

Thiru R.Yesod Vardhan representing the Petitioner and the learned Senior Counsel
Thiru N.C.Ramesh representing the Respondent passes the following

ORDER

1. **Prayer of the Petitioner in D.R.P. No.8 of 2011:-**

The prayer of the Petitioner in D.R.P. No. 8 of 2011 is to appoint an Arbitrator to adjudicate upon the dispute between the Petitioner and the Respondent arising out of the issuance of the notice dated 16-05-2008 for recovery from the Petitioner a sum of Rs.7,17,96,524/- from the payments made to the Petitioner for the power purchased from Petitioner's plant during the period from 14-05-2005 to 14-07-2005.

The prayer as amended in the I.A. No. 1 of 2011 in the said D.R.P. No. 8 of 2011 is to adjudicate the dispute between the Petitioner and the Respondent arising out of the issuance of the notice dated 16-05-2008 for recovery from the Petitioner a sum of Rs.7,17,96,524/- from the payments made to the Petitioner for the power purchased from Petitioner's plant during the period from 14-05-2005 to 14-07-2005 or in the alternative appoint an Arbitrator to adjudicate upon the said dispute if the Hon'ble Commission deems fit.

2. **Change of the name of the Petitioner:-**

On 13-07-2011, the Petitioner filed an I.A. praying to permit amendment of the name of the Petitioner from M/s.Aban Power Company to Lanco Tanjore Power Company Limited and the Counsel for Respondent had no objection to change the name as prayed for. Accordingly, the I.A. was allowed and the Petitioner is now Lanco Tanjore Power Company Limited

3. Facts of the case:-

3.1. The Petitioner Company was selected by the Government of Tamil Nadu during September 1996 through the process of international competitive bidding for setting up small Capacity Multi-fuel Power Projects for generating 113.2 MW electricity in the State of Tamil Nadu. The PPA was entered on 20-05-1998 with Respondent for sale of electricity to the Board.

3.2. The original fuel naphtha was changed to the natural gas available in Tanjore district from Kurtalam gas field of ONGC Limited and marketed by GAIL (India) Limited. The Petitioner was supplied power for testing and commissioning from 31-12-2004. The Petitioner Company in letter dated 06-01-2005 requested the Respondent for synchronization of GTG (Gas Turbine Generator) with TNEB grid on 12-01-2005 to commence the open cycle mode. The Respondent gave permission and allowed synchronization only on 18-02-2005. On 23-03-2005 the Petitioner informed the Respondent that it was ready to generate power on simple cycle mode. The Respondent was also informed that it could draw power and pay tariff rate which includes both fixed as well as variable charges as applicable under the PPA. On 31-03-2005 the Respondent was further informed that the plant had operated at a base load of 65 MW and it was ready for generating power on continuous basis in simple cycle mode. The Respondent was requested to confirm taking power from the plant and pay the tariff at Rs.2.30 per unit as per Schedule 29 of the PPA which provides for payment of tariff under Open Cycle operation of the plant. The Respondent did not show any interest in accepting the simple cycle operation. In these discussions, "Open Cycle" and "Simple Cycle" are used which are synonymous.

3.3. In May 2005, the Respondent needed power to meet the shortage in State due to peak summer demand for electricity. The Respondent decided to request the Petitioner to supply the power generated at its plant at Rs.1.86 per unit and accordingly the Respondent in letter dated 14-05-2005 informed that the Petitioner's request for acceptance of 60 MW continuous power in open cycle mode would be considered as a special case and on the condition of the Petitioner agreeing to accept Rs.1.86 per unit for the continuous generation of 60 MW power from the plant into the grid. The Petitioner agreed for the above adhoc rate of Rs.1.86 per unit instead of claiming the open cycle tariff or Rs.2.30 per unit as per the Schedule 29 of the PPA.

3.4. For the supply of electricity made by the Petitioner from 14-05-2005 to 14-07-2005, the Respondent made payments as per its letter dated 14-05-2005. The Respondent in letter No.CE/PPP/EE/IPP/AEE4/F.Aban/D.408 dated 26-07-2007 sent to the Petitioner called upon it to show cause as to why a sum of Rs.7.18 crores paid towards the fixed charges for purchase of 76.47 million units of power during 14-05-2005 to 14-07-2005 in addition to the variable charges, should not be recovered. The Petitioner sent a reply in letter dated 09-08-2007 to the Respondent setting out the points for consideration against the demand for refund of Rs.7.18 crores. There were several rounds of discussions between the officials of the Petitioner and the officials of the Respondent Board. The Petitioner requested the Respondent to drop the demand for the recovery of the amount. The Member (Generation), Tamil Nadu Electricity Board issued a notice dated 16-05-2008 calling upon the Petitioner to refund the amount of Rs.7,17,96,524/- within a period of 7 days failing which the Petitioner was threatened that action to recover the said

amount from the ensuing bills raised by the Respondent for the power supplied to the Petitioner. Aggrieved by the demand notice threatening action for recovery of the amount of Rs.7,17,96,524/-, the Petitioner filed W.P. No.12799 of 2008 before the Hon'ble High Court of Madras. By order dated 10-01-2011, the Hon'ble High Court of Madras directed the Petitioner to approach the Commission within one month for appointment of an Arbitrator to adjudicate upon the dispute arising pursuant to the issuance of the demand notice. Hence the Petitioner has filed the above petition before the Commission.

