Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No.108 of 2014 & IA. Nos. 250 of 2014 & 348 of 2014
Appeal No. 122 of 2014
Appeal No.18 of 2013
Appeal No. 119 of 2014 & IA Nos. 265 of 2014 and 325 of 2014

Dated: 15th May, 2015

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

In the matter of:

Appeal No.108 of 2014 & IA. Nos. 250 of 2014 & 348 of 2014

1. Power Company of Karnataka Ltd.,
   KPTCL Building, Kaveri Bhavan,
   K.G. Road, Bangalore-560009.

2. Bangalore Electricity Supply Company Limited,
   Kr Circle, Bangalore-560001.

3. Mangalore Electricity Supply Company Ltd.,
   Paradigm Plaza, AB Shetty Circle,
   Mangalore-575001.

4. Gulbarga Electricity Supply Company Ltd.
   Station Main Road,
   Gulbarga-585102.

5. Hubli Electricity Supply Company Ltd.
   Corporate Office,
   Navanagar, PB Road,
   Hubli-580025.

6. Chamundeshwari Electricity Supply Corporation Ltd.
   Corporate Office, No. 927 LJ Avenue,

New Kantarajurs Road,
Mysore-570009. ….. Appellant(s)

Versus

1. Central Electricity Regulatory Commission,
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi-110001.

2. Udupi Power Corporation Ltd, Bangalore
2nd Floor, Le Parc Richmonde,
51, Richmond Road,
Bangalore-560025.

3. Punjab State Power Corporation Ltd, Patiala
The Mall, Patiala-147001
Punjab.

4. M/s. Janajagrithi Samithi, Karnataka
Executive President,
Nandikur, Udupi District,
Karnataka-574138. ....Respondent(s)

Counsel for the Appellant (s) : Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Poorva Saigal
Ms. Ranjitha Ramachandran
Ms. Anushree Bardhan
Ms. Mandakini Ghosh
Mr. Sanjay Pareekh,
Ms. Mamta
Ms. Swapna Seshadri

Counsel for the Respondent (s) : Mr. Dhananjay Baijal
Mr. N. Sai Vinod
Mr. Nikhil Nayyar for R-1, CERC

Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Buddy A. Ranganadhan
Mr. Sitesh Mukherjee

Mr. Sakya Singha Chaudhuri
Ms. Kanika Chugh
Mr. Anand K. Srivastava
Mr. Aniket Prasoon
Mr. J.J. Bhatt, Sr. Adv.
Mr. L. Vishwananthan
Mr. Anuj Berry
Mr. Abihimanu Ghosh
For R-2, Udupi Power

Mr. Dhananjay Baijal
Mr. Nikhil Nayyar for R-1

Mr. Pradeep Misra
Mr. Daleep Kr. Dhyani for R-3 to 5

Appeal No. 122 of 2014

M/s. Janajagrithi Samithi Karnataka,
Executive President, Mr. Balakrishna Shetty,
Nandikur, Udupi District,
Karnataka-574138. …. Appellant(s)

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Mysore-570009.

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The Mall, Patiala-147001
Punjab. ….Respondent(s)

Counsel for the Appellant (s) : Mr. Sanjay Parekh
Ms. Mamta Saxena
Mr. Pukhrambam R. Kumar
Ms. N. Vidya
Mr. Ritwik Parikh

Counsel for the Respondent (s) : Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Sitesh Mukherjee
Mr. Buddy A. Ranganadhan
Mr. Sakya Singha Chaudhuri
Ms. Kanika Chugh
Mr. Anand K. Srivastava
Mr. Aniket Prasoon
Mr. J.J. Bhatt, Sr. Adv.

Mr. L.Vishwanathan
Mr. Anuj Berry
Mr. Abhimanu Ghosh
For R-2, Udupi Power

Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
for R-3, PCKL

Mr. Nikhil Nayyar
Mr. N. Sai Vinod for R-1

Appeal No.18 of 2013

1. Power Company of Karnataka Ltd.,
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Mr. Anand K. Ganesan
Ms. Poorva Saigal
Ms. Mandakini Ghosh
Mr. Sanjay Pareekh,
Ms. Mamta
Ms. Anushree Bardhan
Ms. Swapna Seshadri

Counsel for the Respondent (s) : Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-I, CERC

Mr. C.S. Vaidyanathan, Sr. Adv.
Mr. Sitesh Mukherjee
Mr. Buddy A. Ranganadhan
Mr. Sakya Singha Chaudhuri
Mr. Anand Kr. Srivastava
Ms. Kanika Chugh

Mr. Aniket Prasoon
Mr. J.J. Bhatt, Sr. Adv.
Mr. L. Vishwanathan
Mr. Anuj Berry
Mr. Abhimanu Ghosh for R-2

Appeal No. 119 of 2014 & IA Nos. 265 of 2014 and 325 of 2014

Udupi Power Corporation Ltd, Bangalore
2nd Floor, Le ParcRichmonde,
51, Richmond Road,
Bangalore-560025. .....Appellant

Versus

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Mr. Anand K. Srivastava

Counsel for the Respondent (s) : Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1, CERC

Mr. M.G. Ramachandran
Mr. Anand K.Ganesan for R-2 to 7

Ms. Mamta
Mr. Sanjay Parikh for R-8

J U D G M E N T

RAKESH NATH, TECHNICAL MEMBER

These Appeals have been filed against the various orders passed by the Central Electricity Regulatory Commission **("CERC")** dealing with

determination of capital cost and tariff for 2x600 MW Thermal Power Project of Udupi Power Corporation Limited **("Udupi Power").**

2. Appeal No. 108 of 2014 has been filed by Power Company of Karnataka Limited and the distribution licensees (hereinafter referred to as **'PCKL')** procuring power from Udupi Power challenging orders dated 20.02.2014 and 21.02.2014 passed by CERC in regard to tariff for generation and sale of electricity from Udupi Power and demand of Rs.731.38 crores raised by PCKL on Udupi Power as compensation for difference in price of coal respectively. CERC is the first Respondent and Udupi Power is Respondent No.2. Punjab State Power Corporation Limited **("PSPCL")**, the distribution licensee in Punjab also procuring power from Udupi Power is Respondent No.3. Janajagrithi Samithi, Karnataka, an NGO, is Respondent No. 4. In this Appeal, determination of capital cost and tariff for Udupi Power for the period 11.11.2010 to 31.03.2014 in regard to the first unit and for the period 19.08.2012 to 31.03.2014 in regard to second unit of Udupi project by order dated 20.02.2014 has been challenged. Also order dated 21.02.2014 setting aside the demand raised by PCKL on Udupi Power for difference in coal price has been challenged.

3. Appeal No. 122 of 2014 has been filed by Janajagrithi Samithi, Karnataka challenging the same order dated 20.02.2014 passed by CERC.

4. Appeal No. 18 of 2013 has been filed by Power Company of Karnataka Limited and the distribution licensees challenging order dated 24.12.2012 passed by CERC deciding the provisional tariff of Udupi Power.

5. Appeal No. 119 of 2014 is a cross appeal filed by Udupi power challenging the order dated 20.02.2014 passed by CERC on some issues.

6. The brief facts of the case are as under:-

   (a) The Power Company of Karnataka Ltd. has been established for the purpose of coordination of power purchase activities of five distribution companies in the State of Karnataka who are also Appellants in Appeal No. 108 of 2014 and 18 of 2013.

   (b) Udupi Power earlier named as M/s. Nagarjuna Power Corporation Ltd. **("NPCL")** is a generating company and has established Udupi Thermal Power Project of 2x600 MW based on imported coal in the State of Karnataka.

(c) On or about 10.12.2004, Udupi Power approached the Government of Karnataka **("GoK")** offering to supply electricity from Udupi Thermal Power Project proposed to be set up with a capacity of 1015 MW (2x507.5 MW). Thereafter, Udupi Power filed a Petition before CERC for the approval of tariff for generation and sale of electricity from its Udupi Power Project to State Utilities in Karnataka and Kerala State Electricity Board. NPC also informed that they had placed Letter of Intent **("LOI")** for various packages of the power project on M/s. BHEL, M/s. Navayuga and M/s. Simplex

(d) On a Petition filed by NPCL, the predecessor of Udupi Power, CERC by order dated 25.10.2005 accorded in principle approval of the capital cost of the project with a capacity of 1015 MW for Rs.4299.12 crores inclusive of Interest During Construction **("IDC")**. Thereafter, on 26.12.2005 Udupi Power entered into a Power Purchase Agreement **("PPA")** with the distribution companies of Karnataka for supply of 90% of capacity of the project. Udupi Power also entered into a PPA dated 29.09.2006 with PSPCL for sale of balance 10% capacity. Subsequently, Udupi Power sought clarification of the

order dated 25.10.2005 and also extension of time to achieve financial closure. CERC by order dated 09.03.2006 disposed of the application wherein time extension for financial closure was allowed upto 30.06.2006. As regards clarification CERC held that since at that stage it has not gone into process of actual determination of tariff, it does not consider it appropriate to examine the issue in detail.

(e) Udupi Power again sought for extension of time for financial closure of the generating station and also for relaxation of some of the norms and parameters. CERC by order dated 07.08.2006 disposed of the application of Udupi Power by allowing extension of time for financial closure upto 31.10.2006 and also making it clear that any deviation from the maximum capital cost approved vide CERC order dated 25.10.2005 shall be subject to the conditions mentioned in the above order.

(f) Subsequent to signing the Power Purchase Agreement dated 25.10.2005, there was change in the composition of the shareholding of NPCL and the same was taken over by Lanco Group. After the change over of the shareholding Udupi Power terminated all the contracts with M/s. BHEL, M/s. Navayuga

and M/s. Simplex and re-invited bids for the project. Subsequently on 24.12.2006 EPC contract was awarded on turnkey basis on M/s. Lanco Infratech Limited **("LITL")**.

(g) On 29.07.2008, Udupi Power approached the GoK and the distribution licensees for approval for enhancement of capacity for the project from 1015 MW to 1500 MW and to provide power generation from the increased capacity to Karnataka utilities. Udupi Power on the basis of revision in capacity of Udupi Power sought revision in capital cost of the project. By letter dated 03.02.2009, Government of Karnataka communicated its in principle no objection for enhancement of capacity of the project from 1015 MW to 1500 MW subject to certain conditions. The project capacity was finally restricted to 1200 MW due to problem in obtaining environmental clearance for 1500 MW.

(h) The Government of Karnataka set up a committee under the chairmanship of Justice (Retd.) Gururajan to examine the enhancement of capital cost of the project due to enhancement of capacity from 1015 MW to 1200 MW. Justice (Retd.) Gururajan Committee vide its report dated 23.09.2010,

recommended increase in the project cost by Rs.584 crores excluding IDC. Government of Karnataka based on the above report vide its order dated 25.10.2010 accorded approval to enhance capacity of the Udupi project from 1015 MW to 1200 MW, accepted recommendation of Justice Gururanjan Committee for an increase in capital cost to be extent of Rs.584 crores, excluding IDC, subject to approval of CERC. Udupi Power was also directed to file necessary particulars regarding capital cost increase and tariff along with relevant documents with CERC immediately.

(i) The first unit of the Udupi Power achieved commercial operation on 11.11.2010 and the second unit on 19.08.2012. There was delay in achieving COD of the units due to various reasons.

(j) In the meantime Udupi power filed a Petition before CERC on 14.12.2011 for determination of tariff. CERC after considering submissions of the parties granted provisional tariff for Unit-I by order dated 28.07.2012 for the period 11.11.2010 to 31.03.2014. Aggrieved by the said order, the PCKL and distribution licensees filed an Appeal being No.190 of 2012

before the Tribunal on the ground that provisional tariff order was passed by CERC without hearing them. The Tribunal by order dated 18.10.2012 remanded the matter to CERC and directed to pass appropriate orders in accordance with law after hearing of the parties. Thereafter, CERC passed a provisional tariff order dated 24.12.2012 which has been challenged by PCKL and others in Appeal No. 18 of 2013.

(k) Finally, CERC after hearing the parties passed the impugned order dated 20.02.2014 determining the capital cost and tariff for supply of power from Udupi Project to the distribution licensees. CERC also passed order dated 21.02.2014 in a Petition filed by Udupi Power under Section 79(1)(f) praying for setting aside the claim of Rs.731.38 crores of PCKL towards excess amount of fuel cost on account of cancellation of Fuel Supply Agreement by M/s. Aditya Energy Resources, one of the coal suppliers of Udupi Power. By Order dated 21.02.2014, CERC allowed the Petition filed by Udupi Power and set aside the letter by PCKL raising demand for compensation. Aggrieved by the impugned orders dated 20.02.2014 and 21.02.2014, PCKL and others have filed Appeal No. 108 of 2014.

Janajagrithi Samithi, Karnataka has filed Appeal being No.122 of 2014 challenging order dated 20.02.2014. Udupi Power has also filed a cross Appeal being No. 119 of 2014 challenging certain part of the impugned order dated 20.02.2014.

7. The issues raised in Appeal No. 108 of 2014 are related to:-

(I) Fixation of capital cost of the project

(II) Delay in commissioning of the project allowed by the CERC on account of Force Majeure events, namely, delay in land acquisition, delay due to the change in Visa Rules for Chinese personnel and delay due to the non availability of 400 KV transmission lines and IDC allowed for the delay.

(III) Interest rates should be as per PPA.

(IV) Return on equity and O&M charges as per PPA

(V) Gross Station Heat Rate considered by CERC instead of Net Station Heat Rate as per PPA.

(VI) Auxiliary power consumption taken higher than the PPA and CERC's Regulations, 2009.

(VII) Setting aside of demand of Rs.731.38 crores raised by PCKL on Udupi Power.

8. In Appeal No. 119 of 2014, the following issues have been raised by Udupi Power:-

   I. Error in calculation of EPC contract

   II. Delay in providing start up power

   III. Interest on belated payments

   IV. Claim for station Heat Rate at 2400 kCal/kWh

   V. Claim for auxiliary consumption at 7.5%

   VI. Prayer for direction on signing of Transmission and Wheeling Agreements

   VII. Amendment of PPA and directions on Payment Security Mechanism

9. In Appeal No. 122 of 2014, various issues relating to capital cost including allowance of IDC for various force majeure events has been challenged.

10. In Appeal No. 18 of 2013, CERC's order dated 24.12.20012 deciding the provisional tariff has been challenged on various grounds which are common to Appeal No. 108 of 2014. In view of determination of final tariff and challenge to the same in Appeal No.108 of 2014, Appeal No. 18 of 2013 will not survive.

11. Let us take up the above issues one by one. We shall be taking up the common issues raised in the Appeals together.

12. The first issue is regarding capital cost of the project.

13. Mr. M.G. Ramachandran, Learned Counsel for PCKL has made very elaborate submissions on this issue and also filed written submissions. The submissions of Mr. M.G. Ramachandran are summarized as under:-

(A) CERC has gone wrong in proceeding on the basis that it can override terms of the PPA and also stipulation contained in its own orders dated 25.10.2005 and 07.08.2006 to consider increase in capital cost of the project. The Order dated 25.10.2005 was passed by CERC based on applicable Tariff Regulation, namely Tariff Regulations, 2004 and, therefore, it is not open to the CERC to exercise its regulatory power to override said order and the PPA which was entered into in terms of the above order and prevalent Tariff Regulations. Interest not ought to have been restricted to 7.25% and no IDC beyond the scheduled CoD should have been allowed as per 'in principle' order of CERC and PPA. This has resulted in higher tariff and thereby putting additional burden on the consumers.

(B) The Commission has proceeded wrongly that re-determination of the capital cost became necessary on account of increase in capacity from 1015 to 1200 MW and therefore capital cost has to be determined for 1200 MW afresh without any constraint of the ceiling cost and other aspects contained in the orders dated 25.10.2005 and 07.08.2006.

(C) CERC has been wrong in proceeding on the basis that the tariff for the project need to be determined only in accordance with provisions of Tariff Regulations, 2009 **("2009 Regulations")**, ignoring earlier orders passed by CERC under Tariff Regulations, 2004 **("2004 Regulations")**. The change in control period at the time of commercial operation of the generating station can not lead to the orders passed under earlier Tariff Regulations redundant and a nullity.

(D) CERC has not considered that if any increase in capital cost is to be considered due to increase in capacity, the same need to be restricted only to extent factors necessitating additional capital expenditure. In the absence of any such factor, no increase in capital cost can be allowed. CERC also totally overlooked the report of the CPRI submitted by PCKL.

(E) The Commission has not considered the submissions of PCKL that even if any increase in the project cost is required to be considered on account of increase in capacity, the same is required to be restricted to Rs.97.6 crores as per the detailed analysis submitted by PCKL.

(F) While fixing the capital cost of the project based on increased capacity, CERC has overlooked the fraud played by Udupi Power on the Appellants and the Consumers of the State. In the year 2008, Udupi Power represented that the equipment supplier was willing to increase the capacity of the project from 1015 MW to 1200 MW subject to additional capital cost being paid for such increase. The Government of Karnataka and PCKL agreed to the above believing representation of the Udupi Power that equipment supplier and the developer of the project had decided to increase the capacity. However, it has later transpired that the turnkey contractor viz. namely M/s. Lanco Infratech Ltd. **("LITL")**, a sister concerns of Udupi Power was at all time since beginning having agreement with the suppliers M/s. Donfang Electric Corporation **("DEC")** for capacity of 2x600 MW. The proposal for increase in capacity

from 2x507.5 MW to 2x600 MW was made by Udupi Power knowing fully well that the capacity contracted by LITL with DEC was 2x600 MW . This was done with the intention of unlawful gain to Udupi Power at the cost of consumers.

