Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 30th June, 2014

Present:
HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

Appeal No. 222 of 2013

M/s. GMR Vemagiri Power Generation Limited
6-3-866/1/G/1, Greenlands,
Begumpet, Hyderabad-500 016

... Appellant

Versus

1. **Andhra Pradesh Electricity Regulatory Commission**
   5th and 6th Floor, Singareni Bhavan,
   Red Hills, Hyderabad,
   Andhra Pradesh-500 004

2. **Transmission Corporation of Andhra Pradesh Limited**
   Vidyut Soudha, Khairatabad,
   Hyderabad-500 082

3. **Andhra Pradesh Power Co-ordination Committee**
   Vidyut Soudha,
   Khairatabad,
   Hyderabad-500 082

4. **Central Power Distribution Company of AP Ltd.**
   H NO.11-64-660, 3rd Floor,
   Singareni Bhavan, Khairabad,
   Hyderabad-500 004

5. Southern Power Distribution Company of AP Ltd.
H.NO.193-13 (M),
Upstairs, Renigunta Road,
Tirupati-517 501

6. Northern Power Distribution Company of AP Ltd.
H.NO.1-1-503 and 504,
Opp: NIT Petrol Pump
Chaitanyapuri, Hanamkonda,
Warangal-506 004

7. Eastern Power Distribution Company of AP Ltd
Sai Shakti Bhavan,
Near Saraswati Park,
Vishakapatnam-53 0020

……Respondent(s)

Counsel for the Appellant (s) : Mr. Amit Kapur
Mr. Vishrov Mukherjee
Ms. Ritika Arora
Ms. Sudapurna Mukherjee

Counsel for the Respondent (s) : Mr. K V Mohan
Mr. K V Balakrishnan for R-1
Mr. Anand K Ganesan
Ms. Swapna Seshadri for R-2 to R-7

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. What is the significance of term "only"? This is the only aspect, which has to be probed into, in this Appeal.

2. M/s. GMR Vemagiri Power Generation Limited is the Appellant herein.

3. The Appellant has filed a Petition before the Andhra Pradesh State Commission for a declaration that the term "Fuel" as referred to in the PPA which is defined as a "Natural Gas only" would include the Re-gasified Liquefied Natural Gas. This Petition was dismissed by the State Commission. Hence, this Appeal.

4. The short facts are as follows:

   (a) The Appellant, M/s. GMR Vemagiri Power Generation Limited is operating a Combined Cycle Power Station at Vemagiri, Andhra Pradesh.

   (b) Andhra Pradesh State Commission is the First Respondent. The Transmission Corporation of Andhra Pradesh is the 2nd Respondent. Power Coordination committee is the 3rd Respondent. The various Distribution Companies of Andhra Pradesh are Respondents No.4 to 7.

(c) The Appellant is a Generating Company. It is one among the independent power producers in the State of Andhra Pradesh. It is running a 370 MW combined cycle power station which operates on Natural Gas.

(d) Andhra Pradesh State Electricity Board in May, 1995, invited the bids for establishing Short Gestation Gas/Naptha/Fuel Oil based power stations to bridge the demand-supply gap in the State of Andhra Pradesh.

(e) The Government of Andhra Pradesh ultimately approved the bids submitted by Nippon Denro Ispat Limited which is a parent company of the Appellant to set up a 468 MW capacity power plant with Naptha as a “Fuel”.

(f) Accordingly, the Appellant which was then known as M/s. Ispat Power Limited on 31.3.1997, entered into a PPA with State Electricity Board for supply of 468 MW capacity of power.

(g) On 5.6.2000, the Ministry of Petroleum and Natural Gas, Government of India allocated 1.64 MMSCMD of Natural Gas from KG Basin on firm basis to the Appellant subject to some conditions.

(h) The Appellant, thereupon, entered into a Gas Supply Agreement with GAIL on 31.8.2001 for supply of 1.64 MMSCMD of Natural Gas on firm basis.

(i) This Agreement dated 31.8.2001,was subsequently amended and the term of Gas Supply Agreement extended from 31.12.2010 to 31.3.2020. The Appellant as well as the Respondent Transmission Corporation submitted the draft Amendment Agreement before the State Commission for approval.

(j) Accordingly, the State Commission on 12.4.2003, granted approval to the amendment to the PPA dated 31.3.1997. As per the Amendment, the definition of the term “fuel” was amended to change the primary fuel from Naptha to Natural Gas on 12.4.2003. Accordingly, the amended PPA was executed on 18.6.2003 as per the Order dated 12.4.2003.

(k) This Amendment was made to allow the Natural Gas to be used as the primary fuel with the use of Naptha etc., as alternate fuel in the event that the primary fuel was not available.

(l) At that stage, on 1.12.2004, the Transmission Corporation, Respondent filed an Application before the State Commission to defer the right of the Appellant to use the alternate fuel till 1.1.2007.

Accordingly, on 14.12.2004, the State commission granted the prayer of the Transmission Corporation deferring the use of alternate fuel till 31.12.2006.

(m) Thereafter, the Transmission Corporation filed another Petition before the State Commission for deletion of the alternate fuel Clause from the PPAs. The Appellant also furnished a proposal agreeing to the deletion of the alternate fuel provided for in the PPA earlier.

(n) By the order dated 30.12.2006, the State Commission considered the entire aspect in the Petition filed by the Transmission Corporation and the proposal given by the Appellant and approved for the deletion of the alternate fuel clause in the PPA.

(o) In accordance with the said approval of the State Commission, the parties entered into an amended Agreement on 2.5.2007. By this amendment, the provision pertaining to “alternate fuel” was deleted.

(p) By this Amendment dated 2.5.2007, the definition of ‘Fuel’ was modified in the Clause 1.1.27 as “Fuel” means ‘Natural Gas only’.

(q) From the year 2007-08 onwards, the amended PPA was acted upon by both the parties. The

Appellant also gave declaration of availability from its generating plants on the basis of the Natural Gas.

(r) The Appellant on 17.4.2009 entered into a Gas Sales and Purchase Agreement with Reliance Industries for supply of gas.

(s) This Agreement was approved by the State Commission on 28.4.2009. The Appellants achieved the commercial operation date on 16.9.2009.

(t) There was a meeting convened in which the Distribution Companies, the Transmission Company and the Appellant participated on 2.2.2011. It was decided in the said meeting that the Generating Companies will enter into an Agreement with the GAIL for supply of Regasified Liquefied Natural Gas so that the power demand in the State of Andhra could be addressed.

(u) On the basis of this position, the Appellant entered into a Spot Gas Sales Agreement with GAIL for purchase of Spot Regasified Liquefied Natural Gas. This was approved on 5.2.2011.

(v) In the month of April, 2012, the Appellant issued a Gas Supply and Purchase Notice to GAIL for the purchase of Spot Regasified Liquefied Natural Gas. In April, 2012, the Distribution Company, the

Respondent accepted the power generated on Regasified Liquefied Natural Gas.

(w) The Appellant on 7.8.2012 wrote to Transmission Corporation requesting the permission to use the Re-gasified Liquefied Natural Gas by giving the circumstances and reasons for the said request.

(x) Similar letter of request was sent again on 27.8.2012 by the Appellant. The copy of this letter was sent to the Andhra Pradesh Power Coordination Committee (APPCC). However, this APPCC on 10.9.2012 sent a letter to the Appellant rejecting the Appellant's request to be allowed for the usage of Regasified Liquefied Natural Gas by giving various reasons.

