

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 637MP/2020

Coram:

Shri I.S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 23rd April, 2023

In the matter of

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 read with Articles 12.3, 12.3(ii)(1)(b), 12.7(e) and 17 of the PPA dated 7.8.2008 (as amended vide Amendment Agreement dated 17.9.2008) and under Articles 12.3, 12.3(ii)(1)(b), 12.7(e) and 17 of the TPTCL PPA dated 20.1.2009 (as amended vide Agreement dated 12.10.2010) respectively, seeking recovery of the deemed capacity charges by Jhajjar Power Limited from the Procurers for the contract year 2018-19.

And

In the matter of

Jhajjar Power Limited,

Village: Khanpur Khurd,

Tehsil: Matenhail,

District: Jhajjar-124142, Haryana

...Petitioner

Vs

1. Uttar Haryana Bijli Vitran Nigam Limited,

Vidyut Sadan, Plot No. C-16,

Sector 6, Panchkula-60062, Haryana

2. Dakshin Haryana Bijli Vitran Nigam Limited,

Vidyut Sadan, Vidyut Nagar,

Hisar-125005, Haryana

3. Tata Power Trading Company Limited,

Shatabdi Bhawan,

2nd Floor, B-12 & 13, Sector 4

Noida – 201301

4. Tata Power Delhi Distribution Limited

NDPL House, Hudson Lines,

Kingsway Camp,

New Delhi - 110009

...Respondents



Parties present:

Shri Sanjay Sen, Sr. Advocate, JPL
Shri Aniket Prasoon, Advocate, JPL
Ms. Akansha Tanvi, Advocate, JPL
Ms. Mandakini Ghosh, Advocate, JPL
Shri Rishabh Bhardwaj, Advocate, JPL
Shri Venkatesh, Advocate, TPTCL
Shri Jatin Ghuliani, Advocate, TPTCL
Shri Mohit Mansharamani, Advocate, TPTCL
Shri Abhay Kumar, Advocate, TPTCL
Shri M. G. Ramachandran, Sr. Advocate, Haryana Utilities
Ms. Poorva Saigal, Advocate, Haryana Utilities
Shri Shubham Arya, Advocate, Haryana Utilities
Shri Ravi Nair, Advocate, Haryana Utilities
Ms. Reeha Singh, Advocate, Haryana Utilities
Shri Nipun Dave, Advocate, Haryana Utilities
Shri Nitish Gupta, Advocate, TPDDL
Shri Nishant Talwar Advocate, TPDDL
Ms. Bikita Kaur, JPL
Ms. Sudipta Ghosh, JPL

ORDER

The Petitioner, Jhajjar Power Limited (JPL), who has set-up, owns and operates the Mahatma Gandhi Thermal Power Plant (MGTPP) with a capacity of 1320 MW (2x660 MW) in the State of Haryana has filed the present Petition mainly for adjudication of disputes with regard to payment of capacity charges along with other issues between the Petitioner and Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited (hereinafter referred to as 'the Haryana Utilities'), Tata Power Trading Company Limited ('TPTCL') and Tata Power Delhi Distribution Limited ('TPDDL'). The Petitioner has made the following prayers:

“(i) Direct the Respondents to pay the Petitioner an amount of INR 27,58,19,876/- (i.e., INR 24,82,37,888/- by Respondent Nos. 1 & 2 and INR 2,75,81,988/- by Respondent No. 3) along with interest/late payment surcharge as per the provisions of the PPAs towards Capacity Charges on account of the Petitioner being constrained from declaring its Availability for 88(eighty-eight) days in the FY 2018-19.

“(ii) Direct the Respondents to pay the Petitioner an amount of INR 12,72,93,269 (i.e., INR 11,45,60,238/- by Respondent Nos. 1 & 2 and INR 1,27,33,031/- by Respondent No. 3), along with interest/late payment surcharge as per the provisions of the PPAs, towards the incentive on account of Petitioner being constrained from

declaring its availability for 88 (eighty eight) days in the FY 2018-19 due to non-approval for procurement of coal by the Respondents 1 & 2; and

(iii) grant such order, further relief(s) in the facts and circumstances of the case as this Commission may deem just and equitable in favour of the Petitioner.”

Brief facts of the case:

2. The facts leading to the filing of the Petition in brief are as under:

(a) Haryana Power Generation Company Limited (HPGCL) which was vested with the right related to procurement and bulk supply of electricity by the Government of Haryana was authorised by Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) to procure power on their behalf. HPGCL conducted the International Competitive Bidding (ICB) in accordance with the “Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees” (‘Bidding Guidelines’) issued by Government of India on 19.1.2005 under Section 63 of the Electricity Act, 2003 (the Act).

(b) As per the Bidding Guidelines, Case 2 projects refer to “hydro power projects, load centre projects or other location specific projects with specific fuel allocation such as captive mines available, which the procurer intends to set up under tariff based bidding process”. In accordance with the Guidelines, HPGCL incorporated Jhajjar Power Limited as a Special Purpose Vehicle for setting up MGTPP which would be transferred to the successful bidder on conclusion of the bidding process.

(c) HPGCL conceived MGTPP under Case 2 to be located at Matenheil, District Jhajjar, Haryana with fuel linkage to be procured from Government of India, Ministry of Coal. On 25.5.2006, HPGCL issued the Request for Qualification (RfQ) for development of MGTPP at the identified location for a capacity within the range of 1000-1200 MW. It was made clear in the RfQ that a bidder could quote more than 1200 MW if it was possible to accommodate the same in the identified project site. Paragraph 2.3 of the RfP provided that MGTPP would have a minimum capacity of 1000 MW and maximum capacity of 1320 MW at the generation bus-bar in accordance with the PPA. The RfP further provided

that the procurers would contract 90% of the available Project capacity or contracted capacity from the date of commercial operation of MGTPP and the seller would have to sell the balance 10% of the available Project Capacity outside the State of Haryana. The RfP also made it clear that MGTPP would fall within the Mega Power Policy as notified by the Ministry of Power, Government of India. Paragraph 2.4. (iv) of the RfP clarified that the coal linkage for MGTPP had been secured with the likely coal mines and specification of coal indicated in Annexure 13 of the RfP, though the exact location of mine/subsidiary of Coal India Limited where from coal would be supplied was yet to be notified.

(d) China Light and Power Limited (CLP) was issued the RfQ on 19.2.2007 and after being shortlisted, was issued the RfP documents on 24.12.2007. CLP submitted its bid on 10.3.2008. On conclusion of the bidding process, CLP emerged as the successful bidder and Letter of Intent (LOI) was issued on 23.7.2008. Thereafter, CLP acquired 100% equity shares in Jhajjar Power Limited and entered into PPA dated 7.8.2008 with DHBVNL and UHBVNL (Haryana PPA) for supply of power from 90% net capacity of the power project. The petitioner, Jhajjar Power Ltd negotiated sale of 10% of the net capacity to New Delhi Power Company Ltd (presently known as Tata Power Delhi Distribution Ltd or TPDDL) in order to meet the qualification requirement of a Mega Power Project. The sale was executed through an inter-State trader namely, Tata Power Trading Company Limited (TPTCL) through a Power Purchase Agreement dated 20.1.2009 (Tata PPA) for sale of 10% power at the same tariff as under Haryana PPA. TPTCL entered into a back to back Power Sale Agreement dated 20.1.2009 with TPDDL at the same tariff for sale of the entire contracted capacity.

(e) Based on the PPAs dated 7.8.2008 and 20.1.2009 and confirmation of compliance by the Government of Haryana and Government of NCT of Delhi with the terms and conditions of the Mega Power Policy of Government of India, Ministry of Power vide its letter dated 13.5.2009 accorded Mega Power status to the 1320 MW MGTPP of Jhajjar Power Ltd.

(f) Central Coalfield Limited (CCL) vide its letter dated 14.10.2008 issued the Letter of Assurance (LOA) in favour of Jhajjar Power Ltd for supply of 5.21

million metric tonnes per annum of 'E' grade coal. It was clarified in the LOA that the assurance was subject to review and assessment by CCL of the total coal requirement of the Jhajjar Power Ltd as well as the incremental availability of coal from the mines of CCL and of the imported coal.

(g) The Petitioner entered into a Fuel Supply Agreement with Central Coalfield Ltd. (CCL), a subsidiary of Coal India Ltd. (CIL), on 7.6.2012 for an Annual Contracted Capacity of 5.21 million tonnes of coal. Subsequently, due to poor materialization of coal from CCL, 2.168 million tonnes out of 5.21 million tonnes of Annual Contracted Quantity (ACQ) of CCL was reallocated to multiple subsidiaries of CIL and in this process, the actual quantity allocated against 2.168 million tonnes was 1.889 million tonnes. This resulted in revised ACQ of 4.937 million tonnes from financial year 2015-16 onwards. Accordingly, JPL entered into three more Fuel Supply Agreements ("**FSAs**") with Eastern Coalfields Limited on 23.10.2013, Northern Coalfields Ltd. on 18.10.2013, and Bharat Coking Coal Ltd. on 19.01.2015.

(h) As per the Petitioner, the total ACQ of 4.937 million tonnes under the FSAs for MGTPP is only sufficient to achieve around 65% - 70% Plant Load Factor and there is an inherent shortfall of approximately 1.1 MTPA domestic coal required for MGTPP, with an average Gross Calorific Value (GCV) of the linkage coal being approximately 3650 kCal/kg and consequently, there has been a consistent and regular shortfall in supply of linkage coal being faced by JPL. The Petitioner has submitted that since commissioning of the first Unit of MGTPP on 29.3.2012 barring for contract year 2016-17 and contract year 2020-21 (when there was low lifting of coal due to extremely low procurement of power by the procurers), JPL has faced problems regarding shortage in supply of coal under the FSAs. Therefore, though the FSAs have provisions for supply of coal more than 100% ACQ, albeit at a premium (which is charged in the form of incentive over base price of coal), the said option is not implementable.

(i) For the contract year 2018-19, the overall materialization of coal qua MGTPP was 95.86% of the ACQ, which is not sufficient to achieve normative availability. The present case is arising out of an inherent shortfall in the coal linkage as well

as lopsided supply of coal since pro-rated materialization from June 2018 to November 2018, i.e., the period in issue when MGTPP lost its availability on account of coal shortage, was between 74.26% to 81.70% only, as per the table below:

Year	Month	Monthly Scheduled Quantity (MSQ)	Cumulative MSQ or Pro-rated ACQ	Materialization Rail Mode	Materialization RCR Mode	Total Materialization	Cumulative Total Materialization	Pro-rated % Materialization
(1)	(2)	(3)	(4)	(5)	(6)	(7)=(5)+(6)	(8)	(9)=(8)/(4)x100%
2018	Apr	4,11,417	4,11,417	2,94,179	52,179	3,46,358	3,46,358	84.19%
2018	May	4,11,417	8,22,833	3,05,851	-	3,05,851	6,52,209	79.26%
2018	Jun	4,11,417	12,34,250	2,64,293	-	2,64,293	9,16,501	74.26%
2018	Jul	3,62,047	15,96,297	2,14,699	57,964	2,72,663	11,89,165	74.50%
2018	Aug	3,62,047	19,58,343	2,68,135	69,106	3,37,241	15,26,406	77.94%
2018	Sep	3,62,047	23,20,390	2,88,296	55,422	3,43,718	18,70,124	80.60%
2018	Oct	4,11,417	27,31,807	2,77,256	91,112	3,68,368	22,38,492	81.94%
2018	Nov	4,11,417	31,43,223	2,26,194	1,03,240	3,29,434	25,67,926	81.70%
2018	Dec	4,11,417	35,54,640	2,55,018	1,94,508	4,49,526	30,17,452	84.89%
2019	Jan	4,60,787	40,15,427	2,98,125	2,07,765	5,05,889	35,23,342	87.75%
2019	Feb	4,60,787	44,76,213	2,62,339	2,77,611	5,39,949	40,63,291	90.78%
2019	Mar	4,60,787	49,37,000	3,90,737	2,78,782	6,69,518	47,32,810	95.86%
		49,37,000		33,45,121	13,87,689	47,32,810		

All numbers are in Tonnes

(j) During the contract year 2018-19, there was an overarching shortage of domestic coal (which also impacted MGTPP), and in order to address the same Ministry of Power ('MoP') in the meeting held on 9.2.2018 and conference of Power and NRE Ministers' of States/UTs held on 3.7.2018 advised power generators to make arrangements for imported coal in order to avoid generation loss due to shortage of coal. As such, to meet the shortfall in domestic coal supply (due to overarching nationwide scarcity in the supply of domestic coal) and to ensure that availability of MGTPP is not impacted, the Petitioner vide its letters to Haryana Utilities dated 13.4.2018, 4.6.2018, 18.6.2018, 27.6.2018, 5.7.2018, 12.7.2018, 23.7.2018, 26.7.2018, 3.8.2018, 9.8.2018, 13.8.2018, 21.8.2018, 20.9.2018 and 26.10.2018 highlighting the issues relating to shortfall in linkage coal, sought permission to procure coal from alternate sources as per Article 7.2.1(b) of the Haryana PPA.

