPAs, KERC decided as under:

> "*The generators with existing PPAs are therefore, obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs and the higher rate of Rs 5.00 per kWh shall be applicable only if the supplies are made over and above the normal PPA obligations. For determining the normal supply obligation of such generators, we direct that the utilities shall take into account the quantum of power supplied by them during the months of April, May and June during the previous three years and any supplies made in excess of the average supply of last three years shall be eligible for payment at Rs. 5.00 per kWh determined under this order".*

63. The order of KERC dated 24.3.2011 was challenged before APTEL in Appeal Nos. 142, 142 of 2011 and 10 of 2012 (Himatsingka Seide Limited Vs. KERC & Others and other appeals). APTEL in its judgement dated 3.10.2012 in Appeal Nos.141 and 142 of 2011 and 10 of 2012 has decided the issues as under:

> *"13. Summary of our findings:*
>
> ***Appeal nos. 141 & 142 of 2011***
>
> *13.1 We are in agreement with the principle adopted by the State Commission in offsetting the adverse financial impact on the generators complying with the directions of the State Government u/s 11(1) of the Act by fixing rate keeping in view the revenue that a generator could have realized by selling power in the short-term market, subject to the said rate covering the cost of generation, so that the generating company does not incur a loss. Accordingly, we do not find any infirmity in the State Commission arriving at average short-term market price of Rs. 5.68, Rs. 6.26 and Rs. 5.57 per unit respectively prevailing in the months of April, May and June, 2010 based on the price of traded power as per*

the statistics published by the Central Commission. There is also no infirmity in the decision of the State Commission to fix the price after discounting the marketing expenses and transmission charges. However, the State Commission has not actually determined the marking and transmission expenses and has arbitrarily fixed the price at Rs. 5/- per kWh. Accordingly, we direct the State Commission to determine the discount on account of marketing expenses and transmission charges and redetermine the rate of supply of energy to be paid to the generators during the period April- June 2010, after hearing the Appellants.

13.2 The Appellants are entitled to payment of interest charges for the delay in actual payment by the distribution licensees.

Appeal No. 10 of 2012

13.3 Regarding the jurisdiction issue raised in Appeal no. 10 of 2012, we hold that the State Commission has correctly exercised its powers u/s 11(2) of the Act to offset the adverse financial impact of the Government directions u/s 11(1) of the Act on the bio-mass power generator who have existing PPAs with the distribution licensees. The bio-mass generators having existing PPA with the distribution company are entitled to the rate determined by the State Commission for the quantum of energy in excess of the energy that they would have normally supplied to the distribution licensees under the PPA.

13.4 The State Commission was correct in deciding the quantum of energy under normal supply obligation as average of energy actually supplied during the months of April, May and June during the previous three years excluding the period in the year 2009 when they had been directed to maximise generation by the State Government's order u/s 11(1) of the Act."

64. The facts leading to filing of the Appeal Nos 37 of 2013 and 303 of 2013 are that GMR Energy Limited had established a barge-mounted naphtha based generating station having a capacity of 220 MW at Mangalore in Karnataka and had entered into a short term PPA with Power Company of Karnataka Limited from November 2008 to January 2009. Government of Karnataka by orders dated 30.12.2008 and 1.1.2009 directed all the generating companies in the State to supply electricity to the State Grid under Section 11(1) of the Act and specified a tariff of Rs.5.50/kWh for such supply. GMR Enery Limited filed OP No.47 of 2010 before KERC seeking compensation for the electricity supplied by it in compliance

with the directions under Section 11(1) of the Act. KERC vide its order dated 30.11.2012 determined the tariff of Rs.6.90/kWh for the electricity supplied to the State Grid from January 2009 to May 2009 based on the short-term market rate for round-the-clock power based on bilateral agreement. The said order was challenged before APTEL by both GMR Energy Limited and PCKL by filing Appeal Nos. 37 of 2013 and 303 of 2013 respectively. APTEL in its judgement dated 23.5.2014 decided the appeals with the following findings:

> ***"53. Summary of our findings:***
>
> *i) Off setting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11(1) of the Electricity Act, 2003 would mean fixing a rate keeping in view the revenue the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss.*
>
> *ii) The findings of the Tribunal in judgment dated 3.10.2012 in Appeal no. 141 of 2012 and batch reported as 2013 ELR(APTEL) 0106 in the matter of Himatsingka Seide Vs KERC & Others will squarely apply to the present case.*
>
> *iii) But for the directions of the State Government under Section 11(1) of the Act, GMR would have sold its power in the market as its PPA for long term supply with the distribution licensee had expired in June 2008 and since then it was selling power in the short term market. Thus, there is no infirmity in the State Commission linking the price of power supplied by GMR against the direction under Section 11(1) to the market rate of power. But, from the order of the State Government to supply power at Rs. 5.50 per unit, GMR would have sold its power in the market rate and therefore, the adverse financial impact of the directions under Section 11(1) will be the difference between the rate that GMR would have got in the short term market and the rate fixed by the State Government i.e. Rs. 5.50 per unit.*
>
> *vi) The State Commission has correctly determined the rate of power for supply by GMR during the period of operation of Section 11(1) from January 2009 to May 2009 which in our opinion fairly offsets the adverse financial impact of Section 11(1) direction on GMR.*
>
> *viii) GMR is entitled to simple interest @ 12% from the date when payment was due to be paid to GMR as per the impugned order of the State Commission till 30 days from the date of communication of this judgment. Thereafter, for any further delay in payment by the distribution licensees/PCKL, GMR will be entitled to interest @ 12% per month on the outstanding dues to be compounded on quarterly basis."*

65. From the above judgements of APTEL, the following broad findings emerge with regard to determination of the adverse financial impact arising out of the directions issued under Section 11(1) by the Appropriate Government:

(a) In case of generators having no Power Purchase Agreements with distribution licensees, off setting the adverse financial impact on a generator which supplied electricity to the distribution licensees in compliance of the directions of the State Government under Section 11(1) of the Electricity Act, 2003 would mean fixing a rate keeping in view the revenue which the generator could have realized in short term market subject to the condition that the rate covers the cost of generation so that the generating company does not incur a loss.

(b) The generators with existing PPAs are obliged to supply power at rates specified in the agreement to the extent of the supplies committed in the PPAs. However, such generators are entitled to the rate determined by the State Commission for the quantum of energy in excess of the energy that they would have normally supplied to the distribution licensees under the PPA.

66. The Petitioner has Power Purchase Agreement with the distribution licensees of five States namely, Gujarat, Maharashtra, Rajasthan, Punjab and Haryana and its entire contracted capacity is covered under the PPA. Therefore, the first finding is not applicable in the case of the Petitioner. As regards the second finding, it is to be noted that the Petitioner's generating station is based on imported coal for which the Petitioner had arranged supply of coal from a mine in Indonesia in which the Petitioner has 30% stake. Subsequent to the signing of the PPA, Indonesian

Government on 23.9.2010 issued Regulation No. 17 of 2010 titled as “Procedure to Determine the Benchmark Price for Mineral and Coal Sales” (Indonesian Regulations) mandating export of coal on benchmark prices notified by the Indonesian Government. CGPL approached the Commission seeking relief to offset the adverse financial impact of the Indonesian Regulations in 159/MP/2012. The Commission in its order dated 15.4.2013 in Petition No.159/MP/2013 decided that Indonesian Regulations are neither covered under Change in Law nor under Force Majeure but directed for grant of relief under regulatory powers of the Commission under Section 79(1)(b) of the Act. Subsequently, vide order dated 21.2.2014, the Commission granted compensatory tariff to CGPL. APTEL set aside the said order of the Commission and held that the Indonesian Regulations constituted force majeure under the respective PPA. On appeal, the Hon‘ble Supreme Court vide its judgment dated 11.4.2017 in CA No. 5399-5400 of 2016 [Energy Watchdog vs Central Electricity Regulatory Commission & Ors., [(2017) 14 SCC 80] (hereinafter referred to as “Energy Watchdog Case”) decided that enactment of Indonesian Regulations did not constitute either change in law or Force Majeure, as contractually specified under the respective PPAs. Subsequently, Government of Gujarat vide its Resolution dated 3.7.2018 constituted a High Power Committee (HPC) for resolution of the issues of imported coal based power projects located in the State of Gujarat. The HPC submitted its report to the Government of Gujarat suggesting certain financial and commercial resolution packages including suitable amendment to the respective PPAs. Before implementing the recommendations of the HPC, Government of Gujarat and GUVNL sought a clarification from the Hon’ble Supreme Court whether any amendments to the PPAs in the light of the recommendations of the HPC would be possible on the face of the judgment of the Hon’ble Supreme Court in Energy

Watchdog Case. Hon'ble Supreme Court vide its order dated 29.10.2018 clarified that the judgment in the Energy Watchdog Case would not stand in the way of maintaining any application for amendment to the PPA before the Commission. Thereafter, Government of Gujarat issued the policy directive vide GR dated 1.12.2018 accepting some of the recommendations of the HPC. Consequent to the issue of the policy directive, the Petitioner and Respondent Procurers have been negotiating for finalization of the Supplementary PPA. MoP has from time to time held various meetings and passed directions to the Petitioner and Respondent Procurers to reach amicable settlement of the issues. The Petitioner has submitted that the Petitioner and the Procurer States (mainly GUVNL) are at an advanced stage of resolution of issues which subsequently would be followed by other Procurer States, in terms of MoP's directions.

67. While the negotiation between the Petitioner and Procurer States was going on, the Petitioner continued to supply power to the Procurers at the PPA rates till 17.9.2021. On account of increase in the price of imported coal, the Petitioner withdrew all its units and stopped supplying power to the Respondent Procurers. After negotiations with GUVNL reached an advanced stage, the Petitioner pending formal execution of Supplementary PPA, supplied power to GUVNL in the months of January, February, March, April 2022 and up to 5.5.2022 at the negotiated rates. The Petitioner also supplied power to MSEDCL as per the negotiated rates from 12.4.2022 to 5.5.2022 on same terms in line with the proposed supplementary PPA. Pending the resolution of the issues and formal execution of the Supplementary PPA between the Petitioner and Procurer States, MoP in view of the energy crisis being faced by the country issued directions under Section 11(1) of the Act vide its letter

dated 5.5.2022 mandating all imported coal based power plants to operate and generate power to their full capacity and supply power in the first instance to the PPA holders. The said directions recognized that the present PPAs do not provide for pass through of present high cost of imported coal and appointed a committee to work out benchmark rates of power which would meet all 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. Thereafter, the Petitioner declared availability of power to all Procurers and based on the schedules received from GUVNL and MSEDCL supplied power to them as per the directions of MoP under Section 11(1) of the Act and at the rates fixed by the Committee appointed by MoP, subject to determination of adverse financial impact by this Commission under Section 11(2) of the Act. Even the MoP while issuing directions under Section 11(1) recognized that power cannot be supplied at the PPA rates on account of high cost of imported coal. Therefore, the second finding in GMR judgement is not applicable in the instant matter as the Petitioner and the Respondent Procurers are aware that on account of high cost of imported coal, power cannot be supplied by the Petitioner at PPA rates and have sat down to negotiate for finding out a mutually acceptable negotiated rate for supply of power which would be formalized through signing Supplementary PPA. Thus, MOP having issued directions under Section 11(1) of the Act, it is mandatory for the Petitioner to follow the directions and for this Commission to offset the adverse financial impact of the directions on the Petitioner under Section 11(2) of the Act.