4. Contentions of the Petitioner:-

(a) The recovery based on a unilateral decision of the Board in respect of its own cause will be opposed to the rule *nemo judex in causa sua* which is one of the fundamental canons of natural justice. The proper recourse available to the Respondents is to have its claim adjudicated in the manner known to law before initiating any recovery.

(b) As per terms of section 15.4 (c) of the PPA, notwithstanding any dispute being referred to arbitration, either party shall not withhold, for any reason whatsoever including the pendency of arbitration proceedings any payment obligation admitted by it. The ensuing bills for the power being supplied by the Petitioner to the Respondent, being admitted payment obligation, the Respondent is not entitled to adjust / recover from the ensuing bills, the amount which is subject matter of the present petition unless, adjudicated by the Arbitrator to be nominated by the Commission.

(c) The supply of electricity made by the Petitioner during 14-05-2005 to 14-07-2005 was on the basis of specific written communication and dispatch instructions to meet the demands of the Respondent. The rate of Rs.1.86 per unit was fixed by the Respondent after being satisfied about the Petitioner's ability to supply 60 MW electricity continuously. It was a rate determined by the Respondent as a special arrangement. Since the supply was made against specific written communication it cannot be treated as infirm power as per definition of Infirm Power in section 1 of PPA.

(d) The Petitioner would not have generated the power during that period had it not been for the specific instructions of the Respondent as the GTG was already synchronized successfully and there was no need for operating on continuous basis further until commencement of commercial operation incurring fixed and variable expenditure on the generation and supply of power during the relevant period.

(e) Had the Petitioner not supplied the 60 MW power to the Respondent during the period from 14-05-2005 to 14-07-2005 at the rate of Rs.1.86 per unit, the Respondent would have had to purchase the said quantity of power from other sources at a much higher rate to meet the peak summer power demand.

(f) The amount which the Respondent wants the Petitioner to refund was paid to the Petitioner based on the rate fixed by the Respondent unilaterally and consciously and the Petitioner had no role to play in that. It is therefore not open to the Respondent to go back on its own decision and cause loss to the Petitioner by

recovering the amounts. It is submitted that such a claim by the Respondent is contrary to the agreement between the parties.

(g) The Respondent is not entitled to ignore the fact that the rate of 1.86 per unit was unilaterally and consciously fixed by it and the amount of which refund is now sought was paid to the Petitioner on the basis of such fixation. The Respondent cannot now go back on its own wisdom of fixing the rate payable to the Petitioner. The demand notice in any event amounts to determination of the issue. Such a determination is contrary to the basic canon of law as it amounts to the Respondent being a judge of its own cause. The Respondent cannot be permitted to recover the amount from the Petitioner without reference to the procedure provided under the PPA.

(h) The Respondent has in turn sold the power purchased from the Petitioner during the period from 14-05-2005 to 14-07-2005 to the end users and recovered much more than the amount paid to the Petitioner. The Respondent has made profit out of the electricity supplied by the Petitioner during the period from 14-05-2005 to 14-07-2005. Having used the power supplied by the Petitioner as per the terms stipulated, the Respondent is not justified in now asserting that the Petitioner was entitled only to variable charges.

5. Contentions of the Respondent in their Counter:-

(a) To determine the tariff for sale of electricity by generating companies to Electricity Board, Ministry of Power in its Gazette Notification dated 30-03-1992 notified the relevant factors. The Power Purchase Agreement with M/s.Aban Power

Company Limited was signed by the Respondent Corporation based on the norms specified in the guidelines. As per the guidelines, the tariff payable for the IPPs are in two part system, i.e. fixed and variable charges.

(b) As per para 1.3 of the above said Notification, in respect of infirm power, that is sale of electricity prior to commercial operation of the unit any revenue from sale of power prior to commercial operation of the unit (other than the fuel cost) should be taken as reduction in capital expenditure and not as revenue.

(c) As per Article 1.1. (Definitions) of the Power Purchase Agreement, “Infirm Power” means the electricity produced by the project and delivered to the Board prior to the date of commercial operation at the supply point, not on any request or despatch instructions of the Board in respect of which the Board shall pay the company, variable charges.

(d) Article 5.3 of the PPA states that “The Board shall purchase and pay for all infirm power produced by the company and delivered to the Board prior to the date of commercial operation. The Board shall pay to the company, variable charges calculated as per the formula pursuant to Article 7.3”. Article 7.3 states that the variable charge is price of fuel consumption calculated per Kwhr supplied at the supply point, based on the tariff heat rate set forth in Article 1 of this agreement and determined as set forth in Schedule 34”.

(e) As per Article 1.1 (Definitions) of the PPA “Tariff Heat Rate” shall be based on the lower calorific value of the fuel determined in accordance with the fuel test

pursuant to Article 7.3 (b) and shall be equal to lower of actual tariff heat of the project and 1980.0 Kcal / Kwhr.