(k) According to the Petitioner, Haryana Utilities have on several instances unreasonably delayed and /or denied approval for procurement of coal from alternate sources or otherwise imposed unreasonable or impractical conditions for the same. In this regard, the following is submitted:

(i) Through a memo dated 6.7.2018, HPPC, acting on behalf of Haryana Utilities, advised the Petitioner for procurement of 1,50,000 tonnes of imported coal by conducting a tender through third party e-portal;

(ii) In response to the above, on 12.7.2018, the Petitioner issued a letter to HPPC informing that it has engaged MSTC for conducting the e-tender bidding process and that the outcome of the bid process will be available latest by 24/25.7.2018;

(iii) Further, on 23.7.2018, the Petitioner furnished details of price discovered and other terms & conditions following tender for procurement of 1,50,000 tonnes of imported coal;

(iv) In response to HPPC's letters dated 23.7.2018 and 26.7.2018, wherein HPPC raised issue regarding service charges quoted by MSTC being on a higher side, the Petitioner on 9.8.2018 issued a letter *inter alia* to Haryana Utilities wherein while addressing the issue of reasonableness of the fee charged by MSTC, it was stated that since MSTC is a government entity, it is expected to adhere to certain standards while quoting the charges and hence, MSTC cannot charge arbitrarily. Moreover, it was also highlighted that in another case where the quantum of procurement of imported coal was much bigger than the Petitioner's tender quantity, MSTC charged similar rates.

(I) Due to above, MGTPP was operating with a critical coal stock (i.e., stock below 7 days) for 34 days and super-critical coal stock (i.e., stock below 4 days) for 180 days, out of the total 241 days during June 2018 - December 2018. The Petitioner has stated that one of the Units of MGTPP had to be kept under shut down for 88 days during contract year 2018-19 and thus, the Petitioner was unable to achieve even normative availability of 80%, despite having had requisite technical availability to the tune of 89.70%. This factum of shutdown of one of the Units was duly conveyed by the Petitioner to Haryana Utilities at the relevant time vide various letters dated 18.6.2018, 27.6.2018, 5.7.2018, 26.9.2018, 26.10.2018, and 16.11.2018.

(m) The Petitioner vide its letter dated 23.10.2017 issued a Force Majeure notice to the Respondents on account of refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal. The Petitioner highlighted the continuation of the said Force Majeure Event to Haryana Utilities vide various letters dated 19.1.2018, 18.6.2018, 5.7.2018, 3.8.2018, 26.9.2018, and 16.11.2018. The Petitioner also issued a Force Majeure notice to TPTCL on 24.10.2017 and highlighted the continuation of the same vide various letters dated 22.1.2018, 19.6.2018, 31.7.2018, 26.9.2018, and 16.11.2018.

(n) On account of aforesaid Force Majeure Event, i.e., Haryana Utilities` refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal, in terms of Article 12.3, 12.3(ii)(1)(b) and Article 12.7(e) of the respective PPAs, the Petitioner has filed the present petition claiming deemed capacity charges and incentive equivalent to its technical availability of 89.70%. In the above factual background, disputes have arisen between the Petitioner and the procurers which have led to the filing of the present Petition.

Hearing dated 27.4.2021

3. Matter was heard on 27.4.2021 and notice was issued to the Respondents to file their replies. During the course of hearing, learned counsel for TPTCL took preliminary objection that despite invoking the jurisdiction of this Commission citing composite scheme in respect of its generating station on the basis of the TPTCL's back-to-back power supply arrangement with Tata Power Delhi Distribution Company Limited ('TPDDL'), TPDDL has not been impleaded as a party to the petition. The Commission after considering the submissions of the parties directed the Petitioner to implead TPDDL. Accordingly, the Petitioner has impleaded TPDDL as a party to the Petition.

Hearing dated 15.7.2022

4. During the course of hearing, the learned senior counsel for the Petitioner and the learned senior counsel and learned counsel for the Respondents made detailed submissions in the matter. Considering the request of the learned counsel for the parties, the Respondents were directed to file their written submissions, if any, and the Petitioner was permitted to file its written submissions thereafter. The Petitioner was further directed to include in its written submissions a clear demonstration to the effect that the constraint in declaring full availability for the period of 88 days during financial year 2018-19 was due to denial by Haryana Utilities to approve the procurement of coal from alternate sources. The Petitioner and the Respondents have filed their respective written submissions. The reply, rejoinder and written submissions have been considered together.

Reply and written submissions of the Respondents

5. Haryana Utilities, in their reply dated 4.6.2021 and written submissions dated 20.7.2022, have submitted as follows:

(a) In order to achieve 100% availability in a contract year, the daily coal requirement for the Petitioner vis a vis generation and sale of electricity to the Procurers is 20506 tons (i.e. for 1320 MW (2x660 MW). The normative availability as per the Haryana PPA is 80%. To ensure that such normative availability of 80% is achieved by the Petitioner in a contract year, the total coal required on a daily basis for generation and supply to the Procurers is 16405 tons. Similarly, in order to avoid any penalty in terms of Clause 1.2.5 of Schedule 7, the daily coal requirement for 75% availability is 15379.67 tons. If the daily statement of coal availability at the power plant in regard to the opening stock, addition, consumption and closing stock is seen, it is clear that the closing stock of the previous day with reference to each day of generation, except for one day i.e. 10th July (14613 tons which is otherwise sufficient to declare availability of

one unit in full), in 364 days of the financial year 2018-19 has been more than the quantum of 16404.9 tons which relates to declaration of availability at normative at 80%. Thus, the Petitioner had the ability to declare upto the normative availability and even more than the same during the entire financial year considering that on number of days the closing stock was of a quantum much higher than 16404.9 tons. Accordingly, the claim made by the Petitioner of non-availability of domestic coal from CIL/CIL subsidiaries during the financial year 2018-19 for declaring upto normative availability is patently false and an attempt to mislead.

(b) If the coal stock situation is compared with the quantum of declared generation, it is clearly revealed that though the Petitioner had closing coal stock of the previous day, which is the opening coal stock for the next day, sufficient to operate both the units and undertake generation of not less than 26723.95 (100% generation). However, the Petitioner only declared availability from one unit i.e. 13361.98 MWh. This is duly confirmed by a comparison of the generation dates such as 11.6.2018, 12.6.2018 and the period from 23.6.2018, 24.6.2018, 25.6.2018, 25.6.2018, 27.6.2018, 28.6.2018, 29.6.2018 till 30.6.2018 where both the units had been operated to the extent of 267723.96 MWh on a consistent basis with the closing coal stock compared with coal consumption for declared generation of 26723.95 MWh. Therefore, similar generation from 2 units could have been possible on 64 days out of the 88 days of shut-down of one Unit of MGTTP. If the Petitioner had operated both the units on 18 more days in the whole year instead of one generating unit, the Petitioner could have declared availability of 80% at normative level. Similarly, considering the number of days where coal availability clearly justified declaration of both the units, the Petitioner could have achieved declaration of availability of much higher percentage. Thus, the Petitioner is wrongly claiming that it was affected in the declaration of availability on account of coal shortage.

(c) The Petitioner has not approached this Commission with clean hands in regard to the domestic coal availability from linked mines of Coal India Limited (CIL) and its subsidiaries for generation of electricity in terms of the contracted capacity of the Respondents. In fact, the Petitioner ought to have placed before

this Commission in a transparent and faithful manner the daily statement of coal availability consisting of the opening stock, receipt of coal during the day, consumptions of coal, the declared availability and quantum scheduled by the Haryana Utilities, besides requisitions made to CIL and its subsidiaries and coal made available thereof. There is no material furnished by the Petitioner as to the quantum of the coal requisitioned by the Petitioner, namely, whether the Petitioner sought the entire contracted quantum under the FSA and whether there was a refusal by coal companies to make available quantum of the requisitioned coal. There is also no pleading by the Petitioner in regard to the penalty demanded for such inability of coal company to make available the full quantum of relinquished coal as per the PPA.

(d) Even otherwise, damages for default on part of CIL and coal subsidiaries in supplying the requisite quantum has to be dealt with in terms of FSA executed between coal companies and the Petitioner. If CIL/its subsidiaries fail to supply coal beyond a particular quantum against the contracted capacity, there is an element of penalty payable in terms of Clause 4.6 of the FSA.

(e) The event of force majeure dealt with in Article 12.3 of the PPA has no application to the present claim of the Petitioner. Article 12 of the PPA deals with force majeure in the context of external actions, namely the actions of third party and in no manner deals with the actions of the parties to the PPA. Further, in terms of Article 12.4 (a) dealing with force majeure exclusions, the unavailability of fuel will not constitute an event of force majeure unless the same is a consequence of a force majeure event. There is no event of force majeure which has affected the fuel availability of the Petitioner.

(f) In terms of the PPA, the fixed charges liability is restricted to the quantum of declared available by the Petitioner. The consequences of not declaring availability are on the Petitioner, namely it does not get the fixed charges beyond the quantum declared available and further in terms of Clause 1.2.5 of Schedule 7 of the PPA there is a penalty, if the declaration of availability falls below 75%.

(g) In the facts and circumstances mentioned, the allegation made by the Petitioner that the Respondent Nos. 1 and 2 were not providing timely consents for procurement of coal from alternate sources has no relevance to the performance of the obligations by the Petitioner with the coal availability from the linked mines. In any event and without prejudice to the above, Article 14.2 of the PPA deals with procurer event of default and Article 14.4 deals with the termination procedure and consequences for procurer events of default. The PPA, therefore, expressly and comprehensively deals with all the terms and conditions applicable for generation and supply of electricity, etc. and the consequences of lower declaration of availability during financial year 2018-19 or any alleged breach on the part of the Respondent Nos. 1 and 2 have to be necessarily dealt with only in terms of the above PPA. The Petitioner can only claim reliefs as provided under the PPA and not *de hors* of the PPA and therefore, the claim of the Petitioner towards deemed capacity charges and incentive is devoid of any merit, when the same is not provided for in the PPA.

(h) Without prejudice to the above, the Petitioner has already filed another Petition being No. 285/MP/2019 on 28.8.2019 wherein the relief has been sought for by the Petitioner for the financial year 2019-20 (subsequent year) substantially on the same basis. The purported relief sought for in the present Petition is for financial year 2018-19 (previous year) and the cause of action for claiming the said relief had arisen and was in existence at the time when Petition No. 285/MP/2019 was filed on 28.8.2019. In Petition No. 285/MP/2019 filed on 28.8.2019, the Petitioner did not claim any relief on account of alleged delay in grant of approval for procurement of coal by the Respondent Nos. 1 and 2 for financial year 2018-19 and has limited the claim only to financial year 2019-20. Having not claimed relief in Petition No. 285/MP/2019 for financial year 2018-19, it is not open for the Petitioner to claim the same by way of the present Petition. In view of the above, the present Petition is liable to be rejected on the principles of Order 2 Rule 2 of the Code of Civil Procedure, 1908 which bars a party from claiming directly or indirectly by way of the subsequent Petition what it had failed to claim at the relevant time of filing an earlier Petition.

Reply of Tata Power Trading Company Limited (TPTCL)

6. TPTCL, in its reply dated 21.5.2022 and written submissions dated 28.7.2022, has submitted as follows:

(a) From a bare perusal of the issues raised by the Petitioner, it is evident that the entire focus of the Petition is confined to the alleged shortage in supply of linkage coal by CIL and / or its subsidiaries and persistent delays by the Haryana Utilities & TPDDL to approve the procurement of coal from alternate sources. TPTCL is an electricity trader and in the present case has back-to-back agreements with TPDDL through Tata PSA and the Petitioner through TPTCL PPA, both signed on 20.1.2009, which clearly establishes that the role of TPTCL is of an intermediary between the Petitioner and TPDDL and has no consequent role in the present matter.

