Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:30th June, 2014

Appeal No. 282 of 2013 & Appeal No. 283 of 2013

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

Appeal No. 282 of 2013

PPN Power Generating Company Private Limited
IIIrd Floor, Jhaver Plaza,
1A, Nungambakkam High Road,
Chennai-600 034

... Appellant

Versus

1. **Tamil Nadu Generation and Distribution Corpn Ltd. (TANGEDCO)**
   144 Anna Salai,
   Chennai-600 002

2. **Tamil Nadu Electricity Regulatory Commission**
   19A, Rukmani Lakshmi Pathy Road,
   Egmore, Chennai-600 008

……Respondent(s)

Counsel for the Appellant (s) : Mr. Rahul Balaji
Mr. Senthil Jagadeesan
Mr. Govind Manoharan

Counsel for the Respondent (s) : Mr. R Yashod Vardhan, Sr Adv
Mr. S Vallinayagam

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J U D G M E N T

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

1. M/s. PPN Power Generating Company Limited has filed the Appeal in Appeal No.282 of 2013 challenging the Impugned

Order dated 15.7.2013 passed by Tamil Nadu State Commission fixing the completed Capital Cost for its project as Rs.1344.21 Crores as against the Capital Cost claimed by the PPN Power Project as Rs.1379.25 Crores.

2. Similarly, Tamil Nadu Electricity Board (TANGEDCO) filed the Appeal in Appeal No.283 of 2013 challenging the very same Impugned Order dated 15.7.2013 fixing the Capital Cost of the project as Rs.1344.21 Crores as against its proposal to allow a sum of Rs.1251.27 Crores only.

3. Since both the Appeals have arisen out of the Common Order dated 15.7.2013 and both the parties are the same, this common judgment is being rendered.

4. The short facts are as follows:

(a) M/S. PPN Power Generating Company Private Limited (PPN Power) is engaged in the generation of electricity. It is an independent private power generating company. PPN Power was set-up under the Government of India policy for independent power project Notified on 30.3.1992.

(b) The Respondent Electricity Board (TANGEDCO) entered into a Power Purchase Agreement dated 3.1.1997 with the Appellant for the purchase of entire capacity and energy generated by the Appellant

pursuant to the terms and conditions set out in the Power Purchase Agreement.

(c) Thereafter, PPN Power, the Appellant set up a 330.5 MW Combined Cycle Gas Turbine power generating station in Nagapattinam District Tamil Nadu.

(d) The Appellant achieved the Commercial Operation Date on 26.4.2001. In the meantime, the Appellant obtained Techno Economic Clearance from the Central Electricity Authority under Electricity Supply Act, 1948.

(e) Pursuant to obtaining of the Techno Economic Clearance, a Negotiating Committee was constituted by the Government of Tamil Nadu.

(f) After discussions, the Committee directed the PPN Power, the Appellant to finalise the Engineering, Procurement and Construction contract early and also insisted that the said contract may be finalised by obtaining the International Competitive Bidding Process.

(g) Accordingly, the Appellant accepted the same and had gone for International Competitive Bidding in accordance with the procedure stipulated by the

Respondent to finalise the Engineering, Procurement and Construction contract.

(h) Thereupon, the Appellant submitted all the copies of the draft Engineering, Procurement and Construction contract along with the bid documents to the Respondent, the Electricity Board.

(i) The Respondent Electricity Board, on 31.1.1997 confirmed that the bid documents are in order.

(j) The Appellant submitted the proposal to the Respondent for seeking approval pursuant to the process of finalising the Engineering, Procurement and Construction contract through International Competitive Bidding. The Respondent approved the selection of M/s. Marubeni Corporation as the contractor on 7.7.1997.

(k) The Respondent also confirmed the approval of the Construction Contract. As per the PPA, the completed capital cost of the project was to be submitted to the Central Electricity Authority (CEA) for approval under the Government of India Notification.

(l) Accordingly, the complete details of the expenditure incurred for the project with supporting

documents for the purpose of determining the capital cost were submitted on 20.7.2001 to the CEA.

(m) Pending finalisation of the capital cost by the CEA, the Respondent has been making the monthly energy bills payment on the basis of the provisional capital cost of Rs.1,379.25 Crores claimed by the Appellant, the Generator from 26.4.2001 onwards.

(n) While this process for finalisation of capital cost by the CEA was going on, the Electricity Act, 2003 was enacted on 10.6.2003.

(o) Hence, the Central Electricity Authority took a view that consequent to the enactment of Electricity Act, 2003, the State Commission is the competent authority to fix and determine the Capital Cost.

(p) In view of the above, the Electricity Board, the Respondent filed a Petition before the State Commission in MAP No.1 of 2007 during September, 2007 for determination and approval of the capital cost praying to allow a sum of Rs.1251.27 Crores.

(q) In the meantime, the Appellant filed the Writ petition challenging the jurisdiction of the State Commission in determining the capital cost. However, the Appellant later withdrew the Writ Petition and

approached the State Commission and filed a separate Petition in MAP No.2 of 2008 on 24.9.2008 before the State Commission for determination and approval of Rs.1379.25 Crores as capital cost.

(r) Thus, both these Petitions were filed by both the Appellant and Respondent separately in different Petitions under Electricity Act, 2003 for fixation of the Capital Cost of the project of the Appellant in respect of the PPA entered into between the Appellant and the Respondent.

(s) The State Commission admitted both these Petitions and took up these together. It then directed for constitution of an Evaluation Committee for conducting evaluation and for sending the report to the State Commission to enable it to pass orders regarding the determination of the capital cost.

(t) The Evaluation Committee accordingly, after deliberations had sent the Report to the State Commission.

(u) Thereupon, the comments were called for from the parties by the State Commission on the Report of the Evaluation Committee. Accordingly, both the parties filed their affidavits giving necessary details to enable the State Commission to determine the

capital cost as claimed by them in their respective Petitions.

(v) Ultimately, the State Commission determined the capital cost of Rs.1344.21 Crores. Thus, the State Commission after rejecting the claim of the Appellant to fix capital cost of Rs.1379.25 Crores, fixed the Capital Cost only at Rs.1344.21 Crores. Similarly, after rejecting the proposed capital cost of Rs.1251.27 Crores as claimed by the Respondent, the State Commission fixed the Capital Cost as Rs.1344.21 Crores.

(w) Aggrieved over this rejection of the claims of respective parties, both the Appellant and the Respondent filed the separate Appeals.

5. The PPN Power, the Appellant filed Appeal in Appeal No.282 of 2013 seeking for the enhancement of the amount to be fixed as capital cost. Similarly, the TANGEDCO, the Respondent also filed a separate Appeal in Appeal No.283 of 2013 for reducing the Capital cost.

6. Let us **first deal with Appeal No.282 of 2013** which has been filed by the Appellant PPN Power Generating Company Private Limited.

7. The Appellant filed a Petition before the State Commission with a prayer to accord approval of completed capital cost of

Rs.1379.25 Crores. However, the State Commission passed the Impugned Order dated 15.7.2013 determining the Capital Cost only as Rs.1344.21 Crores after disallowance of Rs.35.04 Crores.

8. As against this disallowance, the Appellant has preferred this Appeal in Appeal No.282 of 2013 seeking to set aside the Impugned Order dated 15.7.2013 to the extent of certain items of disallowance of Rs.19.73 Crores and has prayed to fix the Capital Cost at Rs.1363.96 Crores. Thus, though in the Original Petition, the Appellant prayed for fixing the Capital Cost of Rs.1379.25 Crores, it has now confined itself the prayer to fix the capital cost at Rs.1363.96 Crores in respect of certain items of disallowance of Rs.19.73 Crores. Those disputed items are as follows:

    (a) Engineering, Procurement and Construction Cost –Escalation;

    (b) O&M Expanses

    (c) Interest on Working Capital

    (d) Front End Fee.

    (e) Initial Fuel/Start up

9. In respect of the first item, namely Engineering Procurement and Construction cost –Escalation**,** the Appellant has claimed Rs.14.99 Crores to be added to the Capital Cost.

