

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 37 of 2014**

**Dated: 3<sup>rd</sup> March, 2015**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**In the matter of:**

**Gujarat Urja Vikas Nigam Limited ... Appellant  
Sardar Patel Vidyut Bhavan  
Race Course  
Vadodara – 390 007**

**Versus**

- 1. Gujarat Electricity Regulatory Commission ...Respondent  
1<sup>st</sup> Floor, Neptune Tower,  
Opp. Nehru Brodge, Ashram Road  
Ahmedabad – 380 009**
- 2. CLP India Private Limited  
Torrent House, 6<sup>th</sup> Floor  
“Chanakya”, Off. Ashram Road,  
Ahmedabad – 380 009**

**Counsel for the Appellant: Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Ms. Swapna Seshadri  
Ms. Sheilja  
Mr. Arvind Kumar Dubey  
Ms. Anushree Bardhan**

**Counsel for the Respondent(s): Ms. Suparna Srivastava,  
Ms. Nishtha Sikroria ,**

**Mr. S.R. Pandey and  
Mr. S.R. Bhatnagar for R-1**

**Mr. Amit Kapur,  
Mr. Mohit Venkat,  
Mr. Vishrom Mukherjee and  
Ms. Rimali Batra for R-2**

## **JUDGMENT**

### **RAKESH NATH, TECHNICAL MEMBER**

This Appeal has been filed by Gujarat Urja Vikas Nigam Ltd. (“GUVNL”) challenging the order dated 25.11.2013 passed by Gujarat Electricity Regulatory Commission (“State Commission”) in Petition no. 1053 of 2010 in adjudication of a dispute under Section 86(1)(f) of the Electricity Act, 2003 under the Power Purchase Agreement dated 03.02.1994 between the Appellant and CPL India Pvt. Ltd., a generating company.

2. The Appellant, GUVNL, is a State Government enterprise and is one of the successor companies of the erstwhile Gujarat Electricity Board and formed upon reorganisation of the Board under the Electricity Act, 2003. The State Commission is the first Respondent. CPL India Pvt. Ltd. previously known as Gujarat Paguthan Energy Corporation (“GPEC”) and prior to that known as Gujarat Torrent Energy Corporation is the Respondent no.2. The Respondent no.2 is a generating company.
3. The brief facts of the case are as under:

- a) On 03.02.1994, the erstwhile Gujarat Electricity Board and the Respondent no.2 entered into a Power Purchase Agreement (“PPA”) for sale of power from 654.7 MW combined cycle gas based generating station set up in the State of Gujarat for a period of 20 years.
  - b) The Appellant and the Respondent no. 2 also entered into a Supplementary Agreement dated 05.12.2003 for resolution of certain issues.
  - c) On 27.09.2010, the Respondent no.2 filed a petition being Petition no. 1053 of 2010 before the State Commission raising certain disputes and seeking adjudication thereof.
  - d) The State Commission by order dated 25.11.2013 allowed the claims of the Respondent no.2 on several aspects. The State Commission has also allowed delayed payment surcharge on the same.
  - e) Aggrieved by the order dated 25.11.2013, the Appellant has filed this Appeal.
4. The Appellant has raised the following issues:
- a) **Deemed generation incentive in open cycle mode:** When after commissioning of the combined cycle operation, the Respondent no.2 declares the availability of open cycle operation only, the same cannot be taken into account for determination of deemed generation incentive. The Respondent No.2 is claiming the Station Heat Rate of 2900 Kcal per kWh applicable to open cycle operation when the Station Heat Rate applicable to closed cycle operation is 1950 Kcal/kWh. The Respondent no.2 cannot have advantage of both, namely, the Higher Station Heat Rate for

operation when Steam Turbine is not functioning and at the same time claim deemed generation incentive from the Appellant even when it is not scheduling power from the power plant because of higher cost of its operation in open cycle mode. The PPA clearly imposes the obligation on the Respondent no.2 to declare availability in combined cycle mode, upon which the Appellant is required to issue dispatch instructions. In the absence of declaration of availability of the power plant in the combined cycle mode, the quantum declared in open cycle mode cannot be considered as declaration of availability for incentive under the PPA. The provision relating to open cycle operation with higher station heat rate in the PPA as well as in Tariff Notification of Government of India is relating to initial period when the generating company came into commercial operation in a phased manner.

- b) **Determination of interest on working capital when natural gas is used as fuel:** The State Commission has failed to consider that the interest on working capital is allowed on fuel when the fuel cost is required to be met by the Respondent no.2 in advance. When the Respondent no.2 gets fuel on credit and the entire fuel is paid as pass-through in tariff, there is no requirement of working capital. The purpose of giving interest on working capital for one month fuel cost is to enable tying up of money for meeting the cost of fuel and for no other purpose. When, there is no requirement to tie up the fuel by making advance payment, there is no need for any working capital especially when the cost of credit is being borne by the Appellant.