(b) In the entire Petition, no averment whatsoever has been made against TPTCL. However, curiously the Petitioner has raised a claim against TPTCL without demonstrating any breach by TPTCL or even a single pleading against TPTCL or even TPDDL qua the alleged loss suffered by the Petitioner. Therefore, a unique situation has emerged where a relief has been sought against a party without any pleadings which is impermissible in law.

(c) As per Article 7.2.1 (a) of the PSA dated 20.1.2009 which is a back-to-back agreement, the Petitioner can enter into the FSA on the basis of advice of TPDDL (erstwhile known as NDPL). As per the Haryana PPA, the Haryana Utilities are responsible to approve procurement of coal from alternate source. Thus, it had always been the responsibility of the Haryana Utilities to approve procurement of coal from the alternate source, failing which the Petitioner suffered the losses. TPTCL has no role to play w.r.t. approval of procurement of coal from alternative sources and cannot be held responsible for the same. TPTCL cannot be held liable for the losses suffered by the Petitioner on account of arbitrary and unreasonable actions of Haryana Utilities.

Reply of Tata Power Delhi Distribution Limited (TPDDL)

7. TPDDL in its reply dated 3.9.2021 and written submissions dated 2.8.2022, has submitted the following:

(a) The Petitioner in the present Petition or during the communications with Haryana Utilities has nowhere proved / established that the coal supply intended to be obtained from alternative source is based on the best commercial terms available to any third party operating similar project. On the contrary, the Petitioner intended to procure costlier imported (which no way qualifies as best available commercial decision) and seeks a pass through of the procurement of coal cost on the consent of Haryana Utilities and TPTCL / TPDDL. As per the Haryana PPA / TPTCL PPA / TPDDL PSA, the cost of coal is a pass through as energy charges and the procurers are required to pay to the Petitioner the cost of coal incurred by it at invoiced rates. Therefore, the consent sought by the Petitioner cannot be claimed by it as a matter of right because the same is a pass through and consumers cannot be burdened with additional cost without any checks and balances. If the consent sought by the Petitioner was allowed, then the Petitioner would have ended up procuring costlier coal and cost towards the same would had to borne by the procurers.

(b) The Petitioner cannot tie the liability of payment of capacity charges upon the TPDDL when it is an admitted position of the Petitioner that it was precluded from declaring availability on account of non-grant of approval by the Haryana Utilities alone. The Petitioner has not made any submissions / claims against TPDDL in its Petition.

(c) The approval from the Haryana Utilities is a prerequisite for procurement of coal from alternate source, considering the fact that Haryana Utilities are the lead procurers of power from the Petitioner's MGTTP. If the approval from Haryana Utilities is accorded to the Petitioner, then there is no requirement for the Petitioner to seek any approval from TPDDL and it would be free to enter into a fuel supply arrangement. The same is in terms of the express

contractual provision being the proviso to Article 7.2.1 of the Tata PSA. Therefore, TPDDL, while not being responsible for the grant of approval for procurement of coal from alternate sources, ought not to be burdened with the payment of capacity charges on account of non-grant of said approval.

(d) It is the case of the Petitioner that it has been affected by Direct Non-Natural Force Majeure event and is entitled for payment of capacity charges, on account of non-availability of sufficient coal at site to operate both units of MGTPP at full capacity due to Haryana Utilities allegedly withholding consent for procurement of additional coal from alternative sources. As per Article 12.3 (ii) (1) (b) of the Tata PSA, the unlawful, unreasonable or discriminatory revocation of, or refusal to renew any consent required by the Petitioner would be considered as an event of force majeure provided that an appropriate court of law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down. Therefore, till the time it is decided by this Commission that the alleged non-grant of approval by the Haryana Utilities was unlawful, unreasonable and discriminatory and covered under the Force Majeure clause, the Petitioner cannot claim for relief on account of Force Majeure.

(e) The Petitioner has placed reliance on the decision rendered by this Commission in Petition No. 170/MP/2013 and Petition No. 319/MP/2013 whereby this Commission considered the delay and/or non-grant of approval by the Haryana Utilities for procurement of coal from alternate sources as Force Majeure events. However, the said decision is under challenge before the APTEL and pending adjudication. Therefore, till such time the APTEL does not deliver its findings on the issues involved, the Petitioner cannot place reliance on the said decisions of this Commission.

(f) The Petitioner has also sought for incentives for based on the MGTPP's technical availability to be deemed as actual availability as the Petitioner would have been in a position to achieve higher availability in the event Haryana Utilities would have granted timely approval to the Petitioner. The Petitioner cannot claim for incentives based on a mere hypothesis. TPTCL PPA / TPDDL PSA nowhere permits the Petitioner to claim compensation for

loss of the incentive which it would have been entitled to in case of achieving availability of more than 85%. As per Article 18.15 of the TPTCL PPA *“the liability of JPL and TPTCL shall be limited to that explicitly provided in this Agreement. Provided that notwithstanding anything contained in this Agreement, under no event shall TPTCL or JPL claim from one another any indirect or consequential losses or damages”*. Considering that the Petitioner’s claim of compensation for loss of incentive is indirect / consequential damages / losses, therefore, as per the terms of the PPA and judgments of Supreme Court, the Petitioner cannot be permitted to claim the same from TPDDL / TPTCL.

(g) In the present case, Article 12.7(e) of the PPAs / PSA only provides for compensation for deemed availability at 80% and there is no provision in the PPAs / PSA which provides for compensation for loss of incentive for not achieving availability of more than 85%. Thus, the claim of the Petitioner towards compensation for loss of incentive is of no merit and is required to be rejected.

(h) The Petitioner as per its own admission was seeking to arrange imported coal from the open market which is costlier. The Petitioner cannot be entitled to claim availability / incentive on costlier fuel. If the Petitioner would have procured imported coal, then it would have claimed availability, which would result in an increase in the per unit cost of generation, which will ultimately fall on the consumers. The consumers cannot be burdened with a higher cost of power, and as a regulated entity it is TPDDL’s responsibility to ensure availability of inexpensive power to its consumers.

(i) The Commission in its order dated 21.2.2019 in Petition No. 89/MP/2018 titled Aravali Power Company Private Limited v HPPC and Ors. and Order dated 28.8.2019 in Petition No. 46/MP/2018 in the case of NTPC Limited v CSPDCL & Ors. has held that the inability of the generator to procure coal resulting in shortfall in availability, cannot be passed onto the procurers. A perusal of the said decisions, as rendered by the Commission, clarifies that the responsibility to arrange fuel lies with the generator, and as such the procurer of power cannot be burdened as a consequence of shortage of coal.

The consumers of TPDDL, thus, cannot be burdened on account of failure of the generator to procure coal, when the said reasons are not attributable to TPDDL.

(j) As per Article 12.7 (e) of the TPTCL PPA, the Petitioner is entitled to claim any relief on account of direct non-natural force majeure event only if the average availability of the Petitioner's Project is reduced below 80% for over (a) period of 2 consecutive months; or (b) any non-consecutive period of 4 months, both within any continuous period of 60 months, and only with effect from the end of said period and for so long as the daily average availability of the Petitioner's Project continues to be reduced below 80% as a result of a direct non-natural force majeure event, the Petitioner may claim deemed availability of the Power Station to be 80%, regardless of its actual available capacity. During the period from June 2018 to September 2018, the Petitioner in no consecutive 2 months had faced availability reduced below 80%. It is only during the period from September 2018 to October 2018, the Petitioner has faced reduced availability below 80%. Therefore, the claim of deemed availability charges for 88 days as claimed by the Petitioner is devoid of any merit and the calculations carried out by the Petitioner to calculate availability losses is absurd and wrong.

Rejoinder submissions of the Petitioner

8. The Petitioner has filed its rejoinder to the reply filed by Haryana Utilities, on 24.7.2021 and written submissions in response to the written submissions filed by Haryana Utilities on 22.9.2022. The Petitioner has submitted as under:

(a) If Haryana Utilities' contention (that the decision rendered by this Commission in Petition No. 170/MP/2013 and Petition No. 319/MP/2013 cannot be relied upon due to pendency of Appeal No. 134 of 2016) is favourably considered, the same would effectively tantamount to allowing an automatic stay on the operation of the said orders merely by virtue of pendency on the appeals, which is not permissible in terms of settled principles of law. Therefore, such a contention by Haryana Utilities' should be rejected as it is completely devoid of

any merits and against the basic tenets and fundamental framework of implementation of court orders.

(b) During the contemporaneous period, the Petitioner wrote numerous letters to Haryana Utilities *inter alia* keeping them updated about the dismal coal stock situation at the Plant and its inability to run and operate both Units of the Plant resulting in forced shutdown of one Unit of the Plant in order to conserve coal. However, Haryana Utilities did not raise any question on the veracity of shortage of coal being highlighted by the Petitioner at the relevant time. Rather, Haryana Utilities have raised this issue before various authorities, including the Chief Minister's letter dated 19.3.2018 to Minister of Railways & Coal, Chief Engineer, HPPC's letter dated 12.07.2018 to Executive Director (Coal), Ministry of Railways, and the Additional Chief Secretary, Power Department, Government of Haryana's letter dated 19.7.2018 to the Ministry of Railway.

(c) Despite the above, Haryana Utilities have deliberately sought to project a different picture to obfuscate the main issue and evade their liability towards the Petitioner by projecting that there was no coal shortage at the Petitioner's Plant and that it had sufficient coal on a daily basis to achieve and declare 80% normative availability. Such submissions on part of Haryana Utilities are clearly an afterthought and ought to be summarily rejected.

(d) Haryana Utilities being the lead procurers were completely aware about the operation of the Plant at the relevant time with complete details of shut down of one of the Units for approximately 88 days. However, Haryana Utilities never objected to the Petitioner's practice of shutting down one of its Units in order to conserve coal nor suggested that the Petitioner should run both its Units with the available coal stock until the same is exhausted. As such, it is clear that the contentions now being raised by Haryana Utilities are an afterthought in order to evade their obligation/liability towards the Petitioner.

(e) The contention of Haryana Utilities regarding availability of sufficient quantum of coal for the Plant is based on the flawed premise that if the Petitioner had coal stock of more than or equal to one (1) day, then it cannot be contended that the Petitioner faced any shortfall in supply of coal to operate its Plant so as to meet its normative availability of 80% under the PPAs and beyond (for claiming

Incentives). The quantum of coal received at the Plant as stipulated by the Petitioner is not disputed. Moreover, it is also not disputed that the entire quantum of coal ultimately supplied has been used for power generation by the Petitioner, i.e., coal has not been diverted in any manner. Therefore, in any event, the total heat input available from the coal (received by the Petitioner) remaining the same, the total electricity generated from the Plant (with the quantum of coal supplied to the Petitioner) as well as the overall availability of the Plant during the dispute period, i.e., June-November 2018, would have remained the same. In such a scenario, even if the Petitioner would have operated both Units on the 64 days suggested by Haryana Utilities' (though the possibility of the same is vehemently denied), loss of availability on account of coal shortage would remain the same. In fact, running both the units as suggested by Haryana Utilities would have resulted in consuming all the available coal within 1 (one) day/shorter period and consequently, complete shutdown of the entire Plant on other dates for more days on account of non-availability of coal.

(f) By adopting the approach being purported by Haryana Utilities, complete shutdown of the entire Plant (which is a base load plant) would have occurred many times during the given contract year, which would result in frequent shutting down and restarting of a coal-based base load generating plant. However, the same is not advisable and is also contrary to the Prudent Utility Practices, which the Petitioner is required to follow as per the Haryana PPA. Further, if a Plant is forced to shut down repeatedly, sufficient coal stock is to be first built up in order for it to restart, as restarting and stabilizing a TPP itself requires and consumes a higher amount of coal. In other words, the loss of availability would have happened even in such a scenario and rather to a larger extent as it takes a significant time to restart a completely shut down power plant.

(g) If a plant should be operated even if it had one day's coal stock left, then there was no need for Central Electricity Authority to have specified that power plants should have a coal stock of 30 days on normative basis by way of the guidelines/methodology dated 8.11.2017.

(h) Haryana Utilities have erroneously calculated coal requirement for each day as opposed to calculating the annual/ continuous coal requirement in order to create a prejudicial picture before this Commission. As per the terms of the Haryana PPA, 80% normative availability is to be achieved on an annual basis for recovery of 100% capacity charges, which is arrived at after taking into consideration the time required for maintenance of the Plant, both planned and unplanned. Therefore, Haryana Utilities' approach to convert the annual coal requirement to daily coal requirement and then co-relating it to coal availability, to allegedly show that there was no coal shortage, is absolutely misconceived and entirely flawed.

