CENTRAL ELECTRIICTY REGULATORY COMMISSION
NEW DELHI

Petition No. 155/MP/2019

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

Date of Order: 13th January, 2023

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 read with Articles 3, 6, 7.2(b) and other provisions of Power Purchase Agreement dated 26.12.2005 seeking adjudication of disputes related to legitimate dues payable to Udupi Power Corporation Limited by Karnataka ESCOMs for the period 2010-11 to 2018-19.

And
In the matter of

Udupi Power Corporation Limited,
1st Floor, Lotus Towers, Devaraja Urs Road,
Race Course, Bangalore,
Karnataka

….Petitioner

Vs

1) Power Company of Karnataka Limited,
KPTCL Building, Kaveri Bhavan,
K.G. Road, Bengaluri-560009

2) Gulbaraga Electricity Supply Company Limited,
Station Main Road,
Gulbarga-585102

3) Hubli Electricity Supply Company Limited,
Corporate Office, Navanagar, PB Road,
Hubli-580025

4) Chamundeshwari Electricity Supply Corporation,
No. 29, Kaveri Grameena Bank Road,
Vijaynagara 2nd Stage, Hinkal,

Mysore-570017

5) Bangalore Electricity Supply Company Limited,
K.C. Circle, Benagaluru-560009

6) Mangalore Electricity Supply Company Limited,
Corporate Office, MESCOM Bhavan, First Floor,
Kavoor Cross Road, Bijai, Mangalore-575004

7) Karnataka Power Transmission Corporation Limited,
Corporate Office, Kaveri Bhavan.
Bangalore-560009

….Respondents

Parties Present:

Shri Amit Kapur, Advocate, UPCL
Ms. Poonam Verma, Advocate, UPCL
Shri Saunak Rajguru, Advocate, UPCL
Shri M.R. Krishan Rao, UPCL
Shri Mehul Rupera, UPCL
Shri Sameer Ganju, UPCL
Shri Malav Deliwala, UCPL
Shri Kumar Gaurav, UCPL
Shri Tanmay Vyas, UPCL
Shri M.G. Ramachandran Sr. Advocate, PCKL, MESCOM & HESCOM
Shri Arunav Patnaik, Advocate, PCKL, MESCOM & HESCOM
Ms. Bhabna Das, Advocate, KPTCL
Shri Prasanna, PCKL
Ms. Padamalatha, PCKL
Shri Darpan KM, Advocate, HESCOM & MESCOM
Ms. Amrita Sharma, Advocate, HESCOM & MESCOM
Shri Rajat Jonathan Shaw, Advocate, HESCOM & MESCOM

ORDER

The present Petition has been filed by Udupi Power Corporation Limited (hereinafter "UPCL/Petitioner") under Section 79(1)(f) of the Electricity Act, 2003 (the Act) seeking adjudication of disputes between UPCL and State Utilities of Karnataka (hereinafter referred to as "ESCOMs") and consequential reliefs on account of the following:

(a) Dispute pertaining to capacity charges on account of the difference in computation of declared capacity and disallowance of Capacity Charges for amount of Rs.131.98 Cr. For the period from 10 March 2011 to 31 March 2013;

(b) Disputes pertaining to energy charges:

(i) Due to disallowance of actual landed coal cost incurred by on account of spot procurement of coal resulting in disallowance of Rs.336 crores for the period from November 2010 to March 2019; and

(ii) Directions to Karnataka ESCOMs to pay the unpaid reimbursement charges (coal handling, coal related expenses etc.) of Rs.112.2 crores from November 2010 to March 2019, as per the resolution in the 46th Board Meeting of Power Company of Karnataka Limited (PCKL).

(c) Directions to Karnataka Escoms to pay total dues of Rs.884.50 crores towards differential tariff arising out of the Commission's order dated 20.2.2014 in Petition No. 160/GT/2012 (after deducting Rs.200 crores received by UPCL as ad hoc payment) for the period from November 2010 to January 2013.

2. The disputes between the parties with regard to the item at (b)(ii) and (c) of Para1 above have been mutually resolved and the same has been acknowledged by PCKL vide its letter dated 22.1.2021. The same has been reiterated by the learned counsel for UPCL during the hearing on 20.5.2022 and by both parties in their written submissions. The disputes between the parties are now confined to items at (a) and (b)(i) of Para 1 i.e. (i) disputes pertaining to difference in computation of declared capacity and disallowance of capacity charges from 10.3.2011 to 31.3.2013, and (ii) disputes regarding computation of energy charges due to spot procurement of coal resulting in disallowance of Rs.336 crore for the period from November 2010 to March 2019. The outstanding disputes have been examined hereafter.

Dispute pertaining to capacity charges

3. UPCL has submitted that it has computed the declared capacity in terms of Articles 3 and 6 of the PPA dated 26.12.2005, Tariff Regulations of the Commission and the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (hereinafter "Grid Code"). However, dispute has arisen on account of the difference in computation of declared capacity by UPCL and SLDC Karnataka and consequential impact on the capacity charges amounting to Rs. 131.98 crore payable to UPCL for the period from 10.3.2011 to 31.3.2013. The Petitioner has categorized the disputes regarding capacity charges under the following heads:

(a) Non-availability of 400 kV transmission line for evacuation of power from the project of UPCL:

(i) for the period from 10.3.2011 to 18.8.2012 when Unit I was directed to be backed down for the purpose of synchronization/achieving COD of Unit II; and

(ii) for the period between 19.8.2012 and 6.9.2012 after COD of Unit II.

(b) Reduction of load due to shortage of coal for the period between 16.1.2013 to 30.3.2013.

(c) Tripping of generating station due to KPTCL's transmission line.

(d) Financial impact of the dispute pertaining to capacity charges.

Non-Availability of 400 kV Transmission Line before COD of Unit II-Deemed Capacity Charges for the Period from 10.3.2011 and 18.8.2012 in respect of Unit I

4. The Petitioner has submitted that as per Annexure 4 of the PPA, the ESCOMs of Karnataka were required to provide the following evacuation facilities for evacuation of UPCL's contracted capacity:

(a) 400 kV D/C lines from the project switchyard to Hassan Inter-connection point; and

(b) Two nos. of 220 kV D/C lines from project switchyard to 220 kV switchyards of KPTCL at Kemar and Kavoor.

The responsibility of constructing the above evacuation facilities was entrusted to KPTCL. Two number of 220 kV D/C lines achieved COD prior to the synchronization of Unit I of UPCL. However, 400 kV D/C lines could not achieve its COD which affected the synchronization and COD of Unit II of UPCL.

5. Briefly, the submissions of the Petitioner relating to the dispute pertaining to capacity charges in respect of Unit I arising out of non-availability of 400 kV Transmission Line are as under:

(a) Unit-I (600 MW) of UPCL's generating station was synchronized on 3.6.2010 and achieved the Commercial Operation Date (COD) on 11.11.2010. Thereafter, Unit I was declaring its entire ex-bus capacity after the COD.

(b) Unit II was ready to be synchronized since 15.1.2011. However, it was substantially delayed due to ESCOMs'/KPTCL's failure to provide requisite evacuation facilities.

(c) On 4.3.2011, KPTCL allowed synchronization of Unit II. However, on the basis of the recommendations of Central Power Research Institute (CPRI), KPTCL imposed a condition that generation from Unit II would not exceed 80 MW due to evacuation constraints of the existing 220 kV Double Circuit line. Unit II was finally synchronized on 7.3.2011.

(d) On 30.3.2011, KPTCL informed UPCL that Unit I would be able to sustain tripping of Unit II up to 500 MW even in peak condition based on the CPRI studies.

(e) On 13.8.2012, KPTCL communicated to UPCL that 400 kV transmission line would be ready by 20.8.2012.

(f) On 20.8.2012, UPCL informed PCKL about the successful initial capacity test of Unit II and declaration of COD of Unit II on 19.8.2012.

(g) 400 kV D/C Line from project switchyard connecting to Hassan Interconnection point achieved COD on 6.9.2012.

(h) Due to non-availability of 400 kV line, UPCL was forced to evacuate power through the existing 220 kV Khemar Line which was capable of evacuating about 600 MW only. Therefore, for the purpose of synchronization and COD of Unit II, generation of fully operational Unit I was reduced from time to time as per instructions of SLDC to accommodate generation from Unit II for the period between 10.3.2011 and 18.8.2012.

(i) In terms of the Regulation 3(14) Tariff Regulations, 2009 and Regulation 3(15) of the Tariff Regulations, 2014, computation of declared capacity is directly linked to capability of a generating station to deliver ex-bus electricity.

(j) However, SLDC has erroneously considered UPCL's declared capacity between 10.3.2011 and 18.8.2012 to be lower than its actual capability to generate by treating it as equivalent to actual generation of Unit I only. The consideration by SLDC is contrary to the provisions of the PPA and the applicable Tariff Regulations. Since the responsibility of providing the transmission line was that of the Karnataka ESCOMs, UPCL cannot be penalized for an evacuation constraint caused on account of the unavailability of the transmission line. Therefore, UPCL's capacity charges ought to be computed in respect of its capability to generate power between 10.3.2011 and 18.8.2012.

(k) UPCL has only raised infirm power invoices with respect to Unit-II for the period prior to its COD (from March 2011 to August 2012) where infirm power from Unit II was supplied prior to its COD on 19.8.2012.

6. UPCL has prayed for issue of directions to Karnataka ESCOMs to make payment of the invoices raised by UPCL by considering the following: -

(a) For computation of Capacity Charges, the declared capacity of Unit I be considered as under:

(i) If declared capacity < 556.8 MW then consider declared capacity as declared.

(ii) If declared capacity >= 556.8 MW then consider declared capacity = 556.8 MW

[600 MW-7.2% Normative Auxiliary consumption = 556.8 MW]

(b) The actual energy generated from Unit I should be considered for payment of Energy Charges.

7. UPCL has prayed for deemed capacity charges amounting to Rs.34.37 crore on account of non-availability of 400 kV transmission line for the period from 10.3.2011 to 18.8.2012 in respect of Unit I.

Non-availability of 400 kV transmission line after COD of Unit II – Deemed Capacity Charges for the Period between 19.08.2012 and 06.09.2012 in respect of Unit II

8. Even after declaration of COD of Unit II with effect from 19.8.2012, UPCL was allowed only to operate Unit I due to transmission constraints till the declaration of COD of 400 kV D/C transmission line on 6.9.2012. Accordingly, UPCL has claimed deemed capacity charges in respect of Unit II for the period from 19.8.2012 to 6.9.2012 due to following reasons:

(a) APTEL by its Judgment dated 15.5.2015 in Appeal No. 108 of 2014 has upheld the Order dated 20.02.2014 of the Commission wherein it was held that PCKL's delay in commissioning the 400 kV line caused UPCL's capacity to be stranded. APTEL has recognized the obligation and consequent failure of ESCOMs to commission the 400 kV line.

(b) Despite being ready and available to generate power from both Unit I and II, UPCL was only allowed to operate one unit even after COD of Unit II.

(c) The ESCOMs failed to commission the requisite evacuation capacity despite having been notified by Udupi Power's letter dated 20.08.2012 regarding successful initial capacity test of Unit II and declaration of COD of Unit II on 19.08.2012.

(d) On account of the Respondents' failure, SLDC issued instructions directing Udupi Power to reduce its capacity between 19.8.2012 to 6.9.2012, causing the under-utilization of its fully operational generating station.

(e) As per Regulation 3(14) of the Tariff Regulations, 2009, declared capacity for the period between 19.8.2012 and 6.9.2012 should be calculated on the basis of the capability of Unit II at ex bus and not on the basis of actual generation.

9. Karnataka ESCOMs be directed to pay Udupi Power in terms of the invoices raised by considering as under:

(a) For computation of capacity charges:

If declared capacity < 1113.6 MW then consider declared capacity= As declared by Udupi Power

If declared capacity >= 1113.6 MW then consider declared capacity = 1113.6 MW

[1200 MW – 7.2% Normative Auxiliary consumption =1113.6MW]

(b) Actual energy generated should be considered for payment of Energy Charges.

10. UPCL has prayed for grant of deemed capacity charges in respect of Unit II amounting to Rs.21.23 crore on account of non-availability of 400 kV D/C transmission line for the period between 19.8.2012 and 6.9.2012.

Reduction of load due to shortage of coal for the period between 16.1.2013 to 30.3.2013

11. UPCL has submitted that that it was forced to reduce/shut down the operation of Unit I and Unit II between 16.1.2013 and 30.3.2013 on account of coal shortage caused

by lack of funds due to Karnataka ESCOMs' payment default and SLDC's failure to give a pragmatic day ahead schedule in terms of Regulation 21(4) of the Tariff Regulations, 2009. UPCL has submitted that it informed PCKL by its letter dated 31.10.2012 regarding reduction of load due to coal shortage. UPCL also sent several letters dated 31.10.2012, 12.2.2013, 25.2.2013, 12.3.2013 and 15.3.2013 to SLDC, Karnataka highlighting the compelling circumstances created by the ESCOMs' payment default and the impending shutdown of Units due to coal shortage. UPCL has further submitted that the Karnataka ESCOMs are responsible for the reduction in generation or shut down of operation of the generating station for the following reasons:

(a) Coal shortage leading to shut down of plant was caused on account of Karnataka ESCOMs' failure to pay dues in time. The Commission in its order dated 15.9.2017 in Petition No. 62/MP/2013 and the APTEL in its judgement dated 11.7.2014 in Appeal No. 181 of 2013 (Raghu Rama Renewable Energy Ltd vs. Tamil Nadu Generation and Distribution Corporation Limited) have held that short supply of power or shut down of the generating station due to the shortage in fuel supply created by the buyer's payment default is attributable to the concerned buyer.

(b) UPCL's obligation to supply power and Karnataka ESCOMs' obligation to make payments due thereon are reciprocal obligations, since UPCL's ability to procure fuel (coal) for the operation of its generating station and thereafter supply power to the Respondents is contingent upon the Karnataka ESCOMs making due payments for the same. Reliance has been made on Sections 51 to 54 of the Indian

Contract Act and judgement of the Hon'ble Supreme Court in Sikkim Subba Associates vs. State of Sikkim [(2001) 5 SCC 629].

12. UPCL has submitted that by its letters dated 28.2.2013 and 12.3.2013, UPCL requested SLDC to specify a pragmatic day-ahead schedule for its generating station to optimally utilize its installed capacity of power and energy capability in consultation with the beneficiaries and issue directions. However, SLDC didn't specify a pragmatic day-ahead schedule for UPCL and in its responses dated 12.3.2013 and 14.3.2013 stated that Regulation 21(4) of the Tariff Regulations, 2009 does not find application in case of the Petitioner. UPCL has submitted that SLDC has acted contrary to the Regulations of the Commission, which has resulted in extreme financial loss to UPCL. Accordingly, UPCL has submitted that the declared capacity for the said period should be computed in terms of Regulation 21(4) read with 3(15) of the Tariff Regulations, 2009.

<u>Tripping of generating station due to KPTCL's transmission line</u>

13. UPCL has submitted that differences have also arisen between UPCL and PKCL in declared capacity due to tripping of transmission lines. The sudden tripping of transmission lines on occasions led to tripping of the unit and in some cases led to black-out of the station after which the Units took some time to restore. In such scenarios, the Petitioner was not able to generate as per the declared capacity submitted to SLDC. During resynchronizing of units after tripping, SLDC allowed declared capacity of last block (block in which unit got tripped) only up to the next 10-time blocks during hot start-up and up to 16-time blocks during warm start-up. UPCL has submitted that the said time allocation presently allowed by SLDC is only sufficient to synchronize the unit and it requires another 10-time blocks to ramp up the generation to full load. During the time

blocks of hot start-up and warm start-up, SLDC has considered the actual generation as declared capacity for that block instead of declared capacity given by UPCL.

14. UPCL has further submitted that SLDC has reduced the declared capacity of UPCL's generating station for certain blocks on certain days during the period from April 2011 to February 2012, considering that actual generation from the units was less than the declared capacity. The reductions were only for a short period and difference between the actual generation and scheduled energy (declared capacity to be considered deemed schedule as SLDC has not given Scheduled energy to the Petitioner) has to be accounted in UI mechanism but since SLDC had not implemented the UI mechanism for UPCL, therefore UPCL ought not to be penalized for the same and should be allowed the declared capacity as claimed.

15. UPCL has submitted that since the tripping of the transmission lines and consequential tripping of the generating units were outside its control and the time blocks allowed by SLDC for resynchronization were not sufficient to ramp up the generation to full load, the Commission may consider the declared capacity given by the UPCL for each time block on the days when there was tripping, in order to compute capacity charges. UPCL has prayed that Karnataka ESCOMs be directed to make payments on the basis of invoices raised by UPCL. For computation of capacity charge, declared capacity for the period January 2013 to March 2013 be considered as 1110 MW (full capacity) i.e. maximum peak hour ex-power generating station MW/day.

Financial impact of the dispute pertaining to capacity charges

16. UPCL had submitted in the original Petition that its claim concerning computation of capacity charges resulted in a financial impact of Rs.124.95 crore. However, consequent to the revision of tariff vide order dated 27.6.2019 in Petition No.160/GT/2012, the Petitioner was granted liberty to amend its claims. The Petitioner vide its affidavit dated 14.8.2019 has submitted the revised claims. The break-up of disputed claim of capacity charge as submitted by the Petitioner is as under:

Issue	April 2011 to March 2012	April 2012 to March 2013	Total
Non-availability of 400 kV line before COD of Unit II	22.30	12.07	34.37
Non-availability of 400 kV line after COD of Unit II		21.23	21.23
Shortage of Coal		49.36	49.36
Tripping of Transmission line	**1.45**		**1.45**
Sub-Total	**23.75**	**82.65**	**106.40**
Due to difference in formulae of capacity charge*	25.57		25.57
Sub-Total	**25.57**	**0.00**	**25.57**
Total	**49.32**	**82.65**	**131.98**

**Availability without considering the above issues for FY 2011-12 was less than 70%, therefore, Capacity charge for the year was restricted as per proviso to Clause 21(2)(a) of the Tariff Regulations, 2009. However, revised availability after considering above issues is more than 70% and the capacity charge has to be computed as per Clause 21(2)(a) of the Tariff Regulations, 2009. Therefore, the impact in capacity charge due to difference in formulae has been claimed.*

Dispute pertaining to energy charges

17. UPCL has submitted that the dispute between UPCL and ESCOMs/PCKL regarding computation of energy charges is primarily qua disallowance of actual landed cost of coal incurred by UPCL towards spot procurement of coal. The factual details are capitulated as under:

(a) The total annual coal requirement for operating UPCL's generating station (2 x 600 MW) at an average PLF of 85% is 3.6 MTPA. In order to satisfy the said

requirement, UPCL entered into long- term fuel supply agreements for the supply of coal with: (i) Adaro for 1.2 MTPA, (ii) with Banpu for 0.5 MTPA and (iii) with Glencore for 0.5 MTPA. The total cumulative coal quantity available under the aforementioned agreements entered into by UPCL was 2.2 MTPA.

(b) In accordance with the directions issued by PCKL dated 26.9.2013, UPCL terminated the long-term coal contracts with Adaro for 1.2 MTPA and Banpu for 0.5 MTPA. After termination, UPCL's only subsisting long-term fuel supply agreement to meet its coal requirement was with Glencore for 0.5 MTPA.

(c) In order to remedy the resultant shortage in supply of coal, UPCL invited bids for the long-term procurement of coal on eight occasions between 2009 and 2014. The bidding process initiated by UPCL failed to culminate in the execution of long-term coal contracts.

(d) UPCL sought to meet the resultant shortage in coal for the operation of its generating station through spot procurement and sought PCKL's approval for the same. PCKL granted its approval to the procurement of coal by way of spot shipments at market prices, on the condition that (i): the procurement was to be in line with applicable HBA indices for the month of purchase and (ii) the ocean freight would not exceed $10 per tonne.

(e) The prevalent market conditions were not conducive for the procurement of coal at HBA linked prices with restricted freight charges. The sellers' refusal to follow HBA indices for the spot procurement of coal with restricted freight made it impossible for UPCL to procure coal through spot shipments in line with the

abovementioned conditions imposed by PCKL. As a result of the market conditions, UPCL raised the issue concerning the impossibility of obtaining spot procurement of coal in line with the conditions imposed by PCKL, at the meeting held on 12.8.2016 with the Additional Chief Secretary, Energy Department, Government of Karnataka (GoK).

(f) Thereafter, the issue of UPCL's spot procurement of coal was taken up in PCKL's 46th Board of Directors' meeting wherein it was resolved that spot procurement of coal by UPCL up till March 2016 would be allowed on the condition of self-certification, certifying that CIF prices for spot coal procurement till March 2016 were not more than weighted average price of coal as per terms of long term coal supply agreements with M/s. Banpu, M/s. PT Adaro & M/s. Glencore, which were in force till March 2016.

(g) In pursuance of the decision taken in PCKL's 46th Board of Directors' Meeting, UPCL submitted the requisite certificate to PCKL vide letter dated 9.10.2017, certifying that the CIF prices for spot coal procurement till March 2016 were not more than weighted average price of coal as per terms of long-term coal supply agreements with M/s. Banpu, M/s. PT Adaro & M/s. Glencore. Karnataka ESCOMs benefitted from savings amounting to Rs. 72.06 crores in the period from November 2010 to March 2016 on account of UPCL's spot procurement of coal as opposed to procurement of coal by way of long-term contracts.

(h) In the absence of the requisite long-term coal supply / fuel supply agreements and the consequent shortage in coal for the operation of UPCL's generating station prompted PCKL to allow the spot procurement of coal. UPCL relied on this

assurance to procure the requisite coal. However, in contravention of the assurance, PCKL vide letter dated 18.1.2019 informed UPCL that the decision taken in PCKL's 46th Board of Directors' meeting allowing the spot procurement of coal would also continue to be applicable from FY 2016-17 onwards with two conditions such as:(i) each coal shipment would be treated separately for the purpose of CIF cost comparison instead of the weighted average CIF cost of all shipments; (ii) the cost of Dead Freight would not be considered for the computation of comparable pricing of coal between spot procurement and long-term contracts.

(i) UPCL vide letter dated 6.2.2019 informed PCKL that any disallowance in landed cost of coal would lead to a reduction in Return of Equity to the generator which would be contrary to the spirit of the Tariff Regulations. However, PCKL vide its letter dated 30.4.2019 refused to consider the concerns raised by UPCL.

18. In the light of the above factual matrix, UPCL has submitted that PCKL has arbitrarily and erroneously disallowed the actual coal cost incurred by UPCL on the spot procurement of coal for continued operation of its generating station and uninterrupted supply of power to the Karnataka ESCOMs. The decision of PCKL as per its 53rd and 55th Board of Directors meeting held on 25.8.2018 and 28.12.2018 to disallow Dead Freight in computation of CIF cost thereunder and to consider CIF cost separately, as opposed to the established method of computing CIF cost collectively may result in the arbitrary disallowance of Rs. 336 Crores already incurred by UPCL. This disallowance is contrary to Regulations 21 and 30 of the Tariff Regulations 2009 and 2014 respectively which mandate the consideration of actual landed cost of coal without any exceptions and/or disallowance as part of energy charge calculation.

19. UPCL has submitted that PCKL's decision to disallow consideration of Dead Freight for the computation of CIF cost and to consider the CIF cost of each coal shipment separately instead of considering the CIF cost of the shipments collectively, has divested UPCL of Rs 336 Crores as a part of energy charges due to it as cost incurred for procurement of coal as per the table given below:

Financial Year	PCKL Methodology (In Rs. Crores)
2011-12	1.03
2012-13	-
2013-14	0.86
2014-15	0.96
2015-16	18.71
2016-17	222.04
2017-18	40.23
2018-19	52.20
Total (in Crores)	336

20. Accordingly, UPCL has prayed for allowance of the cost of coal incurred by UPCL on actual basis.

<u>Reply of Respondent PKCL on behalf of ESCOMs</u>

21. PCKL in its reply has submitted that under Regulation 21 of the Tariff Regulations, 2009, for computation of Plant Availability Factor achieved during the month (PAFM) and Plant Availability Factor achieved during the year (PAFY), the declared capacity as certified by the concerned load dispatch center has to be considered. As the Karnataka State Load Dispatch Centre is the designated load dispatch center under the Grid Code, therefore, the ESCOMs were bound by the quantum of declared capacity provided by Karnataka SLDC in accordance with the Tariff Regulations, 2009 and the PPA. PCKL/the Karnataka ESCOMs could not have proceeded on any basis other than based on such quantum provided by SLDC and accordingly was required to compute capacity charges

as declared by the Karnataka SLDC to them consistent with the Tariff Regulations, 2009. PCKL has further submitted that any dispute pertaining to the declared capacity of UPCL ought to have been dealt by UPCL with SLDC at the relevant time and cannot be raised at this belated stage after number of years and such claim suffers from latches and is barred by time. UPCL has been paid capacity charges based on the figures of declared capacity figures as provided by SLDC since the COD of Unit I of the project. PCKL has submitted that UPCL's earlier petitions being Petition No. 160/GT/2012 (for determination of tariff for the period 2009-14) and Petition No. 07/GT/2016 (for truing up of tariff for the period of 2009-14) were filed on 14.12.2011 and 11.01.2016 respectively. The dispute pertaining to capacity charges payable for the period March 2011 to March 2013 ought to have been raised in these petitions. Since UPCL did not raise any such issue in these proceedings, UPCL cannot agitate the claim at this stage in the present proceedings. PCKL has submitted that UPCL has failed to raise its entire claim pertaining to the issue of alleged delay in setting up the 400 kV D/C Transmission Line in its earlier petitions. Therefore, the issue related to declared capacity is barred under Order 2, Rule 2 as well as Section 11 Explanation IV of Code of Civil Procedure, 1908 and these issues cannot be agitated now.

Non-availability of 400 kV transmission line before COD of Unit II i.e. from 10.3.2011 to 18.8.2012

22. As regards the deemed capacity charges between COD of Unit I (i.e. 11.11.2010) to COD of Unit II (i.e. 18.8.2012), PCKL has submitted that UPCL has declared excess capacity for Unit I even when it had for reasons attributable to UPCL backed down generation from/ shut down operation of Unit I. A conjoint reading of accounts pertaining to (i) capacity declared by UPCL, (ii) declared capacity considered by SLDC and (iii) the

actual generation for the above mentioned period reveals that at no time has UPCL declared a capacity of 556.8 MW, the maximum declared capacity by UPCL being 555 MW. However, on account of failure of UPCL's equipment at Unit I during the period from 10.3.2011 to 18.8.2012, UPCL was given liberty to increase its generation from Unit II prior to its COD. An analysis of the outage details of Unit I during this time reveals that UPCL is claiming declared capacity for Unit I even when there had been equipment failure at Unit I making it incapable of generating the declared capacity at Unit I. Allowing UPCL to recover capacity charges for the entire capacity of Unit I at such a time when there had been equipment failure at UPCL's end would amount to UPCL taking advantage of its own wrong. PCKL has submitted the generation data of Unit I for 14 days i.e. from 15.4.2011 to 21.4.2011 and 5.6.2011 to 11.6.2011 in support of its contention.

23. PCKL has submitted that prior to COD, the power that is generated by a unit is considered as infirm power under Regulation 3(20) of the Tariff Regulations, 2009 and under Regulation 11 of the said Regulations, charges are payable for supply of infirm power at the Unscheduled Interchange (UI) rate. The Commission in its order dated 24.3.2017 in Petition No. 7/GT/2016 has already allowed additional amount of Rs. 127.92 Crores towards infirm power generated by both Unit I and Unit II of UPCL's generating station, and therefore, UPCL has been duly compensated for power generated by Unit II prior to its COD. Further the Commission has concluded in its order dated 20.2.2014 in Petition No. 160/GT/2012 that delay in attaining COD of Unit II was on account of delay in commissioning of the 400 kV D/C transmission line by the Respondents and has already compensated UPCL for such delay by allowing excess Interest During Construction, Incidental Expenses During Construction and Financing Charges.

Therefore, UPCL has already been compensated for the loss it suffered on account of the delay in CoD of the transmission line. It cannot now claim any additional benefit as that would amount to being compensated twice over for the delay.

Non-availability of 400 kV transmission line after COD of Unit II - Period between 19.8.2012 and 6.9.2012

24. In response to claim of UPCL for an amount of Rs. 20.11 crore on account of non-availability of 400 kV transmission line after CoD of Unit II, PCKL has submitted that UPCL ought to have raised this issue in the previous petitions when it had raised claims on the basis of delay in setting up of 400 kV transmission line. Further, declared capacity was considered as certified by SLDC as per the regulations and hence, UPCL's claim cannot be allowed.

Shortfall in generation between 16.01.2013 and 30.03.2013 due to non-availability of coal, consequent to payment default by ESCOMs.

25. In response to UPCL's claim for an amount of Rs. 47.46 crore on account of coal shortage leading to shut down of plant / shortfall in generation due to Karnataka ESCOMs' failure to pay dues in time and SLDC's failure to provide it with a pragmatic schedule as per Regulation 21(4) of the Tariff Regulations,2009, PCKL has submitted that the Karnataka ESCOMs were not in breach of any obligation and that SLDC was under no obligation to consider declared capacity as claimed by UPCL. PCKL has submitted that pursuant to UPCL's request, a provisional tariff of Rs. 3.127 per unit was fixed and conveyed by PCKL vide letter dated 10.11.2010. Unit I of UPCL's generating station attained COD on 11.11.2010 and the ESCOMs had been duly making payments at the rate of Rs. 3.127 per unit. It was incumbent upon UPCL to file a tariff petition before the

Commission and to obtain a provisional tariff under Regulation 5(4) of the Tariff Regulations, 2009. However, UPCL chose to file its tariff petition being Petition No. 160/GT/2012 only on 14.12.2011, despite repeated requests by PCKL to do so earlier vide PCKL's letters dated 10.11.2010, 21.4.2011, 27.7.2011 and 17.9.2011. Though UPCL raised invoices as per the tariff claimed in its tariff petition from 14.12.2011 onwards, it did not create any corresponding obligation on the ESCOMs to make payments as per such invoices, and the ESCOMs continued to make payments at the rate of Rs. 3.127 per unit. The provisional tariff for Unit I of UPCL's generating station was first determined by the Commission in its order dated 27.8.2012 in Petition No. 160/GT/2012. However, the order dated 27.8.2012 was set aside by APTEL on 8.10.2012 and the matter was remanded back to the Commission. On 24.12.2012, the Commission passed an order in Petition No. 160/GT/2012 determining the provisional tariff for Unit I of UPCL's generating station which was challenged by PCKL in Appeal No. 18 of 2013 before the APTEL. Vide order dated 8.2.2013, APTEL modified the order of the Commission and directed ESCOMs to pay the tariff as determined by the Commission in respect of Unit I and Unit II with effect from 1.9.2012 till determination of final tariff in four equal instalments and the first instalment would be paid on or before 28.2.2013. Therefore, there was no obligation on the ESCOMs to make any payments above and beyond the directions contained in the said order dated 8.2.2013 of the APTEL. Moreover, compliance of the aforementioned order dated 8.2.2013 has been recorded by the APTEL in its order dated 3.6.2014 in Appeal Nos.122 of 2014 and 108 of 2014. PCKL has submitted that it is not open for UPCL to claim that there were any pending obligations of the ESCOMs as a result of which it was unable to procure fuel, and consequently declared

capacity cannot be considered assuming that the plant was fully available. PCKL has further submitted that the tariff at the rate of Rs. 3.127 per unit had been issued considering a coal stock for a period of sixty days and therefore, it was the responsibility of UPCL to maintain the required stock of coal.

26. PCKL has submitted that as per Regulation 21(4) of the Tariff Regulations, 2009, "the concerned Load Despatch Centre may then specify a pragmatic day-ahead schedule for the generating station to optimally utilize its MW and energy capability, in consultation with the beneficiaries." Thus, this regulation vests SLDC with the authority of scheduling higher MW from a thermal generating station during peak-load hours. In the instant case, SLDC refused to schedule power in such a manner on account of the fact that the State of Karnataka has hydro generating stations which would be used to meet the peak-load requirements. After the SLDC exercises its option not to schedule power in such a manner, it is not open to UPCL to consider declared capacity as per its proposed maximum peak-hour schedule. PCKL has submitted that there was no binding obligation on SLDC to consider declared capacity as per UPCL's proposed maximum peak-hour schedule. PCKL has further submitted that even with the application of Regulation 21(4), on the days when there was zero generation from UPCL's generating station, no capacity charges can be allowed.

Tripping of generating station due to tripping of transmission lines on specific dates between 10.5.2011 to 9.8.2012

27. PCKL has submitted that each time that the transmission line tripped, for the time duration where the line remains unserviceable, the last declared capacity by UPCL immediately before the tripping of the line is considered. Further, UPCL has been

provided with sufficient time to ramp up its production in line with the parameters stipulated by the original equipment manufacturer of the boiler turbine generator which are: (a) Hot start: 150 mins; (b) Warm start: 275 mins; and (c) Cold start: 480 mins. PCKL has submitted that any claim for excess time to ramp up capacity is, therefore, inadmissible.

Dispute pertaining to energy charges

28. UPCL has raised a dispute regarding the computation of energy charges on account of disallowance of actual coal cost incurred by UPCL towards spot procurement. In response, PCKL has submitted that the annual coal requirement of UPCL's generating station is 3.65 MTPA. Due to non-finalization of tender for procurement of coal on long term basis, spot procurement of coal has been resorted to by UPCL. UPCL claims that the cost of spot procurement of coal should be allowed as long as the weighted average of CIF cost of coal procured on spot basis is lower than the weighted average price of coal under the long-term coal supply agreements of UPCL which were in force till March 2016. PCKL has submitted that this claim of UPCL is unsustainable as it is contrary to the understanding between the parties which has already been acted upon. As per clause 4.7 of the PPA, the Seller shall use all reasonable efforts at all times during the term to acquire the Primary and Secondary Fuel on commercially competitive terms consistent with market conditions and the terms and conditions for procurement of coal shall be mutually discussed and finalized by the Principal Buyers and Seller. PCKL has submitted that initially, UPCL would seek approval of PCKL for procurement of coal under spot, which would be approved by PCKL subject to a ceiling on the price payable for the shipment. Barring some instances, initially the ceiling for payment for shipments of coal

purchased on spot procurement was FOB price linked to HBA Index of Indonesia plus freight charges which would not exceed $ 10 per MT. In some cases, the price ceiling for the shipment would also be prescribed as the CIF price being paid under the long-term fuel supply agreements entered into by UPCL. Further, the FSAs of UPCL with M/s Adaro, M/s P.T. Indeminco and M/s Glencore were linked to HBA index rates of Indonesia. Since UPCL had been facing difficulties in procurement of coal on spot basis at a price linked to HBA Index of Indonesia, it requested for a reconsideration of the decision regarding price of spot coal procurement. In the meetings of the Commercial Committee dated 29.12.2015 and 11.02.2016, UPCL requested for approval for spot procurement at CIF prices subject to the condition that CIF price shall not be more than price applicable as per long term contracts. The Board of PCKL in its 46th meeting dated 15.2.2017 decided that "the cost of spot procurement of coal till March 2016 shall be allowed on a self-certification by UPCL subject to the condition that CIF prices so considered for payment shall not be more than the weighted average price of coal as per the terms of the long-term coal supply agreements which were in force till March 2016." PCKL has submitted that the said resolution clearly contemplated comparison of 'CIF prices' of shipments procured on spot basis (as opposed to weighted average price of all shipments procured on spot basis) with the weighted average price of coal as per the terms of the long-term coal supply agreements. In its 53rd meeting held on 25.5.2018, the Board of PCKL decided to continue this methodology for calculation of cost for spot procurement of coal even beyond March 2016. However, UPCL in its letter dated 21.6.2018 requested that CIF prices of spot shipments for the relevant period i.e. FY 2016-17 till FY 2018-19 (30th June 2018) should be compared against the equivalent CIF price as per the methodology

set out in the New Long-term Contract being entered into with supplier for 3 MMTPA and such comparison needs to be done on cumulative basis for period November 2010 to FY 2018-19 (30th June 2018), for all spot shipments procured by UPCL considered together. PCKL in its 55th Board meeting held on 28.12.2018 decided that "the comparison of CIF cost on spot purchases with long-term contract should be made on ship-to-ship basis to arrive the landed cost of coal." PCKL has submitted that the price of coal for various shipments received during the month would have to be allowed at the time the shipment arrives and it would not be possible to allow the cost for coal procurement on the basis suggested by UPCL for future shipments of coal being purchased on spot basis. PCKL has further submitted that the claim of UPCL to compare the spot procurement price with the 'equivalent CIF price as per the methodology set out in the New Long-term Contract being entered into with supplier' is also untenable since the said agreement has not yet been entered into and there can be no comparison with a hypothetical price.

29. PCKL has submitted that since the year 2015, UPCL has procured fuel from its related parties on spot basis and upon comparison of the price at which such coal has been procured with the well known indices such as the HBA index, it is found that spot purchase coal rate is higher by $ 4 to $ 6.8 per MT. PCKL has further submitted that UPCL has in many months given a rebate in its energy charges based on its fuel cost to enable it to schedule its power, which indicates that the fuel cost being claimed by it is exaggerated. For instance, in January 2019, the energy charges as per the invoice were Rs. 4.31 per unit, but a concession of Rs. 0.51 was given. Similarly, in February 2019, the energy charges as per the invoice were Rs. 4.228 per unit, but a concession of Rs. 0.428 was given.

30. As regards UPCL's prayer for inclusion of dead freight charges as part of the cost of fuel being procured on spot basis, PCKL has submitted that in relation to coal supplied by M/s Glencore, under the only subsisting long term fuel supply agreement from 2010 to 2018 (March 18), dead freight charges have been claimed for only 27 shipments out of 44 shipments received till March 2018. Further, in the other FSAs that were in existence till 2014 i.e. M/s. P T Adaro, M/s. P T Indominco Mandiri and P T Trubaindo Coal Mining, Indonesia, there was no such condition for payment of dead freight charges. PCKL has further submitted that if the coal is procured under a long-term contract, ships of appropriate capacity are made available for carrying a pre-decided load of coal, and therefore, there are only few instances when dead freight charges are claimed. However, UPCL has been procuring coal on spot basis from its related entities and has been consistently failing to procure ships of the appropriate capacity. Such a cost ought not to be passed on to the Karnataka ESCOMs/consumers, and therefore, cannot be paid to UPCL. PCKL has also submitted that any amount claimed in this regard which pertains to a period more than three years prior to the date of filing the instant petition is time barred.

Reply of KPTCL

31. KPTCL has submitted that the capacity for Unit I declared by UPCL was far in excess of the actual power generated by it. Unit I of UPCL was not functioning properly and had to be shut down by UPCL due to turbine failure and other technical problems attributable solely to UPCL, as evident from the data provided in Annexure R7/1. In this background, KPTCL, on the advice of CPRI, wrote a letter dated 4.3.2011 to UPCL permitting it to synchronize Unit II with the Grid in view of lack of power generation from Unit I. No

instructions whatsoever were given by KPTCL to back down generation from Unit I, but rather there was a unilateral reduction in power generation by UPCL owing to the frequent outages suffered by Unit I on account of equipment failure, such as boiler tube leakage, turbine failure, condenser tube leakage etc. KPTCL has placed on record a chart Annexure R7/1' showing the outage details of Unit I from 11.11.2010 to 31.3.2012. KPTCL has further submitted that even prior to synchronization of Unit II, Unit I failed to generate power at the capacity declared by UPCL and on several occasions, the combined generation from both Units would also not meet the declared capacity. Further, when Unit I was unable to generate power due to equipment failure, UPCL tried to pass off the capacity of Unit II prior to COD as the declared capacity of Unit I in contravention of Regulation 21(3) of the Tariff Regulations, 2009. KPTCL has submitted that it has correctly considered the declared capacity of UPCL on the basis of actual power generation as UPCL was not at all capable of meeting the capacity declared by it due to technical defaults and outages.

32. KPTCL has further submitted that contrary to the claim of UPCL, Regulation 21(4) of the 2009 Tariff Regulations does not place any obligation on the SLDC to specify a pragmatic day-ahead schedule. On the contrary, the same is left to the option of the SLDC, depending on the facts and circumstances and prevailing grid situation.

Rejoinder by UPCL to the Reply of PCKL and KPTCL

33. UPCL has filed its rejoinder to the replies of PCKL and KPTCL in which it has refuted the contentions of PCKL and KPTCL and reiterated its submission made in the main petition. Briefly, the submissions of UPCL in its rejoinder are capitulated as under:

(a) UPCL's claims are neither barred by limitation nor by the provisions of Order II, Rule 2 of the Code of Civil Procedure, 1908.

(b) The responsibility of providing the transmission line was that of the Karnataka ESCOMs as per the PPA which Karnataka ESCOMs failed to effectively discharge. The resultant reduction in declared capacity of Unit I between 10.3.2011 and 18.8.2012 was on account of the failure of Karnataka ESCOMs to effectively discharge their obligations under the PPA and therefore, UPCL's capacity charges ought to be computed in respect of the capability of Unit I to generate power between 10.3.2011 and 18.8.2012.

(c) The constraints on evacuation continued even beyond 18.8.2012 (i.e. after COD of Unit II was achieved) owing to delay in completion of the 400 kV transmission line by the Karnataka ESCOMs. Udupi Power could not evacuate power to its full potential for the period between 19.8.2012 and 6.9.2012 in accordance with the express directions issued by KPTCL to reduce the capacity. Therefore, the capacity charges for the period between 19.8.2012 and 6.9.2012 must necessarily be calculated as per declared capacity.

(d) Though the provisional tariff for both Units were determined on 1.9.2012, UPCL was forced to reduce/shut down the operation of Unit I and Unit II between 16.1.2013 and 30.3.2013 on account of coal shortage caused by lack of funds due to Karnataka ESCOMs' payment default. PCKL has mis-stated that the provisional tariff determined by the. Commission in Petition No. 160/GT/2012 was set aside by APTEL but the same was simply remanded back for re-determination.

(e) Regulation 21(4) of the Tariff Regulations, 2009 casts responsibility on PCKL/Karnataka ESCOMs/SLDC to give a pragmatic schedule once they receive notice regarding coal shortfall from the generator. PCKL's contention that as per Regulation 21(4), the SLDC is under no obligations to consider declared capacity as claimed by UPCL and that SLDC has authority to decide whether to schedule higher capacity from a thermal generating station, is incorrect. Assuming without admitting that there was no peak requirement from UPCL, PCKL through SLDC should have maintained a uniform load on Round the Clock basis, which PCKL and SLDC have clearly failed to do, as admitted by PCKL in its Reply.

(f) During resynchronizing of units after tripping, SLDC allowed declared capacity of last block (block in which unit got tripped) only up to the next 10-time blocks during hot start-up and up to 16-time blocks during warm start-up. The said time allocation presently allowed by SLDC is only sufficient to synchronize the unit and it requires another 10 time blocks to ramp up the generation to full load. During the time blocks of hot start-up and warm start-up, SLDC has considered the actual generation as declared capacity for that block instead of declared capacity given by Udupi Power.

(g) PCKL in its 46th Board of Directors' meeting held on February 2017 resolved therein that spot procurement of coal by Udupi Power up till March 2016 would be allowed on the condition of self-certification by Udupi Power, certifying that CIF prices for spot coal procurements till March 2016 were not more than weighted average price of coal as per terms of long term coal supply contracts with M/s. Banpu, M/s. PT Adaro & M/s. Glencore, which were in force till March 2016. The

wording used in the minutes of the 46th Board meeting states that "Spot procurement from November 2010 till March 2016 has to be compared with weighted average CIF price of Long-term contracts". This clearly indicates that the spot shipments need to be done on cumulative basis. PCKL vide letter dated 18.1.2019 informed UPCL that the decision taken in PCKL's 46th Board of Directors' meeting allowing the spot procurement of coal would only continue to be applicable from FY 2016-17 onwards with substantial variation whereunder dead freight has been disallowed in computation of CIF cost and each coal shipment would be treated separately for the purpose of CIF cost comparison. The decision to disallow dead freight in computation of CIF cost thereunder and to consider CIF cost separately, as opposed to the established method of computing CIF cost collectively, may result in the arbitrary disallowance of Rs. 336 Crores already incurred by UPCL as per its computations which is contrary to Regulation 21 and 30 of the Tariff Regulations 2009 and 2014 respectively which mandate consideration of actual landed cost of coal without any exceptions and/or disallowance as part of energy charge calculation.

Arguments advanced by the Counsels for the parties

34. Learned Counsel for UPCL made the following submissions during the final hearing:

(a) The present Petition is confined to (i) disputes pertaining to difference in computation of declared capacity and disallowance of capacity charges of Rs 131.98 crore for the period from 10.3.2011 to 31.3.2013 and (ii) dispute regarding the computation of energy charges due to disallowance of actual landed coal cost incurred by the Petitioner towards spot procurement of coal

for Rs 336 crore for the period from November 2010 to March 2019. The claims of the Petitioner relating to non-payment of dues of Rs 884.50 crore towards differential tariff for the period from November 2010 to January, 2013 and the non-payment of reimbursement charges by the Respondents, have been mutually settled between the parties.

(b) The difference in computation of declared capacity had arisen due to: (i) non-availability of 400 kV transmission line for evacuation of power from the Petitioner's project, which was the responsibility of the Respondents; (ii) shortfall in generation faced by Petitioner due to non-availability of coal consequent to payment default by Respondent ESCOMs; (iii) Failure of Respondents (SLDC/KPTCL) to provide pragmatic day-ahead schedule as per Regulation 21(4) of the Tariff Regulations, 2009; (iv) Tripping of transmission lines; and (v) Difference in formula of capacity charges on account of above.

(c) The Petitioner was constrained to terminate the long-term contracts with Adaro and Banpu for supply of coal and was compelled to resort to spot procurement of coal in order to meet its obligations under the PPA. However, due to delay in approval process of PCKL, the 9th bidding process started by the Petitioner in 2015, was extended beyond 3 years without any conclusion.

(d) The Respondent PCKL in its 46th Board of Directors' meeting on 15.12.2017 resolved that spot procurement of coal by the Petitioner till March 2016 would be allowed based on self-certification by the Petitioner.

Subsequently, vide letter dated 18.1.2019, the Respondent informed the Petitioner that the decision taken on 15.12.2017 allowing spot procurement of coal would continue to be applicable from 2016-17 onwards along with modifications. The decision to vary the conditions allowing spot procurement of coal by the Petitioner creates a situation where the gains of spot procurement are retained by the Respondent ESCOMs, whereas the losses are passed on solely to Petitioner. Reliance was placed on the judgment of APTEL in GUVNL v GERC [(2014) SCC OnLine APTEL 168] and M/s Hinduja National Power Corporation Ltd v APERC & ors [(2020) SCC OnLine APTEL 3].

(e) The Petitioner is entitled to recover actual landed cost of coal procured without any exceptions in terms of Regulation 21 of the Tariff Regulations, 2009 and Regulation 30 of the Tariff Regulations, 2014. Any disallowance of the same would result in reduction of ROE, which is contrary to the letter and spirit of the Tariff Regulations. In Nabha Power Ltd v PSPCL 92018) 11 SCC 508, the Hon`ble Supreme Court while interpreting the energy charge formula in its PPA held that the actual cost of coal will be weighted average cost of purchasing coal, transporting it to plant and unloading of coal at site.

(f) The Petitioner's claims are not barred by Order II Rule 2 of the Civil Procedure Code (CPC). Similar contention made by the Respondent PCKL in Appeal Nos 10/2020 & batch matters concerning the same PPA, was rejected by APTEL vide its judgment dated 2.11.2020. The Civil Appeals

filed by the Respondents (CA No. 838/2021) was dismissed by the Supreme Court on 8.2.2022.

(g) Order II Rule 2 does not bar the Petitioners' claim for deemed capacity charges since such claim is based on a different cause of action than those which formed the basis of earlier proceedings. Reliance was placed on SC judgments in Gurbux Singh v Bhooralal (AIR 1964 SC 1810) and Ratnavati v Kavita Ganashamdas [(2015) 5 SCC 223].

(h) The Petitioner has all along regularly raised invoices on time since 3.1.2011 for power supplied to Respondent ESCOMs as per applicable orders. Section 3 of the Limitation Act, 1963 which relates to 'Bar of Limitation' is subject to Section 22 of the Limitation Act, 1963, which specifically provides breach of a continuing nature as an 'exception' to the rule of limitation. Every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings (SC judgment in Udai Shankar Awasthi v State of UP [(2013) 2 SCC 435], State of MP & ors v Yogendra Srivastava (2010) 12 SCC 538, etc., were referred to). The Respondent ESCOMs' default in paying the deemed capacity charges partakes the character of a continuing breach as contemplated under Section 22 of the Limitation Act, 1963. Even otherwise, the Petitioner's claim for recovery of deemed capacity charges is not barred by limitation, since the last right to sue the Respondents accrued much after 12.8.2016.

35. Learned Senior Counsel for PCKL made the following brief submissions in response to contentions of UPCL:

(a) The claims of the Petitioner are time barred and the principles of limitation are applicable in the facts of the present case. Any claim made by the Petitioner for the period beyond 3 years prior to the filing of this petition is not sustainable and relied upon the Supreme Court judgment in AP Power Co-ordination Committee v Lanco Kondapalli Power Ltd [(2016) 3 SCC 468] and this Commission's order dated 25.1.2021 in Petition No. 186/ MP/2018 (KSKMPCL v SPDCL).

(b) The claims in the present case relate to the period prior to 31.3.2014. The claims relating to the period post 31.3.2014 are independent and has no nexus to the claims pertaining to the previous period. The claims of the Petitioner are distinct and complete in themselves and give rise to a separate cause of action for which the Petitioner ought to have raised the claim within the prescribed period. It is not open for the Petitioner to claim that the same constitutes a continuing cause of action (judgment of SC in State of Gujarat v Kothari & associates [(2016) 14 SCC 761] was referred to). Mere writing letters, correspondence/ reports do not automatically extend the limitation as laid down by the Hon`ble Supreme Court in CLP (India) Ltd v GUVNL [(2020) 5 SCC 185];

(c) The Respondent PCKL/ESCOMs have considered the declared capacity of the generating station of the Petitioner, in terms of the PPA and the Tariff Regulations, 2009 and as per the energy accounts duly certified by SLDC.

As the dispute relating to capacity charges pertains to the period from April, 2011 to March, 2013, the same is time barred. As there is no dispute from April, 2013 onwards, there is no continuing cause of action.

(d) The claim of the Petitioner that there has been admission of liability by the Respondent PCKL/ESCOMs based on reconciliation in 2018 is wrong, as the same related only to the payments made by PCKL/ESCOMs and there has been no admission of the amounts payable by the Respondents during such reconciliation.

(e) Disputes relating to capacity charges was never raised by the Petitioner in Petition No.160/GT/2012 or in truing up Petition No. 7/GT/2016, despite the fact that the issue of delay in setting up the 400 kV D/C transmission line was specifically raised and reliefs were claimed.

(f) The Petitioner has failed to establish that it was capable of generating its declared capacity. At no point during the period, has the Petitioner declared a capacity of 556.8 MW, and the maximum declared capacity was 555 MW. The Petitioner has not provided any details regarding the days on which and the period for which Unit-I had to reduce generation to accommodate synchronisation of Unit-II nor has it provided any documents to show that any backing down instructions were received from SLDC for Unit-I. The onus to prove that the Petitioner had to backdown generation from Unit-I to synchronise Unit-II and that it was capable to deliver entire declared capacity from Unit-I lies squarely on the Petitioner, which it failed to discharge.

(g) The Petitioner has already been compensated for the claimed loss suffered on account of delay in setting up of the transmission line in terms of IDC, IEDC and Financing Charges in terms of order dated 20.2.2014**.** It cannot claim any additional benefit as it amounts to being compensated twice for the alleged delay. Moreover, the amounts towards power generated from Unit-II after synchronisation, but prior to COD are payable as per Regulation 11 and no capacity charges are payable for the same.

(h) After claiming IDC upto the actual date of commissioning, the Petitioner cannot claim deemed generation payment, as it cannot have the benefit of both deemed generation and IDC upto actual COD.

(i) The request of the Petitioner for release of adjustable advance payment shows that there was no subsisting payment obligation on the part of Respondent PCKL/ESCOMs at that time. The dispute on this issue pertains to the period from February 2013 to March 2013 for which, the Petitioner should have made provisions for coal stock in December 2012 itself. The obligation on the Petitioner to procure fuel and generate power to its full capacity was not affected in any manner by alleged default of the Respondent PCKL/ESCOMs.

(j) The capacity declaration made by the Petitioner was flawed and SLDC was under no obligation to consider the declared capacity as claimed by the Petitioner. After SLDC exercises its option not to schedule power in such a manner, it is not open to the Petitioner to compel SLDC to consider declared capacity as per its proposed maximum peak hour schedule.

(k) The Petitioner has failed to bring to light any regulatory or contractual provisions which entitles it to additional ten-time blocks and hence, its claim deserves outright rejection. If the Petitioner is facing any loss on account of insufficiency/inaccuracy of OEM specified parameters, it should raise the issue with its EPC contractor.

(l) The claim of the Petitioner to allow the cost of spot procurement as loan as the cost of all shipments of coal procured on spot basis is lower than the cost arrived at for all such shipments as per long-term coal supply agreements, compared cumulatively, is unsustainable as it is contrary to the agreement/ understanding between the parties (i.e. approval of price for coal shipment procured on spot basis, has to be done on shipment-to-shipment basis). All along such approval of price of spot shipments were done on a shipment-to-shipment basis.

(m) The Board of Respondent, PCKL in its 46th meeting dated 15.2.2017 decided that the cost incurred for spot procurement of a shipment of coal would be allowed so far as it does not exceed the price of such coal as per the terms of the long-term coal supply agreements which were in force. The afore-mentioned resolution clearly contemplated comparison of 'CIF prices' of individual shipments procured on spot basis (as opposed to average price of all shipments procured on spot basis) with the price of such coal shipment as per the terms of the long-term coal supply agreements.

(n) Based on the Petitioners repeated requests, the Respondent PCKL/ ESCOMs agreed for a comparison of cost of coal procured under spot

shipments to the CIF price as per terms of the long-term fuel supply agreements on a shipment-to-shipment basis. The comparison has to be made individually for each shipment of coal received on spot basis since each shipment has different characteristics in terms of GCV, moisture content, ash content, Sulphur content etc. Further, comparison on individual shipment basis is required to determine the landed cost of fuel at the time the shipment arrives, which is in turn used to determine the energy charge.

(o) The Petitioner was procuring coal based on the understanding as recorded in the 46th board resolution, which was as per the agreement between the parties. In its 53rd meeting held on 25.5.2018, the Board of PCKL merely decided to continue the methodology adopted in the 46th board meeting for allowance of cost for spot procurement of coal even beyond March 2016.

(p) The cost of spot shipments per MT claimed by the Petitioner is grossly exaggerated as compared to the cost of the same shipments arrived at as per the Glencore FSA i.e. the FSA in force at the particular time. The per MT cost is in many cases is higher by almost $ 30-35 per MT. The difference for the cost of the entire shipment can be as high as Rs. 18.11 crores and up to five shipments can come in a month. Such a trend is seen especially for the period 2016-19 for which the bulk of Petitioner's claim on this account has been made. The Respondent PCKL has allowed coal prices only as per the benchmark agreed between the parties, and there is no separate need to dispute the rates claimed by the Petitioner. The Petitioner has not shown

the basis on which it has computed the cost of coal as per the terms of the long-term FSAs with respect to each spot shipment.

(q) While the Petitioner procures lower GCV coal which has a lesser demand and at lower price, it enjoys the benefit of price adjustment as per the terms of the long-term FSA which provide for high GCV coal, which has a high demand and high price. Therefore, considering the grade of coal actually being procured by the Petitioner on spot basis, the Respondent PCKL/ Karnataka ESCOMs have already provided a beneficial benchmark to the Petitioner, no further benefit can be allowed.

(r) The Petitioner had never raised the issue of considering dead freight for the purposes of calculation either in the meeting held on 12.8.2016 or in its letters communicated to Respondent PCKL. The Petitioner cannot claim a hypothetical dead freight charge to arrive at an inflated CIF price as per the Glencore FSA for the purpose of benchmarking its spot shipments.

(s) The expenses claimed by the Petitioner viz. licence fee, dredging fee, annual maintenance charges, land licence and maintenance fee, 50% of railway Marshalling yard charges, LC establishment charges, Insurance, port dues, pilotage charges, water charges, sampling analysis do not relate to handling of coal and bringing the coal upto the plant and ought to be disallowed. Also, demurrage charges are disallowed in Form 15 of the Tariff Regulations for computing the weighted average cost of coal. When the Petitioner has a dedicated jetty, there is no question of paying demurrage charges.

36. In response to the above, learned counsel for the Petitioner referred to the judgment dated 2.11.2020 in Appeal Nos. 10/2020 to 13/2020 (PCKL & Anr. v.UPCL & batch) filed by PCKL & Karnataka ESCOMs before the APTEL (against CERC's order dated 8.11.2019 in Petition Nos.324/MP/2018 and 325/MP2018 filed by UPCL) and pointed out that the issue of *res judicata*, limitation, Order II Rule 2 of CPC and Section 34(2) of CPC, concerning the same PPA, as raised by the Respondents in the said appeal was rejected by the Appellate Tribunal. Referring to the various correspondences between UPCL and PCKL from 2015 to 2018, the learned counsel for the Petitioner submitted that the appointment of various committees and the participation of the Karnataka ESCOMs in the process of resolving the issues raised by the Petitioner, indicates that PCKL's contention of limitation, is only an afterthought, to deny the lawful claims of UPCL.

37. The learned counsel for the Respondent KPTCL/SLDC referred to the reply filed by it and submitted the following:

(a) Unit I of the generating station was not functioning properly and had to be shut down by UPCL due to turbine failure and other technical problems attributable solely to UPCL, as evident from the data provided in Annexure R7/1. Even prior to synchronization of Unit II, Unit-I failed to generate power at the capacity declared by UPCL and on several occasions, the combined generation from both units would also not meet the declared capacity.

(b) As per outage details of the generating station, enclosed as Annexure-R7/1, for the period from 11.11.2020 to 31.3.2013, the duration of interruption due to generators' outage is 2855.57 hours.

(c) On the advice of CPRI, the Respondent permitted UPCL to synchronize Unit II with the grid in view of lack of power generation from Unit I. No instructions were given by this Respondent to back down generation from Unit I, but there was a unilateral reduction in power generation by UPCL owing to the frequent outages suffered by Unit I on account of equipment failure, such as boiler tube leakage, turbine failure, condenser tube leakage etc.

(d) Regulation 21(4) of the Tariff Regulations, 2009 does not place any obligation on the SLDC to specify a pragmatic day-ahead schedule. On the contrary, the same is left to the option of SLDC, depending on the facts and circumstances and prevailing grid situation.

38. Learned counsel for the Petitioner responding to the SLDC also relied on Annxeure-R7/1 of the reply and submitted that UPCL's claim for Rs 1.45 crore is only on account of interruption due to KPTCL line outage for 118.72 hours, for the period from 11.11.2010 to 31.3.2013.

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39. UPCL has submitted that PCKL had constituted a Technical Committee under the chairmanship of Additional Director (Projects), PCKL and members from State Load Dispatch Centre ("SLDC"), PCKL and UPCL to look in to disputes regarding computation of availability of UPCL's power plant for the period from November 2010 to March 2013 as the issues were technical in nature. Further, PCKL hired the services of Ex Member, APTEL Mr. V.J. Talwar for resolving disputes relating to declared capacity of Udupi

Power. UPCL has further submitted that Technical Committee report was submitted almost a year prior to filing of the petition but neither any action nor any communication regarding the same has been made to Udupi Power despite UPCL being a member of the Committee.

40. UPCL has further submitted that a Commercial Committee comprising of representatives of the Karnataka ESCOMs, PCKL, UPCL and M/s Ramraj & Co. was constituted for deliberating upon spot procurement of coal, adoption of Tariff Regulations, 2014 from 1.4.2014 onwards, reimbursement of LC Charges, High Seas Sales Charges, dead freight, Railway Bonus and other expenses incurred by Udupi Power in relation to landed cost of coal. UPCL participated in the meetings and also duly provided the clarifications and documentations sought by PCKL and M/s Ramraj & Co. UPCL has submitted that the final Report of M/s Ramraj & Co. has not been communicated to UPCL despite several requests and instead PCKL has merely communicated vide letters dated 27.2.2019 and 30.4.2019 that PCKL's Board of Directors has taken a decision to consider CIF of Spot Procurement at a rate which shall not be more than the weighted average price of coal on long term coal supply agreements.

41. UPPCL filed IA No.79/2019 seeking a direction to PCKL to place on record copies of PCKL Technical Committee Report, Report of Mr V.J. Talwar, Ex-Member APTEL and Report of M/s Ramraj & Co, Chartered Accountant. PCKL submitted that these documents are either in the nature of internal deliberations or privileged documents and have not been relied upon while deciding the claims of UPCL. The Commission after hearing the parties issued the following directions vide order dated 26.3.2020:

"*57. We have already decided that the documents are neither in nature of internal notings/deliberation nor are privileged in terms of Section 129 of the Evidence Act. As regards the admissibility of the documents on the ground of relevancy, the same will be decided on furnishing of such documents by PCKL to this Commission. Accordingly, we direct PCKL to submit these documents, namely, reports of Technical Committee and Commercial Committee of PCKL, final report of M/s Ramraj & Co., Chartered Accountant and report of Shri V.J. Talwar in a sealed envelope within 30 days of the issue of this order. The Commission will decide the admissibility of these reports and whether these reports can be shared with UPCL after perusal of the said reports."*

42. In compliance with the above directions, PCKL has placed the documents in a sealed cover to the Commission. The Commission has gone through the reports which consist of (i) Report by Technical Sub-Committee constituted by PCKL with Members from PCKL, BESCOM, SLDC and UPCL with regard to declared capacity; (II) Opinion of Shri V.J.Talwar, ex-Member, APTEL with regard to declared capacity; and (iii) Verification of Capacity and Energy Charges by M/S Ramraj & Co, Chartered Accountants payable by PCKL to UPCL as per the Commission's order dated 24.3.2017. The Commission observes that since both UPCL and PCKL have placed on record the relevant documents and have extensively argued the case before the Commission, it would be appropriate to take decision on the disputed issues based on the pleadings of the parties instead of relying on the various reports submitted by PCKL which are in the nature of opinion of the concerned expert or committee. Accordingly, the Commission took a conscious decision not to rely on these reports/ opinions and decided to adjudicate the disputes between UPCL and PCKL based on the available documents on record and relevant regulations.

Analysis and Decision

43. The following issues arise for the Commission's consideration in the present Petition:

(a) Issue No.1: Whether UPCL's claims are barred by Order II, Rule 2 of the Code of Civil Procedure, 1908?

(b) Issue No.2: Whether UPCL's claims are time barred and attract the provisions of Limitation Act, 1963?

(c) Issue No.3: Whether UPCL is entitled to deemed availability and deemed capacity charges on account of non-availability of 400 kV transmission line which was KPTCL's responsibility for the period: (i) from 10.3.2011 to 18.8.2012 for Unit-I (ii) from 19.8.2012 to 6.9.2012 for Unit I & II.

(d) Issue No.4: Whether UPCL is entitled to deemed capacity charges on account of payment default by ESCOMs and in terms of Regulations 21 (4) of CERC Tariff Regulations, 2009?

(e) Issue No.5: Whether UPCL is entitled to deemed capacity charges for the stipulated 8-time blocks from synchronization to reaching full load operation?

(f) Issue No.6: Whether UPCL is entitled to recover actual landed cost of coal procured from spot-market? and

(g) Issue No.7: Whether Carrying Cost or interest for delayed payment is admissible to UPCL or not?

44. These issues have been examined and dealt with in detail in the following part of the order.

Issue No. 1: Whether UPCL's claims are barred by Order II, Rule 2 of the Code of Civil Procedure, 1908?

45. PCKL in its Reply and during the oral submissions has contended that UPCL's claims are contrary to Order II Rule 2 of CPC as the issues raised in the present Petition were not raised in the earlier Tariff Petitions filed by UPCL before the Commission. In response, UPCL has contended that Order II Rule 2 of CPC poses no bar on UPCL's claims for deemed capacity charges since such claims are based on separate cause of action (i.e. default due to non-payment by ESCOMs) than those which formed the basis of earlier proceedings concerning tariff determination.

46. The Commission notes that the basic purpose of Order 2 Rule II of CPC is to preclude multiplicity of proceedings on the same cause of action. Order II Rule 2 of CPC reads as under:

> "*2. Suit to include the whole claim—(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.*
>
> *(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.*
>
> *(3) Omission to sue for one of several reliefs.—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.*
>
> *Explanation. — For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*"

The principle contained in Order II Rule 2 of CPC is that if there is cause of action for claiming certain reliefs against the opposite party, all such reliefs will have to be claimed in the same proceedings before the same forum (subject, of course, to jurisdictional limits of such forum). If any relief is not claimed in the proceedings so initiated, the plaintiff is deemed to have given up or forgone or relinquished said relief and cannot be claimed in subsequent proceedings.

47. PCKL has argued that since UPCL did not make any specific claim for deemed capacity charges in its previous proceedings before the Commission, fresh proceedings for the relief are barred under Order II Rule 2 of the CPC as the earlier petitions filed by UPCL omitted to include the said claim.

48. We have considered the submissions of the parties. A five Judge bench of the Supreme Court in the case of *Gurbux Singh* vs. *Bhooralal*, [AIR 1964 SC 1810] held that unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based, there would be no scope for the application of the bar. It was further held that a plea of a bar under Order 2 Rule 2 of the CPC can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. Relevant extracts of the said judgement are as under:

> "***6.*** *In order that a plea of a* ***Bar under Order 2 Rule 2(3)*** *of the Civil Procedure Code should succeed the* ***defendant who raises the plea must make out****; (i) that the* ***second suit was in respect of the same cause of action*** *as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3)* ***that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed****. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for* ***unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar****. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning.* ***It is for this reason that we consider that a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits****. It is common ground that the pleadings in CS 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2 Rule 2 of the Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly that without the plaint in the previous suit being on the record, a plea of a bar under Order 2 Rule 2 of the Civil Procedure Code was not maintainable*."

49. In Bapusaheb Chimasaheb Naik-Nimbalkar v. Mahesh Vijaysinha Rajebhosale, [(2017) 7 SCC 769], it was held by Hon'ble Supreme Court that Order II Rule 2 of CPC does not apply if the cause of action in the subsequent suit is different from that of the former suit. Relevant extract of the said judgement is as under:

> *"16.* ***Rule 2 Order 2 CPC does not apply if the cause of action in the subsequent suit is different from that of the former suit*** *as held by this Court in State of M.P. v. State of Maharashtra [State of M.P. v. State of Maharashtra, [(1977) 2 SCC 288 : 1977 SCC (L&S) 232] . In State of Maharashtra v. National Construction Co [(1996) 1 SCC 735] , when the first suit was filed to enforce bank guarantee whereas the second suit to claim damages for breach of underlying contract, this Court laid down that the subsequent suit was not barred by Order 2 Rule 2 CPC. In the case of continuing or recurring wrong there would be corresponding continuing or recurring causes of action when the first suit was based on infringement of the plaintiff's trade mark, second suit was on the continuing act or infringement of its trade mark and continuous passing of action subsequent to filing of the earlier suit, in Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co. [Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co., (1997) 1 SCC 99] , it was held that the* ***cause of actions in two suits were different as such the bar of Order 2 Rule 2 CPC was not attracted. The essential requirement for applicability of Order 2 Rule 2 CPC is to establish the identity of causes of action in the previous suit and the subsequent suit so as to attract the bar*** *as held in Deva Ram v. Ishwar Chand [Deva Ram v. Ishwar Chand, (1995) 6 SCC 733] and Gurbux Singh v. Bhooralal [Gurbux Singh v. Bhooralal, AIR 1964 SC 1810]."*

50. These principles have also been reiterated by Hon'ble Supreme Court in Rathnavathi v. Kavita Ganashamdas, [(2015) 5 SCC 223] in following terms:

> "26. ***One of the basic requirements for successfully invoking the plea of Order 2 Rule 2 CPC is that the defendant of the second suit must be able to show that the second suit was also in respect of the same cause of action as that on which the previous suit was based****. As mentioned supra, since in the case on hand, this basic requirement in relation to cause of action is not made out, the defendants (appellants herein) are not entitled to raise a plea of bar contained in Order 2 Rule 2 CPC to successfully non-suit the plaintiff from prosecuting her suit for specific performance of the agreement against the defendants*."

51. In Rathnavathi case, Hon'ble Supreme Court has further held that the bar of subsequent suit as envisaged under Order 2 Rule 2 of CPC comes into operation if the following conditions are fulfilled:

(a) Where the cause of action on which the previous suit was filed forms the foundation of the subsequent suit;

(b) When the plaintiff could have claimed the relief sought in the subsequent suit, in the earlier suit; and

(c) Both the suits are between the same parties.

52. Therefore, in the light of the principles of law decided in the above judgements, the requirements of attracting the bar under Order 2 Rule 2 CPC are that not only both the earlier suit and subsequent suit are between the same parties, the cause of action for the earlier suit and subsequent suit should also be the same and the plaintiff could have claimed the relief in the earlier suit which has been claimed in the subsequent suit. In the present case, though the parties to the earlier petitions and the present petition are the same, the cause of action in the earlier Petitions is different from the cause of action in the present petition. In the earlier Petitions, the Petitioner had approached the Commission for determination of tariff and truing up of tariff as per the Tarff Regulations [Petition No. 160/GT/2012 [*UPCL vs. PCKL & Ors*] and Petition No. 07/GT/2012 [UPCL *vs. PCKL & Ors.*]. In the present Petition, the Petitioner has approached for compensation in the form of capacity charge and energy charge on account of the failure on the part of Karnataka ESCOMs to discharge their obligations under the PPA, causing the Petitioner pecuniary loss. Therefore, the bar of Order 2 Rule 2 of CPC is not attracted in this case.

53. A similar contention was raised by PCKL in Appeal Nos. 10 of 2020 and Batch [PCKL & Ors. vs. UPCL & Ors.] between the same parties and involving similar objections, which was rejected by the APTEL in its judgment dated 2.11.2020 in the following terms:

> *"72. It is factually wrong on part of appellants to contend that UPCL had raised the issue of LPSC before CERC or this tribunal or that such claim for LPSC has been expressly rejected in the said earlier proceedings. The said earlier petitions brought before CERC by the respondent Udupi were not proceedings instituted for recovery of money, not the least to be equated with a suit for payment of money within the meaning of Section 34 CPC.* ***The dispute relating to rate of charges payable is de hors the obligation of both sides under the Regulations to have the tariff determined by the Commission periodically. Such disputes cannot be mixed up with the said statutory exercise. The previous decisions which have been referred can*** *neither operate as res judicata against the claims instituted through the two petitions which have resulted in the impugned order* ***nor attract the inhibitions contained in Rule 2 of Order II or Section 34(2) of CPC.****"*

54. It has been brought to the notice of the Commission that a Civil Appeal filed by PCKL & ESCOMs being Civil Appeal No. 838 of 2021 challenging the above judgement was dismissed by Hon'ble Supreme Court on 8.2.2022. In effect, the Judgment dated 2.11.2020 of the APTEL has attained finality. Since an identical contention of PCKL between the same parties and involving similar objections has already been rejected by the APTEL which has been upheld by the Hon'ble Supreme Court, we find no merit in PCKL's contention that UPCL's claims are barred under Order II Rule II of CPC.

55. Applying the afore-said principles concerning Order II Rule 2 of CPC to the facts of the present case, Order II Rule 2 of CPC poses no bar on UPCL's claims for deemed capacity charges since such claims are based on a different cause of action (deemed capacity charges on account of non-availability of 400 kV transmission line and dispute of default due to non-payment by ESCOMs) than those which formed the basis of earlier proceedings (determination of tariff and truing up of tariff).

56. In view of the above, this Commission holds that there is no relinquishment/waiver by UPCL of its rights in the earlier proceedings and UPCL's claim under the present Petition is not barred under Order II Rule 2 of CPC.

Issue No. 2: Whether UPCL's claims are time barred and attract the provisions of Limitation Act, 1963?

57. PCKL has contended that UPCL's claims for deemed capacity charge are time barred since the petition has not been filed within a period of three years when the cause of action arose. UPCL has submitted that such a contention is baseless since the claims relate to continuing wrong and is covered under Section 22 of the Limitation Act, 1963 which specifically provides breach of a continuous nature as an exception to the rule of limitation.

58. During the hearings, learned Senior Counsel for PCKL submitted that any claim made by the Petitioner for the period beyond 3 years prior to filing of the petition is not sustainable. Reliance was made on the Supreme Court judgement in AP Power Co-ordination Committee V Lanco Kondapolli Power Ltd [(2016) 3 SCC 468] and the order of the Commission dated 25.1.2021 in Petition No. 186/MP/2018 (KSKMPCL Vs SPDCL). In the written submission, it has been pleaded that time barred claims should not be allowed in the light of principle of law laid down in Tilokchand Motichand v. H.B. Munshi, [(1969) 1 SCC 110] and State of Orissa v. Mamata Mohanty, [(2011) 3 SCC 436].

59. It was further submitted that mere sending of letters making demands, without initiating any legal proceedings for recovery of money, cannot extend the period of

limitation. Reliance was placed on CLP India Pvt. Ltd. v. Gujarat Urja Vikas Nigam Ltd. and Ors., [(2020) 5 SCC 185]. Learned Senior Counsel further submitted that it is not open to the Petitioner to contend that its claim constitutes a continuous cause of action. Reliance was made on the judgement of the Supreme Court in State of Gujarat Vs Kothari & Associates [(2016) 14 SCC 761].

60. It was argued by PCKL that cause of action to sue for a default in payment of a sum of money arises on the date when it is due and payable but is not paid. The submission is that breach of contract, and the injury to the party who is owed the money, is complete once and for all on this date, and the breach or wrong does not continue to occur thereafter. Therefore, proceedings for recovery of money must be initiated within a period of three years from the date such cause of action to sue arose and it cannot continue to arise till the amount is repaid, and further that under the law, the period of limitation for recovery of money cannot be extended indefinitely.

61. We have considered the submission of parties. The Commission is of the view that there can be no quarrel with the broad proposition that under the general application of the Limitation Act, a claim with respect to non-payment of money payable on a monthly/periodic basis brought before an adjudicatory forum cannot be sustained with respect to recovery of money for a period of more than three years prior to the date of institution of the proceedings. However, it is necessary in the present case to ascertain the date on which the “cause of action” arose in favour of UPCL and what is the nature of this claim.

62. Hon'ble Supreme Court in South East Asia Shipping Co. Ltd. v. Nav Bharat Enterprises (P) Ltd., [(1996) 3 SCC 443] explained the expression "cause of action" as under:

> "3. *It is settled law that cause of action consists of bundle of facts which give cause to enforce the legal injury for redress in a court of law. The cause of action means, therefore, every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the plaintiff a right to claim relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action would possibly accrue or would arise. ….*"

63. While PCKL contends that the claim of UPCL is barred by limitation, UPCL argues that there is continuing cause of action within the meaning of Section 22 of Limitation Act, 1963 and, therefore, fresh limitation begins on each day of default. The Commission has noticed that UPCL has all along been regularly raising the invoices on time since 3.1.2011 for the power supplied to ESCOMs as per applicable orders. Evidently, since 2011, the ESCOMs were constantly aware about the amount of deemed capacity charges payable by them to UPCL. The same is also evident from UPCL's letters dated 7.3.2011 and 7.4.2011. UPCL was informed for the first time that the declared capacity considered by KPTCL/PKCL differed from the capacity declared by UPCL for the period between November 2010 to September 2014 during the first meeting of commercial committee of PCKL held on 29.12.2015. Thereafter, PCKL and ESCOMs engaged with UPCL in several processes/ discussions from 2015 to 2018. If the claims of UPCL were barred by limitation, then ESCOMs would not have agreed for appointment of expert committees to resolve the issues raised by UPCL. The fact that the ESCOMs actively participated in the process for resolving the issues raised by UPCL indicates that Karnataka ESCOMs had

finally not rejected the claims of UPCL. The sequence of relevant correspondences between PCKL and UPCL regarding dispute resolution as placed on record is as under:

Sl.	Date	Subject
1.	28.10.2015	UPCL to PCKL - UPCL asked PCKL to resolve dispute regarding Availability.
2	19.12.2015	PCKL to UPCL- UPCL was informed to attend Commercial Committee meeting to be convened on 29.12.2015 to discuss related billing issues.
3.	12.1.2016	PCKL to UPCL -UPCL was informed to attend Commercial committee meeting to be convened on 18.01.2016 to discuss UPCL related billing issues.
4.	16.1.2016	PCKL to UPCL -Letter from PCKL informing Commercial committee meeting on billing issues related to UPCL was postponed.
5.	10.2.2016	UPCL to PCKL - UPCL highlighted issues related to billing (capacity charges included) (relevant @pg. 1380)
6.	29.12.2015 & 11.2.2016	Minutes of Commercial Committee meeting- Difference in Availability as per UPCL and SLDC highlighted.
7.	25.7.2016	PCKL to UPCL - UPCL was informed to attend Technical committee meeting convened on 27.07.2016 at 12 PM for discussing the issues relating to declared capacity of UPCL furnished by SLDC.
8.	1.8.2016	PCKL to UPCL - UPCL was informed to attend Technical Committee meeting convened on 03.08.2016 at 12 PM for discussing the issues relating to Declared Capacity of UPCL furnished by SLDC.
9	12.8.2016	Minutes of Meeting dated 12.8.2016 between Additional Chief Secretary, Depart of Energy, GoK, PCKL officials and representative
9.	23.8.2016	PCKL to UPCL - UPCL was informed to attend Technical committee meeting to be convened on 24.08.2016 at 12 PM for discussing the issues relating to Declared Capacity of UPCL furnished by SLDC.
10.	3.9.2016	PCKL to UPCL - UPCL was informed to attend Technical committee meeting to be convened on 06.09.2016 at 3 PM for discussing the issues relating to Declared Capacity of UPCL furnished by SLDC.
11.	9.11.2016	Resolution/MoM dated 12.08.2016- Issue highlighted and discussed in meeting between ACS (Energy), GoK, PCKL representatives and UPCL. Para 3 captures that PCKL constituted a technical sub-committee to resolve UPCL's capacity declarations (@pg. 677).
12.	22.6.2018	Ramraj & Co. to PCKL – Ramraj & Co. submitted its interim report *inter alia* reg. payment of capacity charges to UPCL. It was indicated that documents were still pending at PCKL's end for finalising the report.
12.	6.12.2018	UPCL to PCKL and KPTCL requested MD KPTCL to provide the report submitted by Mr. V.J. Talwar, and to determine availability claim as per report of Mr. V.J. Talwar and the same be incorporated in M/s Ramraj & Co. report.

64. The Commission has noted that a meeting dated 12.8.2016 took place between Additional Chief Secretary, Depart of Energy, GoK, PCKL officials and UPCL

representative to decide UPCL's claims regarding deemed capacity charges. The MoM was communicated to UPCL vide PCKL letter dated 9.11.2016. The MoM dated 12.8.2016 shows that Managing Director, PCKL was specifically directed by Additional Chief Secretary, Government of Karnataka to resolve the dispute of difference in declared capacity as per SLDC and UPCL. Relevant extract of the minutes of the meeting reads as under:

> *"PCKL has constituted a technical sub-committee based on recommendation of the Commercial Sub-Committee to look into Plant Availability factor as certified by SLDC for the tariff control period 2010-2014 with respect to Ex-Bus Capacity declared by….*
>
> *In respect of payment of Capacity Charges, PCKL confirmed that the two meetings were conducted and final meeting is scheduled to be held during the coming week. PCKL was directed to resolve the differences in the forthcoming meeting and present the same to the PCKL Board…"*

Accordingly, UPCL's claim for recovery of deemed capacity charges is not barred by limitation, since the last right to sue PCKL/ESCOMs accrued to UPCL much after 12.8.2016 which is within 3 years prior to date of filing the present Petition.

65. In this regard, UPCL has relied on the judgement of the Hon'ble Supreme Court in *Shakti Bhog Food Industries Ltd. vs. The Central Bank of India & Anr*. [2020 SCC OnLine SC 482]. The Hon'ble Supreme Court in the said judgement has held as under:

> ***"8.*** *Thus understood, the* ***letter dated 8.5.2002 sent by the Senior Manager of the respondent Bank, at best, be reckoned as accrual of the cause of action to the appellant to sue the respondent Bank****. It is then stated that the appellant received a communication dated 19.9.2002, informing the appellant that it should not carry on any further correspondence with the Bank relating to the subject matter.* ***Until then, the appellant was having a sanguine hope of favourable resolution of its claim including by the Regional Office of the respondents****…*

*10. Concededly, the **expression used in Article 113 is distinct from the expressions used in other Articles in the First Division** dealing with suits such as Article 58 (when the right to sue **"first"** accrues)… The view taken by the trial Court, which commended to the first appellate Court and the High Court in second appeal, would **inevitably entail in reading the expression in Article 113 as – when the right to sue (first) accrues.** This would be **rewriting of that provision and doing violence to the legislative intent**. We must assume that the Parliament was conscious of the distinction between the provisions referred to above and had advisedly used generic expression **"when the right to sue accrues" in Article 113 of the 1963 Act**. **Inasmuch as, it would also cover cases falling under Section 22 of the 1963 Act, to wit, continuing breaches and torts**.*

*11. We may usefully refer to the dictum of a threeJudge Bench of this Court in **Union of India & Ors. vs. West Coast Paper Mills Ltd. & Anr**. which has had an occasion to examine the expression used in Article 58 in contradistinction to Article 113 of the Limitation Act.*

> *"**21**. …The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the **right to sue may accrue to a suitor in a given case at different points of time** and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, **in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose**."*
>
> *13. It is well established position that the cause of action for filing a suit would consist of bundle of facts…In the present case, the assertion in the plaint is that the appellant verily believed that its claim was being processed by the Regional Office and the Regional Office would be taking appropriate decision on at the earliest. That belief was shaken after receipt of letter from the Senior Manager of the Bank, dated 8.5.2002 followed by another letter dated 19.9.2002 to the effect that the action taken by the Bank was in accordance with the rules and the appellant need not correspond with the Bank in that regard any further. This firm response from the respondent Bank could trigger the right of the appellant to sue the respondent Bank..."*

66. In the present case, UPCL was asked to attend the meeting vide PCKL's letter dated 19.12.2015 to discuss and resolve the billing disputes. During the period from 19.12.2015 till the date of filing of the Petition, UPCL has complied with PCKL's directions to participate in the meetings before Commercial Committee, Technical Sub-committee,

M/s Ramraj & Co. proceedings and Mr. V.J. Talwar proceedings; given justifications for its claim of capacity and energy charges, etc. The Commission is of the view that since the claims of UPCL were under active consideration of PCKL and Karnataka ESCOMs, the period of limitation was being extended by way of acknowledgement with every participation and awaiting final decision which could not be taken even within three years prior to the filing of the present petition. Thus, we find and hold that the claim of the petitioner is not barred by limitation.

67. Another leg of the argument by UPCL being that its claims are not hit by bar of limitation because the arrangement between the parties gives rise to a continuing cause of action. We now proceed to examine the said plea of UPCL. As per UPCL, its claim for deemed capacity charge pertains to an ongoing dispute arising out of withholding of dues by ESCOMs and the same cannot be barred by limitation. UPCL has submitted that Section 3 of the Limitation Act, 1963 which relates to '*Bar of Limitation'* is subject to Section 22 of the Limitation Act, 1963 which specifically provides for breach of a continuing nature as an exception to the rule of limitation. Section 22 reads as under:

> *"**22**. **Continuing Breaches and Torts-** In case of a continuing breach of contract or in case of a continuous tort, **a fresh period of limitation begins to run at every moment of the time during which the breach** or the tort, as the case may be, **continues."***

68. PCKL has contended that there is no running account between the parties. Merely because the PPA between the parties is for a period of twenty-five years, the same would neither result in a running account nor a continuing cause of action. PCKL further argues that even when there is a running account between the parties, the same has no bearing on the issue of limitation as regards any claim for deemed capacity charges.

69. The claims being capacity charge and energy charges i.e. tariff related claims are regulatory in nature. The Petitioner had also claimed interest for such outstanding payments which continues till they are paid. The Commission is therefore of the view that there is a continuing nature of the relationship between UPCL and PCKL, it being a commercial arrangement for twenty-five years under the PPA coupled with a clear case of running account, the defaults in question have given rise to a continuing cause of action. Appellate Tribunal in Judgment dated 2.11.2020 has dealt with the continuing nature of commercial relationship between the same parties in the following terms:

> "194. *The pattern shown by the above-mentioned details of billing and payments is* ***clearly indicative of the procurers having understood the arrangement with seller to be such as obliged running accounts*** *to be maintained. This being the sequitur, the* ***argument of the respondent UPCL that it is a case of "continuing cause of action" gets validated and strengthened rendering the plea of limitation bar superfluous***."

70. It is pertinent to note that the *Civil Appeal No. 838 of 2021 filed by PCKL & ESCOMs* challenging the judgment dated 2.11.2020 was dismissed by the Hon'ble Supreme Court vide order dated 8.2.2022 and therefore, the judgement of Appellate Tribunal has attained finality. The APTEL, in the said judgement dated 2.11.2020 after considering the detailed submissions of the parties held that numerous and continuous defaults by ESCOMs in making payment of monthly and infirm power charges on time or in full, demonstrate that the ESCOMs have treated their respective arrangements for procurement of electrical supply from the generator as running accounts in view of the following:

(a) The pattern for billing and payments (*delays and continuous defaults in making payments by ESCOMs*) clearly indicates that procurers have understood the arrangement with seller to be such as obliged running accounts to be maintained.

This being the sequitur, it is a case of "continuing cause of action".

(b) It is a settled position of law that a "continuing wrong" constitutes two elements. It is an act which creates (i) a continuing source of injury and (ii) renders the doer of the act responsible and liable for the continuance of the said injury. Every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings.

(c) Each 'breach' by the ESCOMs resultantly burdened the generator with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of 'continuing breach'. The 'breach' being recurring, the second element of 'continuing breach' is satisfied.

71. The aforesaid judgement of the Appellate Tribunal is squarely applicable to the facts of the present case. It is no longer res integra that a 'continuing wrong' constitutes two elements *viz.* it is an act which creates (i) a continuing source of injury and (ii) renders the doer of the act responsible and liable for the continuance of the said injury. Every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings. This '*breach*' by the ESCOMs burdens UPCL with additional working capital interest, till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of '*continuing breach'*. Since ESCOMs have consistently defaulted in paying deemed capacity charges, therefore, there is a continuous and recurring non-compliance of PPA provisions and Tariff Regulations. The '*breach*' being recurring, ESCOMs are responsible and liable for

the continuance of the said injury, thereby satisfying the second element of '*continuing breach'*.

72. In the present case, since the breach has continued on account of refusal of ESCOMs to discharge settle the claims of UPCL towards deemed capacity charges, a fresh cause of action is constituted so long as the breach is recurrent and continues. The provisions of Section 22 of the Limitation Act, 1963 being in the nature of exception to section 3 of the said Act and the case of UPCL being established as that of a continuing wrong at the hands of ESCOMs, the Commission is of the view that UPCL's claims for deemed capacity charges are not barred by limitation, and consequently, PCKL's contentions lack merit and are rejected on this count as well.

Issue No. 3: Whether UPCL is entitled to deemed availability and deemed capacity charges on account of non-availability of 400 kV transmission line which was KPTCL's responsibility for the period: (i) from 10.3.2011 to 18.8.2012 for Unit-I (ii) from 19.8.2012 to 6.9.2012 for Unit I & II?

73. UPCL has categorised its claim for computation of capacity charges owing to non-availability of transmission line as follows: -

(a) Capacity Charges payable to UPCL for the period between 10.03.2011 – 18.08.2012 i.e. after COD of Unit-I and before COD of Unit II;

(b) Capacity Charges payable to UPCL for the period between 19.08.2012 – 06.09.2012 i.e. after COD of Unit II.

74. As per Annexure 4 of PPA, it is the responsibility of Principal Buyers (ESCOMs) to make available the evacuation facilities as under:

(a) one (1) 400 kV D/C line from project switchyard connecting to Hassan inter-connection point; and

(b) two (2) nos. 220 kV D/C lines from project switchyard to 220 KV switchyards connecting with 220 kV switchyards of KPTCL at Kemar and Kavoor.

75. The 220 kV D/C lines from the project switchyard to 220 kV switchyard of KPTCL at Kemar and Kavoor achieved CoD prior to the CoD of Unit I of UPCL. Unit I was synchronized on 3.6.2010 and achieved COD on 11.11.2010. and was declaring its ex-bus capacity as the existing 220 kV Double Circuit (DC) line was capable of evacuating its entire capacity of Unit I. It was the responsibility of KPTCL/ESCOMs to commission and make the 400 kV transmission line available to UPCL. UPCL has contended that though Unit II was ready to be synchronised since 15.1.2011, it was on account of failure of KPTCL/ESCOMs to commission the 400 kV transmission line that synchronization of Unit II was delayed. KPTCL in its reply has submitted that there was no evacuation constraint because KPTCL had taken measures to augment the 220 kV Khemar line to facilitate evacuation of 600 MW power from UPCL. KPTCL has further submitted that UPCL's request for approval of synchronization of Unit II with the Grid was forwarded to Central Power Research Institute (CPRI) for its opinion who vide letter dated 24.2.2011 opined as under:

"*Unit II can be synchronized provided generation of Unit II shall not exceed 80 MW.*"

KPTCL vide its letter dated 4.3.211 (Annexure P-14 of the petition) permitted UPCL for sysnchronisation of Unit II subject to the following conditions:

"*You have requested approval for synchronization of Unit II with the Grid and your request had been forwarded to CPRI for opinion. CPRI has stated that Unit II can be sysnchronised and allowed to generate power only to an extent of 80 MW initially with the Unit I also being in operation. However, with the shutdown of Unit I due to turbine and other problems, you may synchronise Unit II with the Grid and commence*

generation of power from the Unit II. The combined operation of Unit I and Unit II shall only be as per the advice of CPRI as indicated above."

