CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 212/MP/2019

Coram:
Shri P.K. Pujari, Chairperson
Shri I.S.Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 31st March, 2022

In the matter of

Petition under Section 79 of the Electricity Act, 2003 read with Power Supply Agreement dated 18.2.2016 executed between Sembcorp Energy India Limited and the Distribution Companies for release of amounts arbitrarily and wrongfully withheld by Respondents from fuel charges legally payable to Sembcorp Energy India Limited

And

In the matter of

Sembcorp Energy India Limited,
(*erstwhile Thermal Power Corporation of India Limited*)
Registered office - 6-3-1090, A-Block,
5th Floor, TSR Towers, Raj Bhavan Road, Somajiguda,
Hyderabad-500082 **…….Petitioner**

Vs

1. Southern Power Distribution Company of Telangana Limited,
6-1-50, Mint Compound,
Hyderabad- 500 063

2. Northern Power Distribution Company of Telangana Limited,
H. No.: 2-5-31/2, Corporate Office, Vidyut Bhavan,
Nakkalgutta, Hanamkonda,
Warangal-506 001

3. Telangana State Power Co-ordination Committee,
Registered office - Vidyut Soudha, Khairatabad,
Hyderabad- 500082, Telangana. **…….Respondents**

Parties present:

Shri Vishrov Mukherjee Advocate, SEIL
Shri Ameya Vikram Mishra, Advocate, SEIL
Shri Milind Nigudkar, SEIL
Shri Pankaj Kapoor, SEIL

Shri Anand Ganesan, Advocate, Telangana Discoms
Shri Damodar Solanki, Advocate, Telangana Discoms
Shri D.N Sharma, Telangana Discoms

ORDER

The Petitioner, Sembcorp Energy India Limited (in short 'SEIL') has filed the present petition seeking the following relief(s);

> *(a) Direct the Respondents release of amounts towards fuel charges due to SEIL and have been unlawfully withheld for the period May 17 to Dec' 18 along with applicable interest in terms of PSA thereto, till date of payment;*
>
> *(b) Injunct the Respondents from illegally withholding any amount payable to SEIL in future;*
>
> *(c) Direct the Respondents to pay 75% of the outstanding amounts to SEIL within one week, pending final adjudication;*
>
> *(d) Direct the Respondents to not deduct amounts in the interim pending adjudication;*
>
> *(e) Pass any other order or direction as this Hon'ble Commission may deem fit in light of facts and circumstances of the present Petition.*

2. The Petitioner, SEIL owns and operates a thermal generating station with installed capacity of 1320 MW located at Pyanampuram in Sri Potti Sriramulu (SPSR) Nellore District, Andhra Pradesh (hereinafter referred to as 'the Project'). The Petitioner has a composite scheme for generation and supply of power to more than one State based on;

(a) Power Purchase Agreement (PPA) dated 1.4.2013 for supply of 500 MW of power to the distribution licensees in undivided Andhra Pradesh for a term of 25 years. Subsequent to the enactment of the Andhra Pradesh Reorganization Act, 2014 of the erstwhile state of Andhra Pradesh, the quantum of contracted capacity was divided between the Andhra Pradesh and Telangana distribution licensees and amendment to PPA dated 10.4.2015 was executed between the Petitioner and the Respondents No.1 and 2. The share of Telangana distribution licensees is 269.45 MW and the supply of power under the PPA commenced from date 20.4.2015.

(b) Power Supply Agreement (PSA) dated 18.2.2016 for supply of 570 MW of electricity to the Respondent Discoms for a term of 8 years. The supply of power under the PSA commenced from 30.3.2016 onwards.

3. The PSA dated 18.2.2016 which was entered into between Petitioner and Respondent Discoms on Design, Build, Finance, Own and Operate ('DBFOO') basis using 'domestic coal' supplemented with 'imported coal' as fuel, was approved by the Telangana State Electricity Regulatory Commission (TSERC) vide its order dated 27.1.2016 in O.P No.1 of 2016. In terms of the said PSA, the Petitioner, SEIL primarily uses the following sources of fuel: (i) concessional fuel and (ii) imported fuel. In case of shortfall in the aforesaid sources of fuel, the Petitioner, SEIL is permitted to use fuel under 'Additional Fuel Supply Arrangements (in short "AFSA") in terms of Article 22.9 of the PSA, to the extent of shortfall of domestic coal/imported coal.

Background

4. The background facts of the case, as submitted by the Petitioner, SEIL in the present petition is as under:

(a) In view of the composite scheme for supply of power in the State of Andhra Pradesh and State of Telangana, this Commission has the jurisdiction to adjudicate the present dispute under Section 79 (1) (b) read with Section 79 (1) (f) of the Electricity Act, 2003 (in short 'the Act').

(b) Clause 5.1.4 of the PSA requires the normative availability of the Project to be maintained at 90%. Further, in terms of Clause 6.1.2 of the PSA, the Respondents are obligated to support, cooperate and facilitate the Petitioner, SEIL in the implementation and operation of the Project.

(c) The PSA permits the usage of fuel from the following three sources namely (i) Concessional Fuel; (ii) Imported Fuel; and (iii) Additional fuel under AFSA.

(d) The consequences for shortfall in minimum fuel stock on account of fuel shortage are envisaged under Clause 21.4.2 and Clause 21.5.2 of the PSA. Also, the conditions stipulated under Clause 21.5.7 of the PSA, apply in the

event of shortage of fuel. The abovementioned provisions, envisages the possibility of the following situations:

(i) In case of anticipated shortfall in concessional fuel, if CIL offers to procure imported fuel, Petitioner, SEIL has to provide complete details of the same to the Respondents who have discretion to the approve the same.

(ii) In case the Respondents do not approve the abovementioned procurement, Petitioner will be entitled to supplement imported fuel up to a maximum limit of 40% of imported fuel, but will not be permitted to claim an event of fuel shortage or reduction in minimum fuel stock. However, this will apply after approval from the Respondents.

(iii) If the Respondents do not approve usage of imported fuel and instead approves usage of 'additional fuel' under 'AFSA' or in case the Petitioner anticipates that the imported fuel required to supplement the fuel shortage will exceed the permitted limit of 40%, provisions of Clause 22.9 and Clause 22.10 will apply.

(e) As per Clause 21.5.8 of the PSA, based on available and anticipated fuel stock, the Petitioner, SEIL has to provide a monthly detailed proposal of the anticipated fuel mix for supply of power in the ensuing month to the Respondents. However, if the Respondents do not notify the approved fuel mix before the close of the month in which the proposal is submitted, the fuel mix will be deemed to be approved by the Respondents and Petitioner, SEIL will be entitled to continue to adopt the fuel mix as per the proposal submitted.

(f) Clause 21.5.8 (B) of the PSA applies where the proposed fuel mix is not approved, deemed or otherwise. Further, as per Clause 21.5.8 (C) of the PSA, approval of proposed fuel mix will not impose an obligation on the Respondents to dispatch power from Petitioner, SEIL. It also provides that payment of fixed charges will be based on actual availability and payment of fuel charges will be based on actual fuel consumption.

(g) As per Clause 21.8 of the PSA, the Respondents are obligated to pay to Petitioner, SEIL fuel charges as part of the tariff determined in accordance with Clause 22.2.1 and Clause 22.2.2 of the PSA. As per Clause 22.9 of the PSA, in event of Petitioner anticipating shortfall in 'Concessional Fuel' for generation of electricity, Petitioner is required and entitled to procure and use fuel under 'AFSA' to meet any shortage of fuel. It is evident that the Petitioner, SEIL has to notify the Respondents of the details of the weighted average price of the fuel

including the transportation costs and washing costs (‘Landed Fuel Cost’) under ‘AFSA’ and provide any other information for demonstrating that ‘AFSA ‘is based on the best prices available. Upon such notification, the Respondents or the Appropriate Commission may approve such AFSA. If AFSA is not approved or is partially approved, Clause 21.4.2 and Clause 21.5.2 of the PSA shall apply to the extent of such reduction in availability.

(h) On 20.4.2017, the Petitioner submitted its proposed fuel mix, based on ‘domestic coal’ and ‘imported coal’ for the month of May, 2017 and requested the Respondents’ approval in terms of the PSA. The letter set out total capacity proposed to be generated using the approved fuel sources. On 22.5.2017, Petitioner informed the Respondents that as their approval is still pending, the supply of power for the month of May, 2017 is being continued as per Clause 21.5.8 (A) of the PSA.

(i) In line with the letter dated 20.4.2017, the Petitioner submitted its proposed fuel mix for the months of June, 2017 and July, 2017 (‘Proposal letters’) in accordance with the terms of the PSA. As an illustration, the proposal letter for the month of July, 2017 sets out the total capacity proposed to be generated using the three fuel sources as follows: Concessional fuel (31.88%), Imported fuel (31.86%) and Additional fuel under AFSA (36.26%). Further, the Petitioner also intimated the Respondents about the continued supply of power as per Clause 21.5.8(A) of the PSA, pending approval.

(j) On 12.7.2017, the Respondent No.3 communicated to the Petitioner that monthly energy bills are admitted by considering the domestic concessional coal cost up to 60% of the total requirement, irrespective of the actual cost of additional fuel procured. It was stated that the bills will be revised accordingly. On 19.07.2017, the Petitioner, SEIL responded to Respondent No.3 letter indicating that the PSA does not permit limiting the fuel charges payable, by considering the domestic concessional coal cost up to 60% of the total requirement, irrespective of the actual cost and quantum of imported fuel utilized by Petitioner SEIL. It was pointed out that as the Respondents did not object to the proposal letters, the Petitioner adopted the proposed fuel mix, in the light of the ‘deeming provision’ Clause 21.5.8(A) of the PSA. Further, the Respondents

even continued procuring power from Petitioner, SEIL, being well aware that the availability was based on fuel mix proposed in the proposal letters. Thus, payment was requested for the fuel cost for 'imported fuel' and 'additional fuel' under AFSA.

(k) Thereafter, the Petitioner continued sending proposal letters to the Respondents for the months of August 2017, September 2017, October 2017, November, 2017 and December 2017, along with reminders and intimation regarding continued supply of power in light of the deeming provision of Clause 21.5.8(A). On 5.12.2017, Respondent No.3 communicated to Petitioner that 'imported coal' usage is limited to 40% of the total coal requirement, irrespective of the actual cost of additional fuel procured and reiterated its stand in letter dated 12.7.2017.

(l) On 20.12.2017, Petitioner, SEIL responded to Respondent No.3 letter dated 5.12.2017 reiterating its letter dated 19.7.2017. In addition to this, Petitioner indicated that, if no response is received to its proposal letters, the Petitioner will supply power, without using any additional imported fuel under AFSA. However, in light of the on-going fuel shortage, Petitioner will be entitled claim fixed charges for the non-availability caused due to the said fuel charges in accordance with Clause 21.4.2 and Clause 21.5.2 of the PSA.

