



Petition No 903 of 2013

**BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW**

Date of Order : 30.5.2014
Detailed Order

PRESENT:

1. Hon'ble Sri Desh Deepak Verma, Chairman
2. Hon'ble Smt. Meenakshi Singh, Member
3. Hon'ble Sri Indu Bhushan Pandey, Member

IN THE MATTER OF: Power Purchase Agreement for purchase of 240 MW of electricity on long term basis under Case - I tariff based competitive bidding procedure as per guidelines issued by Government of India (GoI).

AND

IN THE MATTER OF

Essar Power (Jharkhand) Limited (EPJL),
Prakash Deep Building, 10th Floor
7, Tolstoy Marg, New Delhi -110001

-----Petitioner

Noida Power Company Limited (NPCL)
Commercial Complex,
H-Block, Alpha-II Sector
Greater Noida - 201308

----- Respondent

The following were present:

1. Sri Sanjay Sen, Sr. Advocate, Essar Power
2. Sri Karan Kartik, Jt. G.M. Essar Power
3. Sri Vivek Jain, Advocate, Essar Power.
4. Sri S.B. Malagi, Sr General Counsel, Essar Power
5. Sri M.G. Ramachandran, Advocate, NPCL
6. Sri Vishal Gupta, Advocate, NPCL
7. Sri R. C. Agarwala, M.D. & CEO, NPCL
8. Sri Alok Sharma, Manager (Legal). NPCL
9. Sri A.K.Arora, Resident Manager, NPCL

Order

(Date of Hearing 11.3. 2014)

1. The Petitioner, Essar Power (Jharkhand) Limited (EPJL), is a power generating company, setting up a 1800 MW thermal power plant in Tehsil Chandwa, District Latehar, Jharkhand, to be Commissioned in two phases – (a) 2 units of 600 MW each would be Commissioned in Phase I (b) 1 unit of 600MW would be Commissioned in Phase II. The power generated from this plant would be supplied, amongst others, to the Respondent, Noida Power Company Limited (NPCL), a Distribution Licensee under the Electricity Act, 2003 (the Act), in terms of the Power Purchase Agreement (PPA) dated 09.05.2012 entered into between the parties for the purchase/supply of 240 MW of electricity. The tariff under PPA was adopted by the Commission U/s 63 of the Act, vide order dated 4.9.2012 in petition no. 741 of 2011, which was discovered through a transparent process of Case-1 competitive bidding.
2. The Petitioner submitted that the PPA has specified timelines in respect of: (a) fulfillment of conditions subsequent under Clause 3.1 as 8th May, 2013; (b) delivery of electricity i.e. Scheduled Delivery Date as 30th April, 2014. In view of *force majeure* conditions – primarily the delay on the part of the Central Government i.e. the Ministry of Environment and Forest in granting Environmental Clearance - unavoidably delaying and affecting its ability in performing its obligations in a timely manner, the Petitioner wrote to the Respondent on 19th February 2013 seeking an extension of the said deadlines. The Respondent refused the Petitioner's request and asked the Petitioner to furnish additional bank guarantees of Rs. 3.6 crores (Rupees Three crores sixty lacs only) each for every subsequent week and threatened that failure to do so will be met by consequences under the PPA. Therefore, the petition was filed by the Petitioner.
3. The Petitioner has submitted in the petition that Compliance with the strict timelines specified under the PPA is subject to the exception of a force majeure event. Clause 3.4.3 states:

Quote

“3.4.3 In case of inability of the Seller to fulfill any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of “ten (10)”Months, continuous or non-continuous in aggregate...”

The PPA defines force majeure as under:

“Force majeure

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

...

ii. Non-natural Force Majeure Events

...

2. Direct non-natural force majeure events not attributable to the procurer

.....

(b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development/operation of the Power Station, provided the Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

...

3. Indirect Non-Natural Force Majeure Events

a.) Any act of war (whether declared or undeclared), invasion, armed conflict wracked of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action;

...”

Unquote

The Petitioner has stated that the Article 9.3.1 of the PPA shows that the term ‘force majeure’ provides an *inclusive* rather than an exhaustive definition. Thus, the list of force majeure events outlined therein is only illustrative. As long as an event or combination of events is not excluded as a ‘*force majeure exclusion*’ within the

meaning of Article 9.4.1, it would be covered within the force majeure if it *wholly or partly prevents or unavoidably delays a party in the performance of its obligations*, irrespective of whether the same is listed in Article 9.3.1 or not. The Petitioner has added that the delay has been occasioned for reasons beyond the Petitioner's control.

a. Delay in grant of Environmental Clearance by the MoEF:

The Petitioner's thermal plant is a captive coal based plant i.e. power would be generated utilizing the coal from the Ashok Karkata Coal Block allocated to the Petitioner. The Environment Clearance ("EC") for the power plant is in turn dependant on grant of prior EC for the coal mine. Since EC for the coal mine is awaited, EC for the plant has not been granted. Environment Impact Assessment notification dated 14.09.2006 mandates grant of environmental clearance as a condition precedent to commencement of construction. The relevant clause is as follows:

Quote

"6. Application for Prior Environmental Clearance (EC):-

An application seeking prior environmental clearance in all cases shall be made ... after the identification of prospective site(s) for the project and/or activities to which the application relates, before commencing any construction activity, or preparation of land, at the site by the applicant..."

Unquote

The Petitioner has submitted that they are setting up a Power Plant consisting of 3 units of 600 MW each. The application for Environmental Clearance was made on 25.04.2007 for the entire power plant. The EC for the 1st unit of 600 MW was awarded on 08.05.2009. As regards the balance 1200 MW, the Ministry was of the view that first, adequate water linkage i.e. permission to draw water from the rivers, should be obtained. The EC application was kept pending for the balance power plant. The additional water linkage, sufficient for the entire plant of 1800 MW, was obtained on 21.03.2012. However, in the meantime, the Ministry changed its policy, mandating that EC for the power plant would be granted only subsequent to grant of EC for the coal mine. Thus, in view of overhaul of the entire policy, the application for grant of EC for the power plant was kept on hold pending the grant of EC for the project. Thus, in the absence of the EC for the

coal mine, and resultantly in the absence of EC for the power plant, the Petitioner has not been in a position to progress with the project. These delays, which are solely attributable to the Government authorities, are completely beyond the Petitioner's control. Pertinently, the Petitioner had applied for grant of EC prior to the entering of the PPA. There has been no delay on the part of the Petitioner. The Petitioner has already taken effective steps to comply with statutory requirements insisted upon by the MoEF for grant of environmental clearance. Significantly, in May 2013, the Expert Appraisal Committee has recommended grant of EC for the balance 2 units of the power plant.

b. Delay in development of the Ashok Karkata Coal Block mine:

- (i). Reallocation and change in coordinates – initially the mine was allocated by letter dated 06.11.2007. However, due to an upcoming railway corridor in the same area, the block allocation was revised by the Ministry of Coal by letter dated 08.02.2010, which led to change in coordinates of the block. Consequently, the Petitioner had to apply afresh to the State of Jharkhand for a prospecting license.
- (ii). The prospecting license is still awaited even though the same has been applied for; prepared and approved by District officials; and submitted to the Director of Mines, Government of Jharkhand since 03.01.2012.
- (iii). Delay in forest clearance for prospecting: On 17.04.2012, the District Forest Officer, Chatra, completed the departmental procedures for issuing the required approvals, however, he awaits the approval of the prospecting license by the Department of Mines, Government of Jharkhand.

c. Maoist activities: Given the existence of extremist and Maoist activities in the area, there was frequent stoppage of work, and these unplanned interruptions had seriously affected the progress of construction of the Plant.

d. Delay on the part of the Respondents: As per the RFP, the Lol was to be issued to the Petitioner by 25.01.2011 and the PPA ought to have been signed by 15.02.2011. However, the Lol was issued on 16.02.2012 and the PPA was

signed on 09.05.2012. Resultantly, the Petitioner who would have ordinarily got 3 years and 2 months from the date signing of the PPA, for getting the power plant in operation and commencing the supply of power to the Respondent, now gets only 1 year 11 months for the same. This is extremely arbitrary and wrong.

The above-said delay is solely attributable to the Respondent as after the Petitioner was declared as the Lowest Bidder, instead of issuing the Lol to the Petitioner, the Respondent arbitrarily brought in a new third party who had not participated in the bidding process. The Respondent expressed its intent to issue the Lol to this new party. This decision of the Respondent was challenged before this Hon'ble Commission as well as the APTEL. Finally, the APTEL held in favour of the Petitioner. It is only thereafter that on 16.02.2012, the Respondent issued the Letter of Intent ("Lol") to the Petitioner, even though in terms of Clause 2.8.2 of the RFP, the Lol was to be issued on 25.01.2011. Similarly, as per Clause 2.8.2 of the RFP, the 'RFP Documents' including the PPA were to be signed by 15/02/2011. However, it was only on 09/05/2012, that the Power Purchase Agreement ('PPA') was signed between the Petitioner and the Respondent. Thus, the issuance of the LOI as well as execution of the PPA was delayed by the Respondent by more than 13 months and 15 months respectively. On 21.02.2011, the Petitioner addressed a letter to the Respondent accepting the Lol and requesting the Respondent to revise the Schedule Date of Delivery by 13 months, in view of the delay in providing the Lol, to May 2015. However, the Respondent rejected the request of the Petitioner vide its letter dated 06.03.2012. It would here be pertinent to mention that as per the RFP, the Petitioner had to unconditionally accept the Lol within 7 days of the issue of the same or else it would face consequences such as forfeiture of the Bank Guarantee of Rs 7.2 crores (Rupees Seven crores twenty lacs only) it had furnished to the Respondent at the commencement of the bidding process as well as being effectively de-barred from participating in any Case-I bidding process for at least one year. Thus, even though the rejection of the Petitioner's request by the Respondent, for extension in timelines, was illegal and amounted to the

Respondent taking undue advantage of its own wrong, the Petitioner had no option but to sign the same.

4. The Petitioner has submitted that they have filed this petition under Section 86(1)(b) and (f) of the Electricity Act, 2003. The reliefs claimed are as under:
- a. Quash and set aside letters dated 04.04.2013; 07.08.2013, 09.08.2013 and 22.08.2013 issued by the Respondent;
 - b. Restrain the Respondents from taking any coercive or precipitative steps against the Petitioner, including but not limited to encashment of existing bank guarantees;
 - c. Declare that the Petitioner has been unable to adhere to the timelines specified in the PPA dated 09.05.2012 on account of *force majeure* reasons beyond its control;
 - d. Declare that the Petitioner is entitled to exclude the time period spent in awaiting Environmental Clearance, in the calculation of timelines fixed for performance by Petitioner of its obligations under the PPA;
 - e. Declare that the Petitioner is not in breach of its obligations under the PPA dated 09.05.2012 and that its obligations thereunder stand postponed in view of force majeure events;
 - f. Direct that the Respondents shall not be entitled to terminate the PPA dated 09.05.2013 if the Petitioner performs its obligations in the extended time period; or in the alternative, declare that any termination shall be without any claims of any nature whatsoever against the Petitioner.

The Petitioner has also submitted that in case this Hon'ble Commission deems it necessary and appropriate, in the interest of justice, it may refer the present matter to Arbitration in exercise of its powers under Section 86(1)(f) of the Electricity Act, 2003.

5. The Petitioner has brought the details of the issue through the petition as under:
- (i) Pursuant to deliberations held on 20.06.2007-23.06.2007, 30.07.2007 and 13.09.2007 of the 35th Meeting of the '*Screening Committee to consider*

allocation of Coal Blocks earmarked for Power Generation', the 'Ashok Karkata Central' coal block in Jharkhand was recommended for allocation to the Petitioner.

- (ii) By letter dated 06.11.2007, the Ministry of Coal conveyed its approval for allocation of the above stated coal block to the Petitioner for captive use, to enable the latter to meet its coal requirements for the power plant proposed to be established by it in Jharkhand.
- (iii) On 22.02.2008, the Chief Engineer, Project Planning and Monitoring, Water Resources Department, Government of Jharkhand, approved grant of water linkage thereby permitting the Petitioner to draw water for its 2000 MW Thermal Power Plant at Distt. Latehar, Jharkhand. The Petitioner was permitted to draw a quantity of (i) 22 MCM of water on an annual basis from Amanat river in the area of upstream catchment of the Amanat Reservoir Project; (ii) 50 MCM of water from the downstream area of Tenughat Dam from the earmarked water share of DVC, after seeking separate permission from DVC, to enable the Petitioner to meet
- (iv) On 22.07.2008, the Airports Authority of India gave its '*No Objection Certificate*' in respect of height clearance for the proposed construction of chimneys at Villages Chakla, Chatro, Mahumilan, Angaraha and Ardhe, Tehsil Chandwa, District Latehar, Jharkhand. This NOC, which was valid for a period of 4 years, was renewed on 06.06.2012 for another 3 years i.e. till July 21, 2015.
- (v) On 26.07.2008, the office of the Deputy Commissioner, Joint District Magistrate, Latehar, Jharkhand wrote to the Petitioner asking it to deposit Rs. 9.08 crores (being 80% of the total consideration of Rs. 11.35 crores) for enabling transfer of 290.58 acres of Government Land. On 29.07.2008, the Petitioner wrote to the Deputy Commissioner, District Latehar, enclosing a banker's cheque of Rs. 9,08,54,460/- towards the transfer of 290.58 acres of Government Land, being 80% of total consideration, and a certificate dated 04.06.2009 has also been issued by the authorities in this regard.
- (vi) On 08.05.2009, the Ministry of Environment & Forests, Government of India granted environmental clearance to the Petitioner for setting up 1 unit of 600

