IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

REVIEW PETITION NO. 19 OF 2015
&
REVIEW PETITION NO. 22 OF 2015
IN
APPEAL NO. 108 OF 2014

Dated: **6th February, 2019**

Present: **HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

REVIEW PETITION NO. 19 OF 2015

IN THE MATTER OF:

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

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

3. Mangalore Electricity Supply Company Limited
   Paradigm Plaza, AB Shetty Circle,
   Manga;pre-575001.

4. Gulbarga Electricity Supply Company Limited
   Station Main Road,
   Gulbarga – 585102.

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

6. Chamundeshwari Electricity Supply Corporation Ltd.
   Corporate Office, No.927 LJ Avenue,
   New KantarajaUrs Road,
   Saraswathipuram,
   Mysore-570009. **...REVIEW PETITIONER/APPELLANT**

VERSUS

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

2. Udupi Power Corpoation 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 Samiti, Karnataka
   Executive President,
   Nandikur, Udupi District,
   Karnataka-574138. **... RESPONDENTS**

Counsel for the Review Petitioner/
Appellant(s) : Mr. Sanjay Jain, Sr. Adv.
Mr. D.L. Chidananda
Ms. Rhea Jain
Ms. Rajul Jain

Counsel for the Respondent(s) : Mr. C.S. Vaidyanathan, Sr.Adv.
Mr. Apoorva Mishra
Mr. Shresth Sharma
Mr. Anirudh Gupta for
Udupi Power/R-2

REVIEW PETITION NO. 22 OF 2015

IN THE MATTER OF:

Udupi Power Corpoation Ltd., Bangalore,
2nd Floor, Le Parc Richmonde,
51, Richmond Road,
Bangalore-560025 **...REVIEW PETITIONER/APPELLANT**

VERSUS

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

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

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   Paradigm Plaza, AB Shetty Circle,
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   Station Main Road,
   Gulbarga – 585102.

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   Corporate Office,
   Navanagar, PB Road,
   Hubli-580025.

6. Chamundeshwari Electricity Supply Corporation Ltd.
   Corporate Office, No.927 LJ Avenue,
   New KantarajaUrs Road,
   Saraswathipuram,
   Mysore-570009. **... RESPONDENTS**

Counsel for the Review Petitioner/
Appellant(s) : Mr. C.S. Vaidyanathan, Sr.Adv.
Mr. Apoorva Mishra
Mr. Shresth Sharma
Mr. Anirudh Gupta

Counsel for the Respondent(s) : Mr. Sanjay Jain, Sr. Adv.
Mr. D.L. Chidananda
Ms. Rhea Jain
Ms. Rajul Jain

ORDER

PER HON'BLE MR. S.D.DUBEY, TECHNICAL MEMBER

1. The present Review Petitions have been filed by the Review Petitioners, Udupi Power Corporation Limited ('UPCL') and Power Company of Karnataka Limited (PCKL) for review of the Judgment dated 15.05.2015 passed by this Tribunal in Appeal Nos. 108 of 2014, 119 of 2014 , 122 of 2014 and 18 of 2013 **('Impugned Judgment'**).

2. The Review Petition 19 of 2015 has been preferred by the Review Petitioners/Appellants Power Company of Karnataka Limited & Ors. under Section 120 of the Electricity Act, 2003 for review of the Judgment of this Tribunal dated 15.05.2015 in Appeal No.108 of 2014.

2.1 The Review Petitioners/Appellants have prayed for the following relief:-

a) Admit the present review petition;

b) Review and set aside the order dated 15.05.2015 in Appeal No.108 of 2014 to the extent challenged in the present review petition; and

c) Pass such other further Order(s) as this Hon'ble Tribunal may deem just in the facts of the present case.

3. The Review Petition 22 of 2015 has been preferred by the Review Petitioners/Appellant is a cross Appeal filed by Udupi Power Corporation Ltd. under Section 120(2)(f) of the Electricity Act, 2003 for review of the Judgment of this Tribunal dated 15.05.2015 in Appeal No.108 of 2014 & batch of Appeals.

3.1 The Review Petitioners/Appellants have prayed for the following relief:-

I. Pass an order allowing the present review petition seeking review of the Judgment dated 15.05.2015 passed by this Hon'ble Tribunal in Appeal No.108 and batch of appeals on the issues raised in the review petition;

II. Pass such other and further Order(s) / direction(s) as this Hon'ble Tribunal may deem fit and appropriate in the facts and circumstances of the case.

4. Since both the Review Petitions are filed on the same Impugned Judgment we are passing a common judgment for both the Review Petitions 19 of 2015 and 22 of 2015.

5. The Review Petitioner UPCL in Review Petition 22 of 2015 has sought review of the Impugned Judgment claiming errors apparent on the face of the record and material omissions by this Tribunal in recording facts, evidence and substantive contentions urged by the Review Petitioner

during the proceedings in Appeal Nos. 108 of 2014, 119 of 2014 and 122 of 2014 relating to:

i. Disallowance of Gross Station Heat Rate of 2400 kcal/kwh (‘**GSHR**’);
ii. Disallowance of Rs. 141.91 crores on account of error in calculation of EPC cost;
iii. Reliance by this Tribunal on an erroneous report prepared by the Central Power Research Institute (‘**CPRI Report**’) and submitted by Power Company of Karnataka Limited (hereinafter referred to as the ‘Respondent No. 1’) before the Central Electricity Regulatory Commission (hereinafter referred to as ‘**CERC/Central Commission**’), resulting in disallowance of various other costs to the Review Petitioner.

6. The Review Petitioner PCKL in its Review Petition 19 of 2015 is seeking review of the Impugned Order passed by this Tribunal claiming errors apparent on the face of the record in Appeal Nos. 108 of 2014, 119 of 2014 and 122 of 2014 regarding:

i. Consideration of cost of Pro-rata increase for each of the Balance of Plant (BOP) items in the EPC Cost
ii. Erection, Testing & Commissioning expenses
iii. Foreign Exchange Rate Variation (FERV)
iv. Capital expenditure towards staff colony
v. Expenses forming part of original EPC cost - double counting
vi. Non-deduction of revenue earned over and above fuel expenses
vii. Auxiliary consumption

viii. Interest during construction - unit no.2

ix. Energy charges

7. We have heard at length the learned senior counsel, Mr. C.S. Vaidyanathan, appearing for UPCL and learned senior counsel, Mr. Sanjay Jain, appearing for PCKL and carefully considered their written submissions. The individual issues raised in the Review Petitions are dealt hereunder:-

Review Petition No. 22 of 2015

Issue No.1- Disallowance of Gross Station Heat Rate of 2400 kCal/ kWh

8. The learned senior counsel for the Review Petitioner UPCL has submitted the following submissions for our consideration

i. The reduction of 50 kcal/kwh by the Tribunal is based on the erroneous submission made by Respondent No. 1 that the Review Petitioner had in 2005 agreed to reduce Gross SHR by 50 kcal/kwh. The Review Petitioner had never agreed to the Net SHR being 2400 kcal/kwh. In this regard the Review Petitioner relied upon its communications dated 10.12.2004, 08.12.2005. 26.12.2005, Minutes of meeting dated 23.08.2005 and Government of Karnataka (GoK) letter dated 03.02.2009.

ii. From the extract of the letter dated 10.12.2004, it is evident that there was an agreement on absolute number of SHR of 2400 kcal/kwh and not on any relative number of 50kcal/kwh reduction over then applicable CERC norm of 2450kcal/kwh which is further evident from the PPA. The Tribunal has erroneously assumed that if

there was a decrease in the heat rate by 50 kcal/kwh under the 2004 Regulations, a similar decrease would apply to the heat rate under the 2009 Regulations.

iii. Further, the MoM dated 23.08.2006 clearly establishes that the submissions made on behalf of Respondent No. 1 are palpably false since the same, inter-alia, specifies that the tariff parameters will be finally decided by the Appropriate Commission.

iv. The calculation arrived at and approved by the Tribunal is an error apparent on the face of record since the approved GSHR of 2328 kcal/kwh is neither correct in terms of PPA nor the 2009 Regulations (~ 2378 kCal/kWh as per 2009 Regulations). Further, the PPA nowhere states that the GSHR applicable for tariff determination shall be 50 Kcal/kwh less than the norm specified in the tariff regulations applicable for the relevant period.

This Tribunal APTEL in its Impugned Order in Para 104 has itself acknowledged that it may not be possible to achieve the guaranteed heat rate in the annual cycle of operation of a plant due to variation in load and therefore margin has to be provided. Despite the above observation, the Tribunal has allowed SHR after reducing the normative SHR of 2378.14 kcal/kwh by 50 kcal/kwh based on erroneous submission of Respondent No. 1. The decision of the

Tribunal is also erroneous since for an older plant, GSHR can be higher and not lower.

v. Even assuming that a special norm has been created for the Review Petitioner, the same is not permissible under law. The Central Commission is bound by its own Regulations and agreement of parties cannot bypass the norms as prescribed in the Regulations. Further, special norm for any specific plant can only be created by specifying the aforesaid norm in the Regulations itself and not by an order. Notably, the petition before the Central Commission was filed by the Review Petitioner and there was no prayer for specifying any special norm or seeking any deviation from the norms already prescribed in the then prevailing Regulations. It is also submitted that during the proceedings of Original tariff Petition No.160/GT/2012, Respondent No. 1 did not make any submission on the issue of discount of 50 kCal/kwh, however as an afterthought during proceedings of Appeal before this Tribunal made this erroneous submission of discount. In this regard the Review Petitioner has placed reliance of the judgment of Hon'ble Supreme Court in ***PTC vs Central Electricity Regulatory Commission* reported as *(2010) 4 SCC 603*** *and* of this Tribunal in ***North-Eastern Electric Power Corporation Ltd. vs. Tripura State***

Electricity Corporation Ltd. and Ors. **reported as** ***ELR 2007 APTEL 291.***

8.1 ***Per contra***, the learned senior counsel for Respondent No. 1 i.e PCKL has submitted the following submissions for our consideration:

i. The Review is not maintainable since the issue at hand is considered at length by this Tribunal and every aspect has been discussed and then decided. The Tribunal has made a conscious and rational decision to apply 50 kcal/kwh reduction under the 2004 and 2009 Regulations and in case there is a lacuna in the application of the formula then there is no scope for Review but an Appeal before Hon'ble Supreme Court which has been filed by Review Petitioner;

ii. In the garb of the Review, the Review Petitioner is trying to argue that variation is GSHR different from that as applicable under Regulation, is permissible or not. This is a question of law which needs to be addressed in an Appeal against the Impugned Order and not through the present Review. The Respondent No. 1 further highlights the relevant extract of the Impugned Order which inter alia specified that SHR has been decided specific to the circumstance of this case.