(y) Aggrieved over this decision taken by the Coordination Committee, the Appellant on 6.12.2012 filed a Petition in OP No.20 of 2013 u/s 86 (1) (f) of the Electricity Act, 2003 requesting two prayers:

(i) To declare the term **'Natural Gas'** includes Regasified Liquefied Natural Gas for the definition of "Fuel" in the PPA.

(ii) To permit the Petitioner to declare Plant Availability using Regasified Liquefied Natural Gas as fuel.

(z) The Respondent Distribution Companies filed consolidated reply before the State Commission opposing the prayers.

(aa) Ultimately, the State Commission, after hearing the parties passed the Impugned Order dated 8.8.2013, rejecting the Appellant's prayer to permit generation on Regasified Liquefied Natural Gas.

(bb) Aggrieved over this order, the Appellant has filed this Appeal.

5. The learned Counsel for the Appellant has urged the following grounds assailing the Impugned Order:

(a) The State Commission is wrong in holding that the definition of the term "Fuel" under the PPA does not include Regasified Liquefied Natural Gas. Regasified Liquefied Natural Gas is nothing but Natural Gas. The definition of the term "Fuel" under the PPA does not impose any limitations regarding the physical state or form or source of Natural Gas. Section 2(za) of the Petroleum and Natural Gas Regulatory Board Act, 2006 defines the term "Natural Gas" to include Regasified Liquefied Natural Gas. That apart, the Constitution Bench of the Hon'ble Supreme Court in the case of Union of India & Others (2004) 4 SCC 489 has also held that the Regasified

Liquefied Natural Gas is a form of Natural Gas. The State Commission has not given due importance to the definition Section in the Petroleum Board Act as well as the decision of the Constitution Bench of the Hon'ble Supreme Court while deciding the issue in the Impugned Order.

(b) The Impugned Order failed to take into consideration the fact that the conversion of natural gas into liquid form and later re-conversion into gas form is done for making it commercially viable. This means transportation of Natural Gas without any change in chemical properties. All technical and industry literatures recognize the Regasified liquefied natural gas as a form of natural gas. The chemical and physical composition of KG D-6 gas which was allocated to the Appellant and Regasified liquefied natural gas is identical. The State Commission has not given due consideration to this aspect.

(c) The definition of the term "Fuel" under the PPA includes all forms of Natural Gas including Regasified Liquefied Natural Gas. The amendment to the definition of fuel as per Article 1.1.27 of the PPA dated 2.5.2007 deleted only the alternate fuel clause from the PPA. The deletion would relate to the alternate fuel only like Naptha etc., Clause 1.1.27 of

Agreement dated 2.5.2007 would include the word “only” which was used after natural gas, since Naptha or low sulphur heavy stock and the like as alternate fuel alone were deleted. In order to specify the deletion of alternate fuel from the said clause, the word “only” was used. Therefore, the State Commission’s reliance on the word “only” and interpretation according to the definition of “fuel” on account thereof, is clearly erroneous.

(d) The amendment to the PPA and the deletion of the alternate fuel clause has to be seen in the context of surrounding circumstances. This definition of fuel has to be analysed in the light of the surrounding circumstances which led to the Amendment Agreement dated 2.5.2007. The Amendment Agreement sought to ensure that the power producers did not declare availability on alternate fuel. This amendment would not mean that it is to curtail the right of the Appellant to use the primary fuel as natural gas in any of its forms for generation of power.

(e) The Respondent Distribution companies are estopped from contending that the definition of fuel does not include Regasified Liquefied Natural Gas. In fact, on several occasions in the past 3 years, at the request of the Respondents Discoms, the Appellant

generated power using the Regasified Liquefied Natural Gas and supplied the same to the Respondent. All along, the Appellant, after receipt of the supply has been paid the bill amount for the sale of capacity as well as the energy without any demur or without resorting to any amendment to the definition of "Fuel". Thus, it is evident that the Transmission Corporation (R-2) which was acting on behalf of the Discoms accepted and admitted that the Generating Companies including the Appellant were permitted to use the Regasified Liquefied Natural Gas. This is also clear from the fact that they requested the Petroleum Board to facilitate access to transportation facilities so that Regasified Liquefied Natural Gas could be transported to the State of Andhra Pradesh to be used for generation of power.

(f) The price of Natural Gas will not determine the amplitude of 'Fuel' Clause. The Respondent have pleaded that the difference in the price of natural gas and the Regasified Liquefied Natural Gas is an important factor to be taken into consideration and due to the higher price of Regasified Liquefied Natural Gas, the same cannot be used by the Appellant. This contention is wrong because the State Commission itself in its order dated 30.12.2006 granted the

approval to the amendment to the PPA by permitting for deletion of alternate fuel clause and in that order it was noted that any PPA provide for variable cost as pass through and the increase in cost of fuel is an accepted risk that the Transmission Company and the Discoms are taking. Having held so in the earlier order, the State Commission cannot now hold that the higher price of Regasified Liquefied Natural Gas disentitles the Appellant from using the same.

6. In reply to the above submissions, the learned Counsel for the contesting Respondents have submitted the following:

(a) Both the Appellant and the Respondents consciously decided to limit 'Fuel' to 'Natural Gas only'. As per the terms of the PPA as amended from time to time including the amended PPA dated 2.5.2007, the intent and purpose is clearly provided in the earlier orders of the State Commission dated 12.4.2004, 14.12.2004 and 30.12.2006. In these orders, the definitions of "Fuel" and "Availability Declaration" and "Declared Capacity" were specifically amended to limit the cost of power and avoid a situation wherein costly power generated from expensive alternate fuel like Naptha Regasified Liquefied Natural Gas would severely burden the consumers of the Respondent.

(b) The PPA was amended on 18.6.2003 and 2.5.2007. The PPAs were amended to **exclude all other fuel** and provide for **natural gas only** which was the 1.64 MMSCMD allocation by the Government of India to the Appellant. These orders specifically recorded that the Regasified Liquefied Natural Gas is not considered as a 'Fuel'.

(c) Both the Appellant and the Respondents amended the PPA so as to permit the Appellant to use only natural gas as the primary fuel due to the prohibitively high prices of other liquid fuels. The cost of generation using natural gas is about only Rs.3/- per unit. But the cost of generation using Regasified Liquefied Natural Gas is about Rs.14/- per unit. Thus, both the parties agreed on natural gas only as it was a cost effective option. The ceiling limit agreed upon by the parties acted as a safeguard against the generation of costly power using fuel more expensive than what was allocated to the Appellant. On this understanding, the Appellant himself had voluntarily proposed deletion of Clause relating to use of alternate fuel.

(d) The amendments to the PPA clearly show that both the parties have agreed for the fuel to be natural gas only, which was allocated to the extent of 1.64

MMSCMD by the Government of India. Now, the Appellant submits that only a plain reading of the definition of "fuel' would show that it includes all chemical forms including Regasified Liquefied Natural Gas and not 1.64 MMSCMD Natural Gas allocated. Such, an interpretation would render the specific clause referring to the allocated gas meaningless. If all chemical forms of natural gas including Regasified Liquefied Natural Gas were permitted, there is no necessity to refer to allocation of 1.64 MMSCMD.