(m) Subsequent to this, Petitioner continued issuing proposal letters for the months of January, 2018 and February, 2018, but did not receive any response from the Respondents. On 30.1.2018, while reiterating its stand in letter dated 20.12.2017, Petitioner, SEIL communicated to Respondent No.3 indicating that the Respondents had admitted fuel charges from May, 2017 to August, 2017 with deductions of Rs. 26.95 crore, despite having the opportunity to exercise their right under PSA, to restrict supply from concessional and imported fuel only. However, the Respondents continued scheduling power from Petitioner, SEIL. Thus, the deduction of Rs.26.95 crore from fuel charges was not warranted.

(n) On 15.2.2018, Petitioner, SEIL communicated to the Respondent No.3 that the Respondents (1&2) had admitted fuel charges from May, 2017 to October 2017 with deduction of Rs.37.29 crore and were requested to make payment of

fuel charges as per invoices raised and release the said deducted amount. Similarly, by letter dated 16.3.2018, Petitioner, SEIL communicated to the Respondent No.3 that the Respondents (1&2) had admitted fuel charges from May, 2017 to November 2017 with deductions of Rs.40.11 crores and were once again requested to make payment of fuel charges as per invoices raised and release the said deducted amount. Several reminders on 8.6.2018, 11.7.2018 and 8.8.2018 were also sent to the Respondents for release of deducted amount of Rs.40.11 crore. However, no response was received from Respondent No.3 or the Respondents (1&2) in this regard.

(o) Meanwhile, the Petitioner kept sending proposal letters to the Respondents for the months of March, 2018 to January, 2019 along with reminders, informing them that if no response was received to the proposal letters, it would supply power, without using any 'additional imported fuel' under 'AFSA', but will declare non-availability and claim relief in accordance with Clause 21.4.2 and Clause 21.5.2 of the PSA.

(p) On 4.10.2018, Petitioner communicated to Respondent No.3 indicating that the total deducted amount from fuel charges for the period starting from May 2017 to March, 2018 was Rs.45.32 crore and the Respondents were requested to make payment of fuel charges as per invoices raised and for release of the deducted amounts. Petitioner, SEIL also followed up with reminders for release of the deducted amount of Rs.45.32 crore for the months of May, 2017 to March, 2018 and an increased deducted amount of Rs.46.15 crore for the months of May, 2017 to April, 2018 by letter dated 19.11.2018.

(q) On 17.1.2019, the Respondent No.1 wrote to Petitioner stating that the Respondent Discoms' have not been offered fuel under 'AFSA' for the months of October, 2018 to January, 2019 despite the price of 'imported coal' being double the price of 'domestic coal' which is causing financial burden. It was stated that Petitioner is obligated to identify additional sources of fuel in order to optimize fuel procurement cost under the PSA. It was further stated that if additional fuel under AFSA is not offered, Respondent No.1 will be constrained to limit the unit availability, commensurate to domestic coal supplies.

(r) On 28.1.2019, the Petitioner (in response to letter dated 17.1.2019), stated that as the fuel shortage was being mitigated by use of supplemental imported fuel in terms of the PSA, there was no need to offer any 'additional fuel' under 'AFSA' for the months of November, 2018 to January, 2019. The provision of deemed approval in the absence of a response under Clause 21.5.8(A) of the PSA was highlighted in view of the fact that the Respondents never replied to the proposal letters. Petitioner also indicated that the Respondents, after availing the benefit of supply of power, cannot raise the claim that the Petitioner failed to offer 'additional fuel' under 'AFSA' to substitute the high cost of supplemental imported fuel legally utilized, in accordance with the terms of the PSA. Further, it was stated that the provisions relating to AFSA can be triggered only if Clause 21.5.7(B) of the PSA are specifically invoked by the Respondents, which was not done in the present case. Thus, there was no occasion for Petitioner, SEIL to procure and offer 'additional fuel' under 'AFSA'.

(s) On 2.2.2019, the Respondent No.1 wrote to the Petitioner reiterating its stand with respect to Petitioner's purported obligation to offer fuel under AFSA. Thus, Petitioner was requested to offer 'additional fuel' under AFSA to replace the imported fuel. In response, Petitioner on 11.2.2019, reiterated its stand in letter dated 28.1.2019 vis-à-vis the deeming provision under Clause 21.5.8(A) of the PSA and also pointed out that additional fuel under AFSA is procured on an 'ad-hoc basis 'to make up for shortfall and it takes 35-40 days to identify a seller, place orders and receive the shipment. Thus, advance notice in this regard is required from the Respondents. It was further indicated that the price of 'supplemental imported coal' had increased due to market forces and the price of such coal payable to the Petitioner is pegged to indices listed in the PSA and is lower of the actual cost and indexed cost. A personal hearing was also requested to find an amicable solution.

(t) On 18.2.2019, the Respondent No.1 once again reiterated the Petitioner's purported obligation to offer 'additional fuel' under 'AFSA' in the fuel mix proposal submitted for the month of March, 2019. In response, Petitioner SEIL, on 22.2.2019, proposed to offer 'replacement of AFSA' by 'weight of imported fuel' from available 'additional fuel' under AFSA, for the entire quantum of shortfall.

Thus, this would also replace the supplemental imported fuel up to 40% by weight with additional fuel under AFSA. The Petitioner also stated that till such time approval was granted, power will be supplied to Respondents for the month of March, 2019 using only 'concessional fuel' available with it and fixed charges for non-availability of fuel charges will be claimed as per Clause 21.4.2 and Clause 21.5.2 of the PSA. The Petitioner further indicated that being a coastal power plant, the allocation of 'concessional fuel' does not meet 100% coal requirement and thus, even at the time of bidding, the proposal was for 80% of concessional fuel and 20% of supplemental imported fuel blend.

(u) On 8.3.2019, Petitioner communicated to Respondent No.3, reiterating its letter dated 20.12.2017 and indicated that while admitting fuel charges from May, 2017 to July, 2018, the Respondents had withheld a total amount of Rs.51.63 crores. On 9.5.2019, 11.6.2019 and 4.7.2019, Petitioner communicated to Respondent No.3, reiterating its letter dated 20.12.2017 and indicated that while admitting fuel charges from May, 2017 to December 2018, the Respondents had withheld a total amount of Rs.65.18 crore. The Petitioner requested Respondent No.3 to provide the basis and rationale of withholding the said amounts.

(v) However, the Respondent Discoms did not provide any reason for withholding a total amount of Rs.65.18 crores till date. It is submitted that the amounts (as shown below) has been withheld illegally by the Respondents and the PSA does not provide any arbitrary deduction on fuel charges:

Month	***Energy supplied by SEIL (kWh)***	***Amount towards fuel charges billed by SEIL (in Rs.)***	***Amount paid by Discoms towards fuel charges (in Rs.)***	***Balance Payable by Discoms (in Rs.)***
May-17	37,32,04,533	86,65,85,920	80,49,23,211	6,16,62,709
June-17	31,92,07,618	70,52,38,632	65,42,87,124	5,09,51,508
July-17	41,51,54,465	89,71,51,836	83,28,81,032	6,42,70,804
August-17	38,34,62,505	83,83,28,254	74,56,62,274	9,26,65,980
September-17	36,30,42,442	79,93,49,243	72,90,64,610	7,02,84,633
October-17	33,16,64,240	70,27,59,727	66,96,79,492	3,30,80,235
November-17	37,65,02,130	82,17,77,735	79,35,91,247	2,81,86,488
Mar-18	41,24,89,963	98,99,39,018	93,78,64,452	5,20,74,566
April-18	39,11,08,215	93,77,29,231	92,69,12,652	1,08,16,579
June-18	37,27,81,790	92,31,98,143	90,11,19,317	2,20,78,826
July-18	40,52,35,795	1,01,21,24,024	98,24,99,377	2,96,24,647
September-18	37,58,56,350	94,64,02,301	90,53,25,190	4,10,77,111
November-18	23,65,26,978	65,67,84,883	62,13,80,022	3,55,69,768

Month	*Energy supplied by SEIL (kWh)*	*Amount towards fuel charges billed by SEIL (in Rs.)*	*Amount paid by Discoms towards fuel charges (in Rs.)*	*Balance Payable by Discoms (in Rs.)*
December-18	22,31,78,247	66,62,45,453	60,73,79,598	5,94,51,684
Total	**4,97,94,15,270**	**11,76,36,14,400**	**11,11,25,69,598**	**65,17,95,538**

(w) Further, in terms of Article 38.4 of the PSA, the Respondents are liable for payment of interest on the unpaid amounts, which were arbitrarily withheld towards payment of fuel charges, amounting to Rs.11,28,81,893/- (Rs.11.29 crore), as on 13.7.2019. The abovementioned claims are only with respect to deductions of amounts up to December, 2018. The Petitioner reserves its right to claim amounts deducted in the subsequent months or during any other future period.

5. In the above background, the Petitioner, SEIL has filed the present petition seeking the prayers as stated in paragraph 1 above.

Submissions of the Petitioner, SEIL

6. The Petitioner SEIL, in support of the prayers sought in the petition, has made the following submissions.

A. The Respondent Discoms having accepted the supply of power based on usage of additional fuel under 'AFSA' cannot withhold payment

(i) As per Clause 21.5.8(A) of the PSA, Petitioner is obligated to send proposal letters to the Respondents on a monthly basis. The Respondents have the right to approve the fuel mix as per the proposal letters, within the time stipulated therein. Further, in terms of Clause 22.9 of the PSA, Petitioner as required to submit AFSA proposals to the Respondents and in case the Respondents rejected the AFSA proposal, the Petitioner was entitled to fixed charges on the basis of 'deemed availability'.

(ii) Petitioner had been submitting proposal letters on a monthly basis, providing detailed fuel mix, with the precise amount of concessional fuel, imported fuel and additional fuel under 'AFSA' proposed to be used for generation and supply of power. The Respondents have been issuing dispatch instructions and accepting supply of power generated and declared by Petitioner on the basis of the fuel mix proposal submitted on a monthly basis.

Therefore, the Respondents being fully aware of the quantum of supplemented imported fuel and additional fuel under AFSA, had accepted the power supplied.

(iii) Having accepted the supply of power, the Respondents are precluded from limiting the fuel charges vis-à-vis imported fuel/additional fuel under 'AFSA' to 40% for the following reasons:

(a) In case of rejection of AFSA fuel proposal, Petitioner is entitled to fixed charges on 'deemed availability'. However, the Respondents have clearly not exercised this option since they have issued dispatch instructions for power generated using the proposed fuel mix including AFSA.

(b) In case of acceptance of power supplied using AFSA, the Respondents are legally obliged to pay the actual fuel cost for AFSA in accordance with Clause 22.10.1 read with Clause 22.9 of the PSA.

(c) Once the Respondents have accepted performance by Petitioner, SEIL by scheduling power from it and having benefitted from the same, it cannot deduct fuel charges. The Respondents cannot be permitted to accept benefits, but avoid liabilities under PSA.