- MW as part of Phase I of the project, subject to certain conditions. This letter recorded that the water linkage which had been obtained as on that date was only 2461 m³/hour, and this was sufficient for only one unit of 600MW.
- (vii) On 24.02.2010, an Agreement was entered into between *inter alia* the Petitioner and the Power Grid Corporation of India Ltd (“PGCIL”) for securing long term access to the transmission system of PGCIL to enable transfer of electricity from the place of generation to the place of delivery.
- (viii) On 26.02.2010, the Petitioner entered into an Agreement with Global Supplies (UAE) FZE to enable design, engineering, procurement, manufacturing, training of personnel along with transfer of all plant and equipment of foreign origin to its unit Thermal Power Plant.
- (ix) On 24.05.2010, the Chief Engineer, Project Planning and Monitoring, Water Resources Department, Government of Jharkhand, approved grant of additional water linkage permitting the Petitioner to draw 50.00 MCM of water annually from Damodar and Haharo rivers to meet its demand for the thermal power plant. The earlier letter dated 22.02.2008, *to the extent* it indicated that 50 MCM of water could be drawn from the downstream area of Tenughat dam, was superseded. Thus, with the issuance of this letter, the Petitioner was permitted to draw a total of 22 + 50 = 72 MCM of water annually.
- (x) On 19.06.2010, the Petitioner wrote to the Ministry of Environment and Forests, Government of India requesting for environmental clearance for the entire project as opposed to only one unit, *inter alia* contending that after receipt of additional water linkage on 24/05/2010, the Petitioner was permitted to draw a total of 72 MCM or 8169 m³/hr of water, which met the requirements of a 2000 MW plant.
- (xi) On 27.07.2010, an agreement was entered into between the Jharkhand State Electricity Board and the Petitioner, whereby the former agreed to supply of energy in bulk by to the Petitioner for its own use at the premises of the thermal power plant.
- (xii) On 20.08.2010, a Rupee Loan Facility Agreement was entered into between the Petitioner and ICICI Bank (“ICICI”) Limited for the purpose of financing the thermal power project. Under this agreement, ICICI Bank agreed to provide

- financial assistance to the tune of Rs. 1875 crores. The agreement also recorded the intention of the Petitioner to avail financial assistance from certain other lenders as well for sums of Rs. 750 crores.
- (xiii) On 11.10.2010, the Respondent issued a Request for Proposal (“RFP”) for long term procurement of power through tariff based competitive bidding for the purpose of meeting its base load requirement. The RFP indicated the intention of the Respondent to procure 200 (+/- 20%) MW of power for a period of 25 years from the Scheduled Delivery Date i.e. April 2014.
- (xiv) On 19.10.2010 the Petitioner wrote to the Ministry of Environment and Forests, Govt. of India providing details/status of the Power Plant and as advised by the Environment Audit Committee (EAC), the suggested alterations were made. The Ministry was therefore requested for grant of environmental clearance in view of these wise submissions.
- (xv) On 25.01.2011, the Circle Officer, Tehsil Chandwa, District Latehar, Jharkhand issued a certificate that sale deeds for 5 villages consisting of 418.92 acres has been submitted in Circle Office for further necessary course of action.
- (xvi) On 02.02.2011, the Petitioner submitted its financial and non-financial bid for the RFP dated 11.10.2010, enclosing therewith various documents with respect to qualification requirements, details of the generation source and primary fuel as well as a bank guarantee for the quantum of Rs. 7.2 crores (Rupees Seven crores twenty lacs only), valid up to 04.07.2011. The quantum of power offered by the Petitioner was 240 MW. On evaluation of the non-financial bids of all the bidders, all the bidders were qualified by NPCL. Thereafter, the financial bids of these qualified bidders was opened, wherein the levelized tariff of the Petitioner was evaluated to be lowest. Hence, the Petitioner was declared the L1 (lowest bidder).
- (xvii) On 13.02.2011, the Times of India, Ranchi edition reported that frequent bandhs called by Maoists and their splinter groups in various districts including Latehar, had badly hit life and bauxite mining.
- (xviii) Subsequently, on 16.02.2012, the Respondent issued the Letter of Intent (“LoI”) to the Petitioner for supplying 240MW of power for a period of 25 years

commencing April 2014. It bears mention that the Lol was to be issued on 25.01.2011 in terms of Clause 2.8.2 of the RFP. However, it was issued after substantial delay only on 16.02.2012. Similarly, as per Clause 2.8.2 of the RFP, the 'RFP Documents' including the PPA were to be signed by 15/02/2011. However, it was only on 09/05/2012, that the Power Purchase Agreement ('PPA'); the Hypothecation Agreement cum Deed of Hypothecation and the Default Escrow Agreement, were signed between the Petitioner and the Respondent. Thus, the issuance of the Lol as well as execution of the PPA was delayed by the Respondent by more than 13 months and 15 months respectively.

- (xix) On 21.02.2013, the Petitioner addressed a letter to the Respondent accepting the Lol and requesting the Respondent to revise the Schedule Date of Delivery by 13 months, in view of the delay in providing the Lol, to May 2015. However, the Respondent rejected the request of the Petitioner vide its letter dated 06.03.2012.
- (xx) The delay in the issuance of the letter of intent as well as execution of the PPA was due to pendency of litigation before the Uttar Pradesh Electricity Regulatory Commission and the Appellate Tribunal for Electricity, which in turn was attributable solely to the conduct of the Respondent in reopening the bid process by considering the offer of a 3rd party, even after the bid process itself had been completed and a petition for adoption of the PPA was pending in the Uttar Pradesh Electricity Regulatory Commission.
- (xxi) On 09.05.2012, the Petitioner and Respondent executed the RFP documents as enumerated in Clause 2.8.2 of the RFP, which included the Default Escrow Agreement, the Hypothecation Agreement cum Deed of Hypothecation and the Power Purchase Agreement for purchase of 240 MW of power. The Default Escrow Agreement was entered into between the Petitioner, the Respondent, the Default Escrow Agent (namely- Yes Bank Limited) and the Consortium of Banks (also known as Procurer's Banks i.e. Respondent). The Hypothecation Agreement cum Deed of Hypothecation was entered into between the Petitioner and the Respondent.



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- (xxii) As per Clause 2.2.9 (a) of the RFP, before signing the PPA- the Petitioner had to furnish a Contract Performance Guarantee of Rs 72 crores (Rupees Seventy Two Crores) to the Respondent. The Petitioner had furnished the same to the Respondent by way of a Bank Guarantee prior to executing the PPA.
- (xxiii) The Petitioner and the Respondent also entered into a PPA on 09.05.2012 for the supply of 240 MW of Power from the Petitioner to the Respondent. The PPA referred to certain 'conditions subsequent' to be complied with by the Respondent latest by 08.05.2013. The Scheduled Delivery Date for supply of power was specified as 30.04.2014.
- (xxiv) Article 3.1 of the PPA prescribes certain 'Conditions Subsequent' to be satisfied by the Seller i.e. the Petitioner within 12 months from the effective date, unless *inter alia* if such completion is affected by any force majeure event. The consequences of non-fulfilment of the 'conditions subsequent' within 3 months after the expiry of the time specified under Article 3.1, otherwise than on account of a *force majeure* event or a reason attributable directly to the procurer, are prescribed in Article 3.4.1 and 3.4.2. In terms thereof, upon the expiry of 3 months after the date specified under Article 3.1 the Seller shall on a weekly basis, be liable to furnish the Procurer additional Contract Performance Guarantees of Rs. 3.6 crores within 2 business days of the expiry of every such week. Failure to perform the obligations within a maximum period of 6 months after the expiry of the time prescribed in Article 3.1, or the failure to furnish the additional contract performance guarantee in accordance with Article 3.4.1, would give either of the parties the right to terminate the agreement by giving a termination notice of at least 7 days. In case of Termination of the agreement by the Procurer would invite payment of liquidated damages of Rs. 96 crores by the Seller to the Procurer.
- (xxv) On 19.02.2013, the Petitioner wrote a letter to the Respondent providing a detailed status of compliance with the "conditions subsequent" and also the status regarding the 'Scheduled Delivery Date'. It was pointed out that the project development schedule was hampered due to reasons beyond the Petitioner's control and that Commissioning of the plant was expected by
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October 2015. Therefore, it was requested that the time for fulfilment of conditions subsequent by the Petitioner be extended by a period of one year i.e. till 09.05.2014 and the Scheduled Delivery Date be extended by 18 months i.e. till 31.10.2015.

In the said letter, the Petitioner *inter alia* pointed out as follows:

- a. That the Petitioner had submitted its response to the RFP on 03.02.2011 unequivocally stating that (i) Power would be supplied from Phase II of the project and (ii) Coal from the Ashok Karkata Coal block would be used to generate power to be supplied to the Respondent

Conditions Subsequent

- b. That the condition of long-term open access had been complied with an agreement in this regard had been entered into with PGCIL on 24.02.2010.
- c. That the project was intended to be set up over 750 acres of land, out of which, 524 acres of private land had already been acquired and the Petitioner had also been allotted 290.2 acres of government land, and in respect of the latter, 80% of the price had already been paid.
- d. That the Petitioner had already entered into a contract with the Global Supplies (UAE) FZE on 26.02.2010 towards the main plant contract.
- e. That financial closure had been achieved for Phase II of the project and in this regard, extracts of the Rupee Term Loan Facility Agreement dated 20.08.2010 executed between the Petitioner and ICICI bank for Phase II of the project were enclosed.
- f. That several clearances had already been obtained in favour of the Petitioner including Water Linkage, availability of Construction Power, chimney certificate extension granted by the Airports Authority of India.
- g. That as regards environmental clearance from the Ministry of Environment and Forests, Government of India, the Petitioner had already received environmental clearance for 1 unit of 600MW of Phase I

of the project, and that it had been taking effective steps to comply with certain statutory requirements which had been insisted upon by the Ministry for grant of environmental clearance for the balance project.

- h. That as required under the PPA and the Escrow Agreement, the Petitioner had opened an account with the lead escrow agent i.e. 'Yes Bank'.

Scheduled Delivery Date

- i. That the issuance of the LOI as well as execution of the PPA was delayed on account of the Respondent by more than 13 months and 15 months respectively.
- j. That grant of environmental clearance had initially been received for 1 unit of 600 MW. Thereafter, clearance for the entire project has been pending even though the Petitioner had obtained additional water linkage. The Ministry of Environment and Forests later clubbed the issue of environmental clearance with compliance of certain statutory formalities in respect of the coal mine allocated for the plant, leading to further delays, which were beyond the control of the Petitioner.
- k. That the Petitioner had obtained water linkage from the Amanat and Damodar rivers, which are not perennial but seasonal rivers. As a prudent measure to ensure continuous operation of the Plant in view of the water shortage, the project design had to be modified leading to delay.
- l. The Petitioner had attained financial closure in accordance with the PPA.
- m. That given the existence of extremist and Maoist activities in the area, there was frequent stoppage of work, and these unplanned interruptions had seriously affected the progress of construction of the Plant. In this regard, a newspaper article was annexed pointing out that business activities in the area were paralysed for 108 days in a single year.
- n. Delay in development of the Ashok Karkata Coal Block mine:



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- Reallocation and change in coordinates – initially the mine was allocated by letter dated 06.11.2007. However, due to an upcoming railway corridor in the same area, the block allocation was revised by the Ministry of Coal by letter dated 08.02.2010, which led to change in coordinates of the block. Consequently, the Petitioner had to apply afresh to the State of Jharkhand for a prospecting license.
 - The prospecting license is still awaited even though the same has been applied for; prepared and approved by District officials; and submitted to the Director of Mines, Government of Jharkhand since 03.01.2012.
 - Delay in forest clearance for prospecting: On 17.04.2012, the District Forest Officer, Chatra, completed the departmental procedures for issuing the required approvals, however, he awaits the approval of the prospecting license by the Department of Mines, Government of Jharkhand.
 - The statutory clearances for the coal block have been delayed due to change in Government Policies like re-classification of coal blocks for mining and therefore during that period there was limited progress in the regulatory mine development activities.

Therefore, in view of the stated difficulties, the Petitioner requested for an extension of the timeline for compliance with the 'conditions subsequent' and also as regards the scheduled delivery date.

- (xxvi) By letter dated 04.04.2013, the Respondent rejected the request which had been made by the Petitioner in its letter dated 19.02.2013, stating *inter alia* that events predating the signing of the PPA, could not be made the basis for extension of the time frame for performance of any of the obligations thereunder. It was also stated that the force majeure clause applied only to events which occurred subsequent to the signing of the PPA, and what was in

existence at or before the signing of the PPA, could not be a ground for force majeure. It was also pointed out that the Petitioner had failed to give notice of occurrence of force majeure events in terms of Article 9 of the PPA. By this letter, the Respondent also asked for certain clarifications from the Petitioner in respect of the issues which had been raised by the latter in its letter dated 09.02.2013.

- (xxvii) The Respondents letter dated 04.04.2013 was responded to by the Petitioner on 20.07.2013. It was reiterated that the project development was hampered on account of reasons beyond the control of the Petitioner, which could not have been avoided even though the Petitioner had taken all reasonable care and complied with Prudent Utility Practices. The Petitioner also clarified the various issues which had been raised by the Respondent in its letter dated 04/04/2013. While drawing the attention of the Respondent to Article 15.2.1 of the PPA, in terms of which both parties could jointly in writing amend the PPA to extend the timelines for meeting the Conditions Subsequent and the Scheduled Delivery Date, the Petitioner reiterated its request for extension of time lines.
- (xxviii) On 07.08.2013, the Respondent rEPJLied to the Petitioners letter dated 20.07.2013 and again denied the request of the Petitioner for extension of time lines. Even though the Petitioner had responded in detail clarifying each of the doubts raised by the Respondent, nevertheless, without foundation, the Respondent stated that no satisfactory response had been furnished in response to the doubts which had been raised by it. The Respondent stated that under Article 3.4.1 of the PPA, a further period of 3 months was available to the Petitioner to satisfy the conditions subsequent, and which time would expire on 08.08.2013. It was stated that in the event of failure on the part of the Petitioner to fulfil the conditions subsequent by 08.08.2013, the Respondent would be constrained to take appropriate action under the provisions of the PPA.
- (xxix) On 09.08.2013, the Respondent wrote to the Petitioner that in terms of Articles 3.4.1 and 3.4.2, a further maximum period of 3 months after 08.08.2013 was available to the Petitioner to fulfil the conditions subsequent, subject to the

Petitioner furnishing a weekly performance guarantees of Rs. 3.6 crores within 2 days of the expiry of a week from 08.08.2013. It was pointed out that the first week after 08.08.2013 was expiring on 15.08.2013, and therefore the guarantee was to be provided by 17.08.2013 latest, failing which the consequences stated in Article 3.4.2 would follow.

- (xxx) The Petitioner responded to the Respondent vide letter dated 16.08.2013, wherein it stated that, in light of the force-majeure events/circumstances affecting the Petitioner and in accordance with the terms of the PPA, the Petitioner sought extension of the timelines for complying with the conditions subsequent as well as the Scheduled Delivery Date. The Petitioner further stated that in view of Clause 3.4.3 of the PPA (i.e. in case of a force majeure event the Petitioner would be entitled to an additional period of 10 months for complying with the conditions subsequent), the request for additional bank guarantee was not applicable in the present case.
- (xxxi) Vide letter dated 21.08.2013, the Respondent denied the Petitioner's request for extension of the timelines for complying with the Conditions Subsequent. It further denied that force majeure events were affecting the progress of the Petitioner's petition.
- (xxxii) Thereafter on 22.08.2013, by relying on Article 3.4.2 (i), the Respondent served a 'Termination Notice' to the Petitioner giving the Petitioner 7 days Notice before terminating the said PPA.