- c) **Deduction of 1/5<sup>th</sup> cost of maintenance spares:** The State Commission has not considered that the Respondent no.2 had already taken advantage of higher capital cost and fixed charges by capitalizing cost of the initial spares in the capital cost and accordingly the interest on working capital cannot be claimed on actual spares from the 5<sup>th</sup> year onwards. The entire capital cost of initial spares have been capitalized in the first five years entitling the Respondent no.2 to the tariff elements on capital cost such as interest on loans, return on equity, depreciation, etc., and, therefore, there cannot be any double claim on account of the initial spares in the capital cost and in interest on working capital. Neither the PPA nor the Government of India Notification dated 30.03.1992 provides that 1/5<sup>th</sup> cost of the initial spares should be deducted from the working capital only for the first 5 years.
- d) **Delayed Payment Surcharge on above claims:** The State Commission failed to appreciate that the Appellant has withheld the amounts on bonafide understanding of the terms of PPA and cannot be penalized by having to pay delayed payment surcharge. Without prejudice to the submission that the delayed payment surcharge is not payable, if at all the delayed payment surcharge is held to be payable, the rate should be restricted to 1% higher than the rate of interest for working capital of the Appellant or the Respondent no.2, whichever is lesser and not as per Article 6.3 (c) of the PPA, as had been settled between the parties by the Negotiating Committee.
5. We have heard Mr. M.G. Ramachandran, Learned Counsel for the Appellant, Ms. Suparna Srivastava, Learned Counsel for the State

Commission and Mr. Amit Kapur, Learned Counsel for the Respondent no.2 on the above issues.

6. After examining the contentions of the rival parties, the following questions would arise for our consideration:
  - i) **Whether the State Commission has erred in allowing incentive on deemed generation on the open cycle operation of the power plant to the Respondent no.2 when the steam turbine was not available, contrary to the provisions of the PPA?**
  - ii) **Whether the State Commission has erred by allowing cost of one months fuel in calculating the interest on working capital without considering that the Respondent no.2 gets credit on payment for gas?**
  - iii) **Whether the State Commission has erred in allowing the claim of the Respondent no.2 for including 1/5<sup>th</sup> cost of initial spares in calculation of interest on working capital after fifth year of operation of the power plant contrary to the provisions of the PPA and the Government of India Tariff Notification dated 30.03.1992?**
  - iv) **Whether the State Commission has erred in allowing delayed payment surcharge as per the terms of the PPA for the amount withheld by the Appellant due to dispute on the above issues?**
7. **Let us examine the first issue regarding deemed generation for open cycle operation.**
8. According to the Appellant, the Respondent no.2 is not entitled to any payment of incentive on deemed generation when the plant is

operating in open cycle mode. Payment of incentive on deemed generation has to be made only in case the plant is operating in combined cycle mode. In case of open cycle operation, Respondent no.2 is only entitled to capacity charges unless the Appellant has issued dispatch instructions when the plant is operating in open cycle mode.

9. Respondent no. 2 has submitted as under:
  - a) Respondent no.2 is entitled to deemed generation in open cycle mode in terms of the PPA. Moreover, the Appellant has admitted its liability to pay incentive in open cycle mode and paid incentive till FY 2005-06. It was only in the year 2008 that the Appellant raised the issue of non-entitlement of the Respondent no.2 to incentive on deemed generation in open cycle mode and unilaterally deducted certain amounts on this account.
  - b) Respondent no.2 had operated the plant in open cycle mode during the period of scheduled maintenance. The PPA requires the Respondent no.2 to comply with Prudent Utility Practices while scheduling maintenance. It is in furtherance of the same that Respondent no.2 operated the plant in open cycle mode. Therefore, to penalize Respondent no.2 for complying with its obligations under the PPA is unjust and unfair.
10. Mr. Amit Kapur, Learned Counsel for the Respondent no.2 referred to various articles of the PPA to justify his claim.
11. Ms. Suparna Srivastava referred to the findings of the State Commission stating that the Commission after considering the various provisions of the PPA has come to the conclusion that the Respondent no. 2 is entitled to receive the deemed generation

- incentive on open cycle operation which was wrongly withheld by the Appellant from the energy bills of the Respondent no. 2.
12. Let us examine the findings of the State Commission. The findings are summarized as under:
    - a) Schedule 1 of the PPA gives the brief description of the power station of the Appellant as consisting of three gas turbines of 137.945 MW each and a steam turbine of 240.891 MW aggregating to the combined cycle generating capacity of 654.7 MW.
    - b) Article 3.2 of the PPA relating to entry into commercial service recognizes that on the date of synchronization when the generator in open cycle mode and whole power station in combined cycle mode is synchronized with grid is considered as entered into the commercial service from the date of synchronization.
    - c) From the above provisions it is clear that the power station considered in PPA is Combined Cycle Power station which consist of 3 Gas Turbine of 137.945 MW each and one Steam Turbine of 240.891 MW. After commissioning of combined cycle operation, the PPA cannot proceed on the basis that all the provisions of the PPA have to be read in the context of combined cycle generation only while ignoring generation available from gas turbines in case of requirement under open cycle mode. It is, therefore, incorrect to say that the gas turbines are restricted to operate when steam turbines are not available. It also depends on the parties whether to operate the power station in open cycle mode or combined cycle mode as per their requirements.

- d) The delivered energy defined in the PPA is the energy generated by the power station and delivered to the Electricity Board at the delivery point. It is silent about mode of operation i.e. open cycle mode or combined cycle mode.
- e) The definition of 'Delivered Energy', Dispatch, 'Dynamic Parameters', 'Force outage and Scheduled Outage', 'Nominal Base Load Capacity', 'Operating Characteristics' and 'System Parameters' are all referring to the power station, base load capacity or nominal base-load capacity of 635 MW not with reference to any particular gas turbine or steam turbine but with reference to power station as a whole.
- f) PPA refers to the power station without making any distinction between the gas turbines and the steam turbine. Various clauses regarding operation, maintenance, fuel management and availability declaration refer only to the available units and not any particular unit.
- g) The generating plant of 654.7 MW is an integrated gas and steam turbine power plant consisting of three gas turbines and one steam turbine. In such condition, it is incorrect to say that the declaration of availability for the generating station is as a whole of the power station on combined cycle mode not separately for Gas Turbine Units in open cycle mode. This is contrary to agreed terms of the PPA between the petitioner (CPL India) and the respondent (GUVNL). The respondent (GUVNL) admitted that the power plant can be operated in open cycle mode as and when required by the respondent (GUVNL). Hence, the contention of the respondent

- (GUVNL) that declaration of availability is limited to the combined cycle power plant is misinterpretation of the provisions of the PPA.
- h) In the case of Combined Cycle Power Plant with Gas Turbine Unit and Steam Turbine Unit, it is an integrated Power Station where declaration of availability may be possible either in open-cycle or in combined cycle mode as per the requirement of the seller and procurer of power. In such condition, the declaration of availability is qua 654.7 MW in combined cycle mode or qua independently for 3 Gas Turbine unit each of 137.945 MW in open cycle mode.
  - i) When three Gas Turbines and one Steam Turbine work as an integrated unit, the generating station can be said to be in operation as a whole only. When only the Gas Turbine is in operation, it is called open cycle mode operation of the generating station. The entire scheme of the Power Station is as described in Schedule 1 of the PPA is to get a combined effect of the Gas Turbines and the Steam Turbine, when it operates combinedly and when only gas turbines operate, the power station be called to operate in open cycle mode.
  - j) The plea of the petitioner that when the open cycle mode of the operation at that time three gas turbines capacity of 137.945 MW each are available, which constitute about 63% of the capacity of the power station cannot be ignored for availability is concerned, is true and valid reason because when the parties consciously decided that power station of 654.7 MW consists of three gas turbines and one steam turbine. As such, it is unfair and invalid that the availability of the power station be considered in only combined cycle mode with consideration of availability of three gas

- turbines and one steam turbine and not considered when only gas turbines are available in absence of steam turbine to generate the electricity in open cycle mode.
- k) In the PPA and Tariff Notification two heat rates are prescribed for open cycle and combined cycle mode of operations.
  - l) In the definition of schedule outage in the PPA, the term “planned reduction” is with reference to unavailability of any one or more units of the station, which may be steam turbine or gas turbine. The plea of GUVNL that if the steam turbine is unavailable the plant shall not be treated as available to the extent of availability declared on gas turbines is devoid of merit in terms of the PPA.
  - m) Clauses 6.1, 6.2 & 6.4 of the Schedule VI pertaining to dispatch instruction state that the petitioner shall submit availability of power station and if the same is not available the reason for it. Similarly, the respondent (GUVNL) shall be required to submit the requirement with respect to availability of the power station declared by the petitioner. The petitioner shall require to operate the power station as per the dispatch instruction issued by the respondent. Thus, the aforesaid clauses also recognizes that the dispatch procedures adopted by the parties is with reference to power station which in this case is combined cycle power station of 654.7 MW and in open cycle mode of power station, the capacity of power station be considered as 413.835 MW.
  - n) Article 7.5.11 dealing with Net Availability is to be read along with the other provisions of the PPA requiring the petitioner to maintain and operate the power station as either combined cycle power plant of 654.7 MW and declare the capacity available from the

power station either in combined cycle mode or open cycle mode and declare capacity available from such gas turbines be qualified for declared availability under open cycle mode.