(iii) The Hon'ble Supreme Court in Shyam Telelink Ltd v Union of India (2010) 10 SCC 165 has held that a person taking advantage under a contract cannot avoid the burden arising out of it. It further explained the concept of estoppel by acceptance of benefits which is well established in American jurisprudence. The Hon'ble Supreme Court in Bank of India v. O.P. Swarnakar (2003) 2 SCC 721 has highlighted the doctrine of estoppel which has arisen from principle of 'approbate and reprobate'. The Respondents having exercised the option of accepting the benefits of supply of power from Petitioner SEIL, cannot deny the liabilities arising out of the same. The Respondents cannot be permitted to approbate and reprobate and payments towards fuel charges have been illegally withheld by the Respondents.

B. Non-payment of fuel charges amount to unjust enrichment

(i) The Respondents having already consumed the power supplied by the Petitioner in terms of the PSA cannot withhold payment arbitrarily for such benefits. This amounts to unjust enrichment as per Section 70 of the Indian Contract Act, 1872. The Respondents have actually benefitted from the consistent supply of power using Petitioner SEIL's fuel mix. Had the

Respondents rejected the 'imported fuel' and AFSA proposal and paid fixed charges on 'deemed availability', the cost of procurement of power would have been more, as they would have incurred additional cost to procure power from other sources.

(ii) The Hon'ble Supreme Court in *Sahakari Khand Udyog Mandal Ltd v CCE & Customs* (2005) 3 SCC 738, has expounded on the concept of unjust benefit or unjust enrichment. The Respondents have benefitted from supply of power and thus, withholding of such amounts, will result in unjust enrichment which is prohibited.

(iii) It is evident from letters dated 17.1.2019, 2.2.2019 and 18.2.2019, the Respondents are taking contradictory and divergent stands. On one hand, the Respondents are limiting the use of imported coal to 40% and not considering the additional fuel under 'AFSA' in computation of energy charges. On the other hand, they had directed the Petitioner to replace imported fuel with AFSA.

(iv) The Petitioner has optimized the cost of procurement to the benefit of the Respondents in accordance with the terms of the PSA. Furthermore, the PSA permits the Petitioner to procure fuel under 'AFSA' over and above the 40% limit. Once the Respondents have admitted Petitioner's obligation to optimize fuel procurement, the refusal to pay energy charges for 'AFSA' cannot be countenanced.

C. The Respondent Discoms are in violation of their contractual and statutory obligations

(a) The Respondents being licensees under the Act, are bound by the provisions of Sections 61 (b) and (c) of the said Act. Despite the express mandate of Section 61, the Respondents have continually refused to meet their legal and statutory obligation to pay monthly bills in accordance with the PSA. The actions of the Respondents are a clear case of abuse of power and dereliction of statutory duties.

(b) In the present case, the Respondents are misusing their dominant and coercive position since the Petitioner has dedicated 66.98% of its capacity to

the Respondents by arbitrarily and without basis withholding payments, legally due to the Petitioner.

Hearing dated 27.9.2019

7. The Petition was heard on 27.9.2019 and the Commission after hearing the learned counsel for the Petitioner admitted the petition and issued notice to the Respondents. However, the request of the learned counsel for a direction on the Respondents to pay 75% of the outsanding amount to the Petitioner till disposal of the petition [prayer (c) in paragraph 1 above] was declined. The Respondents vide affidavit dated 2.11.2019 have filed their common reply and the Petitioner, SEIL vide affidavit dated 16.12.2019, has filed its rejoinder to the said reply.

Reply of the Respondent Discoms

8. The Respondent Discoms vide their common reply affidavit dated 2.11.2019 has manly submitted the following:

(a) The coal-based generating station of the Petitioner for 1320 MW, has been allotted a coal-linkage of 4.273 MTPA (million tons per annum), out of which Fuel Supply Agreement (in short 'FSA') for 2.543 MTPA was operationalized by Mahanadi Coalfields Limited (in short 'MCL') and allocated to the long-term PPA for 500 MW. As the long-term PSA was entered into on 18.2.2016, the Petitioner sought operationalization of FSA for the balance quantity of domestic/ concessional coal of 1.73 MTPA. The Petitioner also stated to MCL that 4.273 MTPA was sufficient to meet 70% of the coal requirement for both units (Unit-I and Unit-II) and the balance 30% would be arranged through blending imported and domestic coal.

(b) Therefore, the Petitioner clearly understood that it is entitled to the entire quantum of 4.273 MTPA under the coal-linkage, since the supply of electricity was on long-term basis to the Respondent Discoms. In so far as the PSA dated 18.2.2016 is concerned, it has been specifically agreed between the parties that 53% of the coal-linkage would be pro-rata allocated to the gross capacity tied up

under the two long-term PPA/PSA [500/(500+570)=53%] which shall be the Respondents' entitlement of concessional coal. The said arrangement is reflected in Article 22.5.2 of the PSA.

(c) The Respondents' entitlement of the concessional/domestic coal would work out to be 22,17,00,000 tonnes per annum or 2.27 MTPA. The coal-linkage has been granted to the generating station as a whole (1320 MW), out of which, the Respondents are procuring 269 MW + 570 MW, which works out as 839 MW. If the domestic coal is sufficient to cater to 70% of 1320 MW, the benefit of usage of such coal should come to the beneficiaries in proportion of their procurement. The fact that the concessional/domestic coal is to be first utilized for supplying power to the Respondent Discoms is clear from Article 22.5.1, Article 22.6 and Article 22.7 of the PSA. Only after this, Article 22.8 which deals with 'fuel shortage' and Article 22.9 dealing with 'AFSA' has been provided in the PSA.

(d) The Petitioner is selectively relying on Article 21.4.2 and Article 21.5.2 of the PSA which are under the head of "Declaration of Availability/Article 21.5'. Article 21.5 deals in detail with the computation of availability/declaration of availability and the computation of fixed charges. There is one additional provision in Article 21.5.7 which reflect the intention of the parties to compute declaration of availability in case of fuel shortage.

(e) The obligation on the Petitioner at first is to arrange for its entire entitlement of concessional/domestic coal. However, if there is a shortage, the first step provided for, is in Article 21.5.7(A) which provides that in the event of shortage of concessional coal, the Petitioner/Supplier should approach the Respondents/ Utility with the proposal of imported coal offered by CIL/MCL in terms of the subsisting FSA for concessional coal to meet such shortfall and its implications thereof. If the Respondents do not exercise their right to procure such supplemental imported coal from CIL/MCL within 15 days of the date of receipt of the proposal, then, the provisions of Article 21.5.7(B) would apply.

(f) Taking the first request of the Petitioner vide its letter dated 20.4.2017 requesting for approval of fuel mix for the month of May 2017, it can be seen that the Petitioner has not complied with the requirements of Article 21.5.7(A) itself.

The Petitioner in March, 2017 approached MCL to amend the FSA to get the additional 1.730 MTPA. However, on failure of the Petitioner to deal with MCL and to arrange the domestic coal, the Petitioner from May, 2017 assumed that even if the 1.730 MTPA coal is not made available, the Petitioner cannot unilaterally substitute the same by imported coal and the Respondent would be obliged to approve such an arrangement.

(g) The Respondents did not approve the fuel mix proposed by the Petitioner for the month of May, 2017 or any subsequent months under Article 21.5.7(A) within 15 days. Therefore, the matter automatically was to be dealt with under Article 21.5.7(B). Article 21.5.7(B) arises only subject to the provisions of Article 21.5.7(A) namely, when the Respondents do not approve the fuel mix. Article 21.5.7(B)(i) states that upon approval by the Respondents, the Petitioner is entitled to supplement the concessional coal with the imported coal up to a maximum limit of 40% by weight after adjusting GCV corresponding to concessional coal. [For example, if shortage of concessional coal is 2 MT having GCV of 4000 kCal/kg, imported coal with GCV of 6000 kCal/Kg, the requirement of imported coal would be 2 x (4000/6000) = 1.33 MT].

(h) The aforesaid illustration which forms part of the PSA itself indicates that if the imported coal offered is of higher quality (higher GCV), then the quantum of imported coal requirement would be lesser, thereby this would offset the high cost of imported coal. However, the maximum limit of off-set contemplated in the PSA is 40%.

(i) Article 21.5.7(B)(i) further provides that if the Respondents approve the supplementing of domestic coal by 40% by weight, the Supplier/ Petitioner shall not claim this as an event of coal shortage. In the present case, the Respondents have already made payments for the supplemented imported coal to the extent of 40% since the Petitioner was not acting as per the terms of the PSA. There can, therefore, be no claim at all of the Petitioner against the Respondents. In fact, the claim is clearly against the express provisions of the PSA itself.

(j) Further, Article 21.5.7(B)(ii) of the PSA also provides that if the Respondents do not approve usage of imported coal proposed by the Petitioner within the

specified limit of 40% and instead, approves the usage of 'AFSA' to address the fuel shortage, then the provisions of Article 22.9 and Article 22.10 shall apply.

(k) Article 21.5.7(C) stipulates that if the Supplier/Petitioner anticipates that the quantum of imported coal required to be supplemented on account of fuel shortage may exceed the 40% limit by weight (after GCV adjustment), then the provisions of Article 22.9 and Article 22.10 shall apply. A reading of the above provisions clarify that the parties never intended to blend more than 40% imported coal or pay for the same. If the threshold of 40% is crossed, there is an obligation on the Petitioner to identify additional fuel supply sources giving the details of landed cost from the use of such fuel so that the Respondents can take a decision on whether to allow such purchase or not.

(l) Article 21.5.8 further clarifies that the import of coal, even if permitted till 40%, the utility/Respondents have a right to give 15 days' notice to the Petitioner directing it not to utilize the imported coal, in the interest of minimizing the costs of procurement. In such cases, the only relief available to the Petitioner is under Article 21.4.2 of the PSA, namely deemed fixed charges. When all the provisions of the PSA are read in a composite manner stipulate the procedure for the Petitioner to seek the Respondents' approval for fuel-mix using imported coal and relief provided to the Petitioner in case of non-approval of imported coal usage such as deemed availability of its Unit-II up to 70% of the non-available capacity, then it is not understood as to how the Petitioner can claim higher variable charges/fuel charges from the Respondents.

(m) The Petitioner is intentionally confusing between the provisions of Article 22.4 and Article 22.5 which deal with FSA, with the provisions of Article 21.5 which deals with computation of availability. The crucial fact in the present case is that the Petitioner has not complied with its obligation under Article 22.5.2 which requires the Petitioner to execute/ supplement/ amend the existing FSA to ensure that the concessional/domestic coal of 2.27 MTPA is available at all times, during the term of PSA. Had the Petitioner amended the FSA, it would have ensured that 2.27 MTPA, would be available at all times, which would have been adequate to operate Unit-II at 70% PLF. In such a case, the fuel shortage, if any, would have been minimal and could have been dealt in terms of the PSA.