6. The Petitioner has further submitted that the time specified in Article 3.1, for fulfillment of the 'conditions subsequent' is 09.05.2013. The consequences of non-fulfillment of the 'conditions subsequent' within 3 months after the expiry of the time specified under Article 3.1, otherwise than on account of a *force majeure* event or a reason attributable directly to the procurer, are prescribed in Article 3.4.1 and 3.4.2. In terms thereof, upon the expiry of 3 months after the date specified under Article 3.1 i.e. 3 months after 09.05.2013, the Seller shall on a weekly basis, be liable to furnish the Procurer additional Contract Performance Guarantees of Rs. 3.6 crores within 2 business days of the expiry of every such week. Failure to perform the obligations within a maximum

period of 6 months after the expiry of the time prescribed in Article 3.1, or the failure to furnish the additional contract performance guarantee in accordance with Article 3.4.1, would give either of the parties the right to terminate the agreement by giving a termination notice of at least 7 days. Termination of the agreement by the Procurer would invite payment of liquidated damages of Rs. 96 crores by the Seller to the Procurer. The compliance with the strict time lines specified under Article 3.1 of the PPA is subject to the exception of a *force majeure event*. The Petitioner has stated that some of the *force majeure* events claimed by the Petitioner in its letters dated 19.02.2013 and 20.07.2013 i.e. relating to delay in grant of regulatory approvals and the existence of Maoist activities in the area, squarely fall within Article 9.3.1(ii)(2)(b) and Article 9.3.1(ii)(3)(a). Article 9.3.1(ii)(2)(b) uses the term 'refusal' and not 'rejection'. Even though the applications of the Petitioner for grant of approvals have not been *rejected* by the authorities, they have been unreasonably delayed which would constitute a *refusal* to grant the approvals within the meaning of the PPA. It is well settled that contracts ought to be interpreted in a commercially relevant manner. Commercially, an unreasonable delay is equivalent to a *refusal to consider*, even though an order 'rejecting' the proposal may not be existent. Even otherwise, a perusal of Article 9.3.1 would show that the same provides for an inclusive rather than an exhaustive definition of the term 'force majeure'. Thus, the list of force majeure events outlined therein is only illustrative. As long as an event or combination of events is not excluded as a *force majeure exclusion* within the meaning of Article 9.4.1, it would be covered within the force majeure if it *wholly or partly prevents or unavoidably delays a party in the performance of its obligations*, irrespective of whether the same is listed in Article 9.3.1 or not. The explanations given in letters dated 19.02.2013 and 20.07.2013 would show that the delay is either attributable to government authorities, or has arisen for other reasons beyond the Petitioner's control.

EPJL's interim relief application

7. In addition, the Petitioner had also requested for interim relief as follows:



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- a. Direct the Respondents to maintain status quo in respect of the letters dated 04.04.2013; 07.08.2013, 09.08.2013 and 22.08.2013;
 - b. Restrain the Respondents from taking any coercive or precipitative steps against the Petitioner, including but not limited to encashment of existing bank guarantees pending final hearing and disposal of the present complaint;

The interim relief has been requested by the Petitioner on the reasons that the delays have been occasioned on account of force majeure conditions beyond the control of the Petitioner. Irreparable loss and irretrievable injury would be caused to the Petitioner if the reliefs prayed for in the main petition, as well as the interim reliefs prayed for, are not granted to its. The entire financial viability of the Petitioner's project is at risk. The Respondent is taking undue advantage of its dominant commercial position. The financial viability of the Petitioner's entire plant would be in jeopardy if it is faced with financial liabilities for delays which have been unavoidably beyond its control. Any termination will also adversely affect the future prospects of the Petitioner in as much as it will be blacklisted and/or effectively debarred from participating in bidding for supply of power for the next one year. The grant of EC has taken a positive course with the EAC recommending grant of clearance to the Petitioner. Thus, speedy progress of the project is expected, and any financial setback at this stage would gravely prejudice the Petitioner.

NPCL's REPJLy dated 3.9.2013

8. NPCL has stated that the Power Purchase Agreement dated 09.05.2012 was executed between the Petitioner and the Respondent pursuant to the competitive bidding which has been duly approved by this Hon'ble Commission. Article 3.1 of the Power Purchase Agreement dated 09.05.2012 while laying down the obligations of the seller, i.e the Petitioner herein , provides for certain conditions subsequent to be satisfied by the Petitioner within 12 months from the signing of the Power Purchase



Agreement (Effective Date) namely on or before 08.05.2013. Article 3.1 is reproduced herein below for a ready reference of this Hon'ble Commission:

Quote

“ 3.1 Satisfaction of conditions subsequent by the Seller

3.1.1 The seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk within twelve (12) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with their obligations under Article 3.2.1 of this Agreement, of if any of the activities is specifically waived in writing by the Procurer:

- (a) Deleted*
- (b) In case the power station is located outside the state of Procurer, the Seller shall have obtained all the necessary permission for the long term open access for intrastate transmission system from the Power Station Bus Bar to the injection point (except in case of dedicated transmission lines) and shall have executed all necessary agreements for such transmission access and provided as copy of the same to the Procurer;*
- (c) The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;*
- (d) The Seller shall have acquired and taken the possession of the balance area of land out of the total land requirement as mentioned in the proposal filed before the competent authority at the RFP stage;*

The Seller shall submit the letter of possession and equivalent documents for such areas of land as mentioned above to the Procurer.

- (e) The Seller shall have awarded the Engineering, Procurement and Construction Contract (“EPC Contract”) or main plant contract for boiler, turbine and generator (“BTG”), for setting up of the Power Station and shall have given to such contractor or irrevocable NTP and shall have submitted a letter to this effect to the Procurer;*
- (f) The Seller shall have obtained all Consents, Clearances and Permits required for supply of power to the Procurer as per the terms of this Agreement. In case, a project company is incorporated and the Consents, Clearances and Permits have been obtained in the name of a company other than the Project Company, all such Consents, Clearances and Permits shall have been transferred in the name of such Project Company;*

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- (g) *The Seller shall have sent a written notice to all the Procurer indicating the Aggregate Contracted Capacity and total Installer Capacity for each unit and for the Power Station as a whole expressed in MW;*
- (h) *The Seller shall have achieved Financial Closure and have provided a certificate from the lead banker to this effect;*
- (i) *The Seller shall have provided an irrevocable letter to the Lenders duly accepting and acknowledging the rights provided to the Lenders under the terms of this Agreement and all other RFP Documents;*

Unquote

Further, Article 3.4.1 of the Power Purchase Agreement dated 09.05.2012 provides a further period of three months to the Petitioner to fulfill the said conditions subsequent mentioned in Article 3.1.1. However, it further provides that in case of non- fulfillment of the conditions subsequent even after three months of extended period beyond 12 months the seller will be obligated to give an Additional Contract Performance Guarantee of Rs. 3,60,00,000/- (Rupees Three Crore and Sixty Lacs only) on weekly basis, to the Procurer within two (2) business days of expiry of every such week. Further, in case of failure to furnish the Additional Contract Performance Guarantee (or to perform the obligations within 6 months beyond the period specified in Article 3.1 above), the Respondent shall have the right to terminate this agreement by giving a Termination Notice to the Petitioner in writing of at least seven (7) days. Article 3.4 Power Purchase Agreement dated 09.05.2012 reads as under:

Quote

3.4 Consequences of non- fulfillment of conditions subsequent:

- 3.4.1 If any one or more of the conditions specified in Article 3.1 is not duly fulfilled by the Seller, even within "three (3) months" after the time specified under Article 3.1, otherwise than for the reasons directly attributable to the Procurer or Force Majeure event in terms of Article 3.4.3, then on and from the expiry of such period and until the Seller has satisfied all the conditions specified in Article 3.1, the Seller shall on weekly basis, be liable to furnish to the Procurer additional Contract*

Performance Guarantee from any of the banks listed in Schedule 11 of this Agreement of Rs. 3,60,00,000/- (Rupees Three Crore and Sixty Lacs only), which has been provided to the Procurer within two (2) business days of expiry of every such week. Such additional Contract Performance Guarantee shall initially be valid till the Scheduled Delivery Date, and the Procurer shall be entitled to hold and / or invoke the Contract Performance Guarantee, including such additional Contract Performance Guarantee, in accordance with the provisions of this Agreement. However, upon satisfaction of the conditions subsequent by the seller, the additional Contract Performance Guarantee shall be returned by the Procurer.

3.4.2 Subject to Article 3.4.3, if:

- (i) Fulfillment of any one or more of the Conditions specified in Article 3.1 is delayed beyond the period of “three (3) months” after the date specified in Article 3.1 above, and the seller fails to furnish the additional Contract Performance Guarantee to the Procurer in Article 3.4.1 hereof; or*
- (ii) The Seller furnishes additional Contract Performance Guarantee to the Procurer in accordance with Article 3.4.1 hereof, but fails to fulfill the conditions specified in Article 3.1 for a period of “Six (6) months beyond the period specified in Article 3.1 above,*

“The Procurer” or “The Seller” shall have the right to terminate this agreement by giving a Termination Notice to the other party in writing of atleast seven (7) days. The termination of this Agreement shall take effect upon the expiry of the last date of the said notice period (“Termination Date”).

If the Procurer elect to terminate this Agreement in the event specified in the preceding paragraph of this Article, the Seller shall be liable to pay to the Procurer on the Termination Date an amount of Rs.

96,00,00,000/- (Rupees Ninety Six Crores only) as liquidated damages.

The Procurer shall be entitled to recover this amount of liquidated damages on the Termination Date, by invoking the Contract Performance Guarantee and shall then return the balance Contract Performance Guarantee, if any to the Seller. If the Procurer is unable to recover the amount of liquidated damages not recovered from the Contract Performance Guarantee, if any, shall be payable by the Seller to the Procurer within ten (10) days from the Termination Date.

For the avoidance of doubt, it is clarified that this Article shall survive the termination of this agreement.

3.4.3 In case of inability of the Seller to fulfill any one or more of the conditions specified in Article 3.1. due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of "ten (10) months", continuous or non- continuous in aggregate. Thereafter, this agreement may be terminated by either the Procurer or the Seller by giving a Termination Notice of at least seven (7) days in writing to the other party. The termination of the agreement shall take effect upon the expiry of the last date of the said notice period."

Article 4.1 of the Power Purchase Agreement dated 09.05.2012 stipulates the Scheduled delivery date under the Agreement to be 30.04.2014 as under:

4.1. Commencement of Supply of Power to Procurer

4.1.1 The seller shall be responsible to commence supply of power up to the Aggregated Contracted Capacity by the scheduled Delivery Date in accordance with the provisions of this agreement, which is 30 April 2014. However, the Seller and the procurer may mutually agree for commencement of supply in a phased manner from the Revised Scheduled Delivery Date (s) as specified in Article 3.3 of this Agreement."

The Respondent has submitted that perusal of the above quoted terms of the Power Purchase Agreement would make it evident that only exception carved out in the obligation of the Seller, i.e. the Petitioner is in the case of force majeure events which are defined in Article 9.3 and 9.4 of the Power Purchase Agreement dated 09.05.2012.

Unquote

NPCL has further submitted that the Power Purchase Agreement specifically stipulates in Article 9.5 that in case of a claim of alleged Force Majeure event, the affected party has to give notice to the other party of any Force Majeure Event as soon as reasonably practicable, but not later than seven (7) days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure. The proviso to Article 9.5.1 clearly provides that in case any party fails to give notice of the Force Majeure Event, it cannot take the benefit of the same under the Power Purchase Agreement dated 09.05.2012. Article 9.5 of the Power Purchase Agreement dated 09.05.2012 reads as under:

Quote

9.5 Notification of Force Majeure Event

9.5.1 The Affected Party shall give notice to the other party of any Force Majeure Event as soon as reasonably practicable, but not later than seven (7) days after the date on which such party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable after reinstatement of communications, but not later than one (1) day after such reinstatement.

Provided that such notice shall be a pre-condition to the Affected Party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effect on the party claiming relief and the remedial measures proposed. The Affected Party shall give the other party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other party may reasonably request about the Force Majeure Event.

9.5.2 *The Affected Party shall give notice to the other party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations. ”*

Thus, irrespective of the issue on merits as to whether the claim of Force Majeure made by the Seller is sustainable, if the Seller had not given the notice of the Force majeure event within 7 days from such event to the other party namely the procurer the seller will not be entitled to claim any relief under the Power Purchase Agreement dated 09.05.2012.

NPCL has stated that the Petitioner herein has admittedly failed to give any notice as per the provisions of the Power Purchase Agreement of the alleged event of Force Majeure, if any, at the relevant time. The Petitioner has also admittedly failed to fulfill its obligations and to satisfy the conditions subsequent as provided under the Power Purchase Agreement dated 09.05.2012. Having failed in his obligations under the Power Purchase Agreement the Petitioner, is attempting to raise the plea of force majeure as an afterthought without having sent any notice at the relevant time mandated under the Proviso to Article 9.5.1 of the Power Purchase Agreement dated 09.05.2012. It is stated that the Petitioner herein, deliberately and with malafide intentions to mislead this Hon'ble Commission, has not quoted the proviso to Article 9.5.1 and therefore, the Petition under rEPJLy suffers from the vice of “suppressio veri suggestio falsi” and is liable to be dismissed.

9. NPCL has added that the effective date for fulfillment of conditions subsequent by the Petitioner herein was 08.05.2013 and the Petitioner, on 19.02.2013 wrote a letter to the Respondent herein wherein the Petitioner admitted to the delay from its side and stated that it has substantially progressed in satisfying the conditions subsequent as :
 - a. It has entered into an agreement with PGCIL on 24.02.2010 to obtain long term open access.

