

The above D.R.P.No.9 of 2011 came up for final hearing on 07-02-2013. The Commission, upon hearing the arguments of Thiru Vijaynarayan, Senior Advocate representing Thiru Vinod Kumar, Advocate for the Petitioner and Thiru N.C.Ramesh, Senior Advocate representing Thiru P.H.Vinod Pandian, Standing Counsel for the Respondent and upon perusing the relevant records passes the following order:-

ORDER

1. Prayer of the Petitioner in D.R.P. No.9 of 2011:-

The prayer of the petitioner in D.R.P.No.9 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 26-08-2010 whereby demand has been made for an amount of Rs.1,59,57,115/- for the power supplied to the petitioner during the testing and commissioning phase of its power plant from 31-12-2004 to 11-08-2005 and also to resolve the claim of the petitioner of Rs.31,96,03,798 crores towards deemed generation under section 3.4 (b) of PPA for the delay caused by the petitioner in implementation of the project.

2. I.A. No.1 of 2011 in D.R.P.No.9 of 2011:-

I.A.No.1 of 2011 in D.R.P.No.9 of 2011 has been filed by the petitioner on 08-03-2011 to amend the prayer in the said D.R.P.No.9 of 2011 by substituting the prayer with the following prayer:-

“Adjudicate the dispute between the petitioner and the respondent arising out of the issuance of the notice dated 26-08-2010 whereby demand has been made for an amount of Rs.1,59,57,115/- for the power supplied to the

petitioner during the testing and commissioning phase of its power plant from 31-12-2004 to 11-08-2005; and also to resolve the claim of the petitioner of Rs.31,96,03,798 towards deemed generation under section 3.4 (b) of PPA for the delay caused by the petitioner in implementation of the project or in the alternate appoint an arbitrator to adjudicate upon the said dispute”.

3. Facts of the case:-

3.1. The petitioner is a company incorporated under the provisions of the Companies Act, 1956. During September 1996, the petitioner was selected by the Government of Tamil Nadu 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 petitioner is the first independent power producer selected by such bidding at levelised tariff of Rs.2.28 per unit which is the cheapest tariff among all independent power producers in the State.

3.2. The Petitioner after studying the various alternative fuels available, selected natural gas available in Tanjore district from Kuttalam Gas Fields of ONGC Ltd. and marketed by GAIL (India) Ltd.

3.3. The entire electricity generated under combined cycle operations by the Petitioner's plant is sold to the respondent. Revised power purchase agreement dated 01-09-2003 has been entered into incorporating the changes.

3.4. Prior to commencement of commercial operations, it is imperative that the turbines and other equipments used at the plant are successfully tested. For completing the commissioning and testing phase of the power plant, power supply was required to be provided by the respondent as per terms of PPA. The power supplied during the testing and commissioning of the plant is used for testing the equipments to inter-alia ensure that the turbines are running at desired loads and generating continuous power.

3.5. The Petitioner completed the construction works relating to switch yard and GTG by September 2004 and approached the respondent to supply power for back charging the switch yard for testing and commissioning of various equipments in October 2004.

3.6. Since testing of the CVTs would take time, petitioner made several requests since October 2004 to supply the commissioning power so as to complete the testing and commissioning of the equipments as the 40 engineers deployed by the petitioner including 10 engineers from GE Energy, Europe were idling waiting for commissioning power.

3.7. Even after completion of CVT inspection by the end of November 2004, the petitioner was not given testing and commissioning power. Finally, the respondent commenced supply of power for testing and commissioning of the plant on 31-12-2004 after delay of more than 3 months. The delay caused by the respondent in supplying power for testing and commissioning of the plant, delayed the commissioning of the project, resulting in huge loss to the

petitioner. Additionally, the petitioner had to incur huge expenditure for deploying the 40 engineers including 10 engineers from GE Energy, Europe at the plant site awaiting for the power supply for testing and commissioning the equipment for 3 months resulting in escalation of the project costs.

3.8. After testing and commissioning the equipments, the respondent gave permission and allowed synchronization only on 18-02-2005 causing delay of more than one month.

3.9. As per the terms of PPA, the respondent should complete power evacuation feeder lines atleast 90 days prior to the commissioning of the projects. The respondent did not complete the work of two feeder lines (Chidambaram and Kattumanar Koil). The feeders were not ready even by April 2005 stalling the synchronization of steam turbine to grid scheduled to be completed by March 2005.

3.10. The project was delayed by 4 months 10 days for the reasons directly attributable to the respondent resulting in loss to the tune of Rs.32.00 crores.

3.11. The project was delayed by 4 months 10 days caused due to respondent's failure to provide necessary power required for testing and commissioning of the project in accordance with section 3.3 (f) of PPA failure to construct transmission facilities in accordance with section 3.3 (a) and also due to delay in giving the permission for synchronization of gas turbine. The

petitioner is entitled for payment of deemed generation charges for 4 months 10 days of Rs.31,96,03,798/-.

3.12. As aforesaid the petitioner's plant was ready for carrying out testing and commissioning of simple cycle operation and testing as early as September 2004.

3.13 After repeated follow ups and requests, it was only on 31-12-2004, that the respondent commenced temporary power supply to the petitioner's HT SC No. 84 for the purpose of completing the commissioning and testing. The said supply continued till 11-08-2005.

3.14. At the time of providing the power supply for the testing and commissioning, the respondent did not communicate to the petitioner any sanctioned demand. The power supply was provided by the respondent without insisting on the petitioner making application in standard format and signing agreement for giving power connection / supply.

3.15. For the power supplied during the period between 31-12-2004 and 11-08-2005 for testing and commissioning purpose, bills were raised on the petitioner by the respondent. Besides the actual demand and energy consumption charges, the respondent also levied compensation charges / penalty for maintaining low power factor.

3.16. After completion of the testing and commissioning activities, gas turbine of the petitioner's plant was synchronized with the TNEB grid on 18-02-2005 and it was ready for commencement of open cycle generation in March 2005.

3.17. The power generated by the plant during commissioning and testing period and after synchronization during the period from 18-02-2005 to April 2005 was supplied to the TNEB as infirm power on payment of variable charges.

3.18. To meet the peak summer demand, the respondent made specific order to supply power generated under simple cycle operations by the plant. Accordingly, the petitioner supplied power to the respondent for the period from 14-05-2005 to 14-07-2005, at the specific request and dispatch instructions of the respondent at the rate of Rs.1.86 per unit.

3.19. The petitioner completed the testing and commissioning for combined cycle (generating electricity using both gas turbine as well as steam turbine) and declared commencement of commercial operation on 11-08-2005 which was also accepted by the respondent after witnessing capacity test as per the provisions of the PPA.