76. Thus, as per its submissions, KPTCL augmented the 220 kV Khemar line to facilitate evacuation of 600 MW power from UPCL. In response to UPCL's request for synchronization of Unit II, KPTCL consulted CPRI which opined that Unit II can be permitted to generate upto 80 MW while Unit I is in operation. Though the capacity available in 220 kV Khemar line for UPCL has not been clearly spelt out by KPTCL, from the letter of KPTCL as extracted above, it can be inferred that 220 kV Khemar line had the capacity to accommodate 600 MW of Unit I and 80 MW of Unit II. Further as per CPRI advice, when unit I is facing shut down due to turbine and other problems, Unit II may be synchronized and generate power. In other words, the capacity available on 220 kV Khemar line was to the extent of 680 MW i.e. Unit I in operation to its full capacity and 80 MW of Unit II. According to UPCL, it had to reduce the generation of Unit I for the purpose of synchronization of Unit II on account of non-availability of 400 kV transmission line which also delayed the commercial operation of Unit II.

77. KPTCL vide its letter dated 13.8.2012 (Annexure P-16 of the Petition) informed UPCL that the tentative test charge/ trial operation of the said line would take place on or after 20.8.2012. UPCL vide its letter dated 20.8.2012 informed PCKL, KPTCL and ESCOMs that test run of Unit II was successfully conducted between 16.8.2012 and concluded on 19.8.2012 and UPCL has declared commercial operation at 1100 hrs on 19.8.2012. KPTCL declared the commercial operation of 400 kV DC Line with Quad Moose ACSR on 6.9.2012.

78. Against the above factual background, the disputes between the parties pertain to two periods, namely, 10.3.2011 to 18.8.2012 i.e. after COD of Unit-I and before COD of Unit II and the period from 19.8.2012 to 6.9.2012 i.e. after COD of Unit II.

79. As regards the first period i.e. 10.3.2011 to 18.8.2012, PCKL vide reply dated 18.9.2019 has submitted that on account of failure of UPCL's equipment at Unit I during the said period, UPCL was given liberty to increase its generation from Unit II prior to its COD. PCKL has submitted the outage details of UPCL Unit I from 11.11.2010 to 21.9.2011 in Annexure I to its reply and has contended that the analysis of the outage details of Unit I during the period reveals that UPCL is claiming declared capacity for Unit I when there had been equipment failure at Unit I, making it incapable of generating the declared capacity of Unit I. As illustration, PCKL has submitted the data for certain days, namely, 15.4.2011 to 21.4.2011 and 5.6.2011 to 11.6.2011. Further, PCKL in Annexure II to its reply dated 18.9.2019 has submitted a comparative chart for the period 12.11.2010 to 31.8.2012 (except December 2011, March 2012 to July 2012) showing the DC declared by UPCL, DC as per the Regulations, DC revised by SLDC and actual generation. PCKL has submitted that since Unit I of UPCL was under outage due to technical reasons on various occasions, SLDC has treated the actual generation as DC and PCKL has considered the availability for the purpose of fixed charges accordingly.

80. PKCL has further submitted that UPCL has already been compensated for any claimed loss it suffered on account of the alleged delay in setting up the transmission line in terms of Interest During Construction, Incidental Expenses During Construction and Financing Charges granted in the Tariff Order dated 24.2.2014. These additional charges for the delay have already been incorporated into the tariff by way of higher capital cost,

which is payable to UPCL over the course of the 25 years PPA. UPCL cannot now claim any additional benefit on a purported claim of declared capacity as that would amount to being compensated twice over for the alleged delay.

81. In response to UPCL's claim that it had been facing difficulties in procuring coal for operation of both its units, around the period from 19.8.2012 to 6.9.2012, PCKL has submitted that before UPCL can claim declared capacity for both units for the period between 19.8.2012 to 6.9.2012, UPCL needs to demonstrate that it was in possession of sufficient coal stock required for generating from both units and was also technically capable for such generation. Karnataka SLDC has submitted that Unit I of the generating station was not functioning properly and had to be shut down by UPCL due to turbine failure and other technical problems attributable solely to UPCL, as evident from the data provided in Annexure R7/1 of its reply. SLDC has further submitted that even prior to synchronization of Unit II, Unit-I failed to generate power at the capacity declared by UPCL and on several occasions, the combined generation from both units would also not meet the declared capacity.

82. UPCL in response to the submissions of PCKL has made the following submissions:

(a) UPCL declared its capacity based on its capability to deliver ex-bus and if there was any suspicion qua its capacity declaration, then SLDC would have asked UPCL to demonstrate its capacity as per Regulation 6.4 (19) of CERC (IEGC) Regulations, 2010 (Grid Code) which is not the case in the present matter. it is not open at this stage for PCKL and KPTCL to question UPCL's capacity declaration.

(b) UPCL has not claimed capacity charges of the Units when it was not available. UPCL has further clarified that IDC, IEDC and financing charges granted by this Commission in Order dated 20.2.2014 is for the periods prior to respective CoD of Units of UPCL whereas the deemed capacity charges claimed by UPCL is for the period after the CoD of respective Units.

(c) With regard to Karnataka ESCOMs' contention that UPCL needs to demonstrate that it was in possession of sufficient coal stock required for generating from both units during 19.8.2012 to 6.9.2012, UPCL has submitted that it had sufficient coal stock available to generate as per declared capacity provided and the same is evident from monthly invoice submitted by UPCL. In the written submission, UPCL has submitted that opening stock for the month of August, 2012 was 0.593 MMT. Opening stock for the month of September, 2012 was 0.527 MMT and closing stock for the month of September, 2012 was 0.322 MMT. Therefore, Karnataka ESCOMs contention with regard to coal stock cannot be accepted.

83. We have considered the submissions of UPCL and PCKL. One of the objections of PCKL is that UPCL has been compensated through IDC and IEDC for Unit II for the delay in achieving CoD and therefore, deemed capacity charge for Unit I for the period prior to CoD of Unit II when the generation from Unit I was capped cannot be granted. The Commission in the tariff order 20.2.2014 in Petition No. 160/GT/2012 [UPCL *vs. PCKL & Ors.*] and the Appellate Tribunal in its judgement dated 15.05.2015 passed in Appeal No. 108 of 2014 & Batch [*Power Company of Karnataka Ltd. & Ors. vs. CERC & Ors.*] held that PCKL's delay in commissioning of the 400 kV transmission line caused UPCL's

capacity to be stranded. The decision of the APTEL expressly recognised the obligation and failure on the part of ESCOMs to commission the 400 kV transmission line and accordingly, granted Interest during Construction for the delay in commissioning of 400 kV transmission lines for the period prior to commercial operation for the respective units. The relevant extract of Appellate Tribunal's judgement is extracted below:-

> "**85.** *We have examined the findings of CERC. CERC has analyzed the issue in details and correctly* ***allowed delay of 16 months from April 2011 to August 2012 beyond the control of UPCL and not attributable to UPCL. We find that delay in commissioning of the 400 KV line which was the responsibility of PCKL resulted in capacity of UPCL being stranded even though it was ready for generation.*** *We also find that notice for Force Majeure for delay in transmission line was issued only on 07.03.2011 immediately after Unit-II was synchronized on 04.03.2011.* ***We feel that as per the 2009 Regulations, UPCL is entitled for IDC for the delay caused in commissioning of 400 KV lines for evacuation of power from Udupi Project (2x600 MW) which was the responsibility of PCKL."***

84. In the said order, the Commission has not decided the issue of deemed capacity charges for Unit I. The Commission has merely condoned the delay in achieving CoD of Unit II and allowed IDC and IEDC for the period from April 2011 to August 2012 as the delay was beyond the control of and not attributable to UPCL. Therefore, grant of IDC and IEDC to Unit II and deemed capacity charge for Unit I are two different things and have to be independently decided on merit as per the applicable statutory provisions.

85. The next objection of UPCL is that on account of equipment failure at Unit I, UPCL was incapable of generating the declared capacity of Unit I and hence deemed capacity charges are not payable. PCKL vide reply dated 18.9.2019 has submitted that on account of failure of UPCL's equipment at Unit I during the period 10.3.2011 to 18.8.2012, UPCL was given liberty to increase its generation from Unit II prior to its COD. PKCL has

submitted the outage details of UPCL Unit I from 11.11.2010 to 21.9.2011 as per Annexure I to its reply and has contended that the analysis of the outage details of Unit I during the period reveals that UPCL is claiming declared capacity for Unit I when there had been equipment failure at Unit I, rendering it incapable of generating the declared capacity of Unit I. As illustration, PCKL has submitted the data for the following days:

S. No.	Date when generation from Unit I was reduced	Capacity Declared claimed by UPCL for Unit I (MW)	Actual generation by Unit I (MW)	Reason for reduced generation	Generation by Unit II (MW)	Declared Capacity considered by SLDC
1.	15.04.2011	259	195	Condenser tube leakage - UPCL	35	195
2.	16.04.2011	319	0	Condenser tube leakage – UPCL	306	0
3.	17.04.2011	438	0	Condenser tube leakage – UPCL	393	0
4.	18.04.2011	373	0	Condenser tube leakage – UPCL	368	0
5.	19.04.2011	343	0	Condenser tube leakage – UPCL	339	0
6.	20.04.2011	58	0	Condenser tube leakage – UPCL	59	0
7.	21.04.2011	18	0	Condenser tube leakage – UPCL	0	0
8.	05.06.2011	236	0	Tripped due to condenser vacuum low at UPCL	236	0
9.	06.06.2011	502	0	Tripped due to condenser vacuum low at UPCL	502	0

10.	07.06.2011	488	0	Tripped due to condenser vacuum low at UPCL	488	0
11.	08.06.2011	352	0	Tripped due to condenser vacuum low at UPCL	352	0
12.	09.06.2011	243	0	Tripped due to condenser vacuum low at UPCL	243	0
13.	10.06.2011	423	0	Tripped due to condenser vacuum low at UPCL	423	0
14.	11.06.2011	453	28	Tripped due to condenser vacuum low at UPCL	425	28

86. PCKL vide Annexure II to its reply dated 18.9.2019 has submitted a comparative chart for the period 12.11.2010 to 31.8.2012 (except December 2011, March 2012 to July 2012) showing the DC declared by UPCL, DC as per the Regulations, DC revised by SLDC and actual generation. We have extracted the relevant information for selected days covered under the disputed period as under:

Date	Availability Declared at Ex-bus by UPCL	Declared Capacity at Ex-bus by UPCL (correct DC as per 2009 regulations)	Revision of DC of UPCL as per SLDC at Ex-bus	Actual Generation
10.3.2011	155	155	87	281
11.3.2011	538	538	406	536
12.3.2011	555	555	555	559
13.3.2011	555	555	555	557
14.3.2011	555	555	555	556
15.3.2011	551	551	551	551
16.3.2011	545	545	545	546
17.3.2011	131	535	444	145
18.3.2011	143	281	212	178
19.3.2011	541	541	541	539

10.4.2011	382	500	471	377
11.4.2011	91	490	396	60
12.4.2011	381	381	276	213
13.4.2011	530	555	530	505
14.4.2011	530	530	530	502
15.4.2011	259	259	195	230
16.4.2011	319	0	0	306
17.4.2011	438	0	0	393
18.4.2011	373	0	0	368
19.4.2011	343	0	0	339
20.4.2011	58	0	0	59
21.4.2011	18	0	0	0
22.4.2011	408	408	408	411
1.6.2011	460	460	360	270
2.6.2011	383	383	383	377
3.6.2011	0	0	0	0
4.6.2011	0	0	0	0
5.6.2011	236	0	0	235
6.6.2011	502	0	0	485
7.6.2011	488	0	0	472
8.6.2011	352	0	0	354
9.6.2011	243	0	0	247
10.6.2011	413	0	0	424
11.6.2011	453	453	23	434
1.8.2012	555	555	555	496
2.8.2012	546	525	474	474
3.8.2012	555	293	279	528
4.8.2012	342	1	0	236
5.8.2012	555	0	0	358
6.8.2012	555	0	0	299
7.8.2012	555	0	0	301
8.8.2012	503	0	0	273
9.8.2012	47	36	36	34
10.8.2012	555	555	555	302
11.8.2012	555	555	555	260
12.8.2012	555	555	555	262
13.8.2012	555	555	555	262
14.8.2012	555	555	555	257
15.8.2012	555	152	66	244
16.8.2012	555	0	0	554
17.8.2012	555	0	0	578
18.8.2012	555	0	0	575
19.8.2012	740	0	0	567
20.8.2012	1110	555	555	537
21.8.2012	1110	555	555	560
22.8.2012	1004	449	449	451
23.8.2012	1019	464	464	471
24.8.2012	1006	451	451	452
25.8.2012	1110	555	555	545
26.8.2012	1093	538	538	515
27.8.2012	1110	555	555	478
28.8.2012	1110	555	555	486
29.8.2012	1066	511	511	492

30.8.2012	1091	536	536	483
31.8.2012	1110	595	555	458
1.9.2012	1110	555	555	405
2.9.2012	1110	555	555	406
3.9.2012	1110	555	555	355
4.9.2012	1110	555	555	310
5.9.2012	1110	555	555	348
6.9.2012	1110	427	474	472
7.9.2012	1110	1100	1100	1106

87. KPTCL in its reply has submitted that the capacity for Unit I declared by UPCL was in far excess of the actual power generated by it. KPTCL has further submitted that no instructions were given by SLDC to back down generation from Unit I. Rather there was unilateral reduction in power generation by UPCL owing to frequent outages suffered by Unit I on account of equipment failure, such as boiler tube leakage, turbine failure, condenser tube leakage etc. KPTCL has placed a chart at Annexure R7/1 of its reply dated 26.5.2020 (physical copy filed on 13.10.2020) showing the outage details of Unit I from 11.11.2010 to 31.3.2012. Summary of the details of outages as given by KPTCL is as under:

Outage Details of Udupi Power Plant pertaining to UPCL & KPTL		
Period	**Duration of Interruption due to generator outage (in Hrs)**	**Duration of Interruption due to KPTL line outage (in Hrs)**
11.11.2010-31.03.2011	1061:00:00	35:45:00
01.04.2011-31.03.2012	1565:15:00	45:23:00
01.04.2012-31.03.2013	229:42:00	38:04:00

88. UPCL in its rejoinder dated 9.10.2019 in response to paras 11 to 19 of the reply of PCKL (covering the period 10.3.2011 to 18.8.2012) has submitted that DC and actual generation are two distinct heads. Actual generation is for the purpose of computation of Energy Charges whereas DC is for the purpose of recovering capacity charges which is meant to enable a generator to recover its fixed charges. As per Regulations, any

variation of actual generation from scheduled generation is covered under Deviation settlement mechanism. Since, in the instant case, there is scheduling done by SLDC, UPCL cannot be penalized for the fault of SLDC and PCKL. Therefore, the entire reliance placed by PCKL and SLDC on actual generation for computation of Capacity Charges is erroneous. UPCL in its rejoinder to the reply of KPTCL has submitted that the intention of KPTCL was to prevent UPCL from synchronization and thereby achieving commercial operation, so as to wriggle out from paying deemed capacity charges from Unit II.

89. An analysis of the submissions and data made hereinabove leads to following conclusions:

(a) UPCL has declared capacity of Unit I from 10.3.2011 till 18.8.2012 within the installed capacity of Unit I less auxiliary consumption.

(b) For the purpose of synchronization of Unit II, KPTCL has informed on the basis of the advice of CPRI that Unit II can be synchronized and allowed to generate power to the extent of 80 MW while Unit I is still in operation.

(c) Further, as per the advice of CPRI, UPCL has been informed by KPTCL that with the shutdown of Unit I due to problems, UPCL may synchronize Unit II with the Grid and commence generation of power from the Unit II.

(d) UPCL has given the DC for Unit I only upto the commercial operation of Unit II since DC cannot be given prior to CoD of Unit II.

(e) Whenever the Unit I is shut down due to some technical problem, UPCL has combined the generation from unit II (even prior to its CoD) as permitted vide letter of KPTCL dated 4.3.2011.

(f) SLDC while calculating the DC has not considered the capacity declared by UPCL but has recalculated the DC by talking into account only the actual generation from Unit I.

(g) As per outage chart of KPTCL at Annexure R7/1 of its reply, there is outage of plant not only due to failure of the plant and equipment of UPCL but also due to interruption on account of KPTCL's line outage.

(h) COD of Unit II was declared on 19.8.2012 and CoD of 400 kV transmission line was declared on 6.9.2012, From 19.8.2012, UPCL has declared capacity of both Unit I and Unit II. However, the actual generation during the said period is less than 600 MW even though UPCL has declared the combined DC varying between 1004 MW and 1111 MW.

(i) After declaration of CoD of 400 kV transmission line on 6.9.2012, UPCL has generated 1106 MW against 1110 MW DC on 7.9.2012. We are not looking to the data beyond 7.9.2012 since the disputed period is upto 6.9.2012.

(j) SLDC has not explained the provisions of the regulations under which DC has been taken as equal to actual generation Further, it is not understood as to why SLDC has revised the DC as “Declared Capacity at Ex-bus by UPCL (correct DC as per 2009 reg)” and “Revision of DC of UPCL as per SLDC at Ex-bus” whereas it is the prerogative of the generator to revise the DC.

90. UPCL is an ISGS and its scheduling and dispatch is governed by the Grid Code of the Commission. Regulation 6.4.18 to 6.4.20 of the Grid Code provide as under:

> "*6.4.18 It shall be incumbent upon the ISGS to declare the plant capabilities faithfully, i.e., according to their best assessment. In case, it is suspected that they have deliberately over/under declared the plant capability contemplating to deviate from the schedules given on the basis of their capability declarations (and thus make money either as undue capacity charge or as the charge for deviation from schedule), the RLDC may ask the ISGS to explain the situation with necessary backup data.*
>
> *6.4.19 The ISGS shall be required to demonstrate the declared capability of its generating station as and when asked by the Regional Load Despatch Centre of the region in which the ISGS is situated. In the event of the ISGS failing to demonstrate the declared capability, the capacity charges due to the generator shall be reduced as a measure of penalty.*
>
> *6.4.20 The quantum of penalty for the first mis-declaration for any duration/block in a day shall be the charges corresponding to two days fixed charges. For the second mis-declaration the penalty shall be equivalent to fixed charges for four days and for subsequent mis-declarations, the penalty shall be multiplied in the geometrical progression over a period of a month."*

91. It is noticed from the above provisions that it is the responsibility of the generator to declare its plant availability faithfully according to its best assessment. In case the RLDC has the suspicion that the ISGS has deliberately under/over declared the plant capability, the RLDC may ask the ISGS to explain the situation with necessary back-up data. The ISGS shall be required to demonstrate the declared capability of its generating station as and when asked by concerned RLDC and if the ISGS fails to demonstrate the declared capability, the capacity charges due to the generator shall be reduced as per the formula given in Regulation 6.4.20 of the Grid Code.

92. In the present case, UPCL is under the control area jurisdiction of SLDC Karnataka. In our view, if Karnataka SLDC had any doubt about the capability declared by UPCL, the proper course of action would have been for SLDC to ask UPCL to demonstrate the

declared capability. Since SLDC has not asked UPCL to demonstrate its declared capability, it is not open at this stage for PCKL and KPTCL to question UPCL's capacity declaration or unilaterally revise the declared capability or limit the declared capability to actual generation.

93. Now we are considering declared capacity for the period after declaration of COD of Unit II of UPCL till COD of 400 kV transmission line i.e. from 19.8.2012 to 6.9.2012. It is noticed from the chart under para 80 that after declaration of COD of Unit II on 19.8.2012, UPCL has given declaration of 740 MW on 19.8.2012 and thereafter it has declared more than 1000 MW for 6 days, and more than 1100 MW for 11 days since both the units were available for generation. However, during this period, generation is below 600 MW. After COD of 400 kV transmission line on 6.9.2012, the declared capacity was 1100 MW and actual generation was 1106 MW on 7.9.2012. The possible explanation for the variation in generation prior to 7.9.2012 and on 7.9.2012 is that though UPCL declared the CoD of Unit II with effect from 19.8.2012 on the basis of the letter of KPTCL dated 13.8.2012 that the 400 kV transmission line would be test charged on or after 20.8.2012, the said transmission line achieved commercial operation only on 6.9.2012. Therefore, fully operational units of UPCL though available could not generate power commensurate with its declared capacity on account of the failure of KPTCL to make the 400 kV DC transmission line available during 20.8.2012 to 6.9.2012. PCKL has raised an objection that during the corresponding period, UPCL did not have enough fuel to generate the power commensurate with the declared capacity. On the other hand, UPCL has vehemently denied the allegation of shortage of coal. We are of the view that if indeed UPCL had declared the capacity without having the back-up coal stock, it would be a case

of misdeclaration. In such cases, SLDC is not without any remedy. Regulation 6.4.19 of Grid Code clearly empowers the SLDC to ask the generator to demonstrate its declared capacity and in case misdeclaration is proved, Regulation 6.4.20 specifies the penalty to be imposed on the generator. SLDC has not undertaken the required exercise and therefore, in the absence of proven data with regard to misdeclaration of declared capacity, SLDC cannot recommend for capping of the capacity charges to actual generation. Thus, on account of two reasons, namely, non-availability of 400 kV DC transmission line, thereby limiting the evacuation capacity to 600 MW and absence of any test to establish mis-declaration of capacity, the contention of PCKL and KPTCL cannot be sustained.

94. UPCL being an ISGS is governed by the Tariff Regulations of this Commission and during the disputed period, by Tariff Regulations, 2009. The Tariff Regulations of the Commission entitle a generator to recover deemed capacity charges in certain circumstances. As per Regulation 3(14) of Tariff Regulations, 2009, declared capacity is defined as under:

> *"(14) 'declared capacity' or 'DC' in relation to a generating station means, the capability to deliver the ex-bus electricity in MW declared by such generating station in relation to any time-block of the day or whole of the day, duly taking into account the availability of fuel or water, and subject to further qualification in the relevant regulation;"*

Thus, computation of declared capacity is directly linked to 'capability' of a generating station to deliver ex-bus electricity. If UPCL was capable of declaring its ex-bus capacity of Unit I (10.3.2011-18.8.2012) and Unit II (19.8.2012-6.9.2012) after taking into account the availability of fuel or water and if despite being capable, UPCL was

prevented by ESCOMs from scheduling the entire ex-bus capacity, then UPCL would be entitled to deemed capacity charges for the capability declared.

95. The APTEL has recognized the principle that deemed capacity charges are liable to be paid if failure of one party to discharge its obligation affects the other party adversely. In the case of *Talwandi Sabo Power Limited v. PSERC,* [2021 SCC OnLine APTEL 29], the Appellate Tribunal has held as under:

> *"185. Coming to the issue of payment of Deemed Capacity Charges, according to the Appellant, the thermal plant of the Appellant was available and was declared based on the technical capacity to generate and coal stock position. As envisaged in the PPA and coupled with the Judgment dated 07.04.2016, the Respondent-PSPCL was obliged to arrange adequate quantity and quality of coal to the Appellant's plant. Apparently, the said obligation was not kept up by the Respondent-PSPCL. Added to this, the inaction of the PSPCL to give approval for procuring coal from other CIL mines and so also coal offered by CIL through RCR mode has resulted in continuous shortage of coal for running the plant of the Appellant. Ultimately, this has compelled the Appellant to declare lower operational availability of its plant though it was technically available to generate and supply much higher quantum of electricity to Respondent No. 2-PSPCL. We see the force in the contention of the Appellant that the obligation of the Appellant to operate the Plant at its full capacity is interdependent and linked to the obligation of PSPCL to supply adequate quantity and quality of coal.* ***The terms of agreement between the parties, discussed above, goes to show the fulfilment of obligation depends upon the mutual compliance of reciprocal commitments. Therefore, the failure of PSPCL to discharge its obligation, definitely, affects TSPL adversely. Hence, we are of the opinion that the Appellant is justified in claiming deemed capacity charges between September 2016 to May 2017 and October 2017 till 2018 for the reasons stated above."***

96. In the light of the above discussion, the Commission is of the view that from 10.3.2012 till 18.8.2012, UPCL is entitled for deemed capacity charges commensurate with the declared capacity of Unit I, as despite being capable, UPCL was prevented by ESCOMs from generating the entire ex-bus capacity from Unit I due to unavailability of requisite evacuation facility due to failure of the ESCOMs to effectively discharge their obligations

under the PPA. The CoD of Unit II was declared on 19.8.2012 by UPCL based on the KPTCL letter dated 13.8.2012 that 400 kV DC transmission line would be test charged on or after 20.8.2012. Since 400 kV DC transmission line achieved COD only on 6.9.2012, UPCL could generate within 600 MW even though both the Units (total capacity 1200 MW) were available for generation and supply of power from 20.8.2012 till 6.9.2012. Therefore, UPCL is entitled for deemed fixed charges commensurate with its declared capacity for the period 19.8.2012 to 6.9.2012 irrespective of the actual generation. It is also an admitted fact that the Units of UPCL were shut down at various points of time due to fault at the plant level for which UPCL cannot be entitled for deemed capacity charges. UPCL is directed to share with PCKL the documents maintained by its generating station regarding the shutdown of the plant on account of mechanical failures and other problems (not attributable to PCKL, KPTCL and ESCOMs) including durations thereof during the period 10.3.2012 to 6.9.2012. To the extent the plant was shut down due to mechanical problems and other problems (not attributable to PCKL, KPTCL and ESCOMs), the declared capacity for the said period shall be excluded while calculating the deemed capacity charges.

Issue N0. 4: Whether UPCL is entitled to deemed capacity charges on account of payment default by ESCOMs and in terms of Regulations 21 (4) of CERC Tariff Regulations, 2009?

97. The next claim of UPCL is that UPCL is entitled to deemed capacity charges for shortfall in generation between 16.1.2013 and 30.3.2013 since its generation was affected due to non-availability of coal consequent to payment default by Karnataka ESCOMs and failure of SLDC/KPTCL to provide a pragmatic day-ahead schedule. UPCL has submitted that it requested SLDC to specify a pragmatic day-ahead schedule in terms

of Regulation 21(4) of the Tariff Regulations, 2009 on account of coal shortage to optimally utilize its installed capacity and energy capability in consultation with the beneficiaries and issue directions. However, despite being aware of the grave sustainability issues faced by UPCL, SLDC failed to fulfil its obligations under Regulation 21(4) of the Tariff Regulations, 2009 and did not provide a pragmatic day-ahead schedule to UPCL.

98. PCKL has submitted that an amount of Rs. 3.127 per unit was provisionally payable to UPCL, till tariff was determined by this Commission. This figure in addition to other charges also accounted for maintenance of coal stock for sixty days. This amount was fixed pursuant to UPCL's request, and admittedly constituted an agreed rate. Based on COD of Unit I i.e. 11.11.2010, UPCL ought to have filed its petition for determination of tariff in May 2010 under Regulation 5 (1) of the of the 2009 Tariff Regulations. However, UPCL delayed filing its tariff petition being Petition No. 160/GT/2012 till 14.12.2011, despite repeated requests from PCKL/ESCOMs to file on time. PCKL has submitted that from 14.12.2011 onwards, while raising invoices as per the tariff claimed in its tariff petition, UPCL was well aware that in the absence of a provisional/ final tariff determined by the Commission, there was no corresponding obligation on the ESCOMs to make payments as per such invoices based on unilateral and unadjudicated claims in UPCL's tariff petition. ESCOMs continued to make payments at the rate of Rs. 3.127 per unit, as per the prevailing payment obligations between the parties at that time. The provisional tariff for Unit I of UPCL's generating station was first fixed by this Commission in its order dated 27.8.2012 in Petition No. 160/GT/2012. However, the order dated 27.8.2012 was set aside by APTEL on 8.10.2012, and the matter was remanded back to the Commission

which passed the Order in remand proceedings on 24.12.2012. PCKL has submitted that the obligation to procure fuel and generate power to its full capacity was not affected in any manner by any alleged payment default on the part of ESCOMs.

99. UPCL has submitted that this Commission issued provisional tariff Order on 24.12.2012 in Petition No. 160/GT/2012 in the remand proceedings allowing the tariff applicable from November 2010. However, Karnataka ESCOMs still continued to make payments at Rs. 3.127/kwh. Pertinently, the period under dispute wherein UPCL faced coal shortage was January, 2013 to March, 2013 after the Commission issued provisional tariff Order on 24.12.2012. Had PCKL complied with the said Order from January, 2013 onwards and paid the revised higher tariff determined by the Commission, the fund shortage for procurement of coal by UPCL would not have arisen. UPCL has also submitted that as per Regulation of 6.4 (19) of Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (Grid code), it is the responsibility of Load Despatch Centre to ask the Generator to demonstrate the Declared capacity. In the present case, no such procedure was followed by Karnataka SLDC.

100. The Commission observes that both UPCL and Karnataka ESCOMs had agreed to a provisional tariff of Rs. 3.127 per unit till tariff was determined by this Commission. After COD of the Unit I of the generating station on 11.11.2010, payment for supply of energy was made at the said rate by Karnataka ESCOMs to UPCL. However, UPCL filed the Tariff Petition No. 160/GT/2012 only on 14.12.2011 i.e. after more than year of the commercial operation of Unit I. The Commission issued the order for provisional tariff on 27.8.2011. Para 35 of the said order dated 27.8.2011 provided as under:

“*35. The provisional annual fixed charges allowed above is subject to adjustment as per proviso to Clause (3) of Regulation 5 of the 2009 Tariff Regulations.”*

As per proviso to Clause (3) of Regulation 5 of the 2009 Tariff Regulations, the difference in tariff shall be refunded to or recovered from the beneficiaries within six months with simple interest calculated as per the formula given thereunder. Therefore, Karnataka ESCOMs had six months’ time from the date of order of provisional tariff to make the payment of arrears, apart from paying the provisional tariff at the rate determined by the Commission on month to month basis. If the payment of arrears is delayed beyond a period of 60 days from the date of billing, late payment charge at the rate of 1.25% is payable in terms of Regulation 35 of Tarif Regulations, 2009. Thus, the Tariff Regulations provide for a mechanism for compensation of the generator for late payment of tariff by a beneficiary. In the present case, Karnataka ESCOMs challenged the order dated 27.8.2011 before the APTEL on the ground that the provisional tariff order dated 27.8.2012 was passed by the Commission without hearing the respondents. APTEL vide order dated 8.10.2012 set aside the order of the Commission and remanded the matter to the Commission to pass appropriate order in accordance with law after hearing all the parties concerned. The Commission after hearing the concerned parties determined the tariff vide order dated 24.12.2012. Para 50 of the order dated 24.12.2012 contained the following provisions:

“*50. The provisional annual fixed charges allowed above is subject to adjustment as per proviso to Clause (3) of Regulation 5 of the 2009 Tariff Regulations.”*

As already mentioned hereinabove, proviso to Clause (3) of Regulation 5 of the 2009 Tariff Regulations provides that the difference in tariff shall be refunded to or

recovered from the beneficiaries within six months with simple interest calculated as per the formula given thereunder. Further, UPCL is entitled for late payment charge at the rate of 1.25% per month in terms of Regulation 35 of Tarif Regulations, 2009, if the payment is delayed beyond a period of 60 days from the date of billing,

101. It is pertinent to mention that on appeal, APTEL vide its order dated 8.2.2013 modified the order of the Commission dated 24.12.2012 and directed ESCOMs to pay the tariff as determined by the Commission in respect of Unit I and Unit II with effect from 1.9.2012 till determination of final tariff in four equal instalments with first instalment to be paid on or before 28.2.2013. APTEL in its order dated 3.6.2014 in Appeals No. 122 of 2014 and 108 of 2014 has recorded about the compliance of its earlier directions as follows:

> "*We have been informed by the parties that the above interim order dated 8.2.2013 has been fully complied with and the Appellants have paid the provisional tariff of about Rs. 4.11 per unit w.e.f. 1.9.2012.*"

102. In the light of the provisions of the Tariff Regulations allowing time to the beneficiaries to make payment of provisional tariff and arears from the date of raising of bills, with interest and late payment surcharge, as applicable, and after taking into consideration the fact that UPCL was continuously being paid tariff at the rate of Rs.3.127 per unit till the payment of tariff as per the Commission's provisional tariff order dated 24.12.2012, we are not inclined to accept the submission of UPCL that delay in payment of provisional tariff denuded its ability to maintain sufficient coal stock which resulted in shutdown/shortfall of generation between 16.1.2013 and 30.3.2013. It is the responsibility of the generating station to maintain sufficient coal stock to generate and supply the

contracted capacity to its beneficiaries. If the Units of the generating station remained shut down due to its failure to maintain required of coal stock, it cannot be compensated in the form of deemed capacity charges. Thus, the prayer of UPCL on this account is rejected.

103. UPCL has further submitted that it sought pragmatic day ahead schedule from SLDC to optimize the generation during the period of fuel shortage in terms of Regulation 21 (4) of Tariff Regulation 2009. However, SLDC did not grant the pragmatic day ahead schedule in contravention of the provisions of the said regulations. KPTCL has submitted that Regulation 21(4) of the 2009 Tariff Regulations does not place any obligation on the SLDC to specify a pragmatic day-ahead schedule and the same is left to the option of the SLDC, depending on the facts and circumstances and prevailing grid situation. PCKL has submitted that SLDC refused to schedule power in such a manner on account of the fact that the State of Karnataka has hydro generating stations which would be used to meet the peak-load requirements. After the SLDC exercises its option not to schedule power in such a manner, it is not open to UPCL to consider declared capacity as per its proposed maximum peak-hour schedule.

104. Regulation 20(4) of Tariff Regulations, 2009 provides as under:

> *"(4) In case of fuel shortage in a thermal generating station, the generating company may propose to deliver a higher MW during peak-load hours by saving fuel during off-peak hours. The concerned Load Dispatch Centre may then specify a pragmatic day-ahead schedule for the generating station to optimally utilize its MW and energy capability, in consultation with the beneficiaries. DCi in such an event shall be taken to be equal to the maximum peak-hour ex-power plant MW schedule specified by the concerned Load Despatch Centre for that day"*

The above provision makes it clear that in case of fuel shortage, the generator was required to inform concerned RLDC/SLDC regarding fuel shortage, and also to give day ahead DC to SLDC. The generator may propose to deliver a higher MW during peak load hours by saving fuel during off-peak hours. The concerned RLDC/SLDC may then specify a pragmatic day-ahead schedule for the generating station to optimally utilize MW and energy capability in consultation with the beneficiaries. As per the language of the regulations, it is not mandatory for RLDC/SLDC to give day-ahead schedule as sought by a particular generator. RLDC/SLDC has to take into consideration all relevant factors including consultation with the beneficiaries before giving a pragmatic day ahead schedule. Since we have come to the conclusion in para 102 of this order that delay in payment of provisional tariff by Karnataka ESCOMs cannot be said to be the reason for UPCL's inability to maintain sufficient coal stock which resulted in shutdown/shortfall of generation between 16.1.2013 and 30.3.2013, the question whether Karnataka SLDC's denial of pragmatic day ahead schedule to UPCL during the said period is in accordance with Regulation 20(4) of Tariff Regulations, 2009 or not remains no more relevant. Accordingly, the issue is decided against UPCL.

Issue No.5: Whether UPCL is entitled to deemed capacity charges for the stipulated 8 time blocks from synchronization to reaching full load operation?

105. UPCL has submitted that its units were running as per the Declared Capacity before tripping of the transmission lines. Such tripping resulted in the tripping of the generating units and was outside UPCL's control and therefore, UPCL is entitled to deemed capacity charges during such periods of tripping. UPCL has relied upon OEM Manual which

prescribes for the time required for synchronizing a generating station in certain conditions as mentioned below:

(a) Hot Startup- 2 Hr 30 Mins - 10 time blocks
(b) Warm Startup – 4 Hours - 16 time blocks
(c) Cold Startup – 17 Hours - 68 time blocks

According to UPCL, the above time period given in OEM manual is only up to synchronization and after synchronization, as per OEM manual, loading rate (ramp-up rate) is 75 MW/15 min time block which would need 8 time blocks to achieve full capacity of the unit. UPCL has submitted that after re-synchronization, it is not possible for any generating station to start generation at the last declared capacity before tripping, within the time block provided for re-synchronisation. UPCL has further submitted that as a consequence of the tripping, the Units took time to be restored to the level at which they were operating at the time of tripping and in the absence of such concession, UPCL was not able to generate as per the declared capacity submitted to SLDC. UPCL in its letter dated 19.7.2010 to SLDC intimated the actual time required for synchronization under Hot, Warm and Cold Start-up and also the ramp up and ramp down rate to reach the declared capacity. Despite the above, SLDC calculated declared capacity as under:

(a) During re-synchronizing of Units after tripping, SLDC has allowed declared capacity of last block (block in which unit got tripped) only up to the next 10 time blocks during hot start-up and up to 16 time blocks during warm start-up. The said time allocation presently allowed by SLDC is only sufficient to synchronize the unit and it requires another 8 time blocks to ramp up the generation to full load.

(b) During the time blocks of hot start-up and warm start-up, SLDC has considered the actual generation as declared capacity for that block instead of declared capacity given by UPCL.

106. UPCL has submitted that SLDC reduced the declared capacity of UPCL's generating station for certain blocks on certain days during the period from 11.3.2010 and 31.3.2013, considering that the actual generation from the Units was less than declared capacity. Further, during the aforesaid period, SLDC itself gave backdown instructions to UPCL to reduce the load considering State demand which is evident from the SLDC/KPTCL's Reply dated 26.5.2020. UPCL has submitted that the time blocks allowed by SLDC for re-synchronisation are not enough to ramp up the generation to full load. UPCL has submitted that as specified in the OEM Manual, eight (8) time blocks are required to ramp up to the full capacity. UPCL has further submitted that the ESCOMs and KPTCL ought to follow prudent practices while accounting time-blocks for tripping of generators as the time block considered by SLDC is not enough to ramp up generation upto declared capacity by any generating unit. UPCL has claimed a relief of Rs.1.45 crores under this head.

107. PCKL/Karnataka ESCOMs have submitted that each time the transmission line tripped, for the time duration where the line remains unserviceable, the last declared capacity immediately before the tripping of the line was considered. Further, UPCL has been provided with sufficient time to ramp up its generation in line with the parameters stipulated by the original equipment manufacturer of the boiler turbine generator. PCKL has submitted that UPCL has not submitted any regulatory or contractual provision which entitles it to additional ten time blocks and hence its claim deserves outright rejection.

PCKL has suggested that if UPCL is facing any loss on account of insufficiency/inaccuracy in OEM specified parameters, it should raise the issue with its EPC contractor.

108. We have considered the submissions of the Petitioner and the Respondents. From the above submissions, it is observed that the units were running normally before tripping of the transmission lines and then the tripping of transmission line led to the tripping of the units which was outside the control of UPCL. In order to address such eventuality, Para 3.3 of Annexure 3 of the PPA provides as under:

"*3.3 Load Changes at Power*

The Facility's capability for changing load will not be less than 5 MW per minute for each Unit during normal operation, with a higher ramp rate for emergencies."

Thus, the parties have agreed in the PPA to have a ramp rate of 5 MW per minute under normal operation. UPCL vide Annexure P-3 to its affidavit dated 15.8.2020 has placed letter dated 19.7.2010 enclosing therewith the Planning Data Requirements of the generating station. Operational Parameters of the Units of the generating station have been stated as under:

D.	Operational Parameters	
	Min. notice required for synchronizing a Generating Unit from De-synchronisation	As stated in item 4 below
	2. Minimum time between synchronizing different generating units in a power station	Not Applicable

	3. The minimum block load requirements on synchronizing	60 MW
	4. Time required for synchronizing a generating unit for the following conditions:	
	(a) Hot	**2 hrs 30 minutes**
	(b) Warm	**4 hrs**
	(c) cold	**17 hrs**
	5. Maximum generating unit loading rate for the following conditions:	
	(a) Hot	**5 MW/min**
	(b) Warm	**do**
	(c) Cold	**do**
	6. Minimum load without oil support	50%

109. It is observed from the above table that OEM manual provides for separate time requirement for (i) synchronization of generating units for hot, warm and cold start-up conditions; and (ii) maximum generating unit loading rate, after synchronization, as 5 MW/min in all conditions. There is no dispute between the parties with regard to the time blocks required for re-synchronization after the tripping of the generating station following the tripping of the transmission line. However, from the level of re-synchronisation, the generating unit requires ramp up time of 5 MW/min. Therefore, in a time block of 15 minutes, only 75 MW can be loaded after re-synchronization and it will take a maximum of 8 time blocks to reach the level of 600 MW capacity of each unit. The Commission is of the view that after re-synchronization of a unit, the generation of 75 MW during the first

time block is equivalent to maximum generation ex-bus possible by the generating unit. Similarly, in the second time block, stepping up the generation by 75 MW to 150 MW is equivalent to the maximum generation ex-bus possible by the generating unit and so on. Therefore, Petitioner shall be entitled to the computation of DC on pro-rata basis of last declared capacity with steps of 75 MW for 15 minutes time block, subject to maximum of last declared capacity when the tripping took place. For example, the last declared capacity of a unit was 300 MW when the unit tripped. After synchronization, the unit shall be entitled for deemed capacity charges for one hour i.e. four time blocks to reach the last declared capacity of 300 MW before tripping. Accordingly, PCKL is directed to settle the deemed capacity charges on account of tripping of the transmission line in terms of the principle as decided in this order.

Financial Impact of the dispute pertaining to Capacity Charge

110. UPCL has claimed Rs.131.98 crore as compensation on account of disputed capacity charge which includes claims regarding non-availability of 400 kV transmission line before the CoD of Unit II, after the CoD of Unit II, deemed availability on account of shortage of coal, tripping of transmission line and on account of difference in the formula for calculation of capacity charge. In this order, we have allowed deemed capacity charge on account of non-availability of 400 kV transmission line before the CoD of Unit II and after the CoD of Unit II after excluding the period of shutdown of the plant due to technical reasons. UPCL has submitted that it has not claimed deemed capacity charge for the shutdown period. We have allowed the deemed capacity charge claimed subject to verification of the period of shut down. We have allowed the claims for capacity charge on account of tripping of transmission line. However, we have not allowed deemed

capacity charge on account of purported shortage of coal. According to PCKL, since the plant availability factor achieved during the relevant financial years was less than 70%, AFC has been calculated by using the formula prescribed in the proviso to Regulation 21(2)(a) of Tariff Regulations 2009. UPCL on the other hand has submitted that after taking into account the deemed availability as claimed, the plant availability factor is more than 70% and accordingly, UPCL has claimed the capacity charge for the year as per Regulation 21(2)(a) of the Tariff Regulations, 2009. The difference on account of calculation as per Regulation 21(2)(a) and proviso to Regulation 21(2)(a) has been claimed as Rs.25.57 crore. Regulation 21(2)(a) of Tariff Regulations, 2009 alongwith its proviso is extracted as under:

> *'(a) Generating stations in commercial operation for less than ten (10) years on 1st April of the Financial Year:*
>
> *AFC x (NDM/NDY) x (o.5+ 0.5 x PAFM/ NAPAF) (in Rupees).*
>
> *Provided that in case the plant availability factor achieved during a financial year (PAFY) is less than 70%, the total capacity charge for the year shall be restricted to:*
>
> *AFC x (0.5 + 35/NAPAF) x (PAFY/70) (in Rupees).*

Plant Availability Factor (PAF) has been defined in the Tariff Regulations, 2009 as under:

> *"(30) 'Plant availability factor (PAF)' in relation to a generating station for any period means the average of daily decared capacities (DCs) for all the days during that period expressed as a percentage of the installed capacity in MW reduced by the normative auxiliary energy consumption."*

Thus, the determining factor as to calculation of annual fixed charge is whether the annual plant availability factor is more than 70% or not. If it is more than 70% per annum, the fixed charges will be calculated as per Regulation 21(2)(a) of Tariff Regulations, 2009

instead of the proviso under the said regulation and the difference between the two shall be admissible to UPCL.

111. In the light of the above discussion, the disputed capacity charge claimed by UPCL is allowed as under:

(a) Deemed capacity charges for Unit I for the period 10.3.2011 to 18.8.2012 and for Unit I and II for the period 19.8.2012 to 6.9.2012 on account of non-availability of 400 kV transmission line except for the period of shut down on account of fault in the power plant;

(b) Deemed capacity charges on account of tripping of the generating station due to tripping of the transmission line by allowing time @ 75 MW/15 minutes from the time of resynchronization till the unit(s) achieved the declared capacity when the tripping took place;

(c) PCKL has calculated the capacity charge in terms of proviso under Regulation 21(2)(a) of Tariff Regulations, 2009 considering the annual availability as less than 70%. If the annual availability factor is above 70% after considering the relief as granted in sub-paras (a) and (b) above, the capacity charges shall be calculated in terms of Regulation 21(2)(a) of Tariff Regulations, 2009. The difference due to calculation of availability under both methods as mentioned above shall be admissible to UPCL if its annual availability factor exceeds 70%.

Issue No. 6: Whether UPCL is entitled to recover actual landed cost of coal procured from spot-market?

112. The dispute between UPCL and ESCOMs regarding computation of energy charges is primarily *qua* disallowance of actual landed coal cost incurred by UPCL towards spot procurement of coal.

113. UPCL has submitted the following with regard to spot procurement of coal:

(a) UPCL had entered into long-term contracts for the supply of coal with (i) Adaro for 1.2 MTPA, (ii) Banpu for 0.5 MTPA and (iii) Glencore for 0.5 MTPA. However, as per directions issued by PCKL dated 26.9.2013, UPCL terminated the long-term coal contracts with Adaro and Banpu. In the absence of long-term agreements for procurement of coal, UPCL was compelled to resort to spot procurement of coal in order to meet its obligations under the PPA for supply of power to ESCOMs.

(b) UPCL also invited bids for the long-term procurement of coal on eight (8) occasions between 2009 and 2014 in order to remedy the shortage of coal. However, the bidding process failed to culminate in the execution of long-term coal contracts. The bidding process for long-term procurement usually takes around 2 to 3 months. However, due to delay in approval process of PCKL, the 9th Bidding process started by UPCL in 2015 was extended beyond 3 years without any conclusion.

(c) In light of coal shortage being faced by UPCL, PCKL granted its approval to the procurement of coal by way of spot shipments at market prices, on the condition that procurement was to be in line with applicable HBA indices for the month of

purchase and the freight must not exceed $10 per MT. However, the prevalent market conditions were not conducive to the procurement of coal at HBA linked prices with restricted freight charges, making it impossible for UPCL to procure coal through spot shipments in line with the conditions imposed by PCKL.

(d) Thereafter, in PCKL's 46th Board of Directors' meeting held on 15.2.2017, it was resolved that spot procurement of coal by UPCL till March 2016 would be allowed on the condition of self-certification by UPCL. UPCL was required to certify that 'CIF prices for Spot coal procurement till March, 2016 were not more than weighted average price of coal as per terms of long term coal supply contracts with M/s. Banpu, M/s. PT Adaro & M/s. Glencore, which were in force till March, 2016'. Accordingly, UPCL submitted requisite certificate to PCKL by letter dated 9.10.2017. Admittedly, the Karnataka ESCOMs benefitted from savings amounting to Rs. 72.06 Crores during the period from November 2010 to March 2016 on account of UPCL's spot procurement of coal as opposed to procurement of coal by way of long-term contracts.

(e) Subsequently, vide letter dated 18.1.2019, almost 2 years after 46th Board Meeting decision, PCKL informed UPCL that the decision taken in PCKL's 46th Board of Directors' meeting allowing the spot procurement of coal would continue to be applicable from FY 2016-17 onwards along with the following modifications:

(i) Each coal shipment would be treated separately for the purpose of CIF cost comparison instead of collective/cumulative computation as was previously decided.

(ii) Dead freight as prescribed under terms and conditions of the Glencore Contract would not be considered for the computation of comparable pricing of coal between spot procurement and long-term contracts.

(f) PCKL's subsequent disallowance of the dead freight component as prescribed under the terms and conditions of Glencore contract for the determination of CIF cost is contrary to the directions of the PCKL Board of Directors. PCKL having allowed the same is estopped from varying the conditions and assurances based on which UPCL procured coal. Further, the method allowing coal cost of $CIF_{spot} \leq CIF_{\text{weighed average price of long-term contract,}}$ as approved in PCKL's 46th Board Meeting was premised on the legitimate expectation that the long-term contract for procurement of coal would be finalised and executed in the following two months. Hence, varying the decision of the 46th Board of Directors' meeting to disallow the collective computation of CIF costs and the dead freight component under the Glencore contract is not correct. UPCL has submitted that as per the settled principle of law, a contracting party ought not to approbate and reprobate.

(g) The decision to vary the conditions allowing the spot procurement of coal by UPCL created a situation where the gains of the spot procurement are retained by the Karnataka ESCOMs (72.06 Cr.), whereas the losses are passed solely onto UPCL. The Respondents have withheld part payments towards the actual landed coal cost incurred by UPCL while procuring coal through spot market on frivolous grounds. Such actions of PCKL will set a precedent in violation of the vested rights of parties like UPCL.

(h) Regulation 21 of the CERC Tariff Regulations, 2009 and Regulation 30 of the CERC Tariff Regulations, 2014 mandate the consideration of actual landed cost of coal without any exceptions and/or disallowance as part of energy charge calculation. Any disallowance in the landed cost of coal would result in a reduction of the Return on Equity of the generator, which is contrary to the letter and spirit of Tariff Regulations of the Commission.

(i) Article 4.4 of the PPA provides for the formula for Energy Charge calculation and states that price of primary fuel shall be computed on the basis of weighted average of delivered cost of primary fuel as detailed in Article 4.7. Article 4.7 specifies that the cost of primary fuel shall be the aggregate cost associated with purchasing and delivering fuel to the plant boundary and transporting it to the plant site**.** Therefore, reference was drawn to *Nabha Power Ltd.* vs. *PSPCL*, [(2018) 11 SCC 508], wherein the Hon'ble Supreme Court while interpreting the energy charge formula of Nabha Power's PPA clearly held in the context of said PPA that the actual cost of coal would be weighted average cost of purchasing coal, transporting it to the plant and unloading the coal at the site. Present PPA also clearly defines the components that shall comprise actual cost of primary fuel (i.e., coal) and therefore, the energy charges of UPCL must comprise the actual landed cost of purchasing such coal, delivery of coal to the plant boundary and then transporting it to the plant site.

114. In response, PCKL has refuted the claims of UPCL and submitted as under:

(a) Initially, UPCL was seeking approval of PCKL for spot procurement of coal, which would be approved by PCKL subject to a ceiling on the price payable for the

shipment. All along such approval of price of spot shipments was done on a shipment-to-shipment basis. Letter dated 16.11.2015 relied upon by UPCL itself clearly seeks approval to UPCL's proposal of procurement of spot coal at CIF prices not exceeding those provided under long term contracts, thereby indicating that it was not seeking cumulative comparison.

(b) UPCL also highlighted the same during meetings of the Commercial Committee dated 29.12.2015 and 11.2.2016. During 46th Board of Directors meeting of PCKL, it was decided that the CIF price of the long-term contracts shall be compared with the spot shipment and no modification was proposed to this. Therefore, it was decided that the cost incurred for spot procurement of a shipment of coal would be allowed so far as it does not exceed the price of such coal as per the terms of the long-term coal supply agreements which were in force. The Board Resolution contemplated comparison of individual shipments procured on spot basis with the price of such shipment as per the terms of the long term coal supply agreements.

(c) Based on UPCL's requests, PCKL/ESCOMs agreed for a comparison of cost of coal being procured under spot shipments to CIF price as per terms of fuel supply agreements on a shipment-to-shipment basis. The comparison has to be made individually for each shipment of coal received on spot basis since each shipment has different characteristics in terms of GCV, moisture content, ash content, Sulphur content etc. Further, comparison on individual shipment basis is required to determine the landed cost of fuel at the time the shipment arrives, which is in turn used to determine the energy charge. Decisions regarding to scheduling of UPCL's power need to be taken based on the energy charges.

(d) The merit order dispatch has to be followed and comparison on a cumulative basis would distort the procedure of the merit order. Further, following a cumulative method of comparison, the exact liability in the month would be unknown. The cost pertaining to the previous year cannot be passed on in the tariff to the consumers. Furthermore, there would be uncertainty in this approach regarding the period for which cost has to be cumulatively considered.

(e) The request of UPCL to consider the dead freight component of long term contract for comparison with spot procurement price of coal cannot be considered for the following reasons:

i. Draft level shall not be always less than 14.10 meters at discharge port.
ii. Vessel used for procurement of coal through spot having a handling capacity of 70000 to 90000 MTs.
iii. The Dead freight claimed by Glencore for procurement of coal under long term contracts from 2010 to 2018 (March 18) is for only 27 shipment out of 44 shipment received till March 2018.
iv. The dead freight payment is depending on the draft level existing before loading of the coal from the port.
v. Draft level differs from ship to ship basis and shall not be same as two shipments cannot reach at the same time.

(f) UPCL's reliance on the judgement of Nabha Power Limited Vs. PSPCL [(2018) 11 SCC 508] is misplaced as the said case was decided on its peculiar facts and does not lay down any principle of law and is completely distinguishable from the facts and circumstances of the present case.

(g) There was an agreed methodology for considering cost of spot shipments which UPCL seeks to defeat in order to facilitate procurement of spot shipments of coal at a high cost from group entities.

115. With respect to comparison of CIF cost on spot purchase, PCKL has submitted that there are other coal parameters such as GCV, ash, moisture, Sulphur content which vary from coal to coal and need to be considered while procuring coal. UPCL has submitted that the price in spot market depends on various factors such as demand, supply etc. UPCL has submitted that long term price of Glencore was based on GCNC (Global Coal New Castle) index till December, 2015. However, from January, 2016, it was changed to JPU (Japanese Power Utilities) index. GCNC index is market linked whereas JPU index will remain fixed for a year. Therefore, till December 2015, the spot procurement price and long term price were more or less same and ESCOMs got the benefit of Rs. 72 Crs. by procuring coal in spot market till March, 2016. UPCL has further submitted that from January 2016 onwards, prices of coal have increased due to which the spot procurement prices have increased. Further, JPU price was lower and fixed for the whole year based on coal supply agreement. Thus, PCKL cannot unilaterally adopt the methodology to compare the cost of spot vessel with long term vessels and deny the legitimate cost incurred by UPCL. As an example, UPCL has submitted that UPCL has procured one shipment from Glencore (long term coal supplier) in March, 2022 at a FOB price of $ 107.85/MT whereas in the spot market, coal prices are in the range of $ 288/MT.

116. We have given our careful consideration to the submissions of the parties. The generating station of UPCL being in the nature of ISGS and the parties to the PPA having agreed that its tariff would be determined through the Regulated Tariff Mechanism, the

tariff of the generating station is determined by the Tariff Regulations of the Commission issued from time to time. Since the period of dispute on account of spot procurement of coal and other related issues pertain to the period from November 2010 to March 2019, the applicable regulations are Tariff Regulations, 2009 and 2014. Clauses (5) to (8) of Regulation 21 of Tariff Regulations, 2009 deals with the determination and payment of energy charge as under:

"(5) The energy charge shall cover the primary fuel cost and limestone consumption cost (where applicable),and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the calendar month on ex-power plant basis, at the energy charge rate of the month (with fuel and limestone price adjustment). Total Energy charge payable to the generating company for a month shall be:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the month in kWh.}

(6) Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to three decimal places in accordance with the following formulae :

(a) For coal based and lignite fired stations

$$ECR = \{ (GHR - SFC \times CVSF) \times LPPF / CVPF + LC \times LPL \} \times 100 / (100 - AUX)$$

(b) For gas and liquid fuel based stations

$$ECR = GHR \times LPPF \times 100 / \{CVPF \times (100 - AUX) \}$$

Where,

AUX = Normative auxiliary energy consumption in percentage.

CVPF = Gross calorific value of primary fuel as fired, in kCal per kg, per litre or per standard cubic metre, as applicable.

CVSF = Calorific value of secondary fuel, in kCal per ml.

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR = Gross station heat rate, in kCal per kWh.

LC = Normative limestone consumption in kg per kWh.

LPL = Weighted average landed price of limestone in Rupees per kg.

LPPF = Weighted average landed price of primary fuel, in Rupees per kg, per litre or per standard cubic metre, as applicable, during the month.

SFC = Specific fuel oil consumption, in ml per kWh.

"Provided that generating company shall provide to the beneficiaries of the generating station the details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, lignite, natural gas, RLNG, liquid fuel etc., as per the form 15 of the Part-I of Appendix I to these regulations:

Provided further that the details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal and the weighted average GCV of the fuels as received shall also be provided separately, along with the bills of the respective month:

Provided further that copies of the bills and details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, lignite, natural gas, RLNG, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the generating company. The details should be available on its website on monthly basis for a period of three months.

(7) The landed cost of fuel for the month shall include price of fuel corresponding to the grade and quality of fuel inclusive of royalty, taxes and duties as applicable, transportation cost by rail / road or any other means, and, for the purpose of computation of energy charge, and in case of coal/lignite shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal or lignite dispatched by the coal or lignite supply company during the month as given below :

Pithead generating stations : 0.2%

Non-pithead generating stations : 0.8%

(8) The landed price of limestone shall be taken based on procurement price of limestone for the generating station, inclusive of royalty, taxes and duties as applicable and transportation cost for the month."

Clauses (5) to (11) of Regulation 30 of the Tariff Regulations, 2014 deal with the determination and payment of energy charges which are extracted as under:

"(5) The energy charge shall cover the primary and secondary fuel cost and limestone consumption cost (where applicable), and shall be payable by every beneficiary for the total energy scheduled to be supplied to such beneficiary during the calendar month on ex-power plant basis, at the energy charge rate of the month (with fuel and limestone price adjustment). Total Energy charge payable to the generating company for a month shall be:

(Energy charge rate in Rs./kWh) x {Scheduled energy (ex-bus) for the month in kWh.}

(6) Energy charge rate (ECR) in Rupees per kWh on ex-power plant basis shall be determined to three decimal places in accordance with the following formulae:

(a) For coal based and lignite fired stations

$$ECR = \{(GHR - SFC \times CVSF) \times LPPF / CVPF + SFC \times LPSFi + LC \times LPL\} \times 100 / (100 - AUX)$$

(b) For gas and liquid fuel based stations

$$ECR = GHR \times LPPF \times 100 / \{CVPF \times (100 - AUX)\}$$

Where,

AUX =Normative auxiliary energy consumption in percentage.

CVPF=(a) Weighted Average Gross calorific value of coal as received, in kCal per kg for coal based stations

(b) Weighted Average Gross calorific value of primary fuel as received, in kCal per kg, per litre or per standard cubic meter, as applicable for lignite, gas and liquid fuel based stations.

(c) In case of blending of fuel from different sources, the weighted average Gross calorific value of primary fuel shall be arrived in proportion to blending ratio.

CVSF =Calorific value of secondary fuel, in kCal per ml.

ECR = Energy charge rate, in Rupees per kWh sent out.

GHR =Gross station heat rate, in kCal per kWh.

LC = Normative limestone consumption in kg per kWh.

LPL = Weighted average landed price of limestone in Rupees per kg.

LPPF =Weighted average landed price of primary fuel, in Rupees per kg, per litre or per standard cubic metre, as applicable, during the month. (In case of blending of fuel from different sources, the weighted average landed price of primary fuel shall be arrived in proportion to blending ratio)

SFC = Normative Specific fuel oil consumption, in ml per kWh.

LPSFi=Weighted Average Landed Price of Secondary Fuel in Rs./ml during the month

Provided that energy charge rate for a gas/liquid fuel based station shall be adjusted for open cycle operation based on certification of Member Secretary of respective Regional Power Committee for the open cycle operation during the month.

(7) The generating company shall provide to the beneficiaries of the generating station the details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-

auction coal, lignite, natural gas, RLNG, liquid fuel etc., as per the forms prescribed at Annexure-I to these regulations:

Provided that the details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal and the weighted average GCV of the fuels as received shall also be provided separately, along with the bills of the respective month:

Provided further that copies of the bills and details of parameters of GCV and price of fuel i.e. domestic coal, imported coal, e-auction coal, lignite, natural gas, RLNG, liquid fuel etc., details of blending ratio of the imported coal with domestic coal, proportion of e-auction coal shall also be displayed on the website of the generating company. The details should be available on its website on monthly basis for a period of three months.

(8) The landed cost of fuel for the month shall include price of fuel corresponding to the grade and quality of fuel inclusive of royalty, taxes and duties as applicable, transportation cost by rail / road or any other means, and, for the purpose of computation of energy charge, and in case of coal/lignite shall be arrived at after considering normative transit and handling losses as percentage of the quantity of coal or lignite dispatched by the coal or lignite supply company during the month as given below:

Pithead generating stations : 0.2%

Non-pithead generating stations : 0.8%

Provided that in case of pit head stations if coal or lignite is procured from sources other than the pit head mines which is transported to the station through rail, transit loss of 0.8% shall be applicable:

Provided further that in case of imported coal, the transit and handling losses shall be 0.2%.

(9) The landed price of limestone shall be taken based on procurement price of limestone for the generating station, inclusive of royalty, taxes and duties as applicable and transportation cost.

(10) In case of part or full use of alternative source of fuel supply by coal based thermal generating stations other than as agreed by the generating company and beneficiaries in their power purchase agreement for supply of contracted power on account of shortage of fuel or optimization of economical operation through blending, the use of alternative source of fuel supply shall be permitted to generating station:

Provided that in such case, prior permission from beneficiaries shall not be a precondition, unless otherwise agreed specifically in the power purchase agreement: Provided further that the weighted average price of use of alternative source of fuel shall not exceed 30% of base price of fuel computed as per clause (11) of this regulation:

Provided also that where the energy charge rate based on weighted average price of use of fuel including alternative source of fuel exceeds 30% of base energy charge rate as approved by the Commission for that year or energy charge rate based on

weighted average price of use of fuel including alternative sources of fuel exceeds 20% of energy charge rate based on based on weighted average fuel price for the previous month, whichever is lower shall be considered and in that event, prior consultation with beneficiary shall be made not later than three days in advance

(11) The Commission through the specific tariff orders to be issued for each generating station shall approve the energy charge rate at the start of the tariff period. The energy charge so approved shall be the base energy charge rate at the start of the tariff period. The base energy charge rate for subsequent years shall be the energy charge computed after escalating the base energy charge rate approved at the start of the tariff period by escalation rates for payment purposes as notified by the Commission from time to time for under competitive bidding guidelines."

117. The statutory framework is that Energy Charge shall be calculated by the generating station as per the formula given in Clauses (5) and (6a) of Regulation 21 of Tariff Regulations, 2009 and Clauses (5) and (6a) of Regulation 30 of Tariff Regulations, 2014. "LPPF" has been defined as the "Weighted average landed price of primary fuel" during the month. The Regulations further provide that the landed cost of fuel for the month shall include price of fuel corresponding to the grade and quality of fuel inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means and after considering the normative transit and handling losses. It is pertinent to mention that the Tariff Regulations do not provide for any particular process to be followed or source of procurement of coal. It is the sole prerogative of the generating company to arrange coal for generation and supply of electricity to the Procurers. The generating companies are utilizing linkage coal from Coal India/subsidiaries or through e-auction coal or through import. Usually there is no dispute regarding price of linkage coal or e-auction coal. In case of import of coal, the generating companies resort to procurement through long term contract or through spot purchase. While the long-term contract is usually on the basis of competitive bidding, spot procurement by its very nature is done from the market at the prevailing rates.

118. The generating station of UPCL is based on imported coal only. UPCL and PCKL have agreed to a mechanism for procurement of coal in the PPA. Clause 4.7 of the PPA provides for the cost of primary and secondary fuel as under:

> *"4.7 Cost of Primary fuel and Secondary fuel*
>
> *(a) The cost of primary fuel shall be the aggregate cost associated with purchasing and delivering fuel to the Plant Boundary (captive jetty) and transporting it to the Plant site at Nandikur. This cost will include the cost of the commodity, forex adjustment, royalty, Taxes, unloading/loading, transportation charges by rail, port charges, insurance, for the reliable supply of the fuel.*
>
> *(b) The cost of secondary fuel shall be the aggregate cost associated with purchasing and delivering fuel to the Plant site at Nandikur. This cost will include the cost of the commodity and transportation charges by road, for the reliable supply of fuel.*
>
> *(c) The Seller shall use all reasonable efforts at all times during the Term to acquire the Primary and Secondary Fuel on commercially competitive terms consistent with the market conditions.*
>
> *(d) The Seller shall obtain the approval/consent of the Principal Buyers at each stage of procurement/purchase, transportation/shipment, and insurance of Primary and Secondary Fuel (including procurement strategy viz., stipulation of tender condition, tender enquiry, tender receipt and opening, tender evaluation and signing of fuel supply contracts (including related transportation, port and insurance services) required for the operation of the Facility and generation of Electricity. The terms and conditions for procurement of coal shall be mutually discussed and finalised by the Principal Buyers and Seller."*

119. As per the above provisions of the PPA, UPCL is required to make all reasonable efforts during the term of the PPA to acquire primary and secondary fuel at commercially competitive terms consistent with market conditions and is further required to obtain the approval/consent of the Principal Buyer at each stage of procurement/purchase, transportation/shipment and insurance of primary and secondary fuel. UPCL is also required to obtain the approval/consent of Principal Buyer with regard to procurement

strategy such as stipulation of tender condition, tender enquiry, tender receipt and opening, tender evaluation and signing of fuel supply contracts (including related transportation, port and insurance services). In other words, the Principal Buyer exercises pervasive control in the matter of procurement of primary/secondary fuel by UPCL for generation and supply of electricity in terms of the PPA. Thus, since the parties have agreed to a particular process for procurement of coal and secondary fuel and in the absence of any provision in the Tariff Regulations with regard to the process of procurement, the procurement process of primary and secondary fuel will be as per the provisions of the PPA or as may be mutually agreed by the parties which will form the basis of landed coat of coal or secondary fuel whereas the determination of energy charge shall be as per the provisions of the Tariff Regulations.

120. The annual coal requirement of UPCL's power plant is 3.635 MTPA. UPCL had entered into long term contracts for supply of coal with (i) Adaro for 1.2 MTPA, (ii) Banpu for 0.5 MTPA and (iii) Glencore for 0.5 MTPA. Thus, the cumulative coal quantity available under the aforesaid FSAs is 2.2 MTPA. In order to meet the resultant shortage of coal, UPCL invited bids on eight occasions between 2009 and 2014 but the bids did not culminate in the execution of long-term fuel supply agreement. Due to non-finalisation of tender documents for balance quantity of coal, UPCL was procuring coal from the spot market after taking consent from PCKL. PCKL vide its letter dated 26.9.2013 requested UPCL to terminate the long-term fuel supply agreements in terms of Government of Karnataka order dated 1.9.2012. The relevant para is extracted as under:

> *"Under the above circumstances and as assured by Chairperson, Lanco Group and in accordance with GoK directions issued vide order dated 1.9.2012, it is requested to terminate the existing/concluded Fuel Supply Agreements including*

their amendments entered into by UPCL with M/s PT Indomino Mandiri, M/s PT Adaro & M/s Glencore by December 2014 without any financial/legal implications on ESCOMs and invite fresh bids from January 2015 for the entire quantum of 3.635 MTPA of coal."

121. UPCL terminated two of its FSAs with Adaro and Banpu pursuant to the above directions of PCKL and resorted to spot procurement of coal in order to meet its obligations under the PPA. PCKL accorded approval for spot purchase subject to the conditions that (a) procurement was to be in line with the applicable HBA indices for the month of purchase; and (b) the freight must not exceed USD 10 per tonne. Subsequently, PCKL communicated various approvals for spot procurement of coal between 2013 and 2015. Since UPCL was facing difficulties in procurement of coal on spot basis at a price linked to HBA index of Indonesia, it requested for reconsideration of the decision regarding the price of spot procurement of coal. UPCL in its letter dated 19.6.2015 requested PCKL as under:

"*We endeavour to procure coal at best competitive negotiated rates and we hereby request PCKL to approve procurement of spot coal till long term contract for additional quantity is finalised at applicable HPB indices and final CIF value not exceeding CIF values under existing long term contract."*

Further, UPCL in its letter dated 18.9.2015 reiterated its request to use the price under the long term coal procurement agreement to be used as price cap/ceiling for spot procurement. Relevant part of the communication is extracted as under:

"UPCL has therefore requested PCKL time and again that evaluation of spot procurement of coal should be done considering the coal cost had the coal been procured under the existing long term contracts and prices payable under long term contracts should be the cap for spot procurement."

122. In the Commercial Committee meetings held on 29.12.2015 and 11.2.2016, it was decided to bring the issue before the Board of PCKL for consideration of the claim of UPCL. A meeting of MD, Adani Power and other officials with Additional Chief Secretary (Energy), Government of Karnataka took place on 12.8.2016 in which the following were recorded in the minutes:

> *"Considering that the procurement of spot shipment is done on CIF basis and in the absence of break up of CIF prices, ACS(Energy) after discussion with ACS (Finance), decided that based on a suitable self-certification by UPCL that CIF price is lower than long term contracted landed cost of coal (as per requirement of GOK), the price of coal on CIF basis will be allowed".*

123. The matter was subsequently placed before the Board of PCKL in its 46th meeting held on 15.2.2017 wherein it was decided as under:

> "*It was decided that the cost of spot procurement of coal till March 2016 shall be allowed on a self-certification by UPCL subject to the condition that CIF prices so considered for payment shall not be more than the weighted average price of coal as per the terms of the long term coal supply agreements which were in force till March 2016 i.e. with Adaro, Indomino and Glencore."*

124. In response to the above mentioned Board Resolution, UPCL vide is letter dated 9.10.2017 (Annexure P-55 of the Petition) confirmed the following:

> "*We certify that the CIF prices considered for payment by UPCL for spot shipments till March 2016 are not more than weighted average price of coal as per terms of long term coal supply agreements which were in force till March 2016, i.e. with Adaro, Indominco and Glencore and CA certificate dated 13.7.2017 certifying the same is attached as Annexure-1"*

Annexure 1 to the CA Certificate dated 13.7.2017 lists 69 shipments of coal for the period between November 2010 till March 2016 for 5044048 MT of coal. The average CIF price of coal of 69 shipment has been worked out as USD 72.71/MT which has been compared

with the average CIF price of USD 74.95/MT of coal from M/s Banpu, M/s Glencore and M/s Adaro. Based on the calculation, savings to the ESCOMs have been calculated as under:

Quantity (MT)	5044048
Weighted Average of CIF of Supplier (USD)	72.71
Weighted Average of Long Term Contract (USD)	74.98
Savings to ESCOMs per metric tonne (USD)	2.97
Weighted Average Exchange Rate (INR)	62.83
Total savings to ESCOM (Rs. Crore)	72.06

125. Subsequently, UPCL vide its letter dated 21.6.2018 took up the matter with PCKL with regard to the methodology to be adopted for determination of coal cost for the FY 2016-17 till 2017-18 (till 30.6.2018). The said letter is extracted as under:

> "*UPCL is presently getting coal supply only from M/s Glencore under Long Term Coal Supply Contract and entire balance requirement is being arranged by procuring from the spot market.*
>
> *As per the 46th PCKL board meeting minutes of meeting, cost of spot shipments till March 2016 were approved based on the resolution of the said minutes of the meeting:*
>
> > *It was decided that the cost of spot procurement of coal till March 2016 shall be allowed on a self-certification by UPCL subject to the condition that CIF prices considered for payment by UPCL for spot shipments is not more than the weightage average price of coal as per terms of long term coal supply agreements which were in force till March 2016 i.e., with Adaro, Indominco and Glencore."*
>
> *It is brought to your kind notice that the spot procurement is market based mechanism in which prices vary depending on demand and supply of particular grade of quality. So, depending on the market conditions, sometimes a premium has to be paid if demand exceeds supply and vice versa. The intent of the above board resolution was to allow prudent cost of coal incurred by UPCL as per CERC Regulations, which provides for allowance of Landed cost of coal, without any disallowance. It is submitted that the interpretation of above Board resolution is that CIF prices for all shipments under consideration has to be considered on a cumulative basis and not on individual shipment basis.*

In view of the above, it is requested that CIF prices of spot shipments for the relevant period i.e. FY 2016-17 till FY 2018-19 (30th June 2018) should be compared against the equivalent CIF price as per the methodology set out in the New Long-Term Contract being entered into with supplier for 3 MMTPA and such comparison needs to be done on cumulative basis for period November 2010 to FY 2018-19 (30th June 2018), for all spot shipments procured by UPCL considered together."

126. PCKL vide its letter dated 16.11.2018 intimated UPCL regarding the methodology for spot procurement of coal for the period 1.4.2016 to 31.3.2017 and onwards as under:

"*The subject regarding applicability of methodology for spot procurement of coal from 1.4.2016 and onwards was placed before the 53rd PCKL Board of Directors meeting held on 25.8.2018, wherein it is resolved that method of calculation adopted till March 2016 as decided in the 46th Board of Directors meeting held on 15.02.2017 shall be continued for the spot purchase of coal made by UPCL for the year 2016-17 and onwards."*

127. UPCL has submitted that as per the decision in the 53rd meeting of PCKL's Board held on 25.8.2018, the earlier decision taken in PCKL's 46th Board Meeting allowing the spot procurement of coal applicable from FY 2016-17 onwards was modified as under:

(a) Each shipment would be treated separately for the purpose of CIF cost comparison instead of collective/cumulative computation as was previously decided.

(b) Dead freight as prescribed under terms and conditions of Glencore Contract would not be considered for the computation of comparable pricing of coal between spot procurement and long-term contracts.

According to UPCL, on account of these two conditions, UPCL would suffer a loss of Rs.336 crore incurred on the spot procurement of coal.

128. The above contention of UPCL was considered by PCKL in its 55th Board Meeting held on 28.12.2018 and communicated to UPCL vide letter dated 18.1.2019 as under: "Comparison on CIF cost on spot purchases: The request of UPCL to consider the comparison of CIF cost on spot purchases with long term contract on cumulative basis from November 2010 to November 2018 cannot be accepted for the following reasons:

> i. The specification of GCV, Ash, Sulphur and moisture differs in each shipment and comparison with CIF prices shall be done on each shipment.
>
> Ii. The comparison of CIF prices on each shipment is more appropriate to find out the landed cost of each shipment.

The comparison of CIF cost on spot purchases with long term contract shall be made on ship to ship basis to arrive at the landed cost of coal."

129. PCKL in its additional affidavit dated 4.8.2020 (filed on 13.10.2020) has submitted that when the basis of comparison sought by UPCL has been allowed, UPCL now seeks to once again modify it to facilitate purchase of expensive coal from its group companies. PCKL has submitted that the comparison has to be made individually for each shipment of coal received on spot basis since each shipment has different characteristics in terms of the GCV, moisture content, ash content, Sulphur content etc. PCKL has further submitted that comparison on individual shipment basis is required to determine the landed cost of fuel at the time the shipment arrives which in turn is used to determine the energy charge. A cumulative comparison over the period 2010-19 is incompatible with the requirement of energy charges based on which effective scheduling decisions can be

made. Further, following a cumulative method of comparison, the exact liability in the month would be unknown.

130. In its written submission, PCKL has submitted that UPCL's contention that there has been variation from the methodology adopted in the 46th Board of Director's Meeting is misconceived since in its 53rd meeting held on 25.5.2018, the Board of PCKL merely decided to continue the methodology adopted in the 46th Board meeting for allowance of the cost for spot procurement of coal beyond March 2016.

131. UPCL vide para 25 of its affidavit dated 15.8.2020 has submitted that the decision in the 46th Board of Directors meeting held on 15.2.2017 is applicable upto March 2016 only. Relevant submission in the affidavit is extracted as under:

> "*25…….The said issue was eventually taken up in the 46th PCKL Board Meeting wherein PCKL Board had restricted the method of allowance of spot procurement by comparing it with long term contract prices only upto March 2016. However, it may be noted that there was no agreement for such method beyond March 2016 and Udupi Power has only agreed for such a method upto March 2016……..*"

132. From the above sequence of facts and submissions made by both UPCL and PCKL, it emerges that as per the Regulation 21 of Tariff Regulations, 2009 and Regulation 30 of Tariff Regulations, 2014, the landed cost of fuel for the month shall include price of fuel corresponding to the grade and quality of fuel inclusive of royalty, taxes and duties as applicable, transportation cost by rail/road or any other means and transit and handling losses as percentage of quantity of coal. The Tariff Regulations do not provide for the process and source of procurement of coal. In the present case, UPCL and ESCOMs of Karnataka have agreed to a process of procurement of coal in the PPA. Article 4.7 of the

PPA requires UPCL to make reasonable efforts to acquire the Primary and Secondary Fuel on commercially competitive terms consistent with the market conditions and obtain the approval/consent of ESCOMs at each stage of procurement/purchase. In fact, UPCL has been procuring coal after taking the approval of PCKL from time to time. Procurement of coal is being made by UPCL under long term fuel supply agreements and spot procurement. There is no dispute between the parties in so far as prices for procurement of coal through long term fuel supply agreements is concerned. As regards the spot procurement, PCKL initially capped the coal price to the applicable HBA indices for the month of purchase. Subsequently, on the request of UPCL, PCKL Board in its 46th Board Meeting held on 15.2.2017 approved spot procurement till March 2016 on self-declaration by UPCL subject to the condition that CIF prices shall not be more than the weighted average price of coal as per the long term coal supply agreements with M/s Adaro, M/s Indomino and M/s Glencore which were in force till March 2016. UPCL has accepted the said decision and certified the price of coal accordingly till March 2016 vide its letter dated 9.10.2017.

133. The dispute has arisen between the parties as to the price of coal through spot procurement from 2016-17 onwards. While PCKL has stated that it has merely extended the decision taken in its 46th Board Meeting held on 15.2.2017 to subsequent years, UPCL has alleged that the decision has been changed by PCKL. Therefore, there is no convergence of views between UPCL and PCKL regarding the manner capping of price of spot procurement of coal with the price of long term agreement with effect from April 2016 onwards i.e. whether on cumulative basis or ship to ship basis. UPCL has submitted that Tariff Regulations mandate the consideration of actual landed cost of coal without

any exception and/or disallowance as part of energy charge calculation. On the other hand, PCKL has submitted that UPCL is buying bulk of its spot procurement from Adani Group companies including Adani Global Pte Ltd and Adani Global FZE for which no transparent basis of pricing is available. PCKL in its written submission has compared the coal procured in the month of January 2017, February 2017 and March 2017 from M/s Adani Global Pte Ltd and M/s Adani Global FZE with cost of received from M/s Glencore as per long term fuel supply agreement and has submitted that per MT cost in many cases is higher by almost USD 30-35 per MT.

134. The Commission is of the view that as per Article 4.7 of the PPA, UPCL is required to make all reasonable effort at all times to acquire fuel on commercially competitive terms consistent with market conditions. UPCL had entered into long term fuel supply agreements with three suppliers for about 2.2 MTPA out of the coal requirement of 3.635 MTPA. Though UPCL tried to enter into long term contracts for the balance quantum by inviting bids, it could not succeed due to inadequate responses and sometimes due to inordinate delay in approval by PCKL. Consequently, it resorted to spot procurement of coal with the consent of PCKL. It is noticed from Annexure P-55 of the petition that during the period between November 2010 till March 2016, UPCL has received 69 shipments of coal through spot procurement. Out of the 69 shipments, 60 shipments are from the Adani Group of companies Viz. Adani Global Pte Ltd, Adani Global FZE, Adani Enterprises Limited, Adani Power Maharashtra, Adani Power Rajasthan Further, in Annexure A-3 of the PCKL's affidavit dated 4.8.2020 (filed on 13.10.2020), PCKL has compared the prices claimed by UPCL for the 35 spot shipments received during FY 2017-18 with the CIF as per HBA, CIF as per ICI 5800 and CIF as per Kalimantan 5900.

As per the data submitted by PCKL, CIF price of coal claimed by UPCL is higher than the CIF price of coal as per HBA and CIF price of coal as per ICI 5800 in case of all spot shipments whereas CIF as per Kalimantan is more than CIF price claimed by UPCL in 16 out of 35 spot shipments. Even though the parties have not explicitly pleaded that spot procurement of coal has been resorted from countries other than Indonesia, procurement of coal from other countries or High Seas cannot be ruled out.

135. As regards the FOB price of coal from Indonesia, the Commission has already taken a view in order dated 3.6.2022 in Petition No. 111/MP/2022 that export from Indonesia below the HBA price is not permissible since here is a statutory bar on the export of coal below the HBA index from Indonesia. Relevant para of the judgement is extracted as under:

> "*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."*

In the light of the above decision, the Commission is not inclined to accept the contention of PCKL that it is permissible to export coal from Indonesia at prices other than those linked to HBA index and therefore, comparison of the price at which coal is imported by UPCL with that of CIF ICI 5800 and CIF Kalimantan 5800 is unwarranted. Therefore, the only standard benchmark for comparison will be the HPB price linked to HBA Index.

136. As for the disputed period from 1.3.2016 to 31.3.2019, UPCL has been buying from its sister companies as per the documents placed on record. However, the documents do not cover the entire period and therefore, spot procurement of coal through other parties cannot be ruled out. In our view, since the procurement on spot basis is not through competitive bidding but through sister companies at negotiated price, there is a need to align the purchase price with the benchmark price notified by Government of Indonesia every month. We notice that UPCL had entered into an "Amended and Restated Bituminous Coal Sale Agreement" dated 2.11.2010 (Coal Sale and Purchase Agreement) with Glencore International AG for supply of coal which has provision for pricing of coal in Article 7.01A and 7.01B in respect of coal from country of origin except Indonesia and country of origin from Indonesia respectively (placed on record as Annexure A 5 to GUVNL affidavit dated 4.8.2020 filed on 13.10.2020). The said provisions are extracted as under:

"*7.01 A The base CIF price for each metric ton of the Coal supplied under this Agreement during the Term from any origin except Indonesia shall be determined as follows:*

FOB Price:	*GC Newcastle Quarterly Price for the calendar quarter preceding the Quarter in which delivery is made*
less:	*3% discount*

	(a)
CV adjusted:	*(a) x 6200/6250*
Final FOB price	*(b)*
Plus freight & Insurance	*US$13.25/mt*
CIF Price:	*(b)+ USS 13.25*

The base CIF price of the Coal shall be subject to adjustments as detailed in Article 8.

"7.01 B The base CIF price for each metric ton of the Coal supplied under this Agreement during the Term from Indonesia shall be determined as follows:

FOB Price: Based on the actual results declared in the Loadport Certificate of Sampling and Analysis issued by the Loadport Agency, the FOB price shall be arrived as per following formula.

*Invoice price (b) USS PMT = (HBA * K(i) * A(i)) - (B(i) + U(i))*

1) *K(i) = GCV / 6322*
2) *A(i) = (100 - TM) I (100 - 8)*
3) *B(i) = (TS - 0.8) * 3*
4) *U(i) = (TA-15)* 0 3*

Where

HBA= Average HBA index for the calendar quarter preceding the Quarter in which delivery is made
GCV = Gross Calorific value (arb)
TM = Total Moisture (adb)
TS = Total Sulphur (adb)
TA= Total Ash (adb)
Plus freight & Insurance @ US$13.25/ml
CIF Price:(b) +US$13.25

Plus freight & Insurance @ US$ 13.25/mt

CIF Price: (b) + US$ 13.25"

The coal supply on long term basis on the basis of the Coal Sale and Purchase Agreement has been accepted by PCKL.

137. In the above formula, one of the components of CIF price of coal is the FOB price of coal which has been worked out on quarterly basis based on the price of the preceding quarter in which delivery is made. Since UPCL has been making spot procurement, the FOB price needs to be determined based on the price or index for the relevant month in which the delivery is made. Therefore, the pricing of coal as per the above provisions of

Coal Sale and Purchase Agreement has been modified as under which shall be used as benchmark for settlement of dispute between the parties with regard to the spot purchase of coal during the disputed period of 1.4.2016 to 31.3.2019:

(A) Base CIF price of coal procured on spot basis from countries other than Indonesia

FOB Price:	GC Newcastle Quarterly Price for the calendar month in which delivery is made
less:	discount, if any -------------------- (a)
CV adjusted:	(a) x 6200/6250
Final FOB price	(b)
Plus freight & Insurance	US$13.25/MT
CIF Price:	(b)+ USS 13.25

Base price of coal is subject to adjustment with reference to GCV, ash content, Sulphur content and fines (%sizes less than 2 mm) as per Clauses 8.02, 8.03, 8.04 and 8.05 of Coal Sale and Purchase Agreement

(B) Base CIF price for Coal imported from Indonesia

FOB Price: Based on the actual results declared in the Loadport Certificate of Sampling and Analysis issued by the Loadport Agency, the FOB price shall be arrived as per following formula.

Invoice price (b) USS PMT = (HBA * K(i) * A(i)) - (B(i) + U(i))

1) K(i) = GCV / 6322
2) A(i) = (100 - TM) / (100 - 8)
3) B(i) = (TS - 0.8) * 3
4) U(i) = (TA-15)* 0 3

Where

HBA= Average HBA index for the calendar month in which delivery is made
GCV = Gross Calorific value (arb)

TM = Total Moisture (adb)
TS = Total Sulphur (adb)
TA= Total Ash (adb)

Plus freight & Insurance @ US$13.25/ml

CIF Price: (b) +US$13.25

Plus freight & Insurance @ US$ 13.25/mt

CIF Price: (b) + US$ 13.25"

138. UPCL shall calculate the ECR as per the provisions of the relevant Tariff Regulations after considering the CIF price of coal as determined above for the period 1.4.2016 to 31.3.2019 supported by relevant documents to PCKL for settlement of the dues with regard to the energy charges.

139. Since prices of spot procurement are volatile and not in consumer interest, we think it prudent to advise UPCL to take necessary steps for procurement of coal through long term agreements and urge upon PCKL to accord timely approval for such procurement as envisaged in the PPA. This will save both parties from the volatility of prices in the spot market and will be in the consumer interest.

Issue No.7: Whether Carrying Cost or interest for delayed payment is applicable or not?

140. One of the prayers of UPCL in its Petition is that the Respondents should be directed to pay carrying cost on all the outstanding dues. The extract of the prayer is as below:

(i) Direct Karnataka ESCOMs to pay all the outstanding dues towards Udupi Power along with Carrying Cost.

The Petitioner has also prayed for payment of carrying cost along with the differential amount payable to UPCL by Karnataka ESCOMs based on APTEL Judgement dated

06.02.2019. PCKL has submitted that as the principal amounts claimed are not payable, there is no question of payment of carrying cost and even otherwise, UPCL's claim for carrying cost is not permissible under any of the Regulations.

141. We have considered the submission of parties. We are of the view that though Tariff Regulations does not refer to the word Carrying Cost, Regulation 5(3) of Tariff Regulations, 2009 and Regulation 8(13) of the Tariff Regulations 2014 provide for charging interest on delayed payment. The said Regulations are extracted under:

"***Regulation 5(3) of the Tariff Regulations, 2009***

(3) In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance these regulations:

Provided that where the tariff provisionally billed exceeds or falls short of the final tariff approved by the Commission under these regulations, the generating company or the transmission licensee, as the case may be, shall refund to or recover from the beneficiaries or the transmission customers, as the case may be, within six months along with simple interest at the rate equal to short-term Prime Lending Rate of State Bank of India on the 1st April of the concerned/respective year.

(4) Where application for determination of tariff of an existing or a new project has been filed before the Commission in accordance with clauses (1) and (2) of this regulation, the Commission may consider in its discretion to grant provisional tariff upto 95% of the annual fixed cost of the project claimed in the application subject to adjustment as per proviso to clause (3) of this regulation after the final tariff order has been issued:"

Regulation 8(13) if the tariff Regulations, 2014

"(13) The amount under-recovered or over-recovered, along with simple interest at the rate equal to the bank rate as on 1st April of the respective year, shall be recovered or refunded by the generating company or the transmission licensee, as the case may be, in six equal monthly instalments starting within three months from the date of the tariff order issued by the Commission."

The above provisions are based on the principle that the affected party is compensated for the time value of money. The same principle is applicable in the event

where the tariff subsequently approved by this Commission or decision in adjudication cases resulting in revision of tariff is in deviation to the tariff approved earlier for the same period. In other words, it applies for over/under recovery or for over/under payment from the date of earlier determination of tariff and revised determination of tariff for the reasons stated. The rate at which such interest or carrying cost is payable shall be governed by Tariff Regulations applicable from time to time.

142. Therefore, we deem it fit to hold that the Petitioner shall be entitled for interest from the date of provisional tariff or final tariff or revised tariff determined by the Commission on the directions of APTEL as the case may be till the date of this order on the differential amount of fixed charges with simple interest at the rate equal to the bank rate applicable as on 1st April of the concerned financial year. As regards the arrear of energy charges, the Petitioner shall be entitled for arrear of energy charges with simple interest at the rate equal to the bank rate applicable as on 1st April of the concerned financial year from the date it fell due till the date of this order. In case of excess recovery, the Petitioner shall be liable to pay the interest at the same rate.

Recovery of arrears of fixed charges, energy charges and carrying cost

143. The recovery of arrears of fixed charges, energy charges and carrying cost as determined in this order shall be made in six equal monthly instalments starting within three months from the date of the tariff order. If the arrears are not paid as stipulated above, then the Petitioner shall be entitled for late payment surcharge as per the applicable Tariff Regulations.

Summary of Decisions

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

(a) UPCL's claim in the present Petition is not barred under Order II Rule 2 of CPC.

(b) UPCL's claims for deemed capacity charges are not barred by limitation.

(c) PCKL is liable to pay deemed capacity charges to UPCL on account of non-availability of 400 KV transmission line for the period from 10.3.2011 to 18.8.2012 [Unit I] and 19.8.2012 to 6.9.2012 [Unit I and Unit II] except when the generating units were shut down or generation was reduced for the reasons other than attributable to PCKL/ESCOMs/KPTCL.

(d) UPCL is not entitled to deemed capacity charges for the period of shut down between 16.1.2013 and 30.3.2013.

(e) If the annual availability factor is above 70% after taking into account the relief granted for deemed availability, the capacity charges shall be calculated in terms of Regulation 21(2)(a) of Tariff Regulations, 2009 and consequential financial benefits shall be payable to UPCL.

(f) The provisions of Coal Sale and Purchase Agreement as adopted in para 137 of this order shall be used for settlement of dispute between the parties with regard to the spot purchase of coal during the disputed period of 1.3.2016 to 31.3.2019. .

(g) The Petitioner shall be entitled for the carrying cost on the arrears of fixed charge and energy charge in accordance with para 142 of this order.

(h) The recovery of arrears of fixed charges, energy charges and carrying cost as determined in this order shall be made in accordance with para 143 of this order.

145. Petition No.155/MP/2019 is disposed of in terms of the above.

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