(e) Both the parties proposed and the State Commission agreed to delete the use of alternate fuel and retain **'Natural Gas only'** since 'Fuel' under the latter is considerably less expensive. This is established as the State Commission noted that the cost of the facility for storage and handling of alternate fuel already incurred by the Appellant should be retained as it can be used when the generation cost with alternate fuel becomes lesser in future. Therefore, the amendment and interpretation of the term "**fuel**" in the PPA is inextricably linked to the cost of the same fuel.

7. On these grounds, the learned Counsel for the Respondents argued in detail in justification of the Impugned Order.

8. In the light of the above rival contentions, the following questions would arise for consideration:

   (a) Whether the State Commission erred in interpreting the definition of **fuel** as '**Natural Gas only'** under the PPA restrictively by artificially limiting it to physical state of natural gas when the definition and the Article 3.3 of the PPA contemplates all forms of Natural Gas ?

   (b) Whether the State Commission has erred in allowing unilateral modifications of the contractual terms?

9. Since both the questions are interconnected, we shall discuss both the issues together.

10. Before dealing with the above issues, it would be worthwhile to refer to the findings rendered by the Sate Commission on this issue in the Impugned Order:

   "5. Facts relating to establishment of the power plant; execution of PPA between the parties; that the petitioner is entitled to sell available capacity of the project and also the Net Electrical Energy of its project to the respondents and that the respondents are liable to purchase the said available capacity of the project and also the Net Electrical Energy of the project, are not in dispute. Similarly, definition of the term "Fuel" as mentioned in the Article 1.1.27 of the PPA dated 31-03-1997 (as amended from time to time and last

amendment being on 02-05-2007) that it means Natural Gas only is also not in dispute.

6. The dispute that arises for consideration of the Commission is whether the definition of 'Fuel' means Natural Gas alone as incorporated in Clause 1.1.27 of the PPA executed between the parties (or) that the said definition includes RLNG also and consequently whether the petitioner can be permitted to declare its Plant Availability using RLNG as fuel.

7. On behalf of the petitioner, it is vehemently contended that;

(i) definition of "Natural Gas", includes Regasified Liquefied Natural Gas i.e.,RLNG. In support of its contention, the petitioner relied on Section 2(za) of the Petroleum and Natural Gas Regulatory Board Act, 2006 (PNGRB Act) which defines "Natural Gas" and includes "gas in liquid state, namely, liquefied Natural Gas and regasified liquefied Natural Gas".

(ii) according to GAIL which is a leading supplier of Natural Gas & RLNG in the country and also according to other international experts on Oil & gas, Natural Gas comes in 4 basic forms namely (i) Liquefied Natural Gas / LNG, (ii) Re-gasified Liquefied Natural Gas / RLNG, (iii) Compressed Natural Gas / CNG and (iv) Piped Natural Gas /PNG. Thus, RLNG is a form of Natural Gas. It is further stated that Natural Gas is predominantly methane, which is converted to liquid form (Liquefied Natural Gas) for ease of storage or transportation. When it is regasified, the liquefied natural gas is returned to its original gaseous state namely Natural Gas, thereby implying that

composition of RLNG is same as that of Natural Gas.

(iii) In the case of Association of Natural Gas & others vs Union of India & others [2004 (4) SCC 489], the Constitutional bench of the Hon'ble Supreme Court, summarized the definition of "Natural Gas" as defined in various statutes and subordinate legislations. According to the said judgment, RLNG also falls within the definition of Natural Gas, which in turn is held to be a 'Petroleum Product' in various legislations referred therein.

(iv) the parties have all along acted upon the premise that RLNG is nothing but "Natural Gas". According to the petitioner, the amended definition of "Fuel" would clearly indicate that parties have never intended to exclude any form of Natural Gas from the definition of "Fuel" and thus the term "Natural Gas" would encompass all forms of Natural Gas including PNG, RLNG and any other form of Natural Gas which is ideal for generation of power. As the parties have treated RLNG as Natural Gas, the petitioner states that it was allowed to use RLNG to declare Available Capacity of the project and to sell Net Electrical Energy as the PPA. The Commission in its Tariff Order FY 2013-14, permitted power generation with RLNG to an extent of 2431.21 MU by gas based IPPs for supply of such power to general public.

8. The above contentions and other contentions of the petitioner as well as the respondents, are examined as under:

(i) As pointed out on behalf of the respondents, the crux of the issue is interpretation definition of "Fuel" in the PPA subsisting between the parties herein, rather than definition of the term 'Natural Gas', as sought to be emphasized by the petitioner. In constructing all written instruments, the grammatical and ordinary sense of the word is adhered to unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, and inconsistency, but not further. In the light of the above, Clause 1.1.27 as per the amendment dated 02-05-2007 has to be examined. According to it, "Fuel" means ***Natural Gas only****. The use of the word only in the definition of fuel in Clause 1.1.27 of the PPA makes it very clear that the definition is exclusive, but not inclusive. According to Principles of Statutory Interpretation, when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive; whereas, where the word defined is declared to 'include' such and such, the definition is prima facie is extensive. Dictionary meaning of the word only is single in number; without others of the kind; alone; single. In other words, 'Natural Gas' in the same form is the fuel for the purposes of PPA and 'Natural Gas' in any other form is excluded from the definition of "Fuel". While it is so, the petitioner has cleverly taken recourse to the definition of 'Natural Gas' under PNGRB Act to state that 'Natural Gas' includes RLNG. The Commission is of the opinion that in this petition it is required to examine the definition of "Fuel" appearing in the PPA between the parties, but not the definition of 'Natural Gas'. As mentioned above, the*

Commission is of the opinion that as per the PPA subsisting between the parties, "Fuel" in this case means 'Natural Gas' alone, but not any other form of said 'Natural Gas'. Even otherwise, the aid sought to be taken by the petitioner from the definition of 'Natural Gas' under PNGRB Act is of not any help to the petitioner as the said definition is applicable to matters arising under the said legislation and meaning of the definition of 'Natural Gas' cannot be extended to matters arising out of the Electricity Act, 2003. Secondly, in the definition of 'Natural Gas' under the PNGRB Act, 2006 it is specifically mentioned that it includes- "(i) gas in liquid state, namely Liquefied Natural Gas and regasified liquefied Natural Gas". Such inclusive definition of 'Natural Gas' applies to matters arising out of PNGRB Act. On the other hand, by use of the word "only" in the definition of "Fuel" in clause 1.1.27 of the PPA between the parties herein, makes it clear that 'Natural Gas' in the said distinctive form is alone the fuel for the purpose of the PPA and that 'Natural Gas' in any other form is excluded from the said definition of "Fuel".

(ii) There is no dispute with regard to existence of different forms of 'Natural Gas' and the prevalent practice of converting the same from one form to another according to requirement or for the purpose of convenience, including storage and / or transportation. But in view of restrictive definition of "Fuel" which means Natural Gas only (emphasis supplied) in Clause 1.1.27 of the PPA subsisting between the parties, 'Natural Gas' in any other form is excluded from the said definition of "Fuel". Therefore, even though composition of LNG, RLNG, CNG and PNG are same as that of Natural Gas and that they are

different forms of 'Natural Gas', the use of the word "only" in the said Clause 1.1.27, excludes any other form of 'Natural Gas' from the definition of "Fuel".