<u>Our consideration & findings</u>:-

We have considered the submissions of learned senior counsel for Review Petitioner and Respondent No. 1. This Tribunal earlier reduced 50 kCal/kWh from gross Station Heat Rate (SHR) based on the submission of Respondent No. 1 that the Review Petitioner itself had agreed to reduce gross SHR by 50 kCal/kWh in 2005.

8.2 Learned counsel for the Review Petitioner has relied on the UPCL' letter dated 10.12.2004 to indicate that there was an agreement on absolute number of SHR of 2400 kcal/kwh and not on any relative number of 50kcal/kwh reduction over then applicable CERC norm of 2450 kcal/kwh. The same is also evident from the PPA and the content of the letter dated 10.12.2004 to Managing Director, Karnataka Power Transmission Corporation Limited relevant extract of which is reproduced below:

> *"…**We agreed to accept tariff related parameters lower than CERC guidelines on issues such as Station Heat Rate of 2400 kcal after stabilization period,** Aux consumption ranging from 7 – 7.5% with FGD, O&M charges of 2.25% in the first year of operations* …."

8.3 Learned counsel for the Review Petitioner has also relied on Minutes of the Meeting dated 23.08.2006 to submit that it was later decided that

the tariff parameters will be decided by the Appropriate Commission. The relevant extract of the Minutes is as under.

> *"3) Heat Rate: Regarding Tariff Rate mentioned in the PPA, Principal Secretary, Energy Department said that it is not necessary to make changes in the PPA at this stage and **the tariff parameters will be finally decided by the appropriate Commission**."*

It has also been substantiated that parameters were to be determined by the Commission based on the letter dated 03.02.2009 issued by Government of Karnataka. The learned counsel has also pointed out that during the proceedings of Original tariff Petition No.160/GT/2012, Respondent No. 1 did not make any submission on the issue of discount of 50 kCal/kwh.

8.4 In view of the above, it is clear that there was no agreement on reduction of GSHR by 50 kCal/kWh. Further, there is no such provision in the PPA regarding reduction of GSHR by 50 kCal/kWh. This Tribunal relied on the submission made by PCKL which has been proven to be an inference drawn from extant CERC Tariff Regulations and provisions of the PPA. Further, it is relevant to note that both the parties after signing of the PPA had agreed that tariff parameters will be determined by Appropriate Commission and there is no mention of reduction of 50 kCal/kWh therein. It is also noted that the Respondent No. 1 did not raise this issue before the Central Commission. Had there been such

agreement, the Respondent No. 1 would have raised it before the Commission.

8.5 Further, the Tribunal in its Judgment dated 08.11.2017 in Appeal No. 226 of 2016 has observed as below:

> *"(f)(i) The relevant extract from Section 61 of the Act is reproduced below: "Section 61. (Tariff regulations): The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees; ……………………………………"*
>
> ***Section 61 of the Act empowers the Appropriate Commission to formulate tariff regulations and once the tariff regulations are notified the Appropriate Commission is bound to follow it."***

8.6 In view of the above judgment it is clear that once the Tariff Regulation is notified under Section 61of the Electricity Act, 2003 by the Regulatory Commission, it is bound to follow that. Accordingly, the review on this issue is allowed and SHR applicable for UPCL plant shall be strictly as per Regulations of the Central Commission as agreed by the Parties in the PPA without any such reductions.

Issue No.2 - Disallowance of Rs. 141.91 crores on account of error in calculation of EPC cost

9 The learned senior counsel for the Review Petitioner has submitted the following submissions for our consideration:-

(i) This Tribunal through the Impugned Order has rejected the claim of Miscellaneous Contract on two grounds being (a) there was no

submission of the Review Petitioner in this regard before the Central Commission and (b) the Review Petitioner has not challenged the CERC Order dated 03.06.2014 in Review Petition filed before the Central Commission.

(ii) The said findings are an error apparent on the face of record because the submissions regarding the issue raised in review were also raised in the initial petition filed before the Central Commission and also in Appeal No 119 of 2014. Further, the Central Commission's Order dated 03.06.2014 was a review order. Once the review petition was dismissed, the Order dated 03.06.2014 passed in review petition got merged with the Order dated 20.02.2014 passed in main petition. There was no legal requirement of separately challenging the review Order dated 03.06.2014. Further, the said ground is against the law laid down in the matter of **DSR Steel Pvt Limited vs State of Rajasthan & Ors (2012) 6 SCC 782** (**Para 25.1 to 25.3**) and this Tribunal's judgment in the matter of **NTPC Limited vs CERC being Appeal No. 88 of 2013 (Para 24 to 30)** and in view of the doctrine of merger as enunciated in the above-mentioned judgments, Review Petitioner wasn't required to challenge the said CERC Order dated 03.06.2014 in Petition No. 14/RP of 2014.

(iii) By the in-principle approval Order dated 25.10.2005, the Central Commission had approved an EPC cost of Rs. 3688.35 crores, based on the previous EPC contracts awarded to M/s. BHEL, M/s. Navayuga and M/s. Simplex. Subsequently, the EPC Contract was awarded to LITL for Rs. 3526.64 crores by way of fresh bids through International Competitive Bidding conducted in October 2006 for supply, erection and commissioning of the plant. The EPC contract awarded to LITL did not include the value of Rs. 141.91 Crore (106 Cr. + 35.91 Cr.) towards two Miscellaneous contracts as it was originally contemplated that these works will be carried out by Review Petitioner themselves. Later on (after contract was awarded to LITL for Rs. 3526.64 Crores) after seeing the site conditions and local resistance, it was decided to entrust these works also to the EPC contractor by way of two Miscellaneous contracts in addition to EPC contract of Rs. 3526.64 Crores. The Central Commission rejected the Review Petition No. 14/RP of 2014 on the ground that it would dilute the competitiveness of lowest bidder without considering that even after allowing Rs. 141.91 Crores over and above Rs. 3526.64 Crores approved by CERC in Order dated 20.02.2014, the total cost will come to Rs. 3668.55 Crores which is still lower by Rs. 19.80 Crores as compared to EPC cost received of Rs. 3688.35 Crores by BHEL, Navyuga and Simplex. The fact that,

the said works were specifically excluded from the scope of EPC contracts while the rebidding/ICB was carried out in October 2006, has also been captured in the Desein Report dated December 2006.

(iv) Further, the Central Commission has rejected the review on an untenable and erroneous ground that the inclusion of value of these miscellaneous contracts will affect the base price of the bidding which in their view will dilute the status of the lowest bid. The reasoning of the Central Commission is erroneous on the ground that the scope of work awarded to LITL did not include such scope of works and therefore the costs of such contracts are new contracts and do not affect the LITL price bid. Even if such contract was awarded to a third-party contractor, the claim of Review Petitioner would have to be included as necessary EPC costs. These contracts were never the basis of consideration of the EPC bids in 2006 and in any case, these works were entrusted on LITL much later in September 2007. Total value of EPC contracts and these Miscellaneous Contracts is Rs 3668.55 crores which is lower than Rs 3688.35 crores approved by the Central Commission for 1015 MW capacity vide its in-principle Order of 25.10.2005.

(v) The Review Petitioner had filed its Tariff Petition before CERC seeking capital cost (excluding IDC & FC) of Rs. 5057.87 Cr. (in turn being 4.21 Cr. per MW). However, CERC in Order dated 20.02.2014

approved the capital cost (excluding IDC & FC) of Rs. 4601.40 (in turn being 3.83 Cr per MW). It is imperative to point out that even if Rs. 141.91 Cr. is added with the capital cost as approved by the CERC which is Rs. 4601.40 Cr. the revised capital cost comes to Rs. 4743.31 Cr. (in turn being Rs. 3.95 Cr. per MW), which is well below the benchmark cost as observed by the CERC in its order dated 20.02.2014. Based on Impugned Judgment dated 15.05.2015 by Hon'ble Tribunal, CERC re-determined capital cost vide Order dated 10.07.2015, wherein capital cost was revised to Rs 4410.26 Crore from Rs 4610.40 Crore approved earlier vide Order dated 20.02.2014. If Rs. 141.91 Cr. is added with the capital cost as approved by the CERC in order dated 10.07.2015, the revised capital cost comes out to be Rs 4552.17 Crore (in turn being Rs. 3.79 Cr. per MW), which is well below the benchmark cost as observed by the CERC in its order dated 20.02.2014.

9.1 ***Per contra,*** the learned senior counsel for the Respondent No. 1 submitted the following submissions for our consideration:

i. The issue at hand has been dealt with in detail by the Tribunal and therefore there is no occasion in such circumstances for the Tribunal to allow the Review.

ii. With reference to the factual background of the Project, it is emphasized that the Project was initially of 1015 MW capacity

which was later increased to 1200 MW. However, the equipment ordered at the initial stage itself was that of 1200 MW and in such a scenario there is no plausible reason as to why the additional cost as claimed by the Review Petitioner is required.

iii. The judgments relied upon by the Review Petitioner is not applicable since the same grounds have been considered by the Central Commission in Review Petition No. 14/RP of 2014. Further, the Tribunal, through the Impugned Judgment, in fact pointed out that the issues raised in the present Appeal have been considered at length in Impugned CERC Orders including Review Order dated 03.06.2014.