The Petitioner also understood this position and had written to MCL seeking to release the Annual Contracted Quantity for balance 1.73 MTPA, out of 4.273 MTPA allocated under coal-linkage to it.

(n) Article 22.9 and Article 22.10 of the PSA dealing with 'AFSA' come into the picture only when it is established that there is a fuel shortage and there is requirement to enter into an AFSA. This is an alternative provision, when it becomes clear that imported fuel to be supplemented would go beyond the permissible limit of 40%. Under these Articles, the Petitioner is obligated to identify additional fuel sources and notify the Respondents of the details of 'landed fuel cost' demonstrating the cost advantage of procurement of such fuel, as compared to imported coal. Further, Article 22.9 and Article 22.10 permit the Petitioner to procure additional fuel, only with the prior approval of the Respondents. There is no discretion to the Petitioner to unilaterally enter into AFSA, and the only remedy is provided in Article 21.4.2 and Article 21.5.2 of the PSA, which deal with computation of availability and fixed charges.

(o) The position taken by the Petitioner in its letter dated 20.4.2017 indicating 32.74% domestic coal and 67.26% imported coal was patently erroneous. If the blending was beyond the permissible limit of 40%, the Petitioner should have proceeded as per Article 22.9 and Article 22.10 of the PSA. Instead, the Petitioner made no effort to identify other sources of fuel supply and went on giving such letters for every month. In fact, when the Petitioner feigned ignorance of this process, the Respondents vide letter dated 17.1.2019, told the Petitioner to identify additional sources of fuel, under Article 22.9 and Article 22.10 of the PSA. However, the Respondent made no such efforts and started to unilaterally misinterpret the PSA to suit its needs

(p) In the present case, even though the Petitioner did not act as per the terms of the PSA from the very first month of May, 2017 (concerning the present Petition), the Respondents have already made payments for the supplemented imported coal to the extent of 40% and only disallowed the balance. There can therefore, be no claim at all against the Respondents. In fact, the claim is clearly against Article 21.5.7(B)(ii) of the PSA itself. It is the Respondents who have been deprived of their entitlement of concessional/domestic coal which has

resulted in supplementing the same by high cost imported coal for the full quantum of 40% limit by weight (after GCV adjustment). Due to this default, the Respondents had paid several additional amounts to the Petitioner.

(q) The Petitioner not taking any steps to enhance the ACQ from 1.73 MTPA to 2.27 MTPA, cannot cite “reasons beyond the control of the Supplier”, which is a pre-condition for operation of Article 22.8.1. The main reason for fuel shortage of concessional/domestic coal in this case is clearly attributable to the Petitioner and under no circumstances can it be said that the Petitioner is entitled to claim the cost of additional coal from the Respondents.

(r) It does not stand to any reason that such fuel mix would be accepted by the Respondents. The higher cost of imported coal is only justifiable to the extent of 40% if the GCV is substantially higher and not in cases where the GCV is only marginally higher. Further, the import in any case cannot be beyond 40% and if such a situation is anticipated, the provisions of Article 22.9 and Article 22.10 (AFSA) would take over. The Petitioner has submitted fuel mix monthly proposals only with lesser concessional coal quantum right from the date of the commissioning of the Unit-II (i.e., 30.3.2016) with imported coal, having low GCV and higher cost.

(s) The Petitioner has not even offered to act under Article 22.9 and Article 22.10, which relates to AFSA, to replace the imported coal within the specified limit of 40% with additional fuel under AFSA, in terms of Article 21.5.7(B)(ii), which has resulted in higher tariff burden on the Respondents. Since the Petitioner failed to fulfil its obligation under the PSA, the Respondents were forced to incur additional expenditure towards procurement of high cost imported coal and additional fuel, which was supposed to be optimized by increasing concessional coal to mitigate the cost burden

(t) From the annexed statement, the concessional fuel availability and the shortfall w.r.t the Respondents’ entitlement, has been a regular phenomenon right from the date of the commissioning of the Unit-II, whereas the Petitioner is projecting it as an ongoing fuel shortage, which risk ought to be borne by the

Petitioner only, as the concessional fuel shortage is not attributable to the Respondents to the extent of Respondents' entitlement of 2.27 MTPA.

(u) The contention of the Petitioner that the Respondents have accepted the supply of power based on the fuel mixed proposed by the Petitioner is completely incorrect. There is no such acceptance by the Respondents. The Petitioner's conduct resulted in supplementing the concessional coal with imported fuel without adhering to the restriction of 40%, which would not have arisen if the concessional coal had been made available up to 2.27 MTPA by the Petitioner

(v) The PSA has prescribed the methodology/components to be considered for computation of 'Landed Fuel Cost' under Article 22 of the PSA, which does not include the 'demurrages & penal berth charges' paid by the Petitioner, among the parameters forming Landed Fuel Cost, since 'demurrage' is defined as charges payable for storage of cargo within the port premises beyond free period, and 'penal berth charges' are charges levied for vessels not clearing the berth for sailing for more than two hours after completion of cargo operations. These charges/penalties are not attributable to the Respondents and the Respondents therefore, are not liable to pay these charges claimed in the pretext of Landed Fuel Cost. The Respondents have rightly disallowed the sums claimed towards demurrages & penal berth charges to the extent of Rs.3.90 crores included in the Invoices for the period of April, 2018 to October, 2018 and November, 2016 to December, 2018.

(w) The PSA nowhere contemplates that the Petitioner will not enter into the concessional/domestic coal which has been allocated to it but will use imported coal without following the provisions of the PSA. Further, the Petitioner made no efforts to enter into AFSA as per Article 22.9 and Article 22.10, despite the Respondents requesting it to do the same. From the very first month, when the Petitioner gave the fuel mix proposal which shows the import of coal beyond 40%, the Petitioner ought to have proceeded as per Article 22.9 and Article 22.10.

(x) The contention of the Petitioner that since it is issuing monthly proposal letters providing for fuel mix and the Respondents having been issuing despatch

instructions, would mean that the Respondents have accepted the fuel mix and are bound to pay for the same is completely erroneous and wrong. The Respondents vide letter dated 12.07.2017, namely from the time the Petitioner started seeking monthly fuel mix proposals, clearly told the Petitioner that the imported coal is not being permitted as per the request. Further, the domestic coal availability was to be ensured by the Petitioner by signing a revised FSA and the import would be permitted only to the extent of 40% as per Article 21.5.7. This was further clarified vide the letters dated 5.12.2017 issued by the Respondents.

(y) The judgment of the Hon'ble Supreme Court in *"Shyam Telelink Ltd. vs. Union of India"*, reported in (2010) 10 SCC 165 has no application in the present case. The PSA did not permit the Petitioner to simply import fuel, without arranging for concessional/domestic coal and the Respondents paying for the same. When the Respondents vide letter dated 17.1.2019 told the Petitioner to identify additional sources for 'AFSA' as per Article 22.9 and Article 22.10, the Petitioner did not make any effort to identify such sources and vide its letter dated 28.1.2019, started to argue on the construction of the PSA. The Respondents vide letters dated 2.2.2019 and 18.2.2019 further asked the Petitioner to make efforts to enter into AFSA which were also not adhered to by the Petitioner.

(z) It is well settled that the principles of Section 70 (quantum merit/unjust enrichment) has no application in the case of sale and purchase of electricity. The mere fact that the Petitioner has proposed fuel mix from the month of May 2017 would not mean that the Respondents' conduct amounts to unjust enrichment.

(za) The Petitioner itself has enriched by not arranging concessional coal up to the Respondent's entitlement but has claimed the energy charges on the pretext of continued shortage of concessional fuel by procuring low-quality GCV and high-cost imported coal in excess of 40% maximum limit prescribed under the PSA besides depriving the Respondents of their entitlement of concessional coal and burdening them financially.

(zb) As per PSA, the Respondents have to take steps to optimize the power procurement cost by ensuring lesser usage of imported coal not more than 40% by weight (after GCV adjustment). At the same time, if additional fuel under AFSA provision is offered with a cheaper price than the imported coal, then the Respondents would seek to replace the imported coal within the 40% limit as there would be cost advantage to the Respondents. Further, since the fuel shortage of concessional coal was projected by the Petitioner on a continuous/regular basis, it automatically triggers the usage of the additional fuel under AFSA provisions, which has arisen due to the failure of the Petitioner in arranging concessional coal up to the Respondents' entitlement, therefore the Respondents limited the cost of additional fuel under AFSA to the price of concessional coal.

(zc) The Respondents are entitled to replace the costly imported coal with cheaper additional fuel under 'AFSA' within the specified 40% limit. The Petitioner was burdening the Respondents by procuring high-cost, low-quality imported coal, as well as additional coal under ASFA beyond 40% limit, for supplementing the domestic concessional fuel on the pretext of ongoing fuel shortage, without making diligent efforts to procure additional concessional coal up to the Respondents' entitlement, as obligated under Article 22.5.2 of the PSA. The Respondents, therefore, limited the fuel charge bills up to 60% of the fuel requirement up to the MCL's invoice price, as a compensatory measure to mitigate the financial burden on it, but not for undue enrichment, as contended by the Petitioner.

(zd) The allegation of misuse of the dominant position by the Respondents in arbitrarily withholding payment legally due to the Petitioner, is completely arbitrary and without any basis. The Petitioner has not demonstrated any such coercive acts by the Respondents. The burden of proof on such allegations rests with the Petitioner. It is well settled that all clauses of a contract need to be read together to ascertain its meaning. The Appellate Tribunal for Electricity vide its judgment dated 27.9.2011 in Appeal No. 91 of 2010 has held that the 'Articles' and 'Clauses' of an agreement cannot be read in isolation and these must be read holistically.

Rejoinder of the Petitioner SEIL to the Reply of Respondent Discoms

9. The Petitioner vide its rejoinder affidvait dated 16.12.2019 has made the following submissions:

(a) The PSA dated 18.2.2016 entered into between Petitioner, SEIL and Respondent Discoms envisages the use of 'concessional coal' supplemented with 'imported coal' and AFSA coal as fuel. The PSA was approved by the Telangana State Electricity Regulatory Commission vide order dated 27.1.2016 in OP No.1 of 2016. In terms of the PSA, the Petitioner is entitled to use sources of fuel namely (i) Proportionate share being 53% of concessional fuel of 4.273 MTPA procured through linkage from Coal India Limited and its subsidiaries (b) Imported fuel up to a limit of 40%, in case the Petitioner anticipates that concessional fuel may not be sufficient to achieve 90% availability of power and (c) Additional fuel under AFSA, in case Petitioner anticipates that there is further shortfall (beyond 40%).

(b) The FSA dated 22.8.2013 with MCL has been amended to enhance the ACQ to 4.273 MTPA and 53% of concessional fuel procured is allocated for supply of power under the PSA. Therefore, the contention that the Petitioner, SEIL was not procuring its entire entitlement of concessional fuel is incorrect.