- o) The provisions of the PPA cannot be interpreted in a pedantic manner out of context and selectively without regard to the overall scheme of the PPA, the object and purpose sought to be achieved, the intention of the parties while signing the PPA. It is clear that the petitioner and respondent agreed as per the terms of PPA that the power station is capable to operate in open cycle mode with only gas turbines in operation or combined cycle mode with the gas turbines as well as the steam turbine in operation. It is necessary to refer the Fixed Charges in terms of Clauses 7.2 stated in schedule VII of the PPA, which reads as under:

*“78.2 Fixed Charges*

*The Fixed Charge with respect to any fortnight shall be the product of (i) the Net Availability (in kilowatt-hours) during such fortnights, and (ii) the rate expressed in Rupees per kilowatt hours, that is the sum of:*

- (a) Interest*
  - (b) Depreciation*
  - (c) O&M expenses*
  - (d) Return on equity*
  - (e) Insurance Expense and*
  - (f) Foreign Exchange Variation*
- .....”*

Thus, the Fixed Charges are payable according to the Net Availability of the Power Station. The fixed charges are calculated according to the availability and not according to the mode of operation of the plant whether it is combined cycle or open cycle.

- p) When the various clauses of PPA recognize that the power station can operate either as a Combined Cycle power station or open cycle power station, the fixed charges are required to be evaluated with consideration of net availability of the power station irrespective of whether it is operating in combined cycle or open cycle mode.
- q) After considering tariff specified in the Schedule VII in Clause 7.1 of the PPA and the Government of India Notification dated 30.03.1992, the Commission came to the conclusion that parties to PPA agreed to payment of Fixed Charges and Energy (Variable) Charge on nominal basis, and when the power plant operates in open cycle mode SHR is 2900 Kcal/Kwh whereas in the combined cycle mode it is 2000 Kcal/Kwh. As per the terms of the PPA, for the first 6000 Kwh/KW of generation (i.e. 68.5 % PLF), fixed and energy charges are payable as agreed in the PPA, and any excess generation (actual or deemed) above 68.5% PLF qualifies for incentive in addition to variable charge of energy if any generated. Here, in this case, as decided above, the power project is capable to operate in either combined cycle mode or open cycle mode. Therefore, while deciding the net availability, the same may be required to be considered as well as while deciding the first 6000 kWh/KW (i.e. 68.5% of PLF), the available net generation from power plant is required to be considered and not the full capacity of the combined cycle plant.
- r) After examining the Clause 7.4 of the PPA and the Article 4.3 of the Supplementary PPA dated 05.12.2003 regarding incentive, the State Commission came to the following conclusion:

*“The above clauses have reference of clause 7.1 of the PPA which pertains to tariff. As stated above, the tariff is decided based on the capacity of the plant which consist of 3 gas turbines and one steam turbine which operates in combined cycle power project having capacity of 654.7 MW and the PLF in such condition of the plant, the generation is required to be considered with reference to 654.7MW. The same plant is also capable to operate in open cycle mode through operation of gas turbines only. In such condition the generation is required to be determined with the consideration of capacity of available gas turbines only.*”

*Therefore, while determining the incentive, the generation which is required to be considered for payment is with reference to available/deemed generation irrespective of capacity of plant. Hence, the argument of the respondent that the incentive is payable only for combined cycle operation of plant with consideration of 654.7 MW is incorrect and invalid and the same is rejected. Moreover, incentive is required to be paid when availability/deemed generation is more than 6132 hours per kW per year @ 1% at the rate of 0.575 % of Equity. The said incentive is payable for 70 % to 90% of PLF and when the same increase beyond PLF of 90 %, in that case incentive payable @ 0.20 % for 1 % increase in actual generation only. The respondent vide its letter dated 5.12.2003 also agreed to pay deemed generation incentive even when there is open cycle operation of the power station. The respondent had also paid incentive for deemed generation under open cycle mode of operation from FY 1989-99 to 2005-06 and later on in 2008 deducted the paid amount of incentive unilaterally from the monthly bills raised by the petitioner, which is illegal and contrary to provisions of PPA.”*

- s) Considering the above facts, the Commission decided that the respondent no.2 is entitled to deemed generation incentive as per the declaration, if any, done for operation of power station in open cycle mode.
13. The State Commission has given detailed analysis of the PPA and Government of India Notification dated 30.03.1992 and came to the conclusion that the respondent no. 2 is entitled to deemed generation and incentive on open cycle mode also. We have examined the relevant Clauses of the PPA and Government of India's tariff Notification dated 30.03.1992 and are in full agreement with the findings of the State Commission.