(G) Udupi Power has acted in an inprudent manner in regard to contracts for setting up of power project as also fuel supply agreement for procurement of fuel. Udupi Power had abruptly and unilaterally terminated the contracts with M/s. BHEL, M/s. Navayuga Engineering Co. Limited and M/s. Simplex which were the basis for fixation of ceiling capital cost of Rs.4299 crores. These contracts were also the basis for CERC's order dated 25.10.2005 and the PPA dated 26.12.2005. The competitive bidding process followed by Udupi Power for EPC contract was an eyewash as proper procedure was not followed.

(H) Alleged reference to Justice Gururajan Committee and deliberation with Government of Karnataka are not relevant as after constitution of the Regulatory Commission the tariff determination is within the scope, powers and functions of the Appropriate Commission and it is no longer permissible for the

State Government or any Committee nominated by the State Government to finally decide on the tariff or any tariff element.

(I) Udupi Power should bear the consequences of cancelling agreements existing as on 25.10.2005 with BHEL, Navayuga and Simplex, Financial Institutions, etc. and substituting the same with contracts with its group company LITL.

(J) LITL had entered into an agreement with DEC for the Boiler-Turbine-Generator **("BTG")** package vide agreement dated 16.12.2006. Despite repeated requests made by PCKL, Udupi Power did not make available the agreement dated 16.12.2006 entered between LITL and DEC. Udupi Power is responsible for changing the arrangement in the year 2006 hence as per the principle laid down by this Tribunal in Maharashtra Power Generating Co. Ltd. Vs. MERC in Appeal No. 72 of 2010 decided on 24.04.2011 dealing with delay attributable to generating company would squarely apply. Udupi Power cannot claim any compensations or increased tariff for the same.

(K) If BTG package arrangement with DEC was for 2X600 MW, it would be illogical to contend that LITL had planned Balance of Plant **("BoP")**, the civil works, etc., limited to capacity of

2x507.5 MW as BTG package is the main plant package based on which BoP is planned. Therefore, there is no justification for claiming additional cost for increase in capacity from 1015 MW to 1200 MW. Without prejudice to above, in any event, the increase in capacity would result in very less increase in capital cost. It cannot be more than Rs.97.6 crores in aggregate (as against Rs.500.29 crores allowed by CERC).

14. Shri Sanjay Parikh, Ld. Counsel for Janajagarithi Samithi, Karnataka reiterating the arguments put forward by Learned Counsel for PCKL has also laid emphasis on consumer's interest which according to him is paramount. He referred to Section 61 (d) of the Electricity Act, 2003 which provides that while determining the tariff, the Commission shall safeguard consumer's interest and in doing so will also take care of recovery of cost of electricity in a reasonable manner. According to him, CERC has not acted in a reasonable manner and has failed to protect the interest of consumers. According to him, the international competitive bidding conducted by Udupi Power for award of EPC contract was stage managed. Even though contract was awarded on LITL on 24.12.2006, the stamp papers for the contract were purchased by LITL as early as 08.11.2006. CERC

failed to consider that increase in capacity from 1015 MW to 1200 MW and consequent increase in capital cost was a clear misrepresentation with intention to commit fraud on the consumers. CERC should have looked into the conduct of Udupi Power as it is a settled position of law that fraud and concealment can vitiate any conduct or any action or order and the plea of limitation cannot be raised in such cases. He relied on SP Chengalvaraya Naidu (Dead) by LRS Vs. Jagannath (Dead) by LRS and others, 1994 (1) SCC1, Ram Preeti Yadav Vs. UP Board of High School and Intermediate Education & Others (2003) 8 SCC 311, A.V. Papayya Sastry and others Vs. Govt. of AP & Ors, (2007) 4 SCC 221 and Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another, (2004) 3 SCC page 1 at 43.

15. In reply, Shri Vaidyanathan, Learned Senior Advocate representing Udupi Power has made detailed submissions on the issue of capital cost. The gist of his submissions is as under:

(A) Referring to objects & reasons and various sections of the Electricity Act, 2003 regarding encouraging and delicensing of generation sector, he submitted that the entire premise of delicensing of generation is to free generators from hurdles of

regulatory regime so as to allow them to operate freely. A generating company on setting up is only required to approach the appropriate Commission for tariff determination for selling to distribution licensees. The appropriate Commission while fixing the tariff of a generating company will be guided by the provisions of the Act and Rules and Regulations made there under. Thus, the Act does not envisage the interference or micro management. This fact has been acknowledged by this Tribunal in Appeal No. 57 of 2012 in case of MSPGCL vs. MERC & Ors. in which it was held that the terms and conditions for contracts of generating company for equipment suppliers and EPC contracts need not be regulated by the State Commission as it would result in micro management of the affairs of the generating company.

(B) Tariff Policy 2006 has recognized the need to attract adequate investments in the power sector by providing appropriate return as budgetary resources of the Central and State Governments are incapable of providing the requisite funds. Balance needs to be maintained between the interests of consumers and the need for investments while laying down rate of return. While

allowing the total capital cost of the project, the appropriate Commission would ensure that these are reasonable and to achieve the objective requisite benchmark on capital costs should be evolved by the Regulatory Commission. Tariff Policy places equal importance to cost of recovery of generators while balancing consumer interest.

(C) Regulation 7(2) of Tariff Regulations, 2009 **("2009 Regulations")** provides that the capital cost admitted by CERC after prudence check shall form the basis for determination of tariff. Accordingly, CERC in line with Tariff Policy and 2009 Regulations has determined the benchmark capital cost vide its order dated 4.06.2012. Prudence check for capitals cost to be admitted for the generating station for the purpose of tariff has to be carried out by comparing such capital cost to the benchmark norms set out by CERC. It is only in cases where benchmark norms have not been specified that scrutiny of reasonableness of capital expenditure would be carried out for the purpose of prudence check. If the overall cost submitted by the generator is within the benchmark cost the same ought to be allowed and a detailed examination of costs is not required.

Reliance was placed on Explanatory Memorandum of the benchmark cost order wherein it is indicated that hard cost of the project shall be compared with the benchmark cost and in case of a large variation between the two, the Commission may undertake detailed examination. CERC has carried out comparison with benchmark costs for 1200 MW capacity and still found the same reasonable. However, despite this CERC proceeded to determine proportionate increase in cost for 185 MW (1200 – 1015) having regard to 'in principle' cost approved for 1015 MW.

(D) The hard cost allowed for the project in 25.10.2005 order for 1015 MW was 3.89 crores/MW which is actually higher than hard cost allowed under the impugned order of 3.83 crores/MW for 1200 MW. Further if additional cost of Rs.141.9 crores for which Appeal No. 119 of 2014 has been filed by Udupi Power, is allowed the per MW hard cost of the project would be enhanced to above 3.94 crore/MW. Thus the entire premise of PCKL and others that a purported fraud has been carried out by Udupi Power while developing the project is negated by the very fact that there has in actual been no undue gain/profit to

Udupi Power by augmenting the capacity of the project to 1200 MW, as in any case the hard cost per MW allowed in the impugned order is lower than the hard cost per MW allowed for 1015 MW capacity and is also lower than the cost for similar project in benchmark order.

(E) CERC is not bound by the terms of the PPA to the extent that they do not provide for recovery of reasonable costs and returns to Udupi Power and has to act as per the provision of the Act and Regulations. Parties to a PPA cannot agree contrary to the principles under Section 61 of the Act. In this regard he relied on (i) PTC India Ltd. Vs. CERC, (2010) 4 SCC, 603 (ii) Antartic Industries & Ors. Vs. PSERC & Ors. in Appeal No. 192 of 2009, (iii) Appeal No. 112 of 2012, Tamil Nadu Generation & Distribution Corporation Ltd. Vs. Penna Electricity & Ors. and (iv) Appeal No. 43 of 2011, HPSEBL Vs. Jai Prakash Ventures Ltd.

(F) The terms of PPA agreed before the parties will necessarily stand aligned with the Regulations framed by CERC for determination of tariff. The capital cost for project (including IDC) as agreed in PPA can at best be treated as one of the

factors to be considered for determination of tariff under 2009 Tariff Regulations and is not the only or determining factor as sought to be projected by PCKL.

(G) As per 2009 Regulations, the capital cost agreed between the parties has to be taken into consideration while determining the capital cost. Reliance is placed on PTC India Vs. CERC.

(H) The PPA relied upon by PCKL has not been approved by the State Commission u/s 86(1)(b) of the Electricity Act, 2003 and, therefore, is not legally enforceable. PPA unless approved by the State Commission u/s 86(1)(b) has no sanctity . Reliance is placed on (i) PTC Ltd. Vs. CERC, 2010 SCC 603 (ii) Tamil Nadu Generation & Distribution Corporation Ltd. Vs. M/s. Penna Electricity Ltd. & Ors. in Appeal No. 112 of 2012, (iii) Antartic Industries & Ors. Vs. PSERC & Ors. in Appeal No. 192 of 2009 and (iv) State of UP Vs. Kishori Lal Minocha AIR 1980 SC 680. Moreover, GoK has from time to time made it clear that various norms and parameters of tariff and capital cost will be determined by CERC and to such extent PCKL had also requested Udupi Power to file a Petition before CERC. A number of letters exchanged between State Govt. and Udupi

Power and minutes of meetings have been referred to in this regard.

(I) 'In principle' approval of capital cost by order dated 25.10.2005 by CERC is not binding as the tariff is being decided under the 2009 Regulations and parameters of the project have changed.

(J) CERC's order dated 9.3.2006 is having significant and crucial bearing on the findings of CERC in its order dated 25.10.2005. In this order CERC had clearly indicated that tariff for supply by Udupi Power would be determined in future in accordance with terms & conditions applicable at the relevant time.

(K) The BTG package provided by LITL has been 2x600 MW at all times and the fact that 2x600 MW was been procured from DEC was known to the Appellant at all times. The power plant consists not only BTG package but also BoP systems. Since BoP has to be procured from other suppliers, any increase in plant capacity would simultaneously increase cost of BoP systems. Even though DEC had provided a standard module for BTG package for 2x600 MW, the BoP was planned for 2x507.5 MW. The BoP adopted by Lanco Infratech under EPC contract dated 24.12.2006 was for 2x507.5 MW that was later

augmented for 2x600 MW. This is clearly demonstrated by specifications adopted by LITL under EPC contract dated 24.12.2006 and awarded EPC contract for 2x600 MW.

(L) CPRI report was introduced by the Appellant as an after thought and was submitted after the hearing was concluded on 10.09.2013. The contents of CPRI reports have been denied.

(M) Allegations by fraud are wholly irrelevant and merely red herring. Detailed submissions have been made in this regard which we shall be discussing in this judgment.

16. In Appeal No. 119 of 2014, Udupi Power has raised the issue of error in consideration of value of EPC scope for 1015 MW by CERC. According to Udupi Power, CERC has erroneously considered EPC cost for 1015 MW in the impugned order as Rs.3526.64 crores instead of Rs.3668.55 crores as claimed by Udupi Power. CERC had only concluded the value of primary contracts alone without considering the value of miscellaneous contracts.

17. After considering the rival contentions of the parties, the following issues regarding determination of capital cost arise for our

consideration:-

(i) Whether the 'in principle' capital cost approved by CERC by its order dated 25.10.2005 is binding on CERC as ceiling on the completed capital cost of the project while determining tariff?

(ii) Whether CERC is right in allowing capital cost above the 'in principle' capital cost approved by order dated 25.10.2005 and agreed in the Power Purchase Agreement dated 26.12.2005 between the parties?

(iii) Whether the PPA dated 26.12.2005 will override the provisions of applicable Tariff Regulations of CERC?

(iv) Whether CERC was correct in applying Tariff Regulations, 2009 for determination of capital cost & tariff?

(v) Whether CERC is right in allowing any increase in capital cost for increase in capacity of the plant from 1015 MW to 1200 MW in the context of available evidence and ignoring the conduct of Udupi power in placement of orders for plant and equipment?

(vi) Whether CERC has carried out prudence check while determining the capital cost and determined the capital cost correctly?

18. All the above issues are inter-woven and are being dealt with together.

19. The main contention of Mr. M.G. Ramachandran, Learned Counsel for PCKL and Mr. Sanjay Parikh, Learned Counsel of Janajagrithi Samithi, Karnataka are :

(a) Udupi Power is bound by the ceiling on capital cost of Rs.4299.12 crores inclusive of IDC in respect of entire capacity of 2x600 MW. Since the BTG package was for 2X600 MW right from beginning, the BOP and other works should be taken as done with reference to 2x600 MW.

(b) In any event the ceiling in the capital cost of Rs.4299.12 crores is required to be maintained for 1015 MW (2x507.5 MW) and increase in capital cost for the difference of 1200 – 1015 = 185 MW should be restricted to an increase in capital cost for any established additional capital expenditure.

(c) The increase, if any, will be very limited and in no event, will exceed Rs.97.60 crores.

(d) IDC and IEDC are not admissible at all in view of Force Majeure provision contained in the PPA. The only effect of Force Majeure and consequential delay is party being excused of performance and no compensation of non-performance.

20. Let us examine CERC's Tariff Regulations, 2004 **("2004 Regulations").** These Regulations came into force on 01.04.2004. The Regulations provide that unless reviewed or extended by the Commission, these Regulations shall remain in force for a period of 5 years. The capital cost is defined under Regulations 17 as under:-

"17. Capital cost: Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include capitalized initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date:

(i) Coal-based/lignite fired generating station - 2.5%
(ii) Gas Turbine/Combined Cycle generating stations – 4.0%

Provided that where the power purchase agreement entered into between the generating company and the beneficiaries provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for determination of tariff.

Provided further that any person intending to establish, operate and maintain a generating station may make an application before the Commission for 'in principle' acceptance of the project capital cost and financing plan before taking up a project through a petition in accordance with the procedure specified in the Central Electricity Regulatory Commission (Procedure for making application for

determination of tariff publication of the application and other related matters) Regulations, 2004, as applicable from time to time. The petition shall contain information regarding salient features of the project including capacity, location, site specific features, fuel, beneficiaries, break up of capital cost estimates, financial package, schedule of commissioning, reference price level, estimated completion cost including foreign exchange component, if any, consent of beneficiary licensees to whom the electricity is proposed to be sold etc.

Provided further that where the Commission has given 'in principle' acceptance to the estimates of project capital cost and financing plan, the same shall be the guiding factor for applying prudence check on the actual capital expenditure.

Provided further that in case of existing generating stations, the capital cost admitted by the Commission prior to 1.4.2004 shall form the basis for determination of tariff.

Note

Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology, and such other matters for determination of tariff."

21. According to 2004 Regulations, the actual capital cost incurred on completion of the project subject to prudence check by the Commission shall form the basis for determination of final tariff. The first proviso provided that where PPA provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for tariff determination. The second, third and fourth provisos to the above Regulation were inserted by amendment to 2004 Regulations on 11.08.2005 during the period when the application of NPCL, the

predecessor of Udupi Power for tariff determination before CERC was pending. The amendment provided for 'in principle' acceptance of the project capital cost and financing plan before taking up a project. As per the amended Regulations, the 'in principle' acceptance to the estimates of the project capital cost and financing plan shall be the guiding factor for applying prudence check on the actual capital expenditure.

22. **Let us examine the order dated 25.10.2005 passed by CERC approving the in principle capital cost of Udupi Power project.**

23. We find that NPCL, the predecessor of Udupi Power had filed an application to approve the tariff for power project to be set up in Karnataka for a capacity of 1015 MW. It was proposed to sell 90% electricity to be generated at the generating station to Karnataka Power Transmission Corporation Limited and remaining 10% to Kerala State Electricity Board. CERC in its order noted that the application was filed under Regulation 53 of 2004 Regulations, according to which a generating company may make an application for determination of provisional tariff in advance of the anticipated date of completion of the project based on the expenditure actually incurred already. The CERC felt that the application for approval of

provisional tariff could not be taken up for consideration at that stage since under 2004 Regulations, the provisional tariff is to be determined based on the expenditure incurred upto the date of making the application. As the project had not even achieved financial closure, determination of provisional tariff was not considered. However, during pendency of the Petition, CERC amended 2004 Regulations so as to make a provision of 'in principle' acceptance of project capital cost before taking up the project. CERC felt 'in principle' approval of capital cost would provide some comfort to the investors as regards the tariff likely to be charged and will help the investors in achieving the financial closure of the project by arranging for loans etc.

24. CERC also noted that NPCL had gone for international competitive bidding for the award of EPC contract. Letter of intent (LOI) had been placed for EPC contract on M/s BHEL, for civil works on M/s. Simplex Concrete Pile (India) Limited and for external coal handling system on Navayuga Engineering Company Limited. It was informed by the NPCL that negotiations were under way with the consortium of the lending institutions led by the Power Finance Corporation for financing of the project. CERC after considering the LOI placed on

BHEL & others and proposed financing plan and status of the project granted 'in principle' approval for 2x507.5MW project in accordance with the second proviso to Regulation 17 of 2014 Regulations as under:-

"54. We, therefore, accord 'in principle' approval to the capital cost of US$40.0 million + Euro 66.0 million + Rs.3745.86 crores, including IDC and financing charges of Rs.350.14 crores. This totals to Rs.4299.12 crores at the exchange rates of Rs.43.72/US$ and Rs.57.33/Euro."

"55. The 'in principle' approval of the above capital cost is subject to the following conditions:

(a) For the purpose of tariff, the completed capital cost shall not exceed the amount indicated in para 54.
(b) The petitioner shall achieve the financial closure within 120 days from the date of this order.
(c) The norms specified in the 2004 regulations are the ceiling norms and parties may agree to improved norms and where the improved norms are agreed to, such norms shall be the basis for determination of tariff.
(d) No additional capital expenditure incurred on maintaining operational and performance parameters shall be admissible for tariff enhancement during the rated life of the generating station."