3.20. The fact that the petitioner's plant had completed the testing and commissioning phase under simple cycle on 18-02-2005 and the plant had been successfully synchronized with the TNEB grid was not considered by the

respondent while raising the bills for the period during 31-12-2004 to 11-08-2005.

3.21. The petitioner raised invoices on the respondent with a request to permit the petitioner to bill for the net metered energy from the date of synchronization of the plant for open cycle i.e. 18-02-2005.

3.22. The petitioner requested the respondent that it be charged for import power from 18-02-2005 to 11-08-2005, at the same rate at which the respondent pays the petitioner for the power supplied by the petitioner and also requested the demand charges, power factor penalty etc. may not be levied. The petitioner therefore requested refund of excess amounts paid by the petitioner for the power supply from 31-12-2004 to 11-08-2005.

3.23 The petitioner vide letter dated 22-12-2006 raised a claim invoice for Rs.81,19,772/- towards refund of penalty for low power factor compensation charges collected during 31-12-2004 to 11-08-2005. The Superintending Engineer, Thanjavur Circle, vide proceedings dated 08-01-2007, sanctioned the refund of Rs.77,33,116.80 to the petitioner towards refund of low power factor compensation charges collected from the petitioner from 31-12-2004 to 11-08-2005. On 20-02-2007, the said amount of Rs.77,33,116.80 was refunded to the petitioner.

3.24 After more than four years vide the communication dated 29-03-2010, the Member (Generation), TNEB called upon the petitioner to remit within fifteen days an amount of Rs.1,59,57,115/-, failing which to recover the amount from the bills due to the petitioner. The amount claimed in the said communication is purportedly towards low power factor penalty of Rs.77,33,115/- maximum demand charges of Rs.75,24,000/- and development charges of Rs.7,00,000/- for the supply of power for the period from 31-12-2004 to 11-08-2005 for testing and commissioning purposes.

3.25. In terms of section 3.3 (f) of the PPA, the tariff charged by the respondent for providing the power required for testing and commissioning shall be on the same lines as the then prevailing tariff charged by the Board for High Tension III or Low Tension Part C temporary, depending on the load requirement.

3.26 The petitioner was required to be charged only for demand charges and actual consumption charges as applicable for HT III category consumers and no other charges could be levied. The said section of PPA does not contemplate levy of low power factor penalty and non-tariff charges such as maximum demand charges and development charges.

3.27 The petitioner filed W.P.7930 of 2010 before the Hon'ble Madras High Court, challenging the demand made by the Member (Generation), TNEB. By an order dated 07-07-2010, the Hon'ble High Court was pleased to hold that since no show cause notice was issued to the petitioner prior to the issuance of

the demand notice, the petitioner would give a reply to the demand notice treating it as a show cause notice.

3.28. As directed by the Hon'ble High Court, the petitioner vide its letter dated 27-07-2010, submitted a detailed reply to the notice dated 29-03-2010. The petitioner had set out extensively the various reasons on which it disputed the demand made by the respondent and had requested that the demand notice be withdrawn.

3.29. The Director (Generation), TNEB issued a demand notice being Letter No.CE/PP/EE/IPP/AEE4/F.ABAN/D.368/2010, dated 26-08-2010, whereby the petitioner's representation was rejected with additional grounds of audit objection and applicability of change of law provisions in PPA. The petitioner was called upon to make the payment in terms of the demand raised in the letter dated 29-03-2010 within fifteen days.

3.30. The amount claimed in the demand notice dated 26-08-2010 is purportedly towards low power factor penalty of Rs.77,33,115/- (which was refunded earlier), maximum demand charges of Rs.75,24,000/- and development charges of Rs.7,00,000/- for the supply of power for the period from 31-12-2004 to 11-08-2005.

3.31. The amount of Rs.75,24,000/- towards maximum demand charges and Rs.7,00,000/- towards development charges are without any basis and were

not claimed from the petitioner at the first instance when the bills for the relevant period were raised.

4. Contentions of the Petitioner:-

4.1. All the bills raised for the supply of power for the period from 31-12-2004 to 11-08-2005, actual demand and energy charges were claimed and paid as per the terms of the PPA. Additionally the respondent had also claimed an amount of Rs.77,33,115/- towards low power factor penalty in the said bills. The gas turbine of the petitioner's plant was synchronized with the grid from 18-02-2005 and the petitioner had supplied power to the Board during the testing and commissioning period to meet the power shortage in the State. Further, the plant was commissioned for supply of power exclusively to the Board. During testing and commissioning period, auxiliaries are in service and hence low power factor is bound to occur during the testing period though not on a continuous basis and is in the full knowledge of the respondents. Looking into the above factors, the respondent refunded the amount collected for low power factor on 20-02-2007. On account of the aforesaid reasons, the levy of low power factor penalty was not justified.

4.2. The respondent had during 20-02-2007, after due consideration decided to refund the amount of Rs.77,33,115/- which was erroneously collected from the petitioner towards low power factor penalty, for the power supplied to the petitioner during the testing and commissioning period from 31-12-2004 to 11-08-2005.

4.3. In the bills raised during April 2005 to August 2005 for the power supplied to the petitioner for the testing and commissioning phase, the Board had not levied maximum demand charges and development charges. This was for the reason that under clause 3(3) f of the power purchase agreement, no amount other than actual energy charges and demand charges is liable to be paid by the petitioner for the power supplied during testing and commissioning period. In the demand notice dated 29-03-2010, the second respondent has claimed from the petitioner an amount of Rs.75,24,000/- towards maximum demand charges and Rs.7,00,000/- towards development charges. Such claims are without any basis and were also not claimed from the petitioner at the first instance when the bills for the relevant period were raised. It is relevant to point out that in terms of the Supply Code of the TNEB, maximum demand charges are not part of the tariff related charges and are treated as miscellaneous charges. There is no provision in PPA to claim other than tariff related charges. Miscellaneous charges cannot be claimed unless specific agreement is signed in Form No.8.

4.4. The switch yard for evacuation of power was erected by the petitioner. The said switch yard is used for supplying the power generated by the petitioner's plant to the Board. The claim of Rs.7,00,000/- for development charges is therefore without basis.

4.5. The petitioner has already paid the bills raised by the respondent and no amount is due from the petitioner to the respondents. The proper recourse

available to the respondents is to have its claim adjudicated in the manner known to law before initiating any recovery.

4.6. Since the feeders are erected for power evacuation after commissioning of the power plant as per the terms of the PPA and the respondent has not incurred any additional cost for supplying power to petitioner for testing and commissioning, no development charges are payable by the petitioner. It is not fair on the part of the respondent to recover development charges when they have not incurred any expenditure specifically for supplying testing and commissioning power.