(c) In terms of Article 21.5.7(B) of the PSA, in the event of a shortfall in concessional fuel, the Petitioner is permitted to supplement the same with imported fuel up to 40%. Further, as per Article 21.5.7(C) of the PSA, if the Petitioner anticipates that the use of imported fuel up to a limit of 40% will not be sufficient to meet the shortfall, additional fuel under AFSA, over and above the limit of 40%, can be used, to supply power to the Respondent Discoms. Thus, the Respondents' contention that the limit of 40% is for the cumulative of imported fuel and additional fuel under 'AFSA' is misplaced and denied.

(d) The Petitioner has been submitting fuel mix proposals used for supply of power to the Respondent Discoms, on a monthly basis, in terms of Article 21.5.8 (A). In fact, the Respondent Discoms have accepted supply of power, based on the fuel mix proposed by the Petitioner for the period from May, 2017 to December, 2018 in terms of the PSA. The Discoms have also never disputed

the monthly bills raised or rejected the fuel mix proposals submitted by Petitioner SEIL, but have illegally withheld payment of fuel charges for the said period.

(e) As per terms of PSA, the Petitioner is entitled to supplement the shortfall in concessional fuel through imported fuel and AFSA fuel. There is no limit on this quantum, except that the imported fuel is capped at 40%. The Respondents having the option of paying deemed generation charges and not scheduling power from the Petitioner have elected to accept power and therefore, are precluded from limiting the fuel charges vis-à-vis imported fuel/ additional fuel under AFSA to 40% as per terms of PSA.

(f) The PSA does not cap the combined use of imported fuel and AFSA fuel to 40% and such an interpretation will render Article 21.5.7 (c) otiose. In case of rejection of the fuel mix proposal, the Petitioner is entitled to fixed charges on deemed availability. However, the Respondents have clearly not exercised this option, since they have issued despatch instructions for the power generated, using the proposed fuel mix, including additional fuel under 'AFSA', and payment of capacity and energy charges, in relation thereto.

(g) In case of acceptance of power supplied using additional fuel under AFSA, the Respondents are legally obliged to pay the actual fuel cost, for additional fuel under AFSA, in accordance with Article 22.10.1 read with Article 22.9 of the PSA. The Respondents have accepted the performance by the Petitioner by scheduling power from it and having even benefitted from the same, cannot withhold payments illegally. The Respondents cannot take the benefits under the PSA and avoid the liabilities arising out of it.

(g) The Petitioner has followed the procedure laid down under Article 21.5.7 and Article 21.5.8 of the PSA by, *inter alia*, regularly offering to supplement the shortfall in concessional fuel with imported fuel and additional fuel under AFSA. In so far as the procedure under Article 21.5.7 of the PSA is concerned (a) Article 21.5.7(A) is not applicable in the present case as CIL has not offered to procure imported fuel to supplement the shortfall in concessional fuel under the FSA. (b) Article 21.5.7(B)(i) permits the Petitioner to supplement imported fuel

up to a limit of 40% upon Discoms' approval, without claiming fuel shortage (as provided under Article 22.8.1 of the PSA) and (c) In terms of Article 21.5.7(B)(ii) read with Article 21.5.7(C) of the PSA, if the Respondents do not approve usage of imported fuel and instead approve the usage of additional fuel under AFSA or in case Petitioner anticipates that the imported fuel required to supplement the fuel shortage will exceed the permitted limit of 40%, provisions of Articles 22.9 and 22.10 will apply.

(h) Petitioner has complied with Article 21.5.7(B) of the PSA. The quantum of imported fuel used has never been more than 40%, except for the month of May 2016, which was also based on the understanding that 40% limit is an annual limit. This is evident from the monthly fuel mix proposals submitted by the Petitioner.

(i) The Respondents' contention that the Petitioner had identified domestic coal as a source of fuel in response to the RFP and RFQ is wrong and denied. The Petitioner's bid had indicated use of concessional fuel as well as imported fuel for supply of power to Respondent Discoms under the PSA. This was expressly clarified in the bid submitted by the Petitioner. Moreover, the PSA permits use of imported fuel and 'AFSA' fuel in case of shortfall of concessional fuel. Thus, the Respondents cannot contend that the use of imported fuel was not disclosed at the time of bidding.

(j) On 10.08.2016, pursuant to Petitioner's request to increase the operative ACQ, in proportion of the percentage of generation covered under long-term PPAs entered into with the Discoms, the FSA was amended, revising the ACQ from 2.5434 MTPA to 4.2730 MTPA. Thus, the FSA, as it stands, has been signed for the entire linkage quantity.

(k) The total concessional fuel procured by Petitioner was used to supply power under the long-term PPA. The proportionate share of 53% of the concessional fuel received by Petitioner is allocated exclusively for supply of power to the Discoms under the PSA. This fact is also clearly recorded in the monthly fuel mix proposals submitted by Petitioner which are annexed with the Petition. The concessional fuel supply depends on factors which are in the exclusive domain

of the coal supplier MCL and the transporter i.e. the Indian Railways. Petitioner does not have any control over their performance and cannot be made liable for the same.

(l) The request made on 20.4.2017 was not the first request made by the Petitioner. The fuel mix proposals were being submitted to the Respondent Discoms since April, 2016 and invoices were being raised on the basis of such proposals, which have been duly paid / accepted by the Discoms. Further, the operative ACQ under the FSA has been enhanced to 4.273 MTPA vide Addendum No. 4 to the FSA dated 10.8.2016

(m) Petitionerhas always offered additional fuel under 'AFSA', in case it is anticipated that the limit of 40% of imported fuel would be crossed. However, as the Respondents selectively responded to the fuel mix proposals submitted, the same were deemed to be approved, as per Article 21.5.8(A) of the PSA. Availability is to be considered at the power station level (for both Units) and cannot be segregated unit-wise. The additional fuel under 'AFSA' is offered for approval ,anticipating the shortfall in concessional fuel and 40% limit on imported fuel getting exhausted. Petitionerhas made best efforts to ensure the uninterrupted supply of power to the Discoms.

(n) Petitionerhad procured imported fuel in accordance with the coal specification requirement under RFP and RFQ. Thus, claiming the imported fuel to be of mediocre quality at this juncture is unjust. The fuel mix proposals submitted by Petitioner have been deemed to be approved as per Article 21.5.8(A) of the PSA. At the time of entering into PSA, the Respondents were aware of the concessional fuel ACQ under FSA. Nevertheless, Petitionerwas prompt to amend the FSA with MCL on 10.8.2016, thereby revising the ACQ from 2.5434 MTPA to 4.2730 MTPA

(o) The Respondents' letter dated 17.1.2019 related to past supplies. It is submitted that Petitionerhas always offered to procure additional fuel under 'AFSA' whenever required. Admittedly, the Respondents have procured power based on the fuel mix submitted by Petitioner, SEIL. The PSA does not limit the variable charges in the manner put forth by the Respondents. It is submitted

that once the performance (supply of power) was accepted by Respondent Discoms, they are precluded from impugning their liability to pay for the same.

(p) The scheme of the PSA read as a whole allows the Petitionerto procure additional fuel under AFSA and imported fuel, to overcome the shortfall of concessional fuel. Moreover, the objective and purpose of the PSA provisions will be defeated if the Respondent Discoms are permitted to deduct amounts, after having accepted the supply of power, using additional fuel under AFSA and imported fuel.

Hearing dated 28.5.2021 and 13.7.2021

10. During the hearing of the petition on 28.5.2021 and 13.7.2021 respectively, the learned Senior counsel for the Petitiner and the learned counsel for the Respondent Discoms, made detailed oral arguments, reiterating their submisions above. At the request of the parties, the Commision permitted the Petitioner and the Respondent Discoms to file their written submissions and acordingly reserved its order on 13.7.2021. Written submissions have been filed on behalf of the Respondent Discoms and the Petitioner on 29.7.2021 and 9.8.2021 respectively.

Written Submissons of the Respondent Discoms

11. The Respondent Discoms in their written submissions have mainly reiterated their submissions made in their reply. The Respondents have, however, contended that the Petitioner has not complied with any of the provisions of the PSA. (i) No details of requisition of coal from CIL has been provided by the Petitioner. (ii) Petitioner has not approcahed the Respondents in terms of Article 21.4.2 (3rd paragraph). (iii) No details of imported fuel offered to be made available by CIL has been provided by the Petitioner ot the Respondents. (iv) Petitioner has not approcahed the Respondents for any ‘AFSA’ in terms of Article 22.9 and Article 22.10 of the PSA. (v) No approval of the Respondents and the Appropriate

Commission for AFSA has been sought for and obtained by the Petitioner. The Respondents have added that the Petitioner has unilaterally chosen to use fuel contrary to the PSA and therefater take the position that since power has been scheduled the claim of the Petitioner is required to be paid. Referring to the judgments of the Hon'ble Supreme Court in APTRANSCO & anr v Sai Renewable Power Private Limited & ors (2011) 11 SCC 34, K. Marappan V TBPHLC (2020) 15 SCC 401, NHAI vs Bumihiway DDB Ltd (2006) 10 SCC 763, K.P.Singh V State of Bihar (2007) 11 SCC 447 , the Respondents have submited that the question of estoppel does not even arise in case of contractual relationship between parties and that the Petitioner having acted contrary to the specific provisions of the contract, cannot make a claim against the Respondents. The Respondents have also referred to the judgment of the Hon'ble Supreme Court in MTNL v TATA communications (2019) 5 SCC 341 and the judgment of APTEL dated 14.7.2021 in Appeal No. 329/2019 (ALPS Industries V UERC & anr) and submitted that the principle of unjust enrichment has no application when parties have a definitive contract.

Written Submissons of the Petitioner SEIL

12. The Petitioner in its written submisions, has mainly reiterated its submissions made in the Petition and rejoinder. It has however added that the Respondent Discoms had not disputed or rejected the fuel mix proposal and has instead accepted supply of power based on the fule mix proposed by the Petitioner for the period dfrom May, 2017 to December, 2018 in terms of the PSA. It has also refered to the judgment of the Hon'ble Supreme Court in Ramdev Food Products (P) Ltd v A.R Patel (2006) 8 SCC 726 and pointed out that the Respondent Discoms, having accepted the supply of power based on the fuel mix proposals submitted by the

Petitioner, are precluded from limiting the fuel charges vis-a-vis imported fuel/ AFSA to 40% in terms of the PSA. The Petitioner has stated that the only ground for withholding amounts due to the Petitioner was that the use of imported fuel/additional fuel under AFSA cannot exceed 40%. However, in terms of the judgment of the Hon'ble Supreme Court in M.S.Gill v Chief Election Commission 1978(1) SCC 405, the Respondents cannot supplement those reasons by adding grounds subsequently and therefore, all other grounds raised is an afterthought and cannot be relied upon. The Petitioner has stated that the Respondent Discoms have continually refused to meet thier legal and statutory obligation to pay monthly bills in accordance with the PSA.

Analysis and Decision

13. Based on the submisions of the parties and the documents on record, the issue which emerge for consideration is:

> ***Whether the non-payment of amounts towards fuel charges by the Respondent Discoms from the monthly bills raised by the Petitioner for the period from May, 2017 to December, 2018 is in breach of the contractual obligations under the PSA dated 18.2.2016.***

14. The bid of the Petitioner was based on domestic coal/concessional fuel under coal linkage with CIL, as well as imported fuel, for supply of power to the Respondent Discoms under the PSA dated 18.2.2016. Also, the PSA entitled the Petitioner to use (i) proportionate share of 53% of concessional fuel procured by Petitioner through linkage from CIL and its subsidiaries, (ii) Imported fuel upto a limit of 40% in case the Petitioner anticipates that concessional fuel may not be sufficient to achieve 90% availability of power, and (iii) additional fuel under AFSA, in case the Petitioner anticipates that there is further shortfall (i.e beyond 40%). In terms of Article 22.7 of the PSA, the Petitioner is required to maintain a minimum

stock of concessional fuel required to produce electricity under the contracted capacity for 7 days. Though the obligation of the Petitioner is to arrange for concessional fuel/domestic coal, Article 22.8.1 of the PSA provides that in case the Petitioner anticipates any shortfall in supply of domestic coal/concessional fuel required to produce electricity under the contracted capacity, then the Petitioner is required to notify the Respondent Discoms by the last working day of every month and the consequences of such shortfall are provided under Article 21.4.2, Article 21.5.2 and Article 21.5.7 of the PSA.

15. The Petitioner has submitted that in case of shortfall /antcipated shortfall in concessional fuel, the Petitioner is required to submit fuel mix proposal to the Respondent Discoms 10 days prior to the end of each month and in terms of Article 21.5.8(A) of the PSA, if the Respondent Discoms do not reject the said proposal within 10 days, the proposal is deemed to have been accepted. The Petitioner has pointed out that in terms of the above article, it had submitted monthly fuel mix proposals highlighting the shortfall in concessional fuel and proposal for use imported fuel or additional fuel under 'AFSA' for supply of power to Respondent Discoms. The Petitioner has stated that the Respondent Discoms had not disputed or rejected the fuel mix proposal, but instead accepted the supply of power based on the monthly fuel mix proposed by the Petitioner for the period from May, 2017 to December, 2018 in terms of the PSA. The Petitioner has stated that Article 21.5.8 of the PSA have a non-obstante clause which will override the other provisons of the PSA including Article 21.5.7 and therefore, the deemed appproval provision under Article 21.5.8(A) of the PSA will squarely apply in the present case. The Petitioner has added that the Respondent Discoms had accepted the supply of power and therefore should not be permitted to withold the amounts legally due to

the Petitioner. The Petitioner has, therefore, prayed that the Respondent Discoms may be directed to reimburse the said amounts with interest.

16. Per contra, the Respondent Discoms have submited that the plain reading of Article 21.5.8(A) of the PSA makes it clear that it only deals with the fuel mix in relation to concessional fuel and imported fuel and there is not even a reference to the additional fuel under AFSA in the said Article. The Respondents have stated that in case they do not specifically respond to the same, the proposal for use of concessional fuel and imported fuel is taken as deemed approved. According to the Respondents, Article 21.5.8(A) neither permits the Petitioner to procure any additional fuel under AFSA, nor does it permit the Petitioner to disregard the maxium limit of 40% (weight adjusted GCV) for use of imported fuel. The Respondents have contended that the said Article 21.5.8(A) also does not exempt the Petitioner from requiring approvals under Article 21.5.7 or otherwise from following the provisions of Article 22.9 and Article 22.10 of the PSA.

17. We have examined the matter. Article 21.5.8 of the PSA provides for the following:

> "*21.5.8: (A) Notwithstanding anything contrary to this Agreement, not more than ten (10) days prior to the end of each month, the Supplier shall approach the Utility with a detailed proposal of the Fuel mix including the anticipated Utility's Entitlement to Concessional Fuel that will be available for the next month and a proposal to supplement Imported Fuel, if any, and the Utility, upon reviewing the proposal submitted by the Supplier (including the respective Landed Fuel Cost and the implications thereof on the Landed Fuel Cost and the implications thereof on the Fuel Charge), before the close of that month, shall approve the quantum of Concessional Fuel within the Utility's Entitlement to the Concessional Fuel and Imported Fuel to be consumed for generation in the next month. If, however, the Utility doesn't notify the approved Fuel mix for the Contracted Capacity before the close of the month in which the proposal is submitted, the Utility's approval for the proposed Fuel mix shall be deemed to be have been granted and the Supplier shall be entitled to continue to adopt the Fuel mix as per the proposal submitted to the Utility.*
>
> *(B) Notwithstanding anything to the contrary contained in this Agreement, save and except in situations where the Fuel mix proposed by the Supplier has been approved*

(or is deemed to be approved) for any month by the Utility as per provisions of Clause 21.5.8 (A) the Utility, may in its own right and in the interest or minimizing cost of procurement, require the Supplier to not supplement Imported Fuel within the specified limit of 40%. In such event, the Utility shall, by issuing prior notice of 15 (fifteen) days to the Supplier, require the Supplier to identify additional Fuel in accordance with the provisions of Clause 22.9 and Clause 22.10. If, however, the Utility doesn't approve such additional Fuel proposed by the Supplier or the Supplier is unable to procure additional Fuel after reasonable efforts, the Utility may Approve the usage (partial usage) of Imported Fuel within the specified limit of 40% or the Supplier shall be entitled to claim relief as specified under Clause 21.4.2, to the extent cumulative Availability has been reduced below Normative Availability on account of absence of Imported fuel and/or alternate Fuel.

(C) Notwithstanding anything to the contrary contained in this Clause 21.5.8, approval of the Utility on the fuel mix proposed by the Utility shall not be construed as an obligation of the Utility to Despatch the Contracted Capacity. Notwithstanding anything to the contrary contained in this Clause 21.5.8, the payment of fixed Charge shall be based on actual Availability subject to provisions of Clause 21.6 and payment of Fuel Charge shall be based on actual consumption of Fuel, in accordance with the provisions of this Agreement."

18. As per Article 21.5.8 (A) of the PSA, the Petitioner, based on available and anticipated fuel stock has to submit monthly detailed proposal of the fuel mix, 10 days prior to the end of each month to the Respondent Discoms. The Respondent Discoms after reviewing proposal are required to approve the quantum of concessional fuel within the Respondent Discom's entitlement for concessional fuel and imported coal to be consumed for generation during the next month before the close of the month. However, if the Respondent Discoms do not notify the approved fuel mix proposal before the close of the month in which the proposal is submitted, then the proposed fuel mix shall be deemed to have been approved by the Respondents and the Petitioner shall be entitled to continue to adopt the fuel mix as per proposal submitted. In terms of Article 21.5.8(B), the Respondents in the interest of minimising the cost of procurement may require the Petitioner not to supplement the imported fuel and identify additional fuel in terms of Article 22.9 and Article 22.10 of the PSA. If the Respondents do not approve the additional fuel proposed by the Petitioner or the Petitioner is unable to procure additional fuel after reasonable efforts, the Respondents may approve the usage of imported coal within

the specified limit of 40% or the the Petitioner shall be entitled to relief under Article 21.4.2 to the extent cumulative availability has been reduced below normative availability on account of absence of imported coal or alternate coal. As per Article 21.5.8(C), the approval of the fuel mix proposal will not impose an obligation on the Respondent Discoms to disptach power from the Petitioner. It also provides that payment of fixed charges will be based on actual availability and payment of fuel charges will be based on actual consumption.

19. It is noticed that the Petitioner, in terms of Article 21.5.8(A) of the PSA, had been submitting monthly fuel mix proposals to the Respondent Discoms 10 (ten) days prior to the close of every month by its various letters (as annexed with the petition) for the period from May, 2017 to December, 2018, setting out the total capacity proposed to be generated using the approved fuel sources as tabulated under:

Month	Domestic/ Concessional coal	Imported Fuel	Additional Fuel under AFSA
May, 2017	138.837 MU (32.74%)	285.243 MU (67.26%)	-
June, 2017	128.553 MU (31.32%)	66.115 MU (16.11%)	215.732 MU (52.57%)
August, 2017	128.416 MU (30.28%)	169.632 MU (40.00%)	126.032 MU (29.72%)
October, 2017	127.877 MU (30.15%)	169.632 MU (40.00%)	126.571 MU (29.85%)
November, 2017	125.170 MU (30.50%)	164.460 MU (40.00%)	121.070 MU (29.50%)
December, 2017	148.986 MU (35.13%)	169.632 MU (40.00%)	105.462 MU (24.87%)
January, 2018	131.597 MU (31.03%)	169.632 MU (40.00%)	122.851 MU (28.97%)
March, 2018	164.634 MU (38.82%)	169.632 MU (40.00%)	89.814 MU (21.18%)
April, 2018	185.808 MU (45.27%)	164.160 MU (40.00%)	60.432 MU (14.73%)
May, 2018	196.585 MU (46.36%)	169.632 MU (40.00%)	57.863 MU (13.64%)
June, 2018	159.452 MU (38.85%)	164.160 MU (40.0%)	86.788 MU (21.15%)
July, 2018	166.685 MU (39.31%)	169.632 MU (40.00%)	87.763 MU (20.69%)

August, 2018	161.012 MU (37.97%)	169.632 MU (40.00%)	93.436 MU (22.03%)
September, 2018	176.834 MU (43.09%)	164.160 MU (40.00%)	69.406 MU (16.91%)
October, 2018	153.114 MU (36.10%)	169.632 MU (40.00%)	101.334 MU (23.90%)
November, 2018	144.293 MU (60.00%)	96.194 MU (40.00%)	-
December, 2018	80.692 MU	167.811 MU	-

20. The Petitioner had also informed the Respondents about the continued supply of power as per Article 21.5.8(A) of the PSA pending approval of the proposals. The Petitioner was regularly offering to supplement the shortfall in concessional fuel with imported fuel and additional fuel under AFSA with details of the quantum of concessional fuel, imported fuel and additional fuel under AFSA to be used for supply of power to the Respondent Discoms. Thus, the Respondents Discoms had the opportunity to restrict the supply from concessional fuel and imported fuel to 40% only. Also, in terms of Article 21.5.8(B) of the PSA, the Respondent Discoms had the mandate to direct the Petitioner not to use imported fuel to the full extent of 40% limit and advise the Petitioner to instead identify additional fuel under AFSA following the provisions of Article 22.9 and Article 22.10 of the PSA. However, the Respondent Discoms for whatever reasons, did not exercise their its right to approve or reject the monthly fuel mix proposals in terms of the PSA, but opted and continued to schedule power from the project of the Petitioner. As the Respondent Discoms had failed to respond to the monthly fuel mix proposals of the Petitioner submitted in terms of Article 21.5.8(A) of the PSA, the same is deemed to have been approved by the Respondent Discoms by way of tacit consent. In view of legal principles enunciated in Section 70 of the Indian Contract Act, there is a definite obligation of a person/entity enjoying benefit of non-gratuitous act. The Respondent Discoms having impliedly accepted the quantum of the supplemented imported fuel

and additional fuel under AFSA cannot, therefore, withhold the payments to the Petitioner and/or avoid liabilities arising under the PSA.

21. The Respondent Discoms have contended that Article 21.5.8(A) of the PSA do not exempt the Petitioner fom requiring the approvals under Article 21.5.7 or otherwise from following the provisions of Articles 22.9 and 22.10 of the PSA. They have also contended that the Petitioner has no unilateral right to either use imported fuel in addition to the maximum limit of 40% or otherwise procure any additional fuel under AFSA without following the process and seeking the neecssary approvals under Article 22.9 and Article 22.10. In our view, the provisions of Article 22.9 and Article 22.10 of the PSA gets invoked only when the Respondents, in terms of Article 21.5.8 (B) express desire to the Petitioner not to use imported fuel to the extent of 40% limit. The Respondents have, admittedly, not invoked Article 21.5.8 (B) of the PSA and therefore cannot contend that the Petitioner did not follow the provisions of Article 22.9 and Article 22.10 of the PSA. Even otherwise, as pointed out by the Petitioner, Article 21.5.8 of the PSA is provided with a non-obstante clause, which overrides other provisions of the PSA. The Respondent Discoms, having failed to approve the fuel mix proposal of the Petitioner and/or exercise its right for substitution under Article 21.5.8 of the PSA cannot in violation of the PSA withhold payments to the Petitioner.

22. We notice that in response to the monthly fuel mix proposal letters of the Petitioner, the Respondent No.3 vide its letters dated 12.7.2017 and 5.12.2017 had informed the Petitioner that the monthly energy bills of the Petitioner had been admitted by considering the domestic concessional coal cost upto 60% and imported coal usage uto 40% of the total coal requirement irrespective of the actual cost of additional fuel procured. The Petitioner has pointed out that since the PSA

permits the use of imported fuel/AFSA beyond 40%, there is no restriction on the use of such fuel, if there is shortfall in concessional fuel. It has contended that the action of the Respondent Discoms in limiting the fuel charges for imported fuel/AFSA to 40% is therefore contrary to the express terms of the PSA. However, the Respondent Discoms in their written submissions have contended that the Petitioner has not followed Article 21.5.7(A) and therefore is not entitled to take the benefit of Article 21.5.7 (B). They have also contended that Articles 22.9 and Article 22.10 of the PSA in regard to AFSA has also not been followed by the Petitioner. They have argued that though the Petitioner has not taken the approval of the Respondent Discoms for usage of imported fuel to the extent of 40% by weight, the Respondent Discoms have paid the cost of imported fuel to the extent of 40% by weight. The Respondent Discoms have submitted that the Petitioner has unilaterally chosen to use fuel contrary to the provisions of the PSA and therefore, cannot take the plea that since power has been scheduled, the claim of the Petitioner is required to be paid.

23. From the above submissions, the issue which emerge for consideration is whether the Respondent Discoms are precluded from limiting the fuel charges vis-a-vis imported fuel /additional fuel under AFSA to 40% as per terms of the PSA. In this regard, Article 21.5.7 of the PSA which deals with the rights and obligations of the parties in the event of 'fuel shortage' is extracted below.

> ***'21.5.7****: In the event of Fuel Shortage, the following conditions shall apply:*
>
> ***(A)*** *In the event that there is an anticipated shortfall In Concessional Fuel under the FSA executed with CIL for Concessional Fuel and CIL offers to procure imported Fuel under the terms of the FSA for Concessional Fuel to meet such shortfall, then the Supplier shall approach the Utility with complete details of such CIL supplemented imported Fuel and its implications thereof, including implications on Fuel Charge (as is then known to the Supplier) and it shall be the right of the Utility to direct the Supplier to procure such supplemental imported Fuel from CIL under the FSA for Concessional Fuel and the Utility shall convey such decision to the Supplier within fifteen (15) days of*

receipt of the proposal from the Supplier. If, however, the Utility does not approve procurement of such supplemental imported Fuel from CIL under the FSA for Concessional Fuel, then the provisions of Clause 21.5.7 (B) shall apply.

(B)** In case the Supplier reasonably anticipates that the Utility's Entitlement to Concessional Fuel may not be sufficient to achieve Normative Availability on account of Fuel Shortage, then, **subject to the provisions of Clause 21.5.8 (A):

i. Upon approval of the Utility, the Supplier shall be entitled to supplement Imported Fuel up to a maximum limit or 40% by weight (after adjusting to GCV as illustrated below), and the Supplier shall not claim an event of Fuel Shortage or reduction in Minimum Fuel Stock.

ii. Provided, however, as specified in Clause 21.5.7 (B)(i) if the Utility doesn't approve usage of Imported Fuel within the specific limit of 40% and instead approves the usage of additional Fuel to address Fuel Shortage, then provisions of Clause 22.9 and Clause 22.10 shall apply.

***(C)** If the Supplier reasonably anticipates that, the quantum of Imported Fuel required to be supplemented on account or Fuel Shortage, may exceed the specified limit of 40% by weight (after adjusting to GCV), provisions of Clause 22.9 and Clause 22.10 shall apply.*

*By way of illustration, the quantity of Concessional Fuel (GCV 4000 kCal/kg) required for generating Contracted Capacity is 5 MT, but the quantity of Concessional Fuel anticipated during the month is 3 MT, then the Supplier can supplement the balance 2 MT of Concessional Fuel with 1.33 MT of Imported Fuel and/or alternate fuel (GCV 6000 kCal/kg) **subject to the provisions of Clause 21.5.7.**"*

24. Further, Article 22.9 and Article 22.10 of the PSA provides for the following:

"Article 22.9: Additional Fuel Supply Arrangement

***"22.9.1**: In accordance with the provisions of this Agreement, on account of Fuel Shortage and in an event where the Supplier is required to procure and/or entitled to use additional Fuel, the provisions of this Clause 22.9 shall be applicable.*

***22.9.2**: The Supplier shall make best efforts to identify, as soon as may be possible, additional source(s) of fuel supply, and transportation to meet such Fuel Shortage (the "Additional Fuel Supply Arrangement" or "AFSA"). The Supplier shall notify the Utility of the details of the Landed Fuel Cost under the AFSA and provide such other information as the Utility may require, for demonstrating that the AFSA is based on best prices available for supply and transportation of such fuel and upon such notification:*

(A) If the Landed Fuel Cost of such additional Fuel under AFSA is less than or equal to the Landed Fuel Cost for Imported Fuel, then it shall be the right of the Utility to approve such AFSA.

(B) If, however, the Landed Fuel Cost of additional Fuel is higher than the Landed Fuel Cost for Imported Fuel, then, the Supplier shall, with the concurrence of the Utility submit the AFSA for review and approval of the Appropriate Commission.

***22.9.3**: The Supplier shall procure additional Fuel under the AFSA only with prior approval of the Utility and/or Appropriate Commission as the case may be, which approval the Utility and/or Appropriate Commission, may deny in its sole discretion, within fifteen (15) days of the request from the Supplier. Provided, however, that if the Utility and/or Appropriate Commission approve part supply of Fuel under the Additional Fuel Supply Arrangement, it shall, in consultation with the Supplier, approve such additional costs as may be applicable for purchase of Fuel in comparatively smaller*

quantities and such costs shall be considered as part of the Landed Fuel Cost in determining the Fuel Charges.

22.9.4: *If the Utility and/or the Appropriate Commission do not approve AFSA or partially approves AFSA, the Supplier shall be entitled to the reliefs provided under Clause 21.4.2 and Clause 21.5.2 to the extent cumulative Availability has been reduced below Normative Availability for the relevant Accounting Year.*"

22.10 Fuel Charge under AFSA

22.10.1 *If the Supplier enters into an AFSA in accordance with the provisions of Clause 22.9, the Fuel Charge payable by the Utility for any electricity produced from such Fuel shall be determined on the basis of Landed Fuel Cost to be computed in accordance with this Article 22.*

22.10.2 *In the event the Supplier fails to procure Fuel on AFSA, or such AFSA is not approved in full or part by the Utility or the Commission, as the case may be, the Fixed Charge payable for and in respect of any Non-Availability as a result thereof shall be equal to 70% (seventy percent of the Fixed Charge computed in accordance with the provisions of Clause 21.4.2"*

25. Article 21.4.2 of the PSA states as follows:

"*21.4.2 Upon occurrence of a shortfall in the Minimum Fuel Stock on account of Fuel Shortage,* ***Availability shall be deemed to be reduced in accordance with the provisions of Clause 21.5.2*** *and the Non-Availability arising as a consequence thereof shall, for the purposes of* ***payment of Fixed Charge, be deemed to be Availability to the extent of 70% (seventy per cent) of the Non-Availability hereunder.*** *The Parties expressly agree that if Fuel Shortage is caused by an action or omission attributable to the Supplier, it shall not be reckoned for the purposes of computing Availability hereunder. By way of illustration, the Parties agree that in the event the Non-Availability arising on account of shortfall in supply of Fuel is determined to be 50% (fifty per cent), the Supplier shall, with respect to the Non-Availability arising on account thereof in accordance with the provisions or Clause 21.5.2, be entitled to a Fixed Charge as if the Availability is equivalent to 70% (seventy per cent) of such Non-Availability. For the avoidance of doubt, the Parties agree that the Supplier shall not be liable to pay the Damages specified in Clause 21.6.2 if Non-Availability shall arise as referred to in this Clause 21.4.2.*

*For avoidance of doubt. if the Availability on account of shortfall in supply of Fuel is 50%, the Availability for payment of Fixed Charge would be computed as follows: 50%+ (40%*70%) =78%.*

Provided however, the provisions of this Clause 21.4.2 shall come into effect only upon satisfactory submission of schedule of dispatch or Concessional Fuel by CIL and other supporting documentation in support of the claim, including Fuel Stock position of Concessional Fuel and Imported Fuel for the relevant Accounting Year.

It is expressly clarified that relief for reduction in Availability in accordance with this Clause 21.4.2 shall not be applicable, until such time the Supplier approaches the Utility under Clause 21.5.7 or in the event where provisions of Clause 22.9 apply and such relief shall be applicable from the time Fuel Shortage is notified till the earlier of: (i) the end of the relevant Accounting Year, or (ii) until Fuel Shortage ceases to exist. It is also clarified that no relief shall be provided under this Clause 21.4.2, if such Fuel Shortage is solely on account of a default by the Supplier. It is pertinent to note that this provision clarifies that SEIL will not be liable to pay damages for lack of availability if non-availability is on account of fuel shortage."