(f) According to the said provisions of the Power Purchase Agreement, M/s. Aban Power Company Limited is eligible for variable charges only for the power supplied before commercial operation at the tariff heat rate of 1936.5 Kcal/Kwhr or actual whichever is lower.

(g) At the time of March 2005, the power project of the Petitioner Company had not entered into commercial operation. The commitment of the Respondent Corporation to purchase all the power generated by the power project by paying fixed charges starts only when the power project entered into commercial operation. Till then, the Board has to purchase the power generated by the Petitioner Company and pay variable charges only.

(h) After repeated request of the Petitioner Company, Board had purchased 60 MW power from the Petitioner Company by paying fixed charges in addition to the eligible variable charges. This works to approximately Rs.1.86 per unit, i.e. eligible variable charges at Rs.0.82 per unit and the proportionate fixed charges at Rs.1.04 per unit.

(i) The Respondent Corporation had paid a sum of Rs.7,17,96,254/- to the Petitioner Company towards fixed charges for the power supplied from 14-05-2005 to 14-07-2005. The Petitioner Company has supplied 76.47 million units during this period.

(j) While reviewing the records of TNEB, based on the objections of the learned Accountant General (Audit II – Tamil Nadu) it was informed that payment of fixed charges to the extent of Rs.7.18 crore for the infirm power supplied by the M/s. Aban Power Company Limited was not in accordance with the notifications and provisions of the Power Purchase Agreement, particularly;

- (1) Para 1.3 of the Government of India Notification dated 03-03-1992 (S.O.251.6)
- (2) Regulation 20 of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for determination of Tariff) Regulations, 2005.

(k) The learned Accountant General is an independent authority constituted under the Constitution of India exercising sovereign supervisory / advisory functions. The said authority is a statutory body in place, closely monitoring all revenue / accounts of the State Government and its undertakings and the Respondent is duly bounded to obey the directions of such authorities pointing out the error committed in allowing the fixed charges before commercial operation.

(l) According to section 20 (3) (Terms and Conditions for Determination of Tariff) Regulations, 2005, Notification No. TNERC/TR/5/2 dated 24-06-2005 of this Hon'ble Commission [(under the heading Revenue/charges during trial stage (prior to COD)], "the cost of infirm power shall be the lowest fuel cost applicable to the existing similar type of station". According to section (2), [Under the heading Revenue / charges during trial stage (prior to COD)], "the revenue earned from sale of power (infirm) shall be treated as reduction in capital cost".

(m) As per the above provisions the generating companies are eligible for fixed charges only after conducting capacity test satisfactorily and entering into commercial operation. Any revenue earned before commercial operation should be adjusted towards capital cost of the project.

6. Reply of the Petitioner to the Counter filed by the Respondent:-

(a) The contention of the Respondent that the Petitioner is entitled to only the variable charges for the power supplied during the period from 14-05-2005 to 14-07-2005 is against the Respondent's own decision to treat the purchase of power from the Petitioner during the said period by paying at the rate of Rs.1.86 per unit. The Respondent had made the payments to the Petitioner at the rate of Rs.1.86 per unit after being satisfied about the supply made by the Petitioner during the relevant period.

(b) Article 1.1 of the Power Purchase Agreement clearly specifies that any power produced and supplied at the specific request and dispatch instructions prior to the date of commercial operations of the station cannot be treated as infirm power. In the present case, since the Respondent has made a specific request and issued dispatch instructions the power supplied during the relevant period cannot be infirm power. This fact has been confirmed by the Respondent themselves in its reply to office of Accountant General.

(c) Having consciously and unilaterally taken a decision to procure power from the Petitioner during the relevant period at the rate of Rs.1.86 MW, it is therefore not open to the Respondent to now contend that the power supplied by the Petitioner

was infirm power and that the Petitioner is only entitled for variable charges. It is relevant to point out that in the letter dated 02-09-2006 addressed by the Member (Accounts), TNEB to the Deputy Secretary, Energy Department, it has been categorically stated that the Petitioner had supplied firm power continuously on schedule.

(d) The Respondent having offered to purchase power from the Petitioner during 14-05-2005 to 14-07-2005 at Rs.1.86 per unit are not entitled now to contend that decision to demand a sum of Rs.7,17,96,254/- is on the basis that the power supplied by the Petitioner during the relevant period was infirm power. The Respondent had taken a conscious decision to purchase power from the Petitioner to meet the demand of the summer season and also in the letter dated 02-09-2006 addressed by the Member (Accounts), Tamil Nadu Electricity Board, it was conveyed that the company was able to generate continuously 60 MW firm power on schedule.