4.7. In the bills raised for the supply of power for the period from 31-12-2004 to 11-08-2005, demand and energy charges were claimed and paid as per the PPA terms read with applicable tariff order and no amount was claimed towards excess demand and development charges. It is therefore not open to the respondent, after more than four years to claim any amounts from the petitioner for the supply of power for testing and commissioning which was supplied for a specific purpose of making the plant for power generation and for a limited period.

4.8. In 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 ensuring bills, the amount which is subject matter of the present petition unless, adjudicated by the Arbitrator to be nominated by the Commission.

5. Contentions of the Respondent:-

5.1. During the initial construction stage of the power project of the petitioner, there was an obligation on the part of the respondent to provide electricity for their project needs and for testing and commissioning of the project, which is as per Article 3.3(f) of the Power Purchase Agreement between the parties.

5.2. The petitioner has been provided with a HT service connection, squarely falling under the Tariff III applicable to all High Tension consumers. Hence, it can be seen that the petitioner was under duty bound to tender to the respondents all the charges / levies as a normal HT consumer falling under Tariff III would tender under the Tamil Nadu Electricity Supply Code.

5.3. After the coming into force of the Tamil Nadu Electricity Supply and Distribution Codes from 01-09-2004, all energy provided to consumers would be governed within the ambit of the said codes and further they would automatically take precedence over any contracts or agreements entered into earlier between the parties.

5.4. For the HT power consumed by the petitioner between 31-12-2004 to 11-08-2005, under Tariff III, the petitioner was duty bound to remit charges applicable to them under the following heads:-

- (1) Energy charges @ Rs.5/- per Kwhr.
- (2) Actual / maximum demand charges.

Tariff order of Tamil Nadu Electricity Regulatory Commission dated 15-03-2003 para 7.17 (Part 1) 1.0 (v) specifies that, in case of two part tariffs, maximum demand charges for any month will be levied on the kVA demand actually recorded in that month or 90% of the sanctioned demand whichever is higher.

5.5. In respect of High Tension service connections, the average power factor of the consumers installation shall not be less than 0.9 lag. Where the average power factor of High Tension service connection is less than the stipulated limit of 0.9 lag, the compensation charges will be levied.

5.6. The respondent demanded the petitioner to tender payments under the heads of energy charges, actual demand charges for a sum of Rs.77.58 lacs and penalty for lower power factor achieved by the petitioner during the relevant period, which is a sum of Rs.77.33 lacs. The respondent did not collect the maximum demand charges and development charges. Subsequently during February 2007 on representation from the petitioner, the respondent Corporation (TNEB) took a decision to extend a concession by refunding the penalty charges of Rs.77.33 lacs collected towards the low power factor achieved by the petitioner as a one time basis, on a consideration that since the petitioner is power generation company, feeding exclusively to the respondent Corporation.

5.7. The learned Accountant General of India, who had objected to the stand of the Corporation in the above matter. The learned Accountant General, Chennai has now taken a serious view of the unintended benefits, derived by way of concessions shown to the petitioner, which was contrary to statutory provisions, which otherwise should have been a revenue to the tune of Rs.160 lacs to the respondent Corporation.

5.8. Applying the relevant tariff rules of the Tamil Nadu Electricity Supply Code, the petitioner was duty bound to remit a sum of Rs.152.82 lacs towards maximum demand charges, Rs.77.33 lacs towards penalty towards low power factor and Rs.7.00 lacs towards development charges. Out of the above amounts a sum of Rs.77.58 lacs had already been remitted by the petitioner, thereby leaving a balance of Rs.1,59,57,115/- recoverable from them, which has been the precise objection raised by the learned Accountant General-Chennai.

5.9. For the above project needs, testing and commissioning requirements for the period from 31-12-2004 to 11-08-2005, the respondent collected the energy charges, penalty charges for low power factor, actual demand charges instead of collecting the maximum demand charges, since the petitioner has far exceeded the demands during the months of February 2005 to August 2005, except in June 2005. Even as per the PPA dated 01-09-2003, Article 3.3.(f) states that the company shall pay for demand charges and energy (actually consumed on this account in terms of Kwhr.) on a monthly basis which was misconstrued by the petitioner, as if only the actual demand charges are

applicable, whereas they were bound to pay maximum demand charges and other charges as contemplated and applicable to all HT consumers falling under Tariff III order.

5.10. The respondent Corporation can raise any dispute in the billing even after a period of three years. Since, there was an inherent provision in the PPA itself to raise any claim after a period of three years, the limitation act do not apply for this contract.

5.11. The respondent Corporation had initiated the activities for construction of the feeders as early as November 2003. As required under the Power Purchase Agreement, the switch yard of M/s.Aban Power Company Limited was energised on 15-12-2004 itself. Even though the water flooding in Kollidam river had affected the erection work of 110 kV Aban – Kattumannanr Koil Feeder and 110 kV Aban – Chidambaram Feeder for nearly three months, the construction of the transmission lines in all aspects was completed on 19-07-2005 by the respondent (i.e. erection of 4 Nos. 110 kV feeders required for M/s.Aban Power Company Limited to evacuate power as required under the Power Purchase Agreement.

5.12. The respondent had provided the commissioning power 90 days prior (on 31-12-2004) to the scheduled date of completion. Further, the respondent had completed the evacuation lines 60 days prior (on 19-07-2005) to the scheduled date of completion in all respects. Hence, the petitioner claim for delayed provision of commissioning power and delayed completion of the

transmission lines were misconceived one and not maintainable, besides considered alien to the point in dispute.

5.13. There was no delay for according approval for synchronization of Gas Turbine Generator with the grid of the petitioner company by the respondent Corporation as alleged by the petitioner.

5.14. There is no provision in the Power Purchase Agreement for admitting deemed generation for any delay in according approval for synchronization of gas turbine generator, as claimed by the petitioner.

6. Reply to the Counter Affidavit filed on 13-07-2011 by the Petitioner:-

6.1. The allegation of the respondent in paragraph 6 of the counter affidavit that the petitioner squarely falls within the Tariff III category applicable to High Tension consumers is denied as being unsubstantiated and untenable.

6.2. The petitioner is not liable to pay any lower power factor charges, development charges or maximum demand charges as claimed by the respondent.

6.3. The schedule 28 of PPA stipulates for making application and execution of agreement preceding the supply and connection. The petitioner was provided construction power connection of 500 KVA after complying with the formalities of making application, execution of agreement and payment of EMD, security deposit etc. in strict adherence to Schedule 28 of the PPA.