10. With reference to the Second Item i.e. O&M Expenses, the Appellant has claimed Rs.2.73 Crores.

11. In respect of the 3rd item i.e. Interest on Working Capital, it has claimed Rs.0.29 Crores. With regard to other item Front End Fee the Appellant has claimed Rs.0.26 Crores. With regard to the last item i.e. Initial Fuel/Startup, the Appellant has claimed Rs. 1.46 Crores.

12. Thus, the Appellant has prayed to include this total amount of Rs.19.73 Crores with the Capital cost already fixed and thereby to fix the total Capital Cost at Rs.1363.96 Crores.

13. Let us now discuss these issues item wise in this Appeal.

14. The First Item is Escalation in **Engineering Procurement and Construction Costs.**

15. The Power Purchase Agreement was entered into by the Appellant and the State Electricity Board (TANGEDCO) on 3.1.1997.

16. Naphtha is defined in the PPA as an alternate fuel. The plant is designed for 100% Naphtha and Mixed Fuel Operation. The Long Term Fuel Supply Agreement was executed between the Indian Oil Corporation and the Appellant and the same was submitted to the TANGEDCO for approval on 7.5.1997 itself. This has to be approved within 45 days.

17. The State Electricity Board delayed the approval of Fuel Supply Agreement and asked the Appellant for accounting the said PPA on the basis of the Government of India Notification dated 9.6.1998. The Appellant obtained clarification from the Government of India on 22.7.1998 and sent it to Respondent to show that the Notification dated 9.6.1998 is not applicable to already concluded PPAs.

18. Even after this, there was a delay in approval. Ultimately, the Appellant executed the Amendment to the PPA on 6.8.1998. The approval was issued on the same date. This delay in approving the FSA, delayed the Financial Closure also with the result, a notice to proceed to EPC Contractor was also delayed. Ultimately, the Financial Closure was achieved on 7.12.1998. Thus, there was a delay of 123 days in Fuel Supply Agreement approval.

19. The State Commission after considering the Evaluation Committee Report came to the conclusion that there was a delay of 184 days out of which 37 days are accountable to Respondent TNEB and for the balance period of the delay, the responsibility should be taken by the Appellant Generating Company.

20. On the basis of this conclusion, the State Commission held that the escalation cost of Rs.18.76 Crores should be apportioned to the parties in proportion to the respective

delays for which they were responsible and consequently the Respondent TNEB will bear Rs.3.77 Cores and the balance amount of Rs.14.99 Crores shall be borne by M/s. PPN Power, the Appellant.

21. This finding is challenged by the Appellant in this Appeal.

22. The submissions on this issue made by the Appellant are as follows:

> "The PPA mandates that the TNEB has to approve a Long Term Fuel Supply Agreement within 45 days of its submission. This was delayed by the TNEB. The delay in financial closure was occasioned entirely by the TNEB by not approving the FSA in time. Thus, the Capital Cost incurred on account of the said delay which would form part of the capital cost cannot be disallowed. The question of apportioning capital cost which was admittedly incurred is impermissible when the escalation was not due to any delay by the Appellant. The use of Naphtha as Fuel had been recognised by the TNEB in the month of November, 1996 itself. Therefore, the letter of Central Electricity Authority dated 15.5.1998 had no relevance whatsoever for the approval of the Long Term Fuel Supply Agreement. Therefore, the State Commission has committed a mistake in holding that the delay in

achieving the Financial Closure of 187 days has to be apportioned between the TNEB and the Appellant as 37 days and 150 days respectively. Therefore, the escalation amount paid to the EPC Contractor has to necessarily form part of the Capital Cost".

23. On these grounds, the Appellant has prayed that the Impugned Order has to be set aside and the State Commission has to be directed to allow the disallowed escalation cost of Rs.14.99 Crores to form part of the capital cost of the project.

24. On this issue, we have heard the learned Counsel appearing for the Respondent refuting the arguments of the Appellant.

25. While dealing with this issue we would like to refer to the reasonings and the findings given by the State Commission in the Impugned Order on this issue which reads as under:

"16.2 Escalation in EPC cost amounting to Rs.18.76 crores M/s. PPN argued that in view of the delay in approval of the fuel supply agreement the financial closure got delayed and consequently the notice to proceed could be issued only on 1-1-1999. Since the contract between M/s. Marubeni Corporation and PPN provided for notice to proceed by 30-6-1998 and also provided for escalation in the contract price if the notice to proceed is issued after 30-6-1998 but before 30-3-1999 and since the notice to proceed was issued on 1-1-1999 the escalation had to be included in the EPC price and the amount on this account was Rs.18.76

crores. This matter was gone through in detail by the Evaluation Committee where the Evaluation Committee had recommended inclusion of this amount in the EPC contract price. This matter was also reagitated by TNEB based on the Order passed by this Commission in IA permitting them to re-argue this matter. The contention of the TNEB during the re-argument as well as in their submission dated 10-11-2011 is that at no stage the EPC contract was approved by TNEB. It was only the EPC contractor Viz. Marubeni Power Corporation and the EPC contract price of US $ 75,061,000 +J.Y 8,800,000,000 + INR 221,10,00,000 were approved by TNEB. To a pointed question from the Commission as to whether the capital cost can be approved without knowing the scope of work of the EPC contract, no reply came from TNEB. It is necessary to examine the conditions precedent in the PPA with regard to the obligations of each of the parties. Article 3 of the PPA deals with conditions precedent. Article 3.1(e) provides that by 31-12-1997 or such later date as may be agreed to by the parties, M/s. PPN should have executed the long term and short term fuel supply agreements and the fuel transportation agreements containing terms and provisions consistent with the tariff and the requirements of international project finance lenders. Further, the financial closing date shall have occurred and all opinions including of legal counsel of the Parties, required for Financial Closing shall have been delivered.

As regards TNEBs obligation, para 3.2 (e) of the PPA stipulates that by 31-12-1997 or such later date as may be agreed to by the parties, the following events shall have occurred or have been waived by TNEB.

> *"TNEB shall have approved the Long Term Fuel Supply Agreement and the fuel transportation*

agreement and any material amendments thereto, within 45 days of the execution of those agreements or the amendments as the case may be, which approval shall not be unreasonably withheld or delayed. TNEB shall not have the right to approve the short term fuel supply agreement including any spot contract entered into by the company so long as the cost of fuel under the short term fuel supply agreement does not exceed the cost of fuel under the Long Term Fuel Supply Agreement."

The TNEB in their submission dated 10-11-2011 in para 16 submits that the fuel supply agreement was submitted for approval of TNEB on 7-5-1997 and the same was approved by TNEB / TANGEDCO on 6-8-1998. It is also seen from their submissions and also their arguments before the Commission that they were waiting for the amendment to the PPA for revising the heat rate for approval of the FSA. TNEB has stated in their written submissions that the PPA was signed on 3-1-1997 and after that a Notification dated 28-4-1997 was issued by Government of India enabling negotiation of normative parameters like station heat rate and the same had to be followed by TNEB / TANGEDCO. Till such time the applicability of the same was clarified by the Government of India vide Notification dated 27-7-1998 by stating that, the Notification will apply only to the PPAs signed on or after the Notification Viz., 9-6-1998, they were pushing amendment to SHR.

From the examination of the submission by both the parties and the provisions of the PPA, the Commission observes as under:-

1) The FSA was submitted to TNEB by PPN for approval on 7-5-1997 and it was eventually approved on 6-8-1998.

2) The TNEB was pursuing of reduction of heat rate from 2000 Kcal/Kwhr to 1900 Kcal/Kwhr. This was finally agreed to between the parties on 6-8-1998 and on the same day the FSA was approved by TNEB.

3) Examination of various clearances by the CEA brings out yet another dimension to this episode. The issue of using 100% Naphtha as fuel was under consideration for some time between the CEA, PPN and TNEB.