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- b. Out of 724 acres of land required for the project, 524 acres of private land has already been acquired and the Petitioner has already been allotted 290.2 acres of government land.
 - c. Petitioner has entered into a contract with Global Supplies (UAE)FZE on 26.02.2010 towards the main plant contract.
 - d. The Petitioner has executed power purchase agreements with BSEB, JSEB and the Respondent herein and the details of aggregate contracted capacity and total installed capacity was given.
 - e. Financial closure has been achieved.
 - f. Several clearances such as water linkage, availability of construction power, chimney certificate extension granted by the Airports Authority of India
 - g. Environmental Clearance obtained for 1st Unit of 600 MW of Phase I of the project and the Petitioner is taking steps to obtain Environmental Clearance for other units. The Petitioner further stated that it was confident of complying with the conditions laid down by the Ministry of Environment and Forest and receive Environmental Clearance for the balance plant as well.
 - h. Petitioner opened a bank account with lead escrow agent “Yes Bank”

NPCL has stated that the Petitioner in the said letter dated 19.02.2013 also sought extension of the scheduled delivery date and the timeline for satisfaction of the conditions subsequent without taking the plea or giving any notice of any alleged force majeure event affecting the Petitioner. The Respondent herein in rEPJLy to the said letter vide its letter dated 4.4.2013 pointed out the representation given by the Petitioner herein in Schedule 7 of the Power purchase Agreement in the following manner:

“(c) The PPA contains specific representation on the Part of EPJL. These include a clear representation to the following effect:

There are no actions, suits, claims, proceedings or investigations pending or to the best of Seller's knowledge, threatened in writing against the Seller at law, in equity, or otherwise, and whether civil or criminal in nature, before or by any court, Commission, arbitrator or governmental agency or authority, and there are no outstanding judgments, decrees or orders of any such courts, Commission, arbitrator or governmental agencies or authorities, which materially adversely affect its ability to supply power or to comply with its obligations under this agreement.

The Seller/ Successful Bidder has neither made any statement nor provided any information in his Bid, which are materially inaccurate or misleading at the time when such statement was made or information was provided. Further, all the confirmations, undertakings, declarations and representations made in the bid are true and accurate and there is no breach of the same."

Accordingly as on the date of the signing of the PPA, it is to be construed that there was no action or event affecting the implementation of the PPA on the time lines specified in the PPA for all events, namely fulfillment of the conditions subsequent and achievement of the completion and commercial operation of the plant by the Scheduled Delivery Date i.e. 30th April 2014. Even in terms of the above, it is not open to EPJL to claim the existence of any event as on the date of the PPA as affecting the performance of the obligations.

In the letter dated 19.02.2013 the Petitioner was seeking the extension of time line for fulfillment of Conditions Subsequent and Scheduled Delivery Date primarily due to events and factors which happened/ arose prior to the execution of the Power Purchase Agreement dated 09.05.2012 and therefore, could in no manner be treated as force majeure events or events beyond the control of the parties as envisaged in Article 9 of the Power Purchase Agreement. In the circumstances the Respondent herein vide its letter dated 04.04.2013 rejected the demand of the Petitioner for extension of time line for fulfillment of Conditions Subsequent and the scheduled delivery date. In the said letter dated 04.04.2013, the Respondent herein also duly pointed out that in terms of Article 9.5 of the

Power Purchase Agreement dated 09.05.2012 the Petitioner was required to give notice of force majeure event within 7 days from such event and as per the proviso to Article 9.5.1, in case of its failure to give notice, the Petitioner was not entitled to any relief. The Petitioner sent another letter on 20.07.2013 to the Respondent herein wherein it again failed to mention anything about any force majeure event and requested for extension of time. As the additional period of three months for satisfying the conditions subsequent was expiring on 08.08.2013, the Respondent sent a letter on 07.08.2013 to the Petitioner informing about the same stating that in case the Petitioner failed to fulfill the conditions subsequent by 08.08.2013, the Respondent would be constrained to take appropriate action as per the Power Purchase Agreement dated 09.05.2012.

The Respondent has submitted that they further wrote a letter dated 09.08.2013 to the Petitioner that in terms of Articles 3.4.1 and 3.4.2, the additional period of 3 months after 08.08.2013 was available to the Petitioner to fulfill the conditions subsequent, subject to it furnishing an additional weekly contract performance guarantee of Rs. 3.60 crores within 2 days after the expiry of a week from 08.08.2013 i.e. by 17.08.2013. The Petitioner herein responded vide its letter dated 16.08.2013 wherein it for the first time raised the plea of force majeure events and sought extension of the time lines for complying with the conditions subsequent. At no point of time prior to the above the Petitioner, had given any written notice regarding any force majeure event to the Respondent as per the provisions of the Power Purchase Agreement and therefore, the claim of force majeure sought to be raised was clearly an afterthought. Moreover, Petitioner's letter dated 16.08.2013 cannot be construed as a notice/notification under Article 9.5.2 of the Power Purchase Agreement.

The Respondent vide letter dated 21.08.2013 rejected the contention of the Petitioner regarding Force Majeure and also rejected the request of the Petitioner seeking extension of the time lines. The Respondent, finally in view of the failure of the Petitioner to furnish additional performance bank guarantee and failure to fulfill the conditions subsequent, issued the notice on 22.08.2013 in terms of Article 3.4.2(i) of the Power Purchase Agreement dated 09.05.2012 giving 7 days

notice to the Petitioner herein before terminating the Power Purchase Agreement.

10. NPCL has submitted that above narration would establish that the plea of force majeure sought to be raised by the Petitioner herein is only an afterthought and an abuse of the process of law and the same is to defeat the just and legal rights of the Respondent arising out of the Power Purchase Agreement dated 09.05.2012. It is also stated that the alleged force majeure events mentioned by the Petitioner do not fall within the scope of force majeure events as provided in Article 9.3 of the Power Purchase Agreement dated 09.05.2012. Further, such events/ factors occurred prior to the execution of the Power Purchase Agreement dated 09.05.2012 and none of these factors are unforeseeable at the time of submission of the bid by the Petitioner and therefore, cannot be treated as a force majeure event in any manner. In any event, as the Petitioner had never given any notice as provided in Article 9.5 regarding the occurrence of any Force Majeure Event, it is not entitled to claim any relief on the basis of the same as provided in the Proviso to Article 9.5.1 of the Power Purchase Agreement dated 09.05.2012.

NPCL has stated that it is a settled position of law that Force Majeure will arise only in case of occurrence of unforeseeable events / circumstances being beyond the control of parties (Reference: Aloi Prasad & Sons vs. Union of India AIR 1960 SC 588) In the instant case however, the delays caused due to failure of the Petitioner to comply with statutory formalities while applying for environmental clearance was not unforeseeable nor beyond its control. Further, the Petitioner was fully aware of the area being affected by Maoist activities at the time when the Petitioner decided to set up the project and also at the time of submission of the bid in the competitive bidding process initiated by the Respondent. Hence, cannot be said to be an unforeseeable problem and therefore, would not qualify to be a force majeure event. Further, the said reasons for delay pleaded by the Petitioner were not beyond its control and therefore, it is not entitled to any relief even on the basis of equity. The fact that the above event was not considered by the Petitioner itself as Force Majeure at the relevant time is evident from the absence of any notice as per Article 9.5 of the Power Purchase Agreement namely the mandated written notice to be given by the Petitioner within 7 days from the

occurrence of such force majeure event and admittedly, the Petitioner has not given any such notice to the Respondent herein.

NPCL has also stated that Article 3.4.2 of the power purchase agreement allows the Respondent herein to invoke and encash the contract performance guarantees furnished by the Petitioner herein. It is a settled position of law that only in exceptional cases where fraud is able to be demonstrated will the Courts interfere with the encashment of a Bank Guarantee.

NPCL has quoted following cases in support of its arguments.

- (i) **National Highways Authority of India v. Ganga Enterprises, (2003) 7 SCC 410, at page 416:**

10. There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on-demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on-demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee. The bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was enforced because the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the bank guarantee was against the terms of the bank guarantee. If it was in terms of the bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.

(Emphasis supplied)

- (ii) **Vinitec Electronics (P) Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544, at page 547**

"11. The law relating to invocation of bank guarantees is by now well settled by a catena of decisions of this Court. The bank guarantees which provided that they are payable by the guarantor on demand is considered to be an unconditional bank guarantee. When in the course of commercial dealings, unconditional guarantees have been given or accepted the beneficiary is

entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. In *U.P. State Sugar Corporation v. Sumac International Ltd.* this Court observed that: (SCC p. 574, para 12)

“12. The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realisation of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases.”

12. It is equally well settled in law that bank guarantee is an independent contract between bank and the beneficiary thereof. The bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and of no consequence. In *BSES Ltd. v. Fenner India Ltd.* this Court held: (SCC pp. 733-34, para 10)

“10. There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are ‘special equities’ in favour of injunction, such as when ‘irretrievable injury’ or ‘irretrievable injustice’ would occur if such an injunction were not granted. The general rule and its exceptions has been reiterated in so many judgments of this Court, that in *U.P. State Sugar Corpn. v. Sumac International Ltd.* (hereinafter ‘*U.P. State Sugar Corpn.*’) this Court, correctly declared that the law was ‘settled’.”

- (iii) **U.P. State Sugar Corpn. v. Sumac International Ltd., (1997) 1 SCC 568, at page 576**

“16. Clearly, therefore, the existence of any dispute between the parties to the contract is not a ground for issuing an injunction to restrain the enforcement of bank guarantees. There must be a fraud in connection with the bank guarantee. In the present case we fail to see any such fraud. The High Court seems to have come to the conclusion that the termination of the contract by the appellant and his claim that time was of the essence of the contract, are not based on the terms of the contract and, therefore, there is a fraud in the invocation of the bank guarantee. This is an erroneous view. The disputes between the parties relating to the termination of the contract cannot make invocation of the bank guarantees fraudulent. The High Court has also referred to the conduct of the appellant in invoking the bank guarantees on an earlier occasion on 12-4-1992 and subsequently withdrawing such invocation. The court has used this circumstance in aid of its view that the time was not of the essence of the contract. We fail to see how an earlier invocation of the bank guarantees and subsequent withdrawal of this invocation make the bank guarantees or their invocation tainted with fraud in any manner. Under the terms of the contract it is stipulated that the Respondent is required to give unconditional bank guarantees against advance payments as also a similar bank guarantee for due delivery of the contracted plant within the stipulated period. In the absence of any fraud the appellant is entitled to realise the bank guarantees.

17. Before us, however, in the course of argument, the learned advocate for the Respondent urged for the first time that in this case there would be irretrievable injustice to the Respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The Respondent contends that even if it succeeds before the Arbitrator it will not be able to realise its claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the “irretrievable injustice” exception.

- (iv) **Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450, at page 453**

“4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was

given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties. The trading operation would not be jettisoned and faith of the people in the efficacy of banking transactions would not be eroded or brought to disbelief. The question, therefore, is whether the Petitioner had made out any case of irreparable injury by proof of special equity or fraud so as to invoke the jurisdiction of the Court by way of injunction to restrain the first Respondent from encashing the bank guarantee. The High Court held that the Petitioner has not made out either. We have carefully scanned the reasons given by the High Court as well as the contentions raised by the parties. On the facts, we do not find that any case of fraud has been made out.....

(v) *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd.*, (1997) 6 SCC 450, at page 458

“21. Numerous decisions of this Court rendered over a span of nearly two decades have laid down and reiterated the principles which the courts must apply while considering the question whether to grant an injunction which has the effect of restraining the encashment of a bank guarantee. We do not think it necessary to burden this judgment by referring to all of them. Some of the more recent pronouncements on this point where the earlier decisions have been considered and reiterated are *Svenska Handelsbanken v. Indian Charge Chrome*, *Larsen & Toubro Ltd. v. Maharashtra SEB*, *Hindustan Steel Workers Construction Ltd. v. G.S. Atwal & Co. (Engineers) (P) Ltd.* and *U.P. State Sugar Corpn. v. Sumac International Ltd.* The general principle which has been laid down by this Court has been summarised in the case of *U.P. State Sugar Corpn* as follows: (SCC p. 574, para 12)

“The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a

bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take the advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.”

Dealing with the question of fraud it has been held that fraud has to be an established fraud. The following observations of Sir John Donaldson, M.R. in Bolivinter Oil SA v. Chase Manhattan Bank are apposite:

“... The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank’s knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank’s credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged.”

Unquote

11. NPCL has stated that in the instant case, there is no allegation of any fraud or wrong doing in the part of the Respondent and therefore, there is no reason for this Hon'ble Commission to interfere and / or restrain the Respondent herein from encashing the Contract Performance Guarantees furnished by the Petitioner herein. Further, there is no question of any irretrievable injury to the Petitioner herein on account of encashment of the Contract Performance Guarantees. The performance guarantee furnished in the form of bank guarantee is to be treated in lieu of cash deposit and there cannot be any interference in the enforcement of the same as per the settled legal position. It is also no longer res integra that contract performance guarantees are

given by a party to ensure compliance of the terms of the contract by such party and if in any event, such party failed to fulfill its obligations under the said contract, the other party is entitled to encash such contract performance guarantees furnished by the defaulting party. Further, such contract performance guarantees are given to compensate the non-defaulting party in monetary terms and any encashment of the same which can be compensated later in case of any wrongful encashment cannot and will not amount to an irretrievable injury or injustice or loss as contended by the Petitioner herein. It is relevant to state here that the Respondent herein reserves its rights to initiate appropriate legal action against the Petitioner herein to claim liquidated damages as provided under Article 3.4.2 of the Power Purchase Agreement dated 09.05.2012.

12. In view of the above, NPCL has submitted that the petition under rEPJLy is devoid of any merits and has only been filed to abuse the process of law and prayed that this Hon'ble Commission may be pleased to dismiss the Petition under rEPJLy with costs.

The Commission's interim order dated 9.9.2013

13. The Commission heard the parties on 6.9.2013. Since the matter on merit arising out of the issues brought through the petition was required to be dealt at length by the Commission, the Petitioner was directed to submit returnable assured additional performance guarantee as per the conditions of the PPA and till then the Respondent was to withhold their letters mentioned in the application of the Petitioner. The matter was listed for hearing on 27.9.2013.

The Commission's order dated 27.9.2013

14. Against the Commission's interim order, the Petitioner preferred an appeal to Hon'ble Appellate Tribunal of Electricity who disposed of their appeal vide order dated 25.9.2013 with a view that it is for the State Commission to hear the parties and decide the issues raised in this matter and pass the appropriate order in accordance with Law. In this order, Hon'ble Appellate Tribunal of Electricity did not express any opinion on merits. During the hearing, Advocate of Essar Power requested

adjournment on the grounds that they got the order of Hon'ble Appellate Tribunal of Electricity from their website only on 26.9.2013 so they could not get adequate time to go through that and also since their Sr. Advocate Sri J. N. Mathur was out of the country. Sri M.G. Ramchandran, Advocate, NPCL did not object to the Petitioner's plea but categorically propounded the issue of non compliance of the Commission's interim order dated 9.9.2013 regarding submission of returnable assured performance guarantee by the Petitioner as per the conditions of the PPA. The Commission allowed time upto 7.10.2013 for compliance of its order dated 9.9.2013 and submission of returnable assured additional performance guarantee by the Petitioner as per the conditions of the PPA.