(e) In the Respondent's letter dated 07-07-2006 addressed to Office of the Accountant General and also in the letter dated 02-09-2006 addressed to the Deputy Secretary, Energy Department on the same subject it was inter-alia conveyed that

- (i) the company was able to generate continuously 60 MW firm power on schedule;
- (ii) The company accepted to supply 60 MW power without claiming deemed generation;
- (iii) Tamil Nadu Electricity Board was in need of cheaper power to meet the growing summer demand;

- (iv) The company was able to generate continuously 60 MW firm power on schedule;
- (v) The rate was worked out and arrived at Rs.1.86 per unit against their claim of Rs.2.40 per unit by proportionately reducing the open cycle fixed charges components in the PPA which is cheaper than other sources;
- (vi) The Board had purchased power from other IPPs at highest cost of Rs.6.08 per unit and at the lowest cost of Rs.3.24 per unit. The price paid to ABAN was lower than the lowest of the other sources. Instead of buying power from the IPPs at the higher rate (Rs.3.24 per unit), the Board has purchased power from M/s.Aban Power Company Limited at lowest rate of Rs.1.86 per unit thereby saving approximately Rs.10.5 crores.
- (vii) The fixed charges were paid for giving firm continuous power, which is not obligatory on the part of the Petitioner as per PPA.
- (viii) It was also clarified that company has continuously supplied 76.47 MU which they would not have generated in case if their request was not considered.

In the above said letters, the Respondent justified their action in paying the amount and now cannot retreat from the stand. The Respondent is also estopped from raising the contentions as they did in the Counter Affidavit.

(f) It was on account of the Respondent's offer that the Petitioner had incurred expenditure in generating firm power which was supplied to the Respondent. Had the Respondent offered to pay only the variable charges, the Petitioner would not have supplied any firm and continuous power to the Respondent during the relevant period. Having made the Petitioner to incur additional expenditure on generating

firm power by promising to pay at the rate of Rs.1.86, the Respondent is estopped from taking a contrary stand. In fact as per the Power Purchase Agreement, the Petitioner was entitled to Rs.2.30 per unit.

(g) The notification dated 30-03-1992 provides for different tariff guidelines for both generating companies determined based on capital cost and also for the companies who have been awarded projects under competitive bidding. However, paragraph 1.3 of the said notification on which the Respondent has placed reliance is irrelevant and not applicable to the Petitioner. Paragraph 1.3 of the said notification is only applicable for determination of tariff for generating companies whose tariff has not been fixed by competitive bidding.

(h) At paragraphs 8, 9, 10 and 11 of the counter affidavit, the Respondent has extracted from Article 1.1. and Article 5.3 of the PPA. The provision 1.1 of PPA states that any power supplied under specific request and dispatch instructions cannot be considered as infirm power. The Respondent has given specific request vide letter No.CE/IPP/AEE4/F.Aban/D.182/05, dated 14-05-2005 and dispatch instructions for supply of power. Having done so Respondent cannot contradict his own actions to make the power supplied as infirm power by interpreting wrongly and recover the amount unjustifiably. It is relevant to point out that the electricity supplied to the Respondent during the relevant period cannot be treated as infirm power in terms of the definition. The said letter expressly states that 60 MW continuous power in open cycle mode before declaration of commercial operations considered as special case outside the PPA obligation to supply power after COD. Hence, Article 5.3 which relates to the purchase of infirm power is not applicable to

the power supplied during the relevant period. The contention of the Respondent in paragraph 11 of the counter affidavit is therefore incorrect and without basis. The heat rate as stated by the Petitioner is no consequence in the given circumstances.

(i) As regards the reliance on regulation 20 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, it is submitted that the said regulations has no applicability to the present case. The said regulations came into effect on the publication of the gazette notification dated 03-08-2005, whereas the period in dispute is for the period from 14th May 2005 to 14th July 2005, which is prior to the coming into force of the said Regulations.

(j) The guidelines under notification dated 30-03-1992 relevant for competitive bidding process does not envisage reduction of the fixed charges paid from capital expenditure nor there is any such provision in PPA to make such recovery.

(k) The provisions extracted and mentioned by the Respondent in paragraphs 20 and 21 of the counter affidavit are not applicable to the present case.

(l) The PPA which was drafted under the guidelines of Central Government for the competitive bidding process power projects do not provide for deduction of such amount from capital cost nor provide for refund of such amount. The Respondent is not entitled to direct the Petitioner to refund the amount or to direct the Petitioner to reduce the tariff in proportion to the said amount. The notification dated 30-03-1992 with guidelines for competitive bidding process projects does not provide for such deduction.

7. Contentions of the Respondent in their Rejoinder to the reply filed by the Petitioner:-

(a) The main contention raised by the Petitioner both in the main petition as well as in the reply to the counter filed by this Respondent is that the power that was purchased by the Respondent was based on an offer made by the Petitioner herein which was accepted by the Respondent herein, and therefore the Respondent cannot turn around and come forward with the statement that the Respondent has wrongly paid both the variable charges and also fixed charges. This contention cannot be countenanced in law because the purchase price paid by the Respondent herein runs contra to the power purchase agreement wherein it is clear that both the variable charges and fixed charges are payable only after achieving the commercial operation date by the Petitioner herein.

(b) If there should be any deviation from the terms and conditions of the PPA, there should be an amendment to the PPA and without there being any amendment to the PPA, any payment made towards fixed charges is not payable and this clearly shows that the payment towards proportionate fixed charges had been paid by mistake.

8. Issues for consideration:-

The following are the issues involved in this dispute which require consideration of the Commission, viz.,

- (i) Whether the Commission has to nominate an arbitrator for adjudicating the dispute.

- (ii) Whether the power generated and sold to the TNEB during the period from 14-5-2005 to 14-7-2005 in simple cycle operation should be treated as infirm power or firm power, in accordance with the notifications dated 30-3-1992 issued by the Government of India and the PPA entered into between the parties.
- (iii) Whether the Respondent Board is estopped from pleading against the petitioner company when they in their letters dated 7-7-2006 and 2-9-2006 addressed to the Deputy Secretary to the Government of Tamil Nadu (Energy Department) justified their actions in paying the said amount.
- (iv) Whether the payment of the said amount by the Respondent can be said to be a mistake on the part of the Respondent Board.

9. Finding of the Commission:-

9.1. Finding with regard to the first issue:-

(a) Section 158 of the Electricity Act, 2003 provides for arbitration. For the sake of easy reference the said Section 158 is reproduced below:-

“158. Arbitration- Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996)”

(b) The only provision in the Electricity Act, 2003 wherein the arbitration is provided for is Section 160(3) of the Act, which is also reproduced below:-

“160(3) Where the operator makes default in complying with the requirements of this section, he shall make full compensation for any loss or damage incurred by reason thereof, and where any difference or dispute arises as to the amount of such compensation, the matter shall be determined by arbitration”.

(c) Except the above section 160 (3) of the Act, according to which the dispute has to be decided by the arbitrator there is no other provision in the Act wherein the arbitration is mandated for. As per section 86 (1) (f) of the Electricity Act, 2003 the Commission may either by itself decide the dispute or refer the dispute to an arbitrator nominated by it. In the instant case, the issues involved which are referred to in para 8 above are not of such a nature so as to warrant for nomination of an arbitrator.

(d) In this context, it is to be noted that the Commission is an expert body as held by the Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission Vs. CESE Limited (2002 SCC 415). Even if there is any issue of a complicated nature then the Commission may by invoking its power under Regulation 27 of the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 refer such issue at any stage of the proceeding of the Commission to any expert for offering expert opinion which shall form part of the record of the case. Hence the Commission is of the view that there is no need to nominate any arbitrator for referring this dispute to such an arbitrator and the issues are decided by the Commission itself and findings are given against each such issue.

9.2. Finding of the Commission on the second issue :

(a) This power project has one gas turbine generator and one steam turbine generator. Gas turbine is capable of operating in simple cycle mode and when the exhaust gases are passed through a waste heat boiler, steam would be generated and the steam turbine generator would generate additional electricity.

(b) PPA was initially signed on 20-5-1998 and it was amended on 1-9-2003. PPA was further amended on 6th August, 2005. Addendum No.2 to the amended PPA was entered into on 21st July 2006. It is strange that neither the licensee TNEB/TANGEDCO nor the generator, the petitioner herein, deemed it appropriate to place the Power Purchase Agreement before the TNERC for approval. Such an action on both the parties is viewed seriously by the Commission and the actions of the parties are condemned by the Commission.

(c) PPA is entered into for the project and the contracted capacity is indicated as 113.2 MWs. Date of Commercial Operation is defined as the date on which project achieves entry into commercial operation.

Infirm power is defined as follows:-

'Infirm Power' means the electricity produced by the project and delivered to the Board prior to the date of Commercial Operation at the supply point, not on any request or dispatch instructions of the Board, in respect of which the Board shall pay to the company variable charges calculated as per the formula pursuant to section 7.3 of the PPA.

(d) Project has been defined as multi fuel power station based on gas based combined cycle gas turbine technology. Section 4.2 of the PPA indicates that the project shall be deemed to have achieved entry into Commercial Operation on the date of issue by the company to the Board of the Certificate of project completion.

(e) Clause 5.3 of the PPA envisages that the Board shall purchase and pay for all infirm power produced by the company and delivered to the Board prior to the date of Commercial Operation. The Board shall pay to the company, variable charges calculated as per the formula pursuant to Section 7.3.

(f) Clause 6.1 of the PPA relates to operation of the project. Sub-clauses (a), (b) and (c) are relevant and are extracted below:-

“(a) Supply of electricity from the project by the company to the Board shall be in accordance with the instructions of the load dispatch centre. The difference in the delivered capacity at the supply point and instructed capacity shall in no case be more than 2% of the instructed capacity.

(b) The company shall be required to operate and maintain the project in accordance with prudent utility practices, within the technical limits as stipulated in schedule 3, and as per the dispatch procedures stipulated in schedule 6.

(c) The company shall daily submit availability declaration for the project pursuant to schedule 6 to the Board”.

(g) Clause 17.1 of the PPA envisages that no variation, waiver or modification of any of the terms of this Agreement shall be valid unless reduced into an Agreement in writing signed by the parties.

(h) Schedule 1 regarding capacity test procedure refers to gross power generated at Gas turbine generator terminals and steam turbine generator terminals.

(i) Schedule 4 of the PPA relates to calculation of levelised tariff. The Table in this Schedule refers to the first year, which has been indicated as October 2004 to September 2005 with COD as 30th September, 2004. Weights for the first year tariff between Simple Cycle and Combined Cycle has been indicated as approximately 0.4 and 0.6 respectively. Tariff figures for various components have also been indicated separately for simple cycle and combined cycle during the first year. Heat rate and auxiliary consumption have also been indicated separately for simple cycle and combined cycle during the first year of operation.