The approval of CEA for use of Naphtha as fuel to facilitate achieving financial closure by PPN was issued on 15th May 1998. This was communicated by CEA vide letter No. 2/TNE13/91-PAC/4860-81 dated 15th May 1998. The above letter permits modification of condition No. (vi) of the original TEC issued on 24-11-1995 after extensive correspondence between CEA, PPN and TNEB. The CEA's letter dated 15th May 1998 is extracted below:-

CENTRAL ELECTRICITY AUTHORITY
MINISTRY OF POWER
SEWA BHAWAN, RAMAKRISHNAPURAM, NEW DELHI – 110 066.
No. 2/TN/13/91-PAC/4860-81 Dated 15th May, 1998
OFFICE MEMORANDUM
Subject: Pillaiperumalnallur CCGT Plant (330.5 MW) in Tamil Nadu by M/s. PPN Power Generating Company – Deletion of condition of techno-economic clearance – regarding

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The techno-economic clearance accorded by CEA vide letter of even number 2407-16, dated 24-11-

1995, is, inter-alia, subject to signing of gas supply agreement by M/s DMPC with PY -1 and PY-3 gas producers as condition (vi). The request of the Company for deletion of this condition in view of non-availability of firm indications about the gas reserves and gas production rates, which are likely to be available only by mid-1998, and recommendation of the TNEB in this regard, vide their letter No. SC/IPP/EE/PPII/A1/F.PPN PPA/D-1206/96, dated 22-11- 96, were considered by the Authority. The Authority decided to delete this condition to facilitate the company to achieve financial closure based on Naphtha as fuel. The company will, however, make full use of indigenous natural gas within a definite time frame.

Sd/-…..
(Vijoy Kumar)
Secretary

1. Director, M/s PPN Power Generating Co., IIIrd Floor, Jhava Plaza, 1A,
Nungambakkam High Road, Chennai – 600 034.
2. Chairman, Tamil Nadu Electricity Board, 800, Anna Salai, Chennai -600 002.
3. Secretary (Energy), Govt. of Tamil Nadu, Fort St. George, Chennai – 600 009
4. Chief Secretary, Govt. of Tamil Nadu, Chennai.
5. Secretary, Ministry of Power, Govt. of India, SS Bhawan, N. Delhi-110 001.
6. Joint Secretary (IPC) /Thermal), MOP, SS Bhawan, N. Delhi – 110 001.
7. Advisor (Energy), Planning Commission, Yojana Bhawan, N.Delhi-110 001.
8. Member (Planning/Thermal /Power Systems/E&C/Grid Operation/Hydro), CEA, N. Delhi.
9. CE(TA/SPA/R&CA/TCD/Legal/TM/EP), CEA, N.Delhi.
10. CE(PAO), CWC, Sewa Bhawan, New Delhi.

A perusal of the above letter of CEA indicates that permission to use Naphtha as fuel for achieving financial closure was accorded only on 15th May 1998. This implies that the approval for FSA could not have been given before this date when the permission to use 100% Naphtha was given. If the agreed period of 45 days as per clause 3.2 (e) of the PPA is considered for approval of the FSA, the FSA should have been approved by the TNEB by end of June 1998. The FSA was actually approved on 6-8-1998 i.e. with a delay of 37 days. In addition to Notification dated 9-6-1998 of the Government of India regarding negotiation of heat rates better than the normative parameters prospectively had also created confusion with regard to its applicability prior to that date. Under these conditions approval of FSA with Naphtha as 100% fuel could be possible only after 15th May 1998. In any case, PPN have ultimately agreed to the reduction of heat rate as sought by TNEB on 6-8-1998 and the FSA was also approved on the same date. With better co-operation between the parties, the entire thing could have been better handled and this escalation in cost could have been avoided. At best the responsibility for delay could be fixed on TANGEDCO for a period of 37 days. The financial closure was originally scheduled for 30th June 1998 but it was actually achieved on 7-12-1998 and the Notice to proceed was issued on 1-1-1999. The total delay in achieving financial closure and issue of Notice to proceed is 184 days out of which 37 days are accountable to TNEB and for the balance period the responsibility should be taken by PPN. Accordingly, the escalation cost of Rs.18.76 crores should be apportioned to the parties in proportion to the respective delays for which they were responsible. TNEB shall bear Rs.3.77 crores and the balance amount of Rs.14.99 crores shall have to be borne by M/s. PPN.

26. The crux of the elaborate discussions made in the findings given in the Impugned Order on this issue is as follows:

(a) The FSA was submitted to TNEB by PPN for approval on 7-5-1997 and it was eventually approved on 6-8-1998.

(b) The TNEB was pursuing of reduction of heat rate from 2000 Kcal/Kwhr to 1900 Kcal/Kwhr. This was finally agreed to between the parties on 6-8-1998 and on the same day the FSA was approved by TNEB.

(c) Examination of various clearances by the CEA brings out yet another dimension to this episode. The issue of using 100% Naphtha as fuel was under consideration for some time between the CEA, PPN and TNEB.

(d) The approval of CEA for use of Naphtha as fuel to facilitate achieving financial closure by PPN was issued on 15th May 1998. This was communicated by CEA vide letter No. 2/TNE13/91-PAC/4860-81 dated 15th May 1998.

(e) This implies that the approval for FSA could not have been given before this date when the permission

to use 100% Naphtha was given. If the agreed period of 45 days as per clause 3.2 (e) of the PPA is considered for approval of the FSA, the FSA should have been approved by the TNEB by end of June 1998. The FSA was actually approved on 6-8-1998 i.e. with a delay of 37 days.

(f) In any case, PPN have ultimately agreed to the reduction of heat rate as sought by TNEB on 6-8-1998 and the FSA was also approved on the same date. With better co-operation between the parties, the entire thing could have been better handled and this escalation in cost could have been avoided. At best the responsibility for delay could be fixed on TANGEDCO for a period of 37 days. The financial closure was originally scheduled for 30th June 1998 but it was actually achieved on 7-12-1998 and the Notice to proceed was issued on 1-1-1999. The total delay in achieving financial closure and issue of Notice to proceed is 184 days out of which 37 days are accountable to TNEB and for the balance period of 150 days, the responsibility should be taken by PPN. Accordingly, the escalation cost of Rs.18.76 crores should be apportioned to the parties in proportion to the respective delays for which they were responsible. TANGEDCO shall bear Rs.3.77

crores and the balance amount of Rs.14.99 crores shall have to be borne by M/s. PPN Power".

27. We have carefully considered the submissions made by both the parties on this issue and have also gone through the Impugned Order passed by the State Commission.

28. There is no dispute in the fact that the FSA was submitted for approval by TNEB on 7.5.1997 and the same was approved by the TNEB on 6.8.1998.

29. According to the TNEB, they were awaiting for the Amendment of the PPA for revising the Heat Rate for approval of the FSA. Till the applicability of the Notification dated 28.4.1997, was clarified by the Government of India stating that such Notification would apply to the PPAs signed on or after Notification dated 9.6.1998, they were pushing amendment to Station Heat Rate.

30. According to the State Commission, on the basis of the submissions made by both the parties and the provisions of the PPA, the Commission found following aspects:

    (a) FSA was submitted by the PPN Power to TNEB for approval on 7.5.1997. It was approved on 6.8.1998.

(b) TNEB was pursuing all reduction of heat rate from 2000 Kcal/Kwhr to 1900 kcal/Kwhr. This was finally agreed to between the parties only on 6.8.1998 and on the same date the TNEB approved the FSA.

(c) The issue of using 100% Naphtha as Fuel was under consideration for some time between the CEA, PPN Power and TNEB. The approval of the CEA was ultimately issued on 15.5.1998. This was communicated through the letter.

(d) This letter permits modifications of the condition No.6 of the Original Techno Electro Clearance. This letter shows that the permission to use Naphtha for achieving the financial closure was accorded only on 15.5.1998.

(e) Thereafter, the FSA was approved on 6.8.1998 with a delay of 37 days. The Financial Closure was originally scheduled from 30.6.1998 but it was actually achieved on 7.12.1998 and notice to proceed was issued on 1.1.1999. As far as TNEB is concerned, the responsibility for delay in approving the FSA could be fixed for a period of 37 days only. Thus, there was a delay in achieving the financial closure and issue of notice to proceed

of 84 days. If 37 days are accountable to TNEB, and for the balance period the responsibility should be taken by the PPN Power. Thus, the escalation cost of Rs.18.76 Crores if apportioned to the both the parties then the TNEB for 37 days delay shall bear Rs.3.77 Crores and for the balance period of delay PPN power has to bear the balance amount of Rs.14.99 Crores.