(iii) In order to further emphasise the fact that 'Natural Gas' would encompass all of its different forms, including PNG, RLNG which are ideal for generation of power, the petitioner relied on judgment of Constitutional bench of the Hon'ble Supreme Court to state that RLNG falls within the definition of 'Natural Gas'. As mentioned above, there is no dispute of the fact that RLNG is one of the different physical forms of 'Natural Gas' and that they are all petroleum products. But the point that arises for consideration of the Commission is whether any different form, other than that of 'Natural Gas' is agreed to be used as a "Fuel" by the parties herein for generation of power. For the reasons mentioned above, 'Natural Gas' alone in the said physical form is only intended to be used as a fuel for generation of electricity by the parties herein. Hence, the judgment relied by the petitioner is not relevant for the purposes of resolving the dispute by the Commission in this case on hand.

(iv) Simply because the petitioner was permitted to generate power using RLNG two times, once each in the years 2011 and 2012 (or) that the Commission permitted power generation with RLNG by gas based IPPs for supply of such power to general public, does not automatically confer any right to generate power using RLNG as fuel (or) widen the scope of interpretation of the term "Fuel" in the PPA to include all forms of Natural Gas and declare Available Capacity of

the project and to sell Net Electrical Energy as per the PPA, on the said premise.

(v) "Fuel" as defined in the PPA between the parties herein as amended from time to time refers to Natural Gas alone and it cannot be given a wider interpretation to include all forms of Natural Gas. While there is no denying of the fact that physical form of "Natural Gas" includes PNG and RLNG, the use of only in the Clause 1.1.27 of the PPA specifically excludes any other physical form of 'Natural Gas' as fuel. Admittedly, for the convenience of transportation, Natural Gas is converted into liquid Natural Gas at land fall point and then transported to destination and then re-gasified and that no structural / chemical changes occur. But the cost of conversion of Natural Gas into liquid before transportation and re-gasification after transportation, for the purpose of generation of power involves costs. It is not the intention of the parties to use any other physical form of Natural Gas if the same in the said exclusive physical form is not available for generation of electricity. It is borne on record that initially parties herein contemplated Naphtha as the primary fuel. Subsequently, it was agreed between the parties to change the primary fuel of the project as Natural Gas and Naphtha & LSHS as alternate fuel. In due course of time, petitioner agreed to delete alternate fuel clause from the definition of fuel in the PPA in lieu of extending the term of PPA. Further, in view of inability of GAIL to supply Natural Gas, petitioner was permitted to use Natural Gas to be supplied by RIL in consideration of the fact that price of Natural Gas to be supplied by RIL is equal to that of the Natural Gas ought to have been supplied by GAIL. Thus, price and source of 'Natural Gas'

have an important bearing on generation of power. Simply because physical composition of Natural Gas and RLNG are similar does not automatically entitle the petitioner to generate power with RLNG, irrespective of its per unit price and source of supply. In this regard, the further contention of the petitioner that PPA does not place any restriction on cost of generation of power is not correct and cannot be accepted. Cost of per unit generation of power is of paramount consideration while granting consent to PPA and amendments made from time to time.

9. For all the reasons mentioned above, the Commission is of the opinion that as per the Clause 1.1.27 of the PPA dt. 31-3-1997 as amended from time to time, the term "Fuel" means "Natural Gas" only in the said physical form, but not in any other physical form. Therefore, Commission is not inclined to declare that Natural Gas includes RLNG for the definition of Fuel in the PPA. Consequently, Commission is unable to permit the petitioner to declare Plant Availability using RLNG as Fuel.

10. The petition filed by the petitioner under 86(1)(f) of the Act is dismissed.

11. The crux of the findings of the State Commission in the Impugned Order is as follows:

(a) The definition of the term "Fuel" as mentioned in Article 1.1.27 of the PPA dated 31.3.1997 as amended from time to time and the last amendment being on 2.5.2007 would mean 'Natural Gas only'. It is not disputed. The actual

dispute is whether the definition of “fuel” means ‘Natural Gas’ alone as incorporated in the last amendment Agreement dated 2.5.2007 or the said definition would include Regasified Liquefied Natural Gas also. The Petitioner has quoted definition Section of Petroleum and Natural Gas Regulatory Board Act, 2006 as well as the Constitution Bench of Hon’ble Supreme Court in 2004 4 SCC 489 in the case of Association of Natural Gas and Others Vs Union of India to substantiate it’s plea that the Natural Gas would include Regasified Liquefied Natural Gas also.

(b) The crux of the issue is interpretation of the term “Fuel in the subsisting PPA between the parties rather than the interpretation of the term of the definition of the term ‘Natural Gas’.

(c) According to Clause 1.1.27 as per the Amendment dated 2.5.2007 ‘Fuel” means “Natural Gas only”. Use of word “only” in the definition of fuel, makes it clear that the said definition is exclusive but no inclusive. The dictionary meaning of the word ‘only’ is single in number i.e. alone. In other words, the ‘Natural Gas’ in the same form is the fuel. The ‘Natural Gas’ in any other form is excluded from the definition of “Fuel”.

(d) According to the Petitioner, the definition of 'Natural Gas' under the Petroleum Board Act is that it includes Regasified Liquefied Natural Gas. It is required to examine the definition of the 'Fuel' appearing in the PPA between the parties and not the definition of 'Natural Gas'. 'Fuel' in this case means 'Natural Gas alone' but not any other form of said natural gas. The definition of the term 'Natural Gas' under the Petroleum Board Act, 2006 would apply to the said Act alone. But the word "only" in the definition of "fuel" in Clause 1.1.27 of the PPA makes it clear that the natural gas is alone the "fuel" for the purpose of the PPA. The natural gas in any other form is excluded from the definition of "Fuel".

(e) From the different forms of 'Natural Gas', it is prevalent practice of converting the same from one form to another for the purpose of convenience including storage and transportation, etc. But in view of the restrictive definition of the fuel which means 'Natural Gas only' in the PPA subsisting between the parties, the Natural Gas in any other form is excluded from the said definition of the fuel. Therefore, even though the composition of Natural Gas or Regasified Liquefied Natural Gas and other forms are the same, they are different forms of

'Natural Gas'. This means, the word "**only**" in the Clause 1.1.27 excludes any other form of natural gas from the definition of the "Fuel".

(f) The Petitioner relied upon the judgment of the Constitution Bench stating that the Regasified Liquefied Natural Gas falls within the definition of the natural gas. There is no dispute that the Regasified Liquefied Natural Gas is one of the different forms of the natural gas. But the question in the present case is whether the different form other than that of the Natural Gas is agreed to be used as a "Fuel" by the parties for generation of power.

(g) As per the PPA, 'Natural Gas' alone in the said physical form is intended to be used as a fuel for the generation of electricity. Therefore, the judgment of the Constitution Bench is not relevant to solve the present dispute.

(h) Merely because the Petitioner was earlier permitted by the State Commission to generate power using Regasified Liquefied Natural Gas it would not automatically confer any right to the Petitioner to generate power by using the Regasified Liquefied Natural Gas as "Fuel".

(i) The Fuel as defined in the PPA refers to the 'Natural Gas' alone. It cannot be given a wider interpretation to include all forms of Natural Gas. It is true that the physical form of natural gas includes other forms also like Regasified Liquefied Natural Gas but the use of the term "only" in the clause 1.1.27 of the PPA specifically excludes any other form of Natural gas as "fuel".

(j) It is true that for the convenience of the transportation, natural gas is converted into Liquefied Natural Gas and then transported to destinations and thereupon Regasified and in that process no chemical changes occur. But, the cost of conversion of natural gas into liquid before transportation and Regasification after transportation for the purpose of generation of power involves heavy price.