(i) Whilst considering the number of day's coal stock available at the Plant, Haryana Utilities have relied on the data submitted by the Petitioner and have deliberately failed to consider the fact that coal stocks remained above a certain level on a given day because the Petitioner had prudently decided to shut down one of its Unit for 88 (eighty eight) days during the period of June 2018 to December 2018 and operated the other Unit on full load to conserve coal, instead of operating both the Units at part load.

(j) Without prejudice to the aforesaid submissions, as per Haryana Utilities' own calculation, the daily quantity of coal available to the Petitioner's Plant through coal linkages is only 13,526 tonnes per day (i.e., splitting 4.937 MTPA into 365 days) as against the daily requirement of 16,405 tonnes for achieving normative availability of 80%. Accordingly, even going by the over simplified logic presented by Haryana Utilities themselves, there is an inherent shortage in the linkage coal provided by Haryana Utilities limiting the Petitioner's ability to achieve the PPA prescribed normative availability of 80%.

(k) The pro-rated materialization of linkage coal during the dispute period from June 2018 to November 2018, when the Petitioner lost its availability on account of coal shortage, was between 74.26% to 81.70%. Therefore, even going as per Haryana Utilities' misconceived logic of daily coal requirement, the Petitioner would have received approximately 10,821 tonnes (calculated at 80% materialization) of coal per day, which is way less than 16,405 tonnes, i.e., the daily coal requirement for achieving 80% normative availability.

(l) The Petitioner's analysis for the period in question clearly depicts that on days when one of the Units of the Plant was under shut-down, the Petitioner did not even have enough coal stock to run both Units of the Plant for more than 2 (two) days, let alone having the requisite coal stock to meet the requirements under the CEA Coal Stock Guidelines. By way of illustration, on 14.6.2018 the coal stock (opening stock + Receipt) was 25,731 tonnes. In such a scenario, had the Petitioner run both the Units of the Project, the closing stock on 14.6.2018 and opening coal stock on 15.6.2018 would have been just 7,077 tonnes, which is not even sufficient for one-unit operation and may have led to shutting down of both the units in case receipt of incoming coal is delayed by a few hours. In such a scenario, the Petitioner would have had coal stock of 18,264 tonnes on 15.6.2018, which admittedly would not have been sufficient to run the both the Units of the Plant for more than a day.

(m) The prevalent coal shortage during June 2018 to December 2018 is also evident from the daily generation reports published by National Power Portal, which categorically records that one of the Unit of the Petitioner's Plant was under forced shutdown due to 'coal shortage'.

(n) From a bare perusal of Article 7.2.1(b) of the Haryana PPA, it is abundantly clear that only condition to be fulfilled in order for the Petitioner to obtain consent for procurement of alternate coal is that the Petitioner is required to satisfy the Respondents that the FSA intended to be entered into (i.e., procurement of coal from alternate sources, namely imported coal) is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the Project. In the present case, the said condition was duly fulfilled by the Petitioner, as the Petitioner has suggested procurement of imported coal by way of competitive bidding to be undertaken MSTC, i.e., a State owned company, as third-party agency for conducting the e-tender bidding process. Therefore, Haryana Utilities ought to have granted consent to the Petitioner for procurement of alternate coal to meet the shortfall in supply of domestic coal. However, Haryana Utilities have failed to do so and as such, the conduct of Haryana Utilities impugned herein is in contravention of Article 7.2.1(b) of the Haryana PPA.

(o) As Haryana Utilities have acted in contravention of their obligations under Article 7.2.1(b) of the Haryana PPA, the Petitioner was unable to meet the normative availability of 80% under the Haryana PPA and achieve availability corresponding to its technical availability. Haryana Utilities' refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal amounts to unlawful and/or unreasonable refusal to grant any other consent required for the operation of the Plant. Accordingly, any delay and/or non-grant of approval by the Haryana Utilities under the Haryana PPA to arrange coal from alternate sources, qualifies as a Force Majeure Event under Article 12.3 and more specifically as a Direct Non-Natural Force Majeure Event under Article 12.3(ii)(b) of the Haryana PPA. The aforesaid position has already been allowed in the past by this Commission vide its order dated 25.01.2016 in Petition No. 170/MP/2013 and order dated 18.04.2016 in Petition No. 319/MP/2013 in context of contract year 2012-13.

(p) The obligation of the Petitioner to operate the Plant at its full capacity is interdependent and linked to the obligation of Haryana Utilities to supply adequate quantity of coal, including by providing timely consents to the Petitioner for procurement of coal from alternate sources, specifically on account of the Project being set under Case 2 Scenario IV model of the Competitive Bidding Guidelines. In this regard, the Petitioner relied upon the judgment of the APTEL dated 7.4.2016 in Appeal No. 84 of 2013 as well as 19.7.2021 in Appeal Nos. 220 of 2019 and Appeal No. 317 of 2019.

(q) Since payment of capacity charges is directly linked to the normative availability of the Plant, it is but natural that the Petitioner will endeavour to declare maximum availability. However, since there was inherent shortage in the supply of linkage coal, the Petitioner had no other option except to arrange alternate/imported coal so as to enable its Plant to generate up to its maximum capacity. In this regard, the Petitioner has relied upon the judgment of the APTEL dated 19.07.2021 in Appeal Nos. 220 of 2019 & 317 of 2019 (Talwandi Sabo Power Limited v. Punjab State Electricity Regulatory Commission & Anr).

(r) Accordingly, the Petitioner is entitled to recover capacity charges calculated on the basis of deemed normative availability as well as incentive for the contract

year 2018-19 from Haryana Utilities, particularly since the Petitioner cannot be held responsible or made to suffer losses on account of Haryana Utilities' non-fulfilment of its obligation under Article 7.2.1(b) of the Haryana PPA and it was the obligation of Haryana Utilities' to arrange adequate quantity and assured quality of coal.

(s) Consequently, the direct effect of Haryana Utilities' failure to grant approval to the Petitioner for procurement of imported/alternate coal resulted in the Petitioner being deprived of its right to receive payment of full capacity charges and incentives in contract year 2018-19, which it would have been entitled to under the PPAs but for the shortfall in linkage coal coupled with Haryana Utilities' failure to grant approval for procurement of imported coal.

(t) Haryana Utilities' refusal to grant approval to the Petitioner for procurement of imported/alternate coal was due to economic considerations on account of the price of imported coal being higher than that of domestic coal. Haryana Utilities' cannot be permitted to impinge upon the Petitioner's right to ensure maximum availability for its Plant in order to unjustly enrich itself. Without prejudice to the above, even if Haryana Utilities do not want the Petitioner to procure imported coal, they should clearly admit to make payment of deemed capacity charges on deemed availability basis to the Petitioner.

(u) The overall materialization of coal for the contract year 2018-19, i.e., the contract year in dispute, was 95.86% and the pro-rated materialization from June 2018 to November 2018, i.e., the period in issue when the Petitioner lost availability on account of coal shortage, was between 74.26% to 81.70%. Clearly, the Petitioner could not have achieved the same without having requisitioned the required coal from the coal companies. Further, in view of such high materialization of linkage coal at the end of the financial year/contract year, there arises no question of the Petitioner imposing or demanding any penalty from the coal companies (CIL/its subsidiaries) due to short supply of coal. This becomes clear from the mere review of the provision of the FSA which deals with payment of penalty if CIL/its subsidiaries fail to supply below 80% of ACQ on an annual basis.

(v) The Petitioner has already provided details of month-wise materialization of coal in terms of % of ACQ, correspondences detailing/highlighting the difficulties associated with materialization of domestic coal (including shortage of rakes), correspondences providing regular updates on the continuation of Force Majeure Event and details of shutting down of one of the Units to the Respondents; details of daily coal stock during the period June 2018 to December 2018 along with the criticality level of coal stock; details of daily coal stock data maintained by CEA for certain dates for each month during the period from June to December 2018; and daily generation reports published by National Power Portal (NPP) for certain dates in each month from June 2018 to December 2018, along with the pleadings in the present matter, which belies the contentions of Haryana Utilities regarding any alleged failure of the Petitioner to provide requisite details.

(w) By way of Petition No. 285/MP/2019, the Petitioner had sought approval from this Commission of a mechanism/guideline to enable the Petitioner to procure coal from alternate sources in view of lack of timely approvals granted by Haryana Utilities in total disregard and violation of Article 7.2.1 of the Haryana PPA. Whereas, by way of present Petition, the Petitioner is seeking recovery of the capacity charges for its Plant calculated on the basis of deemed normative availability pursuant to the terms of the Haryana PPA, as the Petitioner was constrained from declaring its full availability for 88 (eighty eight) days during the Contract Year 2018-19 on account of the persistent and unreasonable denial by Haryana Utilities (which amounts to Direct Non-Natural Force Majeure Event under Article 12.3(ii)(b) of the Haryana PPA) to approve procurement of coal from alternate sources to offset the shortfall in linkage coal supplies. Accordingly, the issue regarding payment of deemed capacity charges has not been decided qua the Petitioner in Petition No. 285/MP/2019 and thus, the present Petition cannot be said to be barred by Order 2 Rule 2 of CPC. In this regard, the Petitioner relied upon this Commission's order dated 21.1.2020 in Petition No. 43/MP/2019 titled Prayatna Developers Private Limited v. NTPC & Ors., and order dated 28.1.2021 in the matter of Adhunik Power and Natural Resource Ltd. v WBSEDCL & Ors. Petition No. 292/MP/2019.

(x) In any case, the Commission has clearly recorded in its order dated 21.3.2022 in Petition No. 285/MP/2019 at paragraph 37 that the Petitioner has not sought any relief, including any monetary compensation therefore, the present Petition cannot be said to be barred by Order 2 Rule 2 of CPC.

9. The Petitioner has filed its Rejoinder to the reply filed by TPTCL on 24.7.2021 and written submissions in response to the written submissions filed by TPTCL on 22.9.2022. The Petitioner has submitted as under:

(a) The Petitioner and TPDDL have not entered into any contract. It is the Petitioner and TPTCL, which had entered into the TPTCL PPA by virtue of which the Petitioner was obligated to sell 10% of the Plant's net capacity to TPTCL. TPTCL had then entered into a back-to-back arrangement for selling the power to TPDDL, the terms of which are enshrined in the PSA and to which the Petitioner is not a party. Merely because the TPTCL PPA states that TPTCL shall enter into an onward agreement for sale of power outside the State of Haryana, does not entitle TPTCL to attempt to shirk away from its contractual obligations. Under the terms of the TPTCL PPA (particularly Article 12.7(e) thereof), TPTCL is contractually obligated to compensate the Petitioner towards the capacity charges, based on the deemed normative availability. TPTCL, by making baseless and vague averments, is attempting to mislead and divert the attention of this Commission from the issue at hand.

(b) Reliance by TPTCL upon this Commission's order dated 18.4.2016 in Petition No. 319/MP/2013 has no bearing on the case at hand. In any case, by way of order dated 18.4.2016 in Petition No. 319/MP/2013, this Commission has nowhere discharged TPTCL from its obligations under the Tata PPA. It is also relevant to mention here that this Commission's order dated 18.4.2016 in Petition No. 319/MP/2019 has been challenged by the parties before the APTEL by way of Appeal Nos. 134; 138; 149; and 308 of 2016 and Appeal No. 209 of 2017 and the matter is currently *sub judice*.

(c) Without prejudice to Petitioner's contentions in Appeal Nos. 134; 138; 149; and 308 of 2016 and Appeal No. 209 of 2017, it is pertinent to refer to this

Commission's order dated 28.1.2020 in Petition Nos. 67/MP/2019 & 68/MP/2019. Vide its order dated 28.1.2020, the Commission had held that though the power purchase agreements are interconnected and back-to-back, payment to the generators by the trader under the power purchase agreements is not conditional upon the payment to be made by the distribution licensees to the trader.

(d) The Petitioner also relied upon the Delhi Electricity Regulatory Commission's order dated 13.5.2010 in Petition No. 5 of 2009 filed by TPDDL *inter alia* seeking approval of Power Purchase Agreement between TPDDL (formerly known as NDPL) and TPTCL for procurement of 123.22 MW power on Long-Term Basis from the Petitioner, which records TPDDL's submission that the payment risk to the Petitioner is to be borne by TPTCL.