(j) Schedule 6 to the PPA refers to availability declarations and dispatch declarations and formats have been prescribed.

(k) Schedule 29 to the PPA deals with tariff Table specifying individual tariff component. During the first year of operation tariff for both simple cycle and combined cycle have been agreed to.

(l) Schedule 34 indicates the tariff heat rate of 1936.5 Kilo Cal per Kwhr. This seems to be applicable for combined cycle operation only.

(m) Addendum 1 to the amended and restated PPA, which was entered into on 6th August, 2005 includes schedule 18. Item 'c' of this schedule 18 is relevant and extracted below:-

“Company shall deliver to TNEB, Availability notice as per PPA, schedule-6 at 10 hours daily. TNEB will give dispatch notice as per PPA schedule 6 at 11 hours daily.”

(n) The petitioner vide his letter dated 23rd March 2005 has indicated that they would be able to generate around 60 MW (gross) on a continuous basis in simple cycle mode and the entire power can be supplied to the TNEB grid and requested its confirmation of acceptance of taking power from the power station and pay fixed and fuel charges as per schedule 29 of PPA. The acceptance letter of TNEB was sent on 14-5-2005 wherein the TNEB had considered acceptance of 60 MW continuous power from this plant in simple cycle mode before declaration of commercial operation as a special case subject to the following conditions and without prejudice to the PPA conditions:

- (i) Continuous generation of 60 MW power will be accepted into the grid at the rate of approximately Rs.1.86 per unit (i.e. variable charge for the unit delivered into the grid + the proportionate fixed charge with respect to 74.4 MW) Apparently, 74.4 MW is the Gas turbine generator capacity.
- (ii) Petitioner shall comply with backing down instruction from load dispatch centre / TNEB during high frequency and other critical conditions in the grid.
- (iii) Petitioner is not eligible for deemed generation, on any account, during this period.
- (iv) No gas transmission charges will be paid by the Board.
- (v) This purchase of power has no bearing on COD and should not be quoted as reference.
- (vi) This does not absolve the petitioner of his responsibilities to comply with PPA conditions.
- (o) The letter also conveyed that if the above terms are acceptable, availability may be declared to the Chief Engineer / Operation with a copy to the TNEB for

arranging the schedule by Superintending Engineer / LD & GO/ Chennai and payment by Chief Financial Controller accordingly. In the light of the provisions of the PPA as extracted above and the correspondence exchanged between the parties, let us now examine the provisions of the Regulations relating to the operation of the combined cycle power station. This power station is stated to be through international competitive bidding. When the bids were invited in the late 90s the applicable Regulation was the one which was issued by the Government of India on 30th March 1992. It is necessary to look into this notification, a copy of which was filed by the Respondent in his counter affidavit.

(p) Para 4 of the notification relates to thermal power generating station awarded through competitive bidding. This notification stipulates the availability of combined cycle plant gas turbines (in combined cycle mode) as 85 to 90% and steam turbines in combined cycle mode as 60 to 65% during stabilization period and 85 to 90% during subsequent period. Further stabilization period commencing from the date of first synchronization of the unit shall be reckoned as follows:-

- | | | |
|---|---|---------|
| (a) Gas turbines (in simple cycle mode) | - | Nil |
| (b) Steam turbines (in combined cycle mode) | - | 90 days |

(q) This implies that commercial operation date of gas turbine in simple cycle is from the date of first synchronization. The PPA entered into between the parties talks of only the commercial operation date of the project. When the intent of the parties was not clearly brought out in the PPA, the Commission had no choice but to go into the conduct of the parties during the period in question. The definition of

infirm power, as contained in the Government of India notification dated 30th March 1992 in para 1.3 of the notification is extracted below:-

“In respect of infirm power, i.e. the sale of electricity prior to commissioning of the unit, any revenue from such sale (other than the fuel cost) shall be taken as reduction in capital expenditure and in as need revenue.”

(r) It is important to note that Government of India Notification talks of commercial operation of the unit and not of the commercial operation of the project. In accordance with the notification there can be two commercial operation date for a combined cycle power plant viz., one for the gas turbine generator unit and another for the steam turbine generator unit. We have already discussed about the PPA mentioning only about the COD of the project and not COD of individual units. In this context it is necessary to discuss about the infirm power and the payment therefor. While the petitioner argues that the power delivered by him is on a continuous basis from the gas turbine generator and is on specific request of TNEB as confirmed by them in their letters and he has also accepted the total price of Rs.1.86 per Kwhr as offered by TNEB and further followed all the procedure of declaration of availability and complied with the dispatch instructions given by the TNEB and therefore TNEB at a later stage, consequent to an audit objection, cannot attempt to recover this payment of fixed charges for open cycle operation, especially when they have tried to defend their action of paying the fixed charges of simple cycle operation to the audit on two occasions. Per contra the Respondent TNEB / TANGEDCO argued that in accordance with the PPA there is only one commercial operation date for the entire project and power generated before the commercial operation of the project, is infirm power and will only be eligible for payment of energy charges.