(k) It is not the intention of the party to use any other physical form of natural gas if the same in said physical form is not available for generation.

(l) It has to be borne in mind that initially parties contemplated Naptha as the primary fuel. Subsequently, it was agreed between the parties to change the primary fuel of the project as Natural

Gas and Naptha & LSHS as alternate fuel. In due course of time, the parties agreed to delete alternate fuel clause from the definition of the fuel in the PPA in lieu of extending term of the PPA.

(m) In view of the inability of the GAIL to supply Natural gas, the Petitioner was permitted to use Natural gas to be supplied by Reliance in consideration of the fact that the prices of natural gas to be supplied by the Reliance were equal to that of the Natural gas supplied by the GAIL. Thus, the prices of the natural gas have an important bearing on the generation of the power.

(n) According to the Petitioner, it has not placed any restrictions on the cost of generation of power. This cannot be accepted. Cost of the generation of power is of paramount consideration while granting consent to the PPA and amendments made from time to time.

(o) Hence, the Commission is of the opinion that the term “Fuel” means “Natural Gas only” in the said physical form and not in any other physical form. Therefore, the Commission is not inclined to declare that the Natural Gas includes Regasified Liquefied Natural Gas for the definition of fuel in the

PPA. Accordingly, the claim of the Petitioner is rejected.

12. The above reasonings and findings rendered by the State Commission have to be borne in mind while dealing with these issues raised in this Appeal.

13. The short and simple question involved in the present Appeal is as to the interpretation of the definition of the term "**Fuel"** as defined in the PPA dated 31.3.1997 as amended from time to time, the last amendment being on 2.5.2007, in which the definition of the term 'Fuel" has been quoted as **'Natural Gas only'**.

14. In the light of the correct interpretation of the definition, we are to deal with the issue as to whether the term "**Natural Gas only"** as referred to in the amendment agreement dated 2.5.2007 includes 'Regasified Liquefied Natural Gas' also.

15. The crux of the argument of the Appellant is that the term "**Natural Gas Only**" as defined in the PPA Amendment Agreement dated 2.5.2007 includes Regasified Liquefied Natural Gas also as the chemical form of both Natural Gas and Regasified Liquefied Natural Gas are the same.

16. According to the Appellant, Regasified Liquefied Natural Gas when fired is also in gaseous form. Therefore, the term "natural gas" would include Regasified Liquefied Natural

Gas and as such, the Appellant is entitled to generate and supply electricity under the PPA using Regasified Liquefied Natural Gas.

17. On the other hand, the learned Counsel for the Respondents would submit that both the Appellant and the Respondents consciously decided to limit fuel to natural gas only with reference to 'Natural Gas' allocation of 1.64 MMSCMD to the Appellant since it was cheaper in comparison to other alternative and therefore, as per the terms of the PPA as amended from time to time, the intent and purpose is clearly provided in the earlier orders of the State Commission dated 12.4.2004, 14.12.2004 and 30.12.2006 as per which the definition of the "fuel" was specifically amended to limit the cost of power in order to avoid a situation wherein the costly power generated from expensive alternate field like Naphtha and Regasified Liquefied Natural Gas etc., would burden and prejudice the consumers of the Respondent and that therefore, the Regasified Liquefied Natural Gas which is costly, cannot be included in the term "natural gas" and therefore, the claim made by the Appellant before the State Commission has been rightly rejected by the State Commission.

18. In the light of the rival contentions urged by the learned Counsel for the parties, it would be appropriate to examine the stage wise variation in the PPA between the Appellant

and the Respondents in respect of the definition of the term "Fuel". This is set-out as below:

Amendments to the Definition of Fuel

PPA dated 31.03.1997	***Amendment Agreement to the PPA dated 18.6.2003***	***Amendment Agreement dated 02.05.2007***
"27) Fuel: ***means gas, Naptha, low sulphur heavy stock or furnace oil, and the like, that is intended to be used as primary fuel,*** *by one or more units of the Project to generate power from the Project or in case of unavailability of Naptha any of the above as alternate fuel."*	*"Fuel: means* ***Natural Gas that is intended to be used as primary fuel*** *by one or more units of the project to generate power from the Project or in case of unavailability of primary fuel, Naptha or Low Sulphur heavy stock and the like as alternate fuel."*	*"Fuel: means* ***Natural Gas only****."*

19. The close reading of the PPA which was amended from time to time would give the following details:

(a) In terms of the PPA dated 31.3.1997, the fuel means the gas, Naptha, low sulphur, heavy stock or furnace oil and the like that is intended to be used a primary fuel.

(b) As per Amendment Agreement dated 18.6.2003 which was executed pursuant to the State Commission order dated 12.4.2003, the fuel has been defined the "natural gas intended to be used as primary fuel" and in case of unavailability of

the said primary fuel Naptha, Low Sulphur Heavy Stock (LSHS), and the like could be used as alternate fuel.

(c) Pursuant to further negotiations, one more Amendment Agreement was executed between the parties on 2.5.2007 as per the order of the State Commission dated 30.12.2006 wherein two changes were made to the fuel Supply Clause:

(i) The term intended to be used as found in the earlier Agreement dated 31.3.1997 and 18.6.2003 were deleted. Thus, the scope of the natural gas was confined to its natural meaning.

(ii) Use of alternate liquid fuel like Naptha, low sulphur heavy stock or furnace oil and the like was deleted.

20. This amendment would make it clear that subsequent to the amendment agreement dated 2.5.2007, the definition of natural gas was confined or expanded to its natural meaning by deleting the words "**intended to be used**".

21. On the basis of this amendment, it is contended by the learned Counsel for the Appellant that the term "intended to be used" pursuant to the Amendment Agreement dated 2.5.2007 which implies with the restrictions on the source on

natural gas only from GAIL as envisaged in the bid and the Original PPA dated 31.3.1997 had been deleted and as such, the amendment to the definition of fuel in the Agreement dated 2.5.2007 has to be given its full meaning i.e. natural gas in all its forms including Regasified Liquefied Natural Gas.

22. This contention is refuted by the learned Counsel for the Respondents that the proper reading of this amendment would indicate that the intention of the parties is to generate the fuel only through the Natural Gas in its original form and not through it's any other forms of Natural Gas.

23. In order to strengthen the plea made by the Appellant to the effect that Regasified Liquefied Natural Gas is nothing but Natural Gas, the learned Counsel for the appellant has cited the Petroleum Board Act in which the definition of the Natural Gas has been referred to.

24. The definition u/s 2 (za) of the Petroleum and Natural Gas Regulatory Board Act defines the term "Natural Gas" to include Regasified Liquefied Natural Gas. The portion of the definition is given below:

> *"gas obtained from bore-holes and consisting primarily of hydrocarbons and includes-*
>
> > *(i) gas in liquid state, namely, liquefied Natural Gas and* ***Regasified Liquefied Natural Gas****…"*

25. In addition to this definition Section of the term “Natural Gas” in Petroleum Board Act, he has also cited the Constitution Bench judgment of Hon’ble Supreme Court in the case of Association of Natural Gas & Others V Union of India & Others reported as (2004) 4 SCC 489 in which the Constitution Bench of the Hon’ble Supreme Court has held that the Liquefied Natural Gas is a form of Natural Gas. The operative portion of the judgment is given as below:

> *“Q:1. Whether Natural Gas in whatever physical form including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of the List / and the Union has exclusive legislative competenance to enact.*
>
> *A.1: Natural Gas including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of List / and the Union has exclusive legislative competence to enact laws on natural gas.”*

26. On the basis of the definition section in the Petroleum Board Act as well as the judgment of the Constitution Bench, the learned Counsel for the Appellant strenuously submitted that the definition of the Fuel under the PPA includes all forms of Natural Gas including the Regasified Liquefied Natural Gas.

27. We have gone through the definition Section of the Petroleum Board Act as well as the Constitution Bench judgment.

28. The State Commission after considering the definition Section as well as the Constitution Bench judgment, as

referred to above, has concluded that this would not help the Petitioner (Appellant) to resolve the present dispute since the dispute in question in the present case, would involve the interpretation of the relevant Articles of the PPAs in question and therefore, the conclusion on the basis of the interpretation of the Article in the PPA alone has to be arrived at and not on the definition Section of the some other Act or the findings given by the Constitution Bench while interpreting the word "Natural Gas" in the different context.

29. This finding, rendered by the State Commission to the effect that the arguments advanced by the Petitioner/Appellant on the basis of the definition Section of the Petroleum Board Act as well as the Constitution Bench would not be relevant to decide the issue in the present case, in our view, is perfectly justified.

30. As correctly pointed out by the State Commission as well as by the Respondent Counsel, we are only concerned and confined to the question as to what would be the proper interpretation of the meaning of the "fuel" which has ultimately been defined in the amended Agreement of the PPA dated 2.5.2007 as 'Natural Gas only'.

31. Keeping this concept in our mind, the issue in question has to be dealt with.

32. It is settled law that the definition of "Fuel" as referred to in the PPA has to be analysed in the light of the surrounding circumstances which led to the amendment agreement dated 2.5.2007 as laid down in the various judgments of Hon'ble Supreme Court cited by the Appellant as under:

> *(a)* ***Reardon Smith Line Limited V Hansen-Tangen, reported as (1976) 1 W.L.R 989:***
>
> *"No contracts are made in a vacuum: there is always a setting in which they have to be placed.* ***The nature of what is legitimate to have regard to its usually described as the 'surrounding circumstances' but this phrase is imprecise****; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."*
>
> *(b)* ***Supdt and Remembrancer of Legal Affairs v Abani Maity: (1979) 4 SCC 85;***
>
> *"18. Exposition ex visceribus actus is a long recognised rule of construction.* ***Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation****. For instance, the use of the word "may" would normally indicate that the provision was not mandatory. But, in the context of a particular statute, this word may connote a legislative*

imperative particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, "of an ineffectual angel beating its wings in a luminous void in vain". If the choice is between two interpretations", said Viscount Simon L.C in Nokes v Doncaster Amalgamated Collieries Ltd:

"the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of brining about an effective result."

(c) ***Deshbandhu Gupta & Co. V DelhiStock Exchange Association : (1979) 4 SCC 565***

*"**The principle of contemporanea exposition (interpreting a statute or any other document by reference to the exposition it has received from contemporary authority) can be invoked though the same will not always be decisive of the question of construction (Maxewll 12th ed.p.268).** In Crawford on Statutory construction (1940 ed.) in para 219 (at pp. 393-395), it has been stated that administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although not controlling, is nevertheless entitled to considerable weight, it is highly persuasive."*

33. In addition to these judgments, Respondents also have cited some more judgments which would clarify the same ratio, the particulars of which have been given below:

(a) The Hon'ble Supreme Court has held in the matter of **Polymat India (P) Ltd Vs National Insurace Company Ltd at (2005) 9 SCC** ***174 that its is the duty of the Court to interpret the document of contract as was understood between the parties. It is not for the court to make a new contract, however reasonable, if the parties have not made it themselves. Therefore, the terms of the contract have to be construed strictly without altering the nature of the contract as it may affect the interest of the parties adversely.*** The following are the relevant extracts:

"***19. In this connection, a reference may be made to a series of decisions of this Court wherein it has been held that <u>it is the duty of the court to interpret the document of contract as was understood between the parties.</u>*** *In the case of General Assurance Society Ltd V Chandumull Jain,SCR at P. 510 A-B it was observed as under:*

"In interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties,

because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves."

(b) In the case of **Commercial Auto Sales (P) Ltd v Auto Sales (Properties), (2009) 9 SCC 620** the Hon'ble Supreme Court has held as under:

*"14**. It is well settled that the intention of the parties to an instrument must be gathered from the terms thereof in the light of surrounding circumstances**. In union of India V Millennium Mumbai Broadcast (P) Ltd (2006) 10 SCC 510 this Court said that a document must be construed having regard to the terms and conditions as well as nature thereof.*

The true nature of relationship between the parties concerning the occupation of subject premises by the Appellant was required to be ascertained from the family arrangement which the High Court failed to do and thereby committed grave error in not considering the matter in right perspective. As a matter of fact, a material clause like Clause 8 of the family settlement has been overlooked altogether affecting decision in the matter."

(c) Further the Hon'ble Supreme Court in **Gedela Satchidananda Murthy vs Dy Commercial Endowment Department, AP (2007) 5 SCC 677** has referred to an earlier Queen's Bench judgment and held that ***if the parties to a contract by their course of dealing put a particular***

interpretation on the terms of it on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation as if they had written it down as being a variation of the contract. The relevant extract are as under:

> ***"…..If the parties to a contract, by their course of dealing, put a particular interpretation on the terms of it on the faith of which each of them- to the knowledge of the other acts and conducts their mutual affairs they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not- or whether they were mistaken or not or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."***

34. The perusal of these decisions would make it clear that the ratio is that it may be inferred both from the expressed words of the PPA as well as from the conduct of the parties to the PPA that all times they had intended to generate power from "fuel" and this intention would be gathered from surrounding circumstances also. In the light of the above ratio, we shall now see the surrounding circumstances.

35. The surrounding circumstances are as follows:

(a) After the execution of the amended agreement dated 2.5.2007, the Empowered Group of Ministers suggested to enter into a Gas Sales Agreement for supply of natural gas from the KG D-6 basin. Accordingly, the Appellant entered into a Gas Sales and Purchase Agreement with Reliance Industries Limited and NIKO Limited for supply of gas on 17.4.2009. This was approved by the State Commission by the Order dated 28.4.2009. Again on 2.2.2011, a meeting was convened by the Andhra Pradesh Power Coordination Committee (APPCC) in which the APDISCOMs, APTRANSCO and the Power Producers including the Appellant participated. In the said meeting, it was decided that the Generating Companies will enter into an Agreement with the GAIL for supply of Regasified Liquefied Natural Gas so that the power demand in the State of Andhra Pradesh could be addressed. Accordingly, the Appellant entered into a Spot Sales Agreement with the GAIL for purchase of Spot Regasified Liquefied Natural Gas. The APPCC informed the Appellant about the approval of the Spot Gas Sales Agreement. Accordingly, the Appellant declared the availability of power based on the Regasified Liquefied Natural gas.

Then the Appellant issued a Gas Supply and Purchase Notice to GAIL for purchase of Regasified Liquefied Natural Gas. In April, 2012, the APDISCOMs (R-4 to R-7) accepted the power generated on Regasified Liquefied Natural Gas.

(b) In pursuance of the same on 11.5.2012, the Appellant wrote a letter to the Andhra Pradesh Power Coordination Committee (APPCC) enclosing monthly tariff bill for the Gas received from the GAIL. The Appellant wrote to the APTRANSCO also requesting the permission to use Regasified Liquefied Natural Gas by giving various circumstances and reasons for the said request.

36. Admittedly, on several occasions in the past three years, at the request of Discoms, the Appellant generated power using Regasified Liquefied Natural Gas and supplied power to the Distribution Companies. For the sale of supply, the Distribution Companies paid both the capacity charges as well as the energy charges to the Appellant without resorting to any amendment to the definition of fuel.

37. In fact on 12.7.2013, the APTRANSCO (R-2) wrote a letter to the Petroleum Board requesting to ensure for the grant of Open Access to various Generating Companies in the State of Andhra Pradesh for transportation of Regasified Liquefied

Natural Gas through East-West pipe lines. The letter sent by the APTRANSCO to the Petroleum Board is as follows:

> "*It is bring to your kind notice that few IPPs from east coast have already approached RGTIL for transportation of RLNG from west coast based on directives issued by PNGRB. Further, the State Utilities likely to avail RLNG power on need basis.*
>
> *In the light of the above, I request you to kindly issue suitable instructions to M/s. RGTIL for early implementation of Open Access on EWPL to enable to transport RLNG from West Coast to East Coast".*

38. From the foregoing letter, it is clear that the APTRANSCO (R-2) acting on behalf of the Distribution Companies, Respondents accepted and admitted that Generating Companies including the Appellant were permitted to use Regasified Liquefied Natural Gas and made a request to the Petroleum Board to facilitate the access to transportation facilities so that the Regasified Liquefied Natural Gas could be transported to the State of Andhra Pradesh to be used for generation of power.

39. The above facts are not disputed.

40. According to the Appellant since the Distribution Companies, Respondents have accepted that the Appellant was permitted to generate the power using the Regasified Liquefied Natural Gas, they cannot now be allowed to plead contrary to their stand which would amount to estoppels as they are now pleading contrary to their own earlier action.

41. For this proposition, the learned Counsel for the Appellant has cited the following decisions:

> *"(a)* ***Joint Action Committee of Air Line Pilot's Association of India V DG of Civil Aviation (2011) 5 SCC 435:***
>
> *"12. The doctrine of election is based on the rule of estoppel-the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands…"*
>
> ***(b) B L Sreedhar v K.M Munireddy: (2003) 2 SCC 355:***
>
> *"30. If a main either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they others wise might have abstained from, he cannot question the legality of the act, he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."*

42. It was also pointed out that the Distribution Companies (Respondent) decided in the meeting held on 2.2.2011 that Regasified Liquefied Natural Gas will be procured for

generation of power by power producers in the State of Andhra Pradesh.

43. Accordingly, Regasified Liquefied Natural Gas was allocated to the gas based power stations in the State of Andhra Pradesh against existing allocation of Natural gas to GAIL as evident from Ministry of Petroleum and Natural Gas's letter dated 2.3.2012 and the APPCC's letter dated 3.3.2012.

44. That apart, the State Commission in the Tariff Order for the year 2013-14, permitted power generation with Regasified Liquefied Natural Gas to an extent of 2431.21 MU from April, 2013 to July, 2013 by gas based IPPs for supply of such power to general public. Using this permission, the Distribution Companies have already utilised Regasified Liquefied Natural Gas power for the entire month of April, 2013.

45. The State Commission also issued an Order dated 3.1.2013 for generation of expensive power using Regasified Liquefied Natural Gas for the purpose of supplying power to the willing consumers and directed the Distribution Companies to arrange such power through the Appellant and other Power Generating Stations.

46. Before issuing the said order, the State Commission had invited comments from all stake holders and finalised the

schemes. The APTRANSCO or APPCC or the Distribution Companies have not raised any issue with respect to the Regasified Liquefied Natural Gas not being covered in the Fuel Clause of the PPA.

47. These facts would indicate that the Distribution Companies have accepted the fact that the definition of "fuel" under the PPA includes Natural Gas in all its forms including the Regasified Liquefied Natural Gas. In the event that the definition of the Fuel did not include the Regasified Liquefied Natural Gas, the Distribution Companies were required to seek the approval of the State Commission for the amendment of the PPA before the Gas based Power stations were permitted to generate power on Regasified Liquefied Natural Gas. But, this was not done by the Distribution Companies.

48. In the light of the above circumstances and the conduct of the parties, we shall now go into the meaning of the relevant Articles of the PPA in order to find out meaning of the definition of the "Fuel" and the term "Natural Gas Only".

49. As mentioned earlier, the perusal of the PPA and the other Amendment Agreements would show that the definition of 'Fuel' has undergone two major amendments from the Original Agreement:

(a) By the first Amendment, the Appellant was permitted to use Natural Gas as primary Fuel and Naptha , LSHS etc as alternate fuel;

(b) By the second Amendment, the alternate fuel Clause was deleted and fuel was defined to mean 'Natural Gas only'.

50. According to the Appellant, the use of the term "Only" in Article 1.1.27 of the PPA implies exclusion of generation on alternate fuel only. The use of the term "only" in Article 1.1.27 is not meant to limit or restrict the forms of natural gases which may be used. Thus, the term "Natural Gas" would encompass all forms of natural gases including the Regasified Liquefied Natural Gas and any other form of Natural Gas which is ideal for generation of power.

51. It is not seriously disputed that the composition of both Natural Gas in original form as well as Regasified Liquefied Natural Gas are one and the same. On this aspect, the following factors have been brought to our notice:

(a) The chemical and physical composition of KG-D-6 which was allocated to the Appellant and Regasified Liquefied Natural Gas is identical.

(b) The process of liquefaction and regasification is solely for the purpose of

transportation of natural gas. It does not change or alter the basis characteristics of the gas.

(c) KG-D6 Gas and Regasified Liquefied Natural Gas are to be supplied through the same pipeline.

52. The above aspects have to be taken note of while interpreting the definition of 'Fuel' in the light of the term "Natural Gas only".

53. From a close reading of Clause 1.1.27 of the Amendment Agreement dated 2.5.2007, it is clear that the word "only" was used after Natural Gas. The word "only" was used in order to specify the deletion of alternate fuel from the said Clause.

54. Thus, it is evident that there are two aspects which would emerge from the wordings contained in the Amendment Agreement:

(a) The deletion of alternate fuel clause was limited to deletion of alternate fuel like Naptha and LSHS. Regasified Liquefied Natural Gas is not an alternate fuel. It is natural gas itself.

(b) Use of the term "only" in the definition of fuel is intended to limit the definition to natural gas and not alternate fuel like Naptha and LSHS. The use

of the term “only” does not preclude or prevent the Appellant from using Regasified Liquefied Natural Gas.

55. The Amendment Agreement dated 2.5.2007 was solely for the purpose of deletion of the alternate fuel like Naptha like LSHS and not for the other forms of the Natural Gas. In fact, as indicated above, the supply of Natural Gas from GAIL and from KG D-6 basin has reduced to NIL thereby implying the Appellant is not being receiving any Natural Gas from these sources since March, 2013.

56. The order dated 30.12.2006 passed by the State Commission is intended only to delete alternate fuel which would mean Naptha, LSHS and the like. It did not impose any restrictions in terms of the forms of the Natural gas to be used. The Regasified Liquefied Natural Gas and the Natural Gases are supplied in a co-mingled manner. This would show that the Regasified Liquefied Natural Gas is nothing but Natural Gas since, no other restrictions have been placed on the definition of the Natural Gas.

57. At the risk of repetition, it is to be reiterated that the use of the term “Natural Gas only” in the PPA is only used to restrict the definition of the “fuel” to one form of fuel i.e. Natural Gas and not multiple fuel like Naptha and LSHS.

58. In other words, Regasified Liquefied Natural Gas is not an alternate fuel in terms of the PPA. The Regasified Liquefied Natural Gas is nothing but 'Natural Gas'. The liquification and Regasification is simply for the purpose of transportation of natural gas. Hence, it does not come within the category of alternate fuel.

59. This is evident from the Order of the State Commission dated 30.12.2006 in OP No.19 of 2006. In the said order, the State Commission has categorically observed that the proposed amendment were aimed on deletion of alternate fuel and making natural gas as only fuel.

60. The relevant portion of the observation in the said order is extracted below:

> "*As can be seen from the foregoing, the proposed amendments are broadly aimed at mitigating the risk of payment of fixed charges in the event of gas being not available/partially available and consequently the VPGL declaring the availability of the power plant with costly alternate fuels viz., Naptha or Low Sulphur Heavy Stock (LSHS) and the like as per the provisions of the PPA dated 18.6.2003. Accordingly, the amendments centre around deletion of usage of alternate fuel from the definition of "Fuel" in the PPA and making natural gas as the only fuel…"*

61. So, in the absence of any material to demonstrate that the Regasified Liquefied Natural Gas would come under the category of the alternate fuel, it cannot be contended that the Regasified Liquefied Natural Gas is not a Natural Gas merely because it is different form of Natural Gas.

62. Even though the Natural Gas in Original Form has been initially converted into Liquid form and ultimately the Liquid form has been converted into Natural Gas, ultimately, the Appellant has supplied only the said 'Natural Gas' to the Respondent. Therefore, viewed from any angle it cannot be contended that it is not a Natural Gas but it will come under the alternate fuel.

63. One other argument which is also quite relevant, has been advanced by the Respondents.

64. According to the Respondents, the difference in price of Natural Gas and the price of Regasified Liquefied Natural Gas is an important factor to be taken into consideration and since the Regasified Liquefied Natural Gas involves high prices, the same cannot be used by the Appellant to generate the electricity and supply the same to the Respondent.

65. It is further contended by the Respondents that both the Appellant and the Respondents amended the PPA so as to permit the Appellant to use Natural Gas only as a primary fuel in order to prohibit the purchasers other Liquid Fuels with high price.

66. This contention is misplaced for the following reasons.

67. As pointed out by the learned Counsel for the Appellant, the State Commission in its order dated 30.12.2006 granting

approval to the amendment to the PPA for deletion of the term “alternate fuel clause” has noted that the in PPA provide for variable cost as a pass through and increase in cost of fuel is an accepted risk that APTRANSCO and the Distribution Companies are taking. As such, the price risk of natural gas has been assumed by the Respondents.

68. As indicated earlier, in the Order dated 30.12.2006 passed in OP No.19 of 2006, the State Commission has specifically noted that any PPA provide for variable cost as a pass through. With respect to the issue of abnormal increase in price of gases, the Respondent submitted that the price risk would apply to all types of fuel.

69. Thus, it is clear that the price of gas is not a determinative factor. The risk of any increase of price of fuel was assumed by the Respondent in the light of the express submissions of the Respondent accepting the fuel price risk. Hence, they cannot now contend that the cost of fuel was a determinative factor in deciding whether the Appellant is permitted to use Regasified Liquefied Natural Gas under the PPA.

70. In terms of the Order dated 30.12.2006, the Fuel Risk is completely with the Appellant. The Appellant is to arrange for the fuel to operate the plant. The Appellant obtained quotes from GAIL for supply of Regasified Liquefied Natural

Gas. In the very same order, it is recorded that the risk of increase in price of fuel was assumed by the Respondents, the Distribution Companies. As such, the risk of fuel price increase was solely that of the Respondent. Hence, it is for the Respondents to decide whether they want to avail the power being generated.

71. In other words, the issue of cost of power is internal matter among the Respondents. The Appellant is entitled to exercise its right under the PPA which it has done by deciding to use Regasified Liquefied Natural Gas since KG D-6 gas is not available.

72. In any event, since Regasified Liquefied Natural Gas is included in the definition of fuel under the PPA, the high price of Regasified Liquefied Natural Gas cannot prevent the Appellant from generating power on Regasified Liquefied Natural Gas.

73. **Summary of Our Findings**:

We have analysed the definition of "Fuel" as referred to in the PPA in the light of the surrounding circumstances which led to the amendment agreement dated 2.5.2007 as well as conduct of the parties. After careful analysis, we come to the conclusion that the definition of "Fuel" under the PPA includes natural gas in all its forms including the Regasified Liquefied Natural Gas. The reasons are as follows:

(i) On several occasions in the past three years at the request of the Discoms, the Appellant generated power on Regasified Liquefied Natural Gas. For the sale of supply on Regasified Liquefied Natural Gas, the Discoms paid both the capacity charges as well as energy charges to the Appellant without resorting to any amendment to the definition of "Fuel".

(ii) APTRANSSCO acting on behalf of the Discoms wrote a letter to the Petroleum Board in connection with the grant of open access to various generating companies in the State of A.P. for transportation of Regasified Liquefied Natural Gas through East-West pipelines.

(iii) The State Commission in the Tariff Order for 2013-14 permitted power generation with Regasified Liquefied Natural Gas to the extent of 2431.2 MU during the period April 2013 to July 2013 by gas based IPPs for supply of such power to general public. Using this approval, the Discoms utilized energy generated on Regasified Liquefied Natural Gas for the entire month of April, 2013.

(iv) The State Commission also issued order dated 3.1.2013 for generation of expensive power using Regasified Liquefied Natural Gas for the purpose of supplying power to the willing

consumers and directed Discoms to arrange such power through the Appellant and other generating stations. Before issuing the said order, the State Commission invited comments from all stakeholders and finalized the scheme. The APTRANSCO or APPCC or the Discoms have not raised any issue with respect to the Regasified Liquefied Natural Gas not being covered in the Fuel Clause of the PPA.

(v) These facts would indicate that the Discoms have accepted the fact that the definition of "Fuel" under the PPA includes Regasified Liquefied Natural Gas. In the event that the definition of "Fuel" did not include Regasified Liquefied Natural Gas, the Discoms were required to seek the approval of the State Commission for the amendment of the PPA before Gas Based Power Stations were permitted to generate power on

Regasified Liquefied Natural Gas. But, this was not done by the Discoms.

(vi) The definition of "Fuel" in the PPA has undergone two major amendments. The use of term "only" in Article 1.1.27 of the PPA in the final amendment dated 2.5.2007 implies exclusion of generation on alternate fuel only. The use of term "only" in Article 1.1.27 is not meant to limit or restrict the forms of natural gases which may be used. Thus, the term "Natural Gas" would include Regasified Liquefied Natural Gas.

74. Accordingly, the Appeal is allowed and the impugned order is set aside. However, there is no order as to costs.

75. Pronounced in the open court on this day of **30th June, 2014.**

(Rakesh Nath) **Technical Member**

(Justice M. Karpaga Vinayagam) **Chairperson**

Dated:30th June, 2014

√REPORTABLE/~~NON-REPORTABLE~~