(e) It is wholly incorrect for TPTCL to state that since Haryana Utilities are responsible to approve procurement of coal from alternate sources as per the terms of Haryana PPA, the TPTCL has no role to play in such procurement. TPTCL has failed to deal with the Petitioner's case on merits and has merely made bald assertions to distance itself from its obligations under the terms of the TPTCL PPA and deviate from the dispute at hand. There is no response whatsoever by TPTCL either during the arguments or in its written submissions made any submissions with respect to the aforesaid paragraphs of the Petition. TPTCL has completely failed to demonstrate as to how and why the contentions of the Petitioner in the aforesaid paragraphs are wrong, untenable and/or inapplicable.

(f) TPTCL has deliberately chosen not to appreciate the framework of the PPAs, in terms of which (particularly under Article 12.2) it has been agreed that a Force Majeure event under the Haryana PPA (though on account of the Haryana Utilities not timely approving procurement of coal from alternate sources), by necessary implication, would also qualify as a Force Majeure event under the similar provisions of the TPTCL PPA. It appears that TPTCL is attempting to deliberately mislead this Commission by selectively reading the Petition and wilfully ignoring all averments qua TPTCL.

(g) In any case, the present Petition has been *inter alia* filed under Articles 12.3(ii)(1)(b), 12.7(e) read with Clause 1.1(iv) Clause 1.2.4 of Schedule 7 of the TPTCL PPA (and not only under the provisions of the Haryana PPA). Therefore, TPTCL's submission to the extent that it is not a party to the Haryana PPA is completely irrelevant and misconceived.

(h) TPTCL PPA unequivocally captures the framework of the present transaction, which was well within the knowledge of the parties since the time of signing the PPA. Furthermore, as per Article 7.2.1(a) of the TPTCL PPA, the Petitioner could enter into FSA on the basis of 'Advice of TPTCL', therefore, TPTCL also has a role to play with respect to the approval of procurement of coal from alternate sources.

(i) Proviso to Article 7.2.1(a) of the TPTCL PPA provides that in the event Haryana Utilities provide their consent to the Petitioner under the Haryana PPA and TPTCL does not provide its consent, then the Petitioner will have a right to execute the FSA and the requirement of TPTCL's consent shall no longer be applicable. The same does not in any manner mean that TPTCL and/or TPDDL are absolved of their responsibility to provide such consent to the Petitioner. In any case, the same cannot in any manner be construed to absolve TPTCL and/or TPDDL from its obligations/liabilities towards the Petitioner, which it knowingly undertook.

10. The Petitioner has filed its rejoinder to the reply filed by TPDDL on 26.10.2021 and written submissions in response to the written submissions filed by TPDDL on 22.09.2022. In the said pleadings, the additional submissions made by the Petitioner are as follows:

(a) Despite being in a position to declare availability to the tune of 89.70%, the Petitioner could only achieve availability to the extent of 77.62% on account of shortage of coal. Consequently, the Petitioner has been deprived of its right to receive payment of full capacity charges and incentives in contract year 2018-19, which it would have been entitled to under the PPAs but for the shortfall in

linkage coal coupled with Haryana Utilities' failure to grant approval for procurement of imported coal.

(b) If a generator can claim cost of coal for arranging coal corresponding to 100% availability, as has been held by the APTEL, it cannot be restrained from claiming loss of incentive if requisite approval to arrange coal from alternate sources namely, imported coal, is not allowed by the procurers. This is for the simple reason that if a generator is allowed to achieve 100% availability, it automatically would have earned incentive. Therefore, the loss of incentive despite having technical availability higher than normative availability, on account of non-grant of approval cannot by any stretch be categorised as indirect and/or remote losses, which are prohibited under the PPAs as is being contended by TPDDL.

(c) The very attempt by TPDDL to co-relate cost of alternate coal to the aspect of Petitioner's right to claim availability and/or incentive clearly demonstrates that TPDDL deliberately does not want to appreciate the sanctity of the Petitioner's right under the PPAs to arrange sufficient coal to be able to declare availability equivalent to its technical availability and accordingly, claim capacity charges and incentives under the PPAs.

(d) In any case, absence of any specific provision enabling the Petitioner to claim incentive due to Haryana Utilities' failure to provide approval for procurement of alternate coal owing to shortfall in linkage coal cannot be a bar for disallowing the Petitioner's claim, particularly in light of the aforesaid judgment of APTEL dated 19.7.2021 as well this Commission's orders dated 25.1.2016 in Petition No. 170/MP/2013 and 18.4.2016 in Petition No. 319/MP/2013.

(e) TPDDL's reliance on this Commission's order dated 21.2.2019 in Petition No. 89/MP/2018 titled Aravali Power Company Private Limited v. HPPC & Ors. as well as order dated 28.8.2019 in Petition No. 46/MP/2018 titled NTPC Limited v. CSPDCL & Ors. is entirely misplaced and misconceived. In the aforesaid cases, the generating companies are Central Government controlled generating companies and the tariff thereof is regulated by the Commission in terms of Tariff Regulations, which also governs the norms and parameters including the

normative plant availability factor. Regulation 2(2) of the Tariff Regulations, 2014 specifically states that these regulations shall not apply for determination of tariff in case of generating stations or Inter State Transmission systems whose tariff has been discovered through tariff based competitive bidding in accordance with the guidelines issued by the Central Government and adopted by the Commission under Section 63 of the Act.

(f) Further, in the aforesaid cases, this Commission was approached for revision of the Normative Annual Plant Availability Factor on account of shortage of coal, and in this context this Commission held that the generating company had the sole responsibility to arrange fuel/coal for its various thermal power plant. However, in the present case, the Project has been set up under Case 2 scenario 4 of the Competitive Bidding Guidelines and in such cases, the responsibility to arrange adequate quantity and assured quality of coal rests with the procurers, as has been categorically held by the APTEL vide its judgment dated 7.4.2016 in Appeal No. 84 of 2013 as well as judgment dated 19.07.2021 in Appeal Nos. 220 of 2019 and Appeal No. 317 of 2019.

(g) In the present case, there is a specific provision in terms of Article 7.2.1(b) of the PPAs which mandate that the Petitioner can only enter into any agreement for procurement of coal/alternate coal with the express written consent of Haryana Utilities under the Haryana PPA which shall not be unreasonably withheld. Therefore, for this reason too, it cannot be argued that the Petitioner is solely responsible for procurement of coal/additional coal.

(h) The entire premise of the present case is based on invocation of Force Majeure Event in terms of Articles 12.3, 12.3(ii)(1)(b), 12.7(e) primarily on account of persistent and unreasonable denial by Haryana Utilities to approve procurement of coal from alternate sources, namely imported coal (owing to shortfall in linkage coal supplies) pursuant to the terms of the Haryana PPA and the same being inevitably a Force Majeure event under the TPTCL PPA. However, in contrast, the aforesaid cases relied upon by TPDDL have nothing to do with invocation of Force Majeure provision on account of failure of the other contractual party to fulfill its obligation and as mentioned above, in the aforesaid cases, revision of NPAF on account of shortage of coal was sought.

(i) TPDDL was well aware of the terms and conditions of the Haryana PPA and that of TPTCL PPA at the time of execution of the Tata PSA. The framework of the PPAs is structured in such a manner that if Haryana Utilities do not provide their consent under the Haryana PPA for procurement of coal from alternate sources to meet the shortfall in supply under the Fuel Supply Agreements, then the Plant cannot be made available for the purposes of the TPTCL PPA and Tata PSA as well, on account of the resultant shortfall of coal.

(j) Therefore, keeping in view the structure of the PPAs entered into in context of the Plant with both the Procurers, the delay and/or non-grant of approval by Haryana Utilities (under the Haryana PPA) to arrange coal from alternate sources, namely imported coal in the facts and circumstances of the present case, which qualifies as a Force Majeure event under the Haryana PPA, will by necessary implication, also qualify as a Force Majeure event under the similar provisions under the TPTCL PPA and Tata PSA. Consequently, the Petitioner will also be entitled to claim appropriate and proportionate relief from TPTCL under the TPTCL PPA and TPDDL under the Tata PSA.

(k) TPDDL is equally liable and responsible for payment of capacity charges & incentives for the Petitioner's Plant calculated on the basis of deemed availability, as the Petitioner was constrained from declaring its full availability for 88 (eighty-eight) days during the contract year 2018-19 on account of persistent and unreasonable denial to approve procurement of coal from alternate sources by Haryana Utilities.

(l) TPDDL has entirely failed to appreciate that the Petitioner vide its letters dated 11.10.2017 and 23.10.2017 in contract year 2017-18 itself issued Force Majeure notices to the Respondents under Article 12 of the respective PPAs highlighting the occurrence of Force Majeure event, i.e., refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal, as the availability of the Petitioner's Plant was reduced below 80% for 2 consecutive months, i.e., October and November 2017 (as the availability in October 2017 was 69.93% and in November 2017 was 76.95% respectively). The Petitioner gave notice of cessation of the Force Majeure event to TPTCL on

28.1.2020 in contract year 2020-21 in terms of Clause 12.5.2 of the TPTCL PPA. As such, in terms of Article 12.7(e) of the respective PPAs, the Petitioner is entitled to deemed capacity charges to the tune of 80% availability of the Plant for the contract year 2018-19 (when the daily average availability of the Plant continues to be reduced below 80% as a result of a Direct Non Natural Force Majeure Event, namely refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal), which is after the end of the consecutive period of 2 months (i.e., October 2017 and November 2017) during which period the availability of the Petitioner's Plant was reduced below 80%, but prior to the cessation of Force Majeure event.

Analysis and Decision

11. We have considered the submissions of the petitioner and the Respondents on the issue of shortfall in linkage coal and impact thereof on the Petitioner's ability to declare availability. The following issues arise for our consideration:

(a) Issue No. 1: Whether the Petition is barred by Order 2 Rule 2 of the Code of civil Procedure, 1908?

(b) Issue No. 2: Whether Haryana Utilities' refusal to grant approval to JPL for import of coal to meet the shortfall in supply of domestic coal constitutes a Force Majeure event in terms of Article 12.3(ii)(1)(b) of the PPAs?

(c) Issue No. 3: Whether the Petitioner is entitled to payment of deemed capacity charges as per Article 12.7(e) of the PPAs?

(d) Issue No. 4: Whether the Petitioner is entitled to incentive for the technical availability attained beyond 85% (i.e., for 4.70% (89.70% – 85%) during Contract Year 2018-19 as per the formula stipulated under Article 1.2.4 of Schedule 7 of the PPAs?

The above issues have been dealt with in succeeding paragraphs.

Issue No. 1: Whether the petition is barred by Order 2 Rule 2 of the Code of civil Procedure, 1908?

12. Haryana Utilities have argued that the present Petition is liable to be rejected on the principles of Order 2 Rule 2 of the Code of Civil Procedure, 1908 as the

Petitioner has already filed another Petition being No. 285/MP/2019 on 28.8.2019 wherein the Petitioner did not claim any relief on account of alleged delay in grant of approval for procurement of coal by the Respondent Nos.1 and 2 for financial year 2018-19 and has limited the claim only to financial year 2019-20. As per Order 2 Rule 2(2) of the CPC, if a party omits to sue in respect of any portion of his claim, the said party cannot afterwards sue in respect of the portion so omitted and as per Order 2 Rule 2(3) of the CPC, if a party omits to claims a relief arising out of a cause of action, the said party will be barred from claiming such relief subsequently in a separate suit. Thus, having omitted to claim deemed capacity charges for the Contract Year 2018-19 arising out of the same cause of action, in Petition No.285/MP/2019, the Petitioner is barred from filing the present Petition under Order 2 Rule 2 of the CPC.

13. *Per contra*, the Petitioner has submitted that by way of Petition No. 285/MP/2019, the Petitioner had sought approval from this Commission of a mechanism/guideline to enable the Petitioner to procure coal from alternate sources in view of lack of timely approvals granted by Haryana Utilities in total disregard and violation of Article 7.2.1 of the Haryana PPA. Whereas, by way of present Petition, the Petitioner is seeking recovery of the capacity charges for MGTPP calculated on the basis of deemed normative availability as the Petitioner was constrained from declaring its full availability for 88 (eighty eight) days during the contract year 2018-19 on account of the persistent and unreasonable denial by Haryana Utilities to approve procurement of coal from alternate sources to offset the shortfall in linkage coal supplies (which amounts to Direct Non-Natural Force Majeure Event under Article 12.3(ii)(b) of the Haryana PPA). The Petitioner has submitted that the present case is squarely covered by the Commission`s order dated 21.1.2020 in Petition No.