EPJL's review petition dated 7.10.2013

15. The Petitioner vide review petition prayed to the Commission to set aside the Commission's order dated 27.9.2013 stating that the Hon'ble Commission has directed specific performance of submission of additional performance guarantee without adjudicating the facts of the case. Vide notice dated 9th October, 2014, the Commission fixed the hearing on 17.10 2013 with direction to the parties to maintain status quo till further orders.

The Commission's order dated 17.10.2013

16. The Petitioner filed a petition seeking restitution from the Respondent as the Respondent has encashed their bank guarantee. They also requested for enforcement / compliance of the Commission's orders dated 9.9.2013, 27.9.2013 & 9.10.2013. The Petitioner informed that despite Commission's directions served at 12:10 Hrs. on 09.10.2013 to the Respondent, their residual bank guarantee has been encashed by the Respondent at about 17:00 Hrs on 09.10.2013. The Advocate of M/s NPCL submitted that since they had already made request to bank on 08.10.2013 so they could not make any effort to restrain from encashment of bank guarantee. The Commission reserved its order on petition filed on the date of hearing, however, decided to go ahead with the main petition. The Advocate of M/s Essar Power

propounded the background and the issues of main petition before the Commission. Further he requested that they may be allowed some time to file their rejoinder. The Advocate of M/s NPCL did not object on their request for additional time. The Commission allowed the Petitioner to file rejoinder within two weeks from the date of order and fixed the next hearing on 21.11.2013 at 11:30 Hrs. Till then the directions of the Commission as contained in the orders dated 09.09.2013, 27.09.2013 & 09.10.2013 were to be remained in force. On request of the advocate of the Petitioner, the hearing was postponed to 28.11.2013 which was further rescheduled to 10.12.2013.

The Commission's order dated 13.12.2013

17. The rejoinder was filed by the Petitioner on 12.11.2013 in which it refuted the rEPJLy made by the Respondent. In the hearing on 10.12.2013, Sri Sanjay Sen, Sr. Advocate, Essar Power explained all the issues contained in the main petition to the Commission. With the direction to the Petitioner to file his arguments in writing on affidavit within a week with a copy to NPCL, the Commission decided to further continue with the hearing on 14.1.2014 rescheduled to 30.1.2014 and then to 14.2.2014. The hearing in the matter continued on 11.3.2014.

The Commission's order dated 11.03.2014

18. The arguments by both the parties were concluded. The Commission directed the parties to file their written arguments within ten days from the date of order. Additionally M/s Essar Power (Jharkhand) Ltd. was also directed to file an affidavit on actual status of the Jharkhand project. Regarding commitment of supply from alternative source as submitted by the Petitioner, the Commission directed them to file an affidavit which must also include the proof of supply commitment from the alternative source which is a separate entity. The detailed order was to follow subsequently.

Written submission of NPCL dated 21.03.2014

19. NPCL has submitted that the rights and obligations of the respective parties, namely, Essar Power and NPCL have been set out in detail in the terms and conditions

contained in the PPA dated 9.5.2012. The claim and counter claim of the respective parties need to be adjudicated and decided as per the provisions of the PPA dated 9.5.2012. Essar Power has failed to fulfil the conditions subsequent as envisaged in Article 3.1.1 of the PPA within the period of 12 months and also within further 3 months time as specified in Article 3.4.1 (in aggregate 15 months) and, therefore, Essar Power was required to provide Additional Performance Guarantees as envisaged in Article 3.4.1. The plea of Essar Power that it was affected by Force Majeure in fulfilling the conditions subsequent is wrong. Since Essar Power did not fulfil the conditions subsequent within a period of 15 months and also did not furnish the Additional Contract Performance Guarantee as specified in Article 3.4.1 of the PPA, the consequences as provided in Article 3.4.2 of the PPA results leading to NPCL terminating the PPA and becoming entitled to liquidated damages of Rs 96 crores. NPCL has stated that the regulatory powers cannot be exercised in regard to the PPA entered into in pursuance to the Tariff Based Competitive Bidding Process under section 63 of the Electricity Act, 2003 and the Guidelines issued by the Central Government, to extend time or to rEPJLace supply of power from a Company which did not participate in the Competitive Bidding Process. The entitlement of Essar Power to provide electricity from alternate sources is restricted to a specific period as set out in Articles 4.6 and 4.8 of the PPA. The claim of Essar Power to supply power from alternative sources for the entire period of the contract are beyond what is provided in the circumstances mentioned in Articles 4.6 and 4.8 and thus, it is not valid and legal. No Notice of Force Majeure event was given by Essar Power at the relevant time as envisaged in Article 9.5 of the PPA. Accordingly, the rights and obligations of the parties had been solemnly agreed to be restricted to what is stated in the PPA.

20. NPCL has summarized the scheme of the conditions subsequent to be satisfied and the consequences of non-fulfilment as under:
 - (i) Essar Power was given 12 months time to fulfil the conditions subsequent as per Article 3.1.1. The 12 months is to be calculated from the Effective Date, namely, 9.5.2012. Thus, the 12 months expired on 8.5.2013;

-
- (ii) In terms of Article 3.4.1, an additional period of 3 months is given for fulfilment of the conditions subsequent without any further liability on Essar Power. The cushion period allowed is up to 8.8.2013 in the case of Essar Power;
 - (iii) After 8.8.2013 in terms of Article 3.4.1, further cushion period is allowed subject to the condition that Essar Power gives a weekly Additional Contract Performance Guarantee for the amounts as specified in Article 3.4.1;
 - (iv) If Essar Power fails to satisfy the conditions subsequent within 15 months i.e. by 8.8.2013 and fails to furnish the Additional Contract Performance Guarantee on weekly basis, NPCL is entitled to terminate the agreement and claim liquidated damages;
 - (v) The liquidated damages specified is Rs 96 crores;
 - (vi) The only exception to the above obligation of Essar Power is that Essar Power is not able to fulfil the conditions subsequent on account of any Force Majeure event or on account of any failure on the part of NPCL to comply with NPCL's obligation or if NPCL waives any of the conditions subsequent.

NPCL has stated that in order to sustain a valid claim of Force Majeure affecting the satisfaction of the conditions subsequent, it is necessary for Essar Power to cumulatively satisfy following:

- (a) the existence of Force Majeure Event of the nature that it wholly or partly prevented or unavoidably delayed the performance of the Essar Power's obligation under the agreement;
- (b) due notice of Force Majeure was given as provided under Article 9.5 within 7 days of the commencement of Force Majeure. The PPA had specifically provided in Article 9.5.1 – proviso that the notification of the Force Majeure is a pre-condition for claiming relief. In other words, in the absence of an appropriate notification within 7 days of the commencement of the event, the claim for relief for Force Majeure gets defeated or lost. For this purpose the PPA uses the expression “pre-condition” in Article 9.5.1.

Regarding the issue of alternative source of supply, NPCL has stated that it may arise when there is a delay in the commencement of supply of power or when after the commercial operation date, there is an inability on the part of Essar Power to supply. However, there is time restriction. The maximum period of such supply put together is not exceeding 12 months. It is not, therefore, open to Essar Power to offer such power from alternate sources for a period exceeding 12 months and that too substitute the source of supply in place of Jharkhand as well as substitute the company which will supply. The alternative source of supply envisaged in Articles 4.6 and 4.8 is for Essar Power Jharkhand to arrange and supply and not assign the PPA to another generating company.

NPCL has added that in addition to the above, Essar Power had given certain specific representation at the time of the signing of the PPA as contained in Schedule VII of the PPA. Clause 7.1 of Schedule VII dealing with the Representation and Warranties of Essar Power, inter alia, provides as under:

Quote

7.2 Representation and Warranties of the Seller

7.2.1 *The Seller hereby represents and warrants to and agrees with the Procurer as follows and acknowledges and confirms that the Procurer is/are relying on such representations and warranties in connection with the transactions described in this Agreement:*

.....

- v) *There are no actions, suits, claims, proceedings or investigations pending or, to the best of Seller's knowledge, threatened in writing against the Seller at law, in equity, or otherwise, and whether civil or criminal in nature, before or by, any court, Commission, arbitrator or governmental agency or authority, and there are no outstanding judgments, decrees or orders of any such courts, Commission, arbitrator or governmental agencies or authorities, which materially adversely affect its ability to supply power or to comply with its obligations under this Agreement.*
- vi) *The Seller/ Successful Bidder has neither made any statement nor provided any information in his Bid, which was materially inaccurate or misleading at the time when such statement was made or information was provided. Further, all the confirmations,*

undertakings, declarations and representations made in the Bid are true and accurate and there is no breach of the same.

7.2.2 The Seller makes all the representations and warranties above to be valid as on the date of this Agreement.

7.2.3 In the event that any of the representations and warranties made by the Seller in the Article above not true or are incorrect, the occurrence of such event would amount to a Seller Event of Default under Article 11.1 of this Agreement and the Procurer shall have the right to terminate this Agreement in accordance with Article 11 of this Agreement.

Unquote

NPCL has submitted that in terms of the above, the PPA signed on 9.5.2012 was on the basis that there was no problem or issues, particularly, any Force Majeure Event or circumstances prevalent as on 9.5.2012 affecting the performance of the obligation of Essar Power under the PPA including the time specified for satisfying the conditions subsequent under Article 3.1. In other words, the Representation and Warranty given by Essar Power is that as on 9.5.2012, notwithstanding anything that may have happened in the past, there are no issues affecting the implementation of the PPA. It is, therefore, not open to Essar Power to now plead that it was affected by Force Majeure Event or circumstances prior to 9.5.2012 which affects the performance on or after 9.5.2012.

21. NPCL has submitted that there was no such specific claim made by the Petitioner with reference to Article 9.3.1 of the PPA invoking Force Majeure or giving notice of Force Majeure or seeking extension of time for fulfilling the conditions subsequent under Article 3.1.1 or under Article 3.4.1 on the basis of existence of Force Majeure. The letter of 16.8.2013 refers to Essar Power letters of 19.2.2013 and 20.7.2013 and NPCL's letters dated 4.4.2013, 7.8.2013 and 9.8.2013. In these other letters of Essar Power dated 19.2.2013 and 20.7.2013, there was no invocation of Force Majeure or even an attempt to give notice of occurrence of Force Majeure Event as required under Article 9 of the PPA. In the letter dated 16.8.2013, Essar Power has for the first time invoked Force Majeure. As regards stoppage of work due to extremist's

movement and activities (Item (e) mentioned in the letter dated 16.8.2013 at Page 505), the claim made is inadmissible. In this regard, a reference may be made to the letter dated 19.2.2013 sent by Essar Power to NPCL (Page 381 at Page 386) wherein Essar Power has relied on the newspaper reports/clippings of the Times of India dated 13.2.2011. Even otherwise, Essar Power has not referred and relied on any evidence in support of any extremist's movement or activities after signing of the PPA on 9.5.2012. The letter dated 16.8.2013 referring to the letter dated 19.02.2013 and 20.7.2013 is, therefore, to be considered on the basis that Essar Power is relying on the activities mentioned in the previous two letters. Even the letter dated 20.7.2013 (Page 456) refers to the alleged activities prior to the signing of the PPA. In the circumstances mentioned above, the alleged claim for stoppage of work due to extremist's movement or activities is unsustainable and wrong. Another ground of Force Majeure alleged is funding constraint (at Item (d) of the Letter dated 16.8.2013). In the earlier correspondence dated 19.02.2013 (Page 382), Essar Power had clearly agreed that the financial closure had taken place. Further, in the letters dated 19.2.2013 and 20.7.2013, Essar Power had given details of the funding arrangements from the Lenders etc. As the funding arrangements had been tied up with the Lenders and the financial closure had occurred, there cannot be factually any allegation of funding constraint. Without prejudice to the above, the non-availability of funds cannot be a ground of Force Majeure. In this regard Article 9.4.1 (e) of the PPA clearly stipulates insufficiency of finances of funds or agreement becoming onerous to perform, will not be a Force Majeure Event. It comes under Force Majeure exclusion specifically agreed to between the parties. Thus, the funding arrangement is neither factually nor legally a Force Majeure Event to claim relief for extension of time in fulfilling the conditions subsequent. As regards land acquisition of the balance area of land for operating the power plant (mentioned at Item (c) of the Letter dated 16.8.2013) in the earlier letter dated 20.7.2013 (Page 456 at Page 460) Essar Power had confirmed as under that the entire land required for the Main Plant for Phase 2 is under possession of EPJL. As regards the delay in the statutory clearances for Ashok Karkata Coal Block referred to in Item (b) of the letter dated 16.8.2013, it may be seen that no details have been furnished in the said letter. However, the letter dated 16.8.2013 refers to the earlier two letters of Essar Power, namely, 19.2.2013 and

20.7.2013. A perusal of the two earlier letters clearly show that all events relate to the statutory clearances are regarding to the period much prior to 9.5.2012 when the PPA was signed. There is no event referred to after 9.5.2012. Accordingly, these events cannot be taken as a Force Majeure within the meaning of Article 9 of the PPA. These were also not disclosed to NPCL at the time of the signing of the PPA. In any event, the notice contemplated under Article 9.5 of the PPA was not given. The pre-condition for claiming the above as a Force Majeure was not satisfied. Lastly, the delay in the award of environmental clearance for Unit No. 2 of the power plant referred to in the letter dated 16.8.2013 was also with reference to the period prior to 9.5.2012 and no notice of Force Majeure was given as envisaged under Article 9.5 of the PPA. This cannot, therefore, be taken as a void claim of Force Majeure. It is also relevant to note that the two letters dated 19.2.2013 and 20.7.2013 based on which the letter dated 16.8.2013 claims Force Majeure application, do not invoke Article 9 of the PPA or seek extension of time on account of Force Majeure under Articles 3.1 or 3.4. These letters seek for amendment of the PPA as per Article 15.3.1 (wrongly mentioned as 15.2.1 by Essar Power). Clause 15.3.1 reads as under:

15.3 Amendment

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

This clause provides for the amendment with the written consent of both the parties and the approval of the Hon'ble Commission. At no point of time, NPCL ever agreed to any amendment.