(f) This decision was arrived at by the State Commission by taking note of various records as well as the correspondence between the parties namely CEA, TNEB and PPN Power.

31. On going through the Impugned Order and on hearing the learned Counsel for the parties, we find there is no infirmity in these findings especially when the period from 9.6.1998 the date of Notification till clarification issued on 22.7.1998 will have to be excluded as the TNEB's request for clarification was bona fide. Only on the basis of the acceptance made by the Appellant, the approval for the Fuel Supply Agreement was issued by the TNEB on 6.8.1998. As a matter of fact, the EPC contract was executed by the Appellant with its contractor on 5.4.1998 and the same was submitted to the TNEB on 29.5.1998.

32. As pointed out by the learned Counsel for the Respondent, in the correspondence between the Appellant and the Respondent, the Appellant has not stated in any of the correspondence that delay in achieving the financial closure has led to the escalation in cost.

33. Thus, we are of the view that the findings given by the State Commission on this issue by apportioning the delay to both the parties is perfectly valid. Thus, the first issue is decided accordingly.

34. The **second issue** is with regard to **O&M Expenses**.

35. On this issue, the State Commission has disallowed Rs.2.73 Crores. The O&M expenses pertain to the payments made to the O&M contractor during the period of construction of the project. The amount of Rs.2.73 Crores was incurred by the Appellant towards the payment made to the O&M contractor during the Mobilization Period.

36. According to the Appellant, such expenses form part of owner's cost and not O&M expenses post Commercial Operation Date.

37. It is also submitted by the Appellant that the nomenclature for the expenditure is purely from the Accounting practices perspective and it has no relevance with O&M expenses incurred after the Commercial Operation Date.

38. The Appellant further contended that the expenditure was incurred prior to the Commercial Operation Date. Hence, this cannot form part of the tariff and clearly it forms part of the owner's cost. Hence, the expenditure incurred is to be permitted under the head Owner's Cost.

39. According to the Respondent, Clause 3 of the EPC Contract provides that with the written consent of the Appellant, the Contractor cannot sub contract any major portion of the work to any person other than the persons described in Exhibit 'B'. The EPC contract had provided for the construction of the Single Point Mooring system. It does not form part of the Owner's Cost as approved by the CEA. Therefore, this cost was not entitled to be included in computation of capital cost.

40. Let us see the findings on this issue which reads as under:

"The Commission has examined the EPC contract which was made available. It is observed from this contract that there are three provisions in the EPC contract as follows under the head Marine Work / Construction Jetty:

Foreign Supply Contract, USD : 23,854,000
Local Supply Contract, INR : 108,969,000
Local Erection Contract, INR : 163,454,000

From these three provisions, which are substantially high, the Commission is of the view that Single Point Mooring arrangement as far as construction is concerned is adequately taken care in the provisions of EPC contract. The head which is being discussed here is Operation &

Maintenance Single Point Mooring Contract. Any O & M expense is a part of Operation and Maintenance expenses which arise after the COD of the plant and is separately provided for as O & M expense in the fixed charge component of the tariff. In view of this, Commission is of the view that this amount of Rs.2.73 crores should not be included in the capital cost.

41. The above findings would show that the State Commission held that the three provisions in the EPC contract under the head Marine Work were substantially higher and the Single Point Mooring arrangements as far as construction was concerned, was adequately taken care of in the contract those provided for construction of the Single Point Mooring System. Any O&M expenses would arise only after the Commercial Operation Date. Therefore, it does not form part of the owner's cost as approved by the Central Electricity Authority.

42. In the findings to the effect that the amount of Rs.2.73 Crores as claimed by the Appellant would not be included in the Capital Cost, we do not find any infirmity in the findings on this issue. Hence, this issue is decided against the Appellant.

43. The **third issue** is relating to the **Interest on Working Capital prior to Commercial Operation Date**.

44. The State Commission on this issue has held that no interest other than the interest during construction is permissible to be capitalized.

45. According to the State Commission, as referred to in the Impugned Order, the conjoint reading of Techno Economic Clearance of Central Electricity Authority and definition of Capital Cost as referred to in the PPA would show the cost on working capital prior to Commercial Operation Date, cannot be capitalized.

46. Challenging this finding, the Appellant has contended that the Appellant has not included any elements of working capital in the capital cost but the Appellant borrowed the amounts from Banks for funding fuel build-up including security deposits for gas etc prior to Commercial Operation Date and as such, the interest paid on the above amounts borrowed from the banks which were incurred prior to Commercial Operation Date would form part of the pre operative expenses. These expenses not specifically classified in the Techno Economic clearance that these would amount to owner's cost and as such, the State Commission's interpretation that funding the work capital through bank loans would amount to double jeopardy is wrong.

47. It is further submitted that the working capital interest incurred prior to Commercial Operation Date forms part of

the owner's cost and therefore, the said amount of Rs.0.29 Crores under this head of expenditure has to be allowed as part of the capital cost.

48. According to the Respondent, the delayed capital cost of the project has been defined in the PPA. This expenditure i.e. interest on working capital prior to COD will not fall under the said definition. In fact, the said definition of the PPA provides that the capital cost shall not include other elements of working capital and therefore, this amount cannot be included in the computation of working cost.

49. Let us see the findings on this issue:

> *"The specific provision in the PPA that capital cost shall not include other elements of working capital makes it clear that no interest other than the IDC is permissible to be capitalized. In view of this, the Commission does not allow interest on working capital of Rs.0.29 crores which is claimed as pre-operative expense. This was also disallowed by the evaluation committee on the grounds that the officials of M/s. PPN were not able to furnish the documentary support in PPA, TEC, etc to claim working capital and interest on working capital prior to COD."*

50. The findings rendered by the State Commission is to the effect that capital cost shall not include other elements of working capital and as such no interest other than IDC is permissible to be capitalized.

51. As pointed out by the learned Counsel for the Respondent, the term capital cost has been expressly defined in the PPA. The total capital cost of the project has been defined to include the cost of initial spares prior to Commercial Operation Date not exceeding 3% of the total equipment cost, cost of start-up fuel, O&M charges incurred during start-up, interest on and fees related to the borrowed funds used during construction and as such, the interest on working capital prior to Commercial Operation Date will not fall on any of these sub heads.

52. In view of the submissions made by the Respondent and also in the light of the reasonings given by the State Commission for its finding, we are not able to accept the submissions made by the Appellant on this issue.

53. Consequently, the contention of the Appellant on this issue also is rejected. Accordingly, this issue is decided against the Appellant.

54. The **Fourth Issue** is relating to **Front End Fee**.

55. The Appellant has claimed under this item Rs.0.26 Crores.

56. The State Commission has not allowed this amount on the ground that the interest on working capital expenses prior to Commercial Operation Date cannot be permitted.

57. According to the Appellant, the interest on working capital loans prior to Commercial Operation Date has to be allowed.

58. According to the Respondent, the Front End Fee will not fall within the purview of the definition of the term “capital cost” as provided in the PPA and therefore, it cannot form part of the Capital Cost.

59. Let us refer to the findings of the State Commission on this item:

> *“The Commission in the previous para has arrived at the conclusion that the interest on working capital as a part of pre-operative expenses cannot be allowed. Consequently, any loan raised for the purpose of build up of any working capital prior to COD, which may lead to payments of any related fees for raising such loan amount, cannot also be permitted. Hence the Commission disallows the front end fee of Rs.0.26 crores as a part of pre-operative expenses.”*

60. The Appellant has submitted that the interest on working capital borrowings prior to Commercial Operation Date can be permitted as part of Owner’s Cost. If the Owners Cost is to be allowed, the Front End Fee also would be allowed for the same reason.

61. We have considered the submissions of the parties on this issue.

62. On going through the Impugned Order, it is clear that the Interest on working capital as a part of pre operative

expenses cannot be allowed. The reasons given by the State Commission for disallowing the Interest on working capital prior to Commercial Operation Date would be applicable to this item also. We have in the earlier paragraphs confirmed the findings of the State Commission in respect of the interest on working capital. The same would be applicable to this issue also.

63. Consequently, the contention of the Appellant on this issue is also rejected.

64. The **Fifth Issue** is **Initial Fuel and Start-up of Power**. Under this head, the Appellant claimed Rs.1.46 Crores. This has been disallowed by the State Commission.

65. On this item, the State Commission has allowed only Rs.21.02 Crores out of the total claim of Rs.22.48 Crores.

66. According to the Appellant, the State Commission has committed a mistake by holding that only Rs.21.02 Crores, is allowable under this head out of the total amount of Rs.22.48 Crores merely because the TANGEDCO has made a reference to the actual accounts for the Year 2001-02 of the Appellant.

67. It is further stated that the reference to the actual accounts for the Year 2001-02 aggregating to Rs. 21.02 Crores relates only to raw materials consumption during the testing

period which is the start-up fuel only and this aspect has not been considered by the State Commission. The claim of the Appellant on the start-up power expenditure was Rs.22.48 Crores but the State Commission allowed only Rs.21.2 Crores by disallowing the amount of Rs.1.46 Crores.

68. Let us refer to the findings of the State Commission on this issue:

> *"90 days time is allowed from the date of synchronization to commercial operation of the steam turbine in combined cycle mode and therefore it is quite likely that fuel consumption may be more than the normative fuel consumption corresponding to agreed station heat rate of 1900 Kcal/Kwhr. It is therefore appropriate to allow this additional fuel requirement upto the date of COD for the reasons explained above. However, TANGEDCO, after referring to the Annual accounts for the FY 2001 – 02 have pointed out the expenditure under the head shall be Rs.21.02 crores and not 22.48 crores. In view of this an amount of Rs.(22.48 – 21.02) crores i.e. Rs.1.46 crores is disallowed in addition to the disallowance of Rs.0.39 crores already agreed to by PPN under this head. Therefore total disallowance on this account is Rs.1.85 Crores."*

69. The above findings would indicate that the annual accounts for the Year 2001-02 would show that the expenditure under this head was only Rs.21.02 Crores and therefore, the balance amount was disallowed.

70. As pointed out by the Respondent that the Respondent referred to the expenses incurred on the start-up power fuel with reference to the head 'raw materials consumption' during the testing period. Besides that, the State Commission has found 90 days time was allowed from the date of synchronization of the Commercial Operation of the steam turbine in combined cycle mode and therefore, it is quite likely that the fuel consumption may be more than the normative fuel consumption.

71. These reasonings, in our view, holds good to reject this claim.

72. Hence, we decided this issue also against the Appellant PPN Power.

73. As mentioned above, we do not find any infirmity in the findings on all these issues. Hence we hold that there is no merit in this **Appeal No.282 of 2013** filed by the PPN Power. Accordingly, **this Appeal is liable to be dismissed.**

74. **Now let us deal with other Appeal in Appeal No.283 of 2013 filed by TANGEDCO (State Electricity Board)**.

75. In this Appeal, the TANGEDCO is the Appellant and the PPN Power Generating Company is the Respondent.

76. As we indicated earlier, the Appellant TANGEDCO filed MAP No.1 of 2007 before the Tamil Nadu State Commission to fix the Capital Cost of Rs.1251.272 Crores for the project

promoted by the PPN Power Generating Company, the first Respondent.

77. Thereafter, the PPN Power Generation Company Pvt Ltd filed a separate Petition in MAP No.2 of 2008 before the State Commission to get the project cost to be fixed as Rs.1379.25 Crores.

78. As indicated earlier, the State Commission did not fix the Capital Cost of Rs.1251.272 Crores as claimed by the TANGEDCO. Similarly, it did not determine the Capital Cost of the project as Rs.1379.21 Crores as claimed by PPN Power. But the State Commission in the Impugned Order fixed the project cost as Rs.1344.21 Crores.

79. As stated above, since the claims of both the parties have not been allowed in respect of the quantum on certain items, both the parties have filed these two Appeals i.e. Appeal No.282 of 2013 filed by the PPN Power Generating Company Private Limited and Appeal No.283 of 2013 filed by the TANGEDCO.

80. The grievance of the Appellant TANGEDCO in this Appeal No.283 of 2013 is that the State Commission has wrongly fixed the Capital Cost as Rs.1344.21 Crores instead of fixing the Capital Cost as Rs.1251.272 Crores.

81. The detailed facts have already been given in the other Appeal in Appeal No.282 of 2013. Therefore, those facts need not be repeated in this Appeal.

82. In this Appeal No.283 of 2013, the Appellant, TANGEDCO, has raised the following nine issues.

    (a) EPC Contract- Service Charges;

    (b) EPC Contract-Escalation;

    (c) EPC Cost – Construction Power and Water;

    (d) Pre-operative expenses-Travelling and Conveyance;

    (e) Pre-operative Expenses;

    (f) Depreciation;

    (g) EPC Cost (Withheld amount)

    (h) Debt Equity Ratio;

    (i) Prudence Check not carried out.

83. Let us deal with these issues one by one.

84. The First Issue is **EPC Contract-Service Charges.**

85. The Appellant TANGEDCO, has made the following submissions on this issue:

"The State Commission despite the fact that the EPC price mentioned in the Contract is not a fixed price, has wrongly adopted the position that the EPC price is fixed and has allowed this claim of Rs.30.49 Crores to be included to the Capital Cost. The fact that the PPN Power Generating Company Private Limited could not convince the Appellant, the TANGEDCO that the claim is correct by way of correct documentary evidence. Therefore, this amount ought to have been disallowed."

86. In reply to the above submissions, the PPN Power Generating Company Private Limited, the Respondent has made the following submissions:

"This ground, in fact, has not been raised before the State Commission. Therefore, the Appellant cannot seek to argue this fresh point directly in the Appeal. The EPC Contract was concluded after an international competitive bidding process stipulated by the TANGEDCO. Therefore, the process of price and the contract are all approved by the Appellant. The EPC Contract, itself indicates through Clause 2.2 that the Contractor shall perform all of the work in accordance with the Contract and deliver the Facility to Owner on a lump sum, fixed price, and turnkey basis for the Contract amount. Therefore, it is clear

that from a harmonious reading of the Clause of the Contract that total contract amount does not change but only the individual component may change. Hence, it is evident that the EPC price remains fixed and is not variable.

87. While discussing this issue, it would be proper to refer to the findings of the State Commission given in the Impugned Order:

> *"If there is no dispute with regard to the total payment made to the EPC contractor, the break up should not become an issue at this stage. The PPA does not provide for the method of checking of various contracts and the verification requirement by TNEB. In the absence of the same, these issues cannot be subjected to further examination. It is argued by M/s PPN that the industry practice is that the EPC contracts are lumpsum fixed price contract and subsequent to placing of orders for EPC contracts, the same is further divided into foreign supply, local supply and local erection contracts. The total amount of the 3 contracts is the same as agreed in the EPC contract. The TNEB has also conveyed their approval to the total price of the EPC contract. Having done so, the TNEB cannot object to the total price of the EPC contract by checking the individual contracts which are only for the purpose of breaking down of price. Since total EPC contract price is USD 148.393 million and INR 221.10 crores by way of the 3 broken down contracts, the same cannot be objected to. In the absence of any specific methodology agreed upon between the parties, the Commission is inclined to accept the arguments of PPN in this regard. As long as the total payment does not exceed lumpsum cost*

approved by TNEB, the service charges of Rs.30.49 crores as claimed cannot be rejected. The EPC contract price was approved by TNEB on 1-10-1997. The general terms and conditions dated 5-4-1998 submitted by M/s. PPN contains 3 agreements Viz., Foreign Supply Contract amounting to USD 148.393 million, Local Supply Contract amounting to Rs.92.4223 crores and Local Erection Contract amounting to Rs.128.6777 crores the sum of all these 3 contracts totals to the approved value indicated by TNEB in their approved letter dated 1-10-1997. In view of this there is no excess payment made to the EPC contractor and therefore the disallowance of service charges of Rs. 30.49 crores suggested by TNEB cannot be agreed to and the same has to be allowed as a part of capital cost as long as it is within the approved EPC cost.

88. The above findings and discussions would clearly indicate that the TNEB (Appellant) has already conveyed the approval to the total price of the EPC Contract and having done so, the TNEB, the Appellant cannot now object to the total price of the EPC by checking the individual contract which are only for the purpose of breaking down of the price. As long as the payment does not exceed the lump sum cost approved by the TNEB, the service charges of Rs.30.49 Crores as claimed by the PPN Power cannot be are rejected.

89. On going through the Impugned Order and on hearing the learned Counsel for the parties, it is clear that the State Commission has given a correct and categorical finding that there was no excess payment made to the EPC Contractor

and therefore, the allowance of services charges of Rs.30.49 Crores is perfectly valid. Thus, the 1st issue is decided against the Appellant TANGEDCO.

90. Let us now discuss the **Second Issue** which relates to **EPC Contract-Escalation.**

91. The contention of the Appellant on this issue is as under:

> "There was no delay on the part of the Appellant, since the day on which the PPN Power agreed for reduction in the heat rate and to amend the PPA, the TANGEDCO on the very same day approved the Fuel Supply agreement. The PPN Power unreasonably delayed their consent and handled the issue lethargically. Therefore, the allowance of Rs.3.77 Crores towards the escalation is not correct."

92. The submissions of the Respondent PPN Power Generating Company Private Limited is as below:

> "According to the PPA, the Appellant has to approve the Long Term FSA within 45 days of submissions. The obligation cast on the TANGEDCO is an unconditional and stand alone provision. The delay in financial closure was occasioned entirely by the Appellant by not approving the Long Term FSA in time. The State Commission has committed a

mistake in holding that the delay in achieving the financial closure of 187 days has to be apportioned between the Appellant and the PPN Power Generating Company as the Appellant in Appeal No.282 of 2013. Therefore, the Appellant's prayer seeking disallowance of the allowed escalation cost of Rs.3.77 Crores is devoid of merit."

93. Let us refer to the findings on the said issue given by the State Commission:

1) The FSA was submitted to TNEB by PPN for approval on 7-5-1997 and it was eventually approved on 6-8-1998.

2) The TNEB was pursuing of reduction of heat rate from 2000 Kcal/Kwhr to 1900 Kcal/Kwhr. This was finally agreed to between the parties on 6-8-1998 and on the same day the FSA was approved by TNEB.

3) Examination of various clearances by the CEA brings out yet another dimension to this episode. The issue of using 100% Naphtha as fuel was under consideration for some time between the CEA, PPN and TNEB.

The approval of CEA for use of Naphtha as fuel to facilitate achieving financial closure by PPN was issued on 15th May 1998. This was communicated by CEA vide letter No. 2/TNE13/91-PAC/4860-81 dated 15th May 1998.

…….

This implies that the approval for FSA could not have been given before this date when the permission to use 100% Naphtha was given. If the agreed period of 45 days as per clause 3.2 (e) of the PPA is considered for approval of the FSA, the FSA should have been approved by the TNEB by end of June 1998. The FSA was actually approved on 6-8-1998 i.e. with a delay of 37 days.

In any case, PPN have ultimately agreed to the reduction of heat rate as sought by TNEB on 6-8-1998 and the FSA was also approved on the same date. With better co-operation between the parties, the entire thing could have been better handled and this escalation in cost could have been avoided. At best the responsibility for delay could be fixed on TANGEDCO for a period of 37 days. The financial closure was originally scheduled for 30th June 1998 but it was actually achieved on 7-12-1998 and the Notice to proceed was issued on 1-1-1999. The total delay in achieving financial closure and issue of Notice to proceed is 184 days out of which 37 days are accountable to TNEB and for the balance period the responsibility should be taken by PPN. Accordingly, the escalation cost of Rs.18.76 crores should be apportioned to the parties in proportion to the respective delays for which they were responsible. TNEB shall bear Rs.3.77 crores and the balance amount of Rs.14.99 crores shall have to be borne by M/s. PPN.

94. So, as per the finding, both are accountable for delays. The State Commission held that the TANGEDCO was responsible for a period of 37 days and for the balance of 150 days, the responsibility should be borne by the PPN Generating Power Company. Therefore, the State

Commission apportioned the escalation cost of Rs.18.76 Crores to both the parties in proportion to the respective delays. This aspect has been elaborately dealt with in the other Appeal No.282 of 2013 and confirmed the said findings by giving proper reasonings. The same would apply to the present Appeal also.

95. Accordingly the contention of the Appellant on this issue is not tenable. Thus, this issue is decided as against the Appellant.

96. The **Third Issue** is **EPC Cost-Construction Power and Water.**

97. On this issue, the State Commission has allowed Rs.2.05 Crores to the PPN Power Generating Company Private Limited. This has been challenged by the Appellant TANGEDCO.

98. The submission of the Appellant TANGEDCO, on this issue is as follows:

> "The findings given by the State Commission that the amount towards construction of Power and Water is to be allowed since the payment is within the amount approved in the EPC contract, is not correct. The conclusion of the State Commission that the amount has not been incurred at all, the approved cost in the

EPC contract cannot be correct since, the PPN Power Generating Company Private Limited has claimed the excess amount of Rs.1,51,83,581/-. Therefore, the PPN Power is not entitled for allowance of Rs.2.05 Crores towards the construction power and water."

99. The reply of the PPN Power, the Respondent, on this issue is as under:

"So long as the total amounts payable, do not exceed the EPC contract price and escalation thereon, there is no case for disallowance. It is an admitted position that the payments made do not exceed the EPC contract price and escalation thereon. This is the finding of the Evaluation Committee also. The total amount paid under the EPC Contract including for construction of power and water was within the EPC contract amount. This in fact, has been verified by the Appellant and confirmed. It is for this reason, that the Appellant did not raise this issue either before the Evaluation Committee or before the State Commission."

100. The expenditure is as per the EPC contract. As such, there is no excess claim as stated by the Appellant. Therefore, the finding of the State Commission allowing this amount is perfectly justified. This issue is also decided accordingly.

101. The **4th Issue** is **Pre-operative Expenses-Travelling and Conveyance.**

102. On this item, the State Commission has allowed Rs.0.72 Crores. This is challenged by the TANGEDCO. The Appellant's submissions are as follows:

> "The PPN Power has not submitted the necessary documentary evidence to support its claim under this head. The State Commission has allowed 50% of this amount to be added to the capital cost. In fact, the State Commission took a stand that it cannot go by vouchers by vouchers and found that both the Appellant and the Respondent are equally responsible. The Appellant has been aggrieved by this method. As per the terms and conditions for Determination of Tariff Regulations, 2005" the actual capital expenditure on the date of commercial operation based on the audited accounts may be considered subject to prudence check by the Commission but, the same has not been done".

103. The reply of the PPN Power, the Respondent, on the said issue is as under:

> "The Appellant has taken the stand of prudence check being the responsibility for the first time at the Appeal stage. The State Commission in its order disallowed

50% of the expenditure i.e. 0.36 Crores from the capital cost. As per the Regulations, 2005, the Capital Cost has to be determined after prudence check, when there is a dispute between the parties. It is an admitted position that the documents had been submitted by the PPN Power but the Appellant had not verified the submitted documents. Even though the State Commission disallowed 50% of the travelling conveyance expenses, the PPN Power, the Respondent chose not to pursue the same in their Appeal No.282 of 2013. Therefore, the amount of Rs.0.36 Crores allowed by the State Commission has to be retained."

104. Let us refer to the findings rendered by the State Commission on this issue:

"*On the contrary PPN have indicated that they had provided the vouchers relating to voluminous transactions which the TNEB could not verify. They have listed about 11 items to suggest that the TNEB is attempting to disallow this amount without proper reasons. During the hearing on 17th August 2011 both the parties have confirmed that they will review the same and revert back to the Commission within a week or 10 days. However, both the parties are sticking on to their own version without assisting the Commission in concluding this issue in an appropriate manner. Both the parties cannot expect the Commission to examine each and every voucher for allowing or rejecting the claim. Under these circumstances, both the parties will*

have to take the responsibility in assisting the Commission in deciding this issue. The Commission is left with no choice but to allow only 50% of Rs.0.72 crores, which is in dispute, as pre-operative expenses – travelling and conveyance and reject the balance half of Rs.0.36 crores."

105. On going through the Impugned Order and also having regard to the submissions made by the learned Counsel for the parties, it is clear that both the parties have been given opportunity to verify with the vouchers relating to the voluminous transactions and revert back to the State Commission to give relevant particulars for arriving at a proper conclusion. But, both the parties have not given required particulars for assisting the Commission.

106. On the other hand, both the parties have accused each other. Therefore, the State Commission allowed only 50% of Rs.0.72 Crores. The Appellant without verifications of the records and without responding to the directions given by the Commission cannot now claim that there was no prudence check on the part of the State Commission.

107. As pointed out by the Respondent, the stand on the prudence check as against the State Commission has been taken only for the first time at the Appeal stage. This is not permissible. Therefore, the submissions on this account, made by the Appellant are rejected. This issue is also decided as against the Appellant, TANGEDCO.

108. The **5th Issue** is **Pre-operative Expenses.**

109. On this account, the State Commission has allowed Rs.2.75 Crores. This is challenged by the Appellant. The Appellant's submissions are as follows:

> "The amount claimed under pre-operative expenses under communication expenses and Repair and Maintenance expenses was in excess of the amount shown in the Annual Report. The PPN Power, the Respondent did not prove the genuineness of the claim for including the amount in the capital cost. Merely because the Appellant has not raised the issue during the proceedings before Central Electricity Authority, the State Commission has held the issue in favour of the PPN Power, the Respondent. Article 6.1 (m) of the PPA clearly provides that the PPN Power Generating Company should provide the complete details of the expenditure incurred for the project together with the supporting documents. But this was not done by the Respondent. Despite this, the State Commission has held in favour of the PPN Power Generating Company on this issue."

110. The submissions made by the Respondent, PPN Power, on this issue are as follows:

"As mentioned above, the Appellant for the first time in the Appeal stage has taken the stand on the aspect of prudence check by putting the blame on the State Commission. That apart, the Appellant is raising a new claim that the expenditure exceeds the amount shown in the Annual Report. During the proceedings before the Evaluation Committee, the Appellant handed over two sheets detailing the amounts therein for which proof of payments had not been submitted. At that stage, the First Respondent pointed out that the sheets handed over by the Appellant were in fact many ledger extracts received by the First Respondent as advance for sharing capital and hence they are not included in the capital cost. Now, the Appellant has taken a change of stand sent out a list of five heads of expenditure completely unrelated to each other. Therefore, the claim of the Appellant is clearly an after thought to justify the indefensibly through an arbitrary exercise."

111. The findings of the State Commission on this issue is as follows:

"*According to PPN, they pointed out then and there, in the EC that the sheets handed over by them, were in fact monies received by the petitioner as advance for share capital and hence were not included in the capital cost. Monies received for capital cost are credits, whilst*

capital expenses were debits in the expenditure accounts and only debits were included in the capital cost claimed and therefore proof of payment are not necessary for monies received by the petitioner. It is their argument that thereafter the TNEB had asked for break up of expenditure under communication expenses, repairs and maintenance expenses, insurance – electrical installation, insurance- electrical equipments, insurance – medical R. Ram which approximately total to the amount of claim under pre-operative expenses –others. If the details of the claim of Rs.2.75 crores is by misunderstanding of the advance for share capital then this issue will not survive. However, if this issue is actually related to the 5 heads of expenditure which were raised by TANGEDCO during the proceedings before the EC in 2008 and 2009, the next question would be as to why this issue was not raised earlier during the proceedings before the CEA or even during the bi-lateral discussion between the parties for settling the capital cost. In view of this, the Commission is not in a position to accept the arguments of TANGEDCO in this regard and allows the pre-operative expenses - others of Rs.2.75 crores as a part of capital cost."

112. On the basis of the above reasoning, the State Commission allowed Rs.2.75 Crores towards pre-operative expenses.

113. The primary dispute of the Appellant is that the documents for proof of payments were not produced and the State Commission allowed this claim without a prudence check.

114. Admittedly, this point had not been raised before the State Commission. As correctly pointed out by the Respondent, the State Commission observed that the aspect relating to

the sheets relating to the five heads of expenditure have not been raised earlier during the proceedings before the Central Electricity Authority or during the bilateral discussions between the parities for settling the capital cost.

115. The Appellant is unable to give any reason for failure to produce those documents earlier. Under these circumstances, the State Commission was not able to accept the arguments of the Appellant and ultimately allowed the pre-operative expenses as Rs.2.75 Crores. This findings does not suffer from any infirmity. This issue is also decided as against the Appellant.

116. The **6th Issue** is **Depreciation.**

117. On this account, the Sate Commission has allowed Rs.2.69 Crores. Challenging this allowance, the Appellant has filed this Appeal.

118. The contention of the Appellant on this account is as follows:

> "In fact, there were discrepancies in the rates claimed for depreciation and the cases where the claim has been made in excess of 90% of the cost of the asset. In fact, these discrepancies were pointed out by the Appellant through their letter dated 15.10.2011 for which no reply has been sent by the PPN Power

Generating Company Private Limited. The State Commission has failed to give findings on the discrepancies notified by the Appellant in the Depreciation statement submitted by the PPN Power Generating Company Private Limited"

119. The submissions of the Respondent on this issue is as under:

"All type of clarifications sought in this regard had been provided even during the proceedings before the Evaluation Committee. It is denied by the First Respondent that it did not respond to the Appellant's letter dated 15.10.2011 which was received on 19.10.2011. The depreciation rates used were in line with the Company's Act and does not lend to discrepancies in depreciation rates as alleged wrongly by the Appellant. The accounts of the Company have been audited by international firm of auditors. The Evaluation Committee also after hearing both the parties recommended that the claim of the PPN Power Generating Company has to be admitted without any discrepancies. It is recorded in the report that the TNEB officials agreed for the same. Therefore, there is no merit in the contention urged by the Appellant."

120. The findings of the State Commission on this issue are as under:

> "*M/s. TANGEDCO raised another issue with regard to charging of depreciation on Straight Line Method or on Written Down Value Method. They also referred to para 17 of the Judgement of the Hon'ble Appellate Tribunal of Electricity in Appeal No.97 of 2010 to suggest that the depreciation should be charged on the basis of Straight Line Method. Since we are not determining the tariff in this petition and deciding the capital cost of the project, Straight Line Method of depreciation may not be mandated. Since the Accounting Standards permit the use of either method of depreciation for the purpose of accounting and if Written Down Value method has been consistently followed, there should not be any objection in following either of the methods. In view of this, depreciation as part of the pre-operative expenses amounting to Rs.2.69 crores cannot be disallowed.*"

121. In view of the finding that the Accounting Standards permit the use of either method of depreciation for the purpose of accounting and if written Down Value Method has been consistently followed, on that basis, the depreciation as part of the pre-operative expenses amount to Rs.2.69 Crores have been allowed. In fact, the First Respondent limited its claim to depreciation for the period of use till Commercial Operation Date as against the entire asset value, keeping equity in mind.

122. According to the Respondent, the value of assets was not included in the capital cost and out of Rs.3.64 Crores, the Depreciation Claim was limited to Rs.2.69 Crores.

123. In view of the above, there is no merit in the contention urged by the learned Counsel for the Appellant on this count.

124. Therefore, the depreciation amount of Rs.2.69 Crores is being retained. This issue is also decided accordingly.

125. The **7th Issue** is **EPC Cost (withheld amount).**

126. On this issue, the amount of Rs.11.52 Crores which was paid by the Respondent to the EPC Contractor was allowed. Challenging this, the present Appeal has been filed by the TANGEDCO.

127. The contention of the Appellant on this issue are as under:

> "The date of Commercial Operation of the plant was April, 2001. Originally, this amount was not considered by the Appellant for capital cost since the documentary evidence for having incurred the expenditure was not produced. However, on production of the evidence, subsequently, this amount was accepted by the Appellant. The Regulations, 2005 clearly mentions that the actual expenditure should be considered by the State Commission

subject to prudence check. In as much as the cost has not been actually incurred, considering the expenditure in the project cost would amount to serving such as cost in a fictitious manner. Therefore, the Respondent may be directed to include the withheld amount of Rs.11.52 Crores which was paid to the EPC Contractor during the year 2007 to the capital cost only from the date of payment for tariff purpose."

128. The reply by the Respondent on this issue is as under:

"This ground has been urged for the first time at the stage of this Appeal. Therefore, the said ground cannot be permitted at the Appellate stage especially after agreeing before the Evaluation Committee and the State Commission. That apart, it is to be noticed that the Appellant itself had unconditionally considered to allow the expenditure as part of the capital cost. The State Commission has dealt with the withheld amount of Rs.11.52 Crores after recording that the Appellant has agreed for the same. Having agreed to allow the withheld amount to be a part of the capital cost earlier the Appellant cannot now take a fresh stand which is untenable afterthought. Further, the issue has already been settled by this Tribunal in Appeal No.151/152 of 2007 dated 10.12.2008 to the effect that the Capital cost has to be calculated from the

Commercial Operation Date. Therefore, there is no merit on this issue."

129. The findings rendered by the State Commission on this issue are as under:

> "*During the proceedings before the Secretary, the TNEB agreed to admit one of the proposed disallowed item, viz, withheld LD included in EPC costs amounting to Rs.11.52 Crores and hence the disputed amount is limited to Rs.116.34 Crores…*
>
> *"Page No.59 and 60 of M/s. PPN's written submission is the overall summary of the disputed items and nowhere else the Liquidated Damages appear. From this, the Commission concludes that Liquidated Damages of Rs.11,52,30,000/- is a non-issue and therefore, the Commission does not deal with this matter further. TANGEDCO's written submission dt.10.11.2011 also concedes that this LD charges is admissible as a part of capital cost."*

130. In the light of the above findings let us discuss the issue.

131. The Appellant's claim that the actual amount has been paid by the PPN Power, the Respondent to the EPC contractor only in 2007 and hence the same has to be included in the capital cost only from 2007 onwards and not from the Commercial Operation Date i.e. 26th April, 2001. It is to be pointed out that the Evaluation Committee in its finding has given a finding the that claims made by the First Respondent became admissible particularly when the PPN officials on 10.3.2009 furnished the confirmation of the payment from

the Contractors Marubeni Corporation. Even before the State Commission in the Written Submissions dated 10.11.2011, the Appellant conceded that this LD charges is admissible as a part of capital cost.

132. Having agreed to this position earlier, it is not proper for the Appellant now to contend that it cannot include capital cost only from the date of Commercial Operation.

133. As regards this issue, as pointed out by the Respondent, this Tribunal has held that the capital cost is to be determined when it is incurred and not when it is paid. Therefore, the contention of the Appellant cannot be accepted.

134. Accordingly, the expenditure of Rs.11.52 Crores already allowed by the Sate Commission as part of the capital cost from Commercial Operation Date is retained. This issue is decided accordingly.

135. The **8th Issue** is **Debt Equity Ratio.**

136. The Appellant's contention on this issue is this:

> "The Appellant prayed to the State Commission that debt equity ratio may be determined by the State Commission so that the equity deployed may not exceed the ceiling prescribed in the PPA as well as the Notification issued by the Government of India.

Therefore, the Equity should be taken only on 28.01% and not 30%. The Respondent was bound to discharge obligation of showing actual debit and equity deployed in the project."

137. The submissions of the Respondent on this issue are as under:

"The issue has not been raised either before the Evaluation Committee or before the Sate Commission. Therefore, it is not permissible to allow to permit the Appellant to raise this issue at the Appellate stage. In fact, the actual paid up capital of the PPN Power Company is much higher at Rs.490.20 Crores but the Company has restricted its claims to 30% of the capital cost. The State Commission ordered that the debt equity ratio adopted for the provisional capital cost should only be adopted for the capital cost arrived at by the State Commission. This is in line with the Government of India norms. Hence, the debt equity ratio should be maintained at 70:30 as ordered by the State Commission."

138. Admittedly, the Appellant did not raise this issue before the State Commission. However, it is note worthy to refer to the directions issues by the State Commission in the Impugned Order which is as follows:

"….This approved capital cost shall be dived into foreign debt, foreign equity, Indian debt and Indian equity in the same proportion in which the provisional capital cost was divided…"

139. As pointed out by the learned Counsel for the Respondent, the Energy Department, Government of Tamil Nadu through its letter dated 9.2.1998 clarified to the Central Electricity Authority that debt equity ratio is maintained at 70:30 which is within the norms fixed by the Government of India. The State Commission while approving the capital cost of Rs.1,344.21 Crores adjusted for capacity determination to Rs.1,329.76 Crores and reiterated the Debt Equity Ratio to be 70:30. Therefore, there is no infirmity in the Impugned Order with reference to the Debt Equity Ratio.

140. Therefore, the same is retained. This issue also is accordingly decided as against the Appellant TANGEDCO.

141. The **9th and last issue** is **Prudence Check Not Carried Out**.

142. According to the Appellant, the State Commission has not done the prudence check as per Clause18 (3) of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005 while allowing /disallowing several items of the Capital cost.

143. The Respondent has replied to the above issue as under:

"The allegation of the Appelalnt that prudence check was not carried out by the State Commission is misconceived. This point was never raised or argued either before the Evalaution Committee or before the State Commission. It is for the first time this point has been raised before this Tribunal. The initial prudence check is the responsibility of the Appellant. It was for this reason that the Appellant sought of supporting documents relating to the expenses incurred and payments made. In fact, the first Responded had provided supporting documents in 155 volumes in multiple copies and on multiple occasions to the Appellant whenever called for. To go through those documents even exclusive Consultant was appointed by the Appellant. The exclusive Consultant was also present during the various sittings of the Evaluation Committee and during the courts of hearing before the State Commission. In fact there were several recordings by the Evaluation Committee to show that prudence check continued during the proceedings. Evaluation Committee also has recorded about the non-co-operation of the Appellant (TANGEDCO) with the Evaluation Committee for checking each claim on the basis of the supporting vouchers.

144. The relevant observation made by the Evaluation Committee is as follows:

> "*The TNEB have engaged an exclusive Consultant to scrutinize and evaluate the capital cost by checking each claim with supporting vouchers. In spite of availability of any exclusive consultant, it is sorry state of affair that TNEB always claimed that they could not check the bulk of vouchers and various payments. Further, they never came out with their requirements or help from PPN with a clear cut idea. The always came with one clarification and then they will go back to previous clarified item. The attitude was only to drag the matter and not to solve the problem…"*

145. In fact, the Appellant also admitted that due to voluminous data provided by the first Respondent, it was not able to check all the records. Now, the present claim of the Appellant that the prudence check was not carried out by the State Commission is not only belated but also totally untenable.

146. In view of the above this point is also decided as against the Appellant.

147. **<u>Summary of Our Findings</u>**

(a) **PPN Power in its Appeal No.282 of 2013 prayed for determination of Capital Cost as Rs.1363.96 Crores as against the disallowance of certain items by holding that the Capital Cost could be fixed only at Rs.1344.21 Crores. In this Appeal, the Appellant PPN Power has raised**

five issues challenging the disallowance of certain items. The reasonings given in the Impugned order disallowing certain items and for fixing the Capital Cost as Rs.1344.21 Crores are fully justified as such, the issues on the five items raised by the PPN Power, the Appellant have been correctly decided in the Impugned Order. Hence, there is no merit in the Appeal in Appeal No.282 of 2013 filed by PPN Power Generating Company Private Limited. Accordingly, this Appeal is liable to be dismissed.

(b) **The Appellant, TANGEDCO filed Appeal No.283 of 2013 challenging the findings with regard to determination of Capital Cost of Rs.1344.21 Crores praying for the reduction of the Capital Cost to the amount of Rs.1251.27 Crores. In this Appeal, the TANGEDCO, the Appellant has raised nine issues. On going through the Impugned Order and also having regard to the detailed submissions made by the parties, we do not find any infirmity in the conclusion arrived at by the State Commission with regard to these issues. Therefore, this**

Appeal No.283 of 2013 also has no merit. Accordingly, the same is liable to be dismissed.

148. In view of the above, we do not find any merit in both the Appeals as the Impugned Order does not suffer from any infirmity.

149. Accordingly, both the Appeals are dismissed as devoid of merits.

150. However, there is no order as to costs.

(Rakesh Nath) ***(Justice M. Karpaga Vinayagam)***
Technical Member **Chairperson**
Dated:30th June, 2014
√REPORTABLE/~~NON-REPORTABLE~~