6.4. Article 3.3 (f) of the PPA does not provide for making an application and / or execution of an agreement.

6.5. The intention of the parties was never to equate the supply of power for testing and commissioning as a supply to a regular HT connection. The power supplied during the testing and commissioning of the plant is for the purpose of testing the equipments to inter-alia ensure that the turbines are running at desired loads and generating continuous power.

6.6. Article 3.3. (f) of the PPA, that the reference for the tariff to be charged by the respondent given of High Tension Tariff III or Low Tension Part C Temporary Tariff depending on the load requirement only for the purposes of determining and using prevailing consumption and demand charges to be applied for the energy and not for the purpose of classification. The petitioner is also required to pay for demand charges and energy (actually consumed on this account in terms of Kwhr.) on a monthly basis. The PPA does not provide for levying any other charges.

6.7. Section 56 (2) of the Electricity Act prohibits the respondent from making any delayed claims for recovery. The PPA entered with the petitioner by the respondent does not provide for temporary power supply for testing commissioning under Supply Code and Distribution Code and treat the petitioner as HT consumer.

6.8. The petitioner was awarded the power project under International Bidding Process by TIDCO / Tamil Nadu following the guidelines issued by Central Government vide their notification dated 31-03-1992. The Power Purchase Agreement was entered by respondent with petitioner under the said guidelines. Hence the said PPA agreement which reflects the guidelines cannot be treated as superseded by the Tamil Nadu Electricity Supply and Distribution Code.

6.9. Maximum demand charges and development charges form part of the miscellaneous charges and not included in the tariff charges. The PPA does not provide for payment of miscellaneous charges and hence there would be any liability arises upon the petitioner to pay these charges.

6.10. The respondent did not undertake any formalities such as execution of an agreement which is mandatory to fulfill the primary requisites for becoming a High Tension consumer and for levying charges by the respondent.

6.11 As per the Regulation No.2 of the Supply Code Excess Maximum demand charges in case of HT supply, the maximum demand charges for any month shall be based on the KVA demand recorded in that month at that point of supply or such percentage of sanctioned demand as may be declared by the Commission from time to time whichever is higher. The exceeded demand shall alone be charged at the double the normal rate. Further as per the regulation No.2 (n) (d) of the Distribution Code a sanctioned demand or

contracted demand means the demand sanctioned by the licensee and specified in the agreement.

6.12. No sanctioned demand was communicated which forms basis for determining and levying excess demand charges and hence the respondent cannot be justified in making excess demand charges.

6.13. The testing and commission of the plant requires operation of auxiliaries which results in “low factor” as an inevitable aspect of the process. In the absence of an agreement or any express provision in the Power Purchase Agreement, the respondent is not empowered to levy any additional charges.

6.14. There was no special expenditure incurred by the respondent as is evident from letter dated 23-07-2009 obtained under the provisions of the Right to Information Act, which would not substantiate the demand for development charges.

6.15. The respondent is not entitled to go back on its decision to refund the excess amounts collected from the petitioner by merely relying on the auditing report of the learned Accountant General just because factual position has not been accepted by the Accountant General. The respondent is also estopped from altering its initial reasoned decision on the grounds of objections from Accountant General

6.16. Having consciously taken a decision to not levy the excess demand charges and development charges and having decided to refund the amounts collected towards low power factor penalty, the respondent is not entitled to collect the said amounts from the petitioner at present.

6.17. The claims raised by the respondent on the basis of the audit objections are barred by limitation. The connection was disconnected immediately after testing and commissioning and the respondent never showed any arrears of the amounts in any bills after paying the bills raised by them. The subsequent claims of the respondent are squarely the barred by limitation.

6.18. The respondent is aware of its bidding obligation under the contract to complete all evacuation lines work 90 days prior to the actual generation of power in the plant. The gas turbines was ready for testing in October 2004 and the plant was made ready for combined cycle operations in April 2005. Despite repeated reminders, they could provide power supply for gas turbine testing only on 31-12-2004 and respondent as admitted in their counter affidavit completed the transmission lines for evacuation only in July 2005 much beyond the stipulated time for completion and its failure to complete its work within the stipulated time that resulted in the huge losses to the plaintiff company.

6.19. The petitioner completed the construction works relating to switchyard and GTG by September 2004 and approached the respondent to supply power for back charging the switch yard for testing and commissioning of various equipments in October 2004.

7. Findings of the Commission:-

7.1 D.R.P. No.9 of 2011 was filed on 14th February 2011 by Aban Power Limited. Subsequently they had filed an IA changing the name of the Petitioner as Lanco Tanjore Power Company Limited. This IA was allowed by the Commission.

7.2 This Petition was listed by the Commission. The initial prayer of the Petitioner was to refer the matter for arbitration. This prayer was subsequently amended so that the Commission may adjudicate or refer the dispute for arbitration as an alternative. The Petition was admitted on 23.03.2011. When this petition was listed on 13.07.2011 it was adjourned on the request of the Petitioner. On 16.02.2012 the case was adjourned at the request of the Respondent. When the matter was listed on 17.04.2012 it had to be adjourned at the request of both the parties. Again on 26.04.2012, when the matter was listed, both the parties prayed for adjournment. When the matter was listed on 16.11.2012 the Petitioner again sought an adjournment. On 20.12.2012, the case was again adjourned at the request of the Petitioner. Finally, the matter was argued by both the parties on 07.02.2013 and orders were reserved.

7.3 The Petition involves mainly two issues which are listed below.

Issue No.1:- Issue of notice dated 26.08.2010 by TNEB wherein a demand has been made for an amount of Rs.1,59,57,115/- for power supplied to the Petitioner during testing and commissioning phase for its power plant from 31.12.2004 to 11.08.2005. The above referred amount is on account of the following:-

(a) Low Power Factor Penalty	:	Rs.77,33,115/-
(b) Maximum Demand Charges	:	Rs.75,24,000/-
(c) Development Charges	:	Rs.7,00,000/-
Total	:	Rs.1,59,57,115/-

Issue No.2:- The claim of the Petitioner of Rs.31,96,03,798/- for deemed generation under Section 3.4 of PPA. This deemed generation is on account of the delay in provision of 110 KV interconnection (Transmission Facility) for the Commissioning of the Power Station.

7.4 History of the Project:-

This project is selected by Competitive Bidding based on the Government of India guidelines dated 30th March 1992. The amended PPA was signed on 01.09.2003 between the parties. The capacity of the project is 113.2 MW comprising of one Gas Turbine Generator and one Steam Turbine Generator. The PPA casts certain obligations on the generator on the one side and on the power purchaser viz., TNEB / TANGEDCO on the other side. While the Petitioner Generator is to take all actions regarding the financial closure, erection, testing and commissioning of the power station, the power purchaser viz., TNEB / TANGEDCO is obligated to provide the transmission facility for providing testing and commissioning power and evacuation of generated power from the power station of the Petitioner. The TNEB / TANGEDCO is the licensee who has to provide the construction power and startup power and is also the sole power purchaser from the power station of the Petitioner. The power station was commissioned in open or simple cycle mode on 18.2.2005

and the Steam Turbine Generator was commissioned subsequently in August 2005.

