

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

Execution Petition No. 2 of 2014 in Appeal No. 176 of 2011

Dated : 19th November, 2014

**Present : Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of :

PPN Power Generating Co. Pvt. Ltd.

IIIrd Floor, Jhaver Plaza,
1A, Nungambakkam High Road,
Chennai – 600 034

... Petitioner/
Appellant

Versus

Tamil Nadu Generation and Distribution Corp. Ltd.

144, Anna Salai,
Chennai – 600 002.

... Respondent

Counsel for the Appellant :

Mr. Jayant Bhushan, Sr. Adv.
Mr. Rahul Balaji,
Mr. Senthil Jagadeesan,
Mr. Govind Manoharan,
Ms. Shruti Iyer

Counsel for the Respondent :

Mr. R. Venkataramani, Sr. Adv.
Ms. Vijayalakshmi,
Mr. S. Vallinayagam,
Mr. Shodhan Babu,
Ms Neelam Singh,
Mr. Yashraj Singh

ORDER

Rakesh Nath, Technical Member

The present petition has been filed by M/s PPN Power Generating Company Pvt. Ltd. for the execution of the order of this Tribunal dated 22.02.2013 in Appeal No. 176 of 2011 against Tamil Nadu Generating and Distribution Corporation Ltd., the Respondent herein.

2. The brief facts are as under:

- a) The subject matter of the dispute between the parties related to non-payment of Invoices for the period from Commercial Operation Date of the generation station of the Petitioner i.e. from 26.04.2001 till 13.03.2009 and of Annual Invoices for the period from Commercial Operation Date i.e. from 26.04.2001 till 31.03.2007 under the Power Purchase Agreement entered into between the Petitioner and the Respondent dated 31.01.1997.
- b) The non-payment of the said invoices led to filing of the petition before the Tamil Nadu Electricity Regulatory Commission (“State Commission”) with a claim for the

amount of Rs.1,89,91,17,264/-due as on 19.03.2009 and interest thereon in terms of the PPA till the date of actual payment. The State Commission vide its order dated 17.06.2011 allowed the petition in favor of the Petitioner. The State Commission directed the Petitioner to redraw Invoices in terms of its specific directions. The State Commission also directed the Respondent to settle the Petitioner's claim along with interest thereon for the delayed payment within three months of submission of the redrawn invoices by the Petitioner.

- c) In pursuance to the above order of the State Commission the petitioner raised its claim for the period from the Commercial Operation Date i.e. from 26.04.2001 to 13.06.2011 and the relevant Annual Invoices with interest thereon.
- d) Aggrieved by the order dated 17.6.2011 of the State Commission, the Respondent filed Appeal No. 176 of 2011 before this Tribunal. During the pendency of the petition, the Tribunal directed payment of sum of Rs.245 Crores pending the Appeal. The respondent paid in installments, a

sum of Rs.240 Crores as directed by the Tribunal between February 2012 and September 2012.

- e) This Tribunal subsequently dismissed the Appeal filed by the Respondent vide judgment dated 22.02.2013.
- f) Immediately upon receipt of judgment, the Petitioner raised an updated demand on the Respondent by letter dated 25.02.2013.
- g) Aggrieved by the judgment dated 22.02.2013 of this Tribunal, the Respondent filed Civil Appeal No. 4126 of 2013 before the Hon'ble Supreme Court.
- h) The Hon'ble Supreme Court dismissed the Appeal filed by the Respondent vide judgment dated 04.04.2014, upholding the Judgment of this Tribunal.
- i) In the meantime, the State Commission passed an order dated 15.07.2013 in a separate proceeding determining the capital cost of the Petitioner's power project based on which tariff is to be adjusted as per the directions given by the State Commission in its Order dated 17.06.2011. Consequently, the Petitioner on 23.08.2013 raised a revised

claim on the Respondent of all the invoices raised from Commercial Operation Date i.e. 26.04.2001 till 30th June, 2011 and the interest for late payment thereon in terms of the PPA upto 22.08.2013.

- j) On receipt of the Judgment dated 04.04.2014 of the Hon'ble Supreme Court, the Petitioner filed its claim of Rs.685.18 Crores as on 15.04.2014, net of monies owed to the Respondent, requesting for immediate payment. It was pointed out by the respondent that the additional interest of Rs.30,27,965/- would be payable per day from 16.04.2014 till the date of actual payment by the Respondent.
- k) However, the Respondent did not make the payment despite the reminders by the Petitioner.
- l) Aggrieved by non-payment of the demand by the Respondent, the Petitioner has sought execution of the order dated 22.02.2013 of this Tribunal in Appeal No. 176 of 2011 and recover and make over to the petitioner a sum of Rs.690,93,75,293/-(Rupees six hundred ninety Crores ninety three lacs seventy five thousand two hundred ninety

three only) being the sum due as on 04.05.2014 together with future interest thereon in terms of the PPA.

- 3) The Petitioner has made the following submissions:
 - a) The interest on monies due to the Respondent have been computed in the absence of information from the Respondent on the applicable interest rates in terms of the Article 10.6 of the PPA. The Petitioner had been repeatedly seeking this data since its first claim dated 01.07.2011 and even during the current Execution Proceedings. However, the Respondent has not provided the information.
 - b) The Respondent has continued its past practice of disregarding payment obligations and has continued to commit the breach of judicial pronouncements. In view of the failure of the Respondent to honour payment the Petitioner has invoked the jurisdiction of the Tribunal under section 120(3) of the Electricity Act 2003 read with the order XXI of the CPC, 1908 to execute the judgment of Tribunal dated 22.02.2013.

- c) The Petitioner's claim dated 16.04.2014 is only an updation of accrued interest to that date of the adjustment claim submitted vide letter dated 23.08.2013. All other principles and facts of the claim made in August 2013 remain the same. Hence, the claim has been lying with the respondent for more than a year.
- d) The Petitioner has fully complied with each one of the directions of the State Commission set out in paragraph 255 of its order. The Petitioner submitted the claim details in five volumes of documents establishing compliance of the directions in Paragraph 255 (d) to (k) of the orders of the State Commission. Paragraph 255(l) that requires settlement between the parties has not been complied with by the Respondent.

4. The Respondent in its counter affidavit raised the issue of maintainability of the Petition under Section 120(3) of the Electricity Act, 2003 but did not press the same during the arguments. However, the Respondent submitted that the State Commission by order dated 17.06.2011 gave certain directions for redrawing the invoices and no quantum of money was determined by the State

Commission and no direction to pay was made under the said order. The order said that the parties have to make settlement after redrawing the invoices as per its directions. The Petitioner redrew the invoices and submitted to the Respondent. Objections were raised by the Respondent by writing various letters to the Petitioner stating the discrepancies found in the invoices and that the redrawn invoices were not correct.

5. The Respondent during the proceedings of the Petition raised the following specific issues :

- a) **Auxiliary Consumption:** The Petitioner has not followed the provisions of the PPA as informed by the Respondent vide letter dated 12.06.2014. The Petitioner has taken a stand that Variable Fuel Cost (“VFC”) of the redrawn invoices is the same as original invoice. The Petitioner has grossed up the net energy at 3% auxiliary consumption and claimed fuel cost for such units. This stand is not in line with the provisions of the PPA for the following reasons:

- (i) Under Article 1, auxiliary consumption is defined as the difference of energy measured between the generator terminal and interconnection point. Further, the difference shall be a maximum of 3% of the energy.
- (ii) During the meeting held on 22.01.2005, the above clause of the PPA was discussed and interpreted and it was mutually agreed that the auxiliary consumption would be taken as actual or 3% whichever is less.
- (iii) Under Article 10.2 (b)(ii) of the PPA, Annual invoice is for reconciliation of actual amounts receivable for the prior year.

The Petitioner has responded to the query and since this dispute relates to the redrawn invoices it, therefore, needs adjudication by an appropriate forum.

- b) **Excess Auxiliary consumption on account of colony consumption:** The Petitioner consumes electricity in their residential quarters. The percentage of actual

auxiliary consumption is arrived at by subtracting the net expenditure from gross generation which includes the energy utilized for consumption in quarters. Therefore, the Petitioner gets paid for consumption of energy in the residential quarters of their operation and maintenance staff. The Petitioner needs to give effect to the settlement of 2005.

- c) **IOCL Credits**: Under Schedule A of the PPA, the cost of fuel is a pass through in the tariff and any discount received by the Petitioner from the fuel supplier viz., IOCL, ought to be passed on the Respondent by virtue of the provisions of the PPA under Article 6.1(b) and 10.2(a), as well as specific undertaking dated 30.07.1998. The Respondent on 23.03.2013 wrote to IOCL seeking information. IOCL has furnished details of credit information vide letter dated 24.06.2013. The Petitioner has also admitted receipt of discount from IOCL from the year 2001. The fact came to be known to the Respondent when Civil Appeal No. 4126 of 2013 filed by the Respondent against the Judgment of this Tribunal in

Appeal No.176 of 2011 was pending before the Hon'ble Supreme Court as the same was brought to the notice of the Hon'ble Supreme Court by an application seeking directions. Hon'ble Supreme Court by order dated 04.04.2014 had observed that this issue should have been raised at the relevant time and dismissed the application of the Respondent. No finding is given in the Hon'ble Supreme Court's order. Non-adjudication of an issue does not prevent the aggrieved party from raising the same again before the appropriate forum, for the purpose of quantification, as fraud unravels everything.

Similar issue was raised by the Respondent in a proceeding related to M/s GMR Power Corporation in Appeal No. 177 of 2010 and the Tribunal directed the payment of the same to the Respondent.

- d) **Gross Calorific Value**: The Petitioner's project was envisaged as natural gas based project. The PPA provides naphtha as an alternate fuel. The PPA provides for mixed fuel operation viz. both gas and naphtha. The formula given in the PPA under Schedule-A for variable

Fuel Cost when mixed fuel is used envisages use of gross calorific value of gas. However, the Petitioner has used one parameter called Gas Calorific Value which has no sanctity in the PPA in computation of the variable fuel cost. The gas calorific value adopted by the Petitioner is Net Calorific Value and not Gross Calorific Value. Net Calorific Value is about 10% less than the Gross Calorific Value. In this manner the Petitioner gets cost of Naptha for calorific value of gas, resulting in artificially inflating the fuel cost.

- e) **Discrepancies in interest working** : The direction of the State Commission was that the Petitioner has to redraw the Annual Invoices for FY 2001-02 to FY 2006-07 after taking into account the capacity reset. If the revised Annual Invoices show refund to the Respondent such refund shall be made with interest till the date of payment. Similarly, if it transpires that the Respondent owes money to the Petitioner, he will pay to the Petitioner with interest as per Clause 10.6 of the PPA till the date of payment.

The Petitioner has included 0.5% of the cash credit rate charged by the bankers and then compounded the entire rate. However, the PPA claim relating to interest only states that the Petitioner is entitled to compounded interest on the due amount and not on 0.5% of penal interest. The interpretation of Clause 10.6 (e) of the PPA is required to be settled.

- f) **Charging of interest on infirm power supplied by Petitioner:** The Petitioner having allowed rebate on infirm power vide written consent and settled the issue cannot charge interest for delayed payment for the rebate given to TANGEDCO on the infirm power.
- g) **Compounding of interest rate when the delay period is less than the compounding period:** According to the Petitioner, working capital facility is available on quarterly compounded basis till 31.03.2002 and on monthly compounded basis till date. The contention of the Petitioner is that for determining working capital interest, the compounded rate is adopted as per the formula duly considering the period of compounding viz.

monthly/quarterly. The contention of the Petitioner will not apply to situations when the period of availing of working capital is lesser than the period of compounding viz. one month/three months. The compounding rate will not be applied at all by bankers if the facility is availed for a period lesser than period of compounding viz. monthly/quarterly. Therefore, whenever there is delay, which is lesser than a month/three months as the case may be, the compounded rate cannot be adopted for arriving at the initial interest for delayed payment.

- h) **Analysis of Commission's directions:** The State Commission has not adjudicated on the actual amount due and payable to the Petitioner. In view of the Commission's findings the monthly and annual invoices were required to be redrawn. Therefore, the Respondent has a right to scrutinize the redrawn invoices. Neither the dimension of resjudicate nor constructive resjudicate would apply to the present case. On scrutiny of redrawn invoices the Respondent has noticed discrepancies in

relation to the following between the original invoices and the redrawn invoices:

- (i) In the redrawn invoice, the claim towards maintenance spares under working capital for FY 2001-02 has been revised at Rs.3.97 Cr. instead of Rs.4.88 Cr., increasing the claim by 0.91 Cr. towards spares under working capital.
- (ii) PLF for recovery of fixed charges considered in the original bill for FY 2001-02 is 58.8053% whereas in the redrawn invoice the same is revised as 64.221%. The increased PLF will result in increase in fixed charges of the Petitioner.
- (iii) The interest rate charged for working capital during 2002-03 in the original invoices is 15% whereas the rate charged in the redrawn invoices is 15.48%.

6. On the basis of the above contentions, the Respondent has made the following claims:

a)	IOCL Credits	Rs. 66 Cr.
b)	Interest on IOCL credits	Rs. 120 Cr.
c)	Calorific Value of gas	Rs. 396 Cr.
d)	Interest on calorific value of gas	Rs. 383 Cr.
e)	Interest rate on dues to Respondent	Rs. 75 Cr.
f)	Other pending disputes	<u>Rs. 60 Cr.</u>
	TOTAL:	<u>Rs.1100 Cr.</u>

Thus, against the claim of about 685 Crores as on 15.04.2014 of the Petitioner, the counter claim of the Respondent is Rs.1100 Crores. The Respondent has submitted that the above claims deserved a ground level scrutiny and wanted the matter be remitted to the State Commission.

7. On the above issues we have heard Shri Jayant Bhushan, Ld. Senior Counsel for the Petitioner and Shri R. Venkataramani, Ld. Senior Counsel for the Respondent. They have also filed comprehensive written submissions.

8. As the learned Senior Counsel for the Respondent has not pressed the issue of maintainability of the Petition under section 120(3) of the Electricity Act during the arguments and the same has not been included in the written submissions, we are not inclined to go into the same and proceed to consider the Petition on other points on merits.

9. Before considering the contentions of the parties, let us examine the directions given by the State Commission in its order dated 17.06.2011. The same are reproduced as under :

“255.

- (a) *The Commission is competent to adjudicate upon this dispute.*
- (b) *Limitation period prescribed in the Limitation Act 1963 would not apply to proceedings before the Commission; delay and laches would apply.*
- (c) *Order II Rule 2 of the Code of Civil Procedure 1908 is not attracted in the present case.*
- (d) *The Petitioner is directed to redraw monthly invoices for the period from June 2001 to 12-12-2004 after deducting 15 paise per unit.*
- (e) *Monthly invoices are to be redrawn by the Petitioner between April 2002 and March 2006 after withdrawing the raise in capital cost of Rs.66 crores;*

further, monthly invoices from April 2001 to March 2006 are to be redrawn by the Petitioner with capital cost of Rs.1379 crores as against Rs.1386 crores.

- (f) Monthly invoices have to be redrawn in the capacity ratio of 336.299 divided by 347.712 for the period from 26-4-2001 to 21-11-2002 and in the capacity ratio of 343:969 divided by 347.712 for the period from 21-11-2002 onwards.*
- (g) The Petitioner is directed to redraw the monthly invoices of the financial year 2008-09 on the basis of lower interest rates.*
- (h) If the actual payment by the Respondent against each monthly invoice falls short of the corresponding redrawn monthly invoice, the Respondent is liable to pay interest to the Petitioner in terms of clause 10.6 of the PPA till the date of payment by the Respondent. Conversely, if the Respondent has made excess payment against each monthly invoice compared to the corresponding redrawn monthly invoice, the Petitioner is liable to pay interest to the Respondent in terms of clause 10.6 of the PPA till the date of actual payment by the Petitioner.*
- (i) Rebate would be admissible to the Respondent, if the redrawn monthly invoices and the original payment made by the Respondent against the invoice of that month matches or if the Respondent has made excess payment.*

- (j) *The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 as at September of respective years to capture the gains to the Respondent on account of lower interest rates and gains to the Petitioner on account of higher floating rate. The Petitioner is directed to redraw the annual invoices for 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, and 2006-07 as at 30 Sept 2002, 30 Sept 2003, 30 Sept 2004, 30 Sept. 2005, 30 Sept 2006 and 30 Sept. 2007 respectively after taking into account the capacity reset. If the revised Annual invoices show refund to the Respondent, such refund shall be made with interest from November 2002, November 2003, November 2004, November 2005, November 2006 and November 2007 till the date of payment. If it transpires that the respondent owes money to the petitioner on the basis of revised annual invoices, he will pay to the Petitioner with interest as per Clause 10.6 of the PPA till the date of payment.*
- (k) *As and when final capital cost is determined by the Commission adjustment between both the parties will take place in accordance with the PPA.*
- (l) *Settlement by either party after the Petitioner submits the redrawn invoices would take place within three months.”*

10. According to the Petitioner, the Invoices have been redrawn strictly as per directions 255 (d) to (k). The State Commission under 255(k) directed adjustment when final capital cost is determined by the Commission. The State Commission has since determined the final capital cost and accordingly the adjustment has been made by the Petitioner in the redrawn invoices.

11. We find that the State Commission in its order dated 17.6.2011 which was upheld in the Appeals by this Tribunal and the Hon'ble Supreme Court, has not quantified the amount payable but has given specific directions to the Petitioner for redrawing of the invoices as per its findings on the various issues raised by the Petitioner as given in the paragraph 255 (d) to (k). The State Commission further directed settlement after the Petitioner submits the redrawn invoices within three months. Ld. Sr. counsel for the Petitioner explained during the hearings that the invoices had been redrawn strictly as per directions 255 (d) to (k) of the State Commission. The Respondent is now raising issues about the correctness of the redrawn invoices raised by the Petitioner stating that these are not according to the terms of the PPA and the

understanding reached between the parties in the past. Let us consider the issues raised by the Respondent one by one.

12. The first and second issues relate to Auxiliary Consumption and are being considered together.

13. According to the Respondent, the Annual Invoice for Variable Fuel Cost should have been redrawn taking into account the actual auxiliary consumption or 3% whichever is less in line with the PPA and the decision taken in the meeting between the parties on 22.01.2005. The actual consumption in the colony supplied for the power plant should have also been excluded from auxiliary consumption. The working submitted by the Petitioner in the redrawn invoices did not reflect the decision arrived at during the meeting held on 22.01.2005 though the same is adhered to by the Petitioner from June 2007 invoices onwards.

14. As per Learned Sr. Counsel for the Petitioner, this issue was raised before the State Commission by the Respondent and no relief was granted and hence cannot be raised now. According to the

counter affidavit filed by the Petitioner, they had already given effect to the decision taken in the meeting held on 22.01.2005 for the years 2001-07 for the prior periods. Thus it is really a non-issue.

15. As per the Petitioner, the invoices have been raised based on actual auxiliary consumption and 3% whichever is less as per the decision in the meeting dated 22.01.2005 for prior period too. However, according to the Respondent, the decision of the meeting dated 22.01.2005 has been effected only from June 2007.

16. We find that these issues were not raised by the Petitioner in its Petition specifically as a matter of dispute before the State Commission. Under paragraphs 142, 143 and 145 of the order dated 17.6.2011 of the State Commission, the Respondent TANGEDCO made a statement that the excess claim towards excess auxiliary consumption and staff quarters (colony) was deducted and the balance amount was paid. However, the Petitioner had not raised issue specific to auxiliary consumption. The State Commission, therefore, had no occasion to deal with this issue.

17. We feel that the Petitioner has to raise the invoices as per the terms of the PPA. The PPA does not permit inclusion of consumption in employees' colony in the auxiliary consumption and auxiliary consumption has to be actual or 3% whichever is less. General observation of the State Commission regarding unilateral disallowance by the Respondent in Paragraph 232 of its order does not give a right to the Petitioner to raise invoices contrary to the unambiguous terms of the PPA which were objected to by the Respondent earlier and on which some understanding was also reached between the parties.

18. There is no disagreement between the parties that the auxiliary consumption has to be actual or 3% whichever is less and according to the Petitioner the invoices have been raised according to the same understanding. This is, however, disputed by the Respondent that the effect has not been given prior to June 2007. Therefore, we direct the Petitioner to submit working sheets for Monthly and Annual invoices to show the computation of gross energy from the energy sent out on which the Variable Fuel Cost has been claimed by the Petitioner clearly showing the calculation

of auxiliary consumption as per actuals or 3% whichever is less and the deduction of energy consumption of the staff colony for verification of the Respondent. In case the Petitioner finds some variation in gross generation from its earlier computation, the Petitioner shall revise the Invoices and the interest thereon.

19. The third issue is regarding IOCL credits.

20. Shri Jayant Bhushan, Learned Sr. Advocate representing the Petitioner argued that the Respondent had specifically raised the issue of IOCL credits before the Hon'ble Supreme Court which was rejected by the Hon'ble Supreme Court. The ruling of Hon'ble Supreme Court in this regard is as under:

“58. This now bring us to applications for impleadment of IOCL and for direction. I.A.No.6 of 2013 is for the impleadment of IOCL. It is submitted that during the pendency of these proceedings, the respondents have received rebates, discounts, credits, refunds in the fuel price being extended by fuel supplier i.e. Indian oil Corporation ltd. (IOCL). Such benefits have been received by the respondent from January 2001 till date It is pleaded that the respondents have failed to give details about the discounts and credits received the benefit of which ought to have been passed on to the appellant. Therefore, IOCL be made

parties to respondent No.2 to the present appeal. I.A.No.5 of 2013 seeks direction to IOCL to furnish details of all the documents of the matter. Further directions are also sought on the respondent to refund a sum of Rs.240 crores paid by the appellant under the order passed by the State Commission along with interest at the rate as mentioned in PPA.

59. The respondents in a common counter statement to the applications have submitted that the applications are not maintainable. The applications have been evidently preferred purely as dilatory tactics, to delay and deny substantial payments that are due and payable to the respondent pursuant to the orders passed by the State Commission which have been upheld by APTEL. We are not inclined to entertain either of the applications at this stage. The issue sought to be raised in both the applications ought to have been raised by the appellant at the relevant time. The applications are, therefore, accordingly dismissed.”

21. We find that the Hon’ble Supreme Court has dismissed the applications filed by the Respondent with regard to IOCL credits stating that the issue ought to have been raised at the relevant time and cannot be entertained at the Appeal stage. It is, therefore, not open for the Respondent to raise this issue before us in the Execution Petition.

22. The fourth issue is regarding Gross Calorific Value (GCV)

23. According to the Respondent, the Petitioner has wrongly used Gas Calorific Value which is Net Calorific Value instead of Gross Calorific value in calculation of Variable Fuel Cost contrary to the provision of the PPA.

24. The Petitioner has submitted that this issue has been raised by the Respondent for the first time. Similar attempt relating to raising of a dispute pertaining to alleged credits being provided by the Petitioner by its fuel supplier was raised at the Hon'ble Supreme Court for the first time, which was dismissed. Raising of this issue at the execution stage is untenable as the claim is hit by the principle of constructive resjudicate. The Petitioner has however, not denied that they have used Gas Calorific Value/Net Calorific Value in place of Gross Calorific Value in calculating the Variable Fuel Cost.

25. We find that the formula for Variable Fuel Cost (VFC) specified in the PPA clearly indicates Gross Calorific Value of gas to be used in the formula. There is no scope for dispute in this matter. If the

Petitioner has used Net Calorific Value of gas instead of Gross Calorific Value in the invoices then it is only a calculation error which is required to be corrected. There is no finding of the State Commission/Tribunal which allows use of Gas Calorific Value/Net Calorific Value instead of Gross Calorific Value in the formula for calculation of VFC. The principles of resjudicata or constructive resjudicata cannot be applied for an error in the calculation of VFC which has come to the notice of the Petitioner at the execution stage. The Petitioner has also not denied that the allegation of the Respondent that Net Calorific Value has been used in calculation of VFC instead of Gross Calorific Value. Therefore, we direct the Petitioner to correct the Invoices by applying Gross Calorific Value of gas in the formula for VFC, if GCV has not been correctly used in their calculation of VFC and submit the details to the Respondent.

26. The fifth issue is regarding discrepancies in working of the interest.

27. According to the Respondent, the claim relating to interest only states that the Petitioner is entitled to compound interest on

the due amount and not on 0.5% of penal interest. 0.5% has to be added to the compounded rate and not adding of 0.5% and then compounding the interest rate.

28. According to the Petitioner, the interest compounding has been done as per the relevant Article 10.6 of the PPA.

29. Article 10.6 of the PPA reads as under:

“Late Payments. Late Payments shall bear interest accrued from the Due Date they became overdue at a rate equal to the rate charged from time to time on cash credits extended to the Party to whom such payment is due plus one half percent (0.5%) per annum, to the extent permitted by law or if such facilities are not available, at the cash credit rate offered by State Bank of India for such comparable Independent power producers plus one half percent (0.5%).”

30. The Article 10.6 of the PPA is very clear that the 0.5% has to be added to the interest rate and then compounding has to be done. Compounding of interest rate and then adding 0.5% as contended by the Respondent would not make any sense as it would result in

strange combination of compound and simple interest rate in the same formulation.

31. Hon'ble Supreme Court while considering the effect of applicability of Article 10.6 has observed in its Judgment dated 4.4.2014 as under:

“57. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays. It is submitted by Mr. Salve and Mr. Bhushan that bankers of the respondents have applied quarterly compounding or monthly compounding for cash credits during different periods on the basis of RBI norms. Article 10.6 of the PPA has followed the norms of the bank. This can not be said to be unfair as the same principle would also apply to the appellants.”

32. Thus, there is no merit in the contention of the Respondent in this regard.

33. The sixth issue is regarding charging of interest rate on infirm power supplied by the Petitioner.

34. According to the Respondent, the Petitioner has claimed interest on the rebate allowed by it on the infirm power purchased by the Respondent. The interest workings in respect of the rebate on infirm power purchase itself was furnished for the first time only in July 2011.

35. According to the Petitioner, this is a completely unsubstantiated statement which is totally untenable. It is actually for the first time in the Respondent's submissions on 08.10.2014 that a stand is sought to be taken that interest should not be charged on the rebate. The position that the Respondent seeks to project is that in respect of payments relatable to June 2011 when the Petitioner has allowed a rebate, it was illogical to also claim interest as Rebate itself is given for early payment and the payment of interest does not arise.

36. According to the Petitioner, the stand of the Respondent is untenable as interest has been charged on invoice value outstanding and not on rebate. The Rebate of 2.5% agreed to for the said payment was not under the terms of the PPA but was an ad-hoc acceptance conveyed to the Respondent on that occasion alone without waiving the Petitioners right under the PPA. The

Rebate being one that was different from the Rebate as provided for under the PPA, there is no incongruity in charging interest in respect of value of invoice on which payments were actually delayed.

37. We do not find any merit in the claim of the Respondent. The Respondent has not been able to substantiate its claim. This claim is also outside the purview of the PPA and the order which is being executed.

38. The seventh issue is regarding compounding of interest when the delay period is less than the compounding period.

39. According to the Respondent, the contention of the Petitioner is that for determining working capital interest, the compounded rate is adopted as per the formula duly considering the period of compounding viz. monthly/weekly. This contention of the Petitioner will not apply to situations where the period of availing of working capital is lesser than the period of compounding viz. one month/three months.

40. According to the Petitioner, the formula that is applied in lending practices for determining the interest rate is $(1+r/n)^n - 1$ and formula for determining the amount of interest is $P(1+r/n)^n - P$, where 'P' is the principal outstanding, 'r' is the rate of interest and 'n' is the period of compounding. If the compounding is quarterly, the formula for determining the compounded interest and amount of interest respectively would be $(1+r/4)^4 - 1$ and $P(1+r/4)^4 - P$. Similarly if compounding is monthly, the formulae would accordingly be $(1+r/12)^{12} - 1$ and $P(1+r/12)^{12} - P$ respectively. Applying the same interest rate for 2001-02 on quarterly basis, the interest rate of 16.53% stands compounded at 17.58%. Similarly, for the year 2004-05 for instance, the interest rate of 13.17% stands compounded at 13.83%. Accordingly, the interest has been computed from the due date to the date of payment.

41. We find that the methodology used by the Petitioner for calculation of the compound interest is correct and there is no merit in the contentions of the Respondent.

42. **The eighth issue is regarding analysis of Commission's directions.**

43. The Respondent has raised the following discrepancies in relation to the original invoices and the redrawn invoices:

- a) Claim towards maintenance spares under working capital for the FY 2001-02
- b) PLF for recovery of fixed charges for the FY 2001-02
- c) Interest rate charged for working capital during 2002-03.

44. As regards claim towards the maintenance spares under working capital for FY 2001-02, the Petitioner has submitted that it has raised the claim strictly in consonance with the provisions of the PPA, more specifically clause 9 of the Schedule 'A'.

45. The directions of the State Commission in paragraph 255 (e) was to redraw the invoices on the basis of the lowered capital cost of 1379.25 Crores adjusted for capacity. The reduced capital cost included a reduced initial spares component. The maintenance spares forming part of the working capital for the FY 2001-02 had therefore to be recomputed resulting in a change.

46. The Petitioner has given detailed calculation of the redrawn invoice considering the change in capital cost. We find that the

original invoice was raised on capital cost of Rs.1386 crores. The State Commission in paragraph 255(e) of the order directed redrawing of the invoices by the Petitioner between April 2001 to March 2006 with capital cost of Rs.1379 crores as against Rs.1386 Crores. Further, the capacity adjustment was only finalized vide Respondent's letter dated 31.05.2006. Accordingly, the maintenance spares for working capital purpose got changed. We find no fault in the methodology used by the Petitioner in revising the invoice for FY 2001-02 as per the directions of the State Commission.

47. As regards the PLF for recovery of fixed charges for FY 2001-02, the Petitioner has submitted that the PLf of 64.2221% is in line with the provisions of the PPA and the agreed position between the parties as per the Respondent's letter dated 31.05.2006, when the capacity reset was agreed to. This formed part of the Annual Invoice submitted in July 2007 and was accepted by the Respondent. The PLF was correctly computed at 64.2221% in terms of the PPA after considering provisions relating to deemed generation, the agreed position on capacity reset and related PLf

computation as settled between the parties on 31.05.2006. The Petitioner has given detailed computation of PLF.

48. The Respondent has not been able to give any error in the computation of the PLF on account of the capacity reset. In view of the explanation given by the Petitioner, we are not inclined to interfere in the matter as we find no merit in the contention of the Respondent.

49. Regarding the interest charged for working capital during 2002-03, the Petitioner has submitted as under :

- “1. Initial draft working made a couple of months prior to submission adopted an interest rate of 15.475%*
- 2. The updated file for submission of the Fixed Capacity Charge estimates on or before March 1, 2002 adopted the updated interest rate of 15%*
- 3. Coincidentally, the amount of Working Capital interest in both the files was the same, viz., Rs.31.96 crores*
- 4. Inadvertently, whilst submitting the claim, the wrong file was adopted*
- 5. If the correct file showing 15% interest had been adopted, the interest claim would have been Rs.30.25 crores, whilst what has been actually claimed is Rs.30.20 crores.*
- 6. The marginal short claim of Rs.0.05 crores is being ignored by the Petitioner*

7. *Hence, this is a non-issue.”*

50. The Petitioner has submitted the detailed computation in the written submission explaining the above discrepancy. The Respondent has not pointed out any error in the computation submitted by the Petitioner.

51. Considering the above submission of the Petitioner, we do not find any merit in the contention of the Respondent on this issue.

52. In view of above, the Petitioner is directed as follows:

(i) The Petitioner shall submit working sheets for Monthly and Annual invoices to show the computation of gross energy from the energy sent out on which the Variable Fuel Cost has been claimed by the Petitioner clearly showing the calculation of auxiliary consumption as per actuals or 3% whichever is less and the deduction of energy consumption of the staff colony for verification of the Respondent. If the Petitioner finds some variation in gross generation from its earlier computation, the

Petitioner will revise the Invoices and the interest thereon.

- (ii) The Petitioner shall correct the Invoices by applying Gross Calorific Value of gas in the formula for VFC, if GCV has not been correctly used in their computations and submit to the Respondent.**

- (iii) The Petitioner shall revise the invoices and the interest claimed for delayed payment as a consequence of the above directions and submit the same to the Respondent.**

53. The Respondent shall check the computations of the invoice raised by the Petitioner as above, only to the extent of checking of the error in calculations. The Respondent shall not raise any new dispute on the Invoices, if the revised invoices are found to be computed in accordance with the directions of the State Commission in Paragraph 255 (d) to (k) and the directions given in this order. If the Respondent finds

some calculation error, the same shall be referred back to the Petitioner. However, immediately after verification of the calculations which has to be completed by the Respondent within 30 days of the submission of revised Invoices by the Respondent, the Respondent shall make the payment to the Petitioner. If the Respondent finds some calculation error then the Respondent shall make payment to the extent of the undisputed amount as per its calculations and the balance shall be paid as soon as the difference in the computation of the amount due to the calculation error is resolved between the parties.

54. With the above directions, Execution Petition No. 2 of 2014 is disposed of.

55. Pronounced in the open court on this **19th day of November, 2014.**

**(Rakesh Nath)
Technical Member**

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

√

REPORTABLE/~~NON-REPORTABLE~~

vs