Our consideration & findings:-

9.2 We have considered the submissions of the learned senior counsel for the Review Petitioner and Respondent No. 1. This Tribunal in the Impugned Order had rejected the claim of Review petitioner on three grounds being (a) there was no submission made by Review Petitioner in this regard before the CERC, (b) the Review Petitioner has not challenged the Order dated 03.06.2014 passed by CERC in the Review Petition and (c) did not find 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.

9.3 Learned senior counsel for the Review Petitioner pointed out that the submissions regarding the issue raised in review were also raised in the original petition filed before the CERC and also in Appeal No 119 of 2014. Based on the records available, we notice that the Review Petitioner had made submissions before the Central Commission in this regard and therefore, the observation of this Tribunal in the impugned order is not correct.

9.4 Learned counsel further submitted that the second ground of disallowance that the CERC Order dated 03.06.2014 passed in the review petition has not been challenged by the Review Petitioner is not consistent with the findings in **DSR Steel Pvt Limited vs State of Rajasthan & Ors (2012) 6 SCC 782** and this Tribunal's judgment in the matter of **NTPC Limited vs CERC being Appeal No. 88 of 2013**. We note that when the review was dismissed by the Order dated 03.06.2014, it got merged with the Original Order dated 20.02.2014. Therefore, we find merit in the submission of the Review Petitioner that there was no legal requirement of separately challenging the Review Order dated 03.06.2014.

9.5 It is relevant to note that the claims of the Review Petitioner relating to Miscellaneous Contracts were dismissed by this Tribunal in para 125 of the impugned order with the following observation

"……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."

9.6 In view of the observations made above, we find it appropriate to examine the analysis made by the Central Commission in the order dated 03.06.2014. In fact, CERC through its Order in Review Petition No. 14/RP of 2014 had rejected the claim of the Review Petitioner on the ground that it would dilute the competitiveness of lowest bidder. In this regard, we find substance in the submission of the Review Petitioner that even after allowing Rs. 141.91 Crores over and above Rs. 3526.64 Crores approved by CERC in Order dated 20.02.2014, the total cost will come to Rs. 3668.55 Crores which is still lower by Rs. 19.80 Crores as compared to EPC cost of Rs. 3688.35 Crores received from BHEL, Navyuga and Simplex.

9.7 We also considered that the contracts of Rs 141.91 Crore were awarded to LITL, expenditure was incurred, and the works were carried out. Further, the same have been duly certified and audited. Therefore, we opine that these contracts being of prudent nature for` (a) Site Clearance, (b) Soil Investigation, (c) Site Survey, (d) Levelling (e) Site fencing and (f) Plant roads need to be allowed as part of hard cost.

9.8 It is also pertinent to note that CERC in its Order dated 20.02.2014 had given a finding as under:

" 73……. We find that the hard cost of Rs. 5057.85 Crore (Rs. 4.21 crore/MW) with site specific features is comparable to other similar projects such as Simhadri STAGE II, Indira Gandhi Super Thermal, Sipat Stage-I of NTPC and also comparable to ***the benchmark hard cost*** *for coal based thermal power projects specified by the commission, which* ***works out as Rs. 4.87 crore/MW for Unit -I and Rs. 4.54 crore for Unit II****."*

9.9 We thus find substance in the submissions of Review Petitioner that even if Rs. 141.91 Cr. is added to the capital cost as approved by the CERC in Order dated 20.02.2014, it will work out to Rs. 3.95 Crore per MW which is well below the benchmark of Rs 4.87 Crore per MW and Rs 4.54 Crore MW respectively for Unit 1 and Unit 2 as observed by the CERC in its order dated 20.02.2014. **Hence, in view of findings in above mentioned paragraphs, we allow the Review on this issue.**

Issue No.3 - Disallowance of costs due to reliance on erroneous report of Central Power Research Institute ('CPRI Report')

10 The learned senior counsel for the Review Petitioner has submitted the following submissions for our consideration:-

(i) The CPRI report was relied upon by the Respondent No. 1 to contend that the BOP systems were enough to cater to the augmented capacity of 2 x 600 MW. The reliance on the CPRI report is misconceived and the Respondent No. 1 had introduced the report as an afterthought.

(ii) The basis of this report and observations passed therein are vehemently opposed by the Review Petitioner for the following reasons:

a) The work order of the CPRI report was given on 20.06.2013 and the CPRI report was prepared on 02.07.2013 i.e. within a period of 12 days. Though the report states that there was a field study conducted between 20.06.2013 and 01.07.2013, no plant visit had been made by CPRI during this period or at any other time. For a reputed organization like CPRI to give a report without a discussion with the developer of the project raises serious doubts on the authenticity of the report.

b) The CPRI report does not even disclose the assumptions and details based on which conclusion has been drawn. Further, the CPRI report purportedly observes that the augmentation in the BOP is for additional capacity of units likely to be installed in future and for capacity upgradation and that the original specifications are fully capable of handling 2 x 600 MW. However, from a plain reading of CPRI report, it was evident that some of details regarding the BOP systems have not been adequately reflected or properly defined which are essential to compare the features of such equipment. The report does not provide any basis for arriving at its conclusions. Neither is there

an equipment wise comparison of the project with the DPR nor any other benchmark. To arrive at a cogent, fair and reasonable conclusion the CPRI report ought to have considered prevailing statutory norms to compare the BOP packages of the project.

c) A comparison of the BOP package calculated as per the CEA guidelines for balance of plant of 2 x 500MW or above Thermal Power Plant with the BOP packages provided in the Project revealed that there is no inconsistency or superfluous expenditure incurred in BOP package augmentation. Thus, in the facts and circumstances of the case, the CPRI assessment of the plant systems is required to be analysed on the factual basis and cannot be relied upon in totality for such decision making on financial aspects.

Issue No.3 (A) Disallowance of the cost of performance guarantee of Rs. 87.44 crores

10.1 As regards, disallowance of cost of performance guarantee of Rs 87.44 crore, the learned senior counsel for the Review Petitioner submitted the following submissions:-

(i) The Review Petitioner had made available all records and documents relating to the performance guarantee and the contracts with its suppliers and EPC contractors. The Impugned Order ought to be reviewed insofar as there is an erroneous disallowance of the

cost of Performance Guarantee of Rs. 87.44 crores sought as additional cost by DEC for augmentation of capacity from 1015 MW to 1200MW. Further, the reliance on the CPRI report is denied insofar as it is not a credible source for determining the said issue in light of the fact that it is non-transparent in terms of assumptions made and the rationale behind conclusions drawn.

(ii) Even though the BTG initially offered by DEC, against the specified requirement of 2x507.5 MW was a standard 600 MW model but such machines were rated to 507.50 MW with warranty for 507.50 MW only. Hence operating the BTG at 600 MW would have nullified the warranty obligations of the manufacturer. On augmentation of capacity, in order to extend the warranty from 507.50 MW to 600 MW, DEC claimed a sum of US$ 23.50 Million, which was negotiated and reduced to US$ 20 Million. The performance guarantee from DEC was limited to the BTG package and it was the responsibility of the EPC Contractor to guarantee the performance of the entire plant, and such performance guarantee had to be provided. A generating company cannot operate the plant without warranties for plant performance from the EPC Contractor as it exposes the generating company to risk in plant technology, performance and safety. The Review Petitioner submitted that its case cannot be compared with BHEL offering 500 MW machine to

operate at 507.50 MW since BHEL knew from the beginning the requirement is 507.50 MW.

(iii) The Minutes of the Meeting dated 21.07.2008 between LITL and DEC, clearly demonstrate the above reason for increase in performance guarantee. It is also submitted that it was never the case of the Respondent that such additional costs towards Performance Guarantee has not been paid by the Petitioner. Thus, the disallowance of such cost is an error apparent considering the factual situation and record placed before this Tribunal.

(iv) Further, the Review Petitioner has submitted that the Valves Wide Open (VWO) of the machine cannot be considered as continuous rating. All steam turbines have a VWO rating which is a margin provided above the turbine MCR rating. Operation at VWO conditions is rare operation and caters to extremely contingent system situation. A plant cannot be operated regularly or continuously on VWO condition. Even the BHEL machine ordered by the Review Petitioner earlier had VWO rating of 531.4 MW. The Petitioner submitted that no OEM supplier in the world guarantees the performance on VWO condition.

(v) Further, this Tribunal sought to disallow such costs on the erroneous premise that there was an existing agreement between LITL-DEC on 16.12.2006 for 2X600 MW capacity, which was later cancelled

and amended to 2X507.5 MW and that the price revision in these two contracts along with the contracts have not been disclosed to the Respondent. Thus, the Tribunal opined that there should be an adverse inference against the Petitioner, and no costs for performance guarantee for BTG should be allowed. It has been submitted that for all intents and purposes, the contract between LITL and DEC is that entered into on 21.4.2007 for 2 x 507.5 MW pursuant to the contract awarded by the Review Petitioner herein to LITL. The contract dated 16.12.2006 for a standard 2x600 MW project was cancelled on 20.4.2007. This agreement has no significance and may have been a tie-up of LITL with DEC for a standard module of 2 x 600 MW. It is normal industry practice to have an arrangement with the equipment supplier for the purpose of bidding or entering into an EPC contract. Further, the cancellation of the agreement on 20.04.2007 holds no relevance as the same has been decided by the parties and a new contract with similar terms was entered into on 21.4.2007 and there was no price revision in the two contracts. For the Hon'ble Tribunal to hold that prices under the two contracts may have been different and such contracts should have been disclosed to the Respondents hold no significance as there was only a legal contract of 2X507.5 MW. The Review Petitioner had entered into a contract with LITL for the 2x507.5 MW

project in accordance with the pollution control board/environment ministry permissions. The contract dated 21.4.2007 is the point of reference for the DEC and LITL contract.

10.2 ***Per contra,*** the learned senior counsel for the Respondent No. 1 has submitted the following submissions for our consideration

(i) The original contract dated 16.12.2006 was for the capacity of 2 x 600 MW. Merely due to the fact that Review Petitioner purported to show cancellation of the said contract to reduce the capacity and then subsequently increase the capacity again to 2 x 600 MW cannot be a ground for claiming additional Performance guarantee.

(ii) This claim is on the face of it is erroneous, and only to seek to an unjust additional cost by suppression of material facts although LITL had placed orders on Dongfang for standard unit size of 600 MW of Chinese make BTG, which is expected to be standardized in design/material of construction/manufacturing tolerances etc.

(iii) Further, the report of CPRI also clearly brings about the fact that performance guarantee has to be related to the rated capacity of the machines and when the rated capacity was 2 x 600 MW, no additional performance guarantee cost should be allowed for the machines to operate at 600 MW capacity.

(iv) The corrected net output demonstrated during performance test was 619 MW for Unit No.1 and 641 MW for Unit No.2 and the same is greater than the guaranteed value of 600 MW.

(v) Further, the provisions of Bid as well as the terms of the contract entered into by Review Petitioner with Lanco Infratech provides that the BTG has to obviously operate continuously at its rated capacity. Thus the unit offered by Dongfang has to operate at its rated capacity i.e. 600MW irrespective of the guaranteed output agreed to earlier.

(vi) Both Review Petitioner and its affiliate Lanco Infratech concealed that the EPC contract already entered into on 16.12.2006 with Dongfang was for 2 x 600 MW.

(vii) The proposal, for augmentation of capacity was nothing but a collusive effort of Review Petitioner, Lanco Infratech and Dongfang, to increase the capital cost for undue enrichment at the cost of Respondent No. 1 and consumers of Karnataka State.

(viii) The Industry practice is that the Performance Guarantee cost is included in the supply cost of equipment itself and not as a separate item. This fact has also been noticed in the contract entered into by HPGCIL for Rajeev Gandhi Thermal Power Station at Hissar which is also Chinese make equipment and of identical capacity.

(ix) The cost towards performance guarantee is invariably embedded in the firm EPC (CIF supply) cost irrespective of unit size configuration. It is unreasonable demand to pay for the cost towards performance as additional cost apart from equipment cost.

Our consideration & Analysis:-

10.3 We have considered the submissions of the learned counsel of Review Petitioner and Respondent No.1. The Review Petitioner has submitted that the Tribunal has erroneously disallowed cost of Performance Guarantee of Rs.87.44 crores sought as additional cost by DEC for augmentation of capacity from 1015 MW to 1200 MW. The Review Petitioner has contended that the Tribunal disallowed cost of performance guarantee on the erroneous premise that there was an existing agreement between LITL-DEC on 16.12.2006 for 2X600 MW capacity, which was later cancelled and amended to 2X507.5 MW and that the price revision in these two contracts along with the contracts have not been disclosed to the Respondent. The Review Petitioner has also contended that the Tribunal erred in relying on CPRI report which is not a credible source in light of the fact that it is non-transparent in terms of assumptions made and the rationale behind conclusions drawn. The Respondent No.1 has denied the contentions raised by the Review Petitioner on merit.

10.4 We hold that the Tribunal has disallowed the cost of Performance Guarantee in the impugned order after going through the submissions made by the Petitioner, Respondents and the report of CPRI. In fact, the Tribunal had drawn an adverse interference on the issue of non-disclosure of full details about earlier agreement dated 16.12.2006 entered into between LITL and DEC in Para 53 of the impugned order as under:

"53......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 interference is drawn from non-disclosure of this information then the impact of the same will have been borne by Udupi Power."

In view of the above, it was a considered decision of the Tribunal to disallow cost of Performance Guarantee. It is pertinent to note that the Review Petitioner has not highlighted any error on the face of the record but sought to reargue the issue on merit. **Accordingly, the issue is decided against the Review Petitioner and review is rejected on this ground.**

Issue No.3 - (B) Disallowance of Cost of Performance Guarantee of Rs. 41.33 crores claimed by LITL in respect of BOP for enhancement of capacity for the Project

10.6 As regards, disallowance of cost of performance guarantee of Rs 41.33 crore in respect of BOP, the learned senior counsel for Review Petitioner has made following submissions

(i) There is no analysis in the Impugned Order, for the disallowance of the cost of Performance Guarantee of Rs. 41.33 crores claimed by LITL in respect of BOP for enhancement of plant capacity. The Impugned Order disallows such a huge cost merely on the premise that additional capital cost has already been allowed for augmenting the capacity of various BOP equipment.

(ii) The Tribunal in the Impugned Order has not considered that the contract between LITL and DEC was for 1015 MW even though a standard module of 2x600 MW was reflected in the agreement of 16.12.2006. As far as BoP is concerned, LITL had contracted for 1015 MW originally in the EPC contract, and therefore requisite changes in the BoP package had to be made once the capacity was augmented by 1015 MW to 1200 MW. Even though the Impugned Order categorically agrees with this position it has gone ahead and disallowed the performance guarantee cost towards BOP claimed by LITL. Even though additional costs for BOP due to

augmentation have been allowed by this Tribunal, the cost towards providing additional guarantee is a separate cost and the prudence check for checking correctness of cost has not been applied and there exists an apparent error on such disallowance.

(iii) Any increase in plant capacity would also require a simultaneous increase in the BOP systems. Accordingly, even though DEC had provided a standard module BTG package for a 2x600 MW project, the BOP was for a 2x507.5 MW Project. The augmentation of capacity of the Project required a corresponding increase in the capacity of BOP, which resulted in increase in the capital cost for the Project. Such augmentation is clearly demonstrated by comparing the specifications of BOP adopted by LITL under the EPC contract dated 24.12.2006 for 2X507.5 MW with the specifications originally adopted by BHEL and those subsequently adopted by LITL under the amended EPC contracts for 2X600 MW.

(iv) Therefore, there was clearly a requirement for augmenting the BOP equipment to the extent required for change in the capacity of the plant. In this context, the Respondent No. 1's claim that no additional cost was incurred in augmenting the capacity of the plant, is clearly incorrect.

(v) This Tribunal in the Impugned Order has relied on the CPRI report which itself is erroneous and suffers from several defects as stated

above. Reliance on CPRI Report is also faulty since the same has resulted in disallowance of Performance Bank Guarantee for augmentation of capacity (Rs. 87.44 Cr.), C&I System (Rs. 2.98 Cr.), BoP components among such other disallowance which were allowed by CERC and resultantly has a significant financial impact.

10.7 ***Per contra,*** the learned senior counsel for the Respondent No. 1 has submitted the following submissions for our consideration

(i) Review Petitioner has also sought Rs. 41.53 Crores for extending performance guarantee of BOP (Balance of Plant i.e. all equipment's in the Generating station other than BTG). Apart from seeking performance guarantee towards BOP, Review Petitioner has sought additional cost towards each Item of BOP separately.

(ii) If the plant capacity contracted with Dongfang was 2x600 MW vide agreement dated 16.12.2006 the agreements entered into between Review Petitioner and Lanco Infratech on 24.12.2006 including BOP were in reality for 2x600 MW only and therefore there is no augmentation of capacity being entered into between Lanco Infratech with its suppliers in 2008.

(iii) Review Petitioner was required to file the petition furnishing the breakup of capital cost as per prescribed format 5B stipulated by the Central Commission. Instead, Review Petitioner has furnished

the break up of capital cost without even providing the break up of EPC cost. Since Review Petitioner has not furnished the breakup of project cost particularly item wise break up of EPC cost as per format 5B, it was not possible to validate the claims allowed towards Balance of Plant and BTG.

(iv) Respondent No. 1 had sought the expert opinion of Central Power Research Institute (CPRI) which is a premier Government of India institute to verify the Claims of Review Petitioner for additional costs and expenses on account of capacity addition. CPRI vide its report dated 03/07/2013 confirmed that, the existing technical specifications of BOP available for the 2x507.5 MW is sufficient to meet the plant capacity of 2x600 MW plant capacity as the specifications indicated in the details for 2x507.5 MW are in fact the specifications for 2x600 MW and specifications for the auxiliaries are fully capable of meeting a load of 2x600 MW.

(v) CPRI has also confirmed that the OEM cannot seek any additional cost or amounts for running, the plant at its rated capacity of 600 MW or in, other words if OEM claims so, the equipment's being supplied by OEM are of substandard/inferior quality.

(vi) If Review Petitioner is prejudiced on merits of the CPRI Report, then it is not open for it to file the present Review Petition but an Appeal against the Impugned Order and in case the Review

Petitioner succeeds in such Appeal, the findings of CPRI Report will in-turn become unsustainable. It is not apt for this Tribunal to review its own Order in this regard;

(vii) Review Petitioner has failed to establish any prejudice (financial impact) that has been caused upon Review Petitioner and in such a case the remedy for Review Petitioner lies in Appeal and CPRI Report cannot be asked to be excluded from the Impugned Order in the Review;

(viii) CPRI Report and its contents vis a vis Date of Report, Date of Field Report, Period of Field Study (not to be taken as Field visit), scope of the Study addresses the BTG and BoP parameters among such other factors aptly address the issue at hands and therefore there is no reasons for this Tribunal to interfere with the CPRI Report;

(ix) The CPRI Report bearing in mind its contents and scope does not require the physical visit.

Our consideration and Analysis:-

10.8 The Review Petitioner has submitted that the impugned order disallowed the cost of Performance Guarantee of Rs.41.33 crores claimed by LITL in respect of BOP for enhancement of plant capacity without any analysis and merely on the premise that additional capital cost has already been allowed for augmenting the capacity of various BOP equipment. The Review Petitioner has also submitted that even

though DEC had provided a standard module BTG package for a 2X600 MW project, the BOP was for a 2X507.5 MW Project. The augmentation of capacity of the Project a corresponding increase in the capacity of BOP, which resulted in increase in the capital cost for the Project. The Respondent No.1 has submitted that if the plant capacity contracted with Dongfang was 2X600 MW vide agreement dated 16.12.2006 , the agreements entered into between Review Petitioner and Lanco Infratech on 24.12.2006 including BOP were in reality for 2X600 MW only and therefore there is no augmentation of capacity being entered into between Lanco Infratech with its suppliers in 2008. The Respondent No.1 has also submitted that the CPRI Report has confirmed that the existing technical specifications of BOP available for the 2X507.5 MW is sufficient to meet the plant capacity of 2X600 MW and specifications for the auxiliaries are fully capable of meeting a load of 2X600 MW.

10.9 It was held in the impugned order that 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 by CERC as additional capital cost has already been allowed for augmenting the capacity of various BOP equipments. We have observed from the impugned order that the BTG package was standard 2X600 MW right

from the beginning and this Tribunal disallowed cost of performance bank guarantee of 87.44 crores for the main package. We note that CERC had allowed additional capital cost for augmenting the capacity of various BOP equipments. The additional capital, therefore, cost must be inclusive of the cost of performance guarantee charges of Rs.41.33 crores. **The Review Petitioner has also not brought any new facts or break up of cost now in this regard before the Tribunal. Therefore, no ground for review is made out.**

Issue No.3 - (C) The next issue to be considered is Disallowance of other costs without providing adequate reasons

10.10 Learned counsel for the Review Petitioner submitted that with the augmentation of capacity of the project from 1015 MW to 1200 MW, certain enhancements were also required in the various BoP components. In the Impugned Order, this Tribunal has disallowed the costs incurred by the Review Petitioner for enhancement of the capacity of these components, without providing any sufficient reasoning for doing so. As a result, the Cost of Rs.2.98 crores for C&I system, Rs. 27.34 crore incurred towards Air and Fuel Gas System, Cost of Rs. 9.23 crore towards coal slurry and Rs. 14.08 crore towards coal silo, Cost of Rs. 1 crore for Fuel Oil System, Cost of Rs. 1 crore towards Design and Engineering **(totalling to Rs.55.63 crore)** have also been disallowed in the Impugned Order.

10.11 The Review Petitioner has submitted following submission for our consideration:-

a. The reliance on CPRI report is erroneous and there is no basis for the reasoning afforded in the impugned order that the increase in BOP capacity by about 20% will not result in cost by 2.98 crores for C&I system.

b. The Tribunal has disallowed the cost of Air and Flue Gas System on an incorrect assumption that it forms a part of BTG system supplied by DEC whereas the correct position is that the Air & Flue Gas System is part of BOP system by an indigenous supplier.

c. The Tribunal has not set out any reasons for disallowance of cost of coal slurry pond and coal silo. The Tribunal itself has held in the impugned order that the cost towards coal handling plant on account of augmentation is correctly allowed by CERC. Given that coal slurry pond and coal silo are ancillary requirements for coal handling at the project, the disallowance of the same is *ex facie* without any basis.

d. The Tribunal has incorrectly disallowed cost of fuel oil system on the ground that it was part of contract with DEC whereas it was a part of BOP package e for the project and its capacity had to be

enhanced to meet the additional requirement of oil consequent to the increase in capacity.

e. The issue of disallowance of design and engineering cost of Rs.1 crore needs review as it was disallowed on the ground that it is part of overhead cost. The said cost had to be incurred, due to increase in capacity of the plant from 2X507.5 MW, towards preparation of detailed project report, supplementary environmental impact assessment report etc..

f. With regards to reduction in time overrun from 6 months to 3 months, the Tribunal failed to consider that absence of required Chinese experts/specialists during peak project activities had a direct impact on project progress leading to an overall delay of more than 6 months.

g. With regards to disallowance of time overrun on account of delay of Respondents in providing start up power, the Tribunal has not considered the facts placed on record. The procurers were required to provide start up power as per Annexure4 of the PPA to match with schedule of COD of Unit I. The Tribunal failed to appreciate that delay on part of the Respondent in providing 220 kV line has led to delay in commissioning of the project by six months.

<u>Our consideration & Analysis</u>:-

10.12 It is relevant to note that the entire grounds, pleadings, arguments etc. made by the Review Petitioner/Appellant to contest this issue in this Review Petition were duly considered by this Tribunal in detail while adjudicating the said Appeal filed by the Review Petitioner/Appellant and passing the referred judgment dated 15.05.2015. Neither any additional nor fresh ground has been made out by the review petitioner now which otherwise, strengthen its pleadings in support of its intended review of the judgment. **Having regard to the considered decision of CERC which was upheld by this Tribunal, we are of the considered opinion that there is no fresh case or sufficient ground made out by the Review Petitioner to allow review in respect of this issue and hence, rejected.**

11 Accordingly, the Review Petition 22 of 2015 in Appeal No.108, 122, 119 of 2014 & 18 of 2013 is partly allowed for the reasons stated above, so far it relates to issue No. 1 & 2 only.

Let us now take up issues raised by PCKL in its Review Petition 19 of 2015 as below:

<u>Review Petition No. 19 of 2015</u>

Issue No.1 Cost of Pro-rata increase for each of the Balance of Plant (BOP) items in the EPC Cost.

12 As regards to issue of Pro-rata increase for each of the Balance of Plant (BOP) items in the EPC Cost is concerned, the learned senior counsel for the Review Petitioner PCKL has submitted as under:

(i) The Respondent No.2 UPCL had claimed additional cost on account of increase in project capacity from 1015 MW to 1200 MW.

(ii) The Respondent No.2 had unilaterally changed the contract from *M/s* BHEL, *M/s* Navyuga and *M/s* Simplex to its own sister company, *M/s* Lanco Infratech. It was represented that the total EPC cost for Lanco Infratech was lower at Rs. 3526.64 crores as compared to the BHEL/Navyuga/Simplex cost of Rs. 3688.35 crores.

(iii) However, the Respondent No.2 did not give the break up of the EPC cost of Lanco Infratech as per Form 5B of the Tariff Regulations of the Central Commission. The-break-up of the capital cost of BHEL/Navyuga/Simplex in terms of Form 5 B was available.

(iv) For the increase in capacity from 1015 MW to 1200 MW, the Central Commission has held that proportionate increase in the capital cost needs to be allowed for certain BOP items. However, this proportionate increase has been allowed by the Central Commission and upheld by the Tribunal based on the capital cost of Rs. 3688.35 crores, which is BHEL/Simplex/Navyuga cost.

(v) In the circumstances, the proportionate increase in the capital cost if any was to be allowed only based on the total EPC cost of Rs. 3526.64 crores (Lanco Infratech) and not Rs. 3688.35 crores (BHEL/Simplex/Navyuga). The increase from 1015 MW to 1200 MW was from Lanco Infratech contract of 1015 MW to 1200 MW and not from BHEL contract of 1015 MW.

(vi) In view of non-furnishing of breakup of project cost particularly item wise break up of EPC cost by the Respondent No.2 as per the prescribed format 5B stipulated by CERC, the pro-rata reduction over each of the BOP items reckoning the EPC cost of Lanco Infratech of Rs. 3526.64 crores has not been considered by the Tribunal in its order dated 15-05-2015. The impact on coal handling system and Cooling water system is Rs. 2.77 Crores and Rs. 3.5 crores respectively.

(vii) The above was specifically raised by the Review Petitioner before the Hon'ble Tribunal. However, the said issue has not been considered or dealt with by the Hon'ble Tribunal and there is no finding on the non-furnishing of the Form 5B, the reason for considering the BHEL/Simplex/Navyuga cost for proportionate increase even though the claim of Respondent No.2 itself is that the cost of Lanco Infratech is lower. In the circumstances, the

above issue is subject to the review jurisdiction of the Hon'ble Tribunal.

13.1 ***Per contra,*** as regards issue of Pro-rata increase for each of the Balance of Plant (BOP) items in the EPC Cost is concerned, the learned senior counsel for the Respondent No. 2 has made the following submissions for our consideration:-

(i) LITL has quoted a lump sum amount and there was no break up cost provided. LITL was selected being the lowest bidder. Package-wise Break up cost was shown to Respondent Commission same as approved by Respondent Commission in Order 25.10.2005 with an overall reduction of Rs. 19.80 Crores and henceforth approved.

(ii) The Respondent Commission for approving the capital cost for 1200 MW has considered EPC cost of Rs. 3526.64 Crores (Cost considered by Respondent Commission for 1015 MW) and additional cost for 185 MW. The Respondent Commission observed that even after considering additional cost for augmented capacity the total hard cost (Rs. 4.21 crore/MW) with site specific features is comparable to other similar projects and is also comparable to the benchmark hard cost for coal based thermal power projects specified by the Commission of Rs.4.87 Crore/MW).

(iii) By raising this issue, the Review Petitioner is challenging the methodology for capital cost approval, adopted by the Respondent Commission and upheld by Hon'ble Tribunal which is not allowed under the scope of Review Petition.

(iv) EPC cost of Rs. 3526.64 crores was excluding certain additional items of Rs. 141.91 crores. The proportionate increase in the capital cost for 185 MW was carried out after considering the capital cost of Rs. 3688.35 crores for 1015 MW as approved in principle in the order dated 25.10.2005.