14. We have examined the Schedule VII of the PPA (as amended by the Supplementary PPA).

*“4.1 Amendment of Clause 7.1 of Schedule VII*

*The terms of Clause 7.1 of Schedule VII are hereby modified and shall read as under:*

*Tariff:*

*GEB shall purchase power from GPEC, generally on the basis of Gol Notification No. S.O. 251(E), dated 30.03.1992. The tariff for the first 6132 KWh/KW/Year (i.e. 70% PLF) of Availability in any Year during the Term of this agreement shall be the sum of (a) the Fixed Charge and (b) the Variable Charge. For all energy of actual and deemed generation in excess of 70% PLF in any Year and up to 90% Availability, the Tariff payable by GEB shall be the sum of (a) the incentive described below and (b) the variable Charge. Any tax duty or impost on or pertaining to sale of energy or capacity shall be payable by GEB to GPEC over and above the tariff.*

*4.3 Amendment of Clause 7.4 of Schedule VII*

*The terms of Clause 7.4 of Schedule VII are hereby modified and shall read as under:*

*Incentive:*

*The incentive referred in 7.1 above with respect to any month shall be at the rate of 0.575% of Equity for every 1% increase in available/deemed generation above the normative level of 6132 hours per KW per year (70% PLF) up to 90% PLF (i.e. 7884 Kwh per KW per Year). Incentive beyond 90% will be payable at the rate of 0.20% for every 1% increase in actual generation and not on deemed generation basis.”*

15. The ‘Net Availability’ is defined in clause 7.5.11 of Schedule VII of the PPA as under:

*“7.5.11 “Net Availability” : shall mean the Net Capacity expressed in Kilowatt-Hours less all Kilowatt-Hours not made available due to Schedule Outages or maintenance outages.”*

16. In terms the above provisions, for availability upto 70%, the respondent no.2 is entitled to fixed charges on actual and available generation basis and variable charges on actual generation. For available/deemed generation more than 70% and upto 90%, the respondent no.2 is entitled to incentive computed in terms of Schedule VII. Availability is to be declared for the power plant as a whole irrespective of whether in open cycle or combined cycle mode. The definition of net availability also clarifies the position that the kWh energy not made available due to scheduled outage or maintenance outage will not be considered for calculating the net availability. Therefore, when the Steam Turbine is not available due to maintenance outage, the energy availability from such capacity shall be excluded while calculating the net availability. Incentive is payable irrespective of the mode of operation.

17. The above position is very clear from the amendments to the PPA as reflected in the table below:

PPA dated 03.02.1994		Supplementary Agreement dated 05.12.2003		Supplementary Agreement No.2 dated 26.02.2014	
PLF*	Entitlement	PLF*	Entitlement	PLF*	Entitlement
Upto 68.5%	Fixed Charges and Variable Charges	Up to 70%	Fixed and Variable Charges	Up to 70%	Fixed Charges and Variable Charges
Upto 68.5%	Variable Charges and Incentive @0.575% for every 1% increase above PLF	70%-90% (actual and deemed generation)	Variable Charges and Incentive @ 0.575% for every 1% increase in Availability	80%-90% (actual and deemed generation)	Variable Charges and Incentive @ 0.575% for every 1% increase in Availability
		Above 90% (Actual)	Variable Charges and Incentive @ 0.20% for every 1% Increase in actual generation only.	Above 90% (Actual)	Variable Charges and Incentive @ 0.20% for every 1% increase in actual generation only.

18. Learned Counsel for the Appellant has referred to various letters from the Gujarat Electricity Board and GUVNL to the respondent no.2 and meetings held with the respondent no. 2 about their position on open cycle operation of the power plant. We find that these letters are communications only from the appellant regarding their view on the provisions of the PPA. There was no acceptance by the Respondent no.2 that open cycle operation will not be considered for deemed generation. No supplementary agreement was signed between the parties in this regard. In fact the Appellant had been honouring the invoices raised by the Respondent no.2 including deemed generation incentive in open cycle mode. Only in the year 2008, the Appellant raised issue of deemed generation incentive on open cycle operation. Therefore, there is no merit in the contentions of the Appellant in this regard. Therefore, the first issue is decided against the Appellant.
- 19. The second issue is regarding interest on working capital when natural gas is used as a fuel:**
20. According to the Appellant, the interest on working capital for one month fuel cost is not payable to the Respondent no.2. Learned Counsel for the Appellant furnished calculations showing that average inventory carrying days are less than 10 days and for Cairn gas it is nil. It is further argued that there is no storing gas. Interest on working capital is required to be paid only when generator is required to part with cash for meeting operational expenditure of the plant. When the Respondent no.2 has no exposure to deploying the working capital on gas as fuel, then they could not claim interest on working capital for the same.