25. The PPA dated 26.12.2005 entered into between the distribution licensees and NPCL, the predecessor of Udupi Power for capacity of 1015 MW provides for the capital expenditure under Article 41 as under:-

"(a) Capital expenditure of the Facility shall be the actual costs and expenses incurred by the Seller as on date Commercial Operation

Date in connection with the development, design, engineering, acquisition, construction, financing, forex adjustment, testing, start-up and completion of the Facility as approved by the Commission including any taxes, duties made by the Seller.

Notwithstanding anything contained herein above, the Capital expenditure shall be subjected to a ceiling limit as enumerated in Annexure 9 . The IDC shall be allowed in the capital expenditure only up to the Scheduled Commercial Operation Date."

26. In the Annexure 9 of the PPA, the project cost has been indicated as Rs.4299.12 crores (as per 'in principle' approval of CERC) which shall be fixed and shall not be subject to variation except exchange rate variation for foreign currency content. IDC and Financing Cost is to be considered as per the actual with a ceiling value of Rs. 446.25 crores.

27. The PPA provides that the agreement shall come into force only after the approval of Government of Karnataka and the Commission and till then the Agreement is not be legally enforceable against either by Parties.

28. The PPA defines Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2004 as the Tariff Regulations notified under Section 178(2)(s) of the Electricity Act, 2003 which includes the modification, amendments and successor regulations

notified by CERC from time to time. This is also reiterated in Annexure-11 of the PPA.

29. The Tariff Regulations, 2009 **("2009 Regulations")** were notified by CERC on 19.01.2009 and came into force on 01.04.2009 for a period of 5 years. The 2009 Regulations provide that a project or a part thereof which has been declared under commercial operation before the date of commencing of these Regulations and whose tariff has not been determined by Regulations till date, the tariff of such project or such part for the period ending 31.03.2009 shall be determined in accordance with 2004 Regulations.

30. The provision regarding capital cost was modified in the 2009 Regulations. The relevant Regulation is reproduced below:-

"7. Capital Cost. (1) Capital cost for a project shall include:

(a) The expenditure incurred or projected to be incurred, including interest during construction and financing charges, any gain or loss on account of foreign exchange risk variation during construction on the loan"
(b) …….
(c) …….

Provided that the assets forming part of the project, but not in use shall be taken out of the capital cost.

2. The capital cost admitted by the Commission after prudence check shall form the basis for determination of tariff:

Provided that in case of thermal generating station and the transmission system, prudence check of capital cost may be carried out based on the benchmark norms to be specified by the Commission from time to time.

Provided further that in cases where benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan interest during construction, use of efficient technology, cost over run and time over-run and the such other matters as may be considered appropriate by the Commission for determination of tariff.

……..
……..

Provided also that where the power purchase agreement entered into between the generating company and the beneficiaries or the implementation agreement and the transmission service agreement entered into between the transmission licensee and the long-term transmission customer, as the case may be, provide for ceiling of actual expenditure, the capital expenditure admitted by the Commission shall take into consideration such ceiling for determination of tariff"

31. According to 2009 Regulations, the capital cost shall be admitted by CERC on the basis of expenditure incurred after prudence check. The prudence check of the capital cost is to be carried out based on benchmark norms specified by the commission from time to time. However, if the benchmark norms have not been specified, prudence check may include scrutiny of the reasonableness of the capital expenditure, financing plan, IDC, cost over run and time over run etc. and such other matters as may be considered by the Commission for

tariff determination. Seventh proviso to Regulation 7(2) provides that where the PPA entered into between generating company and the beneficiaries provided for ceiling of actual expenditure, the capital expenditure admitted by the Commission shall take into consideration such ceiling for determination of tariff.

32. The main Regulation for capital cost determination in both 2004 Regulations and 2009 Regulations have the same basis for admitting capital cost i.e. expenditure incurred subject to prudence check by CERC. However, there is change in provisos to the main Regulation as given below:-

(i) The provisos for 'in principle' acceptance of capital cost and using the same as guiding factor have been deleted in 2009 Regulations. Instead the basis for prudence check has been specified as benchmark norms to be specified by CERC from time to time and in the absence of benchmark norms, prudence check to carry out on various factors specified in the proviso including cost over run and time over run or as may be considered appropriate by the Commission.

(ii) In 2004 Regulations, the ceiling of actual expenditure, if any, provided in the PPA will be the ceiling for determination of tariff.

However, in 2009 Regulations, the Commission shall take into consideration such ceiling as provided in the PPA for determination of tariff.

33. Section 61 of the Electricity Act provides that the appropriate Commission shall specify the terms & conditions for determination of tariff and in doing so, shall be guided by the following:-

"(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
(e) the principles rewarding efficiency in performance;
(f) …….
(g) …….
(h) …….
(i) the National Electricity Policy and tariff policy."

34. Section 178 gives power to CERC to notify Regulations consistent with the Act and rules. According to Section 178(2)(s), Commission has to make Regulations regarding terms & conditions for determination of tariff under Section 61. As per Regulation 178 (3) all Regulations made by the Central Commission shall be subject to the conditions of previous publication.

35. Tariff Policy notified by Government of India under section 3 of the Electricity Act on 06.01.006 laid down framework for performance based cost of service regulation for generation, transmission and distribution. It provides that while allowing the total capital cost of the project, the appropriate Commission would ensure that these are reasonable and to achieve this objective, requisite benchmark on capital costs should be evolved by the Regulatory Commissions. Suitable performance norms of operation together with incentive and dis-incentive involved along with appropriate arrangements for sharing of gains of efficient operation with consumers have to be evolved and the Central Commission would in consultation with CEA notify operation norms from time to time.

36. Accordingly, the CERC notified Tariff Regulations, 2004 for the period 2004-2009 and Tariff Regulations, 2009 for the period 2009-14.

37. **It has been vehemently argued by Learned Counsel for PCKL that the 'in principle' capital cost accepted by the Central Commission by order dated 25.10.2005 should be the ceiling capital cost for determination of tariff.**

38. Before we answer this question, it would be necessary to examine the Statement of Reasons dated 11.08.2005 for the amendment to

2004 Regulations regarding ‘in principle’ acceptance of capital cost introduced by CERC. It has been mentioned that the existing 2004 Regulations contemplate tariff determination on actual completion of the project. Though the Central Government has issued guidelines for competitive bidding u/s 63 of the Electricity Act, 2003, however, projects continue to come under cost plus regime. Accordingly, applications have been made before CERC by some IPPs for determination of tariff prior to commencement of construction of the generating station since it would give them some level of comfort before actually undertaking the construction of generating station. The matter has been considered and the Commission felt that the existing regulations should be suitably amended to provide for ‘in principle’ acceptance of capital cost before commencement of construction. It was, therefore, proposed that a person intending to set up a power project could seek ‘in principle’ acceptance of project capital cost and financing plan through appropriate application and where the Commission has given ‘in principle’ acceptance to estimated completion cost and financing plan such acceptance shall be the guiding factor for applying prudence check on actual expenditure. A specific query was raised by a stakeholder as to

whether the cost accepted by the Commission 'in principle' would be treated as ceiling cost at the time of determination of tariff. It was clarified by the Commission that it was proposed in the amendment that the cost accepted while according 'in principle' approval shall be the guiding factor for applying the prudence check on actual expenditure. In other words at the time of determination of final tariff, the actual audited expenditure for the project shall be subject to prudence check before deciding the capital cost to be considered for the purpose of tariff. However, the estimated completion cost which forms the basis for 'in principle' approval of the Commission shall be the guiding factor. The Commission further clarified that the amendment was proposed essentially with the intention to promote private participation in power sector. Such a procedure also became desirable in view of the fact that the Electricity Act, 2003 has dispensed with the techno-economic clearance of CEA. It was felt that the regulatory comfort in the form of 'in principle' acceptance would help the future investors to achieve the financial closure expeditiously.

39. In light of above, let us now examine this issue. We are not in agreement with the proposition of Learned Counsel for PCKL and

Janajagrithi Samithi that the 'in principle' capital cost approved by CERC on 25.10.2005 before commencement of construction of the project should be the ceiling capital cost for determination of tariff on completion of the project.

(i) 'In principle' approval was introduced by CERC by amendment dated 11.08.2005 to 2004 Regulations to provide regulatory comfort before actually undertaking construction of a project based on estimated project cost to achieve financial closure of the project expeditiously to promote investment in power sector by private sector which is one of the objectives of the Electricity Act, 2003. Such 'in principle' approval is to serve as a guiding factor for applying prudence check on actual capital expenditure as per the Regulations.

(ii) Third proviso to Regulation 17 of 2004 Regulations specifies that 'in principle' acceptance to the estimates of project capital cost and financing plan shall be the guiding factor for applying prudence check on the actual capital expenditure. This proviso is an exception to the main Regulation 17 which provides for determination of capital cost based on the admitted capital expenditure actually incurred upto COD of the project.

(iii) 'In principle' approval of capital cost of Udupi power project was for a capacity of 2x507.5 MW. However, the capacity of the project was enhanced to 2x600 MW by mutual consent of the parties and the State Government. The State Government while giving its approval for the enhanced capacity of 1200 MW had also conveyed its approval of recommendation of the Committee appointed by it for enhancement of capital cost, subject to approval of the Commission. PCKL has itself accepted that additional capital cost for enhancement of capacity by 185 MW can be allowed for which its own estimate was 131 crores before the Commission (later on revised to 97.6 crores).

(iv) Order dated 25.10.2005 has to be read in the consonance with the prevailing Regulations. The Regulations itself provide for capital cost to be the actual expenditure incurred on completion of the project subject to prudence check by the Commission provided that the 'in principle' acceptance of the project capital cost to be guiding factor for applying prudence check.

40. Reliance on CERC's order dated 07.08.2006 by PCKL and Janajagrithi Samithi will not be of any use. CERC had only clarified in this order that any deviation from the maximum capital cost approved by it by order dated 25.10.2005 shall be subject only to the conditions mentioned in that order. Thus, the Commission had only reiterated the 'in principle' capital cost approved by its order dated 25.10.2005. In the order dated 07.08.2006, CERC has also referred to its order dated 09.03.2006 where CERC allowed extension of time to achieve financial closure. We find that in order dated 09.03.2006 the State Commission observed as under:-

"5. For reasons indicated in the application, we allow time upto to 30.06.2006 for achieving the financial closure. In case the applicant is unable to achieve the financial closure by the said date, the 'in principle' approval accorded vide order dated 25.10.2005 shall lapse.

6. The applicant seeks clarification on certain issues relevant to determination of tariff. Since at this stage we have not gone into the process of actual determination of tariff, we do not consider it appropriate to examined these issues in detail. At this stage, it is enough to say that the tariff for electricity supplied will be determined in accordance with the terms and conditions applicable at the relevant time."

Thus by the order dated 09.03.2006, CERC made it clear that tariff of the project will be determined in accordance with the terms and conditions applicable at the relevant time. The terms and conditions applicable obviously refer to the applicable regulations at the relevant time.

41. The next issue is whether the ceiling capital cost as per the PPA entered between the parties should be the capital cost for determination of tariff and whether PPA can override provisions of the Regulations?

42. We feel that the CERC should not be bound by the terms of the PPA if there is a conflict between the provisions of PPA and the provisions of the Act and the Regulations. CERC u/s 79 (1) (b) has to regulate the tariff of generating companies other than that owned and controlled by the Central Government if such generating companies enters into or otherwise have a composite scheme for generation and sale of electricity in more than one States. Power of Regulations is a wide power and would include to override any provision of the PPA which is inconsistent with the provisions of the Act or Regulations. In this regard, Hon'ble Supreme Court in PTC India Vs. CERC, (2009) 4 SCC 6093 has held that a Regulation u/s 178 is in the nature of a subordinate legislation, such subordinate legislation can even override the existing contracts. On making of the Regulations even the existing PPA has to be modified and aligned with the said Regulations. In other words, Regulation makes an inroad into even

the existing contracts. The Hon'ble Supreme Court in the PTC case held as under:-

"A Regulation under section 178 as a part of the regulatory framework intervenes and even overrides the existing contracts between the regulated entities in as much as it cast a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation."

43. Thus the capital cost for determination of tariff for Udupi Power has to be decided by CERC as per its tariff regulations.

44. **The next issue to be considered is whether 2004 Regulations or 2009 Regulations will be applicable to the present case.**

45. According to the Learned Counsel for PCKL, 2004 Regulations should be applicable as the 'in principle' approval was granted on the basis of 2004 Regulations. Further, if the project has been commissioned as per the schedule indicated in the PPA then it would have been commissioned before 1.04.2009 and in that case 2004 Regulations would have been applicable for determination of capital cost.

46. As discussed above, 2004 Regulations provide that these Regulations shall remain in force from 1.04.2004 for a period of 5 years. After 31.03.2009, 2009 Regulations will govern the field for determination of tariff. After notification of 2009 Regulations, 2004

Regulations can not be applied for determination of tariff for the period 2009-2014. As per 2009 Regulations, 2004 Regulations have to be applied where a project or a part thereof has been declared under commercial operation before the date of commencement of 2009 Regulations where tariff has not been finally determined by the Commission till that date. Tariff for such project or part thereof which was commissioned prior to 01.04.2009 for the period ending 31.03.2009 has to be determined in accordance with the 2004 Regulations. In the present case, the first unit or Udupi project has achieved COD on 11.11.2010 i.e. in the control period of 2009 Regulations. Therefore, 2009 Regulations are the appropriate Regulations for determination of tariff.

47. The CERC notifies Tariff Regulations for a multi year control period after giving public notice and considering the objections and suggestions of the stakeholders to the draft Regulations. The Commission may retain the existing Regulations as prevailing prior to the new control period or may modify the Regulations after considering the suggestions and objections of the stakeholders. 2009 Regulations have been notified to be effective for the period from FY 2009-10 to FY 2013-14. Therefore, 2009 Regulations will

govern the filed in the present case. Therefore, we are in agreement with CERC that tariff for Udupi project has to be determined as per 2009 Regulations.

48. According to Shri Ramachandran, the scheduled date of commissioning of the project as per the PPA was before 31.03.2009. We do not agree with the contention of Mr. Ramachandran. According to the PPA, the scheduled COD of Unit-I was 38 months from the effective date and Unit-II 42 months from the effective date. Effective date is defined in PPA as later of the date of execution and delivery of the Agreement or the date on which each of the conditions precedent set forth in Article 2A is satisfied which in no case shall be greater than one year from the date of execution of this agreement. In the present case, the effective date is one year from the date execution of the agreement i.e. 26.12.2006. Thus scheduled COD for Unit-I as per PPA would be 25.02.2010 and Unit-II 25.06.2010 as given in the impugned order dated 20.02.2014. Thus, the scheduled date of commissioning of the first second Unit was only during the control period of 2009 Regulations. As indicated above, the PPA also provided that the Regulation would include the modification,

amendments and successor regulations notified by CERC from time to time.

49. Let us know examine the impact of change in EPC contractors by Udupi Power after change in holding of the company. We have examined the correspondence between GoK, PCKL, Udupi Power and the correspondence between LITL and Udupi Power.

50. Let us examine the sequence of events:-

(a) On 31.10.2006 NPCL, the predecessor of Udupi Power informed GoK that LoI had been issued by them in September, 2004 based on International Competitive Bidding **("ICB")** in June 2003. As more than 2 years have lapsed and numerous charges have taken place in prices of raw material, it was proposed that a snap/revised bid should be called so as to get current and updated capital cost. Accordingly, they have called for ICB as per the enclosed advertisement.

(b) On 22.11.2006, Director, State Power Procurement Coordination Centre **("SPPCC"),** Government of Karnataka wrote to NPCL, predecessor of Udupi Power, stating that action taken by NPCL for inviting fresh bid was not acceptable. However, it can be considered if the price is lower and the heat

rate is better. On 29.11.2006, NPL replied to SPPCC, GoK giving reasons for revised competitive bidding.

(c) On 24.12.2006, NPCL entered into EPC contracts (four nos.) with LITL for 2x507.5 MW project at Udupi after cancelling the LOI on BHEL, Navayuga and Simplex. However, it is seen from the documents furnished by the PCKL and Janajagrithi Samithi that LITL had already entered into an agreement for supply of BTG for 2x600 MW project at Udupi with DEC, the BTG supplier, by an agreement dated 16.12.2006. This is also accepted by Udupi Power.

(d) On 20.04.2007, LITL cancelled the agreement with DEC for BTG for 2x600 MW project entered on 16.12.2006 in view of change in configuration of units. On 21.04.2007, LITL and DEC entered into a contract for BTG for 2x507.5 MW project.

(e) On 14.05.2007, LITL informed NPCL that DEC was supplying standard modules of machines of 600 MW capacity for the project. However, these machines can run continuously at the capacity of 507.5 MW. On 18.05.2007 NPCL informed LITL that they supported LITL's proposal to enhance capacity to 2x600 MW, any contractual obligations for providing additional

design and engineering margin can only be considered by NPCL as and when it receives the statutory clearance for augmentation of capacity. On 15.07.2008, DEC informed LITL that BTG package offered by them as per requirement of 2x507.5 MW is their standard module units and they can demonstrate the capability of these machines to operate continuously at 600 MW and they can also provide a revised performance guarantee at additional cost of US$ 23,500,000/-.

(f) On 29.07.2008, Udupi Power by a letter addressed to Chief Secretary, Government of Karnataka proposed to increase capacity of the project from 1015 MW to 1500 MW and cost of expansion as well as tariff will be determined by CERC.

(g) On 01.08.2008, LITL proposed to Udupi Power for augmentation of capacity from 1015 MW to 1200 MW at additional cost of Rs.750 crores.

(h) On 07.08.2008, Udupi Power confirmed to LITL that they can proceed to modify all BoP Systems to suit 2x600 MW capacity. Thereafter, TEC Consulting Engineers was appointed to prepare a DPR for augmentation of the capacity.