68. Notwithstanding our observations in paras 64 to 66 above, we notice that the following observations of APTEL in GMR judgement are relevant for guidance to

determine the adverse financial impact of generation and supply of power under Section 11 Directions:

> *"22. The only check that is to be exercised is that the rate of power decided by the State Commission should cover the variable cost of the power plant plus a reasonable profit. This is necessary to cover the eventuality when the market rate is lower than the variable cost of generation. Under such a condition, the generator would not like to run its power plant as the market rate would not compensate even for the expenses incurred for operating the plant. If under such an eventuality, the generator has to run the power plant to supply power to the State Grid against directions of the State Government under Section 11(1), then the State Commission under Section 11(2) of the Act, shall compensate the power plant to cover the variable cost plus a reasonable margin of profit. In the present case the short term market price prevailing during the period of Section 11(1) directions as decided by the State Commission, covers the variable cost of the power generation and, therefore, the compensation has to be based on basis of the short term market price as determined by the State Commission."*

As per the above observations of APTEL, the rate of power decided by the Commission should cover the variable cost of the power plant plus a reasonable profit. APTEL has reasoned that this is necessary to cover the eventuality when the market rate is lower than variable cost of generation as the generator would not like to run its power plant at the market rate as it would not compensate even for the expenses incurred for operating the plant. The Petitioner is required under Section 11(1) Directions to supply power to the PPA holders (Respondent Procurers) in the first instance and only in case of refusal or non-scheduling, the Petitioner has been permitted to sell power at the power exchange. Therefore, while determining the adverse financial impact, the comparison has to be made between the energy charge agreed in the PPA and the variable cost of production in compliance with the directions under Section 11(1) of the Act. In the present case, the energy charge under the PPA is lower than the variable cost of generation with imported coal in order to supply power in compliance with the MoP directions under Section 11 of the Act. Therefore, in order to ensure that the Petitioner maintains and operates its

power plant to generate and supply power to the Respondent Procurers in compliance with the directions of the MoP under Section 11(1) of the Act, the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit, in the light of the principles decided by APTEL in GMR judgement.

(C) Issue No.3: Whether the Petitioner is entitled for fixed charges as per the PPA or the rate paid prior to the issue of the directions under Section 11(1) of the Act?

69. This issue was raised in IA No.50/2022 and was decided by the Commission vide order dated 13.9.2022. To recapitulate the background, para 4(b) of MoP directions dated 5.5.2022 provided as under:

> *"(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 Order in IA No. 50/2022 in Petition No. 128/MP/2022 Page 34 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."*

Based on the recommendations of the Committee appointed by the MoP, the following was provided in para 5(b) of the MoP letter dated 13.5.2022 with regard to payment of fixed charges to ensure reasonable margin of profit during the operation of Section 11 Directions:

> *"(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."*

70. Both GUVNL and MSEDCL deducted 20 paise/kWh from the fixed cost admissible as per the PPA dated 27.4.2007 on the ground that the Petitioner and

GUVNL/MSEDCL have agreed to such reduction in the negotiation preparatory to signing of the Supplementary Power Purchase Agreement (SPPA) and the Petitioner in fact has supplied power to GUVNL and MSEDCL on payment of fixed charge of 70 paise/kWh (90 paise as per PPA/kWh - 20paise/kWh as agreed) up to 5.5.2022. This was contested by the Petitioner on the ground that the Supplementary PPA has not been executed and reduction of 20 paise/kWh cannot be said to have been agreed mutually by the Petitioner and the Respondent Procurers. The Commission after hearing the Petitioner and Respondent Procurers observed as under:

> "*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 suppling 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."*

71. The Commission issued the following directions with regard to the payment of fixed charge in para 54(a) of the order dated 13.9.2022 in IA No.50/2022:

> *"(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.*

72. The Petitioner in its written submission has submitted that the observations of the Commission in the context of fixed charges in order dated 13.9.2022 be passed as final relief in favour of the Petitioner. GUVNL has submitted that in dealing with the determination of the adverse financial impact, the Commission has necessarily to consider and take into account the terms of the PPA dated 22.4.2007 read with the arrangement implemented from January 2022 to April 2022 which is evidenced by (i) HPC Report; (ii) GR dated 5.12.2018; (iii) GR dated 12.6.2020; (iv) the Minutes of Meeting dated 17.3.2022 (conveyed by O.M. dated 29.3.2022 of the Ministry of Power); and (v) the final invoices raised by TPCL for January to March 2022 with reduction in capacity charges. Accordingly, GUVNL has prayed for reduction of 20 paise from fixed charges. MSEDCL has submitted that MSEDCL has paid fixed charges to the Petitioner as per mutually agreed rates at par with the proposed Supplementary PPA from 12.4.2022 to 5.5.2022 and from 6.5.2022 to 25.6.2022 as per notification dated 5.5.2022 and Energy charge rate as discovered by the committee from time to time. MSEDCL has further submitted that since MoP vide its notification dated 13.5.2022 laid down that the fixed charge will be as per the Power Purchase Agreements, or as has been already agreed mutually between the generating company and the Procurers, MSEDCL is liable to pay at a mutually decided reduced fixed rate, i.e. 0.70/kWh as per the proposed Supplementary PPA, which is 0.20/kWh less than that agreed to in the PPA subsisting between MSEDCL and CGPL. The Petitioner has submitted that Resolutions dated 5.12.2018 and

12.6.2020 and the MoM dated 17.3.2022 as relied upon by the Respondents be examined in view of the purpose, intent and circumstances in which those documents have been issued i.e. as constructive steps for execution of the SPPA. The Petitioner has submitted that placing reliance on such resolutions which were to ultimately culminate in execution of SPPA cannot be the basis of unilateral deduction causing undue prejudice and adverse financial effect to TPCL.

I.A. No. 64/2022 {Diary (IA) No. 451/2022}

73. After the order in the present Petition was reserved, Respondent GUVNL filed the above IA seeking to bring on record (a) copy of Energy World's (Economic Times) article titled ,India's Tata Power profit jump's 94.1 per cent on robust energy demand; (b) copy of the Statement of Consolidated Financial Results dated 28.10.2022 for the Quarter and Half Year Ended 30.9.2022; (c) copy of relevant extracts of the Annual Report of Tata Power for FY 2021-2022; and (d) copy of the Statement of Consolidated Financial Results dated 26.7.2022 for the Quarter ended 30.6.2022. GUVNL has submitted that these documents establish that TPCL has acted in pursuance to the SPPA which is contrary to the pleadings of TPCL in IA No.50/2022 that there has been no mutual agreement or that it has acted in pursuance to the draft SPPA which persuaded the Commission to decide in its order dated 13.9.2022 that reduction of 20 paise/kWh from fixed cost is not admissible. GUVNL has prayed to take the documents on record and modify the order dated 13.9.2022 to the extent GUVNL has been directed to refund deduction of fixed charges of Rs.0.20/kWh. The matter was mentioned by learned counsel for GUVNL on 10.11.2022. After hearing the learned counsel for GUVNL and TPCL, the Commission permitted the Petitioner to file its response to the IA and order was

reserved. The Petitioner has submitted its reply vide its affidavit dated 11.11.2022 (filed on 16.11.2022).

74. We have gone through the IA of GUVNL and the reply filed by the Petitioner. GUVNL has submitted that despite the unexecuted SPPA, there was a mutual agreement between TPCL and GUVNL to charge 70 paise/kWh as fixed cost which has been acknlowledged and admitted by TPCL in its Annual Report 2021-22 and Statement of Consolidated Financial Results for the First Quarter ending 30.6.2022 and Third Quarter ending 30.9.2022. Moreover, TPCL has acted as per the agreed terms of the Draft SPPA and raised invoices accordingly for the period between 1.1.2022 and 5.5.2022. GUVNL has submitted that TPCL has withheld these documents from the Commission and deliberately pleaded wrongly in regard to the absence of an agreement between the parties in regard to the reduction of INR 0.20/kWh in fixed charges. GUVNL has sought placement of aforesaid documents on record and modification of second Interim Order allowing fixed charges as per the PPA dated 27.4.2007. TPCL in its reply has submitted that the Annual Report FY 21-22 was released/issued on 27.6.2022 and Q1 Financial Statements were published on TPCL's website on 26.7.2022. The aforesaid documents were already in public domain prior to issue of second interim order on 13.9.2022 and the final hearing of the petition on 27.9.2022. Further, Q2 Financial Statements published on 28.10.2022 are mere reiterations of what has already been informed to the shareholders of TPCL by way of the Annual Report FY 21-22 and Q1 Financial Statements. TPCL has submitted that at no time, TPCL through its pleadings has either denied or ignored the period of supply to GUVNL from its Mundra Plant from January 2022 to 5.5.2022. TPCL has also submitted that through its detailed submissions in IA

No.50/2022, it had explained as to how the supply of power during the periods from October 2021 to December 2021 and from January 2022 to May 2022 was immaterial for the supply under the Section 11 Directions. Moreover, all contentions raised by GUVNL with regard to their Draft SPPA (under discussion) and hence the power supplied under Section 11 ought not to be at a higher rate than the supply as having occurred under the Draft SPPA have been sufficiently and cogently responded to by TPCL within its pleadings. In response to the contention of GUVNL that TPCL has considered the amounts received pursuant to the draft SPPA as revenue, TPCL has submitted that TPCL has supplied power provisionally based on negotiations on the Draft SPPA, (which was simultaneously under discussion) and the difference between existing PPA tariff and Draft SPPA tariff has been disclosed as per prudent accounting practice. TPCL has submitted that GUVNL's reliance on the unexecuted terms of the SPPA ought to be rejected, because the terms of the Draft SPPA specify that it would come into force only upon its execution and thus, it cannot be assumed to be executed.

75. We have considered the submissions of GUVNL and TPCL. GUVNL has relied upon three documents to contend that TPCL has acknowledged the existence of mutual agreement in terms of the draft SPPA and hence, reduction of 20 paise/kWh from the fixed charges should be allowed for power supplied under Section 11 Directions. The relevant portions of the three documents are extracted as under:

Annual Report for the Financial Year 2021-22

"Also, Company is in discussion to amend certain terms of PPA with one of the customers. The discussions are at very advanced stage and agreement is reached except few items. For which discussions are ongoing and accordingly the SPPA is yet to be signed and approved. To ensure continuous supply of power, customer has requested the Company to continue supplying power

based on the proposed amendments which will be effective January 1, 2022. Accordingly, based on the legal opinion obtained, the differential revenue of ₹ 324.00 crores has been recognized on the basis of the current agreed draft of SPPA."

2022-23 Quarter 1 Financial Statement

"The Holding Company continued supplying power to Gujarat Urja Vikas Nigam Ltd ("GUVNL") for the period 1st April, 2022 to 5th May, 2022 based on the draft Supplementary Power Purchase Agreement ('SPPA') which is still under discussion and accordingly, additional revenue of ₹ 277 crore has been recognized in the financial results."

2022-23 Quarter 2 Financial Statement

"The Holding Company supplied power to some customers for the period 1st January, 2022 to 5th May, 2022 based on the draft Supplementary Power Purchase Agreement ("SPPA") which is still under discussion and accordingly, the additional revenue of ₹ 601 crore has been recognized under the said arrangement. Till 30th September 2022, out of the total revenue recognized, ₹ 458 crore has been collected from the customers."