7.5 To deal with the two issues it is necessary to refer to the following provisions.

(i) Regulations 35(2) of the TNERC Tariff Regulation which is reproduced below:-

“In respect of existing Generating Companies covered under Power Purchase Agreement already entered, the tariff and norms shall be as per the terms agreed to. However, modification to the existing Power Purchase Agreement may be undertaken through mutual discussion between the parties to the agreement to explore possibilities of reducing costs and aligning the Power Purchase Agreement with the new market structure.”

(ii) Section 3.3(c) and Section 3.3(f) of the PPA are relevant for deciding the first issue and are extracted below:-

“Section 3.3(c) - Subject to compliance by the Company of all procedures laid down by the Board for obtaining construction power as specified in Schedule 28, the Board shall provide construction power in such quantities as the Company may reasonably require at the Project Site within forty five (45) Days from the Day when the Company makes the payment of the deposit to the Board in respect of such construction power as specified in Schedule 28. The Board would make reasonable efforts to provide uninterrupted supply of construction power to the Project at the Project Site. The Board shall not be held responsible and shall have no financial obligations to the company, on account of interruption in the supply of construction power arising out of any reason. The tariff charged by the Board for construction power shall be on the same lines as the then prevailing tariff charged by the Board for High tension Tariff III or Low Tension Part C Temporary Tariff,

depending upon the load requirement. The Company shall pay for demand charges and energy (actually consumed on this account in terms of Kwhr) on a monthly basis.”

Section 3.3(f) The Board shall provide the necessary power required for testing and commissioning of the Project, pursuant to the provisions of Schedule 1. The tariff charged by the Board for providing the power required for testing and commissioning shall be on the same lines as the then prevailing tariff charged by the Board for High Tension Tariff III or Low Tension Part C Temporary Tariff, depending upon the load requirement. The Company shall pay for demand charges and energy (actually consumed on this accounting terms of Kwhr) on a monthly basis”

(iii) Section 3.3(g) is relevant and is applicable for the power supply arrangement by TNEB to the Petitioner after the Commercial Operation of the same and is extracted below:-

“Section 3.3 (g) After the Date of Commercial Operation, the Board shall make reasonable endeavors to provide the necessary power for start-up and shut down requirements of the Project. The power actually consumed by the Company on this account in terms of Kwhr shall be charged on the monthly basis at a rate applicable to Net Metered Energy determined as per Section 7.2 and 7.3 during that billing period. If the Board is not in a position to supply the necessary power for start-up and shutdown requirements of the Project, the Company shall be entitled to Deemed Generation, pursuant to Section 7.6, provided that such Deemed Generation shall be provided only, if the Project shuts down on account of the events specified in Section 7.6 (a), Section 7.6 (b), Section 7.6 (c), Section 7.6 (d), Section 7.6 (e) and Section 7.6 (f). However, in case the Project shuts down for events other than those specified in Section 7.6 the Board shall have no financial obligations if it is not in a position to supply the necessary power for start-up and shut down requirements of the Project and in such a case the Company shall make its own arrangements for ensuring the availability of the necessary power for start-up and shutdown requirements of the Project after the Date of Commercial Operation.”

(iv) Schedule 28 of the PPA lists out the procedure for obtaining Construction Power and the same is extracted below:-

“SCHEDULE-28 : PROCEDURE FOR OBTAINING CONSTRUCTION POWER

Application for construction power has to be given to in plain paper indicating purpose, location, required load, hours of utilization per day, period for which temporary supply is required etc.

The Assistant Engineer will sanction the estimate, if the load is within 55 KW, the duration for which supply is required does not exceed 180 days and the value of the estimate does not exceed Rs.5,000/-. Otherwise, the estimate will be sent to the Executive Engineer for sanction who can sanction temporary supply for a period of 1 year if the estimate does not exceed Rs.50,000/-

Superintending Engineer can sanction load upto 500 KVA for an estimated value of Rs.2 lacs for 2 years period.

Chief Engineer can sanction upto 1000 KVA for an estimated value of upto 10 lacs without any restriction over the period of sanction.

Member (Distribution) can sanction estimate upto 290 lacs without restriction in load and period of sanction.

After sanction of the estimate, the party will be advised to pay the estimated charges along with advance consumption charges.

On payment, the work order as well as estimate card will be prepared and got approved by EE / AEE who sanctioned the estimate. The materials will be then drawn and work taken up.

The service will be given subject to the conditions and the rates for Temporary Services, as may be notified by the Board. Temporary supply will be given to those classes of loads specified in the tariff under the appropriate rates and conditions prescribed therein.

All the charges incurred in respect of Service connection should be charged against the consumer and no portion of it charged to the Board.

The balance amount still remaining unadjusted at the credit of the party after termination of temporary supply will be refunded to the party. The balance due by the consumer if any will be collected.

Similarly the consumer can apply for increasing the capacity of the meter and shifting of service connection from one location to other in his site. The work will be taken up and completed after collecting the required charges from the consumer.

Office at which the application has to be deposited

All applications for Temporary services will be registered in the Assistant Executive Engineer's office and the same will be sent to concerned Section Officer (AE/JE) who will inspect the premises and the later prepare the estimate.

Process time / Lead time

On payment of estimate and advance current consumption charges.

Other Information

Application Charges

Registration Charges	Single Phase	Three Phase
	Rs.50	Rs.100

The deposit will cover service connection charges without allowing for credit in the first (i.e. gross charge) on account of materials which will be devoluted eventually. Fifteen present should be charged on gross cost. The deposits will be taken in cash / demand draft and not by cheque as these are not permanent supply.

Advance Current Consumption Charges

Advance current consumption charges are to be collected for the load at the appropriate tariff at eight hours a day or for the hours declared by the partly for maximum connected load. The deposit together with the services line charges and the meter rent will be paid in advance of erection of the same level by collecting monthly current consumption charges as per actual. The balance in advance current consumption charges paid by the consumer will be adjusted towards permanent supply or any other dues through proper adjustment entries or refunded as the case may be.

Tariff construction power is as indicated below. The tariff is subject to revision.

	<i>Demand</i>	<i>Energy</i>
	<i>Rs. / KVA /</i>	<i>Non-Metro (P/U)</i>
<i>H.T.Tariff III</i>	<i>300</i>	<i>500</i>

Company estimate that 500 KVA of construction power would be required at plant site.”