(v) The Respondent Commission through its Order dated 20.02.2014 has benchmarked the cost on the basis of the capital cost approved for 1015 MW and has not considered actual. The same has resulted in an inconsistent approach by considering proportionate increase. The Respondent Commission was in fact required to determine the tariff according to actual costs incurred for the Project as per applicable Tariff Regulations.

(vi) The Review Petitioner having agreed to such an approach, cannot be allowed to contend that the initial capital cost should be based on the actual EPC cost quoted by LITL.

(vii) This Tribunal has approved the approach adopted by the CERC and observed that

"58. ….. . Ld. 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 Ld. CERC to determine the capital cost… ."

(viii) This Hon'ble Tribunal has dealt with the issue at hand in detail and therefore no ground for Review is made out.

Issue No.2 - Erection, Testing & Commissioning expenses

14 As regards the issue of Erection, Testing & Commissioning expenses is concerned, the learned senior counsel for the Review Petitioner has submitted as under:

(i) The proposal for revising erection, testing and commissioning expenses from Rs. 27.89 crores to Rs. 17.49 crores (by oversight the same is mentioned as Rs. 21.12 crores in the review petition) is a genuine case of error on face of record. As per CERC Order 20.02.2014, Erection, Testing and Commissioning expenses of Rs. 27.89 crores is allowed based on additional BOP cost of Rs. 360.74 Crores (@7.68%). However as per the Tribunal's Order dtd: 15.05 .2015, the additional BOP cost approved is Rs. 227.76 crores (@7.68%), Hence Erection, Testing and Commissioning expenses needs to be revised as Rs. 17.49 crores.

(ii) The above was specifically raised by the Petitioners before the Hon'ble Tribunal. However, the said issue has not been considered or dealt with by the Hon'ble Tribunal and there is no finding on the non-furnishing of the Form 5B, the reason for considering the BHEL/Simplex/Navyuga cost for proportionate increase even though the claim of Respondent No.2 itself is that the cost of Lanco

Infratech is lower. In the circumstances, the above issue is subject to the review jurisdiction of the Tribunal.

14.1 ***Per contra,*** learned senior counsel for the Respondent No. 2 has made the following submissions for our consideration.

(i) The Respondent Commission for approving the capital cost for 1200 MW has considered EPC cost of Rs. 3526.64 Crores (Cost considered by Respondent Commission for 1015 MW) and additional cost for 185 MW. The Respondent Commission observed that even after considering additional cost for augmented capacity the total hard cost (Rs. 4.21 crore/MW) with site specific features is comparable to other similar projects and is also comparable to the benchmark hard cost for coal based thermal power projects specified by the Commission of Rs.4.87 Crore/MW).

(ii) The Respondent Commission for computing the Erection, Testing & Commissioning expenses has taken the earlier in-principle approved cost for 1015 MW in Order dated 25.10.2005 as basis. The Respondent No. 2 has also submitted the breakup of capital cost as per Form 5B.

(iii) By raising this issue, the Petitioner is challenging the methodology for capital cost approval, adopted by the Respondent Commission

and upheld by Hon'ble Tribunal which is not allowed under the scope of Review Petition.

(iv) EPC cost of Rs. 3526.64 crores was excluding certain additional items of Rs. 141.91 crores. The proportionate increase in the capital cost for 185 MW was carried out after considering the capital cost of Rs. 3688.35 crores for 1015 MW as approved in principle in the order dated 25.10.2005.

(v) The Respondent Commission through its Order dated 20.02.2014 has benchmarked the cost on the basis of the capital cost approved for 1015 MW and has not considered actual. The same has resulted in an inconsistent approach by considering proportionate increase. The Respondent Commission was in fact required to determine the tariff according to actual costs incurred for the Project as per applicable Tariff Regulations.

(vi) The Review Petitioner having agreed to such an approach, cannot be allowed to contend that the initial capital cost should be based on the actual EPC cost quoted by LITL.

Issue No.3 - Foreign Exchange Rate Variation (FERV)

15 The Review Petitioner has submitted that it is not pressing on this issue as the Respondent Commission has already revised FERV in its Order dated 10.07.2015 in Petition No. 160/GT/2012.

Issue No.4 - Capital expenditure towards staff colony

16 As regards the issue of capital expenditure towards staff colony is concerned, the learned senior counsel for the Review Petitioner has submitted as under:

(i) The Central Commission had allowed additional expenditure towards staff colony of Rs. 45 crores. The capital expenditure towards staff colony was already part of the contract between Respondent No.2 and Lanco Infratech as is also given in the Bid Evaluation Report for selection of Lanco Infratech.

(ii) The above was initially suppressed by Lanco Infratech, however when the same was disclosed by Respondent No.2, the Review Petitioners had pointed out that the claim of Respondent No.2 towards staff colony was incorrect and amounts to double benefit. The staff colony was already part of the contract with Lanco Infratech and additional cost of Rs. 45 crores is again been claimed by Respondent No.2. This issue and contention was dealt with by the Central Commission.

(iii) The same was specifically raised by the Review Petitioners before the Hon’ble Tribunal, which has again not been dealt with by the Hon'ble Tribunal. In view of the above, the same amounts to an error apparent on the face of the record.

16.1 ***Per contra,*** learned senior counsel for the Respondent No. 2 has submitted that:

(i) Staff colony was envisaged at the time of in-principle approval, which was to be developed through private developers. However, Yellur being remote village, private developers were reluctant to invest in construction of flats as they apprehended that there will not be enough returns for their investment. Since private developers were not forthcoming, it was realised that the Applicant will have to develop it to cater to the needs of employees of the Project.

(ii) The Respondent No. 2 has deployed qualified and experienced operation and maintenance staff for operation and maintenance of the power plant to ensure the Applicant's contractual commitment of providing power. The Plant is located at Yellur village, which is about 30 kilometres from the nearest district place (Udupi) and about 4-5 kilometres from the nearest consumer market (Padubidri). It is obvious that to achieve higher plant availability, it is necessary to house key operation and maintenance staff close to the power plant boundary. It is also necessary that the well-qualified and experienced staff employed by the Applicant for operation and maintenance purposes need to be provided accommodation in the staff colony in order to induce them to stay in a remote area. In the absence of a staff colony, the plant will run the risk of migration of the plant staff and consequently operations of the plant will suffer.

(iii) CERC in its Order 25.10.2005 as regards to staff colony has

observed as below:

*"38. The township/colony is proposed to be developed through private developers and as such **cost of township is not included in the cost estimates of the generating station**."*

(iv) EPC contract does not include construction of staff colony and Respondent No. 2 has to develop it to cater to the needs of employees of the project. This cost as additional expenditure was allowed by CERC in its Order and upheld by this Hon'ble Tribunal.

16.2 The Review Petitioner in its rejoinder has relied on additional documents filed on behalf of PCKL to submit that staff colony among other items such as temporary labour, materials, consumable were integral part of the Project / included in the work of LITL and therefore Hon'ble APTEL allowing the same in the Impugned Order has committed an error apparent on the face of record.

Issue No.5 - Expenses forming part of original EPC cost - double counting

17 As regards the issue of expenses forming part of original EPC cost – i.e. double counting is concerned, the Review Petitioner has submitted that there are certain heads of expenses which formed part of the original EPC cost, but have been double counted. These costs need to be deducted as the same are being accounted twice to the benefit of Respondent No. 2, when costs have already been included in the

original EPC cost of Rs. 3526.64 Crores. The details aggregating to Rs. 38.44 Crores are as under:

(i) **Operators training (construction and pre-commissioning expenses) of Rs. 2.5 crores**- It is already allowed in the in-principle order dated 25/10/2005 under construction & pre-commissioning expenses. Hence double counting to be disallowed.

(ii) **Design and engineering (overheads) of Rs. 1 crores**: The Review Petitioner did not press this issue as Design and engineering overheads expenses of Rs. 1 crore is already disallowed vide CERC order dated 10.07.2015.

(iii) **33 kv line (other cost) of Rs. 1.83 crores**: The original DPR provides that for the outside plant boundary facilities at Jetty/ coal unloading area, power supply at 110 kV from KPTCL will be taken & stepped down to11 kV/3.3 kV by installing stepped down transformers & switchgears. Hence, it includes the 33 kV line.

(iv) **Dredging cost of Rs. 24.4 Crores**: The work of slope dredging from Jetty to turning circle for the entire length of Jetty is already included in the original DPR. Also the EPC contract provides for construction of port Jetty and associated civil works at New Mangalore Port.

(v) **Preservation cost (other cost) of Rs. 4.81 Crores:** The Respondent No. 2 has claimed Rs. 4.81 Crores stating that cost is borne for preservation of the Unit-2 due to delay in commissioning of Unit-2. In this regard, as per the EPC contract with M/s LITL, the scope of the contract includes supply of oils, lubricant, consumables, chemicals till provisional take over. The contract specifically provides that the EPC contractor shall pay for chemicals, lubricants etc. until provisional taking over and the quantities are such as to permit continued uninterrupted operation of the plant after provisional taking over.

(vi) **Cable cost towards 2nd ICT (other cost) of Rs. 3.9 Crores**: The original DPR provides for installation of 2 nos. of ICTs. The Respondent No. 2 had claimed Rs. 3.9 crores towards cost of additional cabling due to change in the location of 2nd ICT. Incurring of this cost could have been avoided by suitable planning.

17.1 ***Per contra,*** replying to the submissions made on behalf of the Review Petitioner, learned senior counsel for Respondent No. 2 has submitted that:

(i) **Operators training (construction and pre-commissioning expenses) of Rs. 2.5 crores**- The same is the expenditure incurred by Respondent No. 2 in connection with travelling,

conveyance, allowances of its O&M employees to various OEM's manufacturing works both in India and abroad to undergo orientation and familiarization training of various systems being provided by such OEMs. These do not include any fees for imparting training to the candidates as neither DEC nor LITL have charged any fees for the same.

(ii) **Design and engineering (overheads) of Rs. 1 crores-** The same has been disallowed by CERC as well as by this Tribunal and hence, not pressed by the Review Petitioner.

(iii) **33 kV line (other cost) of Rs. 1.83 crores-** 33 kV line is required at captive jetty at Mangalore Port Trust which is 30 kms from Respondent No. 2 plant to meet the requirement of electricity to operate the facilities. Providing this facility was responsibility of Review Petitioner. Further, Review Petitioner requested Respondent No. 2 to take up this work. Respondent No. 2 carried out this work at a cost of Rs. 1.83 Crores which was to be reimbursed by Review Petitioner. The Respondent No.2 denies that the same forms a part of firmed up Project Cost of Rs. 4299.12 Crore.

(iv) **Dredging cost of Rs. 24.40 Crores-** Dredging in jetty area and disposal of additional dredged material from the sea was carried out at a cost of Rs. 24.40 Crores. Quantity assumed in the original

project cost was much less than the actual quantity i.e., 12,00,000 cubic meters. In addition to this, disposal was allowed at far off distance and hard rock was encountered which necessitated rock removal.

(v) **Preservation cost (other cost) of Rs. 4.81 Crores-** Operation of Unit-II was delayed for a long time on account of delay in providing evacuation facility. Hence, Unit-II had to be preserved to avoid damage to components and to maintain the unit in working condition.

(vi) **Cable cost towards 2nd ICT (other cost) of Rs. 3.9 Crores-** Initially 2 Inter Connection Transformers (ICT) were envisaged for the project. PGCIL in April 2007 in its load flow studies stated that one ICT will suffice as overload of 220 kV line is not likely to happen. Accordingly, approval for one ICT was received in December 2008 from KPTCL. In January 2009, KPTCL informed that 500 MW power flow from 220 kV line is possible with 2 Nos of ICTs. The Respondent No. 2 informed KPTCL regarding the long lead time for procurement and cost implication of Rs. 20 Crores. Investment cost of Rs. 20 Crores was not approved by ESCOMs. The Respondent No. 2 has installed 2nd ICT and absorbed the cost of 2nd ICT. The 2nd ICT was to be located at another end of switchyard as the space between 2 ICTs was already occupied by

line bays. Therefore, additional cost of only Rs. 3.90 Crores towards procurement and laying of additional 1500 meters of 220 kV cables was claimed. The claim amount was reduced from Rs, 20.60 Crores to Rs. 3.90 Crores.

17.2 The Review Petitioner vide its rejoinder, inter-alia, submitted that 33 kV line was already allowed in the EPC contract and the details were not provided by UPCL in Form 5 B. As regards dredging, it was submitted that details were not provided in Form 5 B and the work was included in the original DPR and the EPC Contract also included the construction towards port Jetty and associated civil works. **The issue of Designing & Engineering was not pressed by the Review Petitioner.**

Issue No.6 - Non-deduction of revenue earned over and above fuel expenses

18 The Review Petitioner has submitted that in the petition filed by Respondent No. 2 before the Respondent Commission, Respondent No. 2 had claimed for deduction of Rs. 35.14 crores as revenue earned over and above fuel expenses towards sale of infirm power from the Capital Cost. However, this was not done by the Respondent Commission, even though there was a specific prayer of Respondent No. 2. The same though raised has not been dealt with by the Tribunal in the impugned order, and therefore amounts to an error apparent on the face of the record.

18.1 ***Per contra, t***he Respondent No. 2 has denied the contention of the Review Petitioner and submitted that the issue raised is beyond the scope of review.

Issue No.7 - Auxiliary consumption

19 The Review Petitioner has in its rejoinder submitted that he is not pressing the issue of Auxiliary Consumption and hence, not further deliberated/analysed.

Issue No.8 - Interest during construction for unit no.2

20 As regards the issue of Interest during construction for Unit no. 2 is concerned, learned counsel for the Review Petitioner has submitted as under:

(i) The Tribunal has held that Unit No. 2 of the generating station of Respondent No.2 was ready in April, 2011 and the commissioning was delayed only on account of the delay in the construction of the 400 KV transmission line which was commissioned on 26.08.2012.

(ii) The primary error apparent is the fact that generating unit was not ready till 30.06.2012 when the approval of the Pollution Control Board was received by Respondent No.2. In fact, the permission to operate the Unit No. II was itself granted only on 25.01.2012 when the generating station could be treated as ready. This is recorded in the order of the Central Commission itself as under:

*52. It is observed that based on petitioner's letter dated 28.6.2011, KPSCB vide letter 1.7.2011 had granted No-Objection Certificate (NOC) for carrying out the capacity test of Unit-II and subsequently, by letter dated 2.7.2011 had withdrawn the same after finding that the consent conditions stipulated by the Board had not been fully complied with by the petitioner. The petitioner has submitted that the respondents in tandem with the Pollution Control Board ensured revocation of permission which was legitimately provided for operating Unit-II. It has also submitted it was in possession of a valid approval for operating Unit-II until 30.6.2012 and hence the contention of the respondents that it was not capable for generation till that time is baseless. On the contrary, the respondents have submitted that the consent to operate as per letter of KPSCB dated 18.8.2010 for 2 x 600 MW was for the period from 1.7.2010 to 30.6.2011 and even on 17.5.2011, the petitioner had not adhered to the directions of KPSCB reading fly ash utilisation and failed to submit action plan and risk analysis. We have examined the matter. There is no denying the fact that any industry prior to its commercial operation has to fulfil the conditions specified by the State/Central Pollution Control Board. In this case, it has been alleged by the respondents that the petitioner had not complied with the conditions stipulated by KSPCB for which the NOC was apparently granted. We do not propose to traverse into the reasons for which NOC had been revoked by KPSCB as alleged by the parties. In case the petitioner was aggrieved by the action of KPSCB, the petitioner was at liberty to approach the appropriate forum for remedy of its grievance, which admittedly was not done. We notice that even during June-July, 2011, the petitioner was not ready to declare the COD of Unit-II as it had apparently not fulfilled the requirements of the KPSCB. However, it is noticed from the submission of the petitioner vide its affidavit dated 10.8.2013, that KSPCB vide its letter dated 25.1.2012 had permitted the petitioner to operate Unit-II of 600 MW by parallel shutting down Unit-I of the generating station. **Thus, it is evident that the petitioner had fulfilled the conditions of KSPCB prior to 25.1.2012 and was ready for declaration of commercial operation of Unit-II immediately after 25.1.2012.** However, in the absence of 400 kV line for evacuation of the same, there has been delay in the commissioning of Unit-II by the petitioner. It is also noticed that the petitioner was informed by the respondents 1 to 6 vide letter dated 13.8.2012 that the 400 kV line would be charged on or after 20.8.2012 and accordingly, the petitioner had declared commercial operation of Unit-II on 19.8.2012 on 220 kV line.*

(iii) Despite the above, the Tribunal has proceeded on the basis that the generating station was ready in April, 2011 which is an error apparent on the face of the record. There could not have been any commissioning without the mandatory pollution control approval obtained by Respondent No. 2 which was only on 30.06.2012.

(iv) The Tribunal has not even considered that the generating unit was held to be ready for commissioning by the Central Commission only on 25.01.2012 and not in April, 2011. This aspect was not under challenge by the Respondent No. 2. Despite the above, the IDC was granted from April, 2011 which was incorrect.

(v) The 400 KV line did not delay the commissioning of the generating unit, which is established by the fact that the generating unit was commissioned without the 400 KV line. The generating unit was commissioned on 19.08.2012, on the existing 220 kV line. If the delay was on account of the 400 KV line, there could not have been any commissioning prior to the commissioning of the 400 kV line.

(vi) In terms of the PPA, if the generating unit was ready for commissioning but could not be commissioned due to non-availability of transmission line, the generator was entitled to have third party certification and claimed deemed capacity charges. This was not

done by Respondent No. 2 since the generator itself was not ready. This has also not been dealt with by the Hon'ble Tribunal.

(vii) In the Circumstances, the period of 16 months from April, 2011 to August, 2012 counted by the Tribunal for Interest During Construction on the ground that the generating station was ready but could not be commissioned on account of the non-commissioning of the 400 kV transmission line is an error apparent on the face of the record and subject to the review jurisdiction of the Hon’ble Tribunal.

20.1 ***Per contra,*** learned counsel for the Respondent No. 2 has made the following submissions.

(i) This Tribunal has already dealt with this issue after considering the submissions of all the parties and therefore it is amounting to re-adjudication of the appeal by way of review. The Review Petitioner has failed to highlight material fallacy in the reasoning or error apparent.

(ii) The responsibility of construction of 400 kV line was with Review Petitioner and should have been completed by Jan-2010 to achieve COD of Unit-I by Feb- 2010. Delay in construction of line was on account of the delay in ordering and obtaining statutory permission, acquiring land, Right of Way issue & MoEF clearance.

(iii) The Review Petitioner has not disclosed that order for construction

was placed as late as Nov-2008, i.e. 35 months after signing of PPA. Therefore, it was inevitable that the construction of the line would get delayed. Therefore, it is clear that the Review Petitioner/ GoK did not take steps in a timely manner to ensure availability of requisite evacuation capacity on the scheduled COD of the project.

(iv) Further, to obtain patches of land and right of way for 180 Km. length of stretch of land, required constant follow up, both in case of the Agricultural lands and also in case of clearances for the Forest Land. Some of the Agricultural land, from where the 400kV transmission lines passed, involved coffee Plantations areas. This obviously resulted in huge delay and resistance from the affected coffee growers and involved considerable period of time. Petitioners decided to evacuate Unit I power on the existing 220KV lines (25 KM). The Review Petitioners in this regard decided to augment the evacuation capacity of existing 220 KV lines to evacuate 600 Megawatts by replacing the existing Drake ACSR conductor with AAAC moose conductor. For this also, they had delayed the procurement actions, required from their end. The order for the 220kv line was also placed as late as in November 2008.

(v) As regard the readiness of 400 KV DC transmission system, the Review Petitioner delayed the procurement action and also inordinately delayed their actions to acquire patches of land, to seek

clearance from Ministry of Environment and Forests, Government of India, for 81.2 Hectares of Forest land. The contract for 400 KV transmission lines, were awarded in November 2008, that too after persuasion by Respondents. The Review Petitioners made the application to Ministry of Environment and Forest, (endorsed by Government of Karnataka), in January 2010 for forest clearances, by which time they were actually supposed to commission the 400kV line. Therefore, it is clear that the Petitioner/GoK did not take steps in a timely manner to ensure availability of requisite evacuation capacity on the scheduled COD of the Project.

(vi) The Petitioner's contention that the delay in CoD was delayed due to the permission from the Pollution Control Board and not due to delay in the 400 kV lines is incorrect. It is to be noted that KPTCL and Principal Buyers were to complete the commissioning of the 400kv transmission line by Nov/Dec 2009, which they failed to do. Thus, on the date of the synchronisation of Unit II, the Petitioner did not have a ready 400 kV transmission line and only the 220kv line having capacity of 600MW was available. Further, it is submitted that the consent for operation for the 1200 MW plant had been granted by KSPCB for the period 01.07.2010 to 30.06.2011 vide letter dated 18.08.2010. The Respondent No.2 had applied to KSPCB for renewal of CFO on 23.03.2011. In any case, on 16.4.2011, the Unit II

achieved full load which was recognized by the CEA in its letter dated 18.04.2011. Thus, it is submitted that on 07.03.2011, Unit No. II had the necessary Consent for Operation (CFO) but the synchronization and declaration of COD could not be achieved due to the actions of KPTCL and the Review Petitioner. It is submitted that the Review Petitioners were trying to cover up their delay of more than 2 years in the commissioning of the 400 KV transmission line.

(vii) The Respondent No. 2 had issued a letter dated 20.04.2011 to the Review Petitioner giving notice of conducting initial capacity test on Unit II from 04.05.2011 in the presence of NTPC Consultancy Wing. However, the test could not be conducted on such date because the Review Petitioner did not depute concerned official for capacity test. Further, GoK had asked the Review Petitioner to obtain an undertaking from Respondent No. 2 that it will not claim any deemed commercial operation charges or any other charges. This clearly establishes the fact that Review Petitioners were not willing to allow commercial operation of Unit No.2 as it would have exposed their failure of delaying 400 kV transmission lines and would have commercially put them in a precarious position.

(viii) Further, KPTCL wrote to the Respondent No. 2 on 30.03.2011 enclosing the Energy Department letter dated 30.03.2011 asking the Respondent No.2 to confirm that the Respondent No. 2 will not claim

deemed commercial operation charges or any other charges from GoK/ Principal Buyers/KPTCL. This proves that KPTCL and the Review Petitioners were working in tandem to protect each other's mutual interests without having due regard to the requirement of the Project. The Respondent No.2 clarified to the Review Petitioner vide letter dated 07.04.2011 that the Respondent No. 2 is unable to give communication as requested by KPTCL in their letter.

Issue No. 9 - Energy Charge

21 Learned counsel for the Review Petitioner submitted that this issue is not being pressed for further adjudication.

Our Consideration & Analysis:-

22. Issue No.1 - Consideration of cost of Pro-rata increase for each of the Balance of Plant (BOP) items in the EPC Cost.

22.1 We have considered the submissions of the learned senior counsel for both the parties and analysed them to arrive at issuewise decisions. The Respondent No. 2 has contended that the Capital cost was approved by CERC by Order 20.02.2014 and was upheld by this Tribunal in Order dated 15.05.2015. The Respondent No. 2 has further submitted that the Review Petitioner is trying to get this issue re-heard by this Tribunal on merit through this Review Petition. Therefore, the issue does not qualify for Review Jurisdiction of this Tribunal. We note

that methodology of approving capital cost by CERC was based on estimation of additional expenditure required for 185 MW on pro-rata basis of in-principle approved cost. This methodology was upheld by this Tribunal on merits in the Impugned Order after detailed analysis and examination. This Tribunal in the Impugned Order has allowed capital cost approved by CERC partly. Therefore, a decision taken by this Tribunal after analysis cannot be considered under review as it amounts to reopening the whole matter contained in the original Appeal afresh.

22.2 This Tribunal in its Judgment dated 08.11.2017 in Appeal No. 226 of 2016 has observed as below:

"(f)(i) The relevant extract from Section 61 of the Act is reproduced below:

"Section 61. (Tariff regulations): The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees; ……………………………………"

Section 61 of the Act empowers the Appropriate Commission to formulate tariff regulations and once the tariff regulations are notified the Appropriate Commission is bound to follow it. This has

been held by the judgement dated 15.3.2010 by the Constitutional Bench of Hon'ble Supreme Court in case of PTC India Ltd. Vs. CERC. Thus, the Appellant cannot escape from the clutches of the Tariff Regulations, 2009 under which the Central Commission has determined its tariff upto 31.3.2014. The Tariff Regulations, 2009 also envisage carrying out prudence check of capital cost by comparing it with benchmark norms. The Central Commission in absence of the requisite cost estimates/ details of the present case has decided the capital cost of some assets of the Appellant based on the benchmark norms."

22.3 In view of the above judgment, it is crystal clear that once the Central Commission has determined the tariff after comparing it with the benchmark norm and that methodology has also been approved by this Tribunal, it is not prudent for the Review Petitioner to challenge the methodology. Accordingly, the Appellant is estopped from questioning the methodology adopted by the Central Commission. **We are, therefore, not inclined to allow review as fresh adjudication is not permissible through a review petition under the prevailing law. Accordingly, we hold that this particular issue requires a fresh evaluation of merits and also, no special ground for review is mad out. Hence, review declined.**

Issue No.2- Erection, Testing & Commissioning expenses

22.4 Shri C.S. Vaidyanathan, Learned Counsel for Respondent no 2 submitted that the methodology for determination of Capital cost was

approved by CERC in its Order dated 20.02.2014, which has been upheld by this Tribunal in Order dated 15.05.2015. We further submitted that the review is not permissible on the issue under consideration as the Review Petitioner is trying to get this issue re-heard on merit. We hold that the CERC after due consideration of the various contentions of Review Petitioner and Respondent no 2 has approved erection cost to be considered for construction of 1200 MW. In the above Impugned Order it was also categorically held that the Tribunal has examined the capital expenditure item wise and concluded that it is in agreement with the proportionate approach adopted by the CERC. Accordingly, it was the considered view of the Tribunal to uphold the decision of CERC in this regard. It is therefore a natural corollary to apply the proportionate principle to the capital cost based on the decision in Impugned Order. **Therefore, we opine that the erection, testing and commissioning expenses shall also be considered on proportionate basis corresponding to the revised capital cost approved in this order. Thus, we find force in the contentions of Review Petitioner and hold that this issue qualifies for review. Accordingly, answered this issue in favour of the Review Petitioner.**

Issue No.3 - Foreign Exchange Rate Variation (FERV), Auxiliary Consumption and Energy Charges

22.5 Shri Sanjay Jain, Learned senior Counsel for the Review Petitioner during the hearing held on 2.01.2019, submitted that Review Petitioner is not pressing the said issue in the Review petition. Therefore, this Tribunal allows the withdrawal of the said issue by the Review Petitioner.

Issue Nos. - 4,5,6 & 8 - Capital expenditure towards staff colony, non-deduction of revenue earned over and above fuel expenses, Interest during construction for unit no.2 and expenses forming part of original EPC cost - double counting

22.6 We have carefully considered the entire grounds, pleadings, arguments etc. submitted by the Review Petitioner to contest these issues in this Review Petition and note that these issues were duly considered by this Tribunal in detail in the impugned order dated 15.05.2015. The Review Petitioner has not brought to light any new facts or pointed out error apparent in the decision of the Tribunal to strengthen its pleadings in support of its intended review of the judgment. **Hence, we are of the considered opinion that review is not admissible as prevailing law does not permit fresh adjudication under the garb of a review petition. Hence, these issues answered against the Review Petitioner.**

23 Therefore, we allow the Review Petition No. 19 of 2015 in Appeal No.108, 122, 119 of 2014 & 18 of 2013 partly to the extent stated above, so far it relates to issue No. 2 only.

Summary of our finding:-

24. In view of the above considerations and findings, the Review Petition No.22 of 2015 is partly allowed to the extent of that Issue Nos. 1 & 2, are decided in favour of the Review Petitioner and Issue No.3 (A,B & C) is decided against the Review Petitioner.

25. In view of the above considerations and findings, the Review Petition No.19 of 2015 is partly allowed to the extent of that Issue No. 2 is decided in favour of the Review Petitioner and Issue Nos.1,4,5,6 & 8 are decided against the Review Petitioner. The issue nos.3,7 & 9 are not pressed by the Review Petitioner.

ORDER

For the forgoing reasons, as stated supra, the Review Petition Nos. 19 of 2015 & 22 of 2015 in Appeal Nos.108, 122, 119 of 2014 & 18 of 2013 are allowed in part, as stated above in Paragraph Nos. 24 & 25 ***(Summary of findings).***

Accordingly, CERC is directed to re-determine the tariff of the project in line with our findings as referred above in para 24 & 25 within three months from the receipt of a copy of this Order.

In the meantime, PCKL/ESCOMs will continue to pay tariff as determined by CERC in order dated 24.03.2017 subject to adjustment on re-determination of tariff by CERC.

No order as to costs.

Pronounced in the Open Court on this **6th day of February, 2019.**

(S.D. Dubey) **Technical Member**	**(Justice N.K. Patil)** **Judicial Member**

REPORTABLE / ~~NON-REPORTABLE~~

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