22. NPCL has submitted that Essar Power is seeking amendment of the agreement for extending the time for fulfilling the conditions subsequent and for achieving the Scheduled Commercial Operation Date (SCOD) (requiring NPCL to consent to the same) itself establishes that Essar Power never considered the event to be of Force Majeure nature covered by Articles 3.1.1 and 3.4.1 read with Article 9 of the PPA. If

Essar Power had a valid case of being affected by Force Majeure, in the letters dated 19.2.2013 and 20.7.2013, the same would have been specifically referred to. More so, in the letter dated 4.4.2013 written by NPCL in response to the letter of 19.2.2013 of Essar Power, NPCL had specifically referred to the Force Majeure clause and the absence of any notice etc. besides disputing various claims of Essar Power. Even thereafter in the letter dated 20.7.2013 written by Essar Power in response to NPCL's letter dated 4.4.2013, the Force Majeure Event affecting Essar Power and seeking extension of time on grounds of Force Majeure was not raised. Essar Power consciously and deliberately referred to only Clause 15.3.1 (wrongly mentioned as 15.2.1 at Page 466) for amendment of the PPA to extend the time limit. In view of the above, the Force Majeure as event affecting the fulfilment of the conditions subsequent by Essar Power was never raised prior to 16.8.2013. In the meanwhile, the period for fulfilling the conditions subsequent including the additional period of 3 months (aggregate 15 months) expired on 8.8.2013 and Essar Power failed to fulfil the conditions of furnishing the Additional Performance Guarantee after expiry of one week from 8.8.2013. The notice of termination was, therefore, issued duly and fully in accordance with Article 3.4.2 of the PPA. In the circumstances, Essar Power is liable to pay liquidated damages of Rs 96 crores as specified in Article 3.4.2. As against the above, NPCL has appropriated Rs 72 crores from the available Performance Guarantee. The balance amount of Rs 24 crores with interest is payable by Essar Power to NPCL. This Hon'ble Commission may be pleased to direct the payment of the above Rs 24 crores with interest by Essar Power to NPCL.

23. The conduct of Essar Power is also relevant. Though, the relevant issue is on the question of furnishing the Additional Performance Guarantee, Essar Power has chose to raise various issues including extension of Scheduled Commercial Operation Date (SCOD). Essar Power should have furnished the Additional Performance Guarantee and proceed to satisfy the conditions subsequent as envisaged in Article 3.1.1 and Article 3.4. Essar Power cannot raise issues on SCOD extension at this stage. This Hon'ble Commission was pleased to accommodate Essar Power by passing an interim order dated 09.09.2013 that they may furnish the Additional Performance Guarantee pending decision in the petition filed by them. Essar Power chose to file an appeal

against the said interim order. The Hon'ble Appellate Tribunal vide its order dated 25.09.2013 was pleased to allow Essar Power to deposit the Additional Bank Guarantee with this Hon'ble Commission pending the decision in the petition. Essar Power has not established its bonafide by complying with the above order. It is not, therefore, open to Essar Power to claim any equitable consideration by this Hon'ble Commission particularly in the context of the Essar Power having failed to comply with the interim directions. It cannot be said that Essar Power will not furnish the Additional Performance Guarantee as envisaged under Article 3.4.1 of the PPA. The claim made by Essar Power that the consumers interest would require NPCL to continue with the agreement with Essar Power is without any merit. There is no question of NPCL continuing with the defaulting party, particularly, in the context of Essar Power not fulfilling the conditions contained in the PPA and further asking for extension of SCOD to October 2015.

24. NPCL, regarding the claim of Essar Power to make available the electricity from alternative Mahan Generating Company, has submitted that the source of power cannot be substituted. Further, Mahan Generating Company is owned by a separate legal entity. There cannot be any assignment of the PPA. The PPA recognises alternative sources supply only in a limited manner as specified in Articles 4.6 and 4.8. In view of the specific provision, there can be no consideration of any claim from Essar Power for assigning the PPA. This would be contrary to the provisions of the PPA and more particularly the Standard Bidding Documents and Guidelines issued by the Government of India under section 63 of the Electricity Act, 2003. NPCL has also pointed out that Essar Power has not furnished the status of Phase-II of the power project to the Hon'ble Commission. To the best of knowledge of NPCL, no preliminary work has been undertaken at Phase-II of the project site. It was the contention of Essar Power that this Hon'ble Commission cannot consider selecting of alternative sources even prior to signing of the PPA. The decision of the Hon'ble Appellate Tribunal in the case of Essar Power bearing Appeal No. 82/2011 itself was that the agreement should be strictly in terms of the bidding process. It is, therefore, not open to Essar Power to claim the assignment of the power supply to another company, namely, from Mahan Project which had not participated in the bid.

Written submission by EPJL dated 9.4.2014

25. EPJL has stated that Article 3.1 of the PPA stipulates that the Petitioner shall duly perform and complete the activities specified thereunder at their own cost and risk within 12 months from the Effective Date, unless such completion is affected by any Force Majeure event or due the Respondent's failure to comply with their obligations under Article 3.2.1 of the PPA, or if any of the activities is waived in writing by the Respondent. The Effective Date of the PPA is 09.05.2012, being the date of execution thereof by the parties. In terms of Article 3.1.1 (f), it is the responsibility of the Petitioner to obtain all Consents, Clearances and Permits required for supply of electricity to the Respondent within 12 months from the Effective Date, i.e. to say, on or before 08.05.2013. Such Consents etc. include obtention of Environment Clearance (EC) for 1 x 600 MW generating station (Phase – II), EC and Forest Clearance (FC) in respect of Ashok Karkata Coal Block, and grant of Prospecting License by the Coal Ministry in respect of the said Ashok Karkata Coal Block, the availability of domestic fuel being one of the major premises of the aforesaid Bid and the PPA. In terms of Article 3.4.1, the consequences of non-fulfilment by the Petitioner of any of the 'Conditions Subsequent' within 3 months from 08.05.2013 otherwise than on account of a Force Majeure event is that the Petitioner becomes liable on a weekly basis to furnish to the Respondent additional Contract Performance Guarantee of Rs.3.6 crore within 2 business days of the expiry of every such week. Further, if the Petitioner fails to:

- (i) fulfill any of the Conditions Subsequent within a period of 3 months from 08.05.2013, i.e. to say, by 07.08.2013 and the Petitioner fails to furnish additional Contract Performance Guarantee to the Respondent; or
- (ii) the Petitioner furnishes additional Contract Performance Guarantee to the Respondent, but fails to fulfill the Conditions Subsequent within a period of 6 months from 08.05.2013, i.e. to say, by 07.11.2013,

Then the Respondent shall have a right to terminate the PPA by giving a Termination Notice to the Petitioner in writing of at least 7 days and the termination shall become

effective upon the expiry of the said notice period. In case of termination, the Respondent would become entitled to receive from the Petitioner Rs.96,00,00,000/- (Rupees ninety six crores only) as liquidated damages, which can be recovered from the Contract Performance Guarantee(s). By letter dated 19.02.2013, the Petitioner informed the Respondent that their Project Development Schedule is behind schedule and is hampered due to reasons beyond their control, and that as per the current Schedule, the Petitioner expects to Commission the Phase-II of the Plant by October 2015 by use of coal from Ashok Karkata Coal Block. The Petitioner, therefore, requested the Respondent to extend the time line for satisfying the Conditions Subsequent by 1 (one) year i.e., upto 09.05.2014 and further to extend the Scheduled Delivery Date by 18 months i.e., upto 31.10.2015. In making the above requests, the Petitioner reiterated and/or stated to the Respondent that many of the Conditions Subsequent specified in Article 3.1 have been fully and/or substantially satisfied by them and which relate to matters such as:

- (i) Long Term Open Access,
- (ii) Acquisition of Land,
- (iii) Award of BTG/EPC Contracts,
- (iv) Execution of PPAs for sale and supply of electricity,
- (v) Achieving of financial closure,
- (vi) Opening of Escrow Account,
- (vii) Water requirement,
- (viii) Project funding,
- (ix) Tapering Coal linkage, and
- (x) Availability of domestic coal from Ashok Karkata Coal Block allocated by the Ministry of Coal and for matters connected therewith such as a new application for grant of prospecting license due to change in the co-ordinates of the said Coal Block etc.,

The Petitioner specifically informed the Respondent that there has been a delay on the part of the Government in granting EC for the Power Plant of 1x600 MW Phase – II and Prospecting License / EC and FC for the said Ashok Karkata Coal Block due to Maoist activities in the area, among other reasons; and further that on account of the

said delay, extension of time for fulfilling the Conditions Subsequent and for commencing supply of electricity by the Petitioner is just, proper and necessary in the interests of consumers of electricity. In rEPJLy, the Respondent, vide their letter dated 04.04.2013 rejected the aforesaid requests made by the Petitioner by stating, inter alia, that the events relied upon by the Petitioner as Force Majeure events which have admittedly occurred prior to the execution of the PPA, cannot be the basis for extension of time to the Petitioner for performing the obligations under the PPA, and that, in any case, since the Petitioner has not given notice of the occurrence of Force Majeure events to the Respondent, the Petitioner is not entitled to any extension of time. The Respondent sought certain clarifications from the Petitioner and in response to the same, the Petitioner, vide their letter 20.07.2013 while reiterating their aforesaid contentions in the matter, requested for a meeting with the Respondent to arrive at an amicable solution in order to commence supply of the Contracted Capacity to the Respondent under the PPA. While doing so, the Petitioner clearly informed the Respondent that they have exercised reasonable diligence to seek to overcome the Force Majeure events and to mitigate the effects thereof on the performance of their obligations. However, the Respondent, vide their letter dated 07.08.2013 once again denied extension of time to the Petitioner and further stated that if the Petitioner do not satisfy the Conditions Subsequent by 08.08.2013, the Respondent would be constrained to take appropriate action under the PPA. Thereafter, by further letter dated 09.08.2013, the Respondent informed the Petitioner that, subject to the Petitioner furnishing to the Respondent additional Contract Performance Guarantee of Rs.3.6 crore as provided in the PPA, 3 months time from 08.08.2013 would be available to the Petitioner for fulfilling the Conditions Subsequent. In rEPJLy, the Petitioner, vide their letter dated 16.08.2013 informed the Respondent that since the Petitioner has sought extension of time due to the Force Majeure events, the question of the Petitioner providing to the Respondent additional Contract Performance Guarantee does not arise; and that in case of a Force Majeure event, the Petitioner is entitled to an additional period of time of 10 months for satisfying the Conditions Subsequent. The Respondent, vide their letter dated 21.08.2013, informed the Petitioner that they would suffer irreparable loss and injury due to the delay in the implementation of the PPA, including due to the non-fulfilment of the Conditions

Subsequent by the Petitioner. Lastly, the Respondent, vide their letter dated 22.08.2013 addressed to the Petitioner, served a 'Termination Notice' giving to the Petitioner 7 days notice for terminating the PPA and further stating that the Petitioner would be liable to pay to the Respondent an amount of Rs.96,00,00,000/- (Rupees ninety six crores only) as liquidated damages and the Contract Performance Guarantees would be invoked for recovery thereof upon the PPA stands terminated after the expiry of the said notice period. Aggrieved by the above action, the Petitioner had filed the present petition before this Hon'ble Commission for the following reliefs against the Respondent:

- a. Quash and set aside the letters dated 04.04.2013; 07.08.2013; 09.08.2013 and 22.08.2013 issued by the Respondent to the Petitioner;
- b. Restrain the Respondent from taking any coercive or precipitative steps against the Petitioner, including, but not limited to, encashment of existing bank guarantees;
- c. Declare that the Petitioner has been unable to adhere to the timelines specified in the PPA dated 09.05.2012 on account of the Force Majeure reasons beyond its control;
- d. Declare that the Petitioner is entitled to exclude the time period spent in awaiting Environmental Clearance, in the calculation of timelines fixed for performance by the Petitioner of its obligations under the PPA;
- e. Declare that the Petitioner is not in breach of its obligations under the PPA dated 09.05.2012; and that the performance of the Petitioner's obligations under the PPA stand postponed in view of Force Majeure events; and
- f. Direct that the Respondents shall not be entitled to terminate the PPA dated 09.05.2012 if the Petitioner performs its obligations within the extended time period in terms of Prayer (d) above; or in the alternative, declare that any termination shall be without any claim of any nature whatsoever against the Petitioner.

26. On 09.11.2013, the Petitioner has filed its Rejoinder to the aforesaid rEPJLy of the Respondent dated 03.09.2013, in which the Petitioner, while reiterating its earlier stand in the matter, have contended that the whole approach of the Respondent in the matter is anti-consumer, in as much as, in the bids recently invited by U.P. Power Corporation Limited, this Hon'ble Commission has accepted tariff upto Rs.5.08 per unit, while the tariff under the PPA is Rs.4.08 per unit, which shows that there has been 25% increase in the cost of power. The Petitioner has further contended that since May 2013 or thereabout, they have held several meetings with the Respondent in which the proposal for supply of electricity from an alternative source of the Petitioner was discussed; and that pursuant to the same, the Petitioner has made an offer to the Respondent by addressing an e-mail dated 29.07.2013 followed by a further e-mail of the Petitioner to the Respondent dated 09.08.2013. On perusal of the aforesaid e-mails, it is crystal clear that the Petitioner has offered to supply to the Respondent the Contracted Capacity of 240 MW for a period of 25 years from its another Group company, namely, Essar Power M.P. Limited, also a generating company, which has already achieved Commercial Operation Date (COD) on 29.04.2013 in respect of its Unit-I of 600 MW, out of the total project capacity of 1200 MW, on the same terms and conditions as contained in the PPA. The Respondent, without even considering the above proposal of the Petitioner, issued the Termination Notice of 7 days on 22.08.2013 to the Petitioner. This hasty action of the Respondent clearly establishes that they have acted arbitrarily and against the interests of consumers, which cannot, therefore, be sustained in law.

27. EPJL has submitted that on 09.10.2013, this Hon'ble Commission passed an order to maintain status quo. After the passing of the said status quo order, the ICICI Bank, despite notice of the said status quo order passed by this Hon'ble Commission, paid the guaranteed amount of Rs.50,00,00,000/- (Rupees fifty crores only) to the Respondent under its Contract Performance Guarantee and the Respondent received the same in violation of the said order of this Hon'ble Commission dated 09.10.2013, in particular. In view of the above, on 17.10.2013, the Petitioner has filed a contempt petition against the Respondent and its responsible officers alleging that they have deliberately violated the orders passed by this Hon'ble Commission by receiving

payments under the Contract Performance Guarantees. This Hon'ble Commission heard the said petition and has reserved its orders thereon. It further proceeded to hear the main matter. The hearing of the matter before this Hon'ble Commission was concluded on 11.03.2014. This Hon'ble Commission has passed an order on 11.03.2014 directing the parties to file their written arguments in the matter. In so far as the Petitioner is concerned, this Hon'ble Commission has directed to file two separate affidavits setting out thereunder the status of the Power Station at Tori in the State of Jharkhand and the commitment from Essar Power M.P. Limited for supply of electricity to the Respondent from an alternative source.

28. EPJL has submitted that from the pleadings of the parties to the petition stated broadly hereinabove, the following issues arise for the determination of this Hon'ble Commission:

- a. Whether the event or circumstance or combination of events and circumstances including those stated above, more particularly delay by the MOEF in granting EC to the Petitioner in respect of the said power plant, delay by the Coal Ministry in granting the Prospecting License in respect of the said Ashok Karkata Coal Block, and delay by the MOEF in granting EC and FC in respect of the said Ashok Karkata Coal Block when to the knowledge of the Coal Ministry and the MOEF, making domestic coal available to the Petitioner from Ashok Karkata Coal Block is one of the major premises on which the Petitioner participated in the Tariff Based Competitive Bid Process initiated by the Respondent and after being declared as the lowest bidder, executed the PPA on 09.05.2012 with the Respondent for supplying 240 MW of electricity to the latter from its said power plant under construction, constitutes Force Majeure event(s) affording to the Petitioner a good ground for claiming suspension of or excuse from performing its obligations on account of Force Majeure (i.e., for reasons beyond its control and which were unanticipated or unforeseeable and not brought at the instance of the Petitioner) and consequently, for seeking extension of time to the extent of the period during which the Force Majeure event(s) continue?

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- b. Whether the Petitioner has notified the occurrence of the Force Majeure event(s) to the Respondent as provided under the PPA?
 - c. Whether, in the facts and circumstances of the case, the proposal of the Petitioner for supply of 240 MW of electricity from an alternative source i.e., from the power plant belonging to Essar Power M.P. Ltd. (EPMPL) to the Respondent on the same terms and conditions of the PPA dated 09.05.2012 provides a practical and acceptable solution to the problem for ensuring supply of power to the consumers at competitive price, while seeking to ensure sustainability of the electricity sector?
 - d. Whether the Respondent by receiving payments aggregating to Rs.72,00,00,000/- (Rupees seventy two crores only) under the Contract Performance Guarantees from Axis Bank and ICICI Bank has committed civil contempt of the orders for maintaining status quo passed by this Hon'ble Commission from time to time, particularly, the status quo order dated 09.10.2013 and thereby, become liable for the consequences thereof?
 - e. Whether this Hon'ble Commission, in exercise of its wide regulatory powers, can grant to the Petitioner all or any of the reliefs sought for in the petition in the interest of consumers of electricity and to ensure sustainability of the electricity sector?
29. Regarding 28(a) and 28(b), EPJL has stated that the undisputed facts of the case are that the Petitioner and the Respondent have executed the PPA during the construction phase of the said power plant. For constructing a power plant, EC is a must and unless it is granted by the MOEF, the Petitioner cannot lawfully commence its construction. Any delay, therefore, by the MOEF in granting EC for the said power plant would delay its construction and ultimate completion thereof and consequently, delay the generation and supply of electricity therefrom. Looked from this angle, the very fact that even today the MOEF has not granted to the Petitioner EC on the basis of the availability of domestic fuel (i.e., coal from Ashok Karkata Coal Block or from any other suitable and appropriate source), but has granted EC on 14.11.2013 valid only for a temporary period of 5 (five) years to enable the Petitioner to start operations of the
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said power plant by use of imported coal from Indonesia and Australia until domestic coal becomes available for generation of electricity therefrom, clearly shows that the delay in completing and Commissioning of the said power plant are for reasons beyond the control of, and unanticipated or unforeseeable by and not brought about at the instance of the Petitioner. The evidence on record shows that delay in granting of EC and FC in respect of the said Ashok Karkata Coal Block by the MOEF and also delay in granting a Prospecting License by the Coal Ministry in respect of the same are for reasons beyond the control of the Petitioner. These are necessary requirements and inordinate delay by the MOEF and the Coal Ministry in granting them to the Petitioner would amount to Force Majeure events.

The expression 'Force Majeure' has been defined in the PPA. It is not an exhaustive, but an inclusive definition. The events in the case satisfy the requirement of the said definition. Even otherwise, this Hon'ble Commission can give it wide meaning. What is meant by 'Force Majeure' with reference to its history is also well settled. It is undoubtedly a term of wider import. An analysis of the rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to Force Majeure, the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to Force Majeure and even if this be the meaning, it is obvious that the definition of 'Force Majeure' in the PPA is not vague or different from what is stated above.

EPJL has stated that dealing with the case of frustration of contract under Section 56 of the Indian Contract Act, 1872, on account of Force Majeure event, the Hon'ble Supreme Court in paragraph 7 of its judgment reported in (1968) 1 SCR 821 : AIR 1968 SC 522 in the case of *Naihati Jute Mills Ltd. v. KhyaliramJagannath* has observed as under:

Quote

"..... The Court can grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstance which was not contemplated by the parties at the date of the contract. There would be in such a case no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly

have any intention regarding it. When such an event or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs, it is the court which can pronounce the contract to be frustrated and at an end. This is really a positive rule enacted in Section 56 which governs such situation.”

Unquote

In another judgment (i.e., 1971(2) SCC 288 in the case of Smt. Sushila Devi and anr. v. Hari Singh and others, the Hon’ble Supreme Court has observed, inter alia, as under:

Quote

“..... If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view, then it must be held that performance of the contract has become impossible.....”

Unquote

As regards giving of notice by the Petitioner to the Respondent regarding the occurrence of Force Majeure events in the present case is concerned, EPJL has submitted that it is not in dispute that the Petitioner, vide their letter dated 19.02.2013 has informed the Respondent about the above events by stating, inter alia, thereunder as under:

Quote

“..... As elaborated above, the project development schedule is hampered due to reasons beyond the control of the company.....”

Unquote

EPJL has stated that it is true that in the above letter the Petitioner has not expressly used the expression “Force Majeure event(s)”. But, the words ‘due to reasons beyond the control of the company’ mean nothing but Force Majeure. In construing the above notice, it is necessary to give it a commercial construction since the same has been written by commercial people in charge of the project. It is settled principle of interpretation that “if a detailed semantic and syntactical analysis of words in a commercial document is going to lead to a conclusion that flouts business commonsense, it must be made to yield business commonsense. Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of

the language of a commercial document, the Court ought generally to favour a commercially sensible construction. The reason for this approach is that commercial construction is likely to give effect to the intention of the parties. Words ought, therefore, to be interpreted in the way in which reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.

EPJL has added that in view of the above, the contention of the Respondent that no proper notice of Force Majeure events has been given to them by the Petitioner is completely wrong and untenable. So also, the other contentions of the Respondent that events which have occurred prior to the execution of the PPA are not relevant for the purpose of determining whether the same amount to Force Majeure event(s) and that, therefore, no relief(s) on the basis thereof can be given to the Petitioner etc. are not proper and correct. The Petitioner has relied upon some of the events which have occurred prior to the execution of the PPA in aid of construction of the subsequent events and, therefore, all the events have to be read together in the process of interpreting the meaning of the language of commercial contract, instrument or document. The unlawful and unreasonable delay on the part of the MOEF and the Coal Ministry has resulted in delay in implementing by the Petitioner the entire power project in the State of Jharkhand and the same has caused great harm and prejudice to the Petitioner for no fault of their own. As is evident from the Affidavits dated 2-4-2014 filed alongwith these Written Submissions, the construction and Commissioning of the said power plant (i.e., 600 MW Unit under Phase-II) in the State of Jharkhand is, subject to availability of Ashok Karkata Coal Block, expected to be completed by October 2017 and accordingly, the Petitioner prays to this Hon'ble Commission to grant reliefs as it considers appropriate and reasonable having regard to the same.

30. Regarding supply of electricity from an alternative source, point 28(c), EPJL has submitted that it is also an undisputed fact that the Petitioner after its meetings held in May 2013 and thereafter, addressed two e-mails dated 29.07.2013 and 09.08.2013 offering to supply 240 MW of electricity for a period of 25 years (i.e. to say for the entire term of the PPA) for the same agreed tariff and on the other same terms and

conditions as are contained in the PPA. The Respondent rejected the said offer for no just or sufficient cause. In fact, the Respondent served the Termination Notice dated 22.08.2013 of 7 days on the Petitioner for terminating the PPA without even considering the above alternative proposal. This is not legal. The contention of the Respondent that Article 4.6 of the PPA which contains provisions relating to 'Alternative Source of Power Supply' provide for supply of power from an alternate source during the Operating Period. The Operating Period means the period commencing from the Delivery Date i.e., 30.04.2014 until the Expiry Date of the PPA which is 25 years from 30.04.2014 i.e. 29.04.2039. This is a literal construction, but purposive construction needs to be adopted by this Hon'ble Commission and as per that, this Hon'ble Commission can, in exercise of its regulatory powers and in order to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at the agreed tariff, may legitimately go beyond the provisions of the PPA to redress an inequitable situation and to ensure sustainability of the electricity sector. The Affidavits of dated 2-4-2014 containing a commitment from Essar Power M.P. Limited to supply 240 MW of electricity on the same terms and conditions as are contained in the PPA as regards the tariff and other matters for a period of 25 years commencing from 01.04.2015 deserves to be favourably considered by this Hon'ble Commission in the paramount interest of consumers and to secure sustainability to the electricity sector.

31. Regarding point 28(d), encashment of bank guarantee despite the Commission's order to maintain status quo, EPJL has submitted that by its order dated 09.10.2013, this Hon'ble Commission, inter alia, directed the parties as under:

Quote

"And, both the parties are directed to maintain status quo till further orders of the Commission."

Unquote

EPJL has stated that it is not in dispute that the aforesaid order of status quo has been passed by this Hon'ble Commission in response to an interim relief sought by the Petitioner for an order restraining the Respondent from encashing the Contract Performance Guarantees of Rs.72,00,00,000/- (Rupees seventy two crores only) in

aggregate. Prior to the passing of the aforesaid order of status quo, this Hon'ble Commission had also passed an order for maintaining status quo on 09.09.2013 reading, inter alia, as under:

Quote

"..The application of interim relief to maintain status quo was opposed by the Respondent. But since the matter on merit arising out of the issues brought through the petition are still to be dealt at length by the Commission, it would be prudent to hear the parties after submission and examination of documents, subject to submission of returnable assured additional performance guarantee by the Petitioner as per the conditions of the PPA. Till then the Respondent shall withhold their letters mentioned in the application of the Petitioner..."

Unquote

EPJL has submitted that despite the Commission's above orders, the Respondent invoked the Contract Performance Guarantees of Rs.72,00,00,000/-. The Axis Bank paid the guaranteed amount of Rs.22,00,00,000/- on 08.10.2013 and the ICICI Bank paid the guaranteed amount of Rs.50,00,00,000/- on 09.10.2013. EPJL has submitted that the Respondent has invoked the aforesaid Bank Guarantees and further received the payments of the guaranteed amounts with the full knowledge of the status quo orders passed by this Hon'ble Commission which were in force and thereby, deliberately defied the same which shows the willful disobedience or circumvention by the Respondent of the orders of this Hon'ble Commission.

32. EPJL has submitted that the functions of the State Commission as laid down in Section 86 of the Electricity Act, 2003 makes it expressly and explicitly clear that this Hon'ble Commission, as a State Commission, has wide regulatory jurisdiction and powers. In exercise of such power and jurisdiction, this Hon'ble Commission can regulate the supply, distribution and consumption of electricity, including electricity purchase and procurement process of distribution licensees from the generating companies etc. The expression 'regulate' is difficult to define precisely. The Hon'ble Supreme Court in the judgment reported in 1989 Supp. (2) SCC 52 in the case of Jiyajeerao Cotton Mills Ltd. and another v. Madhya Pradesh Electricity Board and another has observed as under:

Quote

“..... It is difficult to give the word a precise definition. It has differentiated of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions. The Court, while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedy.....”

Unquote

In another judgment reported in (1985) 2 SCC 116, the Hon'ble Supreme Court has held as under:

Quote

“..... the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control and involved the adoption of a rule or guiding principle to be followed or the making of a rule with respect to the subject to be regulated... It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislator seeks to remedy.....”

Unquote

The Hon'ble Supreme Court, in its judgment reported in (2003) 3 SCC 186 has held, inter alia, as under:

Quote

“... The regulatory bodies exercise wide jurisdiction. They lay down the law They may fix the price, they may fix the area of operation and so on so forth. While doing so, they may, as in the present case, interfere with the existing rights of the licensees.”

Unquote

The observations of CERC in its order dated 21.02.2014 in the case of Adani Power Limited vs. Uttar Haryana Bijili Vidyut Nigam Ltd. and others has observed as under:

Quote

“.....Therefore, there is an imminent need to find out a practical and acceptable solution to the problem for ensuring supply of power to the consumers at

competitive price while seeking to ensure the sustainability of the electricity sector....”

“ The Commissioner while strongly disapproving the renegotiation of tariff as discovered through the competitive bidding emphasizing that the sanctity of the PPAs and the tariff agreed therein should be maintained and expressed the inclination to explore all possible measures which are practical and commercially sensible to address the situation...”

Unquote

EPJL has submitted that from the above cited judgments, it is crystal clear that this Hon'ble Commission as a regulatory body, subject to any rule of law, can do any act, deed or thing which is in the interest of consumers of electricity as well as for sustainability of the electricity sector. It has wide jurisdiction to determine measures and enforce them for achieving the above twin objects. In performing regulatory functions, it can even override a written contract for doing complete justice to the matter or cause before it.

33. EPJL has submitted that in the facts of the case and the law enumerated hereinabove, it is beyond doubt that the non-performance or delay in performance of the obligations under the PPA by the Petitioner are for reasons beyond the reasonable control of the Petitioner. The same were due to unanticipated or unforeseeable events or circumstances, which were not brought about at the instance of the Petitioner. This is not even the case of the Respondent in the matter. Such being the position, this Hon'ble Commission may hold and declare that the delay in performance of the obligations under the PPA by the Petitioner are due to Force Majeure events and therefore, the Petitioner is entitled to extension of time for performance of the said obligations to the extent of delay caused on account of Force Majeure events. It is apparent from the material placed on record this Hon'ble Commission that the Petitioner has, in the alternative, even offered to supply power to the Respondent on the same terms and conditions of the PPA, including the agreed tariff thereunder from an alternative source i.e. EPMPPL for a period of 25 years upon its transmission system gets ready for evacuation of power from Mahan and further open access permission is granted by the competent authorities. The

Respondent have shown their disinclination to the above proposal of the Petitioner, which is neither fair nor proper. In the circumstances, in the respectful submission of the Petitioner, it is fit and proper case in which, if this Hon'ble Commission finds it difficult to find out a practical and acceptable solution to the problem for ensuring supply of power to the Respondent to ensure sustainability of the electricity sector, the Respondent may be ordered to pay back to the Petitioner the amount of Rs 720,000,000 (Rupees Seventy two crores) received in defiance of the status quo orders passed by this Hon'ble Commission together with interest thereon at the rate at which the Petitioner's Bankers have charged on the said sum in their books of accounts from the date of payment till the date of repayment thereof and upon the Respondent making said payment to the Petitioner, the PPA shall be terminated by an order passed by this Hon'ble Commission with no liability (monetary or otherwise) of either party to the other party to the PPA.

Commission's observations:

34. The petition has been filed by Essar Power (Jharkhand) Limited (EPJL) who has entered into PPA with Noida Power Company Limited (NPCL), a distribution licensee of Uttar Pradesh, for supply of 240 MW of electricity w.e.f. 30.4.2014. The PPA dated 9.5.2012 has been approved by the Commission vide order dated 4.9.2012 u/s 63 of the Act on completion of the bidding process as per the standard guidelines of the Gol. As per the PPA, the specified timelines in respect of fulfillment of conditions subsequent under Clause 3.1 was 8th May, 2013 which EPJL could not fulfill and therefore, sought extension from NPCL. The reasons given by EPJL were as enumerated below:

- a. Delay in grant of Environmental Clearance by the MoEF
- b. Delay in development of the Ashok Karkata Coal Block mine
- c. Maoist activities
- d. Delay on the part of Respondent

EPJL wrote a letter to NPCL seeking extension of timelines by 12 months for fulfilling the conditions subsequent and 18 months for commencement of supply considering above reasons as force majeure conditions. The request was declined by NPCL not

agreeing to above conditions as force majeure conditions. NPCL further went ahead with process of termination and encashment of bank guarantee amounting to Rs. 72 crores.

35. From the petition, rEPJLy, counter, written submissions and deliberations during the hearing etc., the Commission deems following issues which require detailed examination one by one.

- (i) Whether the reasons mentioned by EPJL were within their control?
- (ii) Whether the reasons mentioned by EPJL fall under the force majeure conditions as provided in the PPA?
- (iii) Whether the requisite notification regarding the force majeure conditions, as conceived by EPJL, were given by EPJL as per the provisions of PPA?
- (iv) Whether the encashment of bank guarantee by NPCL be considered as disobedience of this Commission's order?
- (v) Whether the restitution of bank guarantee is required to bring the parties to their earlier positions when the petition was brought before this Commission?
- (vi) Whether supply from other source, as proposed by EPJL, is valid in the terms of PPA?
- (vii) What should be the remedy to ensure requisite supply to the consumers of the licensed area of NPCL?

36. At the outset, the Commission considers that the Act has mandated to the Commissions for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all. The Act also provides for regulation of electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured. The Commission has to adopt the tariff for electricity if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. Accordingly, the tariff discovered by NPCL for purchase of electricity from EPJL was adopted by the Commission on 4.9.2012 with the provision for commencement of supply w.e.f. 30.4.2014 for supply to consumers of the NPCL's licensed area. Subsequent to adoption by the

Commission, certain developments took places which have led to this situation. The questions outlined in para 35, covering the whole issue, are discussed one by one in following paragraphs:

- (i) EPJL has mentioned that they could not fulfill the conditions subsequent under Clause 3.1 by 8th May, 2013 because of Delay in grant of Environmental Clearance by the MoEF, Delay in development of the Ashok Karkata Coal Block mine, Maoist activities and Delay on the part of Respondent. EPJL has submitted that the delay caused was due to the mentioned conditions which were beyond their control. NPCL has stated that the situation was well known to EPJL prior to the execution of PPA and so the bids might have been submitted taking all these factors into account.

From above submissions, it is amply observed that the mentioned conditions have prevailed and NPCL has no objection on that. The only objection by NPCL is that these conditions were known to EPJL before the signing of PPA and so may not be considered for any relief. From the documents, submissions and NPCL's non-rejection on the mentioned reasons, the Commission has found that it is undisputable that there was delay in clearances by MoEF and Coal India and there was Maoist activities in the area which have occasioned in non-fulfillment of conditions subsequent as per the timelines. Now the question arises that whether these situations were possibly known to or were under the control of EPJL or not? EPJL has mentioned that they had applied for grant of environmental clearance well before the signing of PPA. EPJL has also mentioned that the coal mine was allotted to them on 6.11.2007 but due to an upcoming railway corridor, the allocation was revised on 8.2.2010 and so they had to apply to the government afresh. EPJL has further mentioned the delay due to Maoist activities in the area and delay on the part of Respondent. The events were simultaneous and so has the meaning that even if there was only one reason, it could have affected the timelines in the same manner. Therefore, the Commission finds it reasonable to consider that as far as clearances from the MoEF and Coal India were concerned, there was not much in the control of EPJL.

- (ii) The question before the Commission is that whether the reasons mentioned by EPJL fall under the force majeure conditions as provided in the PPA? EPJL has argued that article 9.3.1 of the PPA shows the definition of the term 'force majeure' as an inclusive rather than an exhaustive definition so the list of events outlined therein are only illustrative and as long as the event is not excluded, it would be covered within the force majeure if it wholly or partly prevents or unavoidably delays a party in the performance of its obligations irrespective of whether the same is listed in article 9.3.1 or not. NPCL has stated that the force majeure will arise only in case of occurrence of unforeseeable events being beyond the control of parties whereas in this case the delay has caused due to failure of the Petitioner to comply with statutory formalities while applying for clearances and so may not be considered as unforeseeable and beyond control.

The Commission recognizes the delay caused due to the non availability of statutory clearances within due timeline but does not consider these as force majeure under the provisions of PPA. The definition states that the force majeure means any event or circumstance or combination of events and circumstances *including those stated below.....*, which although leave scope for imagination beyond the list provided in the article but definitely does not encompass the issues known to EPJL at the time of signing of PPA. However, it can not be denied that the extent of delay in getting the clearances was not measurable at the time of signing of PPA especially in the circumstances as explained by EPJL in forgoing paragraphs. The bid could have been made by EPJL with positive node that they would get the clearances within the specified timelines. At the time of signing of PPA, EPJL could have continued with their belief that they would get the clearances soon. Thereby, they could not see the extent and duration of delay at the time of signing of PPA. Hence it can be construed that even if the reasons of delay were known to EPJL but the extent was unforeseen to them. EPJL has also mentioned the reasons of delay as Maoist activities in the area and delay on the part of Respondent but the Commission does not find it appropriate to discuss these issues any further as the delay occurred due to non-availability of clearances

alone has enough ground to decide that whether the delay occurred was due to force majeure events or not? In light of above the Commission opines that the reasons mentioned by EPJL does not fall strictly under force majeure albeit they were unforeseeable circumstances.

- (iii) EPJL has made the pleadings considering the reasons of delay as force majeure which as per the article 9.5 of PPA, requires notification. NPCL has stated that no notification has been made ever by EPJL regarding the force majeure. EPJL has stated that it is true that they did not expressly used the expression “Force Majeure event (s)” in their letters but the words ‘due to reasons beyond the control of the company’ mean nothing but Force Majeure. EPJL has added that it is settled principle of interpretation that if a detailed semantic and syntactical analysis of words in a commercial document is going to lead to a conclusion that flouts business commonsense, it must be made to yield business commonsense.

The Commission finds that EPJL has not made the notification regarding the events as per the conditions of PPA even though they were pretentious about the reasons as force majeure events. However, through their letters, EPJL has been informing NPCL regarding the expected delay due to reasons mentioned above. Since the Commission has already observed that the conditions were not force majeure but they were unforeseeable, the Commission considers that there is no need to further discuss about the requisite notification regarding the force majeure conditions. However, it is established that EPJL has been informing NPCL regarding the delay due to unforeseeable conditions which were hampering the progress of the project.

- (iv) EPJL expressed their inability to fulfill the condition subsequent and commencement of supply on scheduled delivery date and requested for extension of time line by 12 and 18 months respectively vide their letter to NPCL dated 19.2.2013. NPCL in rEPJLy refused the request vide their letter dated 4.4.2013. EPJL made the same request on 20.7.2013 which again was declined by NPCL on 7.8.2013. NPCL, vide letter dated 9.8.2013, on expiry of

15 months as prescribed under clause 3.1.1 and 3.4.1 of PPA , informed EPJL to provide additional performance guarantee of Rs. 3.6 crore per week for the additional three months failing which EPJL would have to face consequences provided under the PPA. On 16.8.2013, EPJL requested NPCL not to take additional performance guarantee considering the reasons of delay as force majeure events. Vide letter dated 21.8.2013, NPCL denied the EPJL's claim and further issued notice of termination on 22.8.2013.

On 26.8.2013, the petition was filed by EPJL before the Commission challenging the letters of NPCL dated 4.4.2013, 7.8.2013, 9.8.2013 and 22.8.2013 and prayed to restrain NPCL from encashing the bank guarantee. The Commission vide order dated 9.9.2013 directed EPJL to submit returnable assured additional performance guarantee as per the conditions of the PPA and till then NPCL was to withhold their letters mentioned in the application of the Petitioner. Again vide order dated 27.9.2013, the Commission allowed time upto 7.10.2013 for compliance of Commission's order dated 9.9.2013. Vide notice dated 9.10.2013, the Commission fixed the hearing on 17.10.2013 with direction to the parties to maintain status quo.

In the mean while on 8.10.2013, NPCL initiated the process for invocation of bank guarantee which continued even after the Commission's notice dated 9.10.2013. Although the process for encashment of BG was initiated by NPCL on 8.10.2013 subsequent to the date as given by the Commission i.e. 7.10.2013 but it was completed only after the Commission's direction vide notice dated 9.10.2013. NPCL's statement during the hearing that since they had already started the process so they could not stop, has no credence as in compliance to the Commission's direction on 9.10.2013, they must have put their best efforts in stopping the process of further encashment of BG's which they did not. Therefore, the Commission considers that the NPCL has not been fair in its compliance, however it can not be made responsible for disobedience of the Commission's direction dated 9.10.2013.

- (v) EPJL has requested for restitution of its bank guarantee amounting to Rs. 72 crores along with the interest which as per them has been received by NPCL in

defiance to the Commission's directions on maintaining the status quo. On contrary, NPCL has claimed further 24 crores with interest as additional bank guarantee as per the terms of PPA.

The Commission considers that the liquidation of bank guarantee has been done by NPCL on 8/9.10.2013 in view of the alleged termination by them as per clause 3.4. of the PPA. The Commission through its orders had allowed the time upto 7.10.2013 for submission of returnable assured additional performance guarantee and till then NPCL was directed to withhold their letters. On 8.10.2013, EPJL requested NPCL not to proceed for invocation of bank guarantee as they had already submitted a request to their bank on 4.10.2013 for providing additional bank guarantee. Ignoring their request, NPCL closed its eyes and proceeded for invocation of bank guarantee through their application to bank dated 8.10.2013. As informed by the parties, only part BG was liquidated on 8.10.2013. The Commission, on 9.10.2013, again directed to maintain status quo till further orders of the Commission but the rest of the BG was encashed on 9.10.2013. NPCL has submitted that through the order, Hon'ble Commission had allowed time upto 7.10.2013 for submission of additional BG and so on laps of that period they preferred to proceed for liquidation of BG on 8.10.2013. They have added that since they were in process for liquidation through the bank, despite the Commission's direction on 9.10.2013, they could not stop the final liquidation of BG. EPJL has alleged that notwithstanding their request on 8.10.2013 that they were in process of getting the additional BG from their Bank, NPCL proceeded for liquidation which continued even after the Hon'ble Commission's direction dated 9.10.2013.

The Commission finds from above that somehow the liquidation of BG became the priority for NPCL and in doing so it did not properly consider even to the request of EPJL. It seems that NPCL was considering only the liquidation of BG and therefore, overlooked EPJL's request. NPCL could not put forth their best efforts in stopping the final encashment of BG despite The Commission's directions on 9.10.2013.

In view of above, the Commission considers the intentions of EPJL who had proceeded for arrangement of additional performance guarantee as

per the directions of the Commission and the provisions of PPA. The Commission also considers that NPCL had an opportunity to proceed for liquidation in the intervening period but it would have been reasonable if they had taken note of EPJL's request. NPCL also could not establish that they had put their best efforts to comply with the Commission's directions on 9.10.2013. Therefore, on equitable presumption, the Commission directs NPCL to restore EPJL's bank guarantee amounting Rs. 72 crores within 15 days from the date this order with no other cost or interest to any of the parties. This would bring EPJL and NPCL to their former position. By bringing them to their earlier status, the Commission allows them an opportunity to rethink over the issues in light of the facts under the provisions of PPA.

- (vi) Vide order dated 11.3.2014, the Commission directed EPJL to file their commitment of supply from alternative source on an affidavit which must also include the proof of supply commitment from the alternative source which is a separate entity. Through the affidavit dated 2.4.2014, EPJL has submitted their commitment of supply of electricity from their 600 MW, Mahan, Madhya Pradesh Plant for a period of 25 years at the agreed levelized tariff of Rs. 4.068/unit with other terms and conditions of PPA remaining the same. EPJL has also submitted that Mahan Plant is owned by Essar Power M.P. Ltd. (EPMPL). NPCL has stated that the PPA recognizes alternative source of supply only in a limited manner as specified in article 4.6 & 4.8 of PPA and under specific provisions there is no scope for assigning the PPA to other entity as EPMPL is another entity.

The Commission considers that there is limitation for supply from alternative source under the specific provisions of PPA. The alternate source can be considered for a limited period and not for the whole term of PPA. Therefore, the Commission opines that EPJL has to keep themselves with the specific provisions of PPA in their commitments.

- (vii) The PPA had ensured supply of electricity to the consumers of specified licensed area w.e.f. 30.4.2014 which has been hampered and the shortage of



supply is being mitigated through short term purchases of electricity. This can not be a solution for long term as in this manner, the electricity procured may be at a higher price than as envisaged through the long term PPA. The reasons discussed above have been unforeseen. So, in such a situation it becomes mandatory for NPCL, being the distribution licensee of the area, to think the possibilities to ensure the requisite quantum of electricity to the consumers on long term basis. Therefore, the Commission directs NPCL to seriously consider the issue of ensuring long term supply of power to the consumers of their area within the existing provisions and bring that proposal to the Commission, which may be lasting and long term.

The Commission further considers that in view of the shortage of power in the State, the reasonable tariff tied up through the subject PPA and the willingness of the parties for an equitable and reasonable solution, it may also be just and proper for the parties to consider entering into a fresh contract, if the present PPA is not continued, on the same terms conditions and tariff except the change in source of generation. However, in such a situation, the modalities would require to be discussed afresh.

37. With the observations and conclusions above, the petitions are disposed of.

(Indu Bhushan Pandey)
Member

(Meenakshi Singh)
Member

(Desh Deepak Verma)
Chairman

Place : Lucknow

Dated: 30.05.2014