(i) On 08.06.2009 the Detailed Project Report **("DPR")** of TEC Consulting Engineers was sent by Udupi Power to LITL.

(j) On 03.02.2009, GoK conveyed 'in principle' no objection for expansion of capacity from 1015 to 1500 MW (later reduced to 1200 MW), subject to certain conditions.

(k) GoK by order dated 25.10.2010 accorded approval to enhanced capacity of Udupi project from 1015 MW to 1200 MW and also accepted recommendations of Justice (Retd.) Gururajan Committee allowing an increase in capital cost to the extent of Rs.538 crores excluding IDC, subject to the final orders of CERC. Udupi Power was directed to file necessary particulars regarding capital cost with CERC.

51. PCKL and Janajagrithi Samithi, Karnataka have raised the following issues:

(a) Udupi Power had acted imprudently by granting the EPC contract for the project to sister concern M/s. LITL after unilaterally cancelling the existing EPC contracts with BHEL, Simplex and Navayuga.

(b) BTG contracts between LITL and DEC and between LITGL and Udupi Power although stated for 2X507.5 MW was in fact

for 2x600 MW standard modules and, therefore due to such BTG contract of 2x600 MW the contract for BOP must also have been for 2x600 MW capacity.

(c) The ICB process conducted by Udupi Power was not transparent as adequate time was not given to the bidders and the technical bids were not opened simultaneously.

(d) Stamp papers used for EPC contract between LITL and Udupi Power were purchased much before the signing of the EPC contract.

(e) LITL and DEC had an agreement for BTG of 2x600 MW capacity for Udupi project prior to signing of agreement between Udupi Power and LITL for EPC contract.

(f) Stamp paper was not used in the cancellation of contract for 2x600 MW units on DEC by LITL.

52. Udupi Power has given a detailed reply for the above allegations and filed a number of documents in support of their contention. Their submissions are summarized as under:-

(a) The contract with M/s. BHEL, M/s. Simplex and M/s. Navayuga were terminated for just reasons. PCKL and Government of Karnataka were fully aware and had knowledge of the fact that

contract with BHEL was terminated and snap bid was going to be arranged by Udupi Power. In fact they have acquiesced while granting custom clearance for import of goods for the project.

(b) After signing the PPA on 26.12.2005, Udupi Power could not achieve financial closure for the project as PCKL had delayed in handling over of signed copy of PPA which was provided only on 1.02.2006. Further, Government of Karnataka guarantee which was due to given within 30 days of signing the PPA i.e. on or before 26.01.2006 was issued on 11.01.2007 i.e. after more than one year of signing of PPA and sent to them on 31.02.2007. Udupi Power in the meantime approached CERC for extension of time for achieving financial closure beyond February, 2006 which the Commission granted upto 31.10.2006 vide its order dated 07.08.2006.

(c) Due to inability to achieve financial closure in time due to delay attributable to PCKL and Government of Karnataka, Udupi Power could not draw money and total initial advance payment to BHEL could not be made before the deadline of 24.10.2006 stipulated by M/s. BHEL in their letter dated 13.10.2006. M/s

BHEL and other EPC contractors were not ready to keep the price line due to delay. Therefore, Udupi Power had to proceed to go for a fresh ICB in October, 2006. Even though Udupi Power had achieved financial closure, in October 2006, it could not draw the term loan till June, 2007 due to non-availability of State Government guarantee which was delayed by more than one year. It was neither commercially prudent nor was possible to pay full advance without achieving financial closure and without having the necessary payment security mechanism from PCKL in place.

(d) Udupi Power proceeded with fresh ICB in October, 2006 for which M/s. BHEL was requested to participate However, M/s. BHEL did not participate.

(e) Udupi Power had informed the GoK vide letter dated 31.10.2006 that it was proposing to go for a snap/revised bid to get the current EPC prices. The GoK had replied by letter dated 22.11.2006 that the change of EPC contract would be considered if the tariff and heat rate were going on to lower than that of BHEL.

(f) The snap bid was carried by Udupi Power due to limited time as the PPA required Udupi Power to execute EPC contract within one year of signing of the PPA. Udupi Power had published notice for bidding in national newspapers dated 31.10.2006 (newspaper cuttings enclosed). PCKL submissions is misleading in this regard as it has contended that notice was only published in the trade general dated 15.11.2006. Invitations were also sent directly by email to 25 to well known EPC contractors and to number of Embassy offices as provided in the Bid Evaluation Report. Despite this only 3 companies participated in the ICB.

(g) Only two bids had been received till 28.11.2006 and, therefore, Udupi Power considered the request of GEA as a special case to extend the bid submission date to 07.12.2006. While waiting the technical bid to GEA, Udupi Power decided to expedite the process of bid review and opened the technical bids of LITL and Zelan on the schedule date of opening on 29.11.2006. When GEA's bid was received on 7.12.2006, NPCL open the technical bid on the same day. However, the price bids were opened for all the three bidders on 13.12.2006.

(h) The argument of PCKL can not be sustained that if BHEL was the contractor there would have been no occasion of delay in the project. It is largely known that BHEL as an executing agency had contracted heavy orders from power plants for the 10^{th} and 11^{th} plans and there were huge delays in commissioning of the projects.

(i) On the issue raised by Janajagrihti Samithi regarding pre-date stamp paper used for agreement, Udupi Power gave following explanation. It is common knowledge and in business practice for large corporations to have stamp paper readily available for contract purpose. Stamp papers are not only used in EPC contracts but also used in bank guarantee. Stamp papers have a validity period of 3 months. Therefore, using a pre dated stamp papers available with LITL for contract does not show or indicate any malafide or fraud. In any case, LITL price was lower than EPC contract with BHEL. On cancellation of agreement dated 16.12.2006 with DEC for 2x600 MW on 20.04.2007, it is submitted that for all intents and purposes, the contract between LITL and DEC is that entered on 21.04.2007 for 2x507.5 MW capacity awarded by Udupi Power to LITL.

The contract dated 06.12.2006 for standard 2x600 MW was cancelled on 20.04.2007. It is normal industry practice to have an arrangement with the equipment supplier for the purpose of bidding. The cancellation of agreement on 20.04.2007 holds no relevance and cannot be challenged for not being on a stamp paper as the same has been decided by the parties and new contract with similar terms was entered into on 21.04.2007.

(j) The environment clearance had been granted initially for 2x500 MW and then subsequently modified for 2x507.5 MW. It was in respect of 2x507.5 MW project that all arrangements had made for projects of BTG and BOP packages by Udupi Power. Udupi Power had entered into an agreement with LITL in accordance with the environmental clearance.

(j) The expansion earlier contemplated was for 1500 MW i.e. 2x600MW + 1x300 MW. However, Udupi Power was advised that environment clearance for 1x300 MW might not be forthcoming and was advised to proceed for 2x600 MW. During the entire process Govt. of Karnataka and the Appellant were kept informed about proposed expansion of the project. Since BTG to be supplied by DEC was for 2x600 MW, Udupi Power

decided for augmentation of capacity for BOP for effective utilization of the standard 600 MW modules. Thereafter, a supplementary agreement was entered with LITL for augmentation in capacity of the project.

(k) Government of Karnataka and PCKL were aware of the fact that BTG module was capable of generating 600 MW being standard 600 MW modules. Udupi Power had submitted revised DPR to Government of Karnataka which clearly stated that EPC contractor during procurement of BTG package has selected standard 600 MW turbine generator sets from DEC. This fact was also placed even before the Justice (Retd.) Gururajan Committee and it is clearly recorded as Udupi Power's submission in the report dated 18.06.2010.

(l) There is no extra cost claimed by Udupi Power for increase in capacity of BTG from 2x507.5 MW to 2x600 MW except for performance guarantee claimed by DEC.

(m) Comparison of parameters of BHEL/ Simplex/ Navayuga contracts and Udupi Power/LITL contract makes it clear that parameters of BOP equipments were originally for 2x507.5 MW. Additional cost was required towards BOP equipment to

cater to augmented capacity. The allegations that Udupi Power has made windfall and undue gain in BOP cost are not tenable.

53. We have examined loads of document submitted by both the parties in this regard. We find that GoK had stated vide letter dated 22.11.2006 that initiation of ICB process for a new EPC contractor in place of BHEL could be considered if the price is lower and heat rate is better. The EPC contract price of LITL was also lower than BHEL, Simplex and Navayuga taken together. Subsequently, GoK and PCKL had also communicated enhancement of capacity of the project to 1200 MW through the same EPC contractor. At this stage, when the project has been commissioned and PCKL has been procuring power from the same, we can not sit on the judgment whether change of EPC contractor was imprudent at the relevant time. However, we have to examine the computed capital cost to see whether any imprudent expenditure has been allowed to Udupi Power. We find that DPR for which enhancement of capacity submitted by Udupi Power to Govt. of Karnataka shows that BTG supplied by DEC was 2x600 MW standard modules. There is no cost implication due to increase in BTG cost due to increase in capacity except for the performance guarantee paid to DEC which we shall be

dealing with in the subsequent paragraphs. However, we find that LITL had an agreement dated 16.12.2006 with DEC for 2x600 MW which was cancelled on 20.04.2007. We understand that in December 2006, Udupi Power had environmental clearance for 2x507 MW plant. The PPA with Karnataka was also in respect of 2x507 MW plant. We agree with the contention of Udupi Power that in December 2006 they could not have entered into an EPC contract for 2x600 MW plant. The EPC contract had to be as per the capacity agreed in the PPA and capacity for which environmental clearance was obtained. However, we feel that Udupi Power should have shared full details about the earlier agreement between LITL and DEC including the cost at which the earlier agreement dated 16.12.2006 and the fresh agreement dated 02.04.2007 was entered between LITL and DEC. LITL was a sister concern of Udupi Power, and, therefore, there should not have been any difficulty in obtaining the details from LITL. This fact regarding earlier agreement between LITL and DEC dated 16.12.2006 and cancellation dated 20.04.2007 came to the notice of PCKL only later. Therefore, if any adverse inference is drawn from non-disclosure of this information then the impact of the same will have been borne by Udupi Power. We find

that about one month was given to prospective bidders in notice inviting ICB bidding advertised in October 2006. Technical bid of the third bidder was not opened on the same day which was a derivation from the normal procedure. However, the price bid of all the three bidders was opened on the same day.

54. We find that the specification of BOP modules, including capacity ordered initially on LITL was of more or less same as placed on BHEL, Navayuga and Simplex for 2x507.5 MW. Capacity of BOP plant was subsequently enhanced. We find that the CERC in the impugned order has examined the enhanced capacity and cost of each module of BOP and then decided the additional cost to be allowed for BOP. Where CERC found that the additional cost claimed by Udupi Power was proportionately on higher side, reduced cost proportionate to the increase in capacity as allowed. We shall be examining the additional cost allowed by CERC in the following paragraphs.

55. According to Sh. M.G. Ramachandran, Learned Counsel for PCKL, CERC has not considered CPRI Report. Shri Vaidyanathan, Learned Counsel for Udupi Power has argued that CPRI Report was submitted after conclusion of arguments and was an after thought.

However, Udupi Power has furnished its comments on CPRI report to the Central Commission wherein it had countered the findings of CPRI. He also stated that no CPRI representative had visited the project site even though the Report states the date of field study.

56. We find that the issue of additional expenditure for augmentation of plant capacity from 1015 MW to 1200 MW had been under discussion between Government of Karnataka, PCKL and Udupi Power since the year 2009. A committee was also constituted by Government of Karnataka which deliberated and furnished its report to State Government and the same was accepted by the State Government. However, only towards the end of hearing before CERC, PCKL submitted a Report of CPRI (July 2013) conducted at the request of PCKL. CERC has considered the addition in capacity of equipment and additional expenditure on all the modules/ sub-systems of the power plant and allowed part of expenditure claimed by PCKL after detailed analysis. CERC has not discussed CPRI Report but CPRI report has been referred to in the submissions of PCKL recorded in the impugned order. However, we have taken into consideration CPRI Report while examining the additional cost allowed by CERC for augmentation of capacity.

57. Let us now see the prudence check made by CERC in approving capital cost.

58. CERC has noted that the contract price awarded to LITL for EPC contract for 1015 MW capacity was lower than the BHEL, Simplex and Navayuga together (Rs.3526.64 crores as against Rs.3688.35 crores). The Contract price to BHEL, Simplex and Navayuga was the basis for in principle cost approval granted by CERC on 25.10.2005 for 1015 MW capacity. On the basis of the contract of LITE for 1015 MW capacity, CERC has considered the additional cost for augmentation of capacity from 1015 to 1200 MW on the basis of subsequent amendment in scope of EPC contracts with respect to scope of work agreed in agreements dated 24.12.2006. CERC has examined threadbare the additional expenditure towards EPC cost claimed by Udupi Power for different sub packages. We are in agreement with the approach adopted by CERC to determine the capital cost. CERC for BTG has allowed only additional expenditure of Rs.87.44 crores for performance guarantee charges of DEC for increase in capacity. Besides performance guarantee performance, the CERC had not allowed any additional expenditure on the BTG package as the modules for BTG were standard 600 MW capacity

modules in the original EPC contract. For BOP packages, the CERC has considered expenditure on various heads and allowed the expenditure after prudence check. Some additional expenditure has been allowed which CERC considered prudent, which has been examined by us. CERC has also compared the capital cost of the similar projects before approving the capital cost. We are in agreement with the approach adopted by CERC and the capital cost approved except for the expenditure allowed on the following items:-

(I) LITL and DEC had entered into an agreement dated 16.12.2006 for BTG for 2x600 MW capacity for Udupi Project which was cancelled on 24.04.2007. This fact was not brought to the notice of PCKL. Udupi Power has also not furnished the copy of the agreement dated 16.12.2006, whether there was any reduction in price due to revision of contract. The BTG package was standard 2x600 MW right from the beginning. We feel that the benefit for non-disclosure of information should be passed on to the consumers. We agree with CPRI Report and the contention of Learned Counsel for PCKL and Janajagrithi Samithi that

cost for performance guarantee for 2x600 MW BTG to DEC of Rs.87.44 crores should not have been allowed by CERC.

(II) The performance guarantee charges of Rs.41.33 crores claimed by LITL for extending performance guarantee in respect of BOP for enhancing capacity of the generating station from 1015 to 1200 MW should not have been allowed as additional capital cost has already been allowed for augmenting the capacity of various BOP equipments.

(III) There is no justification for increasing additional charges for Central & Information (C&I) system by Rs.2.98 crores as only the capacity of the BOP equipment have been increased and increase in BOP capacity to cater to an increase in capacity by about 20% will not result in increase in cost of C&I. CPRI has also recommended the same.

(IV) There is no justification for additional cost of Rs.27.34 crores for air and flue gas system as it is part of BTG and the BTG was standard 2x600 MW right from beginning.

(V) Expenditure of Rs.9.23 crores on coal slurry pond and Rs.14.08 crores for coal silo has been allowed considering that such expenditure is necessary due to augmentation in

capacity. We do not agree that this expenditure is related to increase in capacity and should not have been allowed due to augmentation in capacity.

(VI) Cost of Rs.1 crore allowed for fuel oil system has to be disallowed as it was part of EPC contract with DEC, the BTG supplier.

(VII) Design and Engineering cost of Rs.1 crore is disallowed as it is already included in over head cost.

We agree with all other costs allowed by CERC and the reason given for allowing such costs. Coal handling plant has been augmented by more than that required for increase in capacity, hence CERC has allowed only proportionate increase in coal handling plant cost (Rs.63.01 crores against Rs.114.50 crores) claimed. Staff colony cost has been allowed for FY 2013-14 after CoD of the units. Staff colony is considered essential for operation and maintenance of the plant.

59. The above cost (I to VII) has to be deducted from the capital cost approved by the CERC. The cost of initial shares which was restricted to 2.5% of increase in BoP cost may be adjusted accordingly.

60. We find that the hard cost approved by CERC for 1200 MW capacity worked out to Rs.3.83 crore MW as against the hard cost of Rs.3.89 crores MW for 1015 MW approved 'in principle' approval of project cost in CERC's order dated 25.10.2005. With the reduction in capital cost as decided by us the hard cost is going to reduce further.

61. Next issue is relating to increase in IDC due to delay in commissioning of the project. Shri Ramachandran, Learned Counsel for PCKL has made following submissions:-

a) In terms of Article 10.3 of the PPA, the only effect of the PPA is that Udupi Power can be excused of the performance during the period of force majeure and the Appellant cannot claim liquidated damages for delay in achievement of COD. Therefore, no claim of cost over run, namely IDC is tenable as the same is not provided in the PPA.

b) The PPA specifically provides that any IDC over and above the IDC included in the ceiling capital cost of Rs.4299.12 crores to be allowed for the period after scheduled COD.

62. Shri Vaidyanathan, Learned Counsel for Udupi Power has argued as under:-

a) CERC has to determine the tariff in accordance with 2009 Regulations and Regulation 7(1)(a) expressly provides that the capital cost for the project shall include IDC and financing charges upto date of commercial operation of the project, as admitted by the Commission, after prudence check.

b) There is no clause in the 2009 Regulations in regard to IDC specified in the 'in principle' approval of CERC for capital cost would be the ceiling on IDC.

c) PPA is not enforceable as it has not been approved by the State Commission. Even assuming that it is enforceable, Article 4.1 of the PPA read with Annexure-9 can not prevail over or does not detract from Article 6.12 which provides for adjustment in tariff in the event of any circumstances, including change in law, which materially increases the cost of the seller.

(d) The delay in commissioning of the project was beyond the control of Udupi Power.

(e) The contention of PCKL that IDC was one of the norms agreed between the parties under the PPA cannot be deviated under Regulation 37 of 2009 Regulations is clearly misconceived and

misplaced as IDC is not a norm of operation and would not fall under the scope of Regulation 27.

63. **The question that arises for our consideration is whether Udupi Power is entitled to IDC for time overrun due to reasons beyond the control of Udupi Power, its contractor/ sub-contractors or IDC has to be restricted as per the terms of the PPA?**

64. As already decided earlier the tariff has to be decided as per 2009 Regulations. Regulation 7(1)(a) is relevant and is reproduced under paragraph 30 above. Under the Regulation 7(1)(a), the IDC and financing charges upto the date of commercial operation of the project as admitted by the Commission, after prudence check have to be included in the capital cost. According to second proviso to Regulation 7(2), the prudence check may include interalia IDC and cost over run and time over run. Therefore, IDC due to delay in commission of the project, has to be considered if CERC comes to a conclusion that such delay was beyond control of the project developers and its contractors.

65. This Tribunal in judgment dated 27.04.2011 in Appeal No. 72 of 2010 in the matter of Maharashtra State Power Generation Co. Ltd. Vs. MERC & Ors. has laid down the principle of sharing of cost over run

in commissioning of the projects for which tariff is to be decided under Section 62 of the Electricity Act. The relevant extract of the

"7.4. The delay in execution of a generating project could occur due to following reasons:

i) Due to factors entirely attributable to the generating company, e.g. imprudence in selecting the contractors / suppliers and in executing contractual agreements including terms and conditions of the contracts, delay in award of contracts, delay in providing inputs like making land available to the contractors, delay in payments to contractors/ suppliers as per the terms of contract, mismanagement of finances, slackness in project management like improver co-ordination between the various contractors, etc.

ii) Due to factors beyond the control of the generating company e.g. delay caused due to force majeure like natural calamity or any other reasons which clearly establish, beyond any doubt, that there has been no imprudence on the part of the generating company in executing the project.

iii) Situation not covered by (i) & (ii) above:

In our opinion in the first case the entire cost due to time over run has to be borne by the generating company. However, the liquidated damages (LDs) and insurance proceeds on account of delay, if any, received by the generating company could be retained by the generating company. In the second case, the generating company could be given benefit of the additional cost incurred due to time over-run. However, the consumers should get full benefit of the LDs recovered from the contractors/suppliers of the generating company and the insurance proceeds, if any, to reduce the capital cost. In the third case the additional cost due to time overrun including the LDs and insurance proceeds could be shared between the generating company and the consumer. It would also be prudent to consider the delay with respect to some benchmarks rather than depending on the provisions of the contract between the generating company and its contractors/ suppliers. If the time schedule is taken as per the terms

of the contract, this may result in imprudent time schedule not in accordance with good industry practices."

The above decision was also reiterated in Tribunal's judgment dated 18.1.2013 in Appeal No. 57 of 2012. As per the above principles, if it is decided that the delay in commissioning of the project is due to factors beyond the control of the project developer and if there is no imprudence on the part of project developer in executing the project, cost increase due to time over run should be allowed. This judgment will apply in the present case.

66. We do not find force in argument of PCKL that in view of ceiling on IDC as provided in the PPA, no increase in IDC should be allowed. The Regulation clearly permits IDC and FC upto the CoD including for time over run subject to the prudence check. The proviso regarding ceiling capital cost as agreed in PPA has to be taken into consideration while determining the tariff. However, if the IDC due to time over run is established beyond doubt beyond the control of project developer its contractor or sub-contractor, the same has to be permitted.

67. Let us now take up the specific issues relating to increase in IDC. CERC has allowed IDC for delay in COD of the project on account of following:-

(i) Delay in land acquisition

(ii) Delay due to visa for Chinese personnel

(iii) Delay due to non-availability of transmission capacity

CERC has not allowed delay in providing start up power which has been challenged by Udupi Power in the cross Appeal. The questions that arise for our consideration relating to IDC for delay in commissioning of Udupi Power are:

(i) Whether CERC has erred in considering delay in land acquisition, delay in providing visa for Chinese personnel and delay in availability of 400 KV transmission line as reasons beyond the control of Udupi Power for allowing IDC?

(ii) Whether CERC has erred in not considering delay in providing start up power to Udupi Power as a reason beyond the control of Udupi Power for allowing IDC?

68. **Let us now examine if the delay due IDC allowed by CERC for the period of 8.5 months for Unit-I and 10 months for Unit-II due to delay in acquisition of land has been allowed correctly.**

69. Shri Ramachandran, Learned Counsel for PCKL on this issue has made following submissions:-

(a) The responsibility for acquisition of land was that of Udupi Power and the entire process was in fact facilitated by GoK power utilities. The land was handed over to Udupi Power within stipulated deadline. Out of total land required to the extent of 647.67, acres area to the extent of 420.25 acres required for construction of main plant area was handed over to Udupi Power by Kerala Industries Area Development Board **("KIADB")** latest by 10.01.2007 instead of 26.12.2006. The possession certificate for area to the extent 356 acres required for construction of main plant area was issued to KIADB latest by 18.04.2007. For the balance portion of 64.25 acres required for construction of main plan area, possession certificate has been issued by KIADB latest by 11.09.2007.

(b) As per the standard conditions prescribed by KIADB, the party shall have to execute lease-cum-sale agreement within 30 days

from the date of possession certificate. However, in the instant case Udupi Power executed lease-cum-sale agreement for main plan area of 420.25 acres only on 27.11.2007 i.e. after a delay ranging from 2 years 10 months to 1½ months. Lease-cum-sale agreement executed on 27.11.2007 has been considered as start date by CERC which is incorrect. Udupi Power could have commenced civil work at plant site in January, 2007 itself as land for main plant area has been handed over in January, 2007. The Writ Petition during 2005 challenging the execution for the main plant area was dismissed by High Court of Karnataka on 11.04.2007. Thus the main plant area was free from litigation from April, 2007 itself. The balance 15% land required for main plant area possession certificate was issued in September, 2007.

(c) Responsibility to arrange land was on Udupi Power in line with tariff Regulations. Tariff Regulation, 2014 has been referred to in this regard. Lanco Infratech vide letter dated 29.10.2010 addressed to Udupi Power informed that land for main plant area was handed over in October, 2007 and civil works were immediately taken up.

(d) Lanco Infratech never claimed delay with reference to delay in acquisition of land for the main plant area.

(e) The DPR submitted in June, 2009 for enhancement of capacity did not capture delay in land acquisition.

(f) No notice for force majeure was given by Udupi Power at the relevant time. This is itself shows that claim of Udupi Power is an afterthought.

70. In reply Shri Vaidyanathan, Learned Senior Counsel for Udupi Power has made following submissions:-

(a) PCKL has not denied delay on account of land acquisition in their reply to Udupi Power's submissions before CERC. In spite of Udupi Power highlighting the issues relating to delay in land acquisition before CERC, PCKL did not contest the same before CERC. PCKL raking up this issue and contest the same is malafide and cannot be sustained.

(b) CERC has dealt the issue of delay in land acquisition and has allowed the same in favour of Udupi Power after a thorough evaluation of documents and submissions of the parties.

(c) It was not disputed by PCKL before CERC or this Tribunal that land on this plant was to be acquired by the governmental

agency, namely KIADB, under the provision of KIADB Act. The procedure under the KIADB, Act is that State Government notifies the land for the project in public interest and acquires the same after hearing objections from the public and then hands over the land to KIADB who in turn hands over the land to project developer after necessary documentation.

(d) PCKL in its submissions before CERC has admitted that the actual cost on account of land acquisition could be paid since the acquisition is being done by Government Agency.

(e) It is denied that possession of land was given to Udupi Power prior to April/September, 2007 and that the Udupi Power was in a position to commence work prior to April/September, 2007. The complete land required for BTG installation was made available only in September, 2007 and the lease agreement for the land was executed on 27.11.2007. The work on land could not be commenced till the land required for BTG installation which is the longest activity in construction of plant was required to be carried out to meet the project construction schedule, was handed over.

(f) There were cases filed against the Udupi Power by land owners and in some cases Court had granted status-quo order which were in operation till April, 2009. Details of various cases in High Court have been furnished which show that most of cases were dismissed from April 2007 to as late as October 2009. The lease-cum-sale deed for the main plant area was executed only on 27.11.2007 on account delay in land acquisition. The boiler foundation work was taken up in November, 2007 and in a period of 36 months, Udupi Power achieved CoD of Unit-I (11.11.2010). It is denied that Udupi Power was in possession of land when CERC passed order dated 25.10.2005. At such time the land was only notified by KIADB for development of the project. The actual possession of land for BTG was given to Udupi Power in November, 2007 after a delay of 11 months.

(g) The argument of PCKL that the DPR did not claim any forced majeure delay on account of land acquisition is misconceived since this was not within the scope of DPR. DPR was merely on account of issue of augmentation of capacity and the scope of study of DPR was limited to issue of augmentation required to capacity increase from 1015 to 1200 MW.

(h) Udupi Power has been communicating to authorities of GoK pointing out the delay by KIADB/GoK in handing over the land required for the project. In this connection reference was made to the minutes of the meetings dated 23.08.2006, 02.07.2008 and 07.07.2008, copies of which were furnished.

(i) Udupi Power also explained with the help of site map indicating the different blocks of land at different times to show that there was delay in handing over the land where BTG which was the most critical construction activity had to be installed.

70. Let us examine the findings of the CERC. The relevant paragraph of the impugned order is reproduced below:-

"Delay in land acquisition
39. It could be observed from the above tables that though the effective date was 26.12.2006, due to land acquisition problem the petitioner had to lose 11 valuable months at that start of the commissioning work. The respondents have also not denied this fact of delay in handing over the land to the petitioner. Accordingly, we find that the delay in acquisition of land by the petitioner was beyond their control and hence not attributable to them. Accordingly, the time over run of 8.5 months for Unit-I is allowed as the same is not be attributable to the petitioner. In view of this, the increase in IDEC, IDC and FC due to delay of Unit-I has been allowed.

40. Unit-II of the generating station has been declared commercial on 19.08.2012 which is about 26 months delay from the schedule COD of 25.06.2010 of the generating station. As in case of unit-I, Unit-II is equally affected due to delay in land acquisition by the State Government and therefore, the loss of 10 months due to litigation in land acquisition has been considered as beyond the control of the

petitioner and is allowed. Accordingly, the actual delay in COD of Unit-II of the generating station works out to 16 months only."

71. We find that the PCKL and other Respondents before the CERC had not denied the fact of delay in handing over the land to Udupi Power and accordingly the CERC considered delay in acquisition of land beyond the control of Udupi Power and not attributable to Udupi Power. Udupi Power gave survey nos of land falling in BTG area and date of possession certificate between April 2007 to September 2007. Lease of land was executed in November 2007. Strangely, PCKL has given various submissions before this Tribunal which were not made before the CERC. It is not denied that the Government agencies, namely KIADB was solely responsible for acquisition of land handing over project to the developers. The Udupi Power has explained that there was delay in handing over the land where BTG which is critical path in construction of power project had to be installed. Reference to Tariff Regulation 2014 has been made by PCKL which is not relevant as 2009 Regulations are applicable in the present case. As discussed above land acquisition was the responsibility of GoK and KIADB a Government agency and land was to be handed over to Udupi Power by KIADB. This delay in delivery of land is a reason beyond the control of Udupi Power. Udupi Power is not claiming any

consequential damages due to delay in commissioning of the project and are claiming IDC which has been incurred by them due to delay in handing over possession the land which is permissible as per the Regulations. Therefore, we do not find any infirmity in the findings of CERC relating to delay in land acquisition.

72. **The next issue is relating to visa for Chinese personnel. The question that arises for reconsideration is whether delay in granting of visa to Chinese technicians and engineers of Original Equipment Manufacturers ("OEM)") due to Government policy/ Order resulted in delay in commissioning of the project and whether the IDC is required to be allowed to the project developer for the same.**

73. In this connection, Shri Ramachandran, Learned Counsel for PCKL made following submissions:-

(a) As far as Udupi Power is concerned, its EPC contractor was its sister concern, namely LITL. The conditions faced by sub-contractors of LITL can not affect the rights and obligations of Udupi Power towards the PCKL under the provisions of PPA.

(b) LITL is an Indian company. Neither Udupi nor PCKL are concerned with the manner in which LITL organizes the

construction of power plant. The restriction of Visa applicable to Chinese personnel does not constitute a Force Majeure event. It was open to LITL to arrange the work force in India and it was not impossible for Udupi Power and LITL to perform the contracts.

(c) The legal aspect of what constitutes Force Majeure is well established. The performance of work become onerous or difficult does not constitute Force Majeure.

(d) Even assuming any delay on account of visa, there could not be any financial implication on either of the parties, instead only the commissioning time gets postponed.

(e) The issue of Chinese personnel has arisen only because of selection of DEC, a Chinese company by the sub contractors of Udupi Power. There was no issue of foreign workers which BHEL. If Udupi Power had not changed the contract with BHEL there would not have been any visa issue.

(f) LITL in its letter dated 29.09.2010 addressed to Udupi Power contemplated increase in strength of Chinese experts to 65 from 40 due to change in capacity augmentation. This proposal is an afterthought since there is no necessity to increase

strength of Chinese experts to 60 from 40 during October, 2010 since right from the project inception DEC was installing standard modules size of 600 MW. Therefore, required number of Chinese experts of 40 as assessed by Udupi Power way back in 2006 itself will suffice for execution of 1200 MW project.

(g) The Chinese experts had to leave India consequent to expiry of their visa and not due to Government of India stipulation on change in visa policy. As only 40 Chinese experts are required for erection and commissioning activities, the strength of required Chinese personnel were existing as on January, 2010. Even if the project activities considered to be hampered on account of change in visa policy it shall be from November, 2009 and not from July, 2009 as contemplated by CERC. The delay of 6 months from July, 2009 to December, 2009 due to change in visa policy of GoI allowed by CERC does not materially affect the commissioning of Unit-I since the period of July, 2009 to December, 2009 is subsumed in commissioning of Units.

74. Shri Vaidyanathan, Learned Counsel for Udupi Power made following submissions:-

(a) Change in visa policy by GoI for Chinese personnel is a force majeure event under Article 10 of the PPA.

(b) Further, GoI required Chinese nations working in power project in India on existing visa to leave the country by 30.09.2009 (later extended to 30.10.2009). As a result of change in visa policy, foreign national executing projects/contracts in India were required to obtain a separate category of visa/permits. Thus all Chinese technical experts working for the project had to leave the country prior to such date leading to undue delay in erection, testing and commissioning activities of the project.

(c) It was only after several efforts that Chinese experts started obtaining visa from November, 2009. At this stage, erection, testing and commissioning activities were in full swing and around 65 experts were required at site. Even in November, 2009 only 4 experts were issued visa and gradually the numbers increased to 12 in December, 2009, 30 in January, 2010, 45 in February, 2010 and only in May, 2010 were required number of 65 experts were present to re-commence the work. The presence of Chinese experts at project site was imperative as the equipment was supplied by DEC which could

only be erected, installed, tested and commissioned under the supervision of DECs Chinese engineers. Installation of equipment by anybody other than DEC would render the warranty provided by DEC invalid. Therefore, Udupi Power had no alternative but to wait for the return and recommencing of work by Chinese engineers. Udupi Power has submitted details on the activities which were affected due to non-availability of Chinese experts.

(d) Udupi power had issued letter dated 26.12.2009 to PCKL intimated the occurrence of Force Majeure Events under Article 10 of PPA due to change in visa policy by GoI for Chinese nationals also giving letter dated 15.12.2009 from LITL in this regard. After the project activities were resumed after arrival of Chinese experts, Udupi Power notified the cessation of the force majeure to PCKL on 13.11.2010. Udupi Power submitted various documents to establish direct effect of impact of change in Visa Policy. PCKL did not give any response to notice till 25.06.2011 i.e. for more than 18 months.

(e) Force majeure relating to change in visa policy has been recognized by GoK in its order dated 01.06.2010.

(g) PCKL's contention that liquidated damages could have been sought from EPC contractors by Udupi Power is not tenable as Udupi Power has accepted force Majeure events invoked by EPC contractors.

75. Let us examine the findings of CERC on the issue of change in visa policy by Government of India for Chinese Nationals. CERC has held that any event or combination of event which have some effect upon the performance of any of the contractors/suppliers of Udupi Power shall constitutes force majeure as per the term of PPA agreed between Udupi Power and the distribution licensees. The change in visa policy by Government of India, guidelines of Ministry of Labour and Employment resulted in difficulties in the pre-commissioning activities due to limited visas issued to Chinese technical personnel of DEC. The Commission felt that the absence of sufficient number of experts from OEM who were Chinese nationals during the project activities had a direct impact on the progress of the project leading to delay in completion of the project. Accordingly, the Commission allowed delay of 6 months in completion of the project due to change in visa policy which was beyond the control of Udupi Power.

76. We have carefully examined the submissions made by the parties and the findings of CERC. While we agree with the CERC about the delay caused in commissioning of project due to change in visa policy of Government of India, we feel that total delay should not have been allowed by more than 3 months instead of 6 months allowed by the Commission. We find that Ministry of Commerce, GoI by letter dated 20.08.2009 had issued clarification on the requirement of Visa for foreign national engaged in execution of projects/contractual works in India. Subsequently, Ministry of Home Affairs by letter dated 25.09.2009 issued further clarifications/conditions. Accordingly, all foreign nationals in India on business visas and engaged in project or contract work should return to their home country on expiry of visas or by 31.10.2009 which ever is earlier. No visa extension will be granted in such cases. Foreign nationals have to obtain employment visa only in order to come in India to work on projects/contracts. Further, employment visa was to be granted to skilled or qualified professionals such as technical experts/technicians and not for routine, ordinary or secretarial/clerical jobs. The Ministry of Home Affairs also gave timeline for clearance by Intelligence Bureau within 15 days and Ministry of Labour within 45 days. All other directions

were general directions. Ministry of Labour & Employment guidelines for granting employment visa stipulate granting of visa to the extent of 1% of total persons on the project or maximum 40 persons for each power project. Udupi Power has stated that in November, 2009, only 4 experts were issued visas and gradually number was increased to 12 in December 2009, 30 in January 2009 and 45 in February 2010 and required number of 65 experts were present during May 2010 to recommence the work. We, therefore, feel that delay of 3 months due to difficulties in the months from November, 2009 to January, 2010 only be allowed as by February 2010, 45 persons, which is as per the guidelines of the Ministry of Labour were available at the project.

77. We do not agree with PCKL that erection and commissioning activities could have been carried out without the Chinese experts. BTG was supplied by DEC, China. The erection and commissioning could not have been done on the absence of Chinese engineers/ experts as erection and commissioning in the absence of supervision of Chinese experts would have an impact on warranties of the project.

78. We also do not agree with PCKL that the period of delay due to visa problem would be subsumed in the period of delay allowed by CERC due to non-acquisition in land. The delay due to non-acquisition land has resulted delay in commencement of civil work on BTG which is critical activity for completion of the project from December 2006 to November 2007 (11 months). As per PPA, the first unit was to be commissioned in 38 months and second unit within 42 months. It was during the erection and commissioning stage that the problem of visa came up. Therefore, period of delay due to land acquisition will not subsume the period of delay due to Chinese visa.

79. The next issue is regarding delay in construction of 400 KV transmission line required for evacuation of power from the project.

80. According to the PCKL, Udupi Power scheduled the commissioning test of Unit 2 on 4th July, 2011 despite having no valid Consent for Operation **("CFO")** for commissioning of Unit 2. The Consent for Operation of 2x600 MW issued by Karnataka State Pollution Control Board **("KSPCB")** vide letter dated 18.08.2010 was valid only upto 30.06.2011 i.e. on 04.07.2011 no valid CFO was existing for conducting capacity test of Unit 2. Despite issue of no objection certificate by KSPCB for carrying out capacity test of Unit 2 on

01.07.2011, the same was withdrawn by KSPCB vide letter dated 2.07.2011. KSPCB vide letter dated 19.12.2011 has issued consent for operation of 1x600 MW (Unit-I) only for the period from 01.07.2011 to 30.06.2011. KSPCB only on 30.06.2012 issued Consent for Operation of 2x600 MW only for the period from 01.07.2012 to 30.06.2013. There is no co-relation between readiness of 400 KV line and declaration of COD of Unit 2.

81. As per PCKL, KSPCB vide letter dated 16.04.2011 had directed Udupi Power that 2nd Unit of 600 MW shall not be commissioned without complying with the directions contained in the said letter. One of the conditions was replacement of GRP Sea Water Pipeline by MS Pipeline, non completion of 3 ash ponds and installation of drift eliminator. Witnessing of capacity test in respect of Unit 2 in May 2011 was not conducted by Udupi Power in view of above instructions issued by KSPCB. Despite Unit 2 achieving full load on 16.04.2011, the same cannot be presumed as deemed date of commissioning of Unit 2 since the Udupi Power had not issued notice to Appellants for declaring COD. Therefore, delay of 16 months allowed by CERC from April 2011 to August 2012 should be disallowed. The delay in construction of 400 KV line by KPTCL is

primarily due to delay in granting clearance by MOEF which was beyond the control of KPTCL. PCKL had invoked force majeure on account of delay in granting clearance by MoEF for construction of 400 KV line. As per the terms of PPA, the parties can be excused from the performance of the contract in view of force majeure. There should be no financial implication either to the Appellant or to Udupi Power on account of the above delay. There was no delay on the part of KPTCL in applying for forest clearance.

82. Udupi Power in reply has made following submissions:

a) The responsibility of making 400 KV transmission line ready for evacuation of power generated form Unit 1 and 2 is that of PKCL. This should have been done latest by January 2010 to achieve the schedule COD of Unit 1 by February 2010. However, the construction of 400 KV line was delayed due to delay in ordering and obtaining statutory permissions/ clearance. The order for construction of 400 KV line was placed as late as in November 2008 i.e. 35 months after signing of the PPA. Application for forest clearance to MOEF was made only in January 2010 i.e. by time by which they were actually supposed to commission the 400 KV line.

b) Even though 220 KV line was required from February 2009, it was made available by KPTCL only in September 2009 with a delay of 6 months. Also the power of Unit 1 was being evacuated at 220 KV which was only upgraded from carrying capacity of 325 MW to 600 MW on 18.06.2010. Thus, PCKL was not ready to accept power from Unit-I before 18.06.2010.

c) Unit 2 was ready for synchronization in January 2011 and was synchronized with the grid on 07.03.2011 on 220 KV system. Even though it reached full capacity, determination of COD for the project was pending for want of 400 KV transmission lines. CFO for Unit 2 was valid upto 30.06.2011. Unit 2 was synchronized on 07.03.2011 and reached full load on 16.04.2011 which cannot be denied by PCKL. Had KPTCL made the 400 KV line at that stage Udupi Power was in a position to achieve commercial operation. Finally, Udupi Power was permitted to conduct a capacity test of Unit 2 only in August 2012. Since KPTCL in its letter dated 13.08.2012 informed that 400 KV line is nearing completion and expected to test charge and trial operation on or after 20.08.2012.

d) The communication on force majeure was done by KPTCL only on 07.03.2011 which was also date of synchronization of Unit 2 of the project. This was to protect itself against the claim which would have been attracted on account of failure in commissioning of 400 KV line.

e) KSPCB had conveyed consent for 1200 MW from 01.07.2010 to 30.06.2011 vide letter dated 18.08.2010. Udupi Power informed about readiness of Unit-II for synchronization vide letter dated 01.01.2011, 28.01.2011 and 22.02.2011. However GoK unilaterally referred the matter to CPRI vide letter dated 23.02.2011. On the recommendations of CPRI, KPTCL on 04.03.2011 permitted synchronization limiting to generation of 80 MW. Unit-II was synchronized on 07.03.2011. On 16.04.2011, Unit-II achieved full load. CEA in its letter dated 18.04.2011 recognized that Unit-II had achieved full load on 16.04.2011. Udupi Power issued notice of initial capacity test to PCKL vide letter dated 20.04.2011 and again by letter dated 03.05.2011. However, on 24.06.2011, KPTCL enclosing a note of Secretary, Department of Forest, Ecology and Environment addressed to Chief Secretary conveyed that Unit-II shall not be

commissioned without complying with the directions of KSPCB. KSPCB conveyed no objection to capacity test vide letter dated 01.07.2011. Udupi Power submitted KSPCB's no objection letter to KPTCL vide letter dated 01.07.2011 and requested KPTCL to depute their official to witness the capacity test. However, on the very next day KSPCB withdrew its approval granted for carrying out initial capacity tests without assigning any reason. KPTCL conveyed vide letter dated 02.07.2011 that deputing their officers to witness the initial capacity test does not arise in view of the withdrawal of the no objection granted by KSPCB. It is worth noting that KPTCL had issued this letter immediately after the withdrawal of consent letter of KSPCB was issued to Udupi Power even though KPTCL was not an addressee of such letter. This clearly suggests that KPTCL was influencing the grants of the required permit and approvals by KSPCB.

83. Udupi Power also submitted following:

a) KSPCB granted CFO for 1x600 MW (Unit No.1) vide letter dated 09.12.2011.

b) The Respondent No.2 requested KPTCL vide letter dated 11.01.2012 to permit shut down of Unit No.1 to facilitate installation of drift eliminators.

c) KPTCL wrote to KSPCB to allow Udupi Power time up to June 2012 for the installation of drift eliminators of Unit No.I vide letter dated 11.01.2012.

d) KSPCB made it clear to KPTCL that Unit No. II is already provided with drift eliminators and that there was no impediment to grant consent for both Units vide letter dated 25.01.2012.

e) KSPCB permitted Udupi Power to operate Unit No.II of 600 MW by parallely shutting down Unit No.I vide letter dated 25.01.2012.

f) Udupi Power conveyed to the load dispatch centre that Unit No.II will be synchronized on 27.01.2012 vide fax dated 26.01.2012 and again on 27.01.2012.

g) KPTCL informed vide letter dated 27.01.2012 that Unit No. II was synchronized without the concurrence of SLDC and asked for the Unit to be desynchronized immediately.

h) Udupi Power conveyed to the load dispatch centre that Unit No.II was synchronized on 27.01.2012 after obtaining concurrence from SLDC vide letter dated 27.01.2012.

i) SLDC vide message dated 28.01.2012 asked Udupi Power to desynchronize Unit No. II immediately and indicated that any continued operation of Unit No. II will at the risk of Udupi Power and KPTCL will not be liable for any payment.

j) Left with no option, Udupi Power de-synchronized Unit-II on 29.01.2012.

84. We have examined the documents furnished by the parties. It is clear that Unit-II was ready for synchronization in January, 2011. Despite repeated requests, Udupi Power was not permitted to synchronize Unit and only on 04.03.2011 Udupi Power was permitted to synchronize and operate only upto 80 MW. On 16.04.2011, Unit-II achieved full load which has also been certified by CEA and is not denied by PCKL. Udupi Power issued notices for initial capacity test on 20.04.2011 and 03.05.2011 but it was no permitted even though Udupi Power had permission for operation for 1200 MW plant for the period 01.07.2010 to 30.06.2011. Udupi Power was not even allowed to shut down Unit-I and commission Unit-II on 220 KV system.

Finally, Udupi Power was permitted to carry out capacity test only when 400 KV transmission line was nearing completion. Thereafter Udupi Power carried out capacity test on 220 KV system and completed the same on 19.08.2012.

85. We have examined the findings of CERC. CERC has analyzed the issue in details and correctly allowed delay of 16 months from April 2011 to August 2012 beyond the control of Udupi Power and not attributable to Udupi Power. We find that delay in commissioning of the 400 KV line which was the responsibility of PCKL resulted in capacity of Udupi Power being stranded even though it was ready for generation. We also find that notice for Force Majeure for delay in transmission line was issued only on 07.03.2011 immediately after Unit-II was synchronized on 04.03.2011. We feel that as per the 2009 Regulations, Udupi Power is entitled for IDC for the delay caused in commissioning of 400 KV lines for evacuation of power from Udupi Project (2x600 MW) which was the responsibility of PCKL.

86. **The next issue is regarding delay in providing start up power raised by Udupi Power in Appeal No.119 of 2014.**

87. According to Udupi Power as per Annexure-4 of the PPA, PCKL is required to provide start up power to match with scheduled COD of Unit-I. To achieve COD of Unit-I by February, 2010, start up power should have been provided by PCKL by February 2009. CERC has erred in holding that switch yard of receiver station to be constructed by Udupi Power was not ready before 14.09.2009 disallowing the delay of 6 months in commissioning schedule of the project. Udupi Power received approval of drawings of electrical installation of switch yard from Chief Electrical Inspector **("CEI")** on 02.04.2009. Udupi Power after carrying out necessary compliance as per letter dated 02.04.2009 submitted completion report to CEI on 15.04.2009. However, CEI visited site only in August 2009. The line was charged on 22.09.2009. Thus, there was a delay of 6 months on this account.

88. CERC has examined this issue and held that switchyard of receiving station was not ready before 14.09.2009 as per the report of CEI. CERC also noted that this delay would not have overall impact in the COD of Unit-I and II due to delay in land acquisition and non-readiness of 400 KV transmission line.

89. We find that CEI had accorded permission on 14.09.2009 for charging of the switchyard of Udupi Power Project after inspection in

August 2009. The switchyard cannot be charged before obtaining clearance relating to safety from CEI. It was the responsibility of Udupi Power to obtain clearance from CEI. Therefore, Udupi Power was not ready to receive start up supply before 14.09.2009. We do not find any merits in the contention of Udupi Power. Hence, we reject the same and uphold the findings of CERC.

90. **Let us now take the issue of interest rate.**

91. According to PCKL and Janajagrithi Samithi, the interest rate should be restricted to as approved by CERC in 'in principle' approval and as agreed in the PPA i.e. 7.25% as Udupi Power had voluntarily agreed to a lower interest rate.

92. On the other hand Udupi Power has contended, it had been continuously representing to the PCKL/ Government of Karnataka for amendment of interest rate in the PPA. In this connection, Udupi Power has referred to letters from State Government and minutes of meetings with State Government/ State Utilities wherein it was specifically agreed that interest rate would be as decided by CERC. It is submitted that the interest rate should be allowed on actual as per the provision of 2009 Regulations.

93. Regulation 16(5) of 2009 Regulations provides that rate of interest shall be weighted average of rate of interest calculated on the basis of actual loan prevalent at the beginning of each year applicable to the project. Therefore, we do not find any infirmity in CERC allowing interest rate as per the Regulations

94. We do not find any merit in the contentions of Mr. Ramachandran that improved norms as agreed in the PPA shall be applied for financial norms also as per Regulation 37 of 2009 Regulations. Interest Rate is an uncontrollable factor and decided by the financial institution, Banks. PFC a Government institution is the lead lender for the project. No imprudency has been pointed out by PCKL regarding interest rates that the rates are not in line with the prevailing market interest rates. Even at the time of 'in principle' approval by the CERC and at the time of entering into PPA, the financial closure had not occurred. The 'in principle' approval by CERC was based on the estimated interest rates. CERC by order dated 09.03.2006 had clearly indicated that CERC at that stage had not gone into the process of actual determination of tariff and, therefore, it does not consider it appropriate to examine the clarification sought by Udupi Power regarding determination of tariff. CERC added at that time it

was enough to say that tariff will be determined in accordance with the terms and conditions applicable at the relevant time. We also feel that Regulation 37 is relating to operation norms and not interest rates.

95. Regulation 37 of 2009 Regulations provides that norms of operation specified in the Regulations are the ceiling norms and shall not preclude the generating company and beneficiaries from agreeing to improved norms of operation and in case the improved norms of operation are agreed to, such improved norms shall be applicable for determination of tariff. Norms of operations as specified in Chapter-4 relates to normative Annual Plant Availability Factor, gross station heat rate, secondary fuel oil consumption and auxiliary consumption and do not include interest rate. Further, the issue of interest has been under correspondence between Udupi Power and State Government and utilities since the signing of the PPA. We have examined all the documents furnished by both the parties and find that even after signing of the PPA there was an understanding that interest rate will be decided by CERC.

96. CERC has correctly applied 2009 Regulations for interest rates. In view of above, the issue relating to interest rate is decided against PCKL.

97. **The next issue is regarding Return on Equity ("RoE") and O&M expenses**.

98. It is argued by Shri Ramachandran, Learned Counsel for PCKL that RoE and O&M expenses should be as per the PPA. This is consistent with the direction contained in the 'in principle' approval dated 25.10.2005 which states where the improved norms are agreed to, such norms shall be the basis for determination of tariff. When the generating company had agreed to keep return on equity of 14% per annum, there is no merit in the claim that higher return should be allowed as per the Regulation. Similarly, O&M expenses should be 2.25% of the admitted capital cost with annual escalation of 4% as per PPA. Regulation 37 of 2009 and 'in principle' approval of CERC is referred to in support of the above claims.

99. As discussed above, in case of interest rate, the ROE & O&M expenses has also to be allowed as per the Regulations. Both ROE & O&M are not norms of operation and would not fall under purview

of Regulation 37. CERC has correctly allowed ROE and O&M expenses as per the 2009 Regulations.

100. **Next issue is regarding station heat rate.**

101. According to Shri Ramachandran, Learned Counsel for PCKL in terms of PPA entered into between parties, the net Station Heat Rate **("SHR")** is 2400 kCal/kWh. Against this Udupi Power claimed Gross Station Heat Rate of 2400 kCal/kWh. The gross SHR as per PPA taking auxiliary consumption of 7.5% (as claimed by Udupi Power) is 2220 kCal/kWh. However, taking auxiliary consumption of 6% as per the Regulations, the SHR will work out to 2256 kCal/kWh. DEC, the OEM has guaranteed gross SHR of 2233 kCal/kWh for 600 MW modules and gross heat rate demonstrated during performance test was 2188 kCal/kWh for Unit-I and 2193 kCal/kWh for Unit-II. Net heat rate guaranteed by BHEL for 507.5 MW at 100% TMCR was 2391.5 kCal/kWh. Considering this figure a net heat rate of 2400 kCal/kWh was provided in the PPA. Therefore, the claim of Udupi Power for gross heat rate of 2400 kCal/kWh is not correct and ought to be rejected as the heat rate agreed into PPA is better than normative heat rate as specified in 2009 Regulations. In any case considering that Udupi Power had itself agreed to reduce gross SHR

by 50 kCal/kWh over the applicable norms of CERC during 2005, then considering cushion of 6.5% provided in 2009 Regulation, gross SHR should be 2333.41 kCal/kWh (2191x1.065). Reducing 50 kCal/kWh from 2333.41 kCal/kWh, the gross SHR should not be more than 2283.41 kCal/kWh.

102. In reply, Shri C.S. Vaidyanathan, Learned Counsel for Udupi Power has made following submissions:-

(a) The stipulation regarding net heat rate in the PPA has not been accepted by the Udupi Power at any point of time. Infact, PCKL had clearly indicated that the issue has to be decided by appropriate Commission. In this connection letter dated 24.10.2011 enclosing therewith a copy of the letter dated 20.10.2011 from the State Government to PCKL regarding heat rate norms to be subjected to final approval of CERC has been indicated. Prior to signing of PPA, on the date of signing of PPA, and even thereafter Udupi Power had repeatedly represented to PCKL/GoK that PPA should reflect gross station heat rate of 2400 kCal/kWh and not net station heat rate. Various minutes of the meetings and letters have been referred in this regard.

(b) In the meeting convened by Chief Secretary dated 23.08.2006 it was decided that tariff parameters would be finally decided by the appropriate Commission.

(c) PPA signed with PSPL also states gross station heat rate of 2400 kCal/kWh.

(d) There are anomalies regarding the heat rate in the definition of the “Tariff Heat Rate” as well as formula for energy charges provided in the PPA. PCKL and distribution licensees are conveniently insisting for amending energy charges formula in PPA while have not agreed to remove anomaly in the definition of tariff heat rate.

(e) PCKL has referred to heat rate of 2230 kCal/kWh guaranteed by OEM but have overlooked the provisions in the 2009 Regulations which provides for a margin of 6.5% over the heat rate guaranteed by OEM. Based on this, the gross heat rate would work out to 2378.14 kCal/kWh. PCKL’s contention that the gross SHR demonstrated during the performance test was 2188 kCal/kWh for Unit-I and 2193 kCal/kWh for Unit-II is denied since it is unclear from where such figures have been

culled out. The performance guaranteed test for Unit-II was carried out in March 2010 wherein gross SHR has been achieved as 2352 kCal/kWh after allowing 6.5% margin as per 2009 Regulations.

(f) Order for EPC for the plant was finalized in the year 2006 and all major component equipments necessary for the operation of the project was completed before April, 2009. This aspects has not been taken note of CERC while determining the SHR for the project. CERC has also failed to take note of other submissions made by Udupi Power in support of their claim of gross SHR at 2400 kCal/kWh. Determination of SHR has been challenged by Udupi Power in the cross appeal.

(g) In operating power plant generator has to cater to fluctuation in system demand and the machines are never continuously operating around the clock at 100% TMCR. Therefore, margin has to be provided on the performance guaranteed parameters.

103. Let us examine the findings of the Central Commission.

CERC considered the submissions of the parties, and 2009 Regulations. CERC has noted Government of Karnataka's order after

considering Justice (Retd.) Gururajan Committee Report had decided that the issue of determination of gross SHR should be left on CERC. CERC than considered the formula for energy charges as defined in the PPA and 2009 Regulations and found that the provision for computation of energy charge as provided in the PPA is not in conformity with the formula for computation of energy charges specified in 2009 Regulations. Accordingly based on the formula specified under the 2009 tariff Regulations, GSHR has been worked out and allowed for the purpose of determination of tariff. CERC then decided as under:-

> "161. As per the guaranteed turbine cycle heat rate of 1945 kCal/kWh and boiler efficiency of 88.5% along with the deviation of 6.5% as per the 2009 Tariff Regulations, the Gross Heat Rate works out to 2340.59 kCal/kWh. Without the margin of auxiliary consumption of 6.5%, the Gross Heat Rate works out as 2197.74 kCal/kWh. In light of this, achieving a GSHR of 2220 kCal/kWh as per submission of the respondents 1 to 6 is not possible. Also, the EPC contract was finalized in 2006 and there was no possibility for the petitioner to specify the Station Heat Rate as per the 2009 Tariff Regulations. In view of the above, we consider a GSHR of 2340.59 kCal/kWh based on guaranteed turbine cycle heat rate 1945 kCal/kWh and boiler efficiency of 88.5% with a deviation of 6.5% from the guaranteed design value."

104. We feel that normative gross SHR can not be taken on the basis of the result achieved during the performance test at 100% MCR. Margins have to be provided for variation in load as in actual

operation there will be variation in the generation. There will be variation due to variation in frequency, there will be part loading of unit due to variation in demand, there will be some forced on planned outage of unit and start up after shutdown in normal operation condition. Thus in normal operating generation, it will not be possible to achieve the guaranteed heat rate in the annual cycle of operation of a plant. For this reason, 2009 Regulations provides gross SHR of 2425 kCal/kWh for 500 MW units. The gross SHR has been specified by CERC on the basis of design gross SHR of 500 MW unit with an operating margin of 6.5%. Thus, CERC has thus decided gross SHR of 2340.59 kCal/kWh as against 2425 kCal/kWh as specified in the Regulations. CERC has also found deviation in the formula for variable charges in the PPA. PCKL has contended that when Udupi Power itself had in 2005 agreed to reduce gross SHR by 50 kCal/kWh, then for 2009-14 they should allow reduction of 50 kCal/kWh over 2333.41 kCal/kWh (performance test gross SHR of 2193 kCal/kWhx1.065) i.e. 2283.41 kCal/kWh. If we apply the same formulation to parameters guaranteed by OEM (2233 kCal/kWh as referred to by PCKL), the gross SHR with operating margin of 6.5% as per the Regulation less 50 kCal/kWh would work out to 2328

kCal/kWh. We are therefore, inclined to allow gross SHR of 2328 kCal/kWh. Accordingly decided. We want to make it clear that above gross SHR has been decided specific to the circumstances of this case.

105. Next issue is regarding auxiliary consumption.

106. PCKL has submitted as under:

(a) CERC is wrong in allowing auxiliary consumption higher than that specified in the tariff regulations. The reason for Udupi Power claiming higher auxiliary consumption was due to dedicated jetty and coal handling arrangement at the port, sea water pumping for condenser cooling and desalination of sea water arrangement for meeting the sweet water requirement of boiler and provision of Flue Gas Desulpherizer **("FGD")** for the plant. The above claim is contrary to 2009 Regulations. Udupi Power should not to be allowed for auxiliary consumption of more than 6% in line with tariff Regulations.

(b) The consumption of jetty at the port which is 30 Kms. away from plant can not come under the ambit of definition of auxiliary consumption. The supply contract indicates that the auxiliary consumption includes cooling water make up pump

located outside plant, CW pump, de-sailination plant, FGD plant, etc. Therefore, additional auxiliary consumption sought by Udupi Power forms original auxiliary consumption scope despite installation of additional equipments. The main agreement provides for consumption of 6.5% only. In amendment agreement dated 09.09.2009 only it was increased to 7.5%. Udupi Power sought additional auxiliary consumption despite stipulated value of auxiliary consumption in the supply contract including consumption towards the FGD, de-salination plant, external coal handling etc.EPC contracts also provides that auxiliary consumption for external CHP should be given separately. Thus, auxiliary consumption excluding captive jetty should be less than 6%.

107. Udupi Power has submitted as under:-

(a) With regard to consumption of electricity for captive jetty operation, PCKL vide their letter dated 29/30.03.2010 stated that power consumed for captive jetty will be factored as auxiliary consumption as per the Annexure-4 of the PPA. Hence, a contrary stand taken by PCKL on this issue is not tenable.

(b) Inference of Regulation 3(4) of 2009 Regulations is incorrect. CERC's stipulation on auxiliary power does not cover additionalties such as jetty and external CHP, de-salination plant, FGD, etc. as these are not always present in all power plants. Udupi Power achieved auxiliary power consumption during Performance Guarantee Test at 7.26 % under test condition at 100% MCR. During operation of the plant, plant is not expected to operate at 100% MCR at all times and would have to operate at variable loads thus leading to higher auxiliary consumption. CERC has looked into all these factors and granted an auxiliary consumption at 7.2%.

(c) The correct position of contract is that for a capacity of 1015 MW auxiliary power consumption for performance guarantee is 61700 KW and minimum level of performance guarantee is 6.5% for 100%, 7.5% for 75% and 8.8% for 60% TMCR. As per amended EPC contract for 1200 MW, the minimum level of performance guarantee of 7.5% as auxiliary consumption.

108. Let us examine the findings of the CERC.

Udupi Power had claimed auxiliary consumption of 7.5% as per PPA which included jetty, CHP, sea water pumping and condenser cooling

and sea water arrangements and FGD. CERC has stated that norms under 2009 Tariff Regulations were specified based on actual auxiliary power consumption of different thermal generating stations of 500 MW size plants for the period 2003-04 to 2007-08 wherein additional features like FGD, coal jetty and de-salination plant were not provided.

109. CERC has given explanation for allowing additional auxiliary consumption of 1.2% for additional features like FGD, coal jetty and de-salination plant. PCKL has argued that since coal jetty and external coal handling plant are located away from the power plant, their electricity consumption should not be considered as part of auxiliary consumption. We find that the norms of 6% as per CERC Regulation is based on 500 size units where additional features like coal jetty, external coal handling plant, de-salination plant, FGD etc. are not provided. No additional operation and maintenance charges are being allowed for external coal handling plant and operation and maintenance cost for a standard 500 MW plant without these features has been allowed. Therefore, we do not find any infirmity in CERC's order for allowing additional auxiliary consumption on this account.

110. **The next issue is regarding variable cost/coal purchase cost admissible.**

111. PCKL has made detailed submissions in this regard. The same are summarized as under:

(a) CERC has ignored imprudent act and factors solely attributable to Udupi Power resulting in much higher coal cost and consequent excessive energy charges claimed for generation and sale of electricity. Udupi Power would have be able to procure coal at much cheaper and economical cost as compared to price at which Udupi Power has claimed to have paid to the suppliers of Indonesian coal.

(b) PPA was entered into between the distribution licensees and Udupi Power on 26.12.2005. Udupi Power had then invited bids for procurement of coal. Pursuant to above, Udupi Power had entered into a binding coal supply agreement with M/s. Rio Tinto. Letter of intent was issued to M/s. Rio Tinto for supply of 1.5 MTPA of coal at a firm price for a period of 5 years and after 5 years to be adjusted at mutually agreeable international indices. The above coal supply agreement with M/s. Rio Tinto

and two others were basis on which Udupi Power sought 'in principle' approval from CERC by order dated 25.10.2005.

(c) Udupi Power had the opportunity to enforce the agreement with M/s. Rio Tinto for supply of coal at the price and as per the terms and conditions of the agreement entered into with M/s. Rio Tinto.

(d) Despite the above, Udupi Power proceeded to abandon the contract with Rio Tinto and invited fresh bids for procurement of coal required for the project. The bids were submitted on 25.08.2006 and evaluation of bids was done by TCE Consulting Engineers and the same was submitted on 22.09.2006. There were discrepancies in the process of inviting the bids. The bids were invited after the 'in principle' approval granted by CERC vide order dated 25.10.2005 considering procurement of coal from M/s. Rio Tinto. Despite this, no approval for inviting fresh bids was taken from CERC. No detail of fresh bidding process was given to PCKL. Udupi Power proceeded unilaterally for bid process without prior concurrence of PCKL. Only final evaluation report was submitted to PCKL. GCV of coal was specified as 5200 kCal/kg instead of 6200 kCal/kg represented

in M/s. Rio Tinto's agreement and considered by CERC in 25.10.2005 order. GCV was also contrary to specification contained in the PPA. The quantity proposed was 2.7 MTPA which was not sufficient for operation of plant at 100% PLF.

(e) In pursuance of the above bids invited by Udupi Power, Udupi Power signed Fuel Supply Agreement **("FSA")** on 26.12.2006 with M/s. Glenncore, M/s. PT Adaro, M/s. PT Indominco, PT Trubaindo Coal Mining **("BANPU")** and M/s. Aditya Energy Resources **("Aditya")**. The FOB price was firm for five years from the date of commissioning and ocean freight and insurance for 12 years.

(f) When Appellant furnished the details of FSAs, PCKL vide letter dated 22.06.2007, sought certain modifications to be made in FSA. However, Udupi Power refused to consider these charges.

(g) The FSAs with four coal suppliers did not provide for the termination of the agreement if the generating station is not commissioned by 31.12.2009. FSAs also provided for clause 2.3 dealing with conditions precedent upon satisfaction of which the agreement becomes effective. In addition the FSAs had a

force majeure clause relieving the affected party from performance of obligation. Under Clause 15.3 the agreement can be terminated for one year by giving 2 months notice but the agreement cannot be terminated for entire tenure.

(h) Udupi Power allowed M/s. Aditya to terminate the agreement wrongly by invoking Clause 15.3 and failed to exercise their right to recover from M/s. Aditya the excess amount i.e. difference between prevailing market price and M/s. Aditya FOB price of US$ 33.4 per MT. Udupi Power on its own chose not to take legal action against M/s. Aditya and recover the additional cost and expenditure incurred even though M/s. Aditya had acted as breach of FSA dated 26.12.2006.

(i) Had Udupi Power enforced FSA with M/s. Aditya they would have got coal at much cheaper rate than the price at which it procured coal from other source. Udupi Power would have been entitled to claim liquidated damages for wrongful termination of FSA by M/s. Aditya of an amount of Rs.731.38 crores.

(j) During the course of proceeding before CERC non- furnishing of FSA entered into by Udupi Power in the year 2005 and in the

earlier part of 2006 had come to light. It was transpired from the invoices of the coal suppliers that Udupi Power entered into yet another FAS on 25.10.2005 with M/s. PT Adaro and dated 25.01.2006 with M/s. PT Indominco and dated 16.06.2006/ 26.06.2006 with M/s. Glenncore which are different from coal supply agreement dated 26.12.2006 that has been projected and relied upon by Udupi Power in the proceedings. The said fuel supply agreements have been suppressed by Udupi Power from CERC and PCKL and GoK. CERC had directed to Udupi Power to furnish the agreements but these were not placed on record.

(k) Udupi Power has not enforced Force Majeure Clause against the fuel suppliers.

(l) Judgment dated 18.01.2013 of this Tribunal in Appeal No. 57 of 2012, Maharashtra State Power Generating Company Vs. MERC has been relied upon. Also decision of Hon'ble Supreme Court in (1968) 3 SCR 862, Gopal Krishnaji Ketkar Vs. Mohamed Haji Lati & Ors. (2010) 11 SCC 108, Pradeep Buragohain Vs. Praniti Phrika have been referred to, to argue that when a party does not produce the documents in its

possession, an adverse inference is to be drawn against such party.

112. In reply Learned Senior Counsel for Udupi Power has submitted as under:

(a) PCKL has misconceived in its contention that LoI issued to M/s. Rio Tinto resulted in concluded contact and that Udupi Power had unilaterally cancelled the purported FSA. It is not open to PCKL to raise any issue with regard to alleged contract with M/s. Rio Tinto before CERC in tariff proceeding in 2012 after almost 7 years from the issue of LoI to M/s. Rio Tinto. PCKL was well aware that this LoI did not fructify into contract which required Udupi Power to carry out subsequent bids for fuel supply. PCKL was well aware of the subsequent contracts having accepted supply of power generated from coal supplied under such contract and have even re-negotiated the rates with such coal supplers.

(b) After the termination of FSA, PCKL has itself re-negotiated the contract with fuel suppliers in 2010. No such allegations or objections were raised by PCKL at that time. Thus, any claim

or objections in relation to such alleged FAS is clearly barred by time also.

(c) LoI was issued to M/s. Rio Tinto on 09.08.2004 and a draft agreement was circulated. However, after a series of negotiations, it was decided that there were a number of deviation which had crept into with respect to the original offer and M/s. Rio Tinto was asked to submit a revised offer. M/s. Rio Tinto did not come forward with a revised offer. Thus, there was no formal agreement with M/s. Rio Tinto at any stage and there was no occasion for LoI to be treated as an unconditional acceptance of the M/s. Rio Tinto offer as contemplated by PCKL. The LoI states that revised agreement shall be sent shortly after incorporating all the terms and conditions as per bid documents, offer and post bid documents. LoI states that source of supply were still to be agreed by the parties before the start of supply of coal. The source of coal was a material term which required a consensus between the parties before a formal contract was drawn up. In the absence of same, no binding agreement could have been drawn up nor the LoI been treated as a formal contract. The law is well settled that no

contract would be formed where the terms are uncertain and ambiguous. AIR 1954 SC 236 Vithaldas Jasani Vs. Moreshwar Parsaharm, AIR 2006 SC 871, Dresser Rand SA Vs. Bindal Compressors Agro Chem Ltd. and K.G. Khosla had been relied upon.

(d) Pursuant to unsuccessful completion of second round of bidding, Udupi Power was constraint to carry out the third round of bidding by way of floating fresh tenders. Finally, six bids were received, including a bid from M/s. Rio Tinto itself which shows that earlier offer of M/s. Rio Tinto had not resulted in a contract.

(e) When TCE report regarding evaluation of bids was sent to PCKL, no issue regarding M/s. Rio Tinto was raised. Multiple reminders sent by Udupi Power to PCKL on 21.11.2006, 29.11.2006 and 11.12.2006 and reminders in various meetings, PCKL did not respond to the TCE report for finalization of FSA. As execution of FSA was condition precedent to the initial draw down of loan, Udupi Power had no option but to expedite execution of FSA and finally the 4 FSAs were executed on 26.12.2006 with four companies viz. (1) M/s. Glenncore, (2)

M/s. Banapu, (3) M/s. PT Adaro, (4) M/s. Aditya Energy Resources. PCKL finally sent their views on 22.06.2007 on executed FSA which was sent to them on 04.01.2007. At this stage, it was not possible to incorporate the comments of the PCKL in the FSAs.

(f) The claim of Rs.731.38 crores and allegation of improper conduct is an afterthought as PCKL in its reply dated 19.01.2012 to Udupi Power tariff Petition before CERC did not raise any issue with respect to termination of contracts with M/s. Rio Tinto or any liability arising out the same. PCKL itself in its reply had admitted that M/s. Rio Tinto LoI did not materalise. PCKL cannot be allowed to contradict its own stand and blow hot and blow cold to suit its contentions. Reliance is placed on AIR 2010 SC 2077 Karnan Kapahi and Ors. Vs. Lal Chand Public Charitable Trust & Anr. and AIR 1979 SC 1144, Madras Ports Trust Vs. Hymanshu international by its proprietor Vs. Venkatadri (Dead) by LRs.

(g) In view of PCKL raising claim for Rs.731.38 cores with respect to M/s. Aditya contract, PCKL has foregone its right to raise issue with respect to cancellation of M/s. Rio Tinto LoI. PCKL

cannot be allowed to raise parallel issues with respect of fuel charges.

(h) CERC has correctly disallowed the claim of PCKL of Rs.731.38 crores by clearly holding that PCKL was aware of the fuel supply agreement and also provided acceptance of FSA with coal suppliers.

(i) As per 2009 Regulations, fuel charges are pass through and the coal cost incurred will have to be allowed subject to allowable station heat rate.

(j) Coal supply by M/s. Aditya was to be made from Indonesian mines and therefore, would have been subjected to same increase in price that were claimed by other suppliers in view of Indonesian Government Regulations.

(k) PCKL is estopped from raising any claim with respect to FSAs with the other coal suppliers as PCKL has itself participated and negotiated with fuel suppliers, namely Glenncore, Indomnico and Adaro for the revised contracts. The negotiation Committee constituted under the chairmanship of MD, KPTCL with MDs of Distribution Licensees and PCKL as Members recommended that FSA with three suppliers, namely M/s.

Banapu, M/s. PT Adaro and M/s. Glenncore to be revised with pricing formula prescribed by the Indonesia Regulations for supplies from Indonesia and for Glenncore, New Castle Global Coal Index to be applied for supplies other than Indonesia. These recommendations have been accepted by Government of Karnataka and orders were passed.

(l) As regards Aditya, Government of Karnataka had advised Udupi Power to initiate legal action. Udupi Power consulted its Legal Advisors. Legal Advisors examined the terms of FSA and suggested that M/s. Aditya under Clause 15.3 of the FSA has the right to terminate the FSA by giving two months notice. The entire correspondence in relation to above context were forwarded to PCKL on 29.09.2011. However, PCKL did not contact Udupi Power till 11.12.2012 and on such date issued a letter to Udupi Power claiming an amount of Rs.731.389 crores.

(j) Contention of PCKL that Udupi Power has suppressed the facts regarding existence of FSA dated 25.10.2005, 25.01.2006, 16.06.2006 and 26.06.2006, is completely baseless and misconceived. It is affirmed and reinstated that coal supply for the project from three fuel suppliers is being received under the

FSA dated 26.,12.2006 which have further been amended as per Government of Karnataka order as mentioned.

113. Let us examine the impugned order dated 21.02.2014. The findings of the CERC are summarized as under:-

(a) It is an undisputed fact that the evaluation report prepared by the Udupi Power's Consultant was sent to PCKL on 22.09.2006 for comments. PCKL, however, did not apprise Udupi Power of its views in the matter despite continuous follow up. The execution of agreement for supply of coal was centric to the initial draw down of the loan. In its anxiety to achieve timely financial closure, Udupi Power waited for three months and ultimately executed fuel supply agreement on 26.12.2006, the copies of which were supplied to PCKL by letter dated 04.01.2007. Normal price offer by the bidder against international competitive bidding have a definite validity period. In the volatile coal market holding price validity for long period is not expected. Therefore, the bidder may not necessarily agree to the price after the expiry of validity period. In case the agreements are not executed within the period of validity of bids, the whole process may have to start for the scratch,

causing delay. In the circumstances, Udupi Power cannot be accused of having acted in haste or in an unreasonable manner.

(b) PCKL furnished comments on the bid process and FSA by letter dated 22.06.2007 asking Udupi Power to execute supplementary FSA in light of the comments. Udupi Power promptly responded to the communication received from PCKL vide letter dated 02.07.2007 and forewarned PCKL of the risks involved in re-opening the term of FSA. Udupi Power apprehended that the re-opening of the issues on which comments were made available by PCKL could lead to re-opening the price agreed and if that happened the increase in price would have to be passed on to the buyers of electricity. PCKL did not insist on signing on the supplementary FSA thereafter and matter rested there as PCKL kept silent. It can be inferred from this fact that firstly there was no reluctance on the part of Udupi Power to renegotiate the terms of FSA provided the risks of higher coal price if it happened, was borne by PCKL. Secondly, PCKL accepted the term of FSA probably based on views communicated by Udupi Power. Further PCKL

have called upon Udupi Power to take appropriate legal action against M/s. Aditya for enforcement of the terms of FSA and claimed damages. This also amounts to express acceptance of FSA by PCKL. PCKL at this stage can not be heard to make any grievance regarding the terms and conditions of FSA.

(c) The State Government under GO dated 03.09.2010 directed Udupi Power to initiate legal action for recovery of damage for unlawful termination of FSA. Udupi Power obtained legal opinion and was advised against any legal recourse. Udupi Power acted upon the legal opinion and under its letter dated 29.09.2011 informed PCKL of futility of resorting legal action. When the matter so rested, PCKL issued the impugned letter dated 11.12.2012 calling upon Udupi Power to refund an amount of Rs.731.38 cores on account of excess energy charges based on the surmise that termination of FSA by M/s. Aditya Energy was unlawful.

(d) We agree with the contention of Udupi Power that action of PCKL is unilateral and impugned letter smaks of arbitrariness on their part. Whether or not termination of FSA dated 26.12.2006 was lawful can be decided by a appropriate legal

forum. PCKL who are third party as regard the FSA do not have any authority to decided the validity of termination thereof. We refrain from expressing any opinion on validity of termination because the M/s. Aditya Energy is not amenable to regulatory jurisdiction of the Commission and is not a party before us. Therefore, PCKL's contention that FSA was illegally terminated by M/s. Aditya is untenable at this stage, without any finding of that effect by a judicial forum having sanctity of law.

(e) On the representation of Udupi Power dated 03.04.2010, State Government under its order dated 09.04.2010 constituted a high level committee headed by MD, KPTCL with Managing Directors of the distribution companies in the State as members of the Committee for re-negotiation of the coal contracts. The Committee in its report to State Government recommended adoption of negotiated coal rate for PT Adaro and PT Indominco. Committee also carried out re-negotiations with Glenncore as well and made certain recommendations. However, preamble of the order is silent as regard M/s. Aditya Energy. The Government order, however, states that since M/s. Aditya Energy had not supplied any coal as per existing

contract, Udupi Power should take necessary legal action in accordance with FSA. The State Government in its order dated 29.10.2010 accepted the offer of Glenncore for the rates as applicable to PT Adaro and PT Indominco in case of supply of coal from Indonesian mines. The State Government order permitted Glenncore to link price of coal with New Castle Global Coal Index in case the supply of coal was made from any other country. State Government further directed long term tender for supply of coal as per the given specification be called.

(f) The State directives make it clear that the PCKL and others were duly involved in the negotiations of coal suppliers except M/s. Aditya Energy. It appears that high level Committee excluded M/s. Aditya Energy for negotiations the reason which is not known. In case the re-negotiations were carried out with Aditya Energy, the present situation could have been avoided.

(g) PCKL has not given any basis and details in support of its claim of Rs.731.38 cores.

114. On the basis of above reasoning, CERC allowed the petition filed by Udupi Power and the impugned letter of PCKL raising a claim of Rs. 731.38 crores on Udupi Power was set aside.

115. We find that CERC in the impugned order dated 21.02.2014 has dealt with the claim of Rs.731.38 crores raised by PCKL on account of termination of agreement by M/s. Aditya. However, in the Appeal PCKL has raised a number of other issues relating to agreement of M/s. Rio Tinto, not taking of approval of CERC before calling for fresh bidding in 2006, acceptance of coal with GCV lower than that agreed in the PPA, existence of FSAs dated 25.10.2005, 25.01.2006, 16.06.2006 and 26.06.2006 against which coal is being procured which are not related to claim of Rs.731.38 crores against termination of contract by M/s. Aditya and have also not been dealt in the impugned order.

116. As regards taking approval of CERC before conducting re-biding after non- fructification of M/s. Rio Tinto LoI in view of 'in principle' order of CERC dated 25.10.2005, we have to state that the second proviso to Regulation 17 of 2004 Regulation under which 'in principle' approval of capital cost was given, there is no provision of approval of tendering process for fuel procurement or price of fuel. Therefore, there was no requirement of approval of CERC before conducting re-bidding for fuel procurement.

117. As regards acceptance of GCV of coal below the GCV specified in the PPA, PCKL has not stated as to how they have been aggrieved by the same. PCKL did not respond to evaluation report of the TCE consultant despite several reminders as indicated in the impugned order. This issue was also not flagged by the Committee constituted by State Government on renegotiation of contracts in the year 2010 and not raised by State Government while approving the committee's recommendation on renegotiation of coal price. This issue is now being raised at the belated stage after coal supplies from the suppliers have been started and power supplies have been availed since the CoD of the first unit on 11.11.2010, that too without indicating the prejudice caused to them. We also find that GCV of coal under FSA of M/s. Aditya Energy was for 5500 kCal/kg which is much below the GCV given in PPA. Even then PCKL is contesting termination of FSA by M/s. Aditya.

118. Let us see the issue relating to M/s. Rio Tinto LoI. We find that the second round of bidding for coal supply was held on 20.08.2003. A LoI was issued to M/s. Rio Tinto on 09.08.2004 and a draft agreement was sent to M/s. Rio Tinto for its review and acceptance. It is reported by Udupi Power that M/s. Rio Tinto in turn sent a revised

agreement as per its own format. Since there were number of variation, M/s. Rio Tinto was asked to submit revised offer. However, M/s. Rio Tinto did not respond to the request of Udupi Power. We also find that subsequently M/s. Rio Tinto had participated in the third round of bidding. LoI provided for as under:-

"In line with the above, the revised agreement between NPCL and M/s. Rio Tinto *shall be sent to you shortly after incorporating all the terms & conditions as per bid document, your offer and post bid document."*

119. This indicates that there was no concluded FSA between Udupi Power and M/s. Rio Tinto. LoI issued by Udupi Power could not fructify into a concluded contract. M/s. Rio Tinto also participated in the third round of bidding. It is also seen that PCKL being aware of the contract entered into by Udupi Power based on third round of bidding in 2006 and even re-negotiated the terms with such coal suppliers in 2010 is now raising issue with regard to LoI issued to M/s. Rio Tinto in the year 2004. No such allegations or objections were raised by PCKL at the time of third round of bidding or even at the time of entering into FSA with the fuel suppliers pursuant to third

round of bidding or even at the time of re-negotiation of such FSA in 2010 in which the Appellants were involved fully.

120. The entire issue relating to LoI to M/s. Rio Tinto pertains to period prior to signing of PPA on 25.10.2005. Having not taken any position at that time PCKL is not entitled to raise any purported claim at a very belated stage in the year 2010. We do not find any substance in the contention of PCKL in relation to such alleged FSAs with M/s. Rio Tinto. Further, the claim of Rs.731.38 crores raised by PCKl is relating to termination of contract by M/s. Aditya and not relating to Rio Tinto.

121. Let us now take up the issue relating to PCKL's claim for Rs.731.38 cores. The claim made by PCKL is that after illegal termination of fuel supply agreement by M/s. Aditya Energy, Udupi Power ought to have pursued a legal claim against Aditya Energy and PCKL cannot be expected to pay higher energy charges on account of Udupi Power's default. PCKL accordingly claimed Rs.731.32 crores vide letter dated 11.12.2012. We find that according to the Clause 15.3 of FSA between M/s. Aditya Energy and Udupi Power, both M/s. Aditya Energy and Udupi Power had a right to terminate the contract for any supply year during the term of contract by giving 2 months notice

without assigning any reason whatsoever. We find that Udupi Power had forwarded the evaluation report of their consultant, namely TCE to PCKL on 22.09.2006 to furnish recommendations within 2 months. Multiple reminders were sent to PCKL on 21.11.2006, 29.11.2006 and 11.12.2006. However, PCKL did not respond to the same. When no comments were received for three months despite reminders, Udupi Power entered into FSAs with four coal suppliers, namely M/s. Banapu, M/s. Glenncore, M/s. Aditya Energy and M/s. PT Adaro on 26.12.2006. The copies of FSAs were forwarded by Udupi Power on 04.01.2007 to PCKL. Thereafter on 22.06.2007 only State Government responded by suggesting certain changes in the executed agreements by signing the supplementary agreement. Even at that time PCKL did not raise issue of M/s. Rio Tinto agreement. When Udupi Power pointing out vide letter dated 02.07.2007 that any change by supplementary agreement may have impact on price of coal which will have to be borne by PCKL as fuel cost is pass through in the tariff there was no response. Thereafter, the matter was not pursued.

122. We have seen that Government of Karnataka had appointed a Committee under the chairmanship of MD, KPTCL in the year 2010 to

re-negotiate the price with coal suppliers (in view of Indonesian Regulations). The Committee after negotiations communicated approval for procurement of coal by Udupi Power from 3 suppliers viz. M/s. Banapu, M/s. PT Adaro and M/s. Glenncore as per the conditions of FSA on 26.12.2006 with price to be revised as per the pricing formula prescribed by the Indonesian Regulation for supplies from Indonesia. The recommendations of the Committee were accepted by the State Government. No attempt was made to negotiate the price of coal with Aditya Energy, where the source of coal supply as was of Indonesian. We feel that even if the FSA had not been terminated, M/s. Aditya Energy could not have supplied the coal on a fixed FOB price as per their earlier offer as alleged by PCKL, in light of the change in the Indonesian law/regulations governing sale of coal for export. After considering the contention of the parties and the documents produced by them, we have come to the conclusion that CERC was right in rejecting the claim of PCKL for compensation of Rs. 731.38 crores.

123. **Let us take up other issues raised in Appeal No. 119 of 2014.**

124. The first issue is regarding error in calculation of EPC contract. According to Udupi Power, the Central Commission has erroneously considered the EPC cost for 1015 MW in the impugned order as Rs.3526.64 crores instead of Rs.3668.55 crores claimed by Udupi Power. It has been submitted that cost was first approved by CERC based on contract values of BHEL, Navayuga and Simplex. The Central Commission in the impugned order has incorrectly stated that Rs.3526.64 crores as value of EPC contract awarded to LITL by considering the primary EPC contracts alone without considering the value of miscellaneous contracts. It is stated that certain items were excluded from the EPC contract to LITL at the time of re-bidding, amounting to Rs.141.91 crores. The contract for site clearance, soil investigation, site survey, levelling, site fencing and plant road were excluded in the EPC cost approved under 'in principle' order dated 25.10.2005 based on the contracts with BHEL, Simplex and Navayuga. When EPC contract were re-entered in October, 2006, the above mentioned contracts were not a part of the scope of EPC contract given to LITL as it was originally contemplated that these works will be carried out by Udupi Power themselves. However, later

on after seeing site conditions, it was decided to entrust these works also to EPC contractor and these works were awarded to LITL by two works orders dated 24.09.2007 for Rs.106 crores and Rs.35.91 crores i.e. total of Rs.141.91 crores. It is submitted that while filing tariff petition, Udupi Power had included values of these contracts as part of EPC cost. However, while bringing out these figures in the submissions, there was an inadvertent error in projecting these expenses. Aggrieved by the impugned order, Udupi Power filed a Review Petition which has been rejected by CERC.

125. From the Impugned Order dated 20.02.2014, we do not find any submissions or findings in this regard. Udupi Power had filed a Review Petition on this issue which has been rejected by the CERC. This review has not been challenged before us. We also do not find any merit in the claim of Udupi Power as the project's capital cost was allowed by CERC after analyzing all the components of the power project. Therefore, we do not find any reason to intervene in this matter.

126. The second issue raised is interest on belated payments. We find that this issue was also raised by Udupi Power in the Review Petition

which has already been decided by the CERC in its order dated 06.03.2014. This issue was not raised in the main appeal, therefore, we are not inclined to pass any order on this issue.

127. Next issue is regarding prayer for direction of signing of transmission and wheeling agreement. It is submitted by Udupi Power that main petitions of this issue are pending before the CERC involving issues covered under the above prayer. This is not an issue raised in the main appeal, therefore, we are not inclined to consider this issue.

128. The next issue is prayer relating to amendment of PPA and directions on Payment Security Mechanism. This issue does not pertain relating to the impugned orders and, therefore, we are not inclined to pass any order on this. Other issues raised in Appeal No.119 of 2014 relating to delay in providing start up power, Station Heat Rate and auxiliary consumption have already been dealt above and rejected.

129. Summary of our findings:

(i) Capital cost has to be revised by CERC based on our findings in paragraphs 58 & 59 above and impact on IDC, if any, due to delay of 3 months allowed on account of visa to Chinese

personnel (paragraph 76). Accordingly amount of fixed charges will also be re-determined.

(ii) Energy charges are to be re-determined by CERC based on gross SHR of 2328 kCal/kWh as decided under paragraph 104.

(iii) We do not find merit in other issues raised in Appeal Nos. 108 of 2014 and 122 of 2014. Appeal No. 18 of 2013 does not survive in view of our findings in Appeal No. 108 of 2014.

(iv) There is no merit in Appeal No.119 of 2014 filed by Udupi Power.

(v) CERC has to re-determine the tariff based on the above findings of the Tribunal within 45 days of date of this order. In the interim period, till re-determination of tariff by CERC, Udupi Power will raise bills at the rates determined by CERC in the impugned order i.e. the prevailing rates, subject to adjustment after redetermination of tariff by CERC.

130. In view of the above, the Appeal No.108 of 2014 and Appeal No.122 of 2014 are allowed in part as indicated above. Appeal No. 119 of 2014 is dismissed. Appeal No. 18 of 2013 is also disposed of in view of our findings in Appeal No. 108of 2014. CERC is directed to re-

determine the tariff based on our findings within 45 days of passing of this judgment. In the meantime, PCKL will continue to pay tariff as determined by CERC by order dated 20.02.2014 subject to adjustment on re-determination of tariff by CERC. No order as to costs.

130. Pronounced in the open court on this **15th day of May, 2015.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/NON REPORTABLE

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