26. Article 21.5.2 of the PSA provides as under: -

> "*21.5.2 In the event Fuel stocks decline below the Minimum Fuel Stock on account of Fuel Shortage, subject to provisions of Clause 21.5.7. Availability shall be deemed to be reduced proportionate to the reduction in Minimum Fuel Stock and shall be deemed as Non-Availability on account of Fuel Shortage. Provided that the Utility may, in its sole discretion, Despatch the Power Station for the full or part Non-Availability hereunder and to the extent or such Despatch, the Utility shall pay the full Fixed Charge due and payable in accordance with this Agreement. For the avoidance of doubt and by way of illustration, if the actual stock of Fuel is 80% (eighty per cent) of the Minimum Fuel Stock at the commencement of any day, the Availability for that day shall be deemed to be 80% (eighty per cent) and the Non-Availability on account of Fuel Shortage shall be notified by the Supplier to the Utility accordingly.*"

27. Article 21.5.7(A) provides that in the event of shortage of concessional coal, the Petitioner/Supplier should approach the Respondent Discoms/ Utility with the proposal of imported coal offered by CIL/MCL in terms of the subsisting FSA for concessional coal to meet such shortfall and its implications thereof. If the Respondent Discoms do not exercise their right to procure such supplemental imported coal from CIL/MCL within 15 days of the date of receipt of the proposal, then, the provisions of Article 21.5.7(B) would apply. The Respondent Discoms have submitted that the Petitioner, in terms of Article 21.5.7(A) of the PSA has not arranged for sufficient quantum of concessional fuel and has also not procured the imported fuel offered by MCL. In our view, Article 21.5.7(A) of the PSA is not aplicable in the present case, as nothing is brought on the record to show that CIL had offered to procure imported fuel to supplement the shortfall in concessional fuel under FSA. Hence, the question of the Petitioner approaching the Respondent Discoms with such proposal does not arise. Also, the FSA dated 22.8.2013 with MCL was amended by the Petitioner on 10.8.2016 to enhance the ACQ to 4.273 MTPA and in terms of Article 22.5.2 of the PSA, 53% of the ACQ (2.27 MTPA) of concessional fuel procured is allocated for supply of power to the Respondents under the PSA. However, the supply of concessional fuel depend on factors within

the domain of the MCL over which the Petitioner has no control. As there was no offer from CIL for procurement of imported fuel under the terms of the FSA for concessional fuel to meet the anticipated shortfall, the question of not complying with Article 21.5.7(A) of the PSA does not arise.

28. Article 21.5.7(B)(i) and Article 21.5.7(B)(ii) of the PSA permit the Petitioner to supplement the shortfall in concessional fuel with imported fuel and /or additional fuel under AFSA upto a limit of 40% by weight (after adjustment of GCV) without claiming fuel shortage, after approval of the Respondent Discoms. From the monthly fuel mix proposals submitted by the Petitioner (for the period from May, 2017 to December, 2018), it is noticed that the quantum of imported fuel used by the Petitioner was never more than the limit of 40%, except for the month of May, 2017. Though the Petitioner has submitted that the imported fuel claim for May, 2017 (67.26%) was based on the understanding that the said limit is an annual limit, it is not so in terms of the said article and is liable to be limited to 40%. It is pertinent to note that Article 21.5.7(B) of the PSA is subject to Article 21.5.8(A) of the PSA, which provides for deemed approval of the fuel mix proposal submitted by the Petitioner. Since the Respondent Discoms have failed to approve the usage of imported fuel, the benefit of deemed approval applies in the present case.

29. Further, Article 21.5.7(B)(ii) and Article 21.5.7(C) of the PSA provides that in case the Respondent Discoms do not approve the usage of imported fuel and instead approve the usage of additional fuel under AFSA, or in case the Petitioner anticipates that the imported fuel required will exceed the permissible limit of 40%, the provisions of Article 22.9 and Article 22.10 of the PSA will apply. In terms of these Articles, the Petitioner is required to identify, as soon as possible, the

additional fuel supply arrangements (AFSA) and notify the Respondent Discoms of the details of the weighted average price of fuel, including the transportation cost and washing costs ('Landed Fuel Cost') under AFSA and provide any other information for demonstrating that AFA is based on best prices available for supply and transportation of such fuel. Upon such notification, if the landed cost of such additional fuel under AFSA is less than or equal to the landed fuel cost for imported coal, then it shall be the right of the Utility to approve such AFSA. If the landed cost of additional fuel is higher than the landed fuel cost for imported coal, then the Petitioner with the concurrence of the Respondent Discoms submit the AFSA for review and approval of the Appropriate Commission. The Petitioner shall procure additional fuel under the AFSA only with prior approval of the Respondents or Appropriate Commission as the case may be. It further provides that the Respondents or Appropriate Commission may in their sole discretion deny the approval within 15 days from the date of request from the Petitioner. Further, if the AFSA is not approved or is partially approved, then Article 21.4.2 and Article 21.5.2 of the PSA shall apply to the extent of reduction in availability (deemed availability). Thus, since the Respondents have neither approved nor rejected the procurement under AFSA with a period of 15 days as per the provisions of the FSA and have accepted supply of power in terms of the monthly fuel mix proposal submitted by the Petitioner, it shall be construed that the proposal of the Petitioner for procurement of additional fuel under FSA has been approved.

30. Thus, Article 22.9 and Article 22.10 of the PSA require the Petitioner to give notice of procurement of additional fuel under AFSA along with quantum, price and source. This article also envisages that on receipt of the said proposal, the Respondent Discoms have the option either to accept the supply of power using

AFSA or reject the same and pay deemed fixed charges. We notice from the proposal letters annexed to the petition (as tabulated under paragraph 19 above) that the Petitioner, in terms of this article, had submitted the monthly fuel mix proposals to the Respondent Discoms, containing all the details/ information. For example, in the fuel mix proposal for the month of June, 2017, the Petitioner had proposed the requirement of use of additional fuel under AFSA referencing Article 22.9 of the PSA. The Respondent Discoms, who were aware of said fuel mix, had the option of not scheduling the power and paying deemed generation charges. However, the Respondents had opted to schedule power from the project of the Petitioner and are therefore legally bound to pay the actual fuel cost for additional fuel under AFSA, in accordance to Article 22.10.1 read with Article 22.9 of the PSA. The stand of the Respondent Discoms that the PSA restricts the combined use of imported fuel and additional fuel under AFSA to a limit of 40%, if accepted, will amount to incoporating terms which do not form part of the PSA and may also render Article 21.5.7 (C) of the PSA otiose. Even otherwise, these submissions of the Respondent Discoms are an afterthought as they have not, at any point in time, exercised their right to approve/reject the monthly fuel mix proposals submitted by the Petitioner in terms of the PSA. The Respondents, thus having not followed the provsions of the PSA cannot deduct any fuel charges from the bills of the Petitioner, on this count.

31. The Respondent Discoms have also argued that the Petitioner is entitled to relief under Article 21.4.2 – 'Deemed Availability' and payment of fixed charges thereof, in case the Respondent Discoms do not approve the usage of imported fuel to the extnet of 40% annd also the usage of additional fuel under AFSA under Article 22.9 and Article 22.10 of the PSA. This submission of the Respondent is misconceived considering the fact that the Respondents had the option of paying

deemed geeneration charges and not scheduling power. However, the Respondents Discoms having scheduled and accepted the suppy of power, cannot dispute the use of imported fuel/AFSA by the Petitioner and withhold payments due to the Petitioner.

32. It is noticed from records that while settling the bills, the Respondent Discoms had rejected the claims of the petitioner only on the limited ground that the procurement/ use of imported fuel/ additional fuel under AFSA cannot exceed the limit of 40%. However, the Respondent Discoms in their reply/written submissions to this petition have raised several grounds, none of which were either raised nor contended in any of the communications made between the parties. As pointed out by the Petitioner, the Hon'ble Supreme Court in M S Gill v Chief Election Commission, 1978 (1) SCC 405 has held that when a statutory authority makes an order based on certain grounds, its validity must be judged by the reasons so mentioned, and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. In our view, except for the question of limiting the combined use of imported fuel /AFSA within a limit of 40%, all other issues raised by the Respondent Discoms in the present case are an afterthought and cannot be relied upon. Nevertheless, we have, in this order examined all the submissions of the Respondent Discoms and have concluded that the Respondent Discoms are in breach of the contractual obligations under the PSA dated 18.2.2016 and the withholding /deduction of amounts towards fuel charges by the Respondents from the monthly bills raised by the Petitioner for the period from May, 2017 to December, 2018 is illegal and arbitrary. The Petitioner is therefore entitled for reimbursement of the said amounts wrongfully withheld by the Respondent Discoms.

33. Article 38.4 of the PSA provides as under:

> *"38.4 Delayed payments*
> *38.4.1 The parties hereto agree that payments due from one party to the other party under the provisions of this Agreement shall be made within the period set forth therein, and if no such period is specified, within 30 (thirty) days of receiving a demand along with necessary particulars. Unless otherwise specified in this Agreement, in the event if delay beyond such period, the defaulting party shall pay interest for the period of delay calculated at the rate equal to 5% (five percent) above the bank rate and recovery thereof shall be without prejudice to the rights of the parties under this Agreement including termination thereof.*
>
> *38.4.2 Unless otherwise specified, any interest payable under this Agreement shall accrue on a daily outstanding basis and shall be compounded on quarterly rests*.

34. The Petitioner has submitted that in terms of the above Article, the Respondents are liable for payment of interest amounting to Rs 112881893/- as on 13.7.2019 on the unpaid amount of Rs 65,1795538/- which were arbitrarily withheld towards fuel charge payments in terms of the PSA. We have, in this order, decided that the Respondent Discoms are liable to make reimburse the fuel charges wrongfully withheld by it from the monthly bills of the Petitioner for the period from May, 2017 to December, 2018. Accordingly, we direct the Respondent Discoms to make payment of the said amounts within 60 days from the date of this order, along with interest.

35. The summary of our findings are as under:

(a) The monthly fuel mix proposals submitted by the Petitioner for the period from May 2017 to December 2018, are deemed to have been approved by the Respondent Discoms in terms of the PSA.

(b) The Respondent Discoms having opted to schedule power from the project of the Petitioner are legally bound to pay the actual fuel cost for AFSA, in accordance with Article 22.10.1 read with Article 22.9 of the PSA.

(c) The Respondent Discoms shall release the withheld amount of Rs.65.18 crore (subject to calculation corrections, if any) from the monthly bills of the Petitioner for the period from May 2017 to December 2018, along with interest pendente lite and future, within 60 days from the date of this order.

36. Petition No.212/MP/2019 is disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***	***Sd/-***
(Pravas Kumar Singh)	**(Arun Goyal)**	**(I. S. Jha)**	**(P. K. Pujari)**
(Member)	**(Member)**	**(Member)**	**(Chairperson)**