7.6 Obligations of the TNEB are listed in Section 3.3 of the PPA. Sections 3.3(c), 3.3(f) and 3.3(g) are relied upon by the parties for arguing this case. Section 3.4(b) of the PPA provided for deemed generation in the event of delay in entry into commercial operation on account of TNEB and on account of force majeure events affecting the TNEB. The Petitioner has relied upon this provision for claiming deemed generation which is the Issue No.2. Accordingly, this section is also extracted below for better appreciation of the issues involved.

“3.4(b) If the Company demonstrates that the Project is technically capable of Entry into Commercial Operation by the submission of a completion certificate (“Certificate of Project Completion”) to the Board, and the Date of Commercial Operation of the Project is delayed beyond the Scheduled Date of Completion due to the Board’s failure to construct the Transmission Facility in accordance with Section 3.3(a), or the Board’s failure to provide the necessary power required for testing and commissioning of the Project in accordance with Section 3.3(f), except due to Other Force Majeure events affecting the ability of the Board to perform its obligations under this Agreement, for such delay and the length of the delay associated therewith, the Board shall be required to pay for

- Deemed Generation (“Deemed Commercial Operation”) pursuant to Section 7.6 hereof, and*
- any liquidated damages, which the Company may be required to pay to the Fuel Supplier on account of non-offtake of Fuel, pursuant to the Fuel Supply*

Contract, provided that such liquidated damages shall be determined, in accordance with the principles of take or pay liability set forth in Schedule 32. In case the Tested Capacity as determined at the end of the Allowed Commissioning Period, pursuant to Section 3.4 (c), is less than the Contracted Capacity, such payments shall be reduced by a factor equal to the ratio of Tested Capacity and the Contracted Capacity.

The Monthly Fixed Charge Payment payable by the Board to the Company during such period of delay shall be calculated as if the Date of Commercial Operation had occurred on the date it would otherwise have occurred, but for such delay as described herein. In such a case, the first Tariff Period and the first Billing Period shall start from the date of commencement of Deemed Commercial Operation.”

7.7 Certain other provisions of the PPA would also be relevant in understanding the obligations of the parties and accordingly they are extracted below:-

- (a) “Effective Date” means the date on which conditions precedent pursuant to Section 2.1 or either satisfied in full or such conditions precedent which are unfulfilled are waived pursuant to Section 2.5 by the parties.*
- (b) “Scheduled Date of Completion” means the date which is 720 days from the effective date.*
- (c) “Entry into Commercial Operation” shall have the meaning set forth in Section 4.2. Section 4.2 deals with Certificate of Project Completion after carrying out the capacity testing and achieving the tested capacity of atleast 101.88 MW.*
- (d) “Date of Commercial Operation” means the day on which the project achieves entry into Commercial Operation.*
- (e) “Deemed Commercial Operation” shall have the meaning set for in Section 3.4.*

Let us now take up the discussions on the two issues.

7.8 Discussions on Issue No.1:-

7.8.1 Issue No.1 is regarding the claim made by TNEB amounting to Rs.1,59,57,115/- for three items namely Low Power Factor Penalty, Maximum Demand Charges and Development Charges. The pleadings of the Petitioner were that these three items are not leviable in their case in view of the provisions of the PPA which calls for payment of only the Demand Charges and Energy Charges. The other items in the form of miscellaneous charges are applicable only to consumers and not generators like them. Per contra, the TNEB / TANGEDCO argued that these charges are leviable under the Supply Code and the same was also observed by the Accountant General during his audit and that is why they have again raised a demand by the impugned letter. It is not out of place to mention here that the Petitioner approached the Hon'ble High Court of Madras by way of a Writ Petition questioning the legality of levying these charges. The Hon'ble High Court of Madras had disposed of the Writ Petition by directing the parties to resolve this issue by way of Arbitration Proceedings. Consequently the Petitioner herein has approached this Commission for resolution of this issue by way of this D.R.P. During the arguments the learned senior counsel for the Petitioner had relied on the following Judgements to argue that he is not a "consumer" as defined in the Electricity Act, 2003 and also to argue that he is liable to pay only the Demand Charges and Energy Charges in accordance with the PPA.

- (i) Order of TNERC dated 2nd April 2007 in D.R.P. No.5 of 2006.
- (ii) Order of APTEL dated 10.03.2008 in Appeal No.112 of 2007.
- (iii) Order of APTEL dated 24.05.2011 in Appeal No.166 of 2010.

- (iv) Order of APTEL dated 17.04.2011 in Appeal No.47 of 2011 and I.A. No.73 of 2011.

7.8.2 The learned senior counsel for the Petitioner pointed out that from this Commission's Order in D.R.P. No.5 of 2006, the interpretation given by this Commission that the expression "prevailing tariff rate" would refer to the tariff rates namely electricity charges and it would not refer to development charges which are in the nature of non-tariff related charges. The learned senior counsel has also relied on Order of the APTEL in Appeal No.112 of 2007. The portion of para 36 which is relied upon is extracted below.

".....The claim for non-tariff miscellaneous charges inclusive of development charge is, therefore, hopelessly time barred under the Limitations Act, 1963 and the liability of the Company to pay aforesaid charges is extinguished. Issue at paragraph 17(d) is decided against the Appellant."

The conclusion of the Hon'ble APTEL in this case is contained in para 37(b) which is extracted below:

"37(b) The liability of the Company to pay to the Board on account of non-payment of Development Charges and other charges from the date of commencement of the supply (if not earlier) even though held admissible, in terms of the PPA, is not payable as the appellant has defaulted on so many counts and has raised the demand notices after lapse of more than six years of creation of liabilities and is consequently barred by the Limitations Act. "

7.8.3 The learned senior counsel during his arguments also placed reliance on Orders of the APTEL in Appeal No.166of 2010. The relevant paragraphs relied upon are extracted below:-

"48 Further, consumer as defined in the Act is a person who is supplied with electricity for his own use. Here startup power is supplied to Respondent -1 to

startup its generating unit. Once generating unit is synchronized with the grid, the power so generated is supplied to Appellant. Without startup power, generators cannot start and produce power. Thus, in way, startup power is supplied for the benefit of Appellant only. From this point of view, a generator taking startup power from distribution licensee and supply power to same licensee on startup, cannot be termed as a consumer.

49. In the light of the above discussions a generator requiring “startup power” from the grid cannot be termed as a consumer.”