43/MP/2019 and 28.1.2021 in Petition No. 292/MP/2019 wherein an identical objection/ issue has been rejected by the Commission and it has been held that the subsequent Petition for carrying cost was not barred by Order 2 Rule 2 of the CPC.

14. We have considered the submissions made by the parties. Order II Rule 2 of the CPC bars the splitting of reliefs, claimed in suits, on the same cause of action. Its object, as held in catena of judgements, is two-fold – first the defendants should not be vexed twice for the same cause of action and second, to prevent multiplicity of suits. The Petition No. 285/MP/2019 had been filed by the Petitioner under Section 79(1)(b) read with Section 79(1)(f) of the Act, *inter-alia*, for approval of Guidelines/mechanism for procurement of coal from alternate sources under the Haryana PPA. In the said case, the Petitioner had made the following prayers:

“(a) Hold and declare that the Respondent 1 & 2 are obligated to provide timely approvals to the Petitioner for procurement of coal from alternate sources in accordance with the Article 7.2.1 of the PPA1;

b) Pending hearing and final disposal of the present Petition, grant permission to the Petitioner to procure up to one (1) million ton of coal per annum from alternate sources which may include the e-auction coal and/or imported coal to operate the Plant;

c) Issue the following guidelines for procurement of coal from alternate sources by the Petitioner to mitigate the shortage of domestic linkage coal:

(i) At the commencement of each financial quarter, the Petitioner will furnish to the Respondents a statement of anticipated shortfall of linkage coal during that quarter;

(ii) The Petitioner’s statement will indicate the possible sources for procurement of shortfall coal such as e-auction coal and/or imported coal and/or a combination of these two sources;

(iii) The Petitioner will propose to procure imported coal through a transparent competitive bidding process;

(iv) E-auction coal will be procured based on the availability/auction calendar published by CIL and its subsidiaries;

(v) The Respondents shall have a period of thirty (30) days to approve or disapprove the request for procurement of coal from alternate sources proposed by the Petitioner;

(vi) If the Respondents fail to approve the Petitioner's request within thirty (30) days, the Petitioner's proposal for procurement of coal from alternate sources shall be deemed to be rejected by the Respondents;

d) In case of actual or deemed rejection of the Petitioner's request for procurement of coal from alternate sources, the Respondents shall be obligated to pay full Capacity Charges and incentives as specified in the respective PPAs on the basis of declared technical availability of the Plant and shall not be entitled to levy any penalty on the Petitioner for its inability to achieve 75% Availability during the relevant Contract Year;

e) Allow costs of the present Petition to the Petitioner; and

f) Pass any or such further orders as may be deemed fit and proper in the facts and circumstances of the case”.

15. Perusal of the above clearly reveals that the said matter was filed by the Petitioner merely seeking declarations upon the Haryana Utilities to abide by the provisions of the Haryana PPA and for devising the guidelines for procurement of coal from alternate sources to mitigate the shortage of domestic linkage coal as a pre-emptive measure. As such the matter did not involve any dispute(*lis*) between the parties requiring intervention of this Commission and consequently, the Commission, while disposing the matter vide its order dated 21.3.2022 observed as under:

“36. Section 79(1)(b) of the Act empowers the Commission to regulate the tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Petitioner in the instant Petition is not seeking for regulating tariff. Thus, Section 79(1)(b) is not applicable in the present case. Section 79(1)(f) of the Act empowers this Commission to adjudicate upon the dispute involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) of Section 79(1) of the Act. Clause (a) of Section 79(1) of the Act is applicable in case of generating companies owned or controlled by the Central Government. The Petitioner in the instant Petition is not a generating company owned or controlled by the Central Government and hence, Section 79(1)(a) is not applicable in the present case. Further, clause (c) and clause (d) of section 79(1) of the Act are also not applicable as these deal with regulating the inter-State transmission of electricity and determination tariff for inter-State transmission of electricity, as the Petitioner in the instant Petition is not engaged in inter-State transmission of electricity. Hence, we are of the view that no dispute within the meaning of Section 79(1)(f) of the Act has been brought by the Petitioner in the present petition before us.

37. We also observe that that the Petitioner has not sought any relief, including any monetary compensation. The Petitioner has merely sought directions in the form of advance declaration that the Respondent No. 1 and Respondent No. 2 shall give timely approvals to the Petitioner for procurement of coal from alternate sources in accordance with the Article 7.2.1 of the PPA1.

38.We are of the considered view that the parties are governed as per the terms of the PPA and as no dispute within the meaning of Section 79(1)(f) has been raised before us seeking any relief, any declarations in advance in anticipation of a dispute as prayed by the Petitioner is unwarranted at this stage. Thus, the prayer of the Petitioner seeking declaration that Respondent No. 1 & Respondent No. 2 are obligated to provide timely approvals to the Petitioner for procurement of coal from alternate sources in accordance with the Article 7.2.1 of the PPA1 cannot be granted.

39. In the light of above findings, the prayer of the Petitioner that in case of actual or deemed rejection of the Petitioner's request for procurement of coal from alternate sources, the Respondents shall be obligated to pay full Capacity Charges and incentives as specified in the respective PPAs is premature and therefore, cannot be granted. The rights and obligations of the parties are governed by PPA executed between the parties. As already observed, at present the Petitioner has not placed on record any dispute within the meaning of Section 79(1)(f) of the Act and therefore, no relief can be granted at this stage.

40. The Petitioner has also sought issuance of appropriate guidelines for procurement of coal from alternate sources by the Petitioner to mitigate the shortage of domestic linkage coal. We are of the view that the Commission is not the appropriate forum for issuing such guidelines....”

In the aforesaid order, the Commission observed that the Petitioner therein had failed to point out any dispute between the parties requiring the invocation of the adjudicatory jurisdiction of this Commission under Section 79(1)(f) of the Act. Moreover, with regard to the issuance of various directions as sought by the Petitioner, the Commission went on to hold that either issuance such directions were pre-mature at that stage or the Commission was not the competent authority for issuing such directions. Indisputably, the matter did not entail adjudication of any dispute between the parties – including recognition of force majeure event and the award of the consequential financial relief(s) thereto – as involved in the present case wherein the Petitioner has sought the adjudication of the dispute in relation of

the recovery of capacity charges for its plant at deemed Normative Availability for 88 days during financial year 2018-19 on the basis that it was constrained from declaring its full availability on account of persistent and unreasonable denial by the Haryana Utilities to approve the procurement of coal from alternate sources as per Haryana PPA which also amounts to a Force Majeure event under Haryana PPA. In our view, the cause of action of the present Petition is entirely separate and distinct from the earlier Petition, which was disposed of by the Commission for lack of pointing out any dispute requiring invocation of Section 79(1)(f) of the Act and thus, the present Petition cannot said to be hit by the provisions of Order II Rule 2 of the CPC. While the reliefs as prayed for under the present case might have been available to the Petitioner at the time of filing of Petition No. 285/MP/2019, Order II Rule 2 does not require that when a transaction or right gives rise to several separate cause of action, they should all be combined in the one suit. In view of the above, the contention of the Haryana Utilities that the present Petition is barred by Order II Rule 2 of CPC deserves to be rejected. Accordingly, Issue No. 1 is answered.

Issue No. 2: Whether Haryana Utilities' refusal to grant approval to JPL for import of coal to meet the shortfall in supply of domestic coal constitutes a Force Majeure event in terms of Article 12.3(ii)(1)(b) of the PPAs?

16. The Petitioner has submitted that due to overarching coal shortage in the country and the persistent actions of the Procurers to thwart the Petitioner's efforts to procure alternate coal, MGTPP was not only able to achieve commercial availability equivalent to its technical availability of 89.70% in the financial year 2018-19 which would have been achieved, had the Haryana Utilities granted timely consents for procuring imported coal. The Petitioner has stated that:

(a) The Petitioner had repeatedly and diligently throughout the contract year 2018-19, attempted to convince Haryana Utilities to allow it to procure imported coal in order to avoid generation loss due to shortage of coal at MGTPP. However, Haryana Utilities kept unnecessarily delaying procurement of imported coal citing frivolous grounds and never provided approval to the Petitioner for procuring imported coal despite being completely aware of the fact that there was an acute shortage of domestic coal in the country and there were various bottlenecks/constraints in transporting coal through Rail/RCR mode.

(b) Haryana Utilities have acted in contravention of their obligations under Article 7.2.1(b) of the Haryana PPA. As a result of this, the Petitioner was unable to meet the normative availability of 80% under the Haryana PPA and achieve availability corresponding to its technical availability.

(c) Haryana Utilities' refusal to grant approval to the Petitioner for import of coal to meet the shortfall in supply of domestic coal amounts to unlawful and/or unreasonable refusal to grant any other consent required for the operation of MGTPP. Accordingly, any delay and/or non-grant of approval by the Haryana Utilities under the Haryana PPA to arrange coal from alternate sources, qualifies as a Force Majeure event under Article 12.3 and more specifically as a Direct Non-Natural Force Majeure Event under Article 12.3(ii)(b) of the Haryana PPA, as held by this Commission in its order dated 25.1.2016 in Petition No. 170/MP/2013. Article 12.3 of the PPA defines force majeure to mean any event or circumstance or combination thereof including those enumerated therein that prevents or delays a party from performing its obligations thereunder, but only if

such events or circumstances are outside such party's reasonable control and could not have been avoided. Article 12.3 (ii)(b) of the PPA *inter alia* provides that any unlawful, unreasonable and discriminatory refusal to grant any consent required for the operation of the plant by the procurers shall be considered as a Direct Non-Natural Force Majeure Event, provided an appropriate court has declared such refusal to be unlawful, unreasonable or discriminatory and strikes the same down. The Petitioner has further submitted that the Haryana Utilities ought not to be permitted to penalise the Petitioner for any alleged default on the part of the Petitioner of the provisions of the PPA as the Petitioner is the affected party. The Petitioner has further submitted that as per Article 12.7(e) of the PPA, if the plant's average availability falls below 80% for over 2 consecutive months or for any non-consecutive period of 4 months both within any continuous period of sixty months, as a result of a Direct Non-Natural Force Majeure Event, then with effect from the end of that period and so long as the daily average availability continues to be reduced below 80% as a result of such Direct Force Majeure Event, the Petitioner may through a written notice to the Procurers deem the availability of the plant to be 80% from the end of such period, regardless of its actual available capacity. The procurers are liable to pay the capacity charge calculated on such deemed normative availability, after the cessation of the effects of the non-natural direct force majeure in the form of increase in capacity charge. The Petitioner has submitted that the capacity charge increase is required to be determined by this Commission on the basis of putting the Petitioner in the same economic position as it would have been, had the Petitioner been paid the capacity charges in a situation where the direct non- natural force majeure had not occurred. The Petitioner

has submitted that since the technical availability of MGTPP during 2018-19 was 89.70%, the capacity charge to the extent of the technical availability be allowed in terms of Article 12.7(e) of the Haryana PPA.

17. Haryana Utilities have submitted that capacity charge is payable on declared capacity, namely, the capacity which the Petitioner declares that it is in a position to generate and supply electricity with the requisite availability of fuel. According to Haryana Utilities, there was no shortfall in coal at MGTPP and thus, the question of Haryana Utilities refusal to procure alternate coal is of no consequence. Haryana Utilities have urged that in the facts and circumstances mentioned, the allegation made by the Petitioner that the Respondent Nos. 1 and 2 were not providing timely consents for procurement of coal from alternate sources has no relevance to the performance of the obligations by the Petitioner with the coal availability from the linked mines. They have alleged that the PPA expressly and comprehensively deals with all the terms and conditions applicable for generation and supply of electricity, etc., and the consequences of lower declaration of availability during financial year 2018-19 or any alleged breach on the part of the Respondent Nos. 1 and 2 have to be necessarily dealt with only in terms of the above PPA. It has been pointed out that the Petitioner can only claim reliefs as provided under the PPA and not *de hors* of the PPA and therefore, the claim of the Petitioner towards deemed capacity charges and incentive is devoid of any merit, when the same is not provided for in the PPA.

18. The Petitioner has argued that the MGTPP was envisaged as a Case 2 project under which the procurers were required to bear the risk of fuel and its cost as evident from the RfQ, RfP and the PPAs. TPDDL has submitted that as per Article

7.2.1 of the PSA between TPTCL and TPDDL, if Haryana Utilities give their consent to fuel supply agreement proposed to be entered into, TPDDL's consent is deemed to be given. TPDDL has submitted that under the provisions of the PSA, TPDDL neither assumed any obligation in relation to fuel for MGTPP nor had any significant role in procurement of fuel as per the PSA.