It is evident from the above documents that TPCL has recognised the additional revenue in its Annual Report for 2021-22 and Quarter 1 and Quarter 2 Financial Statements for 2022-23 as the power was actually supplied and payments have been made as per the draft SPPA. However, it is clearly mentioned in these documents that the draft SPPA is still under discussion and is yet to be signed and approved. Article 18.1 of the PPA dated 22.4.2007 between TPCL/CGPL and Respondent Procurers provides as under:

"18.1 Amendment

This Agreement may only be amended or supplemented by a written agreement between the Parties and after duly obtaining the approval of the Appropriate Commission, where necessary."

The PPA can only be amended or supplemented by a written agreement between the Parties and after obtaining approval of the Commission. Since the Supplementary PPA between TPCL and Respondent Procurers are still under

discussion and have not been signed, the provisions of original PPA shall prevail. Draft SPPA between TPCL and Respondent Procurers was a package deal and could not be signed due to negotiations still going on regarding certain aspects of the deal. Pending signing of the SPPA, the Parties agreed for generation and supply of power as per the agreed provisions of the draft SPPA including reduction of 20 paise/kWh in fixed charges. The said fact has been stated in the three documents which have been placed on record by GUVNL. With effect from 6.5.2022, TPCL was directed by MoP, GoI under Section 11(1) of the Act to generate its full capacity and supply to the PPA holders (Respondent Procurers) in the first instance. TPCL has not agreed to accept reduction of 20 paise/kWh from the fixed charges on the ground that generation and supply of power with effect from 6.5.2022 was in pursuance to the Section 11 Directions, and not in pursuance to the package deal as per the draft SPPA which is yet to be signed. We are of the view that in the absence of signed SPPA, it cannot be said that there was a binding mutual agreement between the Parties with regard to reduction of 20 paise/kWh from the fixed charges. We specifically note that after issue of the Section 11 Directions, there is no mutual agreement between the Parties for reduction of fixed charges by 20 paise/kWh. In that view of the matter, the Commission is of the opinion that generation and supply of power by TPCL in terms of the draft SPPA cannot bind TPCL to generate and supply power under Section 11 to the Respondent Procurers on the same terms and conditions. Therefore, we are not persuaded to change our view with regard to fixed charges in the light of the three documents placed on record by GUVNL through IA No. 64 of 2022. Consequently, we reject the prayer in the IA No.64/2022 to modify our earlier order dated 13.9.2022 with regard to fixed charges. IA No.64/2022 is accordingly disposed of.

76. In the light of the above discussion, we reiterate our decision with regard to fixed charges in our order dated 13.9.2022 in IA No.50/2022 which have been extracted in paras 69 and 70 of this order.

(D) Issue No.4: Whether the capacity charges shall be based on the declared availability or capped at 80% of availability during the operation of Section 11 Directions?

77. GUVNL has submitted that in terms of PPA, the entire annual fixed cost of the plant is recovered on achievement of 80% normative cumulative availability and therefore, TPCL cannot claim Capacity Charge on full declared capacity without restricting it up to normative availability. TPCL has submitted that under normal circumstances, TPCL declares only 80% Declared Capacity each year. Considering that the generation and supply of power is being undertaken outside the scope of PPA and TPCL has been specifically directed to operate the Project at full capacity, it is imperative that the capacity charges should not be capped upto Normative Availability, i.e., 80% and be paid for full declared capacity. TPCL has further submitted that Schedule 7 of the PPA provides for an incentive in case availability declared by it is beyond 85%. The Commission through Order dated 13.9.2022 in IA No.50/2022 held that since Section 11 Directions do not provide for the payment of enhanced capacity charges or incentives on account of declaration of availability beyond 80%, the Petitioner cannot be granted additional fixed charge for declaration beyond 80% of availability. TPCL has submitted that since the capping of capacity charges at normative availability of 80% has been applied as per Article 1.2.2 of Schedule 7 of the PPA, in such a case the Petitioner should be granted the incentive as provided under Article 1.2.4 of the PPA at the rate of 40% of Quoted Non Escalable Capacity Charges (in Rs./kWh) for such contract year mentioned in

Schedule 11, subject to a maximum of INR 0.25/kWh on the energy corresponding to the availability in excess of 85%.

78. The Commission in its order dated 13.9.2022 decided the issue of availability for the purpose of payment of capacity charges as under:

> *"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."*

While GUVNL and MSEDCL are of the view that the availability should be capped at 80% being the threshold limit for admissibility of full fixed charges, TPCL has pleaded for capacity charges corresponding to actual declared capacity since as per the Section 11 Directions, it is required to operate and maintain its plant to its full capacity.

79. It is pertinent to mention that in the first interim order dated 17.6.2022, the Commission had issued the following 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 along with subsequent clarifications issued by MoP in letter and spirit."*

While dealing with IA No.50/2022, the Commission focussed on compliance with the above directions i.e. to what extent the Respondent Procurers had complied with the directions issued by MoP vide letter dated 5.5.2022 and subsequent clarifications of

MoP. Accordingly, the Commission in para 37 of the order dated 13.9.2022 observed that 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, there was no merit in the claim of the Petitioner to ask for additional fixed charge for declaration beyond 80% of availability.

80. In the present order, the Commission is determining the adverse financial impact under Section 11(2) of the Act. As already observed in para 67 of this order, the Commission under Section 11(2) of the Act is required to determine the adverse financial impact so as to compensate the Petitioner to recover the cost plus a reasonable margin of profit. As per Article 1.2.2 of Schedule 7 of the PPA, full capacity charges are payable to TPCL on declaring 80% availability. In our order dated 13.9.2022, we have decided that TPCL shall be paid full fixed charges on declaring 80% availability in terms of the PPA and additional fixed charges proportionate to the declared capacity above 80% shall not be payable as there is no such provision in the PPA. However, the Petitioner has submitted that if it is not allowed additional fixed charges for availability above 80%, at least it should be allowed incentive in terms of Para 1.2.4 of Schedule 7 of the PPA. Para 1.2.4 of Schedule 7 is extracted as under:

> *"1.2.4 Contract Year Energy Incentive Payment*
>
> *If and to the extent the availability in a contract year exceeds eighty five percent (85%), an incentive at the rate of 40% of the Quoted Non-Escalable Capacity Charges (in Rs/kWh) for such Contract Year mentioned in Schedule 11, subject to a maximum of 25 paise/kWh shall be allowed on the energy (in kWh) corresponding to the availability in excess of eighty five percent (85%)."*

Thus, as per Para 1,2.4 of the Schedule 7 of the PPA, incentive is payable at the rate of 40% of the Quoted Non-Escalable Capacity Charges (in Rs/kWh) for a

contract year, subject to a maximum of 25 paise/kWh corresponding to the availability in excess of eighty five percent (85%). This is the situation when power is supplied in normal course. When power is supplied under extraordinary circumstances in compliance with directions under Section 11 of the Act, the question arises as to whether there is any case for incentive for declaration of availability beyond 85%. As per the judgement of APTEL in GMR case, the generator while acting under Section 11 direction is entitled for a reasonable profit in addition to the variable cost of generation. Since we have decided that the Petitioner is entitled to recover full fixed charges as agreed in the PPA on declaring 80% availability the Petitioner is getting the reasonable profit as envisaged in the quoted fixed charges. Granting incentive for declaration of availability beyond 85% of capacity, particularly when the Petitioner is allowed to recover the full fixed charges on declaring 80% availability will go beyond the construct of reasonable profit. Accordingly, we are of the view that the Petitioner shall not be entitled for incentive in terms of Para 1,2.4 of the Schedule 7 of the PPA for declaring availability above 85%. Thus, we reiterate our decision in order dated 13.9.2022 in IA No.50/2022 with regard to non-admissibility of additional fixed charges on declaring availability beyond 80% of the capacity of its generating plant.

(E) Issue No.5: Whether deduction on account of rebate shall be in terms of the PPA during operation of the Section 11 Directions?

81. The Petitioner has submitted that the PPA executed between the parties does not contain a specific provision as regards the weekly payments and therefore, rebate cannot be decided as per the PPA. The Petitioner has submitted that the applicable rebate should be 0.567% on the 1st day (since 0.567% is corresponding to be 1/4th of the 2.25%). GUVNL and MSEDCL have submitted that the calculation

of rebate as 1/4th of 2.25% by TPCL is erroneous as there would be no change in the amount of rebate levied if the same percentage is applied for payment on weekly basis or monthly basis since the rate of rebate specified in the PPA is a percentage of the invoice raised and not an absolute amount.

82. We have considered the submissions of TPCL, GUVNL and MSEDCL. Section 11 Directions by MoP provide that payment by the Procurers shall be made on weekly basis and 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. This issue was considered by the Commission while deciding IA No.50/2022. The Commission after examining the provisions of the PPA with regard to rebate for payment on monthly basis decided to extrapolate the said provisions with reference to the payments made on weekly basis as per the Section 11 Directions. Relevant part of the order is extracted as under:

> *"40. 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 25th 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 (5th) 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:*

Number of days before Due Date of Monthly Bill	***Rates of Rebate applicable***
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^{th}) 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 pecent (0.033%) per day for the number of days earlier than the 6^{th} 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 (30th) 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"

41. It is evident from the above provisions of the PPA that for payment of any bill before the due date (i.e. 30th 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 is 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:

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

Payments made beyond 5 days i.e. on 6th day and 7th 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."

83. While dealing with the determination of adverse financial impact in terms of Section 11(2) of the Act, the Commission is of the view that the rebate shall be payable as per the rates in the PPA extrapolated in case of payment on weekly basis. We are not in agreement with the contention of the Petitioner that the applicable rebate should be 0.567% on the 1st day since 0.567% is corresponding to be 1/4th of the 2.25%. In our view, the rates of rebate decided by the Commission in para 41 of the order dated 13.9.2022 by extrapolating the PPA provisions in case of weekly billing adequately addresses the adverse financial impact on the Petitioner on

account of billing and payment for generation and supply of power in compliance with the directions under Section 11(1) of the Act and accordingly, the said decision is reiterated.

(F) Issue No.6: Whether the Procurers who are not availing power are required to pay the fixed charges and open the required LC?

84. PSPCL, Haryana Utilities and Rajasthan Utilities have submitted that there cannot be a mandate to procure power from Tata Power at the terms and conditions of tariff other than those specified in the PPA, particularly when the validity of the PPA tariff has been upheld by the Hon'ble Supreme Court in the case of Energy Watchdog v Central Electricity Regulatory Commission and Ors [(2017) 4 SCC 80]. Further, 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. These Procurers have further submitted that in terms of the Clarification dated 20.05.2022, the LC has to be maintained only by the procurers who opt for requisitioning power from Tata Power under the Section 11 dispensation. TPCL has submitted that in terms of the MoP Clarification dated 20.5.2022, TPCL was compulsorily obliged to make its plant available and schedule power to the procurers. In furtherance of the same, TPCL was ready to schedule capacity to all procurers w.e.f. 25.5.2022, which is also evident from the Regional Energy Accounts of TPCL. In the ordinary course of events as well as under the PPA, if the generator is willing to supply the power to a procurer who is unwilling to schedule the same power for offtake, in such a case, the Generator would be allowed to levy fixed charge/capacity charge from the procurer. TPCL has further submitted that the provision envisaged under the Section 11 Directions as regards sharing of 'net profit' in case TPCL sells power on the power exchanges 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.

85. The Commission has considered the issue of payment of fixed charge by the procurers who are not scheduling power during the operation of Section 11 Directions in the order dated 13.9.2022 in IA No. 50/2022 as under:

> *"50. 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."*
>
> 51. 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."*
>
> *52. It is clear from the above provisions that the share of 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."*

86. Since these Procurers have not made any new submissions, the Commission reiterates the above decision that 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 of sale of their share of power in the Power Exchanges fetches profit.

87. As regards the maintenance of Letter of Credit (LC), the Commission reiterates its decision in order dated 13.9.2022 in IA No.50/2022 that since the payment has to be made on weekly basis, the LC amount should be commensurate with the fixed charge and energy charge for one week. The procurers who are not scheduling power from the Petitioner during the operation of Section 11 Directions shall be required to maintain LC commensurate with the fixed charges for one week for their contracted power.

(G) Issue No.7: How the energy charge shall be computed during the operation of Section 11 Directions?

88. TPCL has filed an Additional Affidavit dated 9.9.2022 to place on record the data for the period 6.5.2022 to 25.8.2022 based on applicable parameters including the actual coal consumption. The Petitioner has submitted the following:

(a) consolidated details of the coal received by the Petitioner (shipment wise) for the period 06.05.2022 to 25.08.2022 in a tabulated manner (Annexure 1 of the affidavit); and

(b) copies of the Certificates of Analysis supporting Gross Calorific Value at Load Port and Discharge Port for the shipments received by the Petitioner for the period 25.6.2022 to 25.8.2022 (Annexure 2 of the affidavit).

89. As regards the details of coal received during the period, the Petitioner has submitted as under:

(i) The coal consumed for generation and supply of power during the period between 6.5.2022 to 25.8.2022 has been from the coal received by the Petitioner from February 2022 onwards (being at USD 188 per MT), when the HBA price was lower than in the months of May, 2022 (being at USD 276 per MT), June, 2022 (being at USD 323/MT) and July, 2022 (being at USD 319/MT). Out of total 21 shipments of coal procured, 12 shipments of coal have been procured from PT Kaltim Prima Coal (KPC) based on HBA derived price.

(ii) Out of 21 shipments, 9 shipments (being 33% of the total imported coal utilized) have been procured from coal mines in other countries being Australia, South Africa and Russia at spot prices based on negotiated price and for being in the interest of efficient / effective pricing.

(iii) The Free on Board (FOB) price of coal is the actual purchase price of coal adjusted for quality parameters such as Total Moisture (TM), Ash content, and Sulphur Contents for Indonesian coal from KPC Mines.

(iv) Ocean Freight is not separately applicable for non-HBA linked prices because it is already included in Cost and Freight (CFR) and Delivered at Place (DAP) prices such as shipments at Serial Nos. 8, 11, 13, 14, 16 and 21 of the table in Annexure A-1. Where Ocean Freight has been separately levied, it has been explicitly specified.

(v) The variable cost of port handling for the month includes waterfront royalty of INR 106/MT and terminal handling charges of INR 147/MT, which are subject to increase based on the agreed escalation in the Port Service Agreement (PSA). The fixed cost of port handling for the month is INR 23 Crore (for FY23 subject to increase due to PSA escalation) and the O&M cost of coal handling for the month is INR 2 Crore, which is allocated based on the quantity of coal received during the month.

(vi) Other Charges as envisaged in the table are on actual inclusive of Letter of Credit (LC) opening charges, hedging cost and inventory carrying cost.

(vii) The shipments during the period did not suffer from transit losses from Load Port to Discharge Port and hence has not been included in the ECR.

90. Based on the above, the Petitioner has calculated the ECR for the period 6.5.2022 to 25.8.2022 as under:

(i) ECR for May,2022- INR 6.28/kWh

(ii) ECR for June,2022- INR 7.03/kWh

(iii)ECR for July, 2022- INR 7.62/kWh

(iv) Estimated ECR for August, 2022- INR 7.47/kWh

91. Since the Committee as per MoP directions has calculated the ECR on the basis of Argus, the Petitioner has placed on record a chart showing the comparison of ECR calculated based on Argus, HBA and the actual coal consumed (which includes coal from sources other than Indonesia) and has submitted that the ECR based on

actual consumption of coal is much lower than that based on Argus (as per MoP directions). The said comparative calculation is extracted hereunder:

Comparison of ECR as decided by MoP with the ECR based on HBA and Actual ECR as per the Petitioner for the period from 6.5.2022 to 25.8.2022

Applicable Date		Scheduled Generation (MUs)		Period (Days)	ECR ₹/kWh		
From	To	GUVNL	MSEDCL		MOP (Directions)	HBA Based*	Actual ECR* (submitted to the Commission)
6-May-22	28-May-22	674	206	23	6.05	8.21	6.28
29-May-22	11-Jun-22	409	122	14	6.22	9.19	6.87
12-Jun-22	25-Jun-22	448	118	14	5.99	9.46	7.03
26-Jun-22	9-Jul-22	487	0	14	5.94	9.44	7.41
10-Jul-22	22-Jul-22	399	0	13	5.98	9.43	7.62
23-Jul-22	6-Aug-22	503	0	15	5.73	9.50	7.56
7-Aug-22	20-Aug-22	391	0	14	5.27	9.61	7.47
21-Aug-22	25-Aug-22	140	1	5	4.73	9.61	7.47

*Note: HBA based ECR and Actual cost ECR has been pro-rated as per no. of days in respective period

92. GUVNL in its reply and written submission has made the following submissions with regard to landed price of imported coal at CGPL Mundra:

(a) The Indonesian Regulations do not prohibit the export of coal at a price less than the HBA derived price for the relevant quality of coal. The object and purpose of the Indonesian Regulations is only to provide that the royalties and obligatory contribution to state revenue on the export of coal shall be at the benchmark price i.e. HBA derived price (HPB), notwithstanding that the export of coal at a lower price. The said position has been considered and upheld so in the Order dated 23.12.2013 passed by the Commission in Suo-Moto Petition No. 308/SM/2013 in which it was observed that “HBA index is only benchmark price, relevant for the purpose of royalty payment to the Government of Indonesia.”

(b) The average price of coal indicated in the reputed publications such as Argus/Coalindo and S&P Global Platts clearly indicates that there are significant quantum of coal of the relevant categories being exported from Indonesia at a price much lower than the average price. GUVNL has compared the FOB price of coal procured from Indonesia along with Market Index published by Argus/ Coalindo and has submitted that coal is exported from Indonesia at lower price than HBA Index price. Coal procurement of Tata Power from its own mine in Indonesia on HBA derived price is on a premium of 16% to 33% to argus and without following competitive bidding process and therefore, coal price agreed between two Tata group companies cannot be considered as arm length transactions. FOB coal price should be considered lower of actual or price derived from Market index while working out tariff ECR under Section 11. Moreover, Coal procurement from mines other than in Indonesia should also be linked with appropriate index and only prudent FOB price should be considered.

(c) Tata Power has procured coal on FOB, CFR and DAP basis. Other charges are a part of procurement on FOB, CFR and DAP basis and cannot be claimed separately. Tata Power has claimed energy charge on actual basis From January to April 2022, wherein Tata Power had claimed Other Charges as ‘Zero’ or around ‘1 $/MT for the same vessels from which coal is also consumed/allocated in the months of May and June 2022 where Tata Power has claimed Other Charges between $4/MT to $6 / MT.

(d) Tata Power has claimed different ocean freight for the same vessel, under the invoices for the respective months and under Section 11. Ocean freight

claimed in the invoice for March 2022 (USD/MT) for MINA OLDENDORFF vessel is USD 11.63/MT whereas Ocean freight claimed under Section 11 for the same vessel id USD 12.8/MT.

(e) Under the PPA, Tata Power has quoted Escalable and Non Escalable Port Handling Charges which take into account all amounts. However, Tata Power in the present petition is claiming charges higher than the charges in the PPA which is not tenable, as there is no independent implication of such charges on account the circumstances for which directions under Section 11 were issued. Therefore, any incremental charges other than quoted charges should not be allowed.

(f) The operational/technical parameters should be considered in terms of the Order dated 6.12.2016 of the Commission in Petition No. 159/MP/2012 i.e., SHR of 2050 and Auxiliary Consumption of 4.75%. Tata Power cannot be allowed to be claim technical/operational parameters in variance from the above. In any case, technical parameters should not be allowed higher than parameters applicable as per the Tariff Regulations of the Commission.

(g) Tata Power has not provided documents with regard to the taxation paid and bifurcation for the same.

93. In respect of applicability of HBA index, the Petitioner has submitted that this issue is no more res-integra as the Commission has decided the same through its order dated 13.06.2022 passed in Petition No. 111/MP/2022. Regarding claim of other charges as as Zero or “$1/MT” during the period between January to April, 2022, TPCL has submitted that during the said period, the power was being supplied

under a separate and temporary arrangement under the proposed SPPA where under the costs with respect to Other Charges was capped. However, for supply in terms of and during the currency of the Section 11 Directions/ Clarifications, TPCL is liable to be compensated based on the actual costs incurred by it. As regards the operational parameters, TPCL has submitted that since the generation and supply of power is being done in terms of directions under Section 11 of the Act, TPCL is to be compensated on the basis of actual cost of generation, which is based on landed cost of coal procurement as has been upheld by the Hon'ble APTEL in GMR Judgment.

94 MSEDCL has not made any comments on the calculation of energy charge, though it has scheduled power from Tata Power. Other Respondents, namely, PSPCL, Haryana Utilities and Rajasthan Utilities have also not made any comments on the calculation of energy charge.

Determination of Components of Energy Charge

Re: Applicability of HBA index

95. After thoroughly going through the Indonesian Regulations, the Commission is of the view that there is a statutory bar on the export of coal below the HBA index from Indonesia. The Commission has dealt with this issue in its recent order dated 13.6.2022 in Petition No. 111/MP/2022 as under:

> *"80. Thus, it emerges from the above that as on 15.10.2018, the Regulations which governed the export of coal from Indonesia are the Government Regulations 23 of2010 supplemented by 2017 Minister Regulations and 2018 Minister Regulations. Article 85(1) of the Government Regulations 23 of 2010 mandates that the holders of coal IUP production operation for export of the coal produced by them must refer to the benchmark price which shall be determined by the Minister based on the market mechanism and/or following prices generally prevailing in the international market. The 2010 Minister Regulations also requires the IUP and IUPK of production operation holders to*

sell their produced coal by referring to the benchmark price both for domestic sales and export. Regulation 7 of the 2017 Minister Regulations provides that HPB of Steam (Thermal) Coal shall be determined by the Director General based on such variables as calorific value of coal, HBA of steam (Thermal) coal, moisture content, sulphur content and ash content. In other words, HBA is the reference price based on the average of four international indices for 6322 kcal/kWh coal with 25% weightage for each of the indices whereas HPB is the benchmark price which is the derivative price from the HBA or reference price in respect of various grades of GCV after factoring in a number of relevant factors such as calorific value of coal, water content, sulphur content, ash content and sodium content of coal. If any IUP and IUPK of production operation holders violates the mandate qua non-adherence to benchmark prices for export of coal, there is provision for mandatory imposition of administrative sanctions in terms of Article 110(1) of the 2010 Government Regulations. Article 12(1) of the 2017 Minister Regulations and Article 40(1) of the 2018 Minister Regulations which includes revocation of mining permit.

81. Thus, a plain reading of the Minister Regulations shows that it is not permissible to export coal below the benchmark price failing which the coal company shall be subjected to administrative sanctions. GUVNL has relied on Regulation 35 of Indonesian Regulation 25/2018 to contend that coal can be exported from Indonesia below HBA price. However, as already noted, such coals are of certain types and for specific purposes which do not meet the requirement of APMuL for generation of electricity from Units 1 to 6 of Mundra Power Project."

Thus, in view of above, we are not in agreement with GUVNL that coal (except for coal of certain types which are not suitable for use in the generating plant of the Petitioner) can be exported from Indonesia at a price lower than HBA price.

Re: Argus ICI vis-à-vis HBA for calculation of FOB price of coal

96. MoP while issuing the directions under Section 11 of the Act recognized that the existing PPA provisions in case of imported coal based plants do not have adequate provision for pass through of the entire increase in the international coal price. Accordingly, MoP appointed a Committee with the mandate to work out the bench mark rates of power to meet all the prudent costs of using imported coal for generating power, including the present coal price, shipping costs and O&M costs etc and a fair margin. Though the benchmark rates to be determined by the

Committee as per the directions of MoP are interim in nature and are not binding on the Commission, while determining the adverse financial impact under Section 11(2) of the Act, the fact remains that the prudently incurred cost for import of coal has to be allowed as compensation to the generating plant based on imported coal for generation and supply of power pursuance to the directions under Section 11(1) of the Act.

97. GUVNL has submitted that the average price of coal export from Indonesia of specified GCV and quality have been published by reputed agencies such as Argus/Coalindo and S&P Global Platts which have been recognized and acted upon by the Commission to determine the escalation applicable on the imported coal. GUVNL has further submitted that the Ministry of Power, Government of India vide Clarification dated 20.05.2022 has stated that it has used the Argus Index to determine the tariff in terms of the Section 11 Directions. GUVNL has made a comparison between the FOB price of coal imported by TPCL (in respect of nine vessels between February 2022 to May 2022) based on HBA derived price with the market index published by Argus/Coalindo and has submitted that coal procurement of Tata Power from its own mine in Indonesia on HBA derived price is on a premium of 16% to 33% and without following competitive bidding process and therefore, coal price agreed between two Tata group companies cannot be considered as arm length transactions. GUVNL has submitted that TPCL cannot be permitted to purchase coal at higher price than market price to get higher tariff under Section 11 of the Act. GUVNL has suggested that FOB coal price should be considered lower of actual or price derived from Market index while working out the ECR under Section 11 of the Act. In respect of coal procurement from mines other than in Indonesia,

GUVNL has submitted that the FoB price should also be linked with appropriate index and only prudent FOB price should be considered.

98. We have considered the submissions of TPCL and GUVNL. HBA or Harga Batubara Acuan is a coal price reference determined by the Government of Indonesia by averaging the calorific value of coal based on 25% each of New Castle Export Coal Index, Global Coal New Castle Index, Platts Kalimantan and Argus Indonesia Coal Index (ICI). While the first two indices represent international price, the last two indices represent the local prices. The category is divided based on coal quality which is set at 6322 kCal/kg (As Received Basis or ARB), moisture content at 8% ARB, Sulphur content at 8% (ARB) and ash content at 15% (ARB). After determining the HBA, the benchmark coal price (HPB) is determined. There are 8 benchmark prices category, representing the quality of coal staring from GCV of 4200 kCal/kg to 7000 kCal/kg. In case of price of coal other than these 8 categories of HPB, the prices are determined by interpolation basis based on GCV, total moisture, total Sulphur and ash. Under the Indonesian Regulations, all Spot Sale Contracts and Term Sale Contracts have to be aligned with the benchmark price. As regards the submission of GUVNL that two indices of Indonesia namely, Platts (5000 kCal/kg GAR and Argus (ICI3, 5000 kCal/kg GAR) are included in the escalation indices notified by the Commission and therefore, the prices of imported coal should be benchmarked with reference to these indices, we would like to point out that export price of coal from Indonesia has to be in conformity with the HPB price based on HBA index. We have already taken a view in our order dated order dated 13.6.2022 in Petition No. 111/MP/2022 that as per the Indonesian Regulations, it is not permissible to export coal below the benchmark price failing which the coal company shall be subjected to administrative sanctions. Therefore, simply because

Platts and Argus indices are included in the composite index notified by CERC does not mean that coal is exported from Indonesia at prices other than HPB. Therefore, any benchmarking of coal exported from Indonesia has to be linked to the appropriate HPB price based on HBA index. In our view, HPB price of coal based on HBA index notified by Government of Indonesia is the appropriate benchmark price for comparing the price of coal imported from Indonesia.

99. The Petitioner has purchased 12 vessels of coal from Indonesia and 9 vessels of coal (33%) from sources other than Indonesia such as Australia, South Africa and Russia at spot prices based on negotiated price. The Petitioner has submitted that in order to mitigate the effects of substantial increase in the HBA derived coal prices and to provide low-cost coal benefits to the Procurers importing coal from countries other than Indonesia at spot prices for being cost effective during that period. The Petitioner has submitted the details of the landed cost of coal in Rs/MT from Indonesia and other countries vide its affidavit dated 9.9.2022. The Petitioner has calculated the FOB cost of coal in USD/MT vessel-wise based on the formula for determination of HPB on the basis of HBA. Thereafter, the Petitioner has added ocean freight, other charges and insurance to the FOB cost of coal to arrive at a total value in USD/MT vessel-wise. Thereafter, the Petitioner has converted the said total value into INR/MT by multiplying at the prevailing exchange rate to arrive at the CIF value of coal. Thereafter, the Petitioner has added port handling charges and taxes and duties to arrive at the landed cost of coal in INR/MT. The calculation table submitted by the Petitioner vide its affidavit dated 9.9.2022 (Annexure R-I) is extracted below:

Sr. No.	Vessel Name	Country of Origin	Supplier Name	Price Basis (HBA/Spot)	Vessel Invoice Date/Bill of Lading Date	HBA $/MT	Vessel Qty (MT)	GCV at Lord Port (kCal/kg)	GCV at Discharge/Mundra Port (kCal/kg)	TM %	Ash %
	1	2	3	4	5	6	7	8	9	10	11
1.	MINA OLDENDORFF	Indonesia	KPC	HBA	6-Feb-2022	188	186647	5116	4956	24.1%	5.5%
2.	MAGDELLENA OLDENDORFF	Indonesia	KPC	HBA	10-Feb-2022	188	186801	5172	5155	23.4%	5.5%
3.	MV SAMJOHN ODYSSE	Indonesia	KPC	HBA	19-Mar-2022	204	190824	5007	4811	25.3%	5.7%
4.	LUDOLF OLDENDORFF	Indonesia	KPC	HBA	22-Mar-2022	204	188149	4973	4816	25.1%	6.0%
5.	SAMJOHN ODYSSE	Indonesia	HBA	KPC	6-May-2022	276	190802	4909	4838	25.4%	6.6%
6.	CAPE LAUREL	Indonesia	KPC	HBA	9-May-2022	276	169616	5238	1569	23.0%	5.4%
7.	MATHILDE OLDENDORFF	Indonesia	KPC	HBA	19-Feb-2022	188	186253	4734	4680	26.7%	6.8%
8.	CL WUZHO #	Australia	VITOL	Spot	19-Jan-2022	Spot	154058	5569	5511	11.2%	18.9%
9.	ALPHA UNITY #	South Africa	VALE	Spot	14-May-2022	Spot	168390	6153	6083	4.5%	22.5%
10.	HERMAN OLDENDORFF	Indonesia	KPC	HBA	23-May-2022	276	190950	4962	4569	26.5%	5.0%
11.	DEYI EXCELLENCE #	Russia	SUEK AG	Spot	25-Apr-2022	Spot	137863	6270	6214	9.3%	12.1%
12.	CAPE CAMELLIA	Indonesia	KPC	HBA	31-May-2022	276	188049	5194	4669	24.2%	4.7%
13.	MV AEGEA #	Russia	SUEK AG	Spot	2-Jun-2022	Spot	72299	6636	6561	9.1%	8.1%
14.	YASA FALCON	Russia	SUEK AG	Spot	2-Jun-2022	Spot	76910	6475	6405	10.1%	8.7%
15.	MV HEIDE OLDENDORFF	Indonesia	KPC	HBA	13-Jun-2022	324	190045	5273	5202	23.2%	4.8%
16.	HORIZON JADE #	Russia	SUEK AG	Spot	28-Jun-2022	Spot	72867.3	6419	6348	11.1%	8.6%
17.	NIGHT KISS #	South Africa	VALE	Spot	29-Jun-2022	Spot	164650	5918	5850	5.2%	24.7%
18.	MV THALASSINI AVRA #	South Africa	VALE	Spot	7-Jul-2022	Spot	168800	5937	5867	4.4%	24.9%
19.	STELLA TESS	Indonesia	KPC	HBA	9-Jul-2022	319	182217	5302	5233	22.7%	4.9%
20.	HARRY OLDENDORFF	Indonesia	KPC	HBA	17-Jul-2022	319	181860	5378	5307	21.7%	5.1%
21.	VIKTOR TSOI #	Russia	SUEK AG	Spot	5-Jul-2022	Spot	72762	6491	6446	10.2%	8.0%

Ser No.	Sulphur %	FOB Cost in (USD/MT)	Other Charges (USD/MT)	Ocean Freight (USD/MT)	Insurance (USD/MT)	Total CIF Value (USD/MT)	Exchange rate & its basis (USD to INR)	Total CIF Value (INR/MT)	Port/Fuel Handling Charges (INR/MT)	Taxes and Duties (INR/MT)^	Transit Loss % - Actuals	Received/ Accounted for in Coal stores Ledger on Date
	12	13	14	15	16	17	18	19	20	21	22	23
1	0.8%	130	4	12.84	0.02	146	74.7	10931	696	985	-	23-Feb-2022
2	0.8%	132	4	12.84	0.02	149	74.9	11141	697	995	-	3-Mar-22
3	0.8%	135	4	13.05	0.03	151	75.9	11487	705	1014	-	7-Apr-2022
4	0.8%	134	3	13.07	0.03	150	76.4	11425	705	1011	-	11-Apr-2022
5	0.8%	177	5	13.52	0.05	196	76.7	15023	706	1196	-	23-May-22
6	1.2%	193	4	10.05	0.05	207	77.4	16053	705	1239	-	25-May-22
7	0.7%	116	4	12.84	0.02	133	74.9	9979	697	938	-	10-Mar-22
8	0.4%	110	4	-	0.02	115	75.8	8688	696	1059	-	13-Feb-22
9	1.8%	175	0	18.81	0.04	195	77.4	15056	705	1233	-	28-May-22
10	0.8%	177	3	13.52	0.05	193	77.6	15009	668	1197	-	14-Jun-22
11	0.2%	176	0	-	0.04	176	78.6	13825	667	1489	-	3-Jun-22
12	1.2%	189	4	12.81	0.05	206	77.7	16020	668	1243	-	16-Jun-22
13	0.3%	194	1	0.00	0.03	195	79.0	15399	667	1608	-	23-Jun-22
14	0.3%	189	2	0.00	0.03	190	79.0	15040	578	1577	-	3-Jul-22
15	1.3%	228	4	13.75	0.05	246	78.1	19188	578	1403	-	10-Jul-22
16	0.3%	188	1	0.00	0.03	189	81.0	15305	578	1603	-	27-Jul-22
17	1.0%	170	2	19.24	0.04	191	78.9	15085	578	1227	-	11-Jul-22
18	1.1%	154	0	19.27	0.04	174	79.0	13727	578	1165	-	19-Jul-22
19	1.2%	227	5	14.02	0.05	246	79.2	19477	579	1428	-	28-Jul-22
20	1.2%	233	5	14.02	0.05	252	79.9	20121	948	1452	-	1-Aug-22
21	0.3%	190	4	0.00	0.03	194	81.0	15722	947	1617	-	4-Aug-22

NOTE:

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

Remarks:

1. *For HBA based shipments (Sr. No. 1,2,3,4,5,6,7,10,12,15,19 & 20), actual FOB cost determination from HBA to HPB standard formula
2. #HCV shipments (Sr. No. 8,9,11,13,14,16,17,18 & 21) are spot purchase and without quality adjustment discount.
3. Ocean Freight is 'NIL' for shipment 'CL WVZHO (Sr. No. 8), DEYI EXCELLENCE (Sr. No. 11), MV AEGEA (Sr. No. 13), YASA FALCON (Sr. No. 14), HORIZON JADE (Sr. No. 16) and VIKTOR TSOI (Sr. No. 21) as these are CFR/DAP shipments purchased on spot basis.
4. Port/Fuel handling charges includes Variable cost and Fixed cost.
5. Port handling variable cost for the month includes waterfront royalty `106/MT and Terminal Handling charges `147/MT which is subject to increase as per agreed escalation in Port Service Agreement (PSA).
6. Port Handling fixed cost for the month is Rs. 23 crore (for FY 23 s.t. increase as per escalation in PSA) and Coal Handling O&M cost for the month is Rs. 2 crore which is appointed based on coal quantity received during the month.
7. Actual other charges (including LC opening charges, hedge cost and inventory carrying cost). For shipment 'HARRY OLDENDORFF' and 'VIKTOR TSOI' estimated other charges has been considered as 2% of FoB value.
8. For FoB shipment, exchange rate is based on actual forex rate of BL date as declared in Financial Benchmarks India Pvt. Ltd. website (https://www.fbil.org.in/#/home). For CIF/DAP shipment exchange rate considered as provided in Bill of Entry.
9. ^Additional details provided for actual Taxes and Duties incurred for individual shipments.
10. For 'HERMAN OLDENDORFF' (Sr. No. 10) and 'CAPE CAMELLIA' (Sr. No. 12), Delta between Load Port GCV and Discharge Port GCV are 393 and 525 Kcal/kg respectively. This concern has been taken up with supplier.

100. Based on the data furnished by the Petitioner, GUVNL has calculated the landed cost of coal (Annexure M to Affidavit dated 23.9.2022) as under:

LPPF Calculation as per GUVNL

Sr. No.	Vessel Name	Country of Origin	Supplier Name	Price Basis (HBA/ Spot)	Vessel Invoice Date/Bill of Lading Date	Vessel Qty (MT)	GCV at Lord Port (kCal/kg)	GCV at Discharge/ Mundra Port (kCal/kg)	HBA $/MT	TM %	Sulphur %	Ash %	HBA derived price for Indonesian Coal in (USD/MT)
	1	2	3	4	5	6	7	8	9	10	11	12	13
1.	MINA OLDEN DORFF	Indonesia	KPC	HBA	06-Feb-22	186647	5116	4956	188.38	24.10%	0.81%	5.50%	129.53
2.	Magdallena Oldendorff	Indonesia	KPC	HBA	10-Feb-22	186801	5155	5155	188.38	23.40%	0.82%	5.50%	131.61
3.	MV SAMJOHN ODYSSE	Indonesia	KPC	HBA	19-Mar-22	190824	5007	4811	203.69	25.30%	0.82%	5.70%	134.63
4.	LUDOLF OLDEN DORFF	Indonesia	KPC	HBA	22-Mar-22	188149	4973	4816	203.69	25.10%	0.82%	6.00%	133.97
5.	SAMJOHN ODYSSE	Indonesia	KPC	HBA	06-May-22	190802	4909	4838	275.64	25.40%	0.80%	6.60%	176.91
6.	CAPE LAUREL	Indonesia	KPC	HBA	09-May-22	169616	5238	5169	275.64	23.00%	1.20%	5.40%	193.38
7.	MATHILDE OLDEN DORFF	Indonesia	KPC	HBA	19-Feb-22	186253	4734	4680	188.38	26.70%	0.70%	6.80%	116.07
8.	CLWUZHO#	Australia	VITOL	Spot	19-Jan-22	154058	5569	5511	158.5	11.20%	0.40%	18.90%	-
9.	ALPHA UNITY #	South Afric	VALE	Spot	14-May-22	168390	6153	6083	275.64	4.50%	1.80%	22.50%	-
10.	HERMAN OLDEN DORFF	Indonesia	KPC	HBA	23-May-22	190950	4962	4569	275.64	26.50%	0.80%	5.00%	176.84

11.	DEYI EXCELLENCE #	Russia	SUEKAG	spot	25-Apr-22	137863	6270	6214	288.4	9.30%	0.20%	12.10%	-
12.	CAPE CAMELLIA (est)	Indonesia	KPC	HBA	31-May-22	188049	5194	5122	275.64	24.20%	1.20%	4.70%	189.10
13.	MVAEGEA (est)#	Russia	SUEKAG	Spot	02-Jun-22	72299	6505	6505	323.91	9.10%	0.30%	8.10%	-
14.	YASA FALCON #	Russia	SUEKAG	Spot	02-Jun-22	76910	6475	6405	323.91	10.10%	8.70%	0.30%	-
15.	MV HEIDGE OLDENORFF	Indonesia	KPC	HBA	13-Jun-22	190045	5273	5202	323.91	23.20%	1.30%	4.80%	227.61
16.	HORIZONJADA#	Russia	SUEKAG	Spot	28-Jun-22	72867.3	6419	6348	323.91	11.10%	0.30%	8.60%	-
17.	NIGHT KISS#	South Afric	VALE	Spot	29-Jun-22	164650	5918	5850	323.91	5.20%	1.00%	24.70%	-
18.	MV THALASSINNIAVRA#	South Afric	VALE	Spot	07-Jul-22	168800	5937	5867	319	4.40%	1.10%	24.90%	-
19.	STELLA TESS	Indonesia	KPC	HBA	09-Jul-22	182217	5302	5233	319	22.70%	1.20%	4.90%	227.23
20.	HARRY OLDENDORFF	Indonesia	KPC	HBA	17-Jul-22	181860	5378	5307	319	21.70%	1.20%	5.10%	233.32
21.	VIKTORTSOI #	Russia	SUEKAG	Spot	05-Jul-22	72762	6491	6446	319	10.20%	0.30%	8.00%	-

Ser No.	Argus index for 5000 GCV coal (USD/MT) - Month previous than B/L month (15)	Argus derived price (USD/MT) (16)	SPOT Price as claimed by CGPL for other than Indonesian coal Cost in [USD/MT] (17)	Minimum FOB coal cost (18)	Ocean Freight (USD/MT)-claimed (19)	Ocean Freight [USD/MT] - as per PPA (20)	Ocean Freight [USD/MT] – admissible (21)	Insurance as claimed by CGPL (USD/MT) (22)	Total CIF Value (USD/MT) (23)	Exchange rate as claimed by CGPL (USD/INR) (24)	Total CIF value [INR/MT] (25)	Port/Fuel Handling Charges (INR/MT) (26)	Taxes and Duties (INR/MT) ^ (27)	LPPF in Rs/MT (28)
	14	15	16	17	18	19	20	21	22	23	24	25	26	27
1	96.18	98.41	-	98.41	11.63	11.63	11.63	0.02	110.06	74.7	8,222	407.5	985.0	9614
2	96.18	99.16	-	99.16	11.63	11.63	11.63	0.02	110.81	74.9	8,300	407.5	995.0	9702
3	115.69	115.85	-	115.85	13.05	12.60	12.60	0.03	128.48	75.9	9,752	409.2	1014.0	11175
4	115.69	115.07	-	115.07	13.07	12.60	12.60	0.03	127.70	76.4	9,756	409.2	1011.0	11176
5	145.12	142.48	-	142.48	13.52	13.10	13.10	0.05	155.63	76.7	11,937	425.0	1196.0	13558
6	145.12	152.03	-	152.03	10.05	13.10	10.05	0.05	162.13	77.4	12,549	425.0	1239.0	14213
7	96.18	91.06	-	91.06	12.84	12.38	12.38	0.02	103.46	74.9	7,749	407.5	938.0	9095
8	-	-	110.24	110.24	0.00	-	0.00	0.02	110.26	75.8	8,358	405.8	1059.0	9823
9	-	-	175	175.00	18.81	-	18.81	0.04	193.85	77.4	15,004	425.0	1233.0	16662
10	145.12	144.02	-	144.02	13.52	13.10	13.10	0.05	157.17	77.6	12,196	425.0	1197.0	13818
11			176	176.00	0.00		0.00	0.04	176.04	78.6	13,837	410.9	1489.0	15737
12	145.12	150.75	-	150.75	12.81	13.10	12.81	0.05	163.61	77.7	12,713	425.0	1243.0	14381
13	-	-	194	194.00	0.00	-	0.00	0.03	194.03	79.0	15,328	427.6	1608.0	17364
14	-	-	189	189.00	0.00	-	0.00	0.03	189.03	79.0	14,933	427.6	1577.0	16938
15	143.36	151.19	-	151.19	13.75	13.32	13.32	0.05	164.56	78.1	12,852	427.6	1403.0	14683

16	-	-	188	188.00	0.00	-	0.00	0.03	188.03	81.0	15,230	427.6	1603.0	17261
17	-	-	170	170.00	19.24	-	19.24	0.04	189.28	78.9	14,934	427.6	1227.0	16589
18	-	-	154	154.00	19.27	-	19.27	0.04	173.31	79.0	13,691	430.2	1165.0	15287
19	138.48	146.84	-	146.84	14.02	13.55	13.55	0.05	160.44	79.2	12,707	430.2	1428.0	14565
20	138.48	148.95	-	148.95	14.02	13.55	13.55	0.05	162.55	79.9	12,988	430.2	1452.0	14870
21	-	-	190	190.00	0.00	-	0.00	0.03	190.03	81.0	15,392	430.2	1617.0	17440

101. The basic differences in calculation of landed cost of coal by TPCL and GUVNL pertain to FOB price of coal, ocean freight and other charges. Ocean freight and other charges have been dealt with under respective heads. As regards FOB price of coal, we are not inclined to accept the Argus derived price for the reason that the export of coal from Indonesia is permitted only on HPB price based on HBA index. Hence, the HBA price prevalent on the date of bill of lading or the actual FOB price of coal whichever is lower has been considered for the purpose of calculation of FOB price of coal imported from Indonesia. As regards the FOB price of coal from countries other than Indonesia namely, south Africa, Australia and Russia, GUVNL has considered the spot price claimed by TPCL for the purpose of calculation of FOB price of coal. Though GUVNL has submitted that the coal imported from countries other than Indonesia should be appropriately benchmarked, it has not suggested any bench mark price of coal prevalent in the countries like Australia, Russia and South Africa. In the absence of benchmark price available for spot procurement of coal from these countries, the actual CIF price paid for these nine vessels shall be considered for calculation of CIF price of coal. However, in case of coal received from sources other than Indonesia, the CIF price of coal plus the mining profit per tonne decided during the month (in respect of Indonesian coal per tonne) shall not be more than CIF price of Indonesian coal received during the said month.

Re: Ocean Freight and Fuel Handling Charges

102. TPCL has claimed the transportation charges and fuel handling charges at actual whereas GUVNL has submitted that these charges should be admissible as per the PPA. GUVNL has further submitted that TPCL has claimed different freight charges for the same vessel under normal invoice and under Section 11 Directions. TPCL has submitted that the principles of Section 11 of the Act as per the settled position of law in the GMR judgement is that the generator should be paid on actuals.

103. We have considered the submissions of TPCL and GUVNL. TPCL has quoted escalable and non-escalable transportation charges and fuel handling charges in the bid tariff. Therefore, TPCL has envisaged and factored all eventuality in so far as transportation and fuel handling charges are concerned. In fact, the imported coal price has been affected by the FOB price of coal which required the supplier of coal in Indonesia to align the export price to HPB based on HBA coal index. None of the elements of energy charge other than FOB price of coal was affected by Indonesian Regulations. Therefore, it is the FoB price of coal for which the generator is required to be compensated as neither the PPA rate nor the market rate would cover the coal cost component in the variable cost of generation. This position is supported by the judgement of the Appellate Tribunal in GMR case where it has been held that the rate of power decided by the Commission should cover the variable cost of the power plant plus a reasonable margin. The Commission is of the view that since the transportation charge has an escalable component which takes care of the escalation in freight charge, the quoted transportation charge shall take care of the adverse financial impact on account of Section 11 Directions. TPCL had quoted

escalable and non-escalable transportation charge and Fuel Handling Charge. Therefore, TPCL shall be entitled for the Transportation Charge and Fuel Handling Charge as per the quoted tariff in the PPA in case of coal imported from Indonesia. TPCL has submitted that Ocean Freight is not separately applicable for non-HBA linked prices because it is already included in Cost and Freight (CFR) and Delivered at Place (DAP) prices except where it is specifically levied. It is noticed from the Ser No.3 of Remarks under Table of TPCL extracted in para 98 that in 6 out of 9 vessels from countries outside Indonesia, ocean freight is included in CFR/DAP. The said Remarks is quoted below:

> *"3. Ocean Freight is 'NIL' for shipment 'CL WVZHO (Sr. No. 8), DEYI EXCELLENCE (Sr. No. 11), MV AEGEA (Sr. No. 13), YASA FALCON (Sr. No. 14), HORIZON JADE (Sr. No. 16) and VIKTOR TSOI (Sr. No. 21) as these are CFR/DAP shipments purchased on spot basis."*

In case of these vessels, ocean freights shall not be separately admissible as it is included in CFR/DAP price. However, in respect of the remaining three vessels namely, Alpha Unity (Ser No.9), Night Kiss (Ser No.17 and MV Thala Sini Avara (Ser No. 18), ocean freight on actual basis shall be admissible. The decision is based on the data submitted till 25.8.2022. The above methodology shall be adopted in case of coals from vessels used for generation and supply of electricity from 26.8.2022 till 31.12.2022.

Re: Other Charges:

104. TPCL has submitted that it is in compliance with the Incoterms 2010 for the procurement of coal. The 'Other Charges' as claimed by TPCL are verified and certified by the Auditor. Further, for the power generated and supplied during the period between January to April, 2022, TPCL had claimed Other Charges as Zero or "$1/MT" as the power was being supplied under a separate and temporary

arrangement, whereunder GUVNL had itself restricted the claim with respect to 'Other Charges' under the proposed SPPA and as such, TPCL was constrained to supply power considering the restricted costs. However, for supply in terms of and during the currency of the Section 11 Directions/Clarifications, TPCL is entitled to be compensated based on the actual costs incurred by it. GUVNL has submitted that TPCL has procured coal on FOB, CFR and DAP basis where other charges are part of the procurement. GUVNL has submitted that TPCL cannot claim the other charges separately.

105. The Petitioner has submitted that the other charges envisaged are inclusive of letter of credit opening charges, hedging cost and inventory carrying cost. The Commission notes that these charges have not been separately quoted by the Petitioner and have been factored in the different charges quoted in the tariff. In our view, the other charges shall not be admissible to the Petitioner. Since the FOB cost of coal is impacted and is linked to HBA linked HPB cost due to Indonesian Regulations, it has to be disbursed on the lower of the HPB price or actual and other costs will be as per the PPA. Since PPA does not provide for reimbursement of other charges, we are not inclined to allow the same.

Re: Foreign Exchange Rate

106. TPCL has claimed the foreign exchange rate on actual whereas GUVNL has submitted that it should be at the average rate. Since TPCL had quoted fuel energy charge, transportation energy charge and fuel handling charge in USD, necessary foreign exchange rates have to be applied while making payment of these charges in INR. As per Clause 1.2.3 of Schedule 7 of the PPA, both escalable and non-

escalable components of tariff are multiplied by “FXn” rate which has been defined as under:

> “*Fxn shall be the simple average of closing SBI TT buying rate (for Rs./US$) for the last fifteen(15) days prior to the first day of the month ‘m’ for which such exchange rates are published by SBI.”*

The Commission is of the view that the impact of foreign exchange shall be decided as per the above formula.

Re: Operational Parameters

107. TPCL has submitted that its actual operating parameters are in line with the norms of the Commission i.e. Heat Rate of 2121 kCal/kWh and Auxiliary Power Consumption of 8.5%. However, there has been variation of operational parameters from the norms of the Commission due to the following reasons:

(a) Frequent Reserve Shutdown: Shutdown request over weekend and start up request less than 2 days in subsequent week. There have been four such instances by GUVNL.

(b) Lower Loading Factor due to surrender by the Procurers for the period 6.5.2022 to 22.9.2022: GUVNL: 23%, MSEDCL: 72%, PSPCL: 100%, RUVNL; 100% and HPPC:100%.

(c) Rainfall impact: Heavy rain adversely affected operating parameters due to moisture (Rainfall in July 2022: 684.25 MM and August 2022: 153.25 MM).

108. GUVNL has submitted that the operational/technical parameters with respect to TPCL should be considered in terms of the order dated 6.12.2016 in Petition No.159/MP/2012 i.e. SHR of 2050 kCal/kWh and Auxiliary Power Consumption of 4.5%. GUVNL has further submitted that in any case technical parameters should

not be allowed higher than the parameters applicable as per the Tariff Regulations of the Commission.

109. We have considered the submissions of TPCL and GUVNL. The operational/technical parameters in terms of the order dated 6.12.2016 in Petition No.159/MP/2012 was in the context of the compensatory tariff which was being granted as a package to TPCL. However, while deciding the adverse financial impact of Section 11 Directions which has to cover the variable cost of generation and a reasonable margin as per the Appellate Tribunal's judgement in GMR case, we are not inclined to adopt the operational parameters in the present case which was approved in order dated 6.12.2016 in Petition No.159/MP/2012. In our view, the operational parameters such as heat rate and APC should be lower of the actual or as worked out in accordance with Tariff Regulations, 2009 which was in force at the time of commercial operation of the generating station of the Petitioner. Heat Rate and APC worked out on the basis of Tariff Regulations, 2009 are 2121 kCal/kg and 8.50% respectively. Accordingly, the operational parameters allowed to the Petitioner are as under:

	As claimed by TPCL				As allowed			
Particular	**May 2022**	**June 2022**	**July 2022**	**Aug 2022**	**May 2022**	**June 2022**	**July 2022**	**Aug 2022**
Heat Rate (kCal/kWh)	2,121	2,131	2,150	2,145	2121	2121	2121	2121
APC- Actual (%)	8.68%	8.21%	8.57%	8.45%	8.50%	8.21%	8.50%	8.45%

The operational parameters for the period from 25.8.2022 till 31.12.2022 shall be calculated on monthly basis and shall be considered as lower of the actual or as determined in accordance with Tariff Regulations, 2009.

Re: Sharing of Profits from sale on Power Exchange

110. MoP in its letter dated 20.5.2022 permitted sale of power through power exchange when it is not scheduled by the Procurer(s). The relevant para is extracted as under:

> *"c) If power is not scheduled by the procurer, the generator will bid the power in the power exchange at the tariff upto the tariff given under Section 11 or the mutually agreed tariff with the Procurer. However, the bid will be cleared on MCP discovered on the power exchanges. In case the average MCP is less than the tariff given under section 11 or the mutually agreed tariff with the procurer, then the generator will not be bound to sell power in the power exchange. However, if the average MCP is more than the tariff given under section 11 or the mutually agreed tariff with the procure, then the generator will mandatorily sell power in the power exchange."*

111. The Petitioner has submitted vide its affidavit dated 30.8.2022 the details of sale of un-requisitioned power on power exchange for the period 6.5.2022 to 28.7.2022. The Petitioner has submitted that the exact share of profit to be shared with each procurer can only be computed pursuant to the determination of ECR by the Commission and expiry of the Section 11 Directions on 31.12.2022. TPCL has submitted that it is committed to share the profit as payable as they become due to the concerned procurer(s).

112. The Commission is of the view that after adjusting the energy charges and other charges such as open access charges and transmission charges, TPCL shall share the profits earned through sale at the Power Exchanges in proportion to the un-requisitioned capacity of the procurers during the relevant month.

Issue No.8: Whether the mining profit shall be shared by the Petitioner while determining the adverse financial impact and to what extent?

113. Para 4(e) of the Directions of MoP under Section 11 of the Act issued vide letter dated 5.5.2022 provided as under:

"(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."

MoP also appointed a Committee to decide the rates at which the power shall be supplied to the PPA holders/beneficiaries. Based on the recommendations of the Committee, the Energy Charge Rate (ECR) was notified by the MoP vide letter dated 13.5.2022. While calculating the ECR, the following treatment was made to the mining profit:

"*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 Indonesia coal; and (b) on distribution of profits and / or dividends from such production, sale and / or supply of such coal by PT Kaltim Prima Coal (KPC) to Tata Power have been considered in accordance with the CGPL letter dated 12th May, 2022 to Gujarat and CEA. CGPL shall source 100% of coal from their own mines."*

Thereafter, Directions deciding the ECR have been issued by MoP from time to time. It is pertinent to mention that the letter dated 13.5.2022 contained a direction that "CGPL shall source 100% of coal from their own mines".

114. GUVNL has submitted that in the light of the recommendations of the High-Power Committee (HPC) appointed by the Government of Gujarat, the provisions in the model PPA attached to the HPC report, the Resolution of Government of Gujarat dated 1.12.2018 mandating TPCL to share 100% of mining profit subject to a minimum of Rs. 0.15 kWh, the provisions in the draft SPPA between GUVNL and TPCL, and minutes of the meeting dated 28.3.2022 issued by MoP, it is wrongful on the part of TPCL to restrict the mining profit only on coal consumed from its mine i.e. PT Kaltim Prima Coal. GUNVL has submitted that mining profit should be worked out on the total coal consumption and TPCL ought to share 100% of the mining profit earned by it with

GUVNL/Procurers. GUVNL has submitted the following calculation for sharing of mining profit by TPCL:

Working of Mining Profit Calculation				
Particular	**May**	**June**	**July**	**August**
FoB price as calculated for consumed coal in the month (USD/MT)	117.6	146.3	150.68	151.12
Contracted price as per PPA	50.88	53.95	57.02	60.08
Incremental revenue in USD/MT	66.76	92.35	93.66	91.04
Taxation (notional) in %	43.84%	43.84%	43.84%	43.84%
Incremental profit in USD/MT	37.49	51.86	52.60	51.13
Actual coal consumption	547239	556529	556529	556529
Net incremental mining profit in USD	20518656	28862869	29273235	28453183
Forex Rate	75.92	77.22	77.78	78.11
Scheduled Generation	1197337180	1185452759	983722162	1047418513
Mining profit/unit	**1.30**	**1.88**	**2.31**	**2.12**

115. TPCL has submitted that for supply of power in terms of the directions and subsequent clarifications of MoP under Section 11 of the Act, TPCL is under no obligation to share mining profits with the procurers for the following reasons:

(a) Sharing of mining profit was being offered to the procurers for the purpose of execution of the SPPA and since the terms of the SPPA have not been fructified, there can be no sharing of mining profit.

(b) The issue of mining profit was conceptualized in relation to the recommendations under the HPC Report and mining profit is to be passed on so as to align with the recommendations of HPC. The element of mining profit cannot be disconnected from other aspects contained in the HPC Report.

(c) The statutory power granted under Section 11(2) is plenary and no limitations can be imposed upon such power through directions of the Central Government under Section 11(1) of the Act. Mining profit deduction in the ECR determined by the Government through the Committee is interim in nature which is to be finally determined by the Commission. Since mining profit element has been wrongly applied and forms part of the ECR determined by the Central Government, the Commission has the statutory power and reciprocally the adjudicatory function to ensure that the relief under Section 11(2) should actually offset the prejudicial impact on TPCL.

116. In response to the submissions of GUVNL for sharing of 100% mining profit as per HPC Report, TPCL has submitted that HPC has clearly stated that mining profit will be shared proportionate to the quantum of coal being supplied from such owned mines. TPCL has submitted that profits limited to supply of coal to TPCL proportionate to the quantum of coal being supplied from such owned mines to the extent of shareholding (30%) of TPCL in KPC mines can only be factored in and not 100% of TPCL's profit in KPC mines. TPCL has submitted that the MoM of MoP dated 17.3.2022 is unsustainable in law and logic since the SPPA is unexecuted. GoG Resolution dated 1.12.2018 and supply of power prior to 6.5.2022 are not relevant since the issue in the petition relates to supply under Section 11 Directions and its adverse financial impact on TPCL.

117. TPCL has submitted that the Commission in its order dated 15.4.2013 passed in Petition No. 159/MP/2022 provided for calculation of net incremental profit from the mines owned by the Petitioner proportionate to the coal supplied to Petitioner's Project which has accrued on account of the Indonesian Regulations requiring the

long-term contract to be aligned with the market price and adjustment of the same in the Compensatory Tariff. Further, in the final order dated 6.12.2016 passed in the said Petition, the Commission has calculated Mining Profit as actual profit from coal mining operations in Indonesia based on the total incremental revenue after payment of taxes and royalty as per Indonesian Regulations. Ultimately, the Commission allowed the sharing of the profits from sale of coal from the mines in which Petitioner has the stake to the extent of off-take of coal from the mines for Petitioner's Project, and accordingly, the profit from mines pro-rata to the offtake of coal by Petitioner's Project has been adjusted against the relief given to CGPL.

118. We have considered the submissions of TPCL and GUVNL. We agree with TPCL that the mining profit adjusted in the ECR determined by MoP on the recommendations of the Committee is an interim arrangement which is subject to the final decision of the Commission under Section 11(2) of the Act. We are also not inclined to rely on the HPC Report or the GoG GR dated 1.12.2018 or the informal understanding between the parties on the terms and conditions for supply of power prior to 6.5.2022 as the basis for adjustment of mining profit since in terms of Section 11(2) of the Act, we are called upon to determine the adverse financial impact of the directions under Section 11(1) of the Act. As already noted, GMR judgement gives the guidance that determination of adverse financial impact under Section 11(2) shall ensure that rate of power decided by the Commission should cover variable cost plus a reasonable tariff. In our view, the test for deciding about the adjustment of mining profit should be whether TPCL despite the adjustment would be able to recover its variable cost with a reasonable margin.

119. The plant of TPCL is a thermal power plant based on imported coal. TPCL had purchased stakes in coal mines in Indonesia to ensure fuel security and the said fact had been revealed during the bidding process. On account of promulgation of Indonesian Regulations, all owners of coal mines in Indonesia were required to align their coal price to the benchmark price determined on the basis of HBA index. This unprecedented development rendered the quoted energy charge as financially unviable. As a result of Indonesian Regulations, the owners of coal mines were benefitted in the form of higher profits. Where a generating company having set up a generating plant based on imported coal is also an owner of the coal mines in Indonesia as is the case of TPCL, it has earned incremental profits from the coal mines while incurring additional expenditure on the higher price of coal. If the incremental profit from coal mines is not factored in the tariff for supply of electricity from the generating plant, the generating company is doubly benefitted from the incremental profit from the coal mine as well as the revised tariff from the beneficiaries. On the other hand, the beneficiaries are to put to disadvantage on account of commercial decision of the generating company by buying coal mine in Indonesia and quoting the tariff and winning the bid on that basis. Therefore, equity, fair play and commercial prudence demand that the generating company shares its incremental profit from the coal mines with the beneficiaries of the generating station to the extent the coal from the coal mine is used to generate and supply power to the said beneficiaries. In the present case, directions under Section 11 mandating TPCL to operate its generating plant based on imported coal at full capacity are binding on both TPCL and beneficiaries which has indirectly resulted in incremental profit to the coal company in Indonesia (KPC) which is owned by the wholly owned subsidiary of TPCL. We have already held in this order that those beneficiaries who are not

scheduling power from TPCL are bound to pay the capacity charges as TPCL is required to make its plant fully available by buying imported coal. Thus, even though a particular beneficiary does not schedule power during operation of section 11 directions, it incurs the financial liability of payment of capacity charges. The Commission is, therefore, of the considered view that the incremental profit earned by KPC in Indonesia by selling coal to TPCL needs to be factored while deciding the adverse financial impact of the directions under Section 11 of the Act as otherwise it will result in windful gain to TPCL while putting the beneficiaries to financial disadvantage.

120. The next question is whether TPCL should share the full profit earned on its share in KPC or it should be limited to the coal sourced by the generating plant from KPC to generate and supply electricity to the beneficiaries during the operation of Section 11 Directions. To consider this issue, certain facts need to be noted. TPCL made an investment in order to acquire the equity shares in PT Kaltim Prima Coal (KPC) through its fully owned subsidiary Bhira Investment Limited. TPCL's share of dividends/profit from KPC is limited to 30%. Section 11 Directions mandates TPCL to source 100% of its coal requirement from KPC. However, TPCL has purchased about 33% of its requirement of coal (9 vessels) from 6.5.2022 to 25.8.2022 from Australia, South Africa and Russia at spot prices based on negotiated price. TPCL has claimed that the beneficiaries have been benefitted from the cheaper coal from these countries compared to the coal from KPC. In the light of the above facts, the Commission is of the view that actual profits from coal mining operations in Indonesia shall be calculated based on the total incremental revenue after payment of taxes and royalty in Indonesia and India for coal supplied to CGPL for generation and supply of electricity. Since TPCL has 30% stake in KPC, the profit to be shared

shall be considered to the extent of 30% after payment of all taxes and charges. Indicative Methodology to be followed for sharing of mining profit is as under:

Ser No.	Particulars	Formula
1	FOB Selling Price of the Indonesian Mining Company as per Invoice during the month (USD/MT)	A
2	Contracted Price of coal as derived from PPA (USD/MT)	B
3	Incremental revenue to Indonesian mining company (USD/MT)	C= A-B
4	Less: Royalty @ 28%	D=C*28%
5	Revenue net of Royalty (USD/MT)	E = C-D
6	Less: Income tax at maximum marginal rate @ 52.7211%	F = E*52.7211%
7	Incremental Profit to Indonesian mining company (USD/MT)	G=E-F
8	Quantity supplied to TPCL by the mining company / consumed (in MT)	H
9	Net incremental PAT to Indonesian mining company (in USD)	I=G*H
10	Tata Power share of net incremental PAT of mining company (USD)	J=I*30%
11	Forex rate (INR)	K
12	Scheduled Generation in kWh	L
13	Tata Power share of net incremental PAT of mining company Rs/kWh	M=(J*K)/L

121. The mining profit calculated as per the methodology in Rs/ KWh in para 120 shall be adjusted in the ECR.

122. In case of coal received from sources other than Indonesia, the CIF price of coal plus the mining profit per tonne (decided during the month in respect of Indonesian coal per tonne) shall not be more than CIF price of Indonesian coal received during the said month.

123. In the light of the above, the summary of our decisions is as under:

(a) The rates decided by the MoP read with the clarification of the Commission thereon vide order dated 13.9.2022 are interim in nature and are subject to determination of adverse financial impact by the Commission under Section 11(2) of the Act

(b) In order to ensure that the Petitioner maintains and operate its plant to generate power for supply to the Procurers in compliance with the directions of the MoP under Section 11(1) of the Act, the Commission under Section 11(2) of the Act is required to compensate the Petitioner to cover the cost plus a reasonable margin of profit.

(c) The decision in order dated 13.9.2022 in IA No.50/2022 regarding fixed charge that GUVNL and MSEDCL cannot unilaterally deduct INR 0.20/kWh from the fixed charges is reiterated. Consequently, I.A. No.64/2022 filed by GUVNL for modification of said order is rejected.

(d) Since TPCL is compensated for full fixed cost on declaring 80% availability, there is no need to provide additional fixed charges above 80% availability or to provide incentive above 85% availability.

(e) The rates of rebate decided by the Commission in para 41 of the order dated 13.9.2022 by extrapolating the PPA provisions in case of weekly billing adequately address the adverse financial impact on the Petitioner for generation and supply of power in compliance with the directions under Section 11(1) of the Act and accordingly, the said principle is reiterated.

(f) 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.

(h) FOB cost of Indonesian coal for the purpose of offsetting of the adverse financial impact under Section 11(2) should be taken as lower of the actual cost of coal or the HPB based on the HBA index. Based on the said cost and the transportation charges as per the PPA, the CIF cost in USD/MT shall be worked out.

(i) In case of coal received from sources other than Indonesia, CIF cost of coal shall be considered. Ocean freight shall not be admissible separately where the ocean freight is included in CFR/DAP. Where the ocean freight is not included in CFR/DAP, ocean freight charges on actual basis shall be considered to work out the CIF cost.

(j) Thereafter, CIF cost as worked out in sub-paras (h) and (i) above shall be converted into INR as per the applicable foreign exchange rate as per the provisions of Clause 1.2.3 of Schedule 7 of the PPA. Landed cost of coal (LPPF) shall be worked out by considering Port Handling Charges as per the PPA and applicable taxes and duties.

(j) In case of coal sourced from countries other than Indonesia, the CIF price of coal plus the mining profit per tonne (decided during the month in respect of Indonesian coal per tonne) shall not be more than the CIF price of Indonesian coal received during the said month.

(k) TPCL shall not be entitled for Other Charges as claimed in the petition.

(l) The operational parameters as worked out on monthly basis shall be lower of the actual or as specified in the Tariff Regulations, 2009 during the operation of the Section 11 Directions.

(m) ECR shall be worked out as a per the following formula:

ECR [Rs/kWh] = (Heat Rate [kCal/kWh] / (1 - Auxiliary Consumption [%]) / GCV of coal consumed [kal/kg]) X Coal cost [Rs/MT] /1000

(n) After adjusting the energy charges and other charges such as open access charges and transmission charges, TPCL shall share the profits earned through sale at the Power Exchanges in proportion to the un-requisitioned capacity of the procurers during the relevant month.

(o) The mining profit to be shared by TPCL shall be determined as per the formula given in para 120 of this order and adjusted against the ECR on monthly basis.

124. Petition No.128/MP/2022 along with IA No.64/2022 are disposed of in terms of the above.

Sd/-	sd/-	sd/-
(P.K. Singh)	**(Arun Goyal)**	**(I.S. Jha)**
Member	**Member**	**Member**