- (s) From the above discussion, it is observed that:
- (i) In the case of competitively bid project, during the time period in which the project was undertaken, para 4 of the Government of India tariff notification dated 30th March 1992, should apply.
 - (ii) While the notification talks of two commercial operation date one for the gas turbine generator and another for steam turbine generator, the PPA talks of only the COD of the project.
- (t) Schedule 4 of the PPA relating to calculation of levelised tariff indicates operation of the project both in simple cycle and combined cycle mode in the first year of operation with weightage of approximately 40% for simple cycle operation and 60% for combined cycle operation.
- (u) Schedule 29 of the PPA which deals with the tariff, specifically provides separate tariff for simple cycle and combined cycle operation. This Table also provides for separate heat rate and auxiliary consumption for operation in simple cycle and combined cycle modes.
- (v) When the petitioner was ready for continuous operation of the gas turbine, sought the approval of TNEB, the Respondent, in March 2005 to which a specific approval was conveyed by TNEB on 14-5-2005 duly indicating a rate which is not as per schedule 29 of PPA. The petitioner has declared availability as claimed in his letter dated 14th May 2005 and the Respondent TNEB had allowed them to dispatch power into the grid. Further, the approval letter dated 14-5-2005 stipulates that this purchase of power has no bearing on COD and should not be quoted as reference.

(w) From the foregoing, the Commission comes to the conclusion that as per the notification of Government of India dated 30th March, 1992, as applicable for competitively bid projects, there are two commercial operation dates one for the gas turbine generator unit and another for the steam turbine generator unit. Further, the definition of infirm power in the PPA defines the same as electricity produced by the project and delivered to the Board prior to the date of Commercial operation at the supply point, not on any request or dispatch instruction of the Board, in respect of which the Board shall pay to the company variable charges calculated as per the formula pursuant to section 7.3. In the instant case it has been clearly established that (i) the gas turbine generator unit was commissioned in simple cycle mode and the steam turbine generator unit was commissioned later thereby making it combined cycle, as per the GOI notification; and (ii) the Respondent TNEB had specifically approved the supply of power from the open cycle gas turbine as a special case subject to certain conditions including the rate of Rs.1.86 per unit which included the variable charge for the units delivered into the grid + the proportionate fixed charge with respect to 74.4 MWs. Schedule 29 of the PPA indicates that two different rates of tariff exist in the PPA itself for open cycle and combined cycle operation. Since power is supplied on the request of TNEB, the power supplied from open cycle gas turbine cannot be treated as infirm power even in accordance with the definition of infirm power as contained in the PPA. Accordingly, the Commission holds that fixed charge is payable for operation of open cycle gas turbine on various counts such as the provision in notification dated 30th March 1992 as discussed above, definition of infirm power in the PPA which envisages payment of only variable charge if the power was despatched not on any request or dispatch instruction of the TNEB, specific offer made by TNEB in May 2005 for dispatch of

power at per unit rate of Rs.1.86 per Kwhr which was accepted by the petitioner, and the payment already made by TNEB thereby clearly confirming their intent of purchasing power from the simple cycle gas turbine on payment of both fixed and variable charges.

9.3. Finding with regard to the third issue:-

(a) The Petitioner Company in para 12 of its reply to the counter has contended that the Respondent in the letter dated 07-07-2006 addressed to the office of the Accountant General and in letter dated 02-09-2006 addressed to the Government of Tamil Nadu (Energy Department) justified their action in paying the amount and as such the Respondent cannot now retreat from the stand and that the Respondent is estopped from raising the contention as they did in the counter affidavit.

(b) The Respondent Board in its rejoinder did not meet the above contention of the Petitioner with regard to the plea of estoppel.

(c) It is noted that the Chairman of the Tamil Nadu Electricity Board in Letter No.CE/IPP/AEE4/F.Aban/D.182/05, dated 14-05-2005 addressed to the Petitioner Company has written as follows:-

“Sub: M/s.Aban Power Company Ltd – Consent for purchase of power from the plant (113.2 MW) of M/s. Aban – Approval accorded with conditions-Reg.

*Ref: 1. Your Lr. No.APCL/TNEB/2005-036 dated 23-03-2005
2. Your Lr. No.APCL/TNEB/2005-037 dated 31-03-2005
3. Your Lr. No.APCL/TNEB/2005-050 dated 28-04-2005
4. Your Lr. No.APCL/TNEB/2005 dated 03-05-2005*

In response to your letters cited under reference, your request for the acceptance of 60 MW continuous power from your plant by Board in Open Cycle

mode before declaration of Commercial Operation can be considered as a special case subject to the following conditions and without prejudice to PPA conditions.

1. Continuous generation of 60 MW power from your plant will be accepted into the Grid at the rate of approximately Rs.1.86 per unit (i.e. variable charge for the units delivered into the Grid plus the proportionate fixed charge with respect to 74.4 MW).
2. You have to comply with backing down instructions from Load Despatch Centre/ TNEB during High frequency and other critical conditions in the Grid.
3. You are not eligible for Deemed Generation, on any account, during this period.
4. No Gas Transmission charges will be paid by the Board.
5. This purchase of power has no bearing on COD and should not be quoted as reference.
6. This does not absolve you of your responsibilities to comply with PPA conditions.