19. The Commission in its Order dated 25.01.2016 in Petition No. 170/MP/2013 has already discussed the provisions of the RfQ, RfP and PPAs to understand the responsibility of the seller and procurers with respect to the arrangement of fuel upto COD and subsequent operation of MGTPP, and held that it is the responsibility of HPGCL to arrange for the coal linkage and HPGCL has informed the bidders through these documents that the procurers had secured a firm coal linkage from the Ministry of Coal. The provisions of the PPA in so far as they pertain to fuel are extracted as under:

Provision in the Power Purchase Agreement between the Petitioner, JPL and Haryana Utilities

"Fuel" means primary fuel used to generate electricity namely, coal."

"Fuel Supply Agreements" means the agreement(s) entered into, between the seller and the fuel supplier and fuel transporter, for the purchase, transportation or handling of fuel required for the operation of the power station."

"7.2.1 The seller shall enter into the Fuel Supply Agreement only on the basis of:

(a) Advice of the procurers;

(b) With the express written consent of the procurer, which shall not be unreasonably withheld, if the seller satisfies the procurer that, the FSA intended to be entered into by the seller is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project in question;

(c) Approval of HERC, if required under the Competitive Bidding Guidelines; and

(d) Prudent Utility Practices.”

Proviso under Article 12.3.i regarding natural force majeure

“Provided that in the event of the procurer is convinced and agrees in writing that the seller has made all reasonable efforts and has fulfilled all its obligations to sign Fuel Supply Agreements with the respective agencies, but is not able to do so within the deadline mentioned in Article 3.1.2 owing to reasons beyond the Seller’s reasonable control, then the seller shall be construed to be affected by the Natural Force Majeure event.”

Provision in the Power Purchase Agreement between JPL and TPTCL

“7.2.1 JPL shall enter into Fuel Supply Agreement (FSA) on the basis of:

(a) Advice of TPTCL

(b) With the express written consent of TPTCL, which shall not be unreasonably withheld, if JPL satisfies TPTCL that the FSA is intended to be entered into by JPL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;
c) Approval of DISCOMs under the DISCOMs PPA and Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required;
and

d) Prudent Utility Practices.

Provided however that in the event that the DISCOMs provide their consent to JPL under DISCOM PPA and TPTCL does not provide JPL with such written consent, JPL shall have the right to execute the FSA and the requirement of TPTCL’s consent shall no longer be applicable.

In the event:

(a) TPTCL provides the written consent to JPL as mentioned in sub-article 7.2.1 (b) above;

Or

(b) TPTCL chooses not to provide such written consent to JPL but avails of the Contracted Capacity and the Electrical Output corresponding to the Available Capacity at the Delivery Point;

TPTCL shall be deemed to have given consent to the execution of the FSA under this Agreement and provisions of Article 7.2.2 and 7.2.3 shall apply to TPTCL. It is further clarified that in the event TPTCL chooses not to provide written consent to JPL and does not purchase the Allocated Contracted Capacity and the Electrical Output corresponding to the available capacity at the Delivery Point, the provisions of Article 7.2.2 and Article 7.2.3 shall not be applicable.”

Provision in the Power Sale Agreement between TPTCL and TPDDL

“7.2.1 JPL/TPTCL shall enter into Fuel Supply Agreement (FSA) on the basis of:

(a) Advice of NDPL;

(b) With the express written consent of NDPL, which shall not be unreasonably withheld, if JPL/TPTCL satisfies NDPL that the FSA is intended to be entered into by JPL/TPTCL is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the project;

c) Approval of DISCOMs under the DISCOMs PPA and Haryana Electricity Regulatory Commission under the Competitive Bidding Guidelines, if required; and

d) Prudent Utility Practices.

Provided however that in the event that the DISCOMs provide their consent to JPL under DISCOM PPA and NDPL does not provide TPTCL/JPL with such written consent, JPL/TPTCL shall have the right to execute the FSA and the requirement of NDPL’s consent shall no longer be applicable.”

20. During the contemporaneous period, the Petitioner wrote numerous letters to Haryana Utilities *inter alia* keeping them updated about the dismal coal stock situation at MGTPP and its inability to run and operate both Units of MGTPP resulting in forced shutdown of one Unit of MGTPP in order to conserve coal. However, Haryana Utilities did not raise any question on the veracity of shortage of coal being highlighted by the Petitioner at the relevant time. In fact, Haryana Utilities have time and again accepted the position of coal shortage for MGTPP and have also raised this issue before various authorities including through correspondences noted by us hereinabove. The Petitioner has also submitted that the shortfall in domestic coal was an industry wide issue due to which even Ministry of Power permitted TPPs to procure imported coal/coal from alternate sources.

21. We also note that in support of its contention regarding shortage of coal, the Petitioner has placed data on record data such as details of month-wise

materialization of coal in terms of % of ACQ, correspondences detailing/highlighting the difficulties associated with materialization of domestic coal (including shortage of rakes), correspondences providing regular updates on the continuation of Force Majeure Event and details of shutting down of one of the Units to the Respondents; details of daily coal stock during the period June 2018 to December 2018 along with the criticality level of coal stock; and daily generation reports published by National Power Portal (NPP) for certain dates in each month from June 2018 to December 2018, which belies the contentions of Haryana Utilities regarding any alleged failure of the Petitioner to provide requisite details. Further, the fact that HPPC, acting on behalf of Haryana Utilities, advised the Petitioner for procurement of 1,50,000 tonnes of imported coal by conducting a tender through third party e-portal itself proves the shortage of sufficient coal stock at MGTPP. Otherwise, there was no reason for Haryana Utilities to allow procurement of imported coal, if the requirement of MGTPP was being met through domestic linkage coal. In view of the above, we observe that the shortage of domestic coal during the relevant period (Contract Year 2018-19) cannot be disputed.

22. Further, during the hearing of the Petition on 15.7.2022, the Petitioner was directed to include in its written submission clear demonstration to the effect that the constraint in declaring full availability for the period of 88 days during financial year 2018-19 was due to denial by Haryana Utilities to approve the procurement of coal from alternate sources..

23. We have examined the data submitted by the Petitioner along with its written submissions dated 22.9.2022 containing the details of opening stock, closing stock, and coal stock received on specific days for the relevant period. The summary of

analysis of the days on which DC loss has been claimed based on the daily opening coal stock for June to December, 2018 is as under:

S. No.	DC loss due to coal shortage during the period June-Dec 2018	No of days	Days	Opening Coal Stock (Days)@20506 Tons per day
1	One unit shut down	76	8	0.61-1.07
			34	1.08 – 2.00
			34	2.00 – 3.47
2	Partial outage	23*(12)	2	0.88 -1.08
			12	1.08 – 2.00
			9	2.01 – 3.60
Total		99*(88)		

*Unit partial outage of 23 days is equivalent to 12 days of complete outage.

24. It can be seen from the above table that opening coal stock position was less than 4 days during the period from June to December, 2018.

25. During the period from June to December 2018, the Petitioner has claimed complete shutdown of one unit on account of coal shortage for 76 days and partial outage due to coal shortage for 23 days. Out of these 76 days, the daily opening coal stock was 0.61 – 1.08 days for 8 days, 1.08 - 2.0 days for 34 days and 2.0 – 3.5 days for 34 days during the period from June to December 2018. Out of 23 days when partial outage of one unit due to coal shortage has been claimed, the daily opening coal stock was 0.88 – 1.08 days for 2 days, 1.08 - 2.0 days for 12 days and 2.0 – 3.6 days for 9 days during the period from June to December 2018.

26. The Petitioner has contended that as per the guidelines/methodology dated 8.11.2017 (CEA Coal Stocking Guidelines) issued by the Central Electricity Authority (CEA) during the period from June-December 2018, the coal stock at MGTPP was well below “*super critical*” level (i.e., coal stock was less than 4 days) on 180 days, i.e., 84% of the time, and “*critical*” level (i.e., less than 7 days) on 34 days, i.e., during 16% of the time. Also, from the analysis of the data submitted by the

Petitioner along with its written submissions, we note that the coal stock at MGTPP was well below “*super critical*” level (i.e., coal stock was less than 4 days) for almost the entire period.

27. Since sustained operation of units is not possible with low coal stock, we are of the view that for a non-pit head load-centre based power generating station, maintenance of adequate coal stock needs to be ensured for reliability of power supply to the beneficiaries of the plant.

28. It is noted that the daily generation reports published by National Power Portal for the period from June to December 2018 categorically records that one of the unit of the Petitioner’s Plant was under forced shutdown due to ‘*coal shortage*’ except for the period from 20.9.2018 to 1.10.2018 wherein reason for outage has been recorded as water wall tube leakage. Thus, it can be seen that out of 88 days for which unit shutdown has been claimed by the Petitioner on account of coal shortage, for 12 days the reason for forced shutdown was water wall tube leakage. Out of remaining 76 days, daily opening coal stock is varying between 0.61 to about 3.5 days. Therefore, we are of the view that the Petitioner was prevented from declaring full availability of MGTPP on account of coal shortage during the period from June-December 2018 and the Petitioner would have achieved technical availability of 80% to recover full capacity charges if Haryana Utilities had accorded approval to the Petitioner for procurement of coal from alternate sources to offset this shortfall.

29. It is, also, noted that the Petitioner did not enjoy the freedom under the PPA to buy coal from any source it decides. Since energy charge is a pass through in tariff, the Haryana PPA makes it obligatory for the Petitioner to buy coal in certain

circumstances. Article 7.2.1 of Haryana PPA provides that the Petitioner shall enter into Fuel Supply Agreement only on the basis of (a) advice of the procurers; (b) with the express consent of the procurers; (c) approval of HERC, if required, under the competitive bidding guidelines; and (d) prudent utility practices. Articles 7.2.1 of the TATA PPA and TATA PSA provide that if TPTCL/TPDDL do not give their consent but Haryana Utilities give their consent, the consent of TPTCL/TPDDL shall be deemed to have given. In effect, the Petitioner has to execute the FSA in accordance with Article 7.2.1 of Haryana PPA. It is seen that the only condition to be fulfilled, for the Petitioner to obtain consent for procurement of alternate coal is that the Petitioner is required to satisfy the Respondents that the FSA intended to be entered into (i.e. procurement of coal from alternate sources namely imported coal) is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the Project.

30. Therefore, next, we have to examine whether in the present case, the said condition (i.e., procurement of coal from alternate sources is on the best commercial terms that would be available to any third party in its procurement of coal for any project similar to the Project) was duly fulfilled by the Petitioner.

31. We note that on 12.7.2018, the Petitioner issued a letter to HPPC informing that it has engaged MSTC, which is a Government entity, for conducting the e-tender bidding process. We observe that since MSTC is a State-owned undertaking, it is expected to adhere to certain standards while quoting the charges and MSTC cannot charge arbitrarily. Thus, it is apparent that by way of undertaking to follow competitive bidding for procurement of imported coal through a State-owned undertaking, i.e., MSTC, as third-party agency for conducting the e-tender bidding

process, the requirement of entering into FSA/procurement of imported coal on the best commercial terms had been met. Therefore, Haryana Utilities ought to have granted consent to the Petitioner for procurement of alternate coal to meet the shortfall in supply of domestic coal. However, we note that Haryana Utilities have failed to do so. Accordingly, the conduct of Haryana Utilities impugned herein is in contravention of Article 7.2.1(b) of the Haryana PPA.