7.8.4 The learned senior counsel for the Petitioner has also relied on Order of APTEL in Appeal No.47 of 2011 and I.A. NO.73 of 2011. Paragraphs 31 and 32 of the order is extracted below:-

“31. The State Commission has also held that Respondent No.1 is a consumer in terms of Section 2(15) of the Act. Section 2(15) of the Electricity Act, 2003 is reproduced as under:

“2(15) “consumer” means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be”

32. We do not agree with the State Commission that Respondent No.1 is a consumer under the definition of sub-Section (15) of Section 2 of the Act. The definition indicates that it includes persons whose premises are for the time being connected for the purposes of receiving electricity with the works of a licensee. However, the generating company is connected to the licensees’ network for supplying electricity and not for receiving electricity. If the explanation as given by the State Commission is applied, then all the generating companies will be consumers under the Act. The Respondent No.1 had also not entered into an agreement with the appellant for drawal of power for start-up purpose in terms of the tariff order of the State Commission for the FY 2006-07 and 2007-08. Having decided the dispute under Section 86(1)(f) treating the

dispute between the Respondent NO.1 as generator and the appellant as a licensee, the State Commission should not have allowed the relief to the Respondent No.1 under Section 56(2) of the Act. Thus the tariff applicable to “other HT industries” for temporary supply would be applicable to the Respondent No.1 for drawl of power from the grid from 19.8.2006 to 4.4.2008.

7.8.5 The Petitioner had also submitted a report of a Committee constituted by the TNEB for deliberating on this issue. This Committee had gone into the aspects of charging of tariff by the Board to the Petitioner and in their recommendation have suggested refund of the penalty for Low Power Factor collected from M/s. Aban Power Company Limited for the period from 31.12.2004 to 11.8.2005 on the ground that Low Power Factor is bound to occur wherever auxiliaries are in service during testing and commissioning period and it is not reasonable to levy Low Power Factor Compensation charges as done in the case of normal HT service. In fact this refund was actually made by the TNEB to the Petitioner sometime later.

7.8.6 The TNEB / TANGEDCO during arguments reiterated their stand that they levied the charges correctly for the Low Power Factor Incentive, Excess Demand Charges and Development Charges as per the Tariff Orders of the Commission, TNERC Supply Code and as per the audit para of the learned Accountant General. The Commission has perused the pleadings of the parties and also the arguments. Going by the Judgements of APTEL in the above referred cases, it is clear that a generator who has a PPA with the Licensee for supplying the entire power cannot be treated as a consumer for the purpose of availing startup power. This could either be for testing and commissioning operations prior to commercial operation or for availing startup

power subsequent to declaration of commercial operation. Further, the PPA talks of payment of demand charges and energy charges only. The Tariff Regulations of this Commission as extracted in para 6.5 recognizes the existing contracts.

7.8.7 A combined reading of all these provisions lead us to the conclusion that the Petitioner Generator herein is not to be treated as a consumer and should not be charged for the startup power whether before or after the commercial operation date as a consumer. He should be charged in accordance with the PPA and levied the demand charges and the energy charges only.

7.8.8 Further, the various provisions of the PPA extracted in para 7.5 of the order clearly indicates that the Petitioner shall pay the Demand Charges and Energy Charges (actually consumed on this account in terms of kwhr) on a monthly basis for the supply provided for construction, testing and commissioning of the project. As regards the supply provided for startup power after commissioning of the units, the same shall be on the basis of "net metering" in line with the tariff fixed for the generator as per Section 7.2 and 7.3 of the PPA.

7.8.9 In the light of the above discussions, the Commission concludes that the Petitioner Generator who is delivering the entire power to the Respondent TNEB / TANEDCO is not a consumer. The payment of capacity charges and energy charges for power drawn during the testing and commissioning period

and thereafter during the Commercial Operation period shall be in accordance with the PPA entered into between the parties. Consequently the demand for Low Power Factor Penalty, Maximum Demand Charges and Development Charges amounting to Rs.1,59,57,115/- cannot be recovered from the Petitioner. Accordingly, the claim of TNEB / TANGEDCO in Notice dated 26.08.2010 in this regard is set aside.

7.9 The 2nd issue raised by the Petitioner is regarding allowing deemed generation under Section 3.4 (b) of the PPA for the delay caused by the Respondent in providing the transmission facilities resulting in delay in the commissioning of the Project.

7.9.1 The Petitioner's argument in their petition is that the project was delayed by 4 months and 10 days due to Respondent's failure to provide necessary power required for testing and commissioning of the Project in accordance with Section 3.3 (f) of the PPA, construct transmission facilities in accordance with Section 3.3 (a) and also in giving permission for synchronization of gas turbine. Therefore, the Petitioner is entitled for payment of deemed generation charges for 4 months and 10 days of Rs.31,96,03,798/-. As already discussed earlier, synchronization of open cycle gas turbine was done on 18.02.2005. Between 18.02.2005 and April 2005, infirm power was supplied on payment of variable charges. From 14.05.2005 to 14.07.2005 power was supplied by mutual agreement between both the parties. This was a subject matter of dispute between the parties and was adjudicated by this Commission in DRP No. 8 of 2011 and this Commission passed its Order on 28.09.2012, approving that the

power supplied between 14.05.2005 and 14.07.2005 is firm power. An appeal was preferred against this order by TANGEDCO vide Appeal No.22/2013 and this was dismissed by Hon'ble APTEL on 10.07.2013. The Petitioner in his submission has stated that the steam turbine generator was declared in commercial operation on 11.08.2005. The Petitioner has stated that they have completed their switchyard by September 2004 and pursued with TANGEDCO for providing necessary testing power. The TNEB commenced supply of power for testing and commissioning of the Plant on 31.12.2004 after delay of more than three months. Further the Petitioner has stated that as per the terms of PPA, the Respondent TNEB should have completed power evacuation feeder lines atleast 90 days prior to the commissioning of the project. Despite follow up, these feeders were not ready even by April 2005. The synchronization of steam turbine to grid was scheduled to be completed by March 2005. In the process, the project was delayed by 4 months and 10 days for which they have claimed deemed generation charges amounting to Rs.31,96,03,798/- as per the terms of Section 3.4 of the PPA.

7.9.2 The Respondent in their counter has stated that as required under the PPA, the switch yard of the Petitioner was energized on 15.12.2004 and the construction of the transmission lines in all aspects was completed on 19.07.2005 by the Respondent – i.e. erection of 4 nos. of 110 KV feeders required for evacuating power as required under the PPA were completed by 19.07.2005 despite certain force majeure conditions. The Respondent TANGEDCO relied on Section 3.3 (a) (Obligation of the Board) of PPA which states as follows:-

“The Board shall be responsible for financing, design, engineering and construction of the Transmission Facility, to the extent required for the purpose of commissioning and testing of the Project pursuant to Section 4.1 shall be completed 90 days prior to the scheduled date of completion. The construction of the Transmission Facility in all aspects shall be completed 60 days prior to the scheduled date of completion. The Board shall allow the Company to make physical inspection of the Transmission Facility during and after the completion of construction of the Transmission Facility on reasonable notice, subject to the Board’s rules and regulations. The inspection of the Transmission Facility by the Company shall be solely for the purposes of gathering information in respect of progress of construction or the status of such Transmission Facility and shall not have any financial, commercial or technical implications for the Board.”