Concurrence may be given for the above conditions for proceeding further in this regard. If acceptable, availability may be declared to Chief Engineer / Operation with a copy to this office for arranging the schedule by Superintending Engineer / LD & GO / Chennai and payment by Chief Financial Controller accordingly”

(d) The Petitioner Company in its letter APCL/TNEB/2005/05 dated 14-05-2005 has written as follows:-

“Dear Sir,

Sub: 120 MW Combined Cycle Power Plant at Karuppur Village, Thiruvudaimaruthur Taluk, Tanjore District, Tamil Nadu – Consent for purchase of power from the plant (113.2 MW) of Aban Power Company Limited – Approval accorded with conditions.

Ref: 1. Our Letter No.APCL/TNEB/2005/036 dated 23-03-2005
2. Our Letter No.APCL/TNEB/2005/037 dated 31-03-2005
3. Our Letter No.APCL/TNEB/2005/050 dated 28-04-2005
4. Our Letter No.APCL/TNEB/2005 dated 03-05-2005
5. Your Letter No.CE/IPP/AEE4/F.Aban/D.182/05, dated 14-05-2005

We acknowledge with thanks the receipt of your above mentioned letter regarding consent for purchase of power from our plant. We confirm our acceptance of the stipulations in the above letter. However, we state this acceptance does not mean any novation, revision or modification of existing PPA conditions”.

(e) The Hon'ble Supreme Court in the case of Rickmers Verwaltung Gimb H. V. Indian Oil Corporation Limited (AIR 1999 SC 504) has inter-alia held that an agreement even if not signed by the parties can be spelt out from the correspondence exchanged between the parties. In view of the above decision of the Hon'ble Supreme Court it is noted that from the letters extracted above an agreement eventhough not signed by the parties can be spelt out in the instant case.

(f) The Respondent is therefore bound to honour the said agreement which has arisen from the correspondences referred to above. The doctrine of legal estoppel as defined in Section 115 of the Evidence Act is also applicable to the Respondent.

9.4. Finding of the Commission on the fourth issue:-

(a) The learned Senior Counsel Thiru N.C. Ramesh during the course of his argument has cited the decision of the Hon'ble Supreme Court in the case of Sales Tax Officer Vs. Kanhaiyva Lal (AIR 1959 SCC Page 135). In the said case, the Hon'ble Supreme Court has in paras 9 and 10 observed as follows:-

“(9) Section 72 of the Indian Contract Act is in the following terms:

“A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it”

(10) As will be observed the section in terms does not make any distinction between a mistake of law or a mistake of fact. The term “mistake” has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It was, however, attempted to be argued on the analogy of the position in law obtaining in England, America and Australia that

money paid under a mistake of law could not be recovered and that that was also the intendment of S.72 of the Indian Contract Act”.

At para (24), the Hon'ble Supreme Court has also observed as follows:-

“(24) We are of opinion that this interpretation put by their Lordships of the Privy Council on S.72 is correct. There is no warrant for ascribing any limited meaning to the word “mistake” as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict between the provisions of S.72 on the one hand and S.21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same”

(b) It is to be noted that the said decision is not applicable to the facts of the present case as there is no mistake of law or mistake of fact. Further as already stated in the finding of the Commission on the second issue in para 9.2 above, in the instant case, it has been clearly established that (i) the gas turbine generator unit was commissioned in simple cycle mode and the steam turbine generator unit was commissioned later thereby making it combined cycle, as per the GOI notification; and (ii) the Respondent TNEB had specifically approved the supply of power from the open cycle gas turbine as a special case subject to certain conditions including the rate of Rs.1.86 per unit which included the variable charge for the units delivered

into the grid + the proportionate fixed charge with respect to 74.4 MWs. Since power is supplied on the request of TNEB, the power supplied from open cycle gas turbine cannot be treated to be infirm power even in accordance with the definition of infirm power as contained in the PPA.

(c) Further as already stated above, the two letters dated 14-05-2005 extracted above brings into existence, an agreement between the Petitioner company and the Respondent Board even though it is not signed by the parties in the legal format of an agreement. The Respondent is bound by the said agreement which has come into existence by way of correspondence and also by the doctrine of legal estoppel as defined in Section 115 of the Evidence Act and also promissory estoppel as propounded by the Hon'ble Supreme Court in various decisions.

10. Conclusion:-

(a) There is no need to appoint any Arbitrator in the instant case.

(b) The notice dated 16-05-2008 for the recovery of Rs.7,17,96,524/- from the Petitioner Company for the payment made to the Petitioner Company from 14-05-2005 to 14-07-2005 is hereby set aside.

11. Appeal:-

An appeal under section 111 of the Electricity Act, 2003 against this order shall lie to the Appellate Tribunal for Electricity within a period of 45 days.

(Sd.....)
(S.Nagalsamy)
Member

(Sd.....)
(K.Venugopal)
Member

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission