Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 97 of 2012

Dated: 28th Febuary, 2013

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

In the matter of

M/s. Raj West Power Limited,
308-311, Geetanjaili Towers,
Ajmer Road,
Jaipur-302 006 **...Appellant(s)**

Versus

1. **Rajasthan Electricity Regulatory Commission,**
Vidyut Viniyamak
Near State Motor Garage
Sahakar Marg,
Jaipur-302 005.

2. **Jaipur Vidyut Vitran Nigam Limited,**
Vidyut Bhawan, Janpath,
Jaipur-302 055.

3. **Ajmer Vidyut Vitran Nigam Limited,**
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305 001.

4. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Estate,
Jodhpur-342003, Rajasthan

5. Mr. G.L. Sharma
3552, Rasta Govind Rajiyon Ka
Near Kabir Bhawan
Purani Basti, Jaipur – 302001

6. Mr. B.M. Sanadhya,
Director, Samta Power,
54/144, Madhyam Marg,
Mansarovar, Jaipur-302 020. **...Respondents**

Counsel for the Appellant	**:**	**Mr. M.G. Ramachandran,** **Mr. Anand K. Ganesan** **Ms. Swapna Seshdari**
Counsel for the Respondents	**:**	**Mr. R.K. Mehta** **Mr. Raheev Ranjan Pathak** **Mr. Antaryami Upadhyay** **Mr. David A** **Ms. Ritwika Nanda** **Mr. Virendra Lodha, Sr. Adv** **Mr. Rohit Shukla** **Mr. Mamta Tiwari** **Mr. P.N. Bhandari** **Mr. Devesh Bansal, Amicus Curiae** **Mr. G.L. Sharma** **Mr. B.M. Sanadhya (Rep.)** **Mr. D.P. Chirania (Rep.)** **Mr. R.C. Sharma (Rep.)**

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Raj West Power Limited challenging the order dated 27.04.2012 passed by the Rajasthan Electricity Regulatory Commission ("State Commission") directing that there would be two Commercial Operation Dates for Units 1 and 2 of the generating station of the Appellant.

2. The Appellant is a generating company. The State Commission is the Respondent no. 1. The distribution licensees are the Respondent nos. 2 to 4. The Respondent no.5 and 6 are consumers being the objectors before the State Commission.

3. The brief facts are as under:

3.1 The Appellant is in the process of establishing a lignite based generating station with eight units of 135 MW each in District Barmer of Rajasthan. At present four units of 135 MW each have been commissioned and are under commercial operation. The project envisages development of lignite mining-cum-thermal power project in the State of Rajasthan. The lignite mines at Kapurdi and Jalipa have been identified for development and supply of lignite for generation of power.

3.2 On 29.05.2006, the Government of Rajasthan entered into Implementation Agreement with the Appellant for construction and establishment of a lignite based generation station and development and mining of lignite from Kapurdi and Jalipa mines by the Appellant.

3.3 The State Commission by order dated 19.10.2006 approved in principle capital cost of the project. Consequently, the Appellant and the distribution

licensees executed a Power Purchase Agreement dated 26.10.2006 for generation and supply of electricity.

3.4 The lignite mines at Kapurdi and Jalipa have been envisaged to be developed by a Joint Venture Company comprising the Appellant and Rajasthan States Mines and Minerals Limited, a State owned mining company. A Joint Venture Company was incorporated for the above purpose. The Joint Venture Company, however, could not proceed to implement the mining project due to delay on the part of the Government of Rajasthan in acquiring the land and transfer and vest the land and mining lease with Rajasthan State Mines and Mineral Limited and thereafter transfer the same to the Joint Venture Company.

3.5 The Appellant proceeded with the construction of the generating station but the mining project could not commence due to the reasons mentioned above. In the meantime, as the State was facing acute shortage of

power, the Appellant offered to operate the generating station on alternate fuel (imported coal) till such time that the designated fuel (lignite) from Jalipa mines was made available. The distribution licensees gave consent for operating the generating stations on imported coal till such time lignite from the designated mines was made available.

3.6 On 17.03.2009, the Appellant filed a petition before the State Commission for approval of the provisional tariff of the first two units of 135 MW each. By order dated 13.11.2009, the State Commission determined the provisional tariff for the first two units of the generating station for supplying electricity to the distribution licensees with the alternate fuel (imported coal). Accordingly, the Appellant started generation of electricity from Unit no. 1 and 2 using imported coal. The Appellant declared commercial operation of the Unit 1 and 2 on 26.11.2009 and 04.10.2010 respectively after filing the Independent Engineer's Certificates for above

two Units and completing all formalities in accordance with the PPA.

3.7 The Appellant filed the Appeal no. 182 of 2010 before the Tribunal against the order of the State Commission dated 13.11.2009 on certain aspects of tariff determination. The Tribunal by order dated 15.12.2011 partly allowed the Appeal and remanded the matter to the State Commission for re-determination of tariff.

3.8 The generation from the Appellant's power plant continued on imported coal till 31.03.2011. The generating units remained shut for the period from 24.04.2011 to 10.10.2011 except for a few days to utilize the remaining stock of imported coal at the generating station. Subsequently, Unit 1 and 2 commenced operation based on the designated fuel, i.e. lignite. These units were again subjected to the process of testing on the designated fuel in October, 2011 and the Commercial Operation Date ('COD') of the said units on the

designated fuel i.e. lignite, was declared by the Appellant on 21.10.2011.

3.9 Based on the recommendations of their Directional Committee, the distribution licensees decided to consider the Commercial Operation Date ('COD') of Units 1 and 2 as on 21.10.2011, i.e. the COD on designated fuel. The Appellant also agreed on COD of Unit 1 and 2 as 21.10.2011 based on the designated fuel (lignite).

3.10 Thereafter, the Appellant filed an application before the State Commission for decision and disposal of the matters pending before the State Commission regarding transfer price of lignite, generation of electricity on alternate fuel and implementation of the judgment dated 15.12.2011 of the Tribunal in Appeal no. 182 of 2010, etc. The Appellant also sought approval of the Commercial Operation Date of Unit 1 and 2 on 21.10.2011, Unit 3 on 7.11.2011 and Unit 4 on 04.12.2011.

3.11 By the impugned order dated 27.04.2012, the State Commission decided that for Units 1 and 2 there would be two Commercial Operation Dates (CODs), one on alternate fuel and the other on the designated fuel. Aggrieved by the State Commission's order dated 27.04.2012, declaring two Commercial Operation Dates (CODs) for units 1 & 2, the Appellant has filed the present Appeal.

4. The Appellant has made the following submissions:

4.1 The Appellant never sought for withdrawal of its earlier stand of treating the CODs on 26.11.2009 for Unit no. 1 and 04.10.2010 for Unit no. 2 on imported coal as proper CODs. There was no prayer or otherwise any suggestion whatsoever from the Appellant before the State Commission that COD of Unit no. 1 and 2 already undertaken on 26.11.2009 and 04.10.2011 respectively is abandoned and fresh CODs are to be directed. The Appellant only sought for urgent interim orders so as to

enable the supply of electricity from Unit 1 and 2 on lignite. Since the objectors before the State Commission were raising objections to the COD on imported coal and sought for COD on lignite the State Commission did not decide the tariff till September, 2011 and consequenlty, the Appellant finally agreed to take steps for fresh CODs of Unit 1 and 2 on lignite. The Appellant after fresh testing and inspection undertook the COD of Unit 1 and 2 on lignite on 21.10.2011. The Directional Committee of the Respondent nos. 2 to 4 also approved and accepted the same COD.

4.2 The State Commission in its written submissions has selectively referred to certain portion of the order dated 13.11.2009 to conclude that in the said order, the State Commission has decided on two CODs for Unit 1 and 2. This is without any merit. There could only be one date of commencement of commercial operation. The terms of the PPA have to be interpreted and applied with reference to one date of COD. The State Commission ought to have

determined one Commercial Operation Date. The concept of having more than one COD is unknown to the laws of the electricity and industry practice.

4.3 The Tribunal may either direct that the COD shall be 21.10.2011 i.e. COD on lignite, and treat the entire generation till 21.10.2011 as infirm power or alternatively the Tribunal may direct that the CODs shall be 26.11.2009 and 04.10.2010 for Unit 1 and 2 respectively i.e. retaining the COD on imported coal.

5. The State Commission in its reply has made following submissions:

5.1 As per Tariff Regulations as well as the PPA between the parties, the onus of declaring COD is on the generator based on certain requirements of testing, certification, etc.

5.2 The Appellant after obtaining approval of the State Government to operate units 1 and 2 of the project on alternate fuel (imported coal), filed a petition in the Commission in the year 2009 for determination of tariff in which it was mentioned that the COD of units 1 and 2 on alternate fuel would be achieved. The distribution licensees also agreed for determination of tariff on imported coal. Consequently, the provisional tariff was determined by the State Commission vide order dated 13.11.2009 which was applicable from the COD of the units on alternate fuel.

5.3 CODs of units 1 and 2 was declared by the Appellant on 26.11.2009 and 04.10.2010 based on fulfillment of the condition and requirements of achieving COD. The Appellant also started billing and getting payment for the full tariff of firm power from the said dates of COD declared by them and accepted by the distribution licensees.

5.4 On 25.01.2011, the Appellant filed the petition for determination of tariff for FYs 2011-12 and 2012-13 which included determination of tariff for units 1 and 2 based on lignite. In this petition the calculation for the proposed tariff for these units were made by the Appellant on COD declared earlier on alternate fuel.

5.5 The distribution licensees in the meeting of Directional Committee held on 12.12.2011 recognized the dates of COD on lignite. However, no decision was taken in the meeting to cancel or withdraw the earlier COD on alternate fuel.

5.6 However, the Appellant in its application dated 9.02.2012 took the stand that COD achieved on lignite would be the COD of the Units 1 & 2. The Appellant proposed that the earlier sale prior to COD on lignite could be reckoned as sale of infirm power and recovery on account of charging provisional tariff be adjusted against the capital cost in consonance with relevant provision of the Regulations.

5.7 If the COD on lignite is only recognized treating power supplied on imported fuel as infirm power, the entire proceedings for tariff determination on imported coal would become infructuous and redundant, which is not permissible.

5.8 In the special circumstances of the case there have been two agreements for sale and purchase of electricity at tariff determined by the Commission on two different fuels and the plant did achieve COD on two different fuels. Therefore, in the exceptional circumstances of the case there can be two CODs.

6. The objectors before the State Commission filed detailed reply and made submissions before us. The objectors emphasized that the first COD on imported fuel could not be ignored.

7. On the above issues we heard Ld. Counsel for the parties, Mr. Devesh Bansal, and other objectors.

8. On the basis of the rival contentions of the parties, the question that would arises for our consideration is:

"Whether the State Commission was correct in deciding that there would be two Commercial Operation Dates for Units 1 and 2, one on alternate fuel (imported coal) and the other on the designated fuel (lignite)?

9. Let us first examine the Power Purchase Agreement dated 26.10.2006 entered into between the Appellant and the Distribution Licensees (R-2 to R-4).

a) The PPA envisages development of power plant with 8 units of 125 MW each based on lignite mines from Jalipa and Kapurdi mines.

b) The Commercial Operation Date is defined as under:

"Commercial Operation Date" or COD

i) the date on which the Unit is declared to be under Commercial Operations by the Seller as per Article 6.3:or

ii) the date falling after one hundred eighty (180) days from the Commissioning Date of the Unit whichever is earlier. Commercial Operation Date in relation to the Power Plant means the Commercial Operation Date of the Last Unit."

c) The 'Fuel' is defined as "Primary Fuel and Secondary Fuel". 'Primary fuel' means lignite mined from Jalipa and Kapurdi mines for generation of power.' 'Secondary fuel' means the Heavy Furnace Oil (HFO) and/or Light Diesel Oil (LDO)'.

d) According to clause 6.3.1 of the PPA, a Unit or the Power Plant, as the case may be, shall be commissioned on the day after the date when the distribution licensees receive a Final Test Certificate

of the Independent Engineer indicating satisfactory completion of the Commissioning Tests.

e) As per clause 6.4, the electricity generated prior to COD of each Unit shall be construed to be for the purpose of testing, commissioning, synchronization and start up. The generating company is entitled for reimbursement of fuel charges on the basis of actual fuel consumption for the generation of infirm power during this period.

f) According to clause 18.17 relating to modifications to PPA, the terms and conditions of the PPA are subject to modifications/amendments, as per the directions of the State Commission or based on any review/clarification sought by the parties and approved by the State Commission.

10. Thus, the PPA provides for declaration of COD of a Unit by the generating company after the Commissioning

Tests have been carried out in accordance with the provisions of the PPA or the date falling after 180 days from the Commissioning Date of the Unit. The primary fuel has been defined as lignite mined from the designated mines and there is no provision for operation of the Unit on alternate fuel. For infirm power generated prior to COD, the generating company is entitled to reimbursement of fuel cost incurred. There is also a clause for modification to the agreement between the parties, subject to the approval of the State Commission.

11. Let us now examine the petition filed by the Appellant before the State Commission in the year 2009 for determination of tariff on alternate fuel in view of delay in development of the lignite mines allocated to the project.

12. The reasons and justification extended by the Appellant for proposing generation on alternate fuel in the above petition were as under:

i) Notwithstanding the delay in mining, the first unit is likely to achieve, COD in July 2009 and synchronization COD of subsequent Units will follow at an interval of 1-3 months.

ii) The country and also the State of Rajasthan is facing power shortage. Under such power shortage scenario, any generation capacity created should not be kept idle and needs to be faithfully utilized.

iii) There is no likelihood of getting adequate indigenous coal/lignite for next 2-3 years. Therefore, the generating company proposes to use alternate fuel including imported coal. State Government has already conveyed approval for import of coal.

iv) Early commissioning of the Units will benefit the distribution licensees in terms of lower Interest During Construction ('IDC') and consequently lower capital cost.

13. The Appellant requested for determination of provisional tariff based on the capital cost actually incurred upto the date of the petition which will be charged from the COD of the Unit. `

14. On the basis of the data furnished by the Appellant, the State Commission by its order dated 13.11.2009 determined the provisional tariff applicable from the COD of Unit 1 and 2 on alternate fuel for FYs 2009-10 and 2010-11, till the plant is run on the designated fuel. However, the State Commission observed in the order dated 13.11.2009 that the stipulated requirement for achieving COD of power station as envisaged in the Regulation could not be met as the first two units were getting started on different fuel as an interim measure. The Commission also referred to the revised definition of commissioning issued by the Ministry of Power on 03.09.2009 in which it was stated that a thermal unit

may be considered as commissioned when the unit achieves the full load on the designated fuel.

15. Subsequently, the Appellant commenced operation of the plant on imported coal and declared the COD of units 1 and 2 on imported coal after following the testing procedure laid down in the PPA.

16. We find that the COD of units on imported coal and operation and sale of power generated by the units 1 and 2 on imported coal was carried out based on the mutual agreement between the parties after the State Government permitted operation of the plant on imported coal and after the arrangement was approved by the State Commission.

17. The order of the State Commission dated 13.11.2009 was challenged by the Appellant before the Tribunal in respect of some issues of tariff determination. The Tribunal by its judgment dated 15.12.2011 allowed the

Appeal partly and directed the State Commission to re-determine the tariff. According to the Respondents, the distribution licensees have filed an Appeal against the judgment of the Tribunal before the Hon'ble Supreme Court and the same is pending.

18. We find that the Tariff Regulations, 2009 of the State Commission define the Date of Commercial Operation in relation to a unit as the date declared by the generator after demonstrating the maximum continuous rating or installed capacity through a successful trial run for 72 hours after notice to the distribution licensee. The Regulations do not deal with the situation of the present case when COD is achieved on alternate fuel and also on designated fuel. There is also no provision for two Commercial Operation Dates for the same unit. The Tariff Regulations, 2009 of the Central Commission also has definition for COD similar to that provided in the State Commission's Regulations.

19. We have also noticed the recommendations of the Directional Committee of the distribution licensees wherein it has been stated that on the request of the Appellant, their officers have been deputed to monitor full load operation of the plant in accordance with the interim tariff order of the State Commission on the designated fuel of Unit 1 and 2 and recommended COD of Units 1 and 2 on designated fuel may be considered as 21.10.2001.

20. Subsequently, the Appellant filed an application before the State Commission with the request to revisit the tariff for the FY 2009-10 and 2010-11 in light of the directions given by the Tribunal in judgment dated 15.12.2011 and further in light of development that COD of Unit 1 and 2 based on use of designated fuel was achieved in October, 2011 and accordingly the period of operation of Unit 1 and 2 prior to COD on the designated fuel may be to be treated as generation and sale of electricity as infirm power. It was prayed that the revenue recovered by the

Appellant for the period prior to COD on designated fuel from Unit 1 and 2 may be adjusted towards the completed capital cost of the project. However, in the written submissions before the State Commission, the Appellant prayed that only one COD may be decided either on alternate fuel or on designated fuel.

21. Let us now examine the findings of the State Commission in the impugned order. The relevant paragraphs are reproduced as under:-

"19. In the light of the position discussed earlier, the contention of RWPL that issue of date of COD was not really gone into or adjudicated upon is untenable. The generator is required to declare COD and that was done and accepted by Discoms. Commission's order of 2009 clearly stipulated COD on alternate fuel as also on designated fuel. The determined tariff of firm power based on alternate fuel had gone upto APTEL on appeal filed by RWPL in respect of some decisions of the Commission and the matter is now in Supreme Court. The stand taken now by the RWPL in terms of power from alternate fuel being infirm power renders the entire proceedings mentioned above related with firm power as infructuous and redundant. When the 2009 order of the Commission made it abundantly clear that ultimate COD would have to be on lignite and still COD on alternate fuel was declared by RWPL , then why this late

realisation that there cannot be two CODs ? Suffice to say that COD declared earlier by the generator on alternate fuel cannot be withdrawn.

20. *The project in the exceptional situation has run a very long period on alternate fuel and there was consent of both the generator and licensees to purchase power on tariff determined by the Commission under Sec. 62 of the Act. The tariff under Sec. 62 is applicable only after COD is achieved and both parties obviously agreed for commercial arrangement of sale and purchase of firm power on alternate fuel as an interim arrangement. The long term arrangement through PPA was based on lignite as the project was conceived on that fuel and eventually operations were switched over from alternate fuel to that fuel in respect of unit 1 and unit 2.*

21. *In the exceptional circumstance of the case there had been two agreements explicit and implied for sale and purchase of electricity at tariff determined by the Commission on two different fuels and plant did achieve the operational parameters required for CODon both the fuels. Two CODs have indeed occurred in the matter. In any case, the two CODs i.e. one on alternate fuel and the other on designated fuel has already been indicated by the Commission in its order dated 13.11.09, which has become final and absolute as far as this issue is concerned. The contention of RWPL that there cannot be more than one COD under the scheme of PPA is of no relevance, as no one could have visualized the exceptional circumstances which have emerged in the matter."*

"23. In consideration of the position discussed above, the Commission has come to the conclusion that position of COD indicated by RWPL in the application dated

09.02.12 is incorrect and, is in contravention of the position clearly indicated in the order dated 13.11.2009 of the Commission. Not only this, RWPL is resiling from and negating its own submissions and assertions made before the Commission in various petitions mentioned in para 10. RWPL is accordingly directed to act in consonance with the order dated13.11.2009, which already settles the position of COD. It is also to clarify that the date of COD on lignite would have to be in accordance with what is envisaged in PPA."

22. Thus, the State Commission has decided that two CODs one on alternate fuel and other on designated fuel have taken place and that the contention of the Appellant that there can not be more than one COD under the scheme of the PPA is of no relevance. The Appellant has been directed to act in consonance with the order dated 13.11.2009 which has already settled the position of COD. The State Commission has thus recognized both the CODs of the Unit 1 and 2 on imported coal and lignite.

23. Let us now examine the findings of the State Commission in order dated 13.11.2009. The relevant extracts of the order are as under:-

"4.3 First Year's Tariff:

4.3.1 The project has been envisaged to use lignite as a fuel. However, due to the constraint in getting land for mining, the project developer has taken recourse to interim arrangement of running the plant on imported coal after seeking Government's approval. Considering the fact that the first two units are getting started on a different fuel as an interim measure, the stipulated requirement for achieving CoD of the power station as envisaged in regulation would not get met. It may be mentioned that even in the revised definition of CoD issued by Ministry of Power, GoI on 3rd September, 2009, the requirement for CoD are as under:

"(a) Thermal Units (coal, Gas, Lignite)

A thermal unit may be considered as commissioned when the construction and commissioning of all plants and equipments required for operation of the unit at rated capacity are complete and the unit achieves full rated load on the designated fuel."

Considering the above position and keeping in view the fact that the variable cost of imported coal is coming out to be much higher than the rate approved by the Commission for lignite based power plant while according in-principle approval in year 2006; it would be unreasonable and inappropriate to apply the first year tariff indicated in PPA at this juncture of

working out provisional tariff based on different fuel. A decision on this would need to be taken after CoD based on lignite fuel is achieved."

"5.1.4 Based on the information submitted by RWPL, the Commission has considered the COD for Unit 1 and Unit 2 as November 30, 2009 and January 31, 2010 respectively. Accordingly the Commission has considered the operation of Unit 1 for 4 months and Unit 2 for 2 months in FY 2009-10."

"5.6.4 The provisional tariff approved under this Order shall be applicable from the CoD of first and second units on alternate fuel for FY 2009-10 and for whole of the financial year FY 2010-11 or till plant is run on designated fuel (lignite), whichever is earlier."

24. In the above order dated 13.11.2009 it has been stated that even though the stipulated requirement of COD as specified in the Tariff Regulations and the Ministry of Power's letter dated 03.09.2009 would not be met with COD on alternate fuel the Appellant had to take recourse to the interim arrangement due to constraints in getting land for mining and after taking the approval of the State Government. However, in view of high variable cost on imported coal, it would be inappropriate and unreasonable to apply first year tariff indicated in the

PPA at the time of determining the provisional tariff on imported coal and a decision on this would be taken after COD on designated fuel is achieved. The State Commission also considered the COD for unit 1 and 2 on alternate fuel and determined the tariff applicable to these units after the COD on alternate fuel for FY 2009-10 and 2010-11 or till the plant is run on the designated fuel, whichever is earlier.

25. We do not find a clear finding in the order dated 13.11.2009 of the State Commission that there would be two CODs, one on imported coal and the other on lignite. The PPA entered into between the Appellant and the distribution licensee, the Tariff Regulations 2009 and the industry practice also do not envisage two CODs. The Tariff Regulations also do not deal with a situation of two CODs for same unit. Normally COD of coal/lignite based thermal power unit is achieved on the designated fuel only as the boiler is designed for getting the rated performance on the designated fuel. However, in this case

the plant could achieve COD on imported fuel as well as lignite due to installation of boilers of CFBC technology in the plant in which combustion of fuel with wide variation in characteristics to give the rated performance is possible. In the peculiar circumstances of the case, the units 1 and 2 of the power plant had to undergo commissioning tests required for COD twice, first on imported coal and later on lignite and the CODs on both the fuels were achieved successfully due to CFBC boilers.

26. The stipulated requirement of COD in the Tariff Regulations is demonstration of maximum continuous rating or installed capacity through successful trial run for 72 hours after notice to the distribution licensee. Admittedly, this requirement was met when the first COD was declared on imported coal by the Appellant. The State Commission had also allowed charging of provisional tariff computed on the basis of the Regulations from the date of COD on imported coal by the order dated 13.11.2009.

27. We have also examined the letter dated 3.09.2009 of the Ministry of Power, Government of India regarding commissioning of generating units relied upon in the order dated 13.11.2009. The office memorandum dated 3.09.2009 of the Ministry of Power, which was furnished by the Ld. Counsel of the State Commission, is a circular sent to all State Governments regarding definition of commissioning of power projects for the limited purpose of reporting capacity addition targets for each year, monitoring and reporting of commissioning of the units to the Ministry of Power. This office memorandum can not be read to amend the provisions of PPA and the Tariff Regulations regarding COD of unit.

28. On complete reading of the order dated 13.11.2009, we feel that the main concern at the time of passing order dated 13.11.2009 for provisional tariff on imported coal was achieving of the performance test on the designated fuel. One of the objectors also raised this issue as recorded in para 2.10.2 of the order dated 13.11.2009.

"2.10.2 They further submitted that the performance test should be carried out so as to check the specifications of the power plant. They further opined that as the power plant is lignite based, so performance test should also be carried out by using lignite as the fuel and only after the successful completion of performance tests the plant will be said to have been commissioned as per the definition."

29. In reply to the above objection, the Appellant submitted that the project is using CFBC boiler and the operational parameters would remain within permissible variations from design values irrespective of fuel mix and performance test can be done even with alternate fuel.

30. The State Commission also concurred with the above views of the objector as evident from the following recording in the order dated 13.11.2009.

"4.10.2 The Commission agrees with the objectors that the COD of the plant should occur after the guaranteed performance parameters are established with prudent engineering practice using lignite as the primary fuel."

31. Admittedly, the testing of the units 1 & 2 have taken place on lignite to the satisfaction of the distribution licensees and COD on lignite was declared on 21.10.2011. We feel that after having carried out the performance test on the designated fuel successfully there is no relevance of having two CODs.

32. There could have been of some relevance of the two CODs for tariff determination if the rated performance such as installed capacity had not been achieved. However, in the present case when the performance test had successfully been carried on the designated fuel, we feel that there is no need to consider two CODs.

33. When we raised the query regarding impact of two CODs on the tariff and the broad methodology for determination of various components of tariff with two CODs of Units 1 and 2 from the learned counsel for the State Commission, we could not get any satisfactory reply.

34. Keeping in view the provisions of PPA, the Tariff Regulations, industry practice and circumstances of the case, there has to be only one COD for Unit 1 and 2, i.e. either COD on the alternate fuel or COD on the designated fuel. Keeping two CODs for the same unit will not serve any purpose and will unnecessarily create complications in determination of tariff and may result in avoidable disputes between the parties.

35. Let us now examine the pros and cons of having COD either on the imported coal or on lignite on tariff determination.

36. If the COD of Unit 1 and 2 is taken as COD on the alternate fuel (imported coal), the Appellant will be entitled to payment of fixed charges determined on the basis of date of the COD on alternate fuel and the variable charges based on the price of the imported coal for the period the units operated on imported fuel. After

the change over from imported coal to lignite, the date from which such changeover takes place the variable charges payable to the Appellant will change based on the price of lignite as decided by the State Commission. There may also be some variation in the fixed charges on change over to lignite e.g. change in working capital due to cost of fuel and limestone. Thus, there will be revision in tariff on change over of fuel from imported coal to lignite.

37 If the second COD, i.e. COD on the designated fuel, is taken as the COD for tariff determination, the energy supplied by the Appellant from the first COD on alternate fuel till the second COD on designated fuel has to be treated as infirm energy and the Appellant will be entitled to only recovery of actual fuel cost incurred for the infirm energy generation. The Appellant will be entitled to fixed charges and variable charges as decided by the State Commission only from the second COD on the designated fuel. However, the Appellant may be entitled to Interest

During Construction (IDC) for the period from the first the COD to the second COD which will be added to the capital cost resulting in higher fixed charges payable for the entire term of the PPA.

38. The Appellant has prayed for declaring only one COD, either the COD on the alternate fuel or on the designated fuel. In our view accepting the first COD of Unit 1 and 2 on imported coal will be correct and in the interest of the consumers for the following reasons.

a) The Appellant has declared the COD of Units 1 and 2 on 26.11.2009 and 04.10.2010 respectively and the same can be considered as COD in terms of the definition of COD in the PPA and the Tariff Regulations. The letter dated 3/2/2007/P&P dated 3.9.2009 from the Ministry of Power, Government of India relied upon in order dated 13.11.2009 of the State Commission is for the purpose of declaration of the capacity addition in the country, monitoring and

the capacity addition targets and can not be used for defining the Commercial Operation Date for the purpose of tariff determination. For tariff determination the provisions of the PPA and the Tariff Regulations would only apply.

b) The State Commission decided the provisional tariff comprising the fixed charges and the variable charges to be recovered by the Appellant from the COD of Unit 1 and 2 on alternate fuel and the Appellant billed and recovered the tariff for supply of power during the period when Unit 1 and 2 operated on alternate fuel (imported coal). This order dated 13.11.2009 was challenged before the Tribunal by the Appellant in Appeal no. 182 of 2010. The Tribunal by judgment dated 15.12.2011 partly allowed the Appeal and directed the State Commission to re-determine the tariff and the State Commission is considering the same in a petition filed by the Appellant. The distribution licensees have filed an Appeal against this

judgment of the Tribunal dated 15.12.2011 before the Hon'ble Supreme Court and the same is pending. The State Commission having determined the tariff on the first COD that has also undergone litigation in the Appellate Court, the tariff can not be readjusted for the period from the first COD to the second COD by the State Commission so as to consider the energy generated on the imported fuel as infirm energy. The Appellant has also acted on the tariff determined by the State Commission on the first COD on imported coal and recovered the amount on this tariff from the distribution licensees for the period of operation on imported coal. It is now too late in the day to reverse the process and derecognize the first COD.

c) If the second COD on lignite is considered for tariff purpose, it will result in increase in capital cost due to additional IDC for the period from the first COD to the second COD resulting in higher capital cost and higher fixed charge component of tariff for the entire term of

PPA which may not be in the overall interest of the consumers. One of the reasons extended by the Appellant while obtaining approval of tariff on alternate fuel and accepted by Commission while determining the tariff on alternate fuel was reduction in IDC. Moreover, the first COD on imported coal is acceptable to the Appellant. The objectors also wanted that the first COD on imported coal should not be ignored.

39. In view of above it would be prudent that the COD of Unit 1 and 2 is considered on the dates they were declared commercial for the first time on imported coal i.e. 26.11.2009 and 04.10.2010 respectively for the purpose of determination of tariff. Accordingly directed.

40. The Appellant has also contended that for the period from 24.04.2011 to 21.10.2011 there was no generation on Units 1 and 2 as the State Commission had not

determined the tariff from 01.04.2011 onwards despite specific requests from the Appellant from 25.01.2011 onwards. Therefore, in case only the first COD on imported coal is considered then they should be entitled to deemed generation and the full fixed charges of the units should be payable to them even for the period when there was no generation, allegedly due to non-determination of tariff by the State Commission. Ld. counsel for the State Commission has rightly objected that this issue could not be decided in the present Appeal as the State Commission had not gone into this issue in the impugned order and the only issue decided by the State Commission was about the COD of the units.

41. We find that the above issue of deemed generation for the period April to October, 2011 has not been considered and no findings have been rendered by the State Commission in the impugned order. Therefore, we are not inclined to consider the above issue regarding deemed generation raised by the Appellant. However, the

Appellant is at liberty to raise the above issue before the State Commission and when it is raised the State Commission will consider and decide the issue as per law.

42. Summary of our findings:

a) **There has to be only one COD for Units 1 & 2 considering the provisions of the PPA, the Tariff Regulations, industry practice and the circumstances of the present case. Keeping two CODs for the same unit will not serve any purpose and unnecessarily create complications in determination of tariff and may result in avoidable disputes between the parties.**

b) **Considering the pros and cons of adopting either, the first COD on the alternate fuel (imported coal) and the second COD on the designated fuel (lignite) and for the reasons, given in the judgment above, we have come to the conclusion that adopting the first COD on imported fuel for**

units 1 & 2 will be more prudent. Accordingly, directed.

c) **We are not inclined to give any finding on the issue of deemed generation for the period 1.4.2011 to 21.10.2011 raised by the Appellant as the same has not been dealt by the State Commission in the impugned order. The Appellant is at liberty to raise the issue before the State Commission and the State Commission shall consider and decide the issue according to law.**

43. The Appeal is allowed to the extent of deciding COD of Units 1 & 2. No order as to costs.

44. Pronounced in the open court on this **28th *day of February, 2013.***

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~

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