21. Mr. Amit Kapur, Learned Counsel for the Respondent no.2 has submitted that the Appellant has wrongly and contrary to the provisions of the PPA refused inclusion of cost of one month's fuel in computation of interest on working capital when the fuel being used is natural gas. He has referred to the Government of India Notification dated 30.03.1992 on the basis of which the PPA in dispute was negotiated and executed and the provisions of the PPA which clearly provides for inclusion of fuel cost of one month for the normative interest on working capital.
22. Mr. Amit Kapur relied on North Delhi Power Ltd. V. Delhi Electricity Regulatory Commission 2010 ELR (APTEL) 0891, and judgment of the Tribunal dated 05.01.2012 in DPSC Ltd. Vs. West Bengal Electricity Regulatory Commission in Appeal no. 67 of 2009 to press his point that interest on normative working capital as agreed to in the PPA has to be allowed.
23. We find that the State Commission after examining the provisions of the PPA has held that the provision for interest on working capital is to meet the cash outflow agreed to between the Appellant and the Respondent no.2 on normative basis. The said Article does not indicate that any verification as to whether the payment is for working capital on gas, or any other fuel used has to be made. Moreover, the fuel defined in the PPA says it can be gas as well as Naptha. Hence, the provisions of this Article is applicable to both the fuels, i.e. gas as well as Naptha.
24. We find that Clause 7.5.9 of Schedule VII of the PPA describes the interest on working capital as under:

*“7.5.9 “Interest on Working Capital”: shall mean the sum of all interest, bank charges and associated financing charges with respect to:*

- (i) Fuel costs for one month;*
- (ii) Operation and maintenance expenses (cash) for one month.*
- (iii) Maintenance spares at actual but not exceeding one year’s requirement less value of one fifth of initial spares already capitalized and,*
- (iv) Receivables equivalent to two months average billing for sale of electricity.*
- (v) All other reasonable expenses as may be mutually agreed.”*

25. The interest on working capital as amended by Supplementary PPA dated 05.122003 provides as under:

*“Interest on working capital”: shall mean the sum of all interest, bank charges and associated financing charges and shall be charged at 11% or any such other rate as may be agreed to between GPEC and the GEB from time to time, with respect to the Working Capital comprising of:*

- (i) Fuel costs for one month at 70% PLF.*
- (ii) Operation and maintenance expenses (cash) for one month.*
- (iii) Maintenance spares at actual but not exceeding one year’s requirement less value of one fifth of initial spares already capitalized.*
- (iv) Receivables equivalent to two times the amount of the Monthly Invoice for sale of electricity.”*

26. Thus, the PPA provides for interest on working capital to be calculated on normative basis. The working capital, *inter alia*, includes the fuel cost for one month at normative PLF of 70%. The fuel as defined in the PPA is natural gas and/or any liquid fuel selected by the Respondent no.2 for use in power station for generating electricity.

27. We find that the tariff agreed to between the parties is a normative tariff. Therefore, the interest on working capital has to be determined on normative basis. The proposition suggested by the Appellant of actual or normative whichever is less will not be applicable to the Respondent no. 2 in view of the specific provision of interest on working capital on the normative basis in the PPA.
28. We also find that the Appellant in the calculations of fuel cost has considered the average inventory carrying days for the Respondent no.2 with respect to the date of billing to the Appellant and not the date of payment. Therefore, the calculations submitted by the Appellant are not in order.
29. We also notice that as per Amendment agreed to between the parties on 05.12.2003. Article 6.3(f) of the PPA was amended as under:

*“4.7 Amendment of Article 6.3(f) of the PPA*

*The terms of Article 6.3(f) of the PPA are hereby modified and shall read as under:*

*In partial amendment to the provisions of Clause 6.2 (b) and 6.3(c) of Article-6 of the PPA, it is agreed that the levy of Delayed Payment Charges on the unpaid amount shall be applied for each day overdue as under:*

<i>Period</i>	<i>Modality of Application</i>	<i>Rate</i>
<i>From 1-4-2000 to 30-6-2003</i>	<i>DPEC shall accrue from the 31<sup>st</sup> Day of the Date of Invoice over the unpaid amount remaining outstanding as on that day.</i>	<i>1.5% p.m</i>
<i>From 1-7-2003 onwards</i>	<i>DPC shall accrue from the 61<sup>st</sup>5 Day of the Date of Invoice over the unpaid amount remaining outstanding as on that day.</i>	<i>1.5% p.m.</i>

*It is agreed, as a one time offer, that recovery of an amount equivalent to 40% (forty percentage points) of the total amount of DPC accrued effective from 1-4-2000 to 30-9-2003, as computed in the manner detailed hereinabove, shall be waived by GPEC.*

*GPEC shall allow a rebate of 1.5% for payments (through cash, L.C. or otherwise) received within 7 days of the invoice and rebate of 1% to be eligible for payments (through cash, L.C. or otherwise) received within 30 days of the invoice.*

*Provided however, that such rebate(s) shall be allowed only if there are no pending/outstanding dues from GEB to GPEC.”*

30. In terms of the above amendment, the Delayed Payment Charges on the unpaid amount shall accrue from 31<sup>st</sup> day of the date of invoice from 01.04.2000 to 30.06.2003 and 61<sup>st</sup> day of the date of invoice from 01.07.2003. The Appellant is also entitled to a rebate of 1.5% for payment (through cash, LC or otherwise) received within 7 Days of invoice and rebate of 1% for payments made within 30 days of the invoice. Therefore, if the Appellant makes payment within 7 days it is entitled to a rebate of 1.5% on the amount of invoice. The Appellant can also make payment within 30 days and still get a rebate of 1%. In view of this the argument of the Appellant regarding the inventory days will not be valid.
31. This Tribunal in Appeal no.1 of 2011 judgment dated 05.01.2012 in the matter between DPSC Ltd. Vs. WBERC after considering the findings of the Tribunal in various other cases has held that when the Regulations provide for interest on working capital on normative basis then the interest on working capital has to be allowed on normative basis and not on actual amount incurred.

The findings of the Tribunal will apply to the present case also where the PPA entered into between the parties provided for interest on working capital on normative basis. Accordingly, this issue is also decided against the Appellant.

**32. The third issue is regarding deduction of 1/5<sup>th</sup> cost of maintenance spares in calculation of interest on working capital.**

33. Mr. M G Ramachandran, Learned Counsel for the Appellant argued that despite the fact that the Appellant has serviced and continue to service the capital cost of initial spares capitalized in the books of the Respondent no.2 even after the fifth year of operation, the State Commission has allowed the Respondent's claim for inclusion after the fifth year, the cost of such maintenance spares in the calculation of the working capital. This is contrary to the PPA and the Government of India Notification dated 30.03.1992.

34. In reply the Respondent no.2 submitted as under:

- (a) The reduction of 1/5<sup>th</sup> of the value of initial spares is to amortize the value of initial spares over a period of 5 years.
- (b) Once the value of the initial spares is reduced to zero (by deduction of 1/5<sup>th</sup> of the value each year for 5 years), no further deduction on account of initial spares is permitted.
- (c) The computation of interest on working capital with respect to the maintenance spares is in terms of the PPA.

35. Let us examine the findings of the State Commission. The relevant findings are summarized below:

- a) Under Clause 7.5.9 of the PPA pertaining to interest on working capital, it was agreed between the parties that the cost of maintenance spares shall be worked out at actual but not exceeding one year requirements less value of 1/5<sup>th</sup> of initial spares capitalized. The said Clause is silent about treatment to be given for reduction of maintenance spares after the 5<sup>th</sup> year.
  - b) It is necessary to understand the purpose of reduction of capital spares capitalized from the actual spares requirements. This is to write back the capitalized initial spares already included in the original value of assets and may be issued for maintenance by the project developer. The period of 5 years is used to ensure that there is no adverse impact on the working capital due to requirement of spares in the initial period of 5 years by the developer. Thus, the write back of initial spares get exhausted within a period of 5 years and cannot be continued to be deducted from the actual requirements. Therefore, the initial spare capitalized should be reduced to zero and the petitioner is entitled for actual spares after 5 years. Therefore, it is incorrect to reduce 1/5<sup>th</sup> of initial capital cost of spares for whole life of project as a part of working capital, once the effect of capital spares is given in the calculation of the working capital requirements of 5 years.
  - c) The Respondent no.2 is entitled to interest on working capital on maintenance spares as decided above from 27.09.2007 onwards,
36. Clause 9.5.9 of the Schedule VII of the PPA dated 03.02.1994 provides for interest on Working Capital to be the sum of all interest, bank charges and associated financing charges with respect to

- (i) Fuel costs for one month;
  - (ii) Operation and maintenance expenses (cash) for one month.
  - (iii) Maintenance spares at actual but not exceeding one year's requirement less value of one fifth of initial spares already capitalized and,
  - (iv) Receivables equivalent to two months average billing for sale of electricity.
  - (v) All other reasonable expenses as may be mutually agreed.
37. The above clause was amended by the Supplementary Appeal dated 05.12.2003 as under:
- Sub Clause (i) was replaced by "fuel costs for one month at 70% PLF and Sub-Clause – (V) was deleted. No charge was made with respect to deduction of 1/5<sup>th</sup> cost of initial spares already capitalized.
38. There is no provision in the PPA or in the Government of India Notification dated 30.03.1992 that 1/5<sup>th</sup> of initial spares should be deducted only for the first 5 years. The cost of initial spares is capitalized and added to the project cost. Interest on loans, Return on Equity, O&M expenses, depreciation, etc. are allowed on such project cost inclusive of cost of initial spares.
39. We find that the State Commission has by its own interpretation has put an additional condition in the PPA which was not agreed to between the parties. Even though the State Commission held that the initial spares capitalized should be reduced to zero and the initial spares should be removed from the capital cost after a period of 5 years, no consequential order was given to the effect of

- giving relief to the Appellant by reducing the fixed cost payable to the Respondent no.2.
40. In view of above we set aside the finding of the State Commission regarding not deducting the cost of 1/5<sup>th</sup> initial spares in the working capital calculation after the 5<sup>th</sup> year of operation which we have found contrary to the PPA and the Government of India Notification dated 30.03.1992. Accordingly, this issue is decided in favour of the Appellant.
- 41. The fourth issue is regarding delayed payment surcharge.**
42. Shri M G Ramachandran, Learned Counsel for the Appellant has argued that the Article 6.3(c) relied by the State Commission could at the maximum apply to the interest on working capital but by no stretch of imagination could the said delayed payment surcharge be awarded in so far as other claims are concerned. The Appellant had withheld the amounts on bonafide understanding of the terms of the PPA and cannot be penalized by having to pay the delayed payment surcharge. If at all the delayed payment surcharge is to be paid it should be at the rate 1% higher than the interest rate of working capital of the Appellant or the Respondent no.2 whichever is less.
43. According to Shri Amit Kapur, Learned Counsel for the Respondent no.2, the Commission has correctly decided delayed payment surcharge in terms of Article 6.3(c) of the PPA. Further the Appellant and the Respondent no.2 had reached no settlement in respect of payment of delayed payment charges. The negotiation Committee merely decided the rate and mode of calculation of delayed payment charges for all further claims.

There is no bearing on the delayed payment charges awarded by the Commission.

44. We find that the Article 6.3(c) of the PPA provides that if the payment in full of the invoice raised by the Respondent no.2 is not remitted on or before the close of the business on Due Date, delayed payment charges on the unpaid amount due for each day overdue will be imposed by the Respondent no.2 at the rate 1.5% per month or the average interest rate charged by the Respondent no.2's bank on working capital loans, whichever is greater. The Appellant in this case had unilaterally withheld the payments of the Respondent no.2 which were due as per the terms of the PPA. Therefore the Respondent no.2 is entitled to delayed payment surcharge on such amounts as per the terms of the PPA. We do not find any infirmity in the State Commission's order in this regard. However, we have objection to application of a different rate of interest on delayed payment surcharge lower than provided in the PPA, if already agreed to between the parties mutually.
45. **Summary of our findings:**

- a) **Deemed Generation for Open Cycle Operation: There is no merit in the contention of the Appellant. The State Commission has correctly decided that incentive is to be allowed for deemed generation in open cycle mode as per the provisions of the PPA.**
- b) **Interest on working capital when natural gas is used as a fuel: There is no merit in the contention of the Appellant in this regard. The State Commission has correctly decided**

the fuel for one month at 70% PLF to be included in the working capital as per the terms of the PPA.

- c) **Deduction of 1/5<sup>th</sup> cost of maintenance spares in calculation of interest on working capital:** The State Commission has wrongly given its own interpretation of the PPA thereby putting an additional condition which was not agreed upon between the parties in the PPA. The State Commission's finding in this regard is set aside.
- d) **Delayed Payment Surcharge:** There is no infirmity in the State Commission allowing the Delayed Payment Surcharge on the amount withheld by the Appellant with regard to issues (a) and (b) as per the terms of the PPA.
46. In view of above the Appeal is allowed in part, only with respect to one issue regarding cost of 1/5<sup>th</sup> initial spares in calculation of interest on working capital. No order as to cost.
47. Pronounced in the open court on this **3<sup>rd</sup> day of March, 2015.**

**(Justice Surendra Kumar)**  
Judicial Member

**(Rakesh Nath)**  
Technical Member

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REPORTABLE/NON-REPORTABLE  
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