32. In view of the above, the dispute between the Petitioner and Haryana Utilities with regard to withholding of capacity charge revolves around the interpretation of the provisions of Article 12.3, Article 12.3(ii)(b), Article 12.7(e) and Clause 1.2.5 of Schedule 7 of Haryana PPA. Accordingly, relevant provisions of Haryana PPA are extracted as under:

“12.3 Force Majeure

A Force Majeure means any event or circumstance or combination of events or circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent such events or circumstances are not within the reasonable control, directly or indirectly of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Events:

act of God, including but not limited to lightning, drought, fire, explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures of the last hundred (100) years:

Provided that in the event the Procurer is convinced and agrees in writing that the Seller has made all reasonable efforts and has fulfilled all its obligations to sign the Fuel Supply Agreements with the respective agencies, but is not able to do so within the deadline mentioned in Article 3.1.2 owing to reasons beyond the Seller's reasonable control, then the Seller shall be construed to be affected by Natural Force Majeure event:

Provided further that in the event the first Unit of the power station is ready in all respects but is not able to achieve the commissioning by the scheduled COD due to: (a) non-completion of the Rail corridor for transportation of coal from CIL's/CIL subsidiary's linked coal mines to the Project site; or (b) non-supply of coal from CIL

or CIL's subsidiary, then the Seller shall be construed to be affected by the Natural Force Majeure event. It must be noted that the Unit shall be considered as ready for commissioning only when the Independent Engineer certifies so in writing to the Procurer. Notwithstanding anything stated above, inadequate availability of Rail corridor for transportation of coal or inadequate supply of coal by CIL/CIL's subsidiary shall not be construed as any kind of Force Majeure event after COD of first unit of the generating station.

ii. Non-Natural Force Majeure Events:

1. Direct Non-Natural Force Majeure Events

a).....

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any consent required by the Seller or any of the Seller's contractors to perform their obligations under the project Documents or any unlawful, unreasonable or discriminatory refusal to grant any other consent required for the development/operation of the Project. Provided that an appropriate Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c).....

2. Indirect Non-Natural Force Majeure Events:

12.4 Force Majeure Exclusions

Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions except to the extent they are consequences of an event of force majeure:

a. Unavailability, late delivery, or changes in the cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the plant;

12.7 AVAILABLE RELIEF FOR A FORCE MAJEURE EVENT

Subject to this Article 12:

(a) No party shall be in breach of its obligations pursuant to this Agreement to the extent that performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b).....

(c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurers for the part of the Contracted Capacity affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event. For the balance part of the Contracted Capacity, the Procurers shall pay Tariff to the Seller, provided during such period of Natural Force Majeure Event, the balance part of the Power Station is declared to be Available for the scheduling and dispatch as per ABT for supply of by the Seller to the Procurers;

(d).....

(e) If the average Availability of the Power Station is reduced below eighty (80) percent for over two (2) consecutive Months or for any non-consecutive period of four (4) months both within any continuous period of sixty (60) Months, as a result of a



Direct Non Natural Force Majeure, then, with effect from the end of that period and for so long as the daily average Availability of the Power Station continues to be reduced below eighty (80) percent as a result of a Direct Non Natural Force Majeure of any kind, the Seller may elect in a written notice to the Procurers, to deem the Availability of the Power Station to be eighty (80) percentage from the end of such period, regardless of its actual Available Capacity. In such a case, the Procurers shall be liable to make payment to the Seller of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Non-Natural Direct Force Majeure in the form of an increase in Capacity Charge. Provided such Capacity Charge increase shall be determined by the Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity charges in a situation where the Direct Non-Natural Force Majeure had not occurred.”

33. From the above provisions of the PPA, the following emerges with regard to the liability of the procurers to pay the capacity charges in case the availability is affected by a force majeure event and the liability of the Petitioner to pay the penalty where the availability is not affected by force majeure event:

(a) Force Majeure means any event or circumstance or combination of events or circumstances which wholly or partly prevents or unreasonably delays an affected party from discharging its obligations under the PPA and to the extent such circumstances or events are not within the reasonable control of the affected party and could have been avoided had the affected party taken reasonable care or adopted prudent utility practices.

(b) Any unlawful, unreasonable or discriminatory revocation or refusal to renew or refusal to grant any consent for the development/operation of the project is an event of non-natural force majeure provided that an appropriate Court of Law declares such revocation or refusal to renew or refusal to grant such consent as unlawful or unreasonable or discriminatory.

(c) Unavailability, late delivery, or changes in the cost of fuel is excluded unless it is the consequence of an event of force majeure.

(d) Every party shall be entitled to claim relief in relation to a force majeure event in regard to its obligations.

(e) If the average availability of the power station is reduced below 80% for over two consecutive months or for any non-consecutive period of four months within any continuous period of sixty months as a result of direct non-natural force majeure, the seller shall through a notice to the procurers elect to deem the availability of the power station as 80% and the procurers shall be liable to pay for such deemed availability in the form of increase in capacity charge subject to the determination by the Appropriate Commission by putting the seller in the same economic position as if the force majeure event had not occurred.

34. We have considered the submissions of the Petitioner in the light of the above provisions. In our view, unreasonable delay in granting approval for procurement of coal from alternative sources by the Haryana Utilities, which is in contravention of Article 7.2.1(b) of the PPA, has prevented the Petitioner to declare full availability of MGTPP for about 76 days during the period from June-December 2018 and is covered under Article 12.3.ii (b) of the PPA relating to direct non-natural force majeure event. However, under Article 12.4.(a) of the PPA, unavailability of fuel cannot be considered as force majeure unless it is the consequence of an event of force majeure. Since delay in approval by Haryana Utilities has resulted in non-availability of fuel, this circumstance will be covered under force majeure.

35. In accordance with Article 12.7(e) of the PPA, if the average availability is reduced below 80% for over two consecutive months or any non-consecutive period

of four months within a continuous period of 60 months as a result of direct non-natural force majeure event, the seller is entitled for capacity charges on such deemed normative availability after cessation of non-force majeure event. In the present case, the Petitioner vide its letters dated 11.10.2017 and 23.10.2017 issued notices of occurrence of Force Majeure to the Respondents and vide letters dated 28.1.2020 issued notice of cessation of Force Majeure. This shows that the event of Force Majeure was continuing during the aforesaid period including the period under dispute. During this period, the availability of MGTPP was reduced below 80% for 2 consecutive months, i.e., October and November 2017 (*as the availability in October 2017 was 69.93% and in November 2017 was 76.95%*). Furthermore, the average availability for the months of October 2018 and November 2018 has also been shown to be lesser than 80% on account of loss of availability due to shutdown of one of the Unit as shown in paragraph 48 of the Petition. Therefore, in our view, the Petitioner is entitled to capacity charges on deemed normative availability in the present case.

36. This view is also in consonance with the view taken by this Commission in its earlier order dated 25.1.2016 in Petition No. 170/MP/2013. The relevant extract of the order dated 25.1.2016 is extracted as under:

“58. Haryana Utilities have taken the position that as per the non-obstante clause under Article 12.3.i of the Haryana PPA, inadequate supply of coal by CIL/CIL’s subsidiaries shall not be construed as any kind of force majeure event after the COD of first unit of the power station. Accordingly, Haryana Utilities have argued that after the COD of Unit 1 of MGTPP, shortfall in coal supply by CCL shall not be considered as force majeure.

*....
This is a limited non-obstante clause excluding the operation of Natural Force Majeure Events as described in Article 12.3.i of the PPA. **This clause does not control the provisions of Article 12.3.ii regarding Non Natural Force Majeure Events and Article 12.4 of the PPA regarding Force Majeure Exclusions under which reliefs have been claimed. Therefore, we are not in agreement with Haryana Utilities that short supply of coal after the FSA was signed cannot be covered under force majeure.***

59. The petitioner has submitted that had the permission been granted in time for import of coal and procurement of coal on “as is where is” basis, the petitioner would have been able to achieve an availability of 78.51%. The petitioner in its letter dated 23.5.2013 addressed to CMD UHBVNL and DHBVNL has given the calculation in support of its contention.

60. We have considered the submission of the petitioner. **In our view, unreasonable delay in according approval for procurement of coal from alternative sources by the Haryana Utilities which has prevented the petitioner to achieve the full availability is covered under Article 12.3.ii (b) of the PPA relating to Direct Non Natural Force Majeure Event. However, under Article 12.4.(a) of the PPA, unavailability of fuel cannot be considered as force majeure unless it is the consequence of an event of force majeure. Since delay in approval by Haryana Utilities has resulted in non-availability of fuel, this circumstance will be covered under force majeure. In our view, the petitioner is partially affected by force majeure condition during the period 2012-13. In accordance with article 12.7(e) of the PPA, if the average availability is reduced below 80% for over two consecutive months or any non consecutive period of four months within a continuous period of 60 months as a result of direct non natural force majeure event, the seller is entitled for capacity charges on such deemed normative availability after cessation of non-force majeure event.”**

37. The Respondents, however, have contended that the order dated 25.1.2016 in Petition No. 170/MP/2013 has not attained finality as it has been questioned before the APTEL. Needless to say that the said order is binding law, unless reversed, particularly maintain an uniformity and regulatory certainty. Furthermore, we have assigned cogent reason as stated above for coming to similar findings in the given facts and circumstances. Thus, the reasoning of the Respondents has no legs to stand.

38. Accordingly, this issue is answered.

Issue No. 3: Whether the Petitioner is entitled to payment of deemed capacity charges as per Article 12.7(e) of the PPAs ?

Issue No.4: Whether the Petitioner is entitled for incentive for the technical availability attained beyond 85% (i.e., for 4.70% (89.70% – 85%) during Contract Year 2018-19 as per the formula stipulated under Article 1.2.4 of Schedule 7 of the PPAs?

39. Both the issues are being taken together for convenience of discussion. In view of the above discussion, it manifests that there was unreasonable delay in granting approval for procurement of coal from alternative sources by the Haryana Utilities and as a result of this, the daily opening coal stock availability has been in the range of 0.61 days to 3.6 days (assuming consumption @20506 tons per day) on days on which DC has been claimed by the petitioner, during the period from June – December 2018. It had prevented the Petitioner from declaring full availability of its plant during the period from June-December 2018. In such a scenario, the Petitioner cannot be penalized by way of payment of lesser capacity charges, that too for no fault of its own.

40. TPTCL has alleged that since it is only an intermediary between the Petitioner and TPDDL has no consequent role in the present matter. We have already considered the issue of liability of TPTCL/TPDDL in such a scenario in detail and dealt with the same by way of our decision in Petition No. 170/MP/2013 and Petition No. 319/MP/2013.

41. Further, we have also issued detailed findings regarding role of an intermediary in such transactions qua SECI/NTPC in the context of renewable energy generators in various orders which are squarely applicable to the present case. Therefore, we cannot accept TPTCL/TPDDL's arguments regarding their liability being restricted and the same are thus rejected as being untenable.

42. The Petitioner has claimed that despite being in a position to declare availability to the tune of 89.70%, they could only achieve availability to the extent of 77.62% on account of shortage of coal for 88 days during the period from June-

December 2018 i.e., the Petitioner has claimed 12.08% loss of availability on account of coal shortage for 88 days. As per the data analysed at Para 24 to Para 29, out of the total 88 days for which coal shortage has been claimed, the opening coal stock availability was always less than 4 days and it varied between 0.61 days to 3.6 days . On account of less coal stock availability, the Petitioner was prevented from declaring full capacity availability during the period. Adequate fuel availability on sustainable basis the Petitioner would have enabled it to achieve at least 80% availability to claim full capacity charges. Therefore, the Petitioner is entitled to recover its full capacity charges only for the year 2018-19.

43. As regards incentive payment, Clause 1.2.4 of the Schedule 7 provides that if the availability in a contract year exceeds 85%, an incentive at the rate of 40% of the Quoted Non Escalable Capacity Charges for such contract year, subject to a maximum of 25 paise/kWh, shall be allowed on the energy (in kWh) corresponding to the availability in excess of 85%. In terms of Article 12.7(e) of the PPA, the availability of the project for the period during which it was impacted by Direct Non-Natural Force Majeure event would be considered as 80% regardless of its actual availability. Article 12.7(e) further stipulates that the procurers shall be liable to make payment to the seller of the capacity charges calculated on such deemed normative availability, after cessation of the effects of Non Natural Direct Force Majeure in the form of an increase in capacity charges on the principle of restitution. Perusal of Article 12.7 (e) of the PPA reveals that the availability of the project for the period during which it was impacted by Direct Non-Natural Force Majeure event is required to be considered as 80% regardless of its actual availability. Thus, the Petitioner is not entitled for incentive payment. Accordingly, the issues are answered.

44. In view of the above discussion, we hereby direct the Haryana Utilities and TPTCL to reconcile the amount and to make payment corresponding to shortfall in full capacity charges, to the Petitioner within four weeks from the date of this order towards capacity charges on account of the Petitioner being constrained from declaring full availability due to fuel shortage during the period from June-December 2018, along with interest/late payment surcharge as per the provisions of the PPAs from the date on which such amounts would have fallen due till the date of payment of the same. Needless to say that TPDDL is liable to reimburse TPTCL and make payment on a back-to-back basis in terms of the Tata PSA.

45. The Petition No. 637/MP/2021 is disposed of in terms of the above.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