According to the Respondent, as per the PPA, they have provided the commissioning power 90 days prior (on 31.12.2004) to the scheduled date of completion. Further, the Respondent claims that he had completed the evacuation lines 60 days prior (on 19.07.2005) to the scheduled date of completion in all respects. Consequently, the Respondent submits that there was no delay in either construction of the transmission lines or in giving permission for synchronization of the gas turbine with grid and prays for dismissal of the petition.

7.9.3 In the rejoinder filed by the Petitioner, the Petitioner has stated that the gas turbine was ready for testing in October 2004 and the Plant was made ready for combined cycle operation in April 2005. Despite repeated reminders, the TNEB provided power supply for gas turbine testing only 31.12.2004 and

the evacuation works were completed in July 2005, much beyond the stipulated time for completion and therefore they are eligible for deemed generation as claimed by them.

7.9.4 During the arguments, the parties have reiterated their written submissions.

7.9.5 The Commission has examined the submissions of both the parties. From the submissions of the parties, it is not very clear as to what was the target date of completion of the power station. The parties have only stated the facts. In view of this, the Commission felt the need for examining the actual dates. Accordingly, the definition of various dates as contained in the PPA had to be examined. The following definitions were examined.

1. Effective date
2. Schedule date of completion
3. Entry into commercial operation
4. Date of commercial operation
5. Deemed commercial operation

The definitions of the above 5 items have already been extracted in para 7.7 of this order. Effective date has been defined as the date on which conditions precedent pursuant to Section 2.1 are either satisfied in full or such conditions precedent which are un fulfilled are waived pursuant to Section 2.5 by the parties. Neither party argued on this item and indicated the effective date.

7.9.6 Scheduled date of completion – This is an important definition. But is defined as the date which is 720 days from the effective date. If the effective date itself is not identified, it is difficult to identify the scheduled date of completion. The rest of the definitions are only for academic interest. Even if 720 days i.e., about 2 years is counted from the date of signing of PPA i.e., 1st September 2003, the scheduled date of completion works out to 31st August 2005, by which time both the simple cycle and combined cycled are completed for commercial operation.

7.9.7 The definition of the Project in the PPA indicated the requirement of transmission lines as follows:

- Upto 50 MW - 2 nos. (110 KV) + one spare bay
- 50 – 100 MW - 3 nos. (110 KV) + one spare bay
- 100 – 150 MW - 4 nos. (110 KV) + one spare bay

7.9.8 The TNEB claims that testing power was given by 15.12.2004 and 4 nos. feeders were completed by 19.07.2005. From the facts of the case, it is observed that the gas turbine generator became operational in February 2005 which indicates that power to the extent of 60 to 65 MW must have been evacuated from the generation through open cycle gas turbine. As regards commissioning of the steam turbine is concerned, it is observed that the same was done during August 2005. The claim of the Petitioner for deemed generation needs to be examined in the light of the Section 3.4 (b) of the PPA, which is already extracted in para 7.6 of this order. According to this provision of the PPA, if the Company demonstrates that the project is technically capable

of Entry into Commercial Operation by the submission of a completion certificate (“**Certificate of Project Completion**”) to the Board, and the Date of Commercial Operation of the Project is delayed beyond the Scheduled Date of Completion due to the Board’s failure to construct the Transmission Facility in accordance with Section 3.3 (a), or the Board’s failure to provide the necessary power required for Testing and Commissioning of the Project in accordance with Section 3.3 (f), except due to Other Force Majeure events affecting the ability of the Board to perform its obligations under this Agreement, for such delay and the length of the delay associated therewith, the Board shall be required to pay for deemed generation (“**Deemed Commercial Operation**”) pursuant to Section 7.6 of the PPA.

7.9.9 The Petitioner has not produced any evidence of having submitted completion certificate of the project. When the scheduled date itself is not fixed duly taking into account the effective date, it is very difficult to arrive at the exact delay if any in providing either the testing and commissioning power or the Transmission Facility. In view of the provisions of the PPA in Section 3.4 (b), submission of completion certificate rests with the Petitioner, which he has not fulfilled.

7.9.10 In any case, this issue is being raised for the first time in February 2011 before this Commission, while the issue arose in 2005 i.e after a lapse of 6 years. This is much beyond the limitation period of three years, as has been held in the order of the APTEL in Appeal No. 112 of 2007, discussed in para 7.8.2 earlier. Further, delay and laches would apply in as much as the

Petitioner has not shown that he has taken up this use in time and followed it regularly with TNEB. Since the Petitioner has neither followed the PPA provisions of 3.4 (b) nor established that the claim is not hit by limitation or delay and laches, the Commission is constrained to reject this claim.

8. Summary of findings:-

- (a) The Commission concludes that the Petitioner Generator who is delivering the entire power to the Respondent TNEB / TANGEDCO is not a consumer. The payment of capacity charges and energy charges for power drawn during the testing and commissioning period and thereafter during the Commercial Operation period shall be in accordance with the PPA entered into between the parties. Consequently the demand for Low Power Factor Penalty, Maximum Demand Charges and Development Charges amounting to Rs.1,59,57,115/- cannot be recovered from the Petitioner. Accordingly, the claim of TNEB / TANGEDCO in Notice dated 26.08.2010 in this regard is set aside.
- (b) This issue is being raised for the first time in February 2011 before this Commission, while it arose in 2005 i.e. after a lapse of six years. This is much beyond the limitation period of three years as has been held in the Order of the APTEL in Appeal No.112 of 2007. Further, the delay and laches would apply in as much as the Petitioner has not shown that he has taken up this issue in time and followed it regularly with TNEB. Further COD of Combined Cycle Power Station is achieved in August 2005, which is ahead of the scheduled COD. Since the Petitioner has

neither followed the PPA provisions of Section 3.4(b) nor established that the claim is not hit by limitation or delay and latches, the Commission rejects the claim of deemed generation amounting to Rs.31,96,03,798.

9. Appeal:-

An appeal against this order lies before the Appellate Tribunal for Electricity under section 111 of the Electricity Act 2003, within a period of 45 days from the date of receipt of a copy of this order by the aggrieved person.

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission