

Tamil Nadu Electricity Regulatory Commission

Constituted under section 82(1) of the Electricity Act 2003

(Central Act 36 of 2003)

PRESENT:

Thiru. K. Venugopal

- **Member**

and

Thiru S.Nagalsamy

- **Member**

M.A.P. No. 1 of 2007

Tamil Nadu Electricity Board,
Now known as Tamil Nadu Generation
and Distribution Corporation Limited,
Represented by its Chairman Cum Managing Director,
144, Anna Salai,
Chennai- 600002

... Petitioner
Counsel for Petitioner
Thiru. H.S. Mohamed Rafi,
Thiru. Vinod Pandian,
Thiru. N.C.Ramesh Senior Counsel

Versus

PPN Power Generating Company Private Limited
III Floor, Jhaver Plaza
1-A, Nungambakkam High Road
Chennai - 600 034
Represented by its Managing Director

... Respondent
Counsel for Respondent
Thiru. Rahul Balaji

and

M.A.P. No. 2 of 2008

PPN Power Generating Company Private Limited
III Floor, Jhaver Plaza
1-A, Nungambakkam High Road
Chennai - 600 034
Represented by its Managing Director

...Petitioner
Counsel for Petitioner
Thiru Rahul Balaji

Vs

Tamil Nadu Electricity Board,
Now known as Tamil Nadu Generation
and Distribution Corporation Limited,
Represented by its Chairman Cum Managing Director,
144, Anna Salai,
Chennai- 600002

... Respondent
Counsel for Respondent
Thiru. H.S. Mohamed Rafi,
Thiru. Vinod Pandian,
Thiru .N.C.Ramesh Senior Counsel

**Date of Hearing : 29-7-2009, 26-8-2009, 8-1-2010,
8-9-2010, 2-11-2010, 19-1-2011,
21-3-2011, 22-3-2011, 23-6-2011,
24-6-2011, 17-8-2011, 18-8-2011,
14-9-2011, 7-10-2011,
19-10-2011 and 20-10-2011**

Date of Order : 15.7.2013

MAP 1 of 2007

The Tamil Nadu Electricity Board filed the petition MAP No 1 of 2007 with the following prayer:

Fix the capital cost of the Private Power Project of the Respondent Company in Pillaiperumalnallur, Nagapatinam District, Tamil Nadu and determine the tariff as

per section 86 (1) of the Electricity Act 2003, Schedule S of the Power Purchase Agreement entered into between the petitioner Board and the Respondent, and pass such suitable further or other orders as this Hon'ble Commission may deem fit and proper and thus render justice.

MAP 2 of 2008

The PPN Power Generating Company filed the petition MAP 2 of 2008 with the following prayers:

- (i) to accord approval of the "Capital cost (actuals) as has been computed by the petitioner strictly in conformity of the provisions of the TEC and the PPA at a sum of Rs.1379.25 Crores and
- (ii) to pass such further or other orders as this Hon'ble Commission may deem fit in the facts and circumstances of the case and thus render justice.

I. History of the Project:

1. On 15-10-1991 by an Official Gazette Notification, section 43-A was introduced to Electricity (Supply) Act 1948. Under this section for the first time, a private power generating company was permitted to enter into a Power Purchase Agreement (PPA) with the State Electricity Boards like TNEB.
2. After introduction of section 43-A (2) to the Electricity (Supply) Act, 1948 and the Notification, the TNEB has mooted out proposals to enter into MOU with various private companies for the purpose of purchasing electricity from them.
3. On number of occasions, discussions between the parties took place and on 22-10-1994, a PPA was initialled between the parties setting out the various terms for the establishment, generation and sale of energy to the TNEB. After the said PPA was initialled, the proposals

were sent to Government of Tamil Nadu, and the Government of Tamil Nadu had “in principle” permitted setting up of project by the generator subject to certain terms and conditions and the issue of Techno Economic Clearance (TEC) by the CEA. Based on the permission granted by the Government of Tamil Nadu, the generator placed its request before the CEA for giving a TEC for the project. Subject to certain conditions, the CEA had issued TEC on 24-11-1995.

4. The TEC was accorded with the condition that the completed cost of the scheme shall not exceed Rs.1121.70 Crores except on account of statutory requirements and foreign exchange rate variation. On 03-01-1997 an amended PPA was entered into between the parties, wherein the capital cost ceiling of the project was mentioned as Rs.1121.70 Crores, which was approved by the Government of Tamil Nadu as already approved by the CEA.
5. As per article 6.1 (m) of the PPA, the generator was to provide to the TNEB within 90 days of the COD (which was achieved on 26-04-2001) complete details of the expenditure incurred for the project for the purpose of determining the capital cost. The generator submitted the same to the CEA and to the Board in July 2001 with a request to determine the capital cost as Rs.1379.25 Crores.
6. Pending finalisation of the capital cost by the CEA, TNEB has been making monthly energy bill payments on the basis of provisional capital cost of Rs.1379.25 Crores submitted by the generator from 26-04-2001 onwards. For the purpose of arriving at the figure of Rs.1379.25 Crores as the fixed charges, the following parameters were taken into account:- (a) the Fixed Capacity Charges was computed in the ratio 336.299/347.712 MW for the period from 26-04-2001 to 21-11-2002 and (b) the Fixed Capacity Charges was computed in the ratio 343.969/347.712 MW from 21.11-2002 onwards.

7. In the meanwhile, the Electricity Act 2003 came into force on 10-06-2003. As per the provisions of the Act, the power which was hitherto exercised by the CEA, namely, fixation of the capital cost, (which in turn enables the determination of tariff at which electricity has to be purchased by the Boards from various power generating companies) now came to be vested with this Hon'ble Commission. Sections 61, 62, and 86 of the Electricity Act 2003, clearly lay down the functions of the Commission and on a perusal of the same it is very clear that the power of fixing the capital cost and determination of the tariff based on such capital cost now vests only with this Commission.

8. The CEA convened a meeting on 22-11-2005 at New Delhi in which the officials of the CEA and the Board participated. An extract of the Record Notes of the discussions is reproduced below:

“..... as per Electricity Act 2003, the completion cost for thermal power projects are not required to be approved by the CEA. As per this Act, the completion cost and the consequent tariff is to be approved by the State Electricity Regulatory Commission. However, as per clause 73 (m) & (n) of EA 2003, CEA can render advise to the State Government / State utility on the reasonableness of the completed cost. It is in this capacity that CEA is considering the completion cost for IPP projects in Tamil Nadu. The views of CEA on the examination of final completion cost in respect of these projects in Tamil Nadu may be considered by the Government of Tamil Nadu and the finalisation of completion cost in respect of these projects may be taken up with Tamil Nadu Electricity Regulatory Commission”.

9. Based on the said clarifications issued by the CEA, the Generator submitted the completed cost application for approval of Rs.1379.25 Crores in MAP 2 of 2008. Subsequently TNEB in their petition MAP 1 of 2007 proposed to allow a sum of Rs.1251.272 Crores by disallowing

a sum of Rs. 127.878 Crores. The details of amount claimed, admitted and disallowed by TNEB are :

Sl. No	Heads	Claim made by the Company		Cost arrived by TNEB		Amount Disallowed	
		US \$ (in Million)	Rs.in .Crs	US \$ (in Million)	Rs.in Crs.	US \$ (in Million)	Rs.in Crs
1	Pre Investigation	0.085	8.807	0.085	8.377	0.00	0.430
2	EPC	152.463	397.043	149.834	340.318	2.629	56.726
3	Non-EPC	4.085	36.887	3.974	27.829	0.111	9.058
4	Over Heads	0.642	25.640	0.642	6.581	0.00	19.059
5	IDC & FC	16.091	134.785	15.796	105.765	0.295	29.020
6	Total	Rs. 1379.149 Crores		Rs. 1251.272 Crores		Rs.127.878 Crores	
Exchange rate – 1 US \$ = Rs.44.76							

10. In order to narrow down the issues between the generator and the Board, the Commission directed the Secretary of the Commission to evaluate the claims of the generator and TNEB and submit a report.
11. The Secretary of the Commission submitted his evaluation report to the Commission on 17.05.2009. The Commission made this evaluation report available to the parties and directed the parties to submit their views.
12. During the proceedings before the Secretary, the TNEB agreed to admit one of the proposed disallowed item, viz, withheld LD included in

EPC costs amounting to Rs. 11.52 Crores and hence the disputed amount is limited to Rs. 116.34 Crores. The details are:

SI.No	Particulars	Amount (Rs Crores) in
1	EPC Costs (65.94 – 11.52)	54.42
2	Proportionate Interest	24.79
3	Pre-operative expenses	12.15
4	Development expenses	6.90
5	Construction Insurance	5.65
6	Financing Charges	5.55
7	Initial Charges	2.61
8	Forward cover Premium	2.43
9	Establishment and construction	0.34
10	Miscellaneous	0.96
11	Land	0.43
12	Customs duty	0.12
13	Total	116.35

13. The submission of the generator and the Board in each of the above items are summarised below:

II. EPC Cost:

The disputed EPC cost Rs. 54.42 Crores comprises four items which are: Service charges – Rs. 30.49 Crores, Escalation – Rs 18.76 Crores, Others in EPC – Rs.3.11 Crores and Construction power and water – Rs.2.05 Crores. The submissions on each of the items are as follows:

1. Service charges:

(i) Submission of TNEB:

- (a) In the Local supply contract, the Company has capitalized following amounts in respect of Local Supply Contract (LSC) payments. The details are:

Service Invoice	: Rs. 29,03,32,347
Service Tax	: Rs. 1,45,88,194
Total	: Rs 30,49,20,541

- (b) The local supply contract (LSC) agreement between M/s. PPN and M/s. Marubeni Corporation (Contractor) states as follows:
“The scope of work under this agreement (local supply) shall cover supply and delivery of all equipment and materials of Indian origin.”
- (c) The company in their letter dated 03.12.2005 stated that the service of mobilization and site preparation of fabrication yards of off-shore concrete pipes, onshore metal pipes, tanks for naphtha/HSD/condensate etc were included in the contract. TNEB/TANGEDCO commented that there is no supporting document to justify the quantum of service charges.
- (d) Then the company in their letter dated 09.12.2005 changed their stand and stated that the LSC related to supply of Contract Master Schedule specification and drawings for start-up transformer etc. However, M/s. PPN has not produced any document to show the quantum of service charge for each specific charge. The service charge has been shown in the invoice as lump sum amounts at random. There is no record to show the actual nature of service done and whether it was verified by some authority.
- (e) M/s. PPN’s statement contained in their letter dated 15.02.2006 that they have sent progress reports then and there and did not clarify or

justify the nature of services done or the amount of service charges. Their stand stated that the overall EPC cost is within the approved amount is also not acceptable, because for admitting any claim, there should be justification of the need, description of the actual work done and the reasonableness of the charges.

- (f) Hence, the service charges and service tax claimed by M/s. PPN are not admissible.

(ii) Submission of PPN

- (a) The primary dispute of the respondent is that service charges are beyond the scope of the EPC Contract and that “... *there is no provision for erection or service charges in the EPC*”. The arguments set out by the respondent at the hearing on 08.09.2011 reiterated this stand.
- (b) This allegation is at the outset denied as false and without basis as established in the following paragraphs.
- (c) All that the petitioner needs to establish is that erection and other services form part of the EPC Contract to negate the respondent’s arguments in this regard.
- (d) The EPC contract is referred to as Project Contract therein. The Project Contract includes the Foreign Supply Contract (FSC), the Local Supply Contract (LSC) & the Local Erection Contract (LEC) and the General Terms and Conditions (GTC) that is common to each of the FSC, LSC and LEC.
- (e) Section 2.2 of the GTC reads as follows:
“2.2.Scope of Work. Contractor shall perform all of the Work in accordance with the Contract and deliver the Facility to the Owner on a lump sum, fixed price, turnkey basis for the Contract Amount, in accordance with the Contract.” (emphasis supplied).
- (f) Work is defined in Section 1 of the GTC as “*shall mean the entire gamut of activities (including engineering, design, procurement, causing to manufacture, construction, erection, installation, training,*

start-up (including calibration, inspection and start-up operation) and testing operations with respect to the Facility) to be performed by the Contractor pursuant to the Contract. Work includes:

*(a) All labour, materials (including consumables to the extent that Contractor is required to provide them pursuant to Section 2.6.2 hereof), equipment, **services**, and other items to be supplied by Contractor ...”.*

- (g) Article 3 of the **LEC** describing Scope of Work states *“The scope of work under this Agreement (the “Local Erection”) shall include taking delivery of equipment and materials from the Indian port of embarkation in the case of imported items and ex-manufacturers’ works in the case of items of Indian origin, arranging transportation to the site and transit insurance, receipt and storage at site, erection, installation, start-up and testing of the Facility, including the execution of all civil and structural works for the Project and the **provision of expatriate specialists as required for supervision of erection and testing the Facility**. The detailed scope of Local Erection is set forth in the Project Contract.”*
- (h) Article 3 of the **LSC** describing Scope of Work states *“The scope of work under this Agreement (the “Local Supply”) shall cover the supply and delivery of all equipment and materials of Indian origin. The detailed scope of Local Supply is set forth in the Project Contract.”*
- (i) The values under LSC and LEC are provided in the Project Contract are specifically qualified with the statement that *“The above break down is approximate only and subject to change due to change of sourcing, etc.”* It therefore follows that it is the total lumpsum that is relevant and not the break up indicated.
- (j) The combined value of the Local Supply and Local Erection is Rs 221.10 Crores.

- (k) Services have been billed by the EPC Contractor on a monthly basis, which aggregated to Rs 29.03 Crores, excluding the service tax component thereon of Rs 1.46 Crores (total Rs 30.49 Crores) . It is therefore clear that the services have been rendered as is acknowledged by the Board.
- (l) It is an admitted position that the EPC contract was approved by the Board. It is also an admitted position that the value approved in Indian Rupees is for a lumpsum of Rs 221.10 Crores.
- (m) Further, it is also an admitted position that, including services billed of Rs 30.49 Crores, the total sum billed and paid to the EPC contractor, does not exceed Rs 221.10 Crores (excluding escalation), approved by the respondent.
- (n) It is also an admitted position that all payments relating to the EPC contract have been verified by the respondent.
- (o) In as much as:
 - (1) The EPC Contract is a lumpsum, fixed price contract to deliver the Project as defined;
 - (2) The EPC contract was finalized through the International Competitive Bidding route and the TNEB has approved the EPC contract.
 - (3) The EPC Contract as well as the LEC forming part thereof, specifically include “**services**” including “**provision of expatriate specialists as required for supervision of erection and testing the Facility**”, “*taking delivery of equipment and materials from the Indian port of embarkation in the case of imported items and ex-manufacturers’ works in the case of items of Indian origin, arranging transportation to the site and transit insurance, receipt and storage at site, erection, installation, start-up and testing of the Facility, including the execution of all civil and structural works for the Project*” (all of which are entirely services);
 - (4) The TNEB has approved the EPC contract;

- (5) The TNEB has approved the EPC contract price, which includes a lumpsum of Rs 221.10 Crores;
- (6) The EPC contract specifically states that *“The above break down is approximate only and subject to change due to change of sourcing, etc.”*
- (7) The entire claim of services (including service tax thereon) aggregating to Rs 30.49 Crores is admissible.

(iii) Evaluation Committee Findings

In a lumpsum contract, there is no possibility to segregate the supply and services items and segregation is not in the scope of the contract. Disallowance at this juncture is not fair, when the payments have already been made. The nature of transactions has already been verified by the TNEB officials and this shows the genuineness of the transaction. In the context of the above, the claim of PPN is admitted.

(iv) Decision of the Commission

Decisions of the Commission on various issues are brought out after the Written and Oral pleadings on all such issues are discussed.

2. Escalation paid to EPC Contractor:

(i) Submission of TNEB

In so far as this sub item under the EPC cost namely, escalation payment made to the EPC contractor is concerned, the contentions raised by PPN in their letters filed before the Evaluation Committee are as follows:

- (a) TNEB/TANGEDCO had approved the EPC contract on 24.6.1998 which has a specific provision for payment of escalation in cost in case of delay in issuing the notice to proceed to the EPC contractor.
- (b) TNEB/TANGEDCO inordinately delayed the approval of the fuel supply agreement though Article 3.2 (e) of the PPA clearly provides that, TNEB/TANGEDCO shall approve the Long Term Fuel Supply

Agreement within 45 days of execution of the agreement or the amendments as the case may be, which approval shall not be unreasonably withheld or delayed.

- (c) TNEB/TANGEDCO was unnecessarily asking for amendment to the PPA, especially the Heat rate from 2000 KCal/Kwh to 1900 KCal/KWh. Consequent on the delay in the insistence of the change in the heat rate, PPN could not issue the notice to proceed to the EPC contractor before 30th June 1998 and prior to 30th March 1999. Therefore any escalation paid to the EPC contractor by PPN, TNEB/TANGEDCO alone is liable.

- (d) **TNEB/TANGEDCO's reply to the above points raised by PPN:-**

Before advertizing to the above contentions raised on behalf of PPN it was contended on behalf of TNEB/TANGEDCO, (based on the conditions mentioned in the PPA,) namely that, EPC contract is not required to be approved by TNEB/TANGEDCO, and that, only the FSA requires to be approved by TNEB/TANGEDCO. In support of the above contention the relevant clauses contained in the PPA relied on are extracted below:-

Article 3.2 provides for enforcement of TNEB/TANGEDCO's Obligations

Article 3.2.(e) reads as follows:-

"TNEB/TANGEDCO shall have approved the Long Term Fuel Supply agreement and Fuel Transportation Agreements and any material amendments thereto, within 45 days of the execution of those agreements or the amendments as the case may be, which approval shall not be unreasonably withheld or delayed. TNEB/TANGEDCO shall not have the right to approve the Short Term Fuel Supply Agreements including any spot contracts entered into by the Company so long as the cost of fuel under the Short Term Fuel Supply Agreements does not

exceed the cost of fuel under the Long Term Fuel Supply Agreement; and”

Further Clause No.4.8 (k) of the PPA reads as follows:-

“ On or before the Financial Closing Date, a copy of the Construction Contract as executed including all schedules thereto, shall be made available to TNEB/TANGEDCO for its review, and”

- (e) Based on the above two clauses it was contended that, from the language employed in the PPA, there is a distinction in the requirement of approval relating to the fuel supply agreement as well as the Construction contract. While Clause No.3.2(e) provides that, TNEB/TANGEDCO shall have approved the long term fuel supply agreement and fuel transportation agreement and any material amendments thereto, within 45 days of the execution of those agreement or the amendment as the case may be, which approval shall not be unreasonably withheld or delayed, Article No. 4.8.(k) clearly provides that the construction contract shall be made available to TNEB/TANGEDCO for its review. From the language employed in the PPA in relation to both the articles, it is clear that there is no requirement on the part of TNEB/TANGEDCO to approve the EPC contract, because the word “review” means, making an appraisal, evaluation with an intention to changing it, if necessary. Therefore it cannot be contended on behalf of PPN that the Board had not approved the FSA and this caused the delay in issuing the notice to proceed to the EPC contractor, and therefore, any escalation paid to the EPC contractor by PPN, PPN is entitled to capitalize the same in the capital cost.
- (f) PPN in order to demonstrate, that, the conditions of the contract was already known to TNEB/TANGEDCO, letters exchanged between the parties in relation to the bid finalization under the ICB route was

produced, and based on which, it was contended that, the conditions of the EPC contract was known to TNEB/TANGEDCO, and therefore, it is not open to TNEB/TANGEDCO to raise such a contention. This contention cannot be countenanced in the eye of law because, unless and until the entire EPC contract is made available to TNEB/TANGEDCO which was done only on 29.05.1998 by PPN, merely placing reliance on the conditions mentioned, while inviting tender during the international competitive bidding is neither here nor there, especially when the terms and conditions between PPN and the EPC contractor gets finalized only when the EPC contract is signed between the parties .It is on record that though the EPC contract was signed on 5.04.1998 between EPC contractor and PPN, the same was furnished to TNEB/TANGEDCO only on 29.05.1998 in complete shape. Till then the conditions of the contract was not made known to TNEB/TANGEDCO. Therefore the contention that, because of TNEB/TANGEDCO participation in finalizing of the conditions while floating the tender under the ICB route, cannot be construed as an approval of the entire EPC contract signed on 05.04.1998 by PPN and EPC contractor. Therefore any contention to the contrary cannot be countenanced in the eye of law.

- (g) In order to demonstrate that the terms and conditions of the contract or for that matter, there was no delay in the approval of the fuel supply agreement entitling PPN to claim the escalation paid to the EPC contractor, the documents exchanged between the parties are being relied upon by the Board.
- (h) In so far as the first contention raised by PPN namely that, the TNEB/TANGEDCO approved EPC contract, has a specific provision for payment of escalation cost in case of delay in issuing the notice to proceed to the EPC contractor is concerned, it is respectfully submitted that from the minutes of the Board meeting found in the documents filed by TNEB/TANGEDCO, it could be noticed that,

TNEB/TANGEDCO, had approved the selection of Marubeni Corporation, Japan, as the EPC contractor, and while approving the name, it has been clearly stated that, the EPC price is to be negotiated and settled, with a further rider that, the Heat Rate and Auxiliary consumption are to be negotiated and incorporated in PPA based on the furnished figure in the EPC contract. Therefore the contention raised by PPN namely that TNEB/TANGEDCO had approved the EPC contract is not correct. On the contrary from the documents filed by TNEB/TANGEDCO, it could be noticed that, what has been approved by TNEB/TANGEDCO is only the name of the EPC contractor, and the EPC price of US\$75,061,000 plus Japanese Yen 8,800,000,000 plus Indian Rs. 221,10,00,000/-. The factual position can be seen from the letters exchanged between the parties.

- (i) PPN in its fax dated 10.09.1997 after setting out the revised cost of the project extracted above, requested the Board to approve the EPC cost immediately, to enable PPN to continue its financing efforts with a view to achieve financial closure by end of November 1997.
- (j) On 01.10.1997, Chief Engineer TNEB/TANGEDCO informed PPN that TNEB/TANGEDCO, has accepted the EPC price for the project mentioned above and had also directed PPN to get the approval from the CEA, at the actual, after completion of the project, taking into account the above EPC price.
- (k) On 05.04.1998, PPN enters into a contract with Marubeni Corporation, Japan, namely the EPC contractor.
- (l) On 08.05.1998, TNEB/TANGEDCO requested PPN to furnish a copy of the signed EPC contract entered into by PPN with EPC contractor, as directed during the internal meeting held on 04.05.1998.
- (m) On 25.05.1998, another letter was sent by TNEB/TANGEDCO to PPN to furnish a copy of the EPC contract to the Board.

- (n) On 29.05.1998, PPN in response to the letter dated 25.05.1998 sent by TNEB/TANGEDCO referred to above, had furnished a copy of the EPC contract for the record of TNEB/TANGEDCO.
- (o) From the above it is clear that TNEB/TANGEDCO had not approved the EPC contract as sought to be contended by PPN before the Evaluation committee namely that, TNEB/TANGEDCO had approved the EPC contract. In fact, on the date when TNEB/TANGEDCO had approved the name of the EPC contractor, and the EPC contract price, PPN had not even entered into the EPC contract, which contract was entered into only on, 05.04.1998 by PPN with Marubeni Corporation, Japan. Therefore it is clear that this contention raised by PPN cannot be countenanced in the eye of law.
- (p) In so far as the Second and Third contentions are concerned, namely that because of the delay in the approval of the Fuel Supply Agreement(FSA), (though it was submitted to the Board for its approval on 07.05.1997) is concerned, and that the same was approved by TNEB/TANGEDCO after the amendment were carried out by PPN in the PPA on 06.08.1998, and that, after the said approval only, the financial closure could be achieved by PPN is concerned, the following was respectfully submitted for the kind consideration of the Hon'ble commission, namely that ,there is no delay on the part of TNEB/TANGEDCO in approving the Fuel Supply Agreement, and that, at any rate the following events would clearly demonstrate that the delay in approval cannot be termed as TNEB/TANGEDCO having been unreasonable and had therefore delayed the approval of the FSA.
- On 07.05.1997 PPN had furnished the FSA for the approval of TNEB/TANGEDCO.
 - TNEB/TANGEDCO, on 28.06.1997 during the meeting of its Board while approving the name of the EPC contractor, had clearly

indicated that the heat Rate and Auxiliary consumption should be renegotiated and incorporated in the PPA.

- On 07.07.1997 also, a request was made by TNEB/TANGEDCO for negotiating the Heat rate.
- On 18.08.1997, TNEB/TANGEDCO once again wrote letter seeking for amendment to the Power Purchase Agreement.
- On 18.10.1997, another letter was written by TNEB/TANGEDCO to PPN to send the addendum incorporating the amendment to PPA as requested in the TNEB/TANGEDCO letter dated 18.08.1997 referred to above.
- On 18.11.1997, TNEB/TANGEDCO had clearly informed PPN about its comments on Fuel Supply Agreement under its letter dated 07.07.1997, and at the same time, requested for the addendum asked for by TNEB/TANGEDCO for incorporation in the PPA.
- On 08.12.1997, TNEB/TANGEDCO writes a letter to PPN calling for negotiation to carry out the amendments sought for by it in the PPA, and calls for a meeting at 3 PM on 09.12.1997.
- On 02.01.1998, TNEB/TANGEDCO writes another letter calling for a negotiation on the amendments to the PPA and FSA on 07.01.1998, after specifically stating that, the concurrence for FSA is held up for finalization of certain issues through negotiation.
- On 03.01.1998, PPN responds by stating that, it was unable to meet the Board on 22.12.1997 and requested for a meeting to be held in the week commencing from 19th of January 1998.
- On 12.01.1998 TNEB/TANGEDCO fixes meeting on the PPA and FSA at 11 AM on 21.01.1998, after specifically stating that the concurrence for the FSA can be given only after certain issues are discussed and sorted out.

- On 31.01.1998, PPN writes a letter to TNEB/TANGEDCO in pursuance to the discussion on 24.01.1998 with TNEB/TANGEDCO, by stating that, all the lenders have indicated that the Power Purchase Agreement executed on 03.01.1997 with TNEB/TANGEDCO, shall not be amended without the approval of the lender, and that, PPN will discuss the matter with the lenders and revert back to TNEB/TANGEDCO, and the process may take about 2 to 3 months time.
- On 10.03.1998 PPN writes to TNEB/TANGEDCO informing TNEB/TANGEDCO that, the lenders are not agreeable to any changes to the PPA entered into on 03.01.1997.
- On 11.03.1998, PPN requests for approval of the fuel supply agreement.
- On 16.03.1998, in reply to the letter of PPN dated 10.03.1998, TNEB/TANGEDCO under its letter, calls for a meeting for discussing the Heat rate on 20.03.1998.
- On 20.03.1998, PPN after referring to the letter dated 16.03.1998 states that, though the company in view of the commitment to the investor and lenders would not agree for any revisions to the PPA, on the persuasion of the Electricity Minister, PPN had agreed to certain points raised by TNEB/TANGEDCO.
- On 25.03.1998, PPN writes a letter seeking for approval of the FSA which was submitted on 07.05.1997 to TNEB/TANGEDCO.
- On 30.04.1998, PPN once again reiterates its views on the amendment sought for once again reassuring that, PPN shall proceed with the amendment to PPA after obtaining approval from the lenders as agreed to in terms of its letter dated 10.03.1998. At the same time requested for the approval of the FSA to attain the financial close.

- On 06.05.1998, PPN once again requests for the approval of FSA.
- On 04.06.1998, TNEB/TANGEDCO requests for amendment of the PPA relating to Heat rate.
- On 05.06.1998 PPN writes that in relation to the FSA that PPN is still awaiting the approval of FSA by TNEB/TANGEDCO.
- On 05.06.1998, PPN writes a letter to TNEB/TANGEDCO stating that they are not agreeable for any renegotiation of the parameters already agreed and incorporated in the PPA.
- On 09.06.1998, notification issued by G.O.I in relation to station Heat rate.
- On 15.06.1998, PPN once again requests for the approval of FSA after drawing the attention of the TNEB/TANGEDCO to article 3.2 of PPA, which says that TNEB/TANGEDCO shall approve the FSA within 45 days.
- On 24.06.1998, TNEB/TANGEDCO once again writes a letter requesting PPN for modification in the PPA.
- On 04.07.1998, after making a reference to a meeting held on 27.06.1998 with the Hon'ble Minister for Health and Electricity, wherein it was agreed that necessary clarification would be obtained on or before 03.07.1998 on the applicability on the notification dated 09.06.1998 to the PPN project, informs the Board that, the said notification will apply to the package approved by the authority on or after the date of its publication.
- On 06.07.1998, TNEB/TANGEDCO writes a letter to PPN stating that, the clarification sought for by TNEB/TANGEDCO on the notification dated 09.06.1998 is still awaited, and at the same time requesting for the amendment suggested to the PPA.

- On 23.07.1998 letter from PPN to the TNEB/TANGEDCO stating that the notification will apply only to PPA'S which were executed and delivered to the parties on or before 09.06.1998.
- On 28.07.1998, PPN writes a letter to the Board that out of deference to the wishes of the Hon'ble Minister and the Board PPN agrees to reduce the Heat rate in the PPA from 2000Kcal/Kwh to 1900KCal/Kwh, subject to TNEB/TANGEDCO providing requisite approval on or before 01.08.1998.
- On 29.07.1998, the TNEB/TANGEDCO, agrees for the renegotiated Heat rate to1900KCal/kWh.
- On 05.08.1998 PPN sends a copy of the addendum with appropriate corrections to the Board to enable PPN to execute the PPA.
- On 06.08.1998, Addendum I, to the amendment and the restated power purchase agreement dated 03.01.1997 was entered into between the parties. On that date about 9 amendments were carried out including the reduction in the heat rate from 2000KCal/Kwh to 1900KCal/Kwh.
- On 06.08.1998, TNEB/TANGEDCO approves the FSA submitted by PPN.
- On 05.11.1998, PPN writes to TNEB/TANGEDCO that the process, to achieve the financial close commenced on 09.10.1998, and that, the financial close process is slated to be completed by the end of the month.
- On 09.12.1998, PPN writes a letter to TNEB/TANGEDCO recording its gratitude and unstinted support given to it by the Board for developing the project.

- On 19.12.1998, PPN request's for approval of the assignment of the PPA and the guarantee given by GOTN from TNEB/TANGEDCO, as required under Article 17.10 of the power purchase agreement and clause 6 (B) of the guarantee.
- In order to demonstrate that the EPC contract has been approved by TNEB/TANGEDCO, PPN has relied upon the letter dated 24.06.1998, wherein it has been stated that “while approving the EPC contract TNEB/TANGEDCO has already informed you that the Heat Rate and Auxiliary consumption would have to be negotiated and incorporated in the PPA based on the figures furnished in the EPC contract vide this office letter dated 07.07.1997 and 08.07.1997.” Taking advantage of the word loosely worded in the said letter, namely that, the EPC contract (instead of EPC Contractor) has been approved by TNEB/TANGEDCO in this letter, a contention has been raised that, TNEB/TANGEDCO had approved the EPC contract on 24.06.1998. This contention is not correct because, no letter has been written by TNEB/TANGEDCO approving the EPC contract. On the contrary from the letters dated 07.07.1997 and 08.07.1997 referred to in the letter dated 24.06.1998, it could be seen that, only the EPC contractor has been approved. Therefore due to a mistake, instead of the word EPC contractor, the word EPC contract being wrongly mentioned in the letter dated 24.06.1998, it does not mean that, the EPC contract has been approved by TNEB/TANGEDCO. In fact in the letter dated 08.07.1997 from PPN, PPN had thanked TNEB/TANGEDCO in approving Marubeni Corporation, as the EPC contractor. Therefore it is clear that the contentions raised by PPN as if, the EPC contract has been approved by TNEB/TANGEDCO in the letter dated 24.06.1998 is not correct.

- Further Article 17.1 of the PPA clearly provides that, the PPA cannot be amended except by prior written agreement between the parties. That is why TNEB/TANGEDCO had to write several letters to PPN, right from day one, requesting for the reduction in the Heat rate, and after it was agreed to by PPN, the same was incorporated by way of amendment on 06.08.1998 to the PPA entered into between the parties.
- From the above, it could be noticed that, TNEB/TANGEDCO cannot be held responsible in requesting for the amendment to the Heat rate because, if the station heat rate, is reduced, this will result in less cost of power produced. It will not be out of place if it is mentioned here that the PPA was signed on 03.01.1997, and after that a notification dated 28.04.1997 was issued by the Government of India reducing the station heat rate, and the same had to be followed by TNEB/TANGEDCO till such time the applicability of it was clarified by the Government of India vide notification dated 27.07.1998 by stating that, the notification will apply only to the PPA's signed on or after the date of the notification namely 09.06.1998. At any rate, from the correspondence referred to above it could be noticed that, PPN was taking shelter by taking a stand, namely that, the lenders were not willing for such an amendment to the PPA. However from the financial document filed by TNEB/TANGEDCO, it could be noticed that, PPA has been defined as the amended and restated PPA together with any subsequent amendments to the PPA. Therefore it is clear that once the financial document recognizes any future amendment to be binding on the financing banks, PPN therefore cannot be heard to contend that, the lenders are not willing to agree to amend the PPA. It bears mentioning here that at any rate, on that date, namely on 6.12.1998, the financing document was not

executed by PPN with the Financial Institutions, and was executed only on 07.12.1998.

- From the factual statements set out above, it cannot be construed that the requirement of the reduction of the heat rate by TNEB/TANGEDCO can be said to be an unreasonable one as contented by PPN. Therefore it is clear that because of the delay on the part of PPN in accepting, the reduction in the Heat rate, any escalation paid to EPC contractor by PPN, cannot be held to be on account of TNEB/TANGEDCO, without which TNEB/TANGEDCO could not approve the FSA. Therefore the escalation paid by PPN to the EPC contractor (because of the delay in issuance of the notice to proceed to the EPC contractor), cannot be claimed to be due to the default of the Board.
- Further, from the correspondence referred to in the earlier paragraphs, it is clear that, at no point of time any case has been pleaded by PPN that, if there is any delay in the approval of the FSA by TNEB/TANGEDCO, the same will result in the payment of escalation to the EPC contractor, and that, the same will have to be borne only by TNEB/TANGEDCO. This is because PPN is fully aware of the fact that TNEB/TANGEDCO had not approved the EPC contract. In fact no letter from any of the lenders was produced by PPN to TNEB/TANGEDCO at that time, nor has any letter been produced before the Hon'ble commission by PPN stating that, the lender is not willing for any amendment to the PPA. Further PPN did not advance any case at any point of time that, consequent on the reduction of the heat rate, PPN will be greatly affected either by way of generation or as to how PPN will be prejudiced. In the absence of any such case pleaded, it is clear that PPN had only delayed the approval of FSA by TNEB/TANGEDCO.

- It is therefore respectfully submitted that having regard to what has been stated above, the request made by TNEB/TANGEDCO in relation to the reduction of the heat rate from 2000Kcal/Kwh to 1900 Kcal/Kwh, cannot be termed as one being unreasonable, especially when, Article 3.2. (e) of the PPA, clearly provides that TNEB/TANGEDCO cannot “unreasonably” withhold the approval of the FSA.
- Therefore looked at from any point of view, PPN is not entitled to claim any amount paid by it towards escalation to the EPC contractor, especially when on the same day when the amendments to the PPA was executed, the FSA was approved by the Board . Therefore any delay in the approval of the FSA by TNEB/TANGEDCO is solely attributable only to PPN.

In fine, the contentions of the Board on this issue are four fold:

- (1) EPC Contract was not approved by TNEB/TANGEDCO as stated by PPN in their responses till date;
- (2) The reduction in heat rate from 2000 Kcal/kWh to 1900 KCal/kWh asked for by TNEB/TANGEDCO cannot be construed as an unreasonable one as provided by TNEB/TANGEDCO in PPA
- (3) No document has been produced by PPN saying that the lender’s are not agreeable for reduction in the heat rate ,especially when the financial document was signed only on 07.12.1998 with the financial institutions by PPN
- (4) If really the non-acceptance of the terms by the lender was the only reason for delay in not accepting the reduction in heat rate, PPN has so far has not substantiated with relevant documents till date, to prove the basis on which, the lenders have subsequently accepted the reduced heat rate for funding the project.
- (5) While approving the EPC Contractor TNEB/TANGEDCO, has clearly stated that, the Station Heat Rate has to be re-negotiated.

(ii) Submission of PPN

- (a) The primary disputes of the respondent are that the petitioner “... *did not seek for any approval for escalation of cost*” and “... *as per Article 15 (a) of the PPA, company did not notify this to TNEB*”.
- (b) The additional objections raised, for the first time, during arguments on 20.10.2011 by the respondent were (i) the EPC contract was never submitted to the respondent; (ii) the TNEB is not even aware of the scope; (iii) the PPA only requires submission of the EPC contract for review; (iv) the EPC contract was never approved by the TNEB; and (v) the FSA approval was delayed by the TNEB in order to obtain the amendment to the PPA as sought by the TNEB and the only issue that needs to be decided by the Hon’ble Commission is whether this was a reasonable delay.
- (c) The objections raised in para (a) above have been addressed by the affidavit dated 07.10.10 and we draw reliance thereon. The objections in paragraph (b) above are addressed hereinafter.
- (d) The TNEB’s letter dated 22.05.96 prescribes the procedure for competitive bidding process for the EPC. This letter, inter alia, stipulates “3) *The detailed specifications with bid documents may be sent to the Board for approval; 4) After getting Board’s approval for both the short list of firms and detailed specifications with bid documents, the same may be sent to the short listed firms calling for quotations; 5) The quotations received may be evaluated and the evaluation got approved by Board before contract is awarded.*”
- (e) The petitioner submitted a copy of the draft EPC contract along with EPC bid document.
- (f) The TNEB’s letter dated 31.01.97 confirms that “*The Bid Documents are generally in order ...*”
- (g) The petitioner’s letter dated 28.05.97/02.06.97, in respect of award of the EPC contract by inviting International Competitive Bidding, inter alia,

covers the following (i) the petitioner had engaged itself to this task to ensure total compliance of the TNEB's directive in this regard; (ii) at every stage of the process, had kept the TNEB informed of action taken and obtained approval from the TNEB wherever necessary or called for; (iii) delineates all the steps taken, reasons therefor and the outcomes; (iv) submission of the evaluation of the LOIs; (v) drawing reference to the TNEB's approval of the short listed bidders; (vi) drawing reference to the TNEB's letter dated 31.01.97 approving the bid documents; (vii) the details of the evaluation; (viii) seeking approval for appointment of the EPC contract at the prices indicated therein; and (ix) stating specifically *"We have already forwarded a copy of the draft EPC contract along with the EPC bid documents to TNEB... We shall forward to you a copy of the final EPC contract document..."*.

- (h) The TNEB's letter dated 07.07.97 refers to the petitioner's letter dated 28.05.97/02.06.97, whilst accepting the same, stipulates that *"... the EPC price is to be negotiated and settled and the heat rate and auxiliary consumption etc are also to be negotiated ..."*
- (i) The TNEB's letter 08.05.98 states inter alia, *"Board while reviewing the progress of the projects in its meeting held on 4.5.98 has directed to obtain a copy of the signed EPC contract. You are requested to furnish ... copy of the EPC contract for placing before the Board immediately."*
- (j) The petitioner submitted the executed EPC contract on 29.05.98 to the TNEB.
- (k) The TNEB states, inter alia, in its letter dated 24.06.98 *"It is once again brought to your notice that while approving the EPC contract, Board has already informed you that the heat rate and auxiliary consumption would have to be negotiated ..."*
- (l) The above cumulatively and clearly establish that
 - (1) The Bid Documents were submitted and approved by the TNEB and the Bid Documents specifically cover the scope of the EPC contract. In

any event, price cannot be determined unless scope is laid out. Hence, the TNEB cannot claim to be unaware of the scope of the EPC contract.

- (2) Whilst the PPA requires submission of the EPC contract for review, the TNEB's letter dated 22.05.96 (which is dated well prior to the execution of the PPA – PPA was executed on 03.01.97) required the Bid Documents to be approved and the draft EPC contract formed an integral part of which, which therefore implies approval of the TNEB.
 - (3) The EPC contract had been submitted to the TNEB along with the Bid Documents, which were approved by the TNEB.
 - (4) The TNEB has specifically stated that the Bid Documents (which included the EPC draft contract) were generally in order, thus approving the EPC contract.
 - (5) The carve out to the contents of the petitioner's letter dated 28.05.97/02.06.97 have been delineated therein. Hence, all other aspects of the petitioner's letter *ibid* have been accepted/approved. At the cost of repetition, the letter *ibid* specifically draws reference to the submission of the draft EPC contract forwarded with the EPC bid documents to the TNEB, which the TNEB found to be generally in order.
 - (6) The TNEB in its letter dated 08.05.98 requires submission of the signed EPC contract for placing before the TNEB's Board. Evidently, this signifies approval of the EPC contract by its Board. The TNEB follows this up and reiterates in its letter dated 24.06.98 that it has approved the EPC contract.
- (m) Read together, it would be amply clear that the admitted position between the parties was that the EPC contract had indeed been approved. It was only as an afterthought, that the TNEB, at the final hearing date, viz., 20.10.11, made an untenable plea that it had not indeed approved the EPC contract.

- (n) The TNEB also stated that the PPA did not require the EPC contract to be approved. The TNEB however, conveniently fails to recognize its own stipulation to the petitioner that the Bid Documents relating to the EPC be approved by it. Admittedly, an integral part of the Bid Documents is the draft EPC contract. Thus, this is a clear stipulation that the EPC contract, which is an integral part of the Bid Documents, requires to be approved by it. In fact, the TNEB did approve the EPC contract on more than one occasion, as brought out by the documents referred to above.
- (o) If the contention of the TNEB were that the EPC contract was indeed not approved by it, why does the TNEB rely upon the EPC contract in respect of various disallowances proposed by it, e.g., (i) untenably proposed disallowance Construction Power and Water, (ii) Change Order, etc.
- (p) Clearly, the TNEB cannot choose to selectively reject portions of the approved EPC contract. The obvious conclusion therefore is that the EPC contract has to be accepted in its entirety.
- (q) Article 3.2 (e) of the PPA enjoins the TNEB to approve the Long Term Fuel Supply Agreements “*within 45 days of ... which approval shall not be unreasonably withheld or delayed.*” This is a standalone provision and cannot be linked to amendment to the PPA, as claimed by the TNEB.
- (r) The PPA itself is a concluded contract and any renegotiations thereon cannot be enforced by one party unilaterally. The petitioner had consistently held that a concluded contract cannot be sought to be renegotiated, as the entire process of development, contract structuring and financing were hinged on such a critical, concluded contract. In any event, this cannot be a reason for not approving the FSA.
- (s) The TNEB once again reiterates that it **resorted to coercion** and facts clearly establish that the petitioner had to finally accede to an untenable renegotiation of a concluded contract **under duress**.
- (t) It would be amply clear that the approval of the FSA within 45 days is mandated and the TNEB is obliged to comply with such an agreed obligation. This is an absolute obligation cast on the TNEB and this is not

conditioned on any other factors, except the execution of the FSA or amendments thereto. Renegotiation of the PPA cannot be a reason for not approving the FSA, apart from a clear admission by the TNEB that it **resorted to coercion**. It may be reiterated here that the petitioner even obtained a clarification from the Ministry of Power, Government of India, that the notification dated 09.06.98 did not apply to concluded PPAs and therefore would not apply to the petitioner.

- (u) It may be noted that the reference to the notification dated 09.06.98 was only an excuse and an afterthought, as the FSA was submitted for approval on 07.05.97, well over a year earlier, against the stipulation of mandatory approval within 45 days. Even on this account, the entire delay lies at the doorstep of the TNEB and the TNEB cannot shy away from the fact that this untenable, undue delay in approval of the FSA led to the delay in achieving financial closure.
- (v) It is pertinent to state that naphtha was always the Alternate Fuel in the PPA. On 15.05.98, the day on which the Firm Financial Package was approved, the CEA deleted condition (vi) in the TEC which read “signing of gas supply agreement by M/s DMPC with PY-1 and PY-3 gas producers”. This deletion was based on a recommendation to this effect by the TNEB.
- (w) The approval was received on 15.05.98 and the petitioner could quite well have achieved financial closure by 30.06.98, in the normal course. Hence, the only reason why the petitioner could not achieve financial closure was the non-approval of the FSA by the TNEB.
- (x) In view of all of the above, the escalation in the EPC contract, solely attributable to delays caused by the TNEB, may kindly be permitted.

(iii) Evaluation Committee findings

PPN in their letter dated 10-03-2009 reiterated that the escalation is as per EPC contract and TNEB’s position to disallow escalation is untenable. During the meeting on 30-03-2009, PPN informed that “Provision for such a escalation is available explicitly in the contract if the notice to proceed is

issued after June 30, 1998 but prior to March 30, 1999". Hence, the eligibility is established. It was also agreed to by the TNEB. Hence the claim of PPN is admitted.

3. "Others" on EPC Cost

(i) Submission of TNEB

- (a) The contention of PPN was that PPN was asked to break up the actual capital cost in the format provided to PPN, and that, the format, inter alia, required a break up between "Mechanical", "Electrical" and a general residual category "Project cost- Others" under the EPC cost category and that TNEB/TANGEDCO sought to disallow the differential US \$ and Indian Rupees on a wrong premise.
- (b) During the hearing it was pointed out by the Hon'ble Commission that such method of working is not correct and on such observation being made by the Hon'ble Commission, TNEB/TANGEDCO accepted the said position and withdrew its objections. Having regard to the above this amount PPN is entitled to add the same to the capital cost.
- (c) Hence the amount claimed under this head was not disputed by TNEB/TANGEDCO. Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim can be added to the capital cost.

(ii) Submission of PPN

- (a) The primary dispute of the TNEB appears to be that the petitioner had only clarified for US \$ 2.458 million and Rs 14.587 crores under "*other head*".
- (b) The petitioner denies the same as incorrect due to apparent improper understanding of facts by the TNEB. The same was also established to the Evaluation Committee by means of all the working papers in connection with this disallowance. The broad facts are set out hereunder.

- (c) The petitioner was asked to break up the actual capital cost into a format provided to it. This format, inter alia, required a break up between “Mechanical”, “Electrical” and a general residual category “Project Cost - Others” under the EPC cost category. The components of expenditure that could not be fitted into the sub-heads in “Mechanical” and “Electrical” were fitted into “Mechanical - Others” under “Mechanical” and separately in “Electrical - Others” under “Electrical”.
- (d) The values in US \$ for the Project Cost under “Others (specify)” was US \$ 2.513 million and for “Electrical - Others” was US \$ 2.458 million. The TNEB verified both categories. Thereafter, when the EPC cost verification exercise was repeated by the TNEB, it attributed the supporting documents for US \$ 2.458 million to the claim of US \$ 2.513 million, thus claiming to disallow the differential US \$ 0.058 million. It may be mentioned that the claim for US \$ 2.513 million had already been verified. Similarly, the TNEB for the value in INR for Rs. 17.455 Crores incurred under “Others (specify)” chose to match with the supporting documents of INR 14.587 Crores incurred under “Mechanical” – Others thus claiming to disallow the differential of Rs. 2.868 Crores.
- (e) Admittedly, the TNEB had verified all payments relating to the EPC contract.
- (f) The petitioner had clarified this on several occasions to the TNEB, both in writing and during various discussions, but the TNEB chose not to acknowledge facts that were staring them in the eye.
- (g) The issue was examined in detail by the Evaluation Committee constituted by the Hon’ble TNERC and the petitioner’s position was clearly established and the findings of the EC support this position.
- (h) Although the TNEB had prayed that it be permitted to reargue this matter vide his IA No. 1 of 2011 dated 16.08.11, no further submissions were made.

- (i) In view of the above, the expenditure of Rs 3.11 Crores may kindly be admitted.

(iii) Evaluation Committee Findings

After a detailed discussion on 30-03-2009, it was indicated that this disallowance is due to the confusion of electrical items and mechanical items under the head others under EPC contract. The TNEB officials have not properly applied their mind on this issue and they have not furnished any defects on the payments proof furnished. The claim of PPN is admitted.

4. Construction Power and Water

(i) Submission of TNEB

- (a) The case put forward by PPN is that, the total amount paid under the EPC Contract including for Construction Power and Water was within the EPC contract amount and that, this claim was similar to claims made for supply of gas turbine or generator or steam turbine or its generator or any of the other systems comprising the project. Therefore this claim is fully payable and may be admitted.
- (b) TNEB/TANGEDCO by way of reply to the above submissions made it clear that, PPN is not entitled to any amount under this head of claim, because the same runs contra to the clauses contained in the EPC contract, dated 05.04.1998 entered into by PPN with Marubeni Corporation. According to TNEB/TANGEDCO, from clause No. 2.28 of the EPC contract, it is clear that any power and water up to the date of installation of the equipment has to be met only by the EPC contractor. The language employed in this clause is “Contractor shall make provisions at his own cost”, there by meaning that, providing of electricity and water is deemed to be included in the amount payable to the EPC Contractor as

- agreed to in the EPC contract. Therefore it is clear that the expenses have to be met only by the EPC contractor, and PPN. Since this has been already included in the EPC cost and if payment claimed is to be allowed it will amount to a double claim hence cannot include it in the capital cost, for the purpose of determining the actual capital cost. Since it has already been included in the EPC cost and any payment made will amount to double claim.
- (c) The above submission was further fortified by making a reference to clause 2.6.2 (a & b), of the EPC contract which clearly provides that, PPN has to provide power and water to the interconnection point for the purpose of Commissioning, performance, testing and operation. This distinction in the requirement mentioned in the EPC contract, has to be borne in mind for the purpose of determining this head of claim for the purpose of finding out as to whether this claim can be added to the capital cost, as sought to be contended by PPN or not.
 - (d) Therefore looked at from any point of view, having regard to clause No. 2.28 of the EPC contract which provides that the EPC Contractor has to meet at his own cost, any expenses incurred for water and electricity till the date of installation, this head wise claim cannot be added in the capital cost, in addition to what is to be paid to the EPC Contractor, as per the EPC Contract. As otherwise, if this amount is capitalized, it would mean that, the EPC Contractor will be entitled to more than the actual amount as per the EPC Contract, especially when the language used is “at its own cost” in clause No. 2.28.
 - (e) Further no break up details of the expenses incurred showing whether the claim has exceeded the value of the EPC Contract amount approved by TNEB/TANGEDCO vide letter dated 01.10. 1997 has been furnished by PPN. This contention is raised without prejudice to the above contentions, namely that, PPN can not capitalize this amount as one of the items to the

capital cost for the purpose of determining the tariff as otherwise it will amount to a double payment in respect of this claim.

- (f) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim made by PPN cannot be added to the capital cost, and therefore is liable to be rejected as otherwise it will amount to a double payment in respect of this claim.

(ii) Submission of PPN

- (a) The primary dispute of the TNEB seems to be that the EPC contract provides that the Contractor shall make provisions at its own cost, inter alia, for supply of potable and non-potable water and electricity. Hence, payments by the generator to the EPC contractor for Construction Power & Water are not to be paid.
- (b) The above is denied as incorrect due to improper understanding of the facts and the EPC contract.
- (c) One of the heads under which claims were made by the EPC contractor was for Construction Power and Water.
- (d) This claim was similar to claims made for supply of Gas Turbine or Generator or Steam Turbine or its Generator or any of the other systems comprising the Project.
- (e) The total amount paid under the EPC contract, including for Construction Power & Water, was within the Contract Amount.
- (f) Although the TNEB had prayed that they may be permitted to reargue this matter vide their IA No. 1 of 2011 dated 16.08.11, no further submissions were made.
- (g) For the above reasons, the claim is fully payable and may kindly be admitted.

(iii) EC findings:

PPN in their letter dated 10-03-2009 stated that during the meeting TNEB officials agreed to come with proper reply after checking the payment records furnished. TNEB is making out as if PPN has paid this amount in addition to the EPC cost, which is not the case. This has to be included as part of the EPC cost and would not suffer any disallowance. Considering the above, the claim of PPN is admitted.

III. Proportionate Interest and Finance Charges

1. Submission of TNEB

- (b) PPN had claimed a sum of Rs. 24.79 Crores towards this head of claim based on the capital cost of Rs. 1379.15 Crores arrived at by PPN. However before the Evaluation Committee, objections were raised in relation to the various heads of claims put forward by PPN. Before the Evaluation Committee PPN had accepted that some of the heads of claims are not pressed and consequently the amount of capital cost got reduced from Rs. 1379.15 Crores to Rs 1377.62 Crores. Further before the Hon'ble Commission arguments have been advanced by both the parties relating to various heads of claims raised by PPN. Depending on the result of the arguments advanced under the various heads of claims to be decided by the Hon'ble Commission, the proportionate cost towards IDC & FC has to be revisited. Therefore this head of claim will depend upon the final order to be passed on the determination of capital cost, as against the various heads of claim made and the amounts to be arrived at by the Hon'ble Commission.

1. Submission of PPN

- (a) This amount is to be determined based on the final amount of the capital cost claim that is not allowed.
- (b) On the basis of a disallowance of Rs 5.43 Crores, the EC has determined disallowance under this head at Rs 0.58 Crores.

- (c) This sum is to be derived eventually prorata to the disallowance of Rs 0.58 crore in para 2 above, based on the final determined capital cost by the Hon'ble TNERC. Both parties concurred with this principle at the hearing on 20.10.11.

IV. Pre-operative expenses – Rs.12.15 Crores

1. The Pre-operative expense consists of sixteen (16) items. The details are:

i) Depreciation	–	Rs.2.69 Crores
ii) Guest house expenses	–	Rs.26.80 Lakhs
iii) Hospitality expenses	–	Rs.9.80 Lakhs
iv) Hire Purchase Interest	–	Rs.16.29 Lakhs
v) Interest	–	Rs.4.25 Crores
vi) Interest on working capital	–	Rs.31.11 Lakhs
vi) Money transit insurance	–	Rs.0.71 Lakhs
vii) Front end fee	–	Rs.26.19 Lakhs
viii) Professional Charges	–	Rs.30.78 Lakhs
ix) O & M Maintenance expenses	–	Rs.5.33 Lakhs
x) Travelling and Conveyance	–	Rs. 72.20 Lakhs
xi) Club Membership Fee	–	Rs.12.00 Lakhs
xii) Community Project Expenses	–	Rs.8.75 Lakhs
xiii) Donation	–	Rs.0.65 Lakhs
xiv) Donation eligible for IT	–	Rs.5.25 Lakhs
xvi) Others under pre-operative expenses	–	Rs.2.75 Crores.

2. During the discussion in the evaluation committee meeting PPN agreed to withdraw the claim of Rs.76.88 Lakhs such as, Guest house expenses – Rs.26.80 Lakhs, Hospitality expenses – Rs.9.80 Lakhs, Interest to the extent of Rs.17.85 Lakhs out of total claim of Rs.4.25 Crores, Interest on working capital to the extent of Rs.2.45 Lakhs, O & M expenses – 5.33

Lakhs, Community Project expenses – Rs.8.75 Lakhs, Donation – Rs.0.65 Lakhs and Donation eligible for IT – Rs.5.25 Lakhs.

3. Hence, the dispute was limited to Rs. 11.38 Crores. The submissions of the parties on each item are as follows.

4. Interest – Rs.4.07 Crores

PPN claimed an amount of Rs.4.25 Crores as interest under the head pre-operative expenses and they agreed to withdraw an amount of Rs.17.85 Lakhs from the above claim. Hence the dispute in interest claim has been limited to Rs.4.07 Crores.

(i) Submission of TNEB

- (a) It was contended on behalf of TNEB/TANGEDCO that, this interest claimed is towards principal which is claimed under equity in the balance sheet of M/s PPN. Hence, M/s PPN is not entitled to this amount based on the balance sheet of the Company for the years 1996-99, from which one could notice that, in the Balance Sheet under column Sources of Funds having description Shareholder funds, it has been further shown as Advance for Share Capital vide page no.6,39 and 59 respectively.
- (b) Apart from the Advance for Share Capital, HP loan under Secured Loans borrowed has been indicated in the Annual Report. The outstanding Advance for Share Capital under the head Share Capital year-wise as shown in the balance sheet in the respective page numbers are as follows:

Year end	Rs.	Page no.
31.03.1996	2,65,96,000	6
31.03.1997	7,28,59,000	6
31.03.1998	10,01,12,000	39
31.03.1999	28,11,000	39

31.03.2000	43,000	59
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- (c) From the above, it was contended that the only inference is that, the interest of Rs. 4.07 Crs. must have been incurred only towards servicing the Advance received towards Share Capital.
- (d) From the above, it is clear that, as against equity to be brought in, PPN appears to have borrowed loan and shown as Advance towards equity, and on that, whatever interest paid has been capitalized and paid through equity. The Schedule Loan tied up for the project appears to have been received by PPN from December 1998, and whereas, this Advance towards equity has been paid during November 1998, based on the information furnished by PPN before the Evaluation Committee.
- (e) Therefore the ultimate conclusion boils down to this, namely, that the interest paid on the advance for the capital, cannot be capitalized and is to be excluded from equity considered for the project for tariff purposes, which in other words amounts to a Double Jeopardy. The expression double jeopardy here means, that the PPN instead of investing equity in a timely manner seems to have borrowed money as against equity, and loaded interest to the capital cost, and thereafter seems to have cleared the advance to share capital with equity only brought in by PPN. Therefore, any interest paid during the interregnum period cannot be added to the capital cost and passed on to TNEB/TANGEDCO.
- (f) During the course of the proceedings before the Evaluation Committee a statement detailing the month end balances along with the interest amount on the same has been furnished. The year end balances of the same are as follows:

Year ending	(Statement - Rs)	(Annual Report - Rs)	Difference - Rs
31.03.1996	2,41,56,200	2,65,96,000	24,39,800

31.03.1997	7,04,19,052	7,28,59,000	24,39,948
31.03.1998	9,48,61,131	10,01,12,000	52,50,869

- (g) On correlation, the following emerges viz., the difference is nothing but interest which has not been accounted for in the statement furnished by PPN. Further, CEA vide its letter dated 15.05.1998 permitted capitalizing of IDC and Finance Charges only and not any other interest as claimed by PPN vide clause 2 (i) set out in para 4e is extracted here under.

“2.i. The project shall be executed in accordance with this approved financial package and no change shall be made without prior approval of the concerned State Government and Central Electricity Authority.”

- (h) In fine, it is respectfully submitted that M/s PPN is therefore not entitled to the interest claimed under pre-operative expenses as the same is borrowed for servicing the equity deployed which was also subsequently repaid by equity for the project. However, when the above submission was made, M/s PPN promised to come back, but did not do so till the date completion of the arguments viz. 20.10.2011 though the issue was raised on 17.08.2011. Therefore, it is respectfully submitted that if any arguments on this issue is made in written submissions to be filed by PPN the same should be eschewed or an opportunity may be given to TNEB/TANGEDCO to counter the same.
- (i) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- (a) Of the total disputed value of Rs 4.25 Crores, PPN has agreed to a disallowance of Rs 0.18 Crores, leaving the balance of Rs 4.07 Crores to be allowed.

- (b) The objection of the Board is that details sought were not provided.
- (c) This is denied as false. All data sought were provided on multiple occasions and has also been recorded as having been provided.
- (d) This forms part of the Owner's Costs and has to be permitted.
- (e) The findings of the EC support the Board's contentions.
- (f) In as much as all requirements have been met, this claim may kindly be allowed.

iii. Evaluation Committee findings

During the joint meeting on 30-03-2009, PPN officials have furnished the interest working statement which was already furnished to TNEB and they stated that the loan was availed for the purpose of mobilisation of the project.

5. Others in pre-operative expenses :

i. Submission of TNEB

(a) The various heads included under the head "others" are given below:

- o Communication expenses : Rs.1,08,57,899
- o Repair Maintenance : Rs.1,66,40,544
- o Insurance (Electrical installation) : Rs. 6,318
- o Insurance (Electrical Equipments) : Rs. 19,687
- o Insurance Medical R.Ram : Rs. 2,258

Total : Rs.2,75,26,716

Communication Expenses & Repair & Maintenance:

(b) According to TNEB/ TANGEDGO, Expenses may be project related/non project related expenses. As per AS 10, the project related expenses directly attributable for construction are capitalized. The AS 10 is relied upon for the limited purpose in relation to this claim as PPN has capitalized in accordance with the Accounting Standards of Institution of

Chartered Accountants of India. Whereas overheads are allowed as per Para 9.3 of AS 10 of Institution of Chartered Accountants of India which reads as follows:

*“9.3 Administration and other general overhead expenses are usually excluded from the cost of fixed assets because they do not relate to a specific fixed asset. However, in some circumstances, such expenses as are specifically attributable to construction of a project or to the acquisition of a fixed asset or bringing it to its working condition, **may** be included as part of the cost of the construction project or as a part of the cost of the fixed asset.”*

- (c) In view of the above, the expenses claimed for the project cannot be higher than the expenses shown in the Annual Report. Though the Annual Report may disclose higher amount under communication expenses, the question is how much the same relates to the project will be the question. At any point of time, the expenses cannot exceed the actual amount shown in the Annual Report.
- (d) In the case on hand, PPN has claimed communication expenses/Repair & Maintenance expenses, higher than what is reflected in the Annual reports.
- (e) M/s. PPN has not produced any documentary evidence even before the Evaluation Committee. In view of the above, TNEB/TANGEDCO took a stand that the claim is on a rough and ready basis.
- (f) On persistent request of TNEB/TANGEDCO, Ms. PPN vide letter dated 15.10.2011 has parted with the data viz., the voucher number, volume no., etc. under which the expenditure were claimed.
- (g) TNEB/TANGEDCO through a neutral source got the same audited and the results with Communication Expenses are as follows:

Sl.No.	Particulars	Rs.	Total (Rs.)
1.	Vouchers without supporting documents		

	a	Amount transferred to Dyna Utility Investments Co. Ltd. through debit advice only	6,86,276	
	b	No supporting documents are available	35,71,322	42,57,598
2.		Vouchers not available for verification (includes the balancing figures which towards missing files)		4,47,871
3.		Vouchers for which supporting document were available		61,52,430
4.		Total		1,08,57,899

- (h) TNEB/TANGEDCO humbly submits to the Hon'ble Commission that the claim made for which supporting documents including the payment through debit advice only and for which vouchers were not available cannot be permitted to be capitalized as we will not be in a position to know whether the expenditure incurred is for the project.
- (i) On a superficial perusal M/s. PPN is claiming an amount exceeding the amount claimed in the Annual report is debatable. In view of the above, Hon'ble Commission may request to furnish the amount claimed with reconciliation with the Annual Report to avoid excess claim.
- (j) Hence, it is therefore prayed that the Hon'ble Commission may be pleased to hold that this head of claim cannot be capitalized while finalizing the capital cost. If at all the amount to be allowed is Rs. 61,52,430/- only for which documentary proof were furnished as against the amount claimed Rs. 1,08,57,899/-

Repair & maintenance - Rs.1,66,40,544/-

- (k) In this case, there is nothing indicative from PPN of the fact as to how the repair & maintenance and for which amount has been claimed was

done. If the repairs & maintenance was outsourced definitely an agreement would have been entered with the person who undertakes to do the repair & maintenance. On the contrary, if the repairs & maintenance was done by PPN, then the actual expenses incurred for doing so should be reflected in the books of accounts by way of salary, spares maintenance etc., In this case to the knowledge of TNEB/TANGEDCO no documentary evidence has been produced to substantiate this claim. Further, nothing is indicative of the purpose namely whether it is for the machinery, vehicles, etc has been furnished by PPN.

- (l) On persistent request of TNEB/TANGEDCO, M/s. PPN vide letter dated 14.10.2011 has parted with the data viz., the voucher number, volume No. etc. under which the expenditure were claimed.
- (m) TNEB/TANGEDCO through a neutral source got the same audited and the results with Repairs and Maintenance Expenses are as follows:

S.No.	Particulars	Rs.	Total (Rs.)
1.	Vouchers without supporting documents		
	a Amount transferred to Dyna Utility Investments Co. Ltd. through debit advice only	7,41,021	
	b No supporting documents are available	50,46,080	57,87,101
2.	Vouchers not available for verification(includes the balancing figures which is towards Missing files)		55,09,980
3.	Vouchers for which supporting documents were available		53,43,463
4.	Total		1,66,40,544

- (n) Further on a perusal of the Annual Reports, it is ascertained under pre-operative expenses, repairs and maintenance were claimed towards building, plant & machinery, others & vehicle maintenance.
- (o) In fact, on a perusal of the Annual Reports for the financial year 2001-02, the buildings & plant and machinery were capitalized only during this period. As such, until this stage, it may be safely construed that these assets were under construction. During the construction period any repairs & maintenance expenses have to be to account of the EPC contractor, being a turnkey project. Hence, the claim now made towards repairs & maintenance has to be borne by the EPC contractor only.
- (p) Further if at all any expenses towards maintenance can be claimed by PPN, it can only be relating to the rented head office building which is normally borne by the owner in the absence of any agreement, vehicle repairs, etc. It may also be seen from the statement furnished by PPN towards pre-operative expenses claim; no amount towards rent has been claimed. Hence, the presumption made that repairs & maintenance would have been incurred for the head office, is also ruled out.
- (q) In so far as the claim towards guest house expenses is concerned, PPN before the Evaluation Committee had withdrawn the claim towards Guest House expenses. There are no other buildings to be maintained except the head office, vehicles, etc.
- (r) TNEB/TANGEDCO humbly submits to the Hon'ble Commission that the claim made for which supporting documents including the payment through debit advice only and for which vouchers were not available cannot be permitted to be capitalized as TNEB/TANGEDCO will not be in a position to know whether the expenditure incurred is for the project.

- (s) On a superficial perusal M/s. PPN is claiming an amount exceeding the amount claimed in the Annual report is debatable. In view of the above, the Hon'ble Commission may request to furnish the amount claimed with reconciliation with the Annual Report to avoid excess claim.
- (t) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected. If at all the amount to be allowed works out to Rs. 53,43,463/- only for which documentary proof were furnished as against the amount claimed Rs. 1,66,40,544/-

Insurance (Electrical installation, equipments & medical claim)

Insurance (Electrical installation)	: Rs.	6,318
Insurance (Electrical Equipments)	: Rs.	19,687
Insurance Medical R. Ram	: Rs.	2,258

- (u) In so far as the above three heads of claims are concerned since the amounts in dispute are very meagre no arguments were advanced and as such was accepted by TNEB/TANGEDCO before the Hon'ble commission.
- (v) On persistent request of TNEB/TANGEDCO, M/s. PPN vide letter dated 12.10.201 has parted with the data viz., the voucher number, volume No. etc. under which the expenditure were claimed.
- (w) TNEB/TANGEDCO through a neutral source got the same audited and the vouchers were not available for Rs. 27,628/- as against the claim of Rs. 28,263/-.
- (x) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected. If at all the amount to be

allowed works out to Rs. 635/- only for which documentary proof were furnished as against the amount claimed Rs. 28,263/-

ii. Submission of PPN

- (a) The primary dispute of the respondent is that documents for proof of payment were not produced.
- (b) During the hearing at the Hon'ble TNERC, the respondent brought in an artificial build up for the aforesaid amount (not exactly tallying up to the amount of disallowance proposed by the respondent) and sought supporting documents relating to such heads of expenditure.
- (c) The entire contentions of the respondent are false and misleading. The actual facts are provided herein.
- (d) The written submissions of the respondent clearly categorize this item as "*Others (Financial Charges)*".
- (e) During the proceedings before the EC, the respondent handed over to the petitioner two sheets detailing the amounts therein for which proof of payments had not been submitted. These sheets represented one of the many ledger extracts provided by the petitioner to the respondent, during the bipartite capital cost verification exercise.
- (f) The petitioner pointed out then and there that the sheets handed over by the respondent, were in fact monies received by the petitioner as Advance for Share Capital and hence were not included in the capital cost. Monies received for capital were credits, whilst capital expenses were debits in the Expenditure Accounts and only debits were included in the capital cost claim. It follows that the question of proof of payment does not arise for receipts. Hence, submission of proof of payment cannot arise for monies received by the petitioner.
- (g) Upon realizing the folly of the stand for disallowance, the respondent, changing its stand as an afterthought, sent out a list of 5 heads of expenditure vide their letter dated 12.03.2009, which ostensibly represented the disallowance.

(h) The untenability of the aforesaid stand is clearly exposed in the light of the following:

- (i) The 5 heads of expenditure put together, as an afterthought by the respondent are (a) Communication expenses, (b) Repairs and Maintenance expenses, (c) Insurance – Electrical Installation, (d) Insurance – Electronic Equipments and (e) Insurance – Medical – R. Ram.
- (ii) The nature of all of the above expenditure could never be correlated to “Others (Financial charges)” and clearly exposes the intention of the respondent to somehow put together a list of expenditure when confronted during the proceedings at the EC that the break-up provided pursuant to the disallowance in the hand-out, that it represented only monies received as Advance for Share Capital.
- (iii) Without admitting the position, if one were to consider that the expenses were indeed the 5 heads of expenditure as claimed by the respondent, the falsehood of such a claim would be evident from the fact that the respondent had provided 16 separate items of disallowances, the smallest of which was Rs 0.71 lacs, whilst it clubs 5 heads of expenditure aggregating Rs 2.75 Crores. The incongruity of clubbing 5 heads, whilst all other 15 heads were separately listed, clearly establishes the respondent’s falsehood and the afterthought, once the initial position of the respondent was proved wrong.
- (iv) The expenditure under these 5 heads aggregates Rs 2,75,26,716/- whilst the original disallowance claimed was Rs 2,75,26,725/-. The disparity in the numbers is evident on the face of it. Further, the original disallowance of Rs 2,75,26,725/- exactly matches the two sheets relating to Advance for Share Capital that was handed over by the respondent to the petitioner during the Evaluation Committee proceedings.

- (i) All records relating to expenses and their payments have been fully submitted to the respondent and so it cannot now be claimed that these were not examined. Further, there can be no case for producing **payment proof** for **monies received** by the petitioner.
- (j) Notwithstanding the above, in deference to the Hon'ble TNERC, the petitioner provided the details sought for to the respondent once again.
- (k) Hence, the entire claim of Rs 2.75 Crores may please be allowed.

iii. Evaluation Committee Findings

PPN officials stated that the claims have already been included and they have already furnished the relevant records to TNEB. *Based on the facts furnished above, the claim of PPN has been admitted.*

6. Depreciation: Rs. 2.69 Crores

i. Submission of TNEB

- (a) PPN has claimed a depreciation of Rs. 2.69 Crs. as part of pre-operative expenses. On a perusal of the depreciation statement furnished by M/s PPN, certain discrepancies were noticed by TNEB/TANGEDCO which was addressed vide this office letter dated 15.10.2011, and no reply has been received till date from PPN.
- (b) The depreciation rates stated to have been claimed according to Companies Act, 1956 is not in line with the said Act.
- (c) The depreciation stated to have claimed was in excess of the rates provided for in the Companies Act.
- (d) Section 205 of Companies Act restricts the depreciation claimed to 95%; whereas the depreciation claimed in some case exceeds 95% of

the capital cost and in some cases the depreciation claimed exceeded the cost of the asset.

- (e) On perusal of the Annual report for the period 1998-99, M/s. PPN has provided that there is increase in depreciation amount to the tune of Rs.11,65,365/- due to change in methodology of depreciation except for vehicles which has been continued adopting WDV. The same is extracted below:

“Depreciation on assets (other than Interior Decoration) which have been put to use is provided for in accordance with the rates stipulated in Schedule XIV of the Companies Act, 1956, on a straight line basis, except for vehicles, which are depreciated on a written down value basis. Expenses incurred on Interior Decoration are written off over a period of five years. Depreciation on all assets are provided proportionate to the period of usage.

In the current year, the Company changed (with retrospective effect) its method of providing depreciation on vehicles from a straight line basis at rates prescribed in Schedule XIV to the Companies Act, 1956 to a written down value method at rates prescribed in Schedule XIV to the Companies Act, 1956. Had the company continued to use the earlier basis of providing depreciation, the Pre-operative Expenditure for the current year would have been lower by Rs. 11,65,365/- and the Net Block of fixed assets would correspondingly have been higher by that amount.”

- (f) TNEB/TANGEDCO humbly submits that M/s. PPN has frequently changed the methodology of Depreciation in order to claim higher depreciation during the construction period. The act of M/s. PPN is not in the interest of the end consumer who is going to bear the tariff. In view of the above, Hon’ble Commission may kindly peruse the depreciation claim before proceeding further.

(g) TNEB/TANGEDCO is further at a loss to note whether the same can be claimed as part of owner's cost as contemplated by PPN. During the hearing CEA under its letter dated 18.12.1995 was pleased to clarify the TEC granted earlier under the Owner's cost as follows:

"The owners cost and IDC + financing charges included in the above capital cost are given below:

- a) *Over heads (Rolling stock / operational equipment / chemicals, O & M Mobilization/ training, construction management and establishment) : US \$ 15.587 M + Rs. 20.7 Cr.*
- b) *IDC & financing charges : US \$ 22.39 M + Rs. 20.7 Cr.*

IDC and financial charges shall be subject to review by CEA on submission of final financial package for approval of the CEA."

- (h) The amount claimed if at all, can be claimed only under establishment as the entire construction has been done through EPC Contract. Further PPN claiming as part of establishment towards depreciation claimed on vehicles, furniture, electrical fittings, etc. under establishment is debatable and therefore cannot be included in the capital cost.
- (i) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- (a) The primary dispute of the respondent is that (i) no proof of payment provided for depreciation; (ii) proof of acquisition of assets by way of invoices/bills have not been provided for verification, (iii) depreciation percentage adopted has not been provided, (iv) that if depreciation were to be included, this would amount to double claim of depreciation

and (iv) EC has not recorded petitioner's specific contention for not accepting Chartered Accountant certificate.

- (b) At the hearing on 19.10.11, for the first time, the respondent sought certain clarifications on depreciation rates applied.
- (c) At the hearing on 18.08.11, the respondent stated, inter alia, that they would leave it to the Hon'ble TNERC to decide whether the assets for which depreciation is claimed is essential for the project or not.
- (d) The allegations of the respondent in paragraphs b & c are denied as false and mischievous.
- (e) It would also be clear from the contents of para 9 of Item H of the Spiral Bound Volume (as indeed in the case of all other disputed heads of expenditure), that the respondent's approach is to seek new and additional documentation but not verify the same, thereafter move on to another position, with the single minded, predetermined objective of denying an expenditure, without valid reasons. The facts are set out hereinafter.
- (f) The respondent, while providing the hand-out of various disallowances, disallowed depreciation on the ground that proof of payment had not been produced for depreciation.
- (g) The petitioner responded that this is unheard of in the annals of accounting and sought the advice of the respondent on how to show payment proof for depreciation.
- (h) When the EC pointed out the futility of the respondent's requirements, the respondent changed tack and sought proof of acquisition of assets. It had been agreed between the parties before the Evaluation Committee that the list of assets supported by an independent Chartered Accountant's certificate would be provided.
- (i) The same were provided and further clarifications sought were also provided, which is recorded by the Evaluation Committee.
- (j) On 19.10.11, the respondent sought, for the first time, clarifications on rates of depreciation used, etc. This should have been done well prior

to 2007, when the verification exercise was completed by the respondent and would have been responded to appropriately. It may be noted that the capital cost details were submitted on 20.07.01 and more than ten years later, they now wish to verify certain fundamental computations that should have been done years earlier. This is clearly a dilatory tactic. In any event the agreed position was that, being a company, the petitioner is bound by statute and depreciation could only be computed at the rates in force, from time to time, and the audited accounts do not carry any adverse remarks relating to depreciation, clear testimony to the petitioner adopting appropriate depreciation rates.

- (k) Clearly, the respondent is on a fishing expedition with the sole aim of disallowing legitimate claims on some pretext or another, without any substance.
- (l) The respondent allegation that a double claim for depreciation would result if the petitioner's depreciation claim of Rs 2.69 Crores is allowed **is completely misplaced**. The petitioner has limited its claim to depreciation, as against the entire asset value. The value of all assets not included in the capital cost is Rs 3.64 Crores, on which depreciation claim was limited to Rs 2.69 Crores. The alternative would be to withdraw the entire depreciation claim of Rs 2.69 Crores and include the value of the asset of Rs 3.64 Crores as Owner's Costs in the total capital cost which would only enhance the capital cost. It is therefore evident that the petitioner has acted in a fair and transparent manner.
- (m) Adverting to the respondent's suggestion to the Hon'ble TNERC that that they would leave it to the Hon'ble TNERC to decide whether the assets for which depreciation is claimed is essential for the project or not, this is not only an afterthought but also the most unfair and untenable suggestion. This position was taken for the first time by the respondent more than 10 years after COD. This position was not taken

at any point in time prior to this, including in the written submissions to date, clearly establishing that this is clearly an afterthought. Further, the respondent cannot seek to bring in an arbitrary yardstick or criterion, not envisaged in the TEC, by virtue of hindsight.

- (n) Without conceding the point, it would also be obvious that items such as office furnishing, furniture, computers, vehicles etc are pre-requisites for any office to function.
- (o) Hence, the questions of whether it is essential or not does not even arise.
- (p) In view of all of the above, the Hon'ble TNERC may kindly allow the depreciation claim of Rs 2.69 Crores.

iii. Evaluation Committee Findings

In the joint meeting dated 30-03-2009, the PPN officials clarified that the depreciation to Benz car was higher, because the depreciation was claimed including the companies contribution on the car purchase and hence the car value is higher than the HP agreement. TNEB officials also agreed for the same. Based on the above, the claim of PPN has to be admitted without any disallowance.

7.Travelling and Conveyance - Rs. 0.72 Crores

i. Submission of TNEB

- a. PPN has not furnished vouchers in respect Rs. 0.72 Crores

Cash payment : Rs.27,19,127.65

Bank payment : Rs.44,99,974.35

- b. Earlier, out of the total claim of Rs. 3,19,36,621/- PPN was able to produce documents only for Rs. 2,47,17,519/-, thereby leaving a balance of Rs. 72,19,102/- TNEB/TANGEDCO vide letter dated 07.03.2009 set out the details of the list of vouchers and for want adequate evidence for accepting the same. PPN vide letter dated

15.04.2009 has replied that they have provided for the same. According to TNEB/TANGEDCO a duty is enjoined upon PPN to produce the necessary documents as provided in Article 6.1(m) of the PPA. PPN therefore cannot be heard to contend that the documents have been provided, without mentioning what those documents are. In view of the stalemate created TNEB/TANGEDCO through a neutral source got the same audited and the results with T.A Bill expenses as follows.

S.No.	Particulars	Total (Rs.)
1.	Vouchers without adequate supporting documents	55,46,278
2.	Vouchers for which supporting document were available	2,21,06,120
3.	Vouchers not furnished	42,84,223
	Total	3,19,36,621

- c. M/s. PPN vide their letter dated 10.10.2011 has replied that this does not figure in the list of disputed items before the Hon'ble TNERC and there is no question of the Hon'ble TNERC giving any directions in this regard and this is yet another attempt by TANGEDCO to raise new issues, including those not before the Hon'ble TNERC. Further M/s. PPN stated as follows: "The last sentence of the said letter states "The total vouchers amounting to Rs.2,76,52,398/- are only available towards traveling and conveyance expenses". By your own admission, all vouchers are available with you, which you may refer to." They have not replied to the issue raised directly.
- d. TANGEDCO humbly submits to the Hon'ble Commission that the claim made for which supporting documents and for which vouchers were

not available cannot be permitted to be capitalized as we will not be in a position to know whether the expenditure incurred is for the project.

- e. Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected. If at all the amount to be allowed works out to Rs. 2,21,06,120/- only for which documentary proof were furnished as against the amount claimed Rs. 3,19,36,621/-.

ii. **Submission of PPN**

- (a) The primary dispute of the Board appears to be that PPN has not produced any receipt for having paid the amount to the concerned persons for expenses under this head aggregating Rs 0.25 Crores. Further, the Board also objects to PPN not producing both receipt and bank statement containing necessary entries for Rs. 0.11 Crores and hence, disallowance of Rs 0.72 Crores is in order.
- (b) On 19.09.11, the Board sent a letter to PPN seeking documentary evidence for expenses under this head.
- (c) The position of the Board in para (a) is denied as false and untenable. As the entire issue revolves around documentation for Rs 0.36 Crores (Rs 0.25 Crores + Rs 0.11 Crores), the Board's position that Rs 0.72 Crores is to be disallowed is unfathomable! The facts are detailed hereinafter.
- (d) The original position of the Board was that this expenditure head had **voluminous transactions and it could not verify the same**. This is also recorded by the Evaluation Committee. PPN then offered a solution during the proceedings before the Evaluation Committee -PPN would select large value transactions either by itself or as selected by

the Board and provide both a summary of such transactions and the supporting documents thereto. The Board wished that PPN identify the supporting documents for this select list of transactions from the records already submitted to the Board. The generator offered to do so on 20.01.09, requested the Board to make available at the Board's office, all the documents already submitted by the generator to facilitate the Board with identification of each of the supporting documents.

- (e) Upon agreement to the proposal of the generator in para 4 above, PPN provided a list of transactions for Rs 0.36 Crores to the Board. Following this, PPN visited the office of the Board to facilitate identification of the supporting documents in the possession of the Board.
- (f) Upon arrival at the Board's office on 20.01.2009, PPN found that none of the documents had been made available and communicated so to the Board on 21.01.09.
- (g) Subsequently, in order to close this issue out, PPN, on its own accord, sent out a copy of all supporting documents to the Board, with a copy to the EC. Due to an oversight, one lot of supporting documents relating to Rs 0.11 Crores, out of the aforesaid Rs 0.36 Crores was not attached to PPN's letter dated 21.01.09 and was thereafter provided by way of letter dated 15.04.09 by PPN.
- (h) There can't be a better example of Board's intention to disallow expenditure incurred by PPN on some pretext or another.
- (i) First, the Board refuses to verify documentation provided on the pretext that the same is voluminous.
- (j) Second, PPN offers to pick high value transactions aggregating approximately 50% of the expenditure and provide supporting documents therefor.

- (k) Third, the Board makes it difficult for PPN by asking it to identify the supporting documents from the volumes of documents already submitted by the generator and lying in the possession of the Board.
- (l) Fourth, PPN agrees to such an unreasonable demand and arrives at the premises of the Board on the mutually agreed date of 20.01.09.
- (m) Fifth, the Board refuses to even make available the voluminous documents in its possession for identification by PPN.
- (n) Sixth, in order to move forward, PPN thereafter provides to the Board copies of supporting documents in its possession. Such documentation included proof of payments by way of identification of the same in the bank statements.
- (o) Seventh, the Board thereafter seeks receipts from the payees concerned for an aggregate of Rs 0.25 Crores when the proof of actual payments had already been provided to the Board by way of debits in the generator's bank statement - another desperate attempt to deny this expenditure. It would be clear that once the above payment proof has been produced, the Board cannot insist on another form of payment proof, viz., production of receipt from the concerned persons. It would be pertinent to note that PPN had earlier informed the Board on several occasions that, as a policy, the generator does not seek nor receive or preserve separate receipts from the payees in respect of bank payments.
- (p) Eighth, PPN provides supporting documents for Rs 0.11 Crores, on 15.04.09, which bunch had, by an oversight, not been attached to the earlier letter of 21.01.09.
- (q) Ninth, after duly acknowledging receipt of the same, the Board untenably states in the Written Submissions that the "*... company has not produced both receipt and bank statement containing necessary entries for Rs 10.75 lakhs. ...*".

- (r) Tenth, the Board's statement in above, also clearly establishes that the Board has not even perused the documents submitted to it by disallowing the entire claim of PPN.
- (s) Eleventh, the attitude of the Board to (a) refusing to verify documents on the flimsy pretext that it is voluminous and then proceeding to deny the entire expenditure; (b) not make available documents in its possession, to enable PPN facilitate identification, as stipulated by the Board; (c) the seeking of receipts for payments through banking channels; (d) not perusing even the agreed, large value, small volume extracted documents submitted once again for the select list aggregating Rs 0.36 Crores; and (e) committing perjury of denying receipt of documents acknowledged by it for receipt, clearly demonstrates the Board's intentions.
- (t) The Board may choose to not to verify documentary evidence provided by the generator, but it is not open to it to disallow expenditure that it had chosen not to so verify, apart from such a position defeating the process of capital cost verification itself.
- (u) In respect of para 2, the Board vide its letter dated 19.09.11, brought up the issue of travelling and conveyance expenditure of Rs 2,76,52,398/- for the first time. The issue in dispute is Rs 0.72 Crores and there is no scope for bringing in a sum of Rs 2.76 Crores. The Board sought supporting documents for Rs 0.55 Crores within this overall Rs 2.76 Crores. This issue is completely outside the purview of the capital cost exercise as per the terms laid down by the Hon'ble TNERC, as delineated in the following paragraphs.
- (v) PPN responded on 10.10.11 that this matter was not even part of the Capital Cost determination process, as the ground rules laid by the Hon'ble TNERC was that only matters of dispute taken up before the EC would be considered.
- (w) No response to the aforesaid letter has been received till date, a clear admission of the position taken by PPN.

- (x) Without prejudice to the above, if one were to take a view that Rs 0.55 Crores is within the overall Rs 0.72 Crores brought up before the Evaluation Committee, the plea of the Board fails, as supporting documents for Rs 0.36 Crores had already been once again submitted, leaving only a balance Rs 0.36 Crores to be substantiated. Hence, there is no case for Rs 0.55 Crores to be substantiated as part of the disputed amount of Rs 0.72 Crores.
- (y) Conversely, this clearly establishes that this is a new issue being brought up by the Board directly with the generator, in order to restart a verification process, willfully delay the process of determination of Capital Cost, whilst completely negating the processes before the Evaluation Committee and this Hon'ble Commission.
- (z) In view of the above, the entire claim of travelling and conveyance expenditure may please be allowed.

iii. Evaluation Committee Findings

“Based on the fact that volumes of records have been furnished by the generator and the Board officials expressed their inability to verify the volume of records, the claim may be admitted on receipt of balance vouchers”.

8. Professional Charges - Rs. 0.30 Crores

i. Submission of TNEB

- (a) The amount has been claimed towards professional charges incurred for the preparation of shareholders agreement. The primary objection raised by TNEB/TANGEDCO on 29.3.2006 was that, there is no bank evidence for having incurred the expenditure vide page No. 326 Annexure K additional type set of documents to the petition filed by TNEB/TANGEDCO on 28.09.2007. PPN tried to explain the non production of vouchers by stating that the Standard Chartered Bank (SCB) who is supposed to have cleared this amount had expressed their

inability to provide the bank statements due to shifting of their accounting package. Though it is stated so, neither a copy of PPN's letter addressed to SCB nor any documentary evidence from SCB to PPN, exhibiting its inability were produced as evidence to substantiate their case.

(b) In fact TNEB/TANGEDCO wanted two documents viz 1) Bank statement and 2) Invoices. whereas PPN has provided only invoices expressing their inability to provide the bank statement as their banker SCB had changed the package for that period and hence cannot provide the same. PPN has provided a TDS payments challans as an alternate proof and correspondences with Kelly Drye & Warren to whom the amount is claimed to have been paid. It is pertinent to note that, though PPN in its letter dated 26.7.2000 has claimed to have enclosed two original invoices, from the records it is noticed that the second invoice was not made available.

(c) Professional expenses totally claimed

Invoice details	Amount (in US \$)
1376820/15.6.2000	9360.40
139074/11.7.2000	4429.54

(d) PPN at any rate cannot be heard to contend that it has no records to substantiate this claim, especially having regard to Article 6.1 (m) of PPA. The details are essential for ascertaining whether any expenditure can be capitalized in addition to the approved cost.

(e) In effect for want of bank evidence this amount is disputed by TNEB/TANGEDCO and Hon'ble Tamil Nadu Electricity Regulatory Commission may kindly reject this head of claim made by PPN.

(f) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- (a) The primary dispute of the Board appears to be that the generator has not provided documentary proof for effecting payment and further that the receipts from the payee in support of the expenditure under this head have not been produced.
- (b) The first part of the Board's position is denied as false. The facts are stated hereinafter.
- (c) The payments relate to professional charges rendered by Kelley, Drye & Warren, overseas counsel. The invoices and the payment proof relating to the same were provided to the Board vide PPN's letter dated 24.12.2008 duly acknowledged by the Board. During the proceedings at the Evaluation Committee, the Board had agreed to check the payment details and revert. There is also a finding to this effect in the MOM at the EC.
- (d) The Board then sought copies of receipts from Kelley, Drye & Warren for payments made to it.
- (e) PPN responded that these are overseas remittances and these can only be remitted through banking channels and the proof of such payment has been evidenced by the bank debit advice, Outward Telegraphic Transfer copies, independent Chartered Accountant Certificate as well as the exchange control forms submitted whilst effecting payment. PPN's policy is not to seek receipts for payments through banking channels.
- (f) PPN reiterates its stand that once payment proof through banking channels have been provided, there is no case for any further documentation in this regard. Non-production of a receipt from the payee would in no way invalidate the transaction.
- (g) The Board has incorrectly stated in the Written Statement by averring that "... the company had not filed documentary proof for having paid

the amount towards professional charges” after having actually verified the same.

- (h) In view of the above, the expenditure under this head may please be allowed.

iii. Evaluation Committee Findings

In as much as PPN has furnished the bank records as proof for payments, non-submission of receipt from the consultants as required by TNEB in any manner will not invalidate the transaction.

9. Interest on Working Capital - Rs. 0.29 Crores

i. Submission of TNEB

- (a) PPN vide letter dated 24.12.2008 has indicated that the amount has been incurred towards building up working capital which reads as follows:

“Interest relates to interest on working capital borrowings paid during the build up of working capital prior to Commercial Operation Date (COD) and such costs are required to be capitalized as per accounting concepts”.

- (b) The CEA vide its approval dated 18.12.1995 has provided that the rolling stock up to the date of commissioning is to be funded through Owner’s cost and after commissioning it is paid through tariff. PPN has funded the working capital through bank loan in lieu of own funds and had claimed the expenditure along with the interest as equity, which tantamount to a double jeopardy.

- (c) Further, CEA vide its letter dated 18.12.1995 permitted capitalizing of IDC and Finance Charges only and not any other interest as claimed by PPN as extracted vide para (2)(i) set out here under :

“2.i. The project shall be executed in accordance with this approved financial package and no change shall be made without prior approval of the concerned State Government and Central Electricity Authority.”

- (d) In fine, it is submitted that M/s PPN is therefore not entitled to the interest claimed under pre-operative expenses as the same is borrowed for servicing the equity deployed which was also subsequently replaced with equity for the project.
- (e) Hence it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- (a) Of the total of Rs 0.31 Crores, the generator has accepted disallowance of Rs 0.02 Crores, leaving a balance of Rs 0.29 Crores to be allowed.
- (b) The primary dispute of the Board appears to be that Interest on Working Capital is only covered under the Tariff and hence cannot be permitted in the Capital Cost.
- (c) At the outset this position is denied, as the Board has failed to distinguish between Interest on Working Capital that forms part of Tariff and Interest on the borrowings of the generator during the build up of its working capital, inter alia, for procurement of fuel required for testing prior to synchronization and until COD is achieved.
- (d) It is a well accepted position that fuel is required to enable the project to synchronize its turbines with the grid. Synchronization under the PPA shall be achieved not more than three months prior to COD. It therefore follows that fuel build up has to occur prior to COD.
- (e) Similarly, spares (other than initial spares) have to be built up prior to COD to enable testing, synchronization, reaching COD and operating continuously thereafter.
- (f) Further, the Infirm Power supplied leads to build up of debtors prior to COD.
- (g) The company also paid a security deposit to GAIL to enable them to commence construction of the pipeline for delivery of natural gas from

the Kuttalam fields on a fallback basis, the sole beneficiary of which was the Board by way of significantly reduced tariff till gas from PY1 fields commenced in November 2009. It may be noted that the generator spent capital costs in utilizing low pressure gas, which was entirely borne by the generator as the Board refused to pay tariff in respect of such capital expenditure.

- (h) All of the above, viz., fuel build up, including gas, spares build up and debtor build from Infirm Power require to be funded and this was done by way of Working Capital loans prior to COD. It may be noted that the above working capital build up, viz., fuel, spares and debtors do not form part of the capital cost or funding thereof. Details of Working Capital Build up are provided separately.
- (i) In order to fund such a working capital build-up as above, the generator had to borrow funds prior to COD. Interest paid on such borrowing for the period upto COD necessarily forms part of the expenditure incurred by the generator to bring the Project to COD. Such expenses would therefore necessarily form part Owner's Costs.
- (j) Banks nomenclature for such borrowings, even when utilised by the generator before COD, are considered as working capital borrowings and hence the objection of the Board is a misplaced conclusion that interest on working capital occurs only after COD and forms part of Tariff.
- (k) Working capital interest prior to COD is not being claimed under Interest during Construction, but as part of Owners Costs. The misplaced conclusion of the Board is probably further compounded by his not appreciating this distinction.
- (l) At this point, it is important to point out that Interest during Construction (on long term debt) is part of Capital Cost under the head IDCFC and the interest expenditure thereon post COD is allowed as Tariff.
- (m) Similarly, working capital Interest till COD would form part of Capital Cost (under Owner's Costs) and post COD, Working Capital Interest

forms part of Tariff. The Board refuses to accept such a position for reasons not adduced by it.

- (n) The objection of the Board in this regard primarily evidences their refusal to accept the basic concept of borrowing for fuel procurement and other working capital build up prior to COD.
- (o) In view of the above, Interest on working capital borrowings prior to COD, forming part of Owner's Costs, may please be permitted.
- (p) The generator states in response to the EC findings, that interest on working capital incurred upto COD forms part of Owner's Costs, which is one of the components of the TEC approval dated 24.11.1995 and which is specifically included in the definition of Capital Cost in the PPA. This should serve as adequate documentary support in the PPA and in the TEC. The Evaluation Committee findings in this regard are therefore incorrect.

iv. Evaluation Committee findings

PPN officials are not able to furnish the documentary support in PPA, TEC etc., to claim working capital and interest on working capital prior to CoD. Hence, the entire claim of Rs. 31, 11,161.00 have to be disallowed.

10.Front End Fee - Rs. 0.26 Crores

i. Submission of TNEB

- (a) It has already been submitted by TNEB/TANGEDCO that PPN is not eligible for working capital hence correspondingly this expenditure cannot be permitted to be capitalized.
- (b) It is submitted that one month buildup of fuel is normally paid through working capital as pass through item in tariff. Under Article 1 of the PPA, the working capital Interest has been defined as follows *"the rates applicable to the company for its working capital facility as of the Fixed Capacity Charge computation date, or in the event no such facility is in*

- place, the rate for working capital facilities to comparable independent power companies offered by the State Bank of India from time to time”.*
- (c) PPN vide letter dated 24.12.2008 has indicated that the front end fee has been incurred towards mobilizing working capital which reads as follows:
“Interest relates to interest on working capital borrowings paid during the build up of working capital prior to Commercial Operation Date (COD) and such costs are required to be capitalized as per accounting concepts. Proof of payment in the form of bank statements and also a letter from ILFS financial services having received the front-end –fees of Rs. 20,00,000 in their letterhead was also enclosed.”
- (d) From the above, it is clear that PPN vide letter dated 24.12.2008 has indicated that, PPN has drawn a sum of Rs.20,00,00,000 by way of short term loan through ILFS, for which the above front end fee has been paid, and not as working capital facility. It is pertinent to note that, as per the approved FFP package dated 15.5.1998, PPN cannot draw any short term loan from any financial institutions/Bankers. Further CEA vide letter dated 15.05.1998 permitted capitalizing IDC & Financing charges approved in respect of loans drawn as per financial package and not any other expenditure. The relevant clause 2(i) extracted in para 4(e) is set out here under for ready reference:
“2. i. The project shall be executed in accordance with this approved financial package and no change shall be made without prior approval of the concerned State Government and Central Electricity Authority.”
- (e) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost, and therefore is liable to be rejected.

ii. Submission of PPN

- (a) The primary dispute of the respondent is that the front end fee for obtaining a Working Capital loan is not permissible as this is interrelated to the issue of Working Capital Interest being permitted.

Further, the respondent has brought in a new issue of documentary evidence not having been provided.

- (b) The allegations are denied. The facts and conclusions are detailed hereinafter.
- (c) The issue of Interest on Working Capital being a part of Owner's Costs has been clearly established to be allowable in the previous Head of Expenditure. Hence, the front end fee thereon is also irrefutably allowable.
- (d) Further, there is a finding in the EC that the petitioner had in fact, vide its letter dated 24.12.2008, provided the precise details that the respondent is once again seeking in his current affidavit. This is a well known, repeated tactic of the respondent with the sole aim of disallowing legitimate capital costs expended.
- (e) In as much as all the supporting documents required have been submitted for verification to the respondent yet again, the expenditure under this head may please be allowed.

iii. Evaluation Committee Findings

The requirement of TNEB as expressed in the meeting on 06.01.2009 has been fulfilled and TNEB have not informed any defects on the records furnished by PPN. Hence, the claims of PPN have to be admitted.

11. Hire Purchase Interest: Rs. 0.16 Crores

1. Submission of TNEB

- (a) As detailed earlier, it was contended on behalf of the TNEB/TANGEDCO that from the balance sheet of the Company for the years 1996-99, one could notice that there is column Secured Loans under which it has been further shown as HP loans (Secured by Hypothecation Agreement). Other than this, no other loan has been disclosed for Advance towards Share Capital. Further, the Schedule Loan tied up for the project appears to have been received by PPN from December 1998, and whereas, the loan shown in the Balance

Sheet representing HP loans has been cleared during November 1998, based on the proof submitted by PPN. The outstanding HP loans under Secured Loan shown year-wise are as follows:

Year end	Rs.	Page no.
31.03.1996	34,97,000	8
31.03.1997	29,97,000	8
31.03.1998	18,43,000	41
31.03.1999	Nil	

- (b) From the above, one can deduce that the interest of Rs. 0.16 Crs. also could have been incurred only towards HP interest.
- (c) Further, since the loan has been repaid prior to receipt of schedule loans drawn for the project, it can only be through equity and not from any other source.
- (d) Therefore, from the above, the only inference that arises is that loan has been replaced through equity along with interest.
- (e) Therefore, interest paid is not chargeable to TNEB/TANGEDCO for the purpose of arriving at the capital cost.
- (f) Further, CEA vide its letter dated 15.05.1998 permitted capitalizing of IDC and Finance Charges only, and not, any other interest as claimed by PPN. The relevant clause 2(i) extracted in para 4(e) is reproduced for Hon'ble Commission's ready reference:
"2(i) The project shall be executed in accordance with this approved financial package and no change shall be made without prior approval of the concerned State Government and Central Electricity Authority."
- (g) In fine, it is submitted that M/s PPN is therefore not entitled to the interest claimed under pre-operative expenses as the same is borrowed for servicing the equity deployed, which was also subsequently replaced by equity for the project.

- (h) Hence, it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

2. Submission of PPN

- (a) The primary dispute of the Board appears to be that the documents and details sought by the Board have not been furnished.
- (b) A subsequent objection has been raised in an additional submission in March 2011 that there is no provision in the PPA for capitalizing expenditure towards HP interest.
- (c) The allegations are denied as false. The facts in respect of para (a) are detailed hereinafter.
- (d) The Board first stated that there was no proof for payments. As the bank statements of Standard Chartered Bank, for proof of payment relating to 1995 to 1997 were not available and duplicate statements could not be produced as the bank had migrated to new software, it was agreed during the Evaluation Committee proceedings that the generator would provide original copies of HP agreement, working sheets for interest, proof of closure of agreement by way of letter from the HP provider. These were submitted. The Board thereafter sought for the RC books of the cars under HP. The generator stated that this was uncalled for, as all other documents required and agreed to between the parties had been provided for and there would be no end to the fishing expedition that the Board had embarked on.
- (e) The Board deliberately chooses not to take cognizance of the facts in the above para and reverts to status quo ante. Not providing the documentation sought would in no way affect the genuineness of the transaction which has already been authenticated by the documentary proof already provided.
- (f) In respect of para (b), nothing is farther from the truth than this allegation. The definition of "Capital Cost" in the PPA reads "*The total capital cost of the Project, defined to equal the sum of (a) all costs of development,*

financing, construction and insurance ...” Clearly; this head of expenditure would fall squarely within this definition. Recognizing this, the Board did not even mention this during the hearings, a clear admission that there are no teeth in this claim of the Board.

- (g) In the Evaluation Committee meeting, the TNEB officials have stated that the HP provider have not furnished any letter for closing of the agreement. They just acknowledged the PPN letter seeking closure of agreement. PPN officials agreed to furnish the above letter within a week. Accordingly, we have furnished the confirmation letter of Om Sindhoori Capital Investments Company Limited stating that it is not a sister company of the generator company.
- (h) In view of the above, the expenditure may be fully permitted.

3. Evaluation Committee findings

TNEB officials have stated that the HP provider have not furnished any letter for closing of the agreement. They just acknowledged the PPN letter seeking closure of agreement. PPN officials agreed to furnish the above letter within a week. Accordingly, they have furnished the confirmation letter.

12. Club Membership - Rs. 0.12 Crores

1.Submission of TNEB

- (a) The Annual Report of the company for the period 1998-99 under Schedule G Notes to Accounts “Significant Accounting Policies” point 7 reads as follows:
“The Company has entered into an agreement with PPNHL to avail of project promotion services. In accordance with the agreement, the project promotion service charges (which include charges for Mr. S. Narayanan’s services) are paid by the Company to PPNHL.”
- b. In as much as the Annual Report reveals the above, any expenses incurred towards the club membership for the comfort of Mr. Narayanan chief Executive officer (CEO) has to be borne only by

PPNHL, and not by PPN, as Mr. Narayanan is only an employee of PPNHL and his services have been lent by the PPNHL to PPN.

- (c) In terms of the promotional services agreement between PPN and PPNHL, the fee payable by PPN under the agreement shall be determined as cost to the company pertaining to Mr. S. Narayanan, Chief Executive Officer, along with a fee of 3% thereof. Since, already cost to the company has been paid and this expense not being part of the perquisites extended by the company to the employees, this amount/claim is not allowable.
- (d) Further, contention raised on behalf TNEB/TANGEDCO was that the case pleaded by PPN is that the Club Membership is essential in order to have business meetings in the club in order to avoid large sums of money for holding such business meetings in Hotels. Having said that, PPN has not established such meetings to have been held in the club to justify this contention nor the expenses incurred. Therefore, it was primarily argued on behalf of TNEB/TANGEDCO that the so called expenses cannot be included in the capital cost.
- (e) The club membership fees are stated is to be about more than 10 years by M/s PPN. M/s PPN claiming the entire expenditure in one year is not correct, and if at all, it can spread over the useful life of membership period.
- (f) Hence it is therefore prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- a. The Board's primary dispute is that this expenditure was done for the comfort of the generator and is being provided to its employees. Hence, should be disallowed.

- b. The generator does not accept the position of the Board. The facts are covered below.
- c. All expenses incurred are for the comfort of the generator to ensure that the project is implemented. For the sake of argument, without accepting the same, this expenditure, even if treated as an employee cost, is similar to salaries and other components thereof. The compensation package to its employees cannot be questioned by the Board.
- d. Club membership is taken in the name of the generator, so that the membership gets transferred automatically to an incumbent, when an existing employee entitled to the same, leaves employment.
- e. Club membership is primarily provided to senior employees of the generator to hold business meetings with various visitors, including international business counterparts, in connection with the Project. In the absence of the club membership, such meetings would have been held in expensive hotels, which would have cost the generator significantly larger sums of money and which would have been admitted without any objections. Hence, this cannot be for the benefit of the employee.
- f. It must be noted that all the prospective investors in the Project were overseas investors, EPC bidders were overseas companies, the EPC contract was with Marubeni Corporation, Japan and its major sub-contractors were overseas partners, such as Mitsubishi Heavy Industries, Japan, Kier International, UK, Stone & Webster, Canada, etc. There were three investors in the Project that were from other countries, the O & M contract was with a US company, overseas funding was being sought and tied up.
- g. Clearly, an expenditure set out to optimize expenses which would otherwise have been admitted and would have well exceeded the club related expenditure, is now being sought to be disallowed, without tenable reasons.

- h. It may also be noted that when the CEA approved the TEC, no break-up for Owner's Costs were provided and it would be inappropriate and unacceptable to now bring in artificial yardsticks for disallowance at the whims of the Board.
- i. The evaluation committee disallowed this expenditure on the grounds that as it (club membership) is in the name of the company, it shows it has been taken for the comfort of the corporate. Hence the claim of PPN may be disallowed
- j. The Board states in this regard that "comfort of the Owner" is a new yardstick which was not stipulated at the time the CEA approval was accorded. Further, this expenditure was incurred with a view to reduce Owners' costs under Business Meeting and related heads of expenditure. Hence, this expenditure may kindly be permitted.

iii. Evaluation Committee Findings

Inasmuch as it (club membership) is in the name of the company, it shows it has been taken for the comfort of the corporate. Hence the claim of PPN may be disallowed.

13. Money Transit Insurance – Rs.71,401/-

Both the parties have not discussed this issue.

1. Evaluation Committee Findings

Initially the TNEB official wants proof for payments. PPN officials stated that the Standard Chartered Bank has shifted their accounting package and hence they are not able to produce the bank statement for the period 1995-1999. They furnished the alternate proof of insurance policy

documents indicating the premium amount. TNEB officials on 30-03-2009 meeting agreed for the claim and hence the claim of PPN was admitted.

V Development Expenses – Rs.6.91 Crores

i. Submission of TNEB

a. The following five items were claimed under this head:

Sl. No.	Description of expenditure	Amount (Rs. in Cr.)	Details of documents
1.	Professional charges for gas contract paid to Mr. Kelly Dyre Warren	0.32	Accepted based on the journal vouchers and bills vide PPN letter dated 24.12.2008.
2.	Professional charges for 'project import' paid to Inder Shipping Service (P) Ltd.	0.01	Bill attached. Hence, accepted.
3.	O&M SPM (Single Point Mooring) Contract paid to PSEG India (P) Ltd.,	2.73	1. The purpose for which the amount has been spent is not known to TNEB/TANGEDCO. 2. PPN vide its letter dated 24.12.2008 has stated that the amount have been expended for certain project expenses without detailing /indicating the purpose for which the amount has been really incurred to PSEG India Pvt. Ltd towards O & M SPM contract. In the absence of any details from PPN, TNEB/TANGEDCO has rightly disputed this amount. If details of payment are furnished, the same will be allowed even

			today subject to verification. 2) No documentary evidence such as invoices, vouchers, cash receipts are not available.
4.	Project Development Expenses paid to PSEG India P (Ltd)	0.43	Accepted based on the bill attached.
5.	Project promotion service paid to PPN Holdings	3.41	Not accepted.

- b. Two items were disputed under this head It may kindly be noted that the O & M contract to PSEG India P Ltd. copy of which is stated to be available with TNEB/TANGEDCO is in fact has not been given even till date.
- c. TNEB/TANGEDCO wanted under its letter dated 29-03-2006 supporting documents from PPN namely the copy of the order or agreement or invoices or receipts. None of those documents have been furnished for two items namely expenses of Rs.2.73 Crores paid to PSEG India Pvt. Ltd and Project promotion service paid to PPN Holdings.
- d. TNEB/TANGEDCO in another letter dated 24.2.2009 addressed to Secretary/TNERC, copy to PPN and the same was reiterated. One more stand taken by TNEB/TANGEDCO is Final Financial Package (FFP) does not provide for the development expenses.
- e. Hence it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- a. The respondent's primary dispute is that the petitioner has not provided receipts for various payments made to various parties. The respondent also states that in two cases invoices had not been furnished. The third leg of objection is that CEA, its advisor, had communicated its deletion as

there is no separate provision for development expenses in the overhead cost.

- b. These allegations are denied as false. The facts are provided hereinafter.
- c. All relevant documents were submitted vide letter dated 24.12.2008 duly acknowledged by the respondent.
- d. The respondent then stated in his letter dated 24.02.09, that the petitioner has not produced cash receipt for payment and payment proof for Rs. 3,54,346/- which is also recorded by the Evaluation Committee.
- e. The respondent has conveniently disregarded its admission in the handout provided to the petitioner during the proceedings of the Evaluation Committee, that it had verified the bank payment proof for development expenses and now goes back and asks for payment proof once again for Rs. 3,54,346/-.
- f. To quote the respondent's statement referred in previous para in their handout, "The payments for the above amounts were verified with Bank Statement, and it is found that all the payments are debited in the Bank Statement."
- g. In view of the above admission by the respondent, there can be no case for providing payment proof yet again in respect of Rs 3,54,346/-.
- h. The petitioner also changed tack to seek receipts after having admitted that they had verified all payments under this head from the bank statements.
- i. The petitioner has always maintained that as a policy it does not seek receipts for payments made through banking channels, as the same is both superfluous and unwarranted. Apart from being a most unreasonable requirement, the respondent cannot impose such a stipulation on the petitioner several years after project completion, especially when it had not stipulated such a condition prior to project implementation.
- j. Without prejudice to the above, the dispute can at best be Rs. 3,54,346/- and cannot give the respondent the excuse to disallow the entire expenditure of Rs 6.91 Crores.

- k. Under the circumstances, development expenses may be allowed in full.

iii. Evaluation Committee Findings

(i) TNEB in their letter dated 24-02-2009 stated that the Company has not produced the cash receipt for payment and payment proof for Rs.3, 54,346/- There is no provision in the FFP for these payments. Hence, the claim cannot be accepted.

(ii) PPN in their letter dated 10-03-2009 expressed that TNEB only wanted bank proof for the payments made, but is now changing track selectively. Company does not obtain cash receipts for these payments made through the banking channels and authorized dealers. By the same token, TNEB should disallow the entire EPC payment and IDCFC, since cash receipt for the same is not available.

(iii) During the discussion on 30-03-2009, TNEB argued that there is no provision in the FFP and the internal note of CEA. In this context PPN wanted to highlight the fact that the FFP does not deal any thing other than financing terms.

VI. Construction Insurance - Rs. 5.65 Crores

i. Submission of TNEB

- a. On behalf of TNEB/TANGEDCO, though it was contended that this amount claimed by PPN under this head of claim is not eligible to be added to the capital cost, on behalf of PPN placing reliance on page 25 clause 26 under the heading "Other conditions" of the Financial Agreement dated 7.12.1998 which reads as follows:

"The Borrower shall take a comprehensive insurance package including coverage for loss of profit or revenue, third party liability insurance, etc. in respect of the power plant to the satisfaction of the Lead Institution."

- b. It was contended that based on the above clause only this policy was taken. Further reliance was also placed on the conditions mentioned in the PPA found at Page 18 under the heading “Specified Insurance charge” which reads as follows :

“The Project costs incurred by the Company for public liability insurance, currency risk insurance, builder’s risk insurance and any other insurance required for financing, in each case to the extent required by the Lenders and any other insurance specified in Article 12 hereof, and in any other case, to the extent selected by the Company and approved by TNEB/TANGEDCO which approval shall not be unreasonably withheld.”

- c. When the above provisions are contained both in the financial documents and in the PPA, the eligibility of the amounts claimed under this head of claim is not disputed by the Board.

ii. Submission of PPN

At the hearing on 18.08.11, the respondent agreed to admit this expenditure and referred to the relevant provisions of the PPA in this regard.

iii. Evaluation Committee Findings

1. In the joint meeting on 30-03-2009, PPN informed that ALOP is at the instance of the financial consortium with IDBI. TNEB stated that this was not allowed by the CEA in its earlier meeting but they could not produce any record for such a decision from CEA. It was noted that EPC contract explicitly contains such a loss to provide for ALOP.
2. The clause 9.1.1 (e) of the EPC contract which was approved by TNEB provides for ALOP and this should be at owner’s expenses. Hence, the TNEB’s proposal of disallowance is not fair. Hence, the claim of Advance Loss of Profit (ALOP) may be admitted.

VII. Financial Charges - Rs 5.545 Crores

The claim includes the following :

a. Management fees	---	Rs.0.688 crores
b. DGP	--	Rs.4.167 crores
c. Closing Fees	--	Rs.0.170 crores
d. Other Guarantee Fee	--	Rs.0.453 crores
e. Annual Agency Fee	--	Rs.0.067 crores

Total	--	Rs.5.545 crores

i. Submission of TNEB

1. Management fee - Rs. 0.688Crs.

- (a) As per the financial agreement dated 7.12.1998, Article II clause 2.3, provides for a management fee at the rate of 3.15% on the amount of principal and interest amount of Guarantee assistance sanctioned on or before the date of signing of this agreement.
- (b) As per Schedule I namely particulars of Guarantee assistance, the total amount shown towards principal and interest works to 155.16 Million USD and the corresponding value of rupee is shown as Rs.659.43 Crs. (Rs.42.50/USD).
- (c) The Management fee @ 3.15%, if worked the same works out to Rs. 20.77 Crs, whereas against this the payment made by PPN is Rs. 21.46 Crs. The difference in the claim between TNEB/TANGEDCO and PPN works out to, Rs.0.69 Crs.

- (d) This amount is in dispute between the parties. For admitting the same, TNEB/TANGEDCO had requested PPN to furnish necessary primary evidence viz., the bank voucher showing the total US Dollar paid along with its exchange rate, to ascertain the actual expenditure incurred in lieu of bank statement, being secondary evidence. No such document was produced by PPN.
- (e) In view of the above, TNEB/TANGEDCO prayed that the amount needs to be disallowed.
- (f) Hence it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

2. Deferred Guarantee payment - Rs.4.167 Crs

- (a) It is the case of TNEB/TANGEDCO that no certificate was produced by PPN for the amounts received from the Guarantors namely; IDBI, IFCI, BOB and IDFC. However after COD along with the Quarterly bills, PPN is producing a statement to the said effect. In TNEB/TANGEDCO's letter dated 4.3.2009, the above issue was addressed. Till today, PPN has not addressed this issue by producing necessary certificate as done in the case of tariff invoices in order to show such payment to other banks.
- (b) Hence, it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

3. Other Guarantee - Rs.0.453Crs

- (a) According to PPN, as per clause 4.3.1.a of the EPC contract, an advance payment of 10% (Mobilization Advance) of the contract amount has to be made on or before the notice to proceed date and that the EPC Contractor had agreed to provide the Bank Guarantee even was not obligated to do so under the EPC Contract, provided

that, such Guarantee is borne by PPN. The further case of PPN is that, any advance payment to be made as per the RBI guidelines in Foreign Exchange outside India, has to be supported by a Bank Guarantee. Therefore, the payment made by M/s PPN for the purpose of Bank Guarantee was to meet the Statutory Requirements and the said amount claimed under this head can be treated as Owner's cost.

- (b) By way of answer to the above, on behalf of TNEB/TANGEDCO it was contended that, the payment made by M/s PPN towards furnishing of a Bank Guarantee cannot be termed as Statutory one because, the RBI Guidelines was in force much prior to the execution of EPC Contract, which is dated 05.04.1998. Any Statutory requirement which comes into force after the execution of the agreement alone can be claimed under Change in Law as provided in Article 15 of the PPA. In the case on hand, since the requirement of furnishing a bank guarantee was in force much before the entering into the PPA, the ignorance of law cannot be a ground for the purpose of PPN including the same under Change in Law or under Owner's cost. Further Owner's cost has been clearly defined by CEA while according its approval, which has been extracted in the preamble portion of this written submission Therefore this head of claim cannot be brought under the owners cost.
- (c) Further, it was demonstrated that the payment made by PPN cannot be termed as a Statutory requirement as sought to be made out, when it is the duty of M/s PPN to have verified the statutory requirement especially when it involves payment to the contractor outside India prior to execution of the EPC Contract dated 05.04.1998.
- (d) Hence, it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

1. Management fee - Rs. 0.688Cr.

- (a) The primary dispute of the Board is that Weighted Average Exchange Rate should not be applied.
- (b) The Board's position is denied.
- (c) During the capital cost verification exercise, the Board, citing advice from CEA, required that the entire capital cost components should be computed on a Weighted Average Exchange Rate.
- (d) The parties mutually agreed to this stipulation and have carried out the entire exercise on that basis.
- (e) The Board has not adduced reasons for why the Weighted Average Exchange Rate should not apply.
- (f) As agreed between the parties, the entire exercise has been carried out on the basis of the Weighted Average Exchange Rate. Hence, the position of the Board is untenable.
- (g) In any event, the fee paid is less than the fee payable upon applying the Weighted Average Exchange Rate.
- (h) The expenditure under this head, as claimed, may kindly be permitted.

2. Deferred Guarantee payment - Rs.4.167 Crs

- (a) The primary dispute of the Board is that the Board has sought certificates from the leading bankers, viz. IDBI, IFCI, BOB and IDFC for having received the amount from the generator towards guarantee commission, which has not been produced.
- (b) All payment proof in respect of the guarantee commission has been provided to the Board since all payments are made only to the banks and financial institutions who had guaranteed the foreign currency debt of the project. Having verified the bank payment proof, the Board cannot expect the generator to produce a receipt from the banks and financial institutions for the same which is superfluous and irrelevant.
- (c) The Board has also at the hearing on 19.10.11 confirmed that they had indeed verified all payments in the bank statements.

- (d) Guarantee Commission is the payment on the outstanding foreign currency loan principal and interest at every quarter made by the generator to the four Deferred Payment Guarantors, viz., IDBI, IFCI, BOB and IDFC who had guaranteed the foreign currency debt pursuant to the financing documents.
- (e) In the case of development expenditure, the Board in its Written Submission states "*As per the banking practice it is universal fact that no banks will issue receipts*". The Board evidently contradicts itself by now seeking receipts from the bankers themselves. Further, the bankers would have called an event of default if the payments had not been made. Admittedly, the payments have been verified with the bank statements. Can there be any flimsier ground for disallowance?
- (f) In view of the above, the expenditure under this head may kindly be admitted.

3. Other Guarantee

- a) The Board's primary dispute to the other guarantee fee during the proceedings at the Evaluation Committee has been that the generator has incurred the bank guarantee charges in respect of advance payment to the EPC contractor and this action resulted in additional expenses which could not be justified.
- b) During the hearing on 20.10.11, the Board for the first time raised the bogie of "ignorance of law" cannot be an excuse.
- c) The objections of the Board are a misplaced understanding of facts, which are set out hereinafter.
- d) The EPC contractor was paid advance pursuant to the provisions of the EPC contract. Any such advance payment to the EPC contractor could be made only against a bank guarantee pursuant to the Reserve Bank of India's (RBI) regulations in this regard.
- e) The EPC contract does not require the contractor to bear the cost of such bank guarantee.

- f) The generator never stated that it was ignorant of the statute in respect of advance payments. Had this been stipulated as a condition in the EPC contract, the price quoted would have incorporated this cost and the price gone up in excess of such costs, as EPC pricing is typically Cost + Risk Premium+ Margin. In such an event, the Board would have incurred this as EPC cost and the overall costs would have been higher.
- g) The generator agreed to bear the cost of the bank guarantee that the EPC contractor was not contractually obligated to bear in order to comply with the statute. The generator treated the same as Owner's Costs.
- h) Accordingly, the generator incurred the guarantee commission amount of Rs. 0.45 Crores, supported by adequate documentation and included the same under Owner's costs, which was verified by the Board.
- i) Statutory costs incurred pursuant to a RBI regulation are to be permitted, keeping in mind the nature, relevance to the project and the appropriate head under the TEC approval.
- j) Once the generator has adhered to a statutory obligation cast upon the nature of payment to a non-resident corporate, it should not be open to question by the Board since that is a necessary cost that is incurred to follow the law of the land in the process of project implementation.
- k) So long as the nature of expenditure, the proof of payment and the classification of expenditure under the TEC approved heads are appropriate, the Board cannot be unilaterally sit in judgement on whether such expenditure is additional or not. Any expenditure can only be determined to be additional if such expenditure exceeds the limit prescribed for Owners' Costs under the TEC.
- l) The draft EPC contract had been submitted to the Board, which it approved. Without prejudice to the generator's position in this regard, if the issue raised by the Board is one of ignorance of law, the Board is equally guilty of ignorance of law, when it approved the EPC contract. Just because it is inconvenient, the Board cannot now, after having approved the EPC

contract, choose to deny the generator's genuine claim for an expenditure incurred by it necessarily for project implementation.

- m) The Evaluation Committee has disallowed this amount on the grounds that the PPN has made the payment as the EPC contractor has not made the payment and they claim it as owner's cost. Such being the case, PPN has to recover this amount from EPC contract payment only. The claim cannot be admitted just because it is categorized under owner's cost.
- n) As stated by PPN, this expenditure is not incumbent on the EPC contractor in terms of the EPC contract. As the bank guarantee is a statutory requirement, in order to implement the project, the generator decided to bear the cost. Hence, this expenditure, which has been incurred for statutory purpose and wholly and exclusively for the implementation of the Project is fully justified and may be permitted.
- o) In view of the above, the other guarantee fee may therefore kindly be allowed as the expenditure classified under Owner's costs remains within the TEC approved limit.

(j) Evaluation Committee Findings

- (a) **Management fee** - Rs. 0.688 Crores – The weighted average rate has been calculated based on the payment made in various dates. If the actual date of payment is being considered as stated by TNEB, then the adoption of weighted average rate is meaningless. Hence, the claim may be admitted.
- (b) **Deferred Guarantee payment** - Rs. 4.167 Crores – The TNEB has verified the actual payment proof and they have not stated any defects on payment proof verified. Hence, this claim may be admitted.
- (c) **Other Guarantee** – Rs.0.453 Crores - The PPN has made the payment as the EPC contractor has not made the payment and they claim it as owner's cost. Such being the case, PPN has to recover this amount from

EPC contract payment only. The claim cannot be admitted just because of it is categorized under owner's cost.

VIII. Initial Fuel and Start up Power - Rs. 2.61 Crores

1. Submission of TNEB

(a) The Company has claimed fuel consumption and start up power charges up to 26.04.2001 i.e. up to COD.

1. Naphtha 12871.724 MT	:18.03 Crs
2. HSD(start up & shut down fuel 1153086 KL)	: 2.09 Crs.
3. Startup Power cost paid to TNEB/TANGEDCO	: 2.35 Crs.

Total	: 22.48 Crs.
Infirm power billed to TNEB/TANGEDCO (paid)	:15.38 Crs.
Balance Rs.22.48Crs. – Rs.15.38Crs.	: 7.09 Crs.

As per PPN's letter dated 18.12.2004, Start up fuel amount works out to Rs. 2.14 Crs. comprising of the following:

a. The start-up fuel HSD	Rs. 0.81 Crs
b. Naphtha fuel	Rs. 1.33 Crs

c. Total (A)	Rs. 2.14 Crs
Add: Start up Power charges as per PPN (B)	Rs. 2.35 Crs.

Total cost works out to (A + B)	Rs. 4.49 Crs.
	=====

(b) Summarizing, for balance amount Rs. 2.60 Crs. (7.09 - 4.49), PPN has so far not furnished details, hence cannot be allowed to be capitalized.

(c) According to PPN this amount was incurred towards fuel for the periods between synchronization and COD. As per the PPA the power supplied during this period was eligible to be paid at the variable cost alone at 1900Kcal/kWhr. Obviously, during the pre-commissioning period company spent fuel much higher than the reimbursement as per the PPA. Such excess has been included as part of the owner's cost. This is to be allowed as owner's cost.

- (d) CEA vide letter dated 05/2005 has allowed only the start-up fuel up to synchronization be capitalized. The expenditure other than the same is not permitted to be capitalized.
- (e) The receipt of Rs. 15.38 Crs. has only been deducted towards infirm energy charges by M/s PPN in lieu of revenue of Rs 15.77 Crs. Thus total short reduction of Rs. 0.39 Crs. for which M/s PPN has principally agreed to the same.
- (f) M/s. PPN has incurred Rs. 21.02 Crores as per Annual Report for the period 2001-02 as against the claim of Rs. 22.48 Crores resulting in excess claim of Rs. 0.46 Crores.
- (g) Hence, it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

(ii) Submission of PPN

- (a) The primary dispute of the Board has been that (i) the EC's finding that the generator has deducted from the capital cost an amount of Rs 15.77 Crores towards Infirm Power paid by the Board to the generator; (ii) "... *the question of excess and over payment of Rs 2.605 Crores proposed to be capitalised doesn't arise*"; and (iii) the Board deliberately states that start up fuel and power from synchronisation to COD cannot be paid.
- (b) This is a deliberate falsehood in the light of clinching evidence to the contrary having been set out and provided to the Board on several occasions, including before the Evaluation Committee. Hence, these objections are denied as untenable. The facts are delineated hereinafter.
- (c) The detailed statement of initial fuel purchased and start-up power are as below:

Particulars	Rs.	Rs.
Start-up Fuel:		

Raw materials		
a. HSD	2,08,81,585	
b. Naphtha	18,93,80,880	
c. HSD Insurance	6,075	210,268,540
Less: Infirm power billing		(153,771,240)
Balance start-up fuel costs		56,497,300
Less: Taxes & Duties		(9,029,886)
Balance start-up fuel costs		47,467,414
Start-up Power:		
Add: Start-up power		23,483,158
Total Initial fuel purchase and start-up power		70,950,572

- (d) It would be obvious from the above statement that from the cost of fuel consumed for start-up and the start-up power cost incurred by the generator upto COD the Infirm power billing has been reduced and the claim of the generator as part of capital cost is for such amount. Copy of the above statement provided by the generator duly acknowledged by the Board is ample evidence of the falsehood in the matter.
- (e) Board's allegation that the Evaluation Committee finding is erroneous, is preposterous. As can be seen from the statement above, deduction of Rs 15.77 Crores towards Infirm Power charges has been made and is a matter of record, which the Board (as in other cases) refuses to acknowledge. During the hearing on 19.10.11, the generator admitted that there is an apparent error in the amount taken for deduction. Instead of taking the amount billed towards Infirm Power of Rs 15.77 Crores as a deduction, by an oversight a sum of Rs 15.38 Crores, being the actual payment received, was taken. The difference of Rs 0.39 Crores, is the 2.5% rebate that the generator had agreed to in writing. The generator agreed at the hearing on 19.10.11 that it agrees for the reduction of Rs 15.77 Crores instead of Rs 15.38 Crores.

- (f) It is unfortunate that the Board, apart from its falsehood, refuses to recognise material supporting documents submitted whilst determining the costs incurred in respect of initial fuel purchase and start-up power.
- (g) Definition of Capital Cost in the PPA specifically provides, inter alia, for “(d) costs of start-up fuel.” Further, the definition of Capital Cost in the PPA specifically provides for expenditure incurred “... *until the applicable Commercial Operation Date.*”
- (h) In view of para (g) above, Start-up fuel costs upto COD are, by definition, part of the Capital Cost. Arbitrary restriction upto Synchronisation without assigning reasons therefor is completely untenable.
- (i) The Board takes umbrage under a purported CEA recommendation. Apart from CEA, by its own admission, having no role in the Capital Cost determination exercise, nothing in support has been provided despite promises by the Board to submit the same.
- (j) The Board alleged that the generator had agreed in its letter dated 18.12.2004 to the Board’s proposal to delete start up fuel from synchronisation to COD. The Board was put to strict proof, which it has failed to provide till date.
- (k) The falsehood of the Board is clearly exposed in this regard, as they choose to read and present selectively one limb of a sentence and deliberately suppress the other significant limb, of the generator’s letter dated 18.12.2004. The generator’s letter states “*Start-up fuel costs were to be incurred to start and operate the plant to synchronise with the TNEB Grid and for acceptance tests conducted later to determine the capacity*”. It is evident that capacity determination and related tests can only be completed post synchronisation. The provisions of the PPA are such that Capacity determination and COD happened through the same testing procedure. The statement submitted by the generator provides break-up between pre-synchronisation and post synchronisation till COD as required by the Board and nothing else is to be read into or attributed to this.

- (l) There can be no case for “*excess and over payment*” as falsely alleged by the Board. The Board is artificially trying to project as if a fuel cost (net of infirm power) from Synchronisation to COD is an “excess payment”, which has been categorically demonstrated otherwise by PPN.
- (m) Under the circumstances, where the reduction of infirm power revenue from capital cost is evidenced beyond doubt, the entire amount on fuel purchase and start-up upto COD may kindly be allowed, after adjusting Rs 0.39 Crores as clarified by PPN.

iii. Evaluation Committee Findings

- (a) The cost incurred upto CoD shall be included for capital cost. While calculating the capital cost, the revenue earned on selling the power generated prior to CoD (infirm power) has been deducted from the total capital cost.
- (b) After deducting the entire revenue the fuel cost should automatically be included in the capital cost. Hence, the disallowance of TNEB is not fair on this. Hence, the claim may be admitted.

IX. Forward Cover Premium - Rs. 2.43 Crores

1. Submission of TNEB

- a. To avoid any increase the FERV in future payment, PPN had taken this policy. According to TNEB/TANGEDCO this expenditure cannot be held to be an involuntary expenditure or an expenditure which was forced upon PPN. PPN chose to incur this expenditure on its own for its own reason. Even FFP dated 15.05.1998, does not provide for any such payment. However during the course of the hearing before the Hon’ble Commission the amounts claimed under this head was not pressed and was withdrawn on behalf of PPN.

- b. Hence it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

ii. Submission of PPN

- a. The primary dispute of the Board at the Evaluation Committee proceedings were that (i) there is no provision in the PPA, (ii) the PPN has not obtained prior permission from Board for taking forward cover premium policy and (iii) the amount paid is for the comfort of the PPN and no details of benefits accrued to the PPN have been given.
- b. The PPN contended before the Hon'ble Commission that the expenditure had been genuinely incurred in order to protect the overall costs of the project.
- c. Given the very nature of transaction, foreign exchange rates fluctuate minute to minute and hedges are carried out on the spot, at the most appropriate time. Hedging after obtaining the Board's approval would have been impractical and defeated the entire purpose of hedging.
- d. However, in view of the Board's insistence that its approval had not been taken, the PPN, at the hearing on 19.10.11, agreed to the disallowance.

iii. Evaluation Committee Findings

Originally it was included in EPC cost and then regrouped into owner's cost. M/s. PPN has regrouped this for their convenience. If it has been included in the EPC cost, then it needs prior approval of CEA and TNEB. Because of non-obtaining approval, PPN have regrouped from EPC into owner's cost. In the TEC there is no break up for owner's cost. Owner's cost may be approved in the TEC to incur the miscellaneous and unforeseen expenses. This expense cannot be considered as miscellaneous expenses. Transfer of expenditure to suit the convenience and overcome approval cannot be entertained. Based

on the above, the entire claim of Rs.2,43,10,000.00 may be disallowed as proposed by TNEB.

X. Miscellaneous Item - Rs. 0.96 Crores

i. Submission of TNEB

- (a) According to PPN the claims made under the head, PPN is entitled to include the cost incurred to be included in the capital cost. PPN's specific case on this issue is found in para 4 at page 158 of the documents filed by PPN before this Hon'ble Commission and the same reads as follows:

"As per EPC Contract, one Naphtha tank was for treated Naphtha and the other two for raw naphtha. During construction, it was felt that this would impair the ability of the Petitioner to take the treated naphtha tank for maintenance and it was considered essential that one of the two raw naphtha tanks be facilitated to store either treated or raw naphtha. After discussions with the Contractor, a Change Order for the above was issued on the EPC Contractor for US \$ 89,000 + Rs. 19 lacs. The Change Order in respect of Emergency Diesel Generator (EDG) related to procurement of a load bank that was recommended by the supplier as a part of maintenance activity in order to keep the EDG in a state of readiness at all times. The initial scope did not envisage any facilities for testing under dummy load conditions. In view of the criticality of the equipment, it was considered necessary to provide for the same. Change Order for US \$22,000 was placed on the EPC Contractor for an additional load bank for the Emergency Diesel Genset. These change orders were issued by the Owners to ensure plant availability as required under the PPA and accordingly treated as Owner's costs."

- (b) TNEB/TANGEDCO by way of an answer to the above, it was contended that there is an inconsistency in the case pleaded by PPN because, the claim once made under a change order as provided in the EPC contract, cannot be brought into as an item which can be

brought under the definition of Owner's cost. The items included in the Owner's Cost as set out by the CEA has been set out in the preamble portion of this written submissions, which clearly does not contemplate including these two items of work to be included as Owner's Cost for the purpose of including the same to the capital cost.

- (c) Another argument advanced on the side of TNEB/TANGEDCO was that, at any rate no documentary evidence has been produced by PPN namely, the change order as provided in the EPC contract entered into between PPN and the EPC Contractor. Further, it was contended on the side of TNEB/TANGEDCO that no approval was sought for from TNEB/TANGEDCO before carrying out these additional works. When this argument namely that, no approval was asked for from TNEB/TANGEDCO, it was interjected on the side of PPN by taking a stand, namely that, the EPC Contract is a bipartite agreement and therefore no approval from TNEB/TANGEDCO is necessary. When such an interjection was made, on the side of TNEB/TANGEDCO it was pointed out that, if the EPC contract was only a bipartite agreement, the contention of PPN when it came to the question of arguing the case relating to the escalation paid to the EPC Contractor paid by PPN, on account of the so called delayed approval of the EPC contract by TNEB/TANGEDCO, is inconsistent. At one breath PPN has contended that the EPC Contract is a bipartite agreement, and at another breath, has contended that the EPC Contract having been approved by TNEB/TANGEDCO, TNEB/TANGEDCO is bound by it. Therefore it is clear that PPN is inconsistent in its stand relating to the EPC Contract not only relating to the approval or otherwise of the EPC Contract by TNEB/TANGEDCO, but also PPN is not sure as to under what head, PPN is entitled to, namely under the "change order" or under "Owner's cost.

- (d) The second contention raised by TNEB/TANGEDCO was that, PPN had not produced any document of having executed the change order as provided under Annexure I to the EPC Contract dated 05.04.1998.
- (e) Thirdly from the clauses contained in the EPC Contract, especially the definition clause and Exhibit I, it was contended that execution of change order between PPN and the EPC Contractor is a sine-qua-non for the purpose of making a claim, especially when the EPC contract, provides for the same. Till date no change order to the work as provided in the format given in Exhibit I to the EPC contract has been produced before this Hon'ble Commission. However only documents under which TNEB/TANGEDCO had addressed namely letters addressed to the Customs Department for the waiver of Customs duty by TNEB/TANGEDCO alone was produced, and on the basis of the documents produced, it was contended that, TNEB/TANGEDCO was aware of the change order. This submission cannot be countenanced in the eye of law because, the letter was intended for some other purpose, and for the purpose of making a claim, it is the bounden duty of PPN to produce the actually executed "change order" as provided in the EPC contract.
- (f) Further, from the document produced by PPN namely the letter dated 23.10.2001 addressed by TNEB/TANGEDCO to the Secretary, Energy Department the value of the amount mentioned works out to Rs 96,20,000/- and whereas according to PPN the value of the change order is of Rs. US \$ 89000 = Rs 18 lakhs in relation to Naphtha tank and US \$ 22000 towards Emergency Diesel GEN set. It is also clear from the stand taken by PPN that a change order was in fact entered into between M/s. PPN and the EPC Contractor, and therefore PPN is duty bound to produce the change order entered into by PPN with the EPC Contractor.

- (g) At this juncture it is relevant to make a reference to Article 6.1(m) and the relevant clause has been extracted in the preamble portion of this written submissions which clearly provides that it's the duty of PPN to provide supporting documents to TNEB/TANGEDCO for determining the capital cost.
- (h) Therefore looked at from any point of view, in the absence of the change order, coupled with not complying with the conditions contained in the EPC Contract, PPN is not entitled to the amounts claimed under this head of claim to be capitalized.
- (i) Hence it is prayed that the Hon'ble commission may be pleased to hold that this head of claim cannot be added to the capital cost and therefore is liable to be rejected.

2. Submission of PPN

- a. The primary disputes of the Board are (i) *"though there is a clause in EPC for change in order it would be relevant to mention that as per article 15.A of the PPA, the PPN should be notified and it is mandatory, EPC cannot be read in isolation. The terms of the EPC are to be construed along with the terms of the PPA. EPC is only an offshoot of the PPA. PPA is the parent document."* (ii) *"Further the definition of the term capital cost also stipulates for any amendment after consultation with the PPN and (iii) CEA in its letter dated __.05.05 has specifically mentioned as follows, 'There is no separate provision for miscellaneous items in non EPC cost. In view of this being deleted.'* "
- b. During the hearing on 19.10.11, the Board stated that they had not approved the EPC contract, they were not even aware of the Change Order and the PPN had not submitted any documents relating thereto nor sought their approval.
- c. These objections of the Board are completely false and clearly establish the intention of the Board in denying genuine expenditure on

untenable grounds that is evident from the facts that are given hereunder.

- d. None of the issues in para a above were even brought up by the Board during the hearing on 19.10.11, a clear admission that the primary disputes in para (a) above are untenable. In the following paragraphs, the facts would clearly show why the objections in para (a) are untenable.
- e. Firstly, the reference to Article 15(a) of the PPA is completely irrelevant as Article 15(a) deals with Change in Law and not with a Change Order under the EPC contract. The Board had already attempted referring to the same clause for denying Escalation expenditure of Rs. 18.76 Crores earlier and now attempts once again to try and relate unrelated clauses in the PPA. For the sake of convenience, Article 15(a) of the PPA is reproduced below:
- “If, as a result of Changes in Law, the Company suffers an increase in costs or reduction in net after tax return or other economic burden (including, without limitation, as a result of any restriction on the ability to convert Rupees to Dollars in accordance with the Tariff, or remit funds in Dollars outside of India), the aggregate economic effect of which exceeds the equivalent of One hundred and twenty-five thousand United States dollars (US \$ 125,000) in any Year, the Company may so notify TNEB and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupies in the absence of such cost increase, reduction in return or other economic burden, and the Parties hereto shall meet and either agree on such amendments to this Agreement or alternative arrangements to implement the foregoing”.*
- f. It would be abundantly clear from a reading of the above Article that the Board’s feeble objection to disallow the Change Order under this clause is irrelevant and completely untenable.

- g. Secondly, the reference made by the Board is to the definition of Capital Cost relates to Approved Modifications, which is a defined term. A Change Order under the EPC contract cannot, under any stretch of imagination, be deemed to be an Approved Modification. Change Order are common under EPC contracts, as the original specifications typically would not be in a position to envisage every single variable and only during detailed engineering and construction would such changes be identified to ensure that the plant meets the covenants under the PPA. The two change orders clearly fall within this ambit. It may also be noted that the total value of Change Orders is only Rs 0.96 Crores when compared with the total capital cost of Rs. 1379.25 Crores.
- h. The Board seems to specialise in referring to clauses that have no relevance to the subject on hand, clearly demonstrating the untenability of its stand the singular objective of denying genuinely incurred expenditure.
- i. Thirdly, the Board which refers to a CEA letter dated __05.05 of stating there being no separate provision for miscellaneous items in non EPC cost may kindly be put to strict proof on such a letter. When there is no break up provided by TEC for non-EPC cost at the time of TEC clearance, it would be hind sighted and arbitrary to now determine the components of Owners' Costs, so long as the costs incurred are genuine and an inextricable part of the project.
- j. When the Board first took this position of a CEA letter dated xx .05.05, the PPN, as early as on 10.08.2009, sought a copy of the same and also mentioned that even date of the letter had not been provided. The Board has not yet produced the same. As already stated, the Board cannot today make arbitrary claims that Owners' Costs cannot include a specific item, more than 16 years after the TEC approval, which did not provide any break-up.

- k. It may be pertinent to note herein that the format provided by CEA contains “Miscellaneous items” as a specific entry in 3.1.11 under Non-EPC cost. The Board’s position is hence imaginary and untenable and should be admonished for making such preposterous, untenable claims.

- l. Adverting to the allegations above, the untenability of the Board’s stand would be established in the following paragraphs.

- m. The PPN has already established elsewhere in these submissions that the EPC contract had in fact been approved by the Board. Even by conduct, this is an admitted position between the parties.

- n. Once the EPC contract is approved, no further approvals are required in the administration of the various provisions of the EPC contract. The Board’s position is that, although it has approved the EPC contract, in respect of those clauses that it now finds inconvenient, it expects the PPN to obtain the Board’s approval once again. The Board further expects the PPN to read its mind and seek approval when no such requirement exists. On this ground also, the Board’s position is without basis.

- o. The PPN, at the hearing on 20.10.11 submitted documents to establish that the Board has, in fact, recommended the Change Order items to

the Energy Department, Government of Tamil Nadu for concessional Customs Duties.

- p. The Board's letter referred to above could not have been sent, unless the data relating to the Change Order had been submitted by the PPN, clearly establishing the falsehood of the Board
- q. In view of all of the above, the PPN pleads that the Hon'ble Commission may be pleased to allow the expenditure under this head.

3. Evaluation Committee Findings

During the discussion on 30-03-2009, PPN claims that the original EPC contract was approved by TNEB and it allows changes between change order contract and PPN informed TNEB of the changes and there is no necessity to get TNEB approval for change order. As the EPC contract permits the change in work and change order in the definition clause and also does not require the approval of TNEB/CEA, the claim of PPN is admissible.

XI. Establishment and Construction Supervision Insurance - Rs. 0.34

Crores

i. Submission of TNEB

- (a) Only defence against this head is the non-availability of proof. The claim is made for the year 1994-95 and 1995-96.

- (b) It is therefore prayed that this Hon'ble commission may be pleased to kindly consider the submissions made above and fix the capital cost accordingly and render justice.

ii. Submission of PPN

- a. The primary dispute of the Board is that it has requested the PPN to furnish the bank proof for making payment of Rs. 0.339 crores. The Board also had stated that the expenses related to statutory payments for the period 94-95 & 95-96.
- b. The Board's objection is totally misleading and false. The facts in the matter would evidence the falsehoods which are set out hereunder.
- c. The amount sought to be disallowed does not pertain to statutory payments but bonus paid to employees. The payment proof in the form of bank statement has been provided by the PPN during the course of proceedings at the Evaluation Committee. All the payment records were verified by the Board.
- d. As the payment proof formed part of a consolidated payment and to ensure that no further flimsy issues are raised by the Board, the following documents were provided on 10.03.09 and again on 15.04.09 by the PPN to the Board:
- a statement of reconciliation;

- a CA certificate in support
 - a certificate from HDFC Bank in support;
 - a bank statement supporting the payment; and
 - a bank debit slip for payment of the TDS relating thereto.
- e. Once the payment proof, which was the main objection raised by the Board has been provided, the question of disallowance does not arise.
- f. During the hearing on 19.10.11, the Board had no responses to the PPN's arguments on the above line, a clear admission that this amount is allowable.
- g. In view of the above, the expenditure of Rs 0.34 Crores under this head may kindly be allowed.

iii. Evaluation Committee Findings

PPN in their letter dated 10-03-2009 stated that the Company has already provided proof of payments to TNEB and a copy also furnished now. Based on the facts furnished above, the claim of PPN has been admitted.

Finding of the Commission :

1. This project is a 330 MW combined cycle power project comprising of a gas turbine of 230 MW and steam turbine of 100 MW. This project was executed through the MOU route based on the liberalization policy of the Government of India in the early 1990s. The terms and conditions of the PPA is broadly in line with the Government of India Tariff Notification dated 30-3-1992. The PPA was signed on 3rd January 1997. The project achieved financial closure on 7-12-1998. Notice to proceed was issued by M/s PPN on 1st January 1999. The project was declared under Commercial Operation on 26-4-2001.

2. In accordance with the terms and conditions of the PPA, which again is dependent on the Government of India Tariff Notification dated 30-3-1992, the completed capital cost of the project was to be submitted to the Central Electricity Authority for approval under para 1.2 of the said notification. Apparently, this was done and both M/s. PPN and TNEB were before the CEA for obtaining approval of the completed capital cost or the actual capital cost. While this process was on, Electricity Act, 2003 was enacted in 2003. The process of approval of completed capital cost continued in the CEA for some more time. Finally, the CEA took the view that consequent to the enactment of Electricity Act, 2003, the State Electricity Regulatory Commission is the competent authority for approval of capital cost. Accordingly, the issue was not pursued further by the CEA in the year 2006. The action then switched over to the State Electricity Regulatory Commission. The TNEB filed petition MAP No. 1 of 2007 before the TNERC for approval of the capital cost and determination of

tariff. However, certain writ petitions were filed by the IPPs before the High Court of Madras with regard to the jurisdiction of the TNERC for determination of the capital cost and tariff in such cases. Finally, M/s. PPN filed petition No. MAP No. 2 of 2008 on 24-9-2008 before the TNERC for approval of the capital cost.

3. These petitions were filed under Sections 61, 62 and 86 of Electricity Act, 2003. The prayer being “to fix the capital cost of the private power project of the company in Pillai Perumal Nallur, Nagapattinam District, Tamil Nadu and determine the tariff as per Section 86 (1) of the Electricity Act, 2003 on the basis of PPA entered into between the PPN and TNEB and pass such suitable further orders as this Commission may deem fit and proper and thus render justice”.

4. The Commission admitted these petitions and directed that a Committee be constituted under the Secretary, TNERC with the Deputy Director (Tariff) to assist him. The Committee went into details of differences between the parties for working out the capital cost on completion of the project. The Committee submitted a report on 17-5-2009 after detailed deliberations with the parties. The report of the Evaluation Committee was then sent to both the parties and their views on the report were filed by the parties. The Commission took up hearing of the matter. Hearings were held on the following dates after the report of the Evaluation Committee:-

1. 29-7-2009
2. 26-8-2009
3. 8-1-2010
4. 8-9-2010

5. 2-11-2010
6. 19-1-2011
7. 21-3-2011
8. 22-3-2011
9. 23-6-2011
- 10.24-6-2011
- 11.17-8-2011
- 12.18-8-2011
- 13.14-9-2011
- 14.7-10-2011
- 15.19-10-2011 and
- 16.20-10-2011

5. Most of these hearings were held separately without mixing with other cases, as it involved an important decision on the capital cost. The TNEB at a much later stage brought in Senior Advocate Thiru N.C. Ramesh for arguments. In September 2011 the TNEB / TANGEDCO also moved an interim application for permitting them to adduce further arguments on some of the issues which were already heard. The TNEB / TANGEDCO were permitted to re-argue the matter when this IA was disposed on 7-10-2011. On completion of the hearing on 20-10-2011 the parties were allowed to file written submission of their arguments by 10-11-2011. Orders were reserved on 20-10-2011.

6. The parties have submitted their written submission on or around 10-11-2011. Some of the submissions made by TNEB in their written submissions

were found to be going beyond the arguments and the entire pleadings in the matter which had gone on from 2007 to 20-10-2011. In fact, some of these issues have not been raised by TNEB before the CEA where these matters went on for almost five years. The issues raised in the written submission by TNEB are as follows: Para 4 (g) in Page 6 of the written submission:

- (a) M/s. PPN has got approval towards change in financial package as set forth in CEA letter dated 15-5-1998.*
- (b) The equity deployed consequent to change in the debt funding needs to be ensured by the Hon'ble TNERC that is to whether the same has not exceeded the ceiling prescribed in the PPA as well as in the notification of Government of India.*
- (c) Whether to admit the cost incurred towards excess loan of Rs.113.25 crores as part of capital cost for tariff determination for the point of view that the same was incurred without requisite authority.*
- (d) This is in addition to the excess cost incurred over approved cost of Rs.13.47 crores discussed in para 4(f) above.*
- (e) TNEB / TANGEDCO humbly submits that the Hon'ble TNERC may kindly consider the same while determining the capital cost.*

7. In para 4 (f) in Page 5 of written submission, three tables have been given but without any proper explanation. The purpose for which these tables have been given is also not explained.

8. The composition of the financial package Viz., debt and equity which again has to be split between foreign equity and Indian equity and foreign debt and Indian debt is very critical to the estimation of the capital cost of the project. Phasing of funds for construction i.e. use of equity and debt over the construction period is another critical input in deciding the interest during construction of the

project. The weighted average exchange rate for the entire construction period is yet another critical parameter for estimation of capital cost of the project. While no dispute has been raised on the Interest During Construction (IDC) component of the capital cost and weighted average exchange rate for the project, raising this issue of debt and equity at this late stage is not proper on the part of TNEB/TANGEDCO. This amounts to re-opening of the entire case after completion of the hearing and reserving the judgment. The Commission therefore rejects the suggestion of TNEB as the entire case cannot be reopened after orders have been reserved. In this connection, the Commission would like to refer to yet another submission of TNEB in item (c) viz., proportionate IDC and FC of Rs.24.79 crores in page 23 of their submission dated 10th November 2011. Here the TNEBs position is that the IDC and Financing charges will have to be on a pro-rata basis based on the final capital cost arrived at by the Commission. If there can be no dispute on the IDC and financing charges even in this submission, the question of deciding the debt and equity as raised by TNEB now should also not arise.

9. Further the TEC of CEA dated 24-11-1995 is for the following estimated completion cost :

US \$ 206.549 Million + Rs.429.8 crores (Equivalent Rs.1121.7 crores) including IDC & Financial charges of US \$ 22.3 Million + Rs.68.2 crores (Equivalent Rs.138.70 crores) (Base ER 1US\$=Rs.33.5)

Final financial package approved on 15.5.1998 by CEA (Base Exchange Rate – Rs.33.5/USD) provides for Debt and Equity as follows:-

	FC(US\$ M)	Indian component (Rs. Cr)
Debt	98.464	447.75
Equity	73.4519	95.69
Total	171.9159	543.44

A comparison of the estimated completed capital cost and the financial package would indicate that the capital cost and the financing are matched properly at the Base Exchange Rate. From this it is observed that the availability of Foreign currency is lower than the expenditure in foreign currency thereby giving an impression that Indian currency might have been converted to incur Foreign currency expenditure approved in the estimated completed capital cost. During the construction period the Exchange Rate Variation has to be captured. Further the TNEB has also not indicated the equity considered in the provisional capital cost of Rs.1379.25 crores based on which billing is admitted by them since CoD of the power station in 2001. Hence this issue should have been raised by TNEB at an appropriate stage and not after reserving of orders.

10. The Commission also would like to refer to Sl.No. (9) in page 8 of the submission wherein TNEB have pointed out that the TNERC had relegated the finalization of the capital cost to an Evaluation Committee Viz., the Secretary, TNERC. It is very strange that TNEB takes the position that the Commission had relegated the finalization of the capital cost to the Evaluation Committee after participating in the proceedings before the Evaluation Committee. In this connection, we would like to refer to Section 86 (1) (f) of the Electricity Act, 2003 which is reproduced below:-

“Adjudicate upon the disputes between the licensees, and Generating Companies and to refer any dispute for arbitration.”

11. The issue was dealt with by the Supreme Court in the Gujarat Urja case wherein it has been held that the Appropriate Commission may either adjudicate upon the disputes between the licensees and generating companies or may refer any dispute for arbitration. The relevant portion of the judgment is extracted below:-

“26. It may be noted that Section 86(1)(f) of the Act of 2003 is a special provision for adjudication of disputes between the licensee and the generating companies. Such disputes can be adjudicated upon either by the State Commission or the person or persons to whom it is referred for arbitration. In our opinion the word “and” in Section 86 (1) (f) between the words ‘generating companies’ and ‘to refer any dispute for arbitration’ means ‘or’. It is well settled that sometimes ‘and’ can mean ‘or’ and sometimes ‘or’ can mean ‘and’ (vide G.P. Singh’s Principle of Statutory Interpretation’ 9th Edition, 2004 page 404).

27. In our opinion in Section 86 (1)(f) of the Electricity Act, 2003 the word ‘and’ between the words ‘generating companies’ and the words refer any dispute means ‘or’ otherwise it will lead to an anomalous situation because obviously the State Commission cannot both decide a dispute itself and also refer it to some Arbitrator. Hence the word ‘and’ in Section 86 (1) (f) means ‘or’.

28. Section 86(1)(f) is a special provision and hence will override the general provision in Section 11 of the Arbitration and Conciliation Act, 1996 for arbitration of disputes between the licensee and generating companies. It is well settled that the special law overrides the general law. Hence, in our opinion, Section 11 of the Arbitration and Conciliation Act, 1996 has no application to the question who can adjudicate / arbitrate disputes between licensees and generating companies, and only Section 86 (1) (f) shall apply in such a situation.

30. Shri Jayant Bhushan, learned counsel for one of the parties in the connected case submitted that Section 86(1)(f) is violative of Article 14 of the Constitution of India because it does not specify when the State Commission shall itself decide a dispute and when it will refer the matter to arbitration by some arbitrator. In our opinion there is no violation of Article 14 at all. It is in the discretion of the State Commission whether the dispute should be decided itself or it should be referred to an arbitrator. Some leeway has to be given to the legislature in such matters and there has to be judicial restraint in the matter of judicial

review of constitutionality of a statute vide Government of Andhra Pradesh & Ors. Vs. Smt.P.Laxmi Devi JT 2008(2) 8 SC 639. There are various reasons why the State Commission may not decide the dispute itself and may refer it for arbitration by an arbitrator appointed by it. For example, the State Commission may be overburdened and may not have the time to decide certain disputes itself, and hence such cases can be referred to an arbitrator. Alternatively, the dispute may involve some highly technical point which even the State Commission may not have the expertise to decide, and such dispute in such a situation can be referred to an expert arbitrator. There may be various other considerations for which the State Commission may refer the dispute to an arbitrator instead of deciding it itself. Hence there is no violation of Article 14 of the Constitution of India”.

12. From the above, it may be seen that the Commission may either adjudicate upon the dispute or refer the matter for arbitration at its own discretion.

13. The Commission would also like to refer para 8 of the Conduct of Business Regulation

“8.1. The Commission shall have the power to appoint Secretary, Officers and other employees for discharging various duties. It may also prescribe qualification, experience and other terms and conditions for appointing of such officers and other employees.

8.2. The Commission may appoint Consultants to assist the Commission, in the discharge of its function”.

14. In the light of the judgments of the Hon’ble Supreme Court in Gujarat Urja case and also the provisions in the Conduct of Business Regulation, the Commission does not see anything wrong in taking the assistance of the staff of the Commission in working out the details. It should be further noted that the Commission has devoted considerable time in hearing the matter on many dates

as indicated in para 4. Ample opportunity was given to both the parties to argue their issues. So much so, when an IA was filed by the TNEB for rehearing certain issues, consequent to engaging a Senior Counsel by them, even that opportunity was given to TNEB. The Commission also would like to point out that a similar procedure was followed by the Commission for determination of capital cost and tariff in the case of Dazzle Power Project in PPAP No.4 of 2008 where TANGEDCO was a party. In view of this, the Commission is of the view that the procedure adopted by the Commission in this case is perfectly in order especially when the parties have never objected to this procedure in the first instance.

15. Now, we would like to deal with individual issues relating to disputed amount of capital cost. Currently, the provisional capital cost being used for the purpose of provisional tariff is Rs.1379.25 crores. Tariff and all other disputes are based on this capital cost and the associated debt and equity corresponding to this capital cost. Disputed amount has been indicated as Rs.116.35 crores, the break up of this amount is listed below in descending order of their quantum.

Rs. in Crores

1)	EPC Cost	54.42
2)	Proportionate interest	24.79
3)	Pre-operative expense	12.15
4)	Developmental expense	6.90
5)	Construction insurance	5.65
6)	Finance charges	5.55
7)	Initial charges	2.61
8)	Forward cover premium	2.43

9)	Miscellaneous	0.96
10)	Land	0.43
11)	Establishment and construction	0.34
12)	Custom duty	0.12
	Total	116.35

The parties were allowed to furnish their submissions on each and every item of the disputed amount and accordingly they argued the matter before the Commission. Individual items have sub heads. Let us take up these items one by one.

16. EPC Cost This has the following sub heads.

The disputed EPC cost of Rs.54.42 crores is further divided as follows:-

- | | | |
|---------------------------------|---|-------------------|
| 1. Service charges | : | Rs.30,49,20,000/- |
| 2. Escalation | : | Rs.18,76,00,000/- |
| 3. Others | : | Rs. 3,11,40,000/- |
| 4. Construction power and water | : | Rs. 2,05,30,000/- |

Originally when the issue was before the Evaluation Committee of Secretary, TNERC, another item Viz., withheld LD amounting to Rs.11.523 crores was also in dispute. This issue was debated in the Evaluation Committee as the same was disallowed by TNEB at that point in time as there was no proof for payments. TNEBs position at that time was that a letter has to be obtained from Marubeni Corporation stating that the above amount paid to Marubeni Corporation is on account of withheld LD charges. This letter was furnished by PPN on 10-3-2009. Accordingly, this amount was held as admissible by TANGEDCO. This issue was also admitted by TNEB before the Commission in the hearing held on 8-9-

2010 and in their final submission in para 10. Accordingly, the Commission confines itself to the disputed amount of Rs.54.42 crores under the head EPC cost, the break up of which was discussed above.

On a specific query from the Commission during the hearing to both the parties as to entering into EPC contract and price there of, it was confirmed by PPN that the EPC price is the lumpsum fixed price and total price payable for the work agreed. Both parties confirmed that no ceiling on capital cost has been agreed to in the PPA as per para 1.2 of the Government of India tariff notification dated 30-3-1992. In case of change in scope of work and any additional payment there of, a change order was required to be issued in terms of the EPC contract by M/s. PPN. M/s. PPN further confirmed that no change Order was issued at any stage by them to the EPC Contractor.

Now, we need to go into individual items of dispute.

16.1) Service charges : Rs. 30.492 crores

TNEB moved an application in September 2011 wherein they have prayed for permission to make further submission in so far as payment of escalation cost to the EPC contractors, service charges, construction power, water and others in the main head EPC. The IA was allowed as per the following order:-

1. The TANGEDCO has filed an Interim Application No.1 of 2011 in M.A.P.No.1 of 2007 praying that they may be permitted to make further submission in so far as payment of escalation cost to the EPC contractors, service charges, construction power, water and others in the main head EPC. The Interim Application was taken up by the Commission on 14-9-2011.

2. *The learned senior counsel for TNEB, Thiru.N.C.Ramesh submitted that since the arguments are not yet over in the case relating to determination of capital cost of PPN, he quoted Clause 48(1) of Conduct of Business Regulations 2004 of the Commission, which is based on Section 151 of the Code of Civil Procedure 1908. The Clause is extracted below:-*

“Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice or to prevent the abuse of the process of the Commission”

3. *He stated that in the interest of justice, re-hearing on the issues listed in the Interim Application of the TANGEDCO would be in order. He submitted that he would take 1 ½ hours to argue the additional points.*

4. *The learned counsel for the Respondent opposed the prayer of the TANGEDCO and submitted that reopening of arguments on certain issues would further delay the proceedings, which are already three years old. Ends of justice would be met, if the Petitioner TANGEDCO is permitted to file additional written submission on the issues listed by them. At the worst, the Petitioner may be permitted to circulate their arguments in advance to the Respondent so that the Respondent can effectively counter the arguments.*

5. *In this context the Commission is constrained to refer to the annual statement of accounts of the TNEB for 2009-2010 (preliminary). The following statement appears in para 3 of page 49:*

“If I were to opine that based on the judgement of the Supreme Court in Gujarat Urja, the TNEB could move a petition to set aside the Award (irrespective of whether the same is moved in India or in overseas). The filling of the said petition will immediately act as a stay of the Award (as per Indian Law) and the matter may take couple of years for determination. Thereafter, even if the Award is set aside, the capital cost determination will be relegated to TNERC who would take some years to determine the same. I am compelled to take note of this delays because, several capital cost

fixation in respect of other IPP's are still pending before the TNERC for the last several years."

6. The report states that the TNERC takes several years for completing the determination of capital cost. TNEB cannot now, to seek to delay further the determination of capital cost by reopening the issues, which have been heard. The change of counsel by the TANGEDCO cannot be a ground for fresh arguments on the issues already covered. The statement of the TNEB is incorrect because other than PPN no other IPP has filed petition for determination of capital cost.

7. Since this is the first major case of determination of capital cost which will also decide the tariff for the entire life of the PPA, the prayer as sought for is granted, limiting to the four issues raised in the IA."

Based on the order of the Commission in the IA, the Learned Senior Counsel for TNEB / TANGEDCO Thiru N.C. Ramesh re-argued this matter further. In their submission dated 10-11-2011, TNEB emphasized that the EPC contract is only for review and not for approval and what they have approved is only the name of the EPC contractor and the contract amount. To examine this issue we need to go into the EPC contract price. The EPC contract price indicated by M/s. PPN in their letter dated 28-5-1997 / 2-6-1997 with respect to Marubeni Corporation, who is the successful bidder / EPC contractor, was as follows:-

US\$: 75,061,000 + Japanese Yen 8,800,000,000 + Indian Rupees 241,10,00,000.

The conversion rate of Japanese Yen to Dollar was stated as 120 Yen per \$ which was the rate on the date of submission of the bid. The corresponding approval of TNEB for this capital cost was conveyed vide letter dated 1-10-1997

which is US \$ 75,061,000 + J.Y 8,800,000,000 + INR 221,10,00,000. If the J.Y is converted into US \$ @ 1 USD = 120 J.Y, the EPC cost in USD and INR works out to 148.393 m USD + INR 221.10 crores. In the light of the discussions in para 16 this amount is the lumpsum fixed price contract price of EPC. The rest of the prices are break up of the same between foreign supply contract, local supply contract and local erection contract. If there is no dispute with regard to the total payment made to the EPC contractor, the break up should not become an issue at this stage. The PPA does not provide for the method of checking of various contracts and the verification requirement by TNEB. In the absence of the same, these issues cannot be subjected to further examination. It is argued by M/s PPN that the industry practice is that the EPC contracts are lumpsum fixed price contract and subsequent to placing of orders for EPC contracts, the same is further divided into foreign supply, local supply and local erection contracts. The total amount of the 3 contracts is the same as agreed in the EPC contract. The TNEB has also conveyed their approval to the total price of the EPC contract. Having done so, the TNEB cannot object to the total price of the EPC contract by checking the individual contracts which are only for the purpose of breaking down of price. Since total EPC contract price is USD 148.393 million and INR 221.10 crores by way of the 3 broken down contracts, the same cannot be objected to. In the absence of any specific methodology agreed upon between the parties, the Commission is inclined to accept the arguments of PPN in this regard. As long as the total payment does not exceed lumpsum cost approved by TNEB, the service charges of Rs.30.49 crores as claimed cannot be

rejected. The EPC contract price was approved by TNEB on 1-10-1997. The general terms and conditions dated 5-4-1998 submitted by M/s. PPN contains 3 agreements Viz., Foreign Supply Contract amounting to USD 148.393 million, Local Supply Contract amounting to Rs.92.4223 crores and Local Erection Contract amounting to Rs.128.6777 crores the sum of all these 3 contracts totals to the approved value indicated by TNEB in their approved letter dated 1-10-1997. In view of this there is no excess payment made to the EPC contractor and therefore the disallowance of service charges of Rs. 30.49 crores suggested by TNEB cannot be agreed to and the same has to be allowed as a part of capital cost as long as it is within the approved EPC cost.

16.2 **Escalation in EPC cost amounting to Rs.18.76 crores**

M/s. PPN argued that in view of the delay in approval of the fuel supply agreement the financial closure got delayed and consequently the notice to proceed could be issued only on 1-1-1999. Since the contract between M/s. Marubeni Corporation and PPN provided for notice to proceed by 30-6-1998 and also provided for escalation in the contract price if the notice to proceed is issued after 30-6-1998 but before 30-3-1999 and since the notice to proceed was issued on 1-1-1999 the escalation had to be included in the EPC price and the amount on this account was Rs.18.76 crores. This matter was gone through in detail by the Evaluation Committee where the Evaluation Committee had recommended inclusion of this amount in the EPC contract price. This matter was also re-agitated by TNEB based on the Order passed by this Commission in IA permitting them to re-argue this matter. The contention of the TNEB during the

re-argument as well as in their submission dated 10-11-2011 is that at no stage the EPC contract was approved by TNEB. It was only the EPC contractor Viz. Marubeni Power Corporation and the EPC contract price of US \$ 75,061,000 + J.Y 8,800,000,000 + INR 221,10,00,000 were approved by TNEB. To a pointed question from the Commission as to whether the capital cost can be approved without knowing the scope of work of the EPC contract, no reply came from TNEB. It is necessary to examine the conditions precedent in the PPA with regard to the obligations of each of the parties. Article 3 of the PPA deals with conditions precedent. Article 3.1(e) provides that by 31-12-1997 or such later date as may be agreed to by the parties, M/s. PPN should have executed the long term and short term fuel supply agreements and the fuel transportation agreements containing terms and provisions consistent with the tariff and the requirements of international project finance lenders. Further, the financial closing date shall have occurred and all opinions including of legal counsel of the Parties, required for Financial Closing shall have been delivered.

As regards TNEBs obligation, para 3.2 (e) of the PPA stipulates that by 31-12-1997 or such later date as may be agreed to by the parties, the following events shall have occurred or have been waived by TNEB.

“TNEB shall have approved the Long Term Fuel Supply Agreement and the fuel transportation agreement and any material amendments thereto, within 45 days of the execution of those agreements or the amendments as the case may be, which approval shall not be unreasonably withheld or delayed. TNEB shall not have the right to approve the short term fuel supply agreement including any spot contract entered into by the company so long as the cost of fuel under the short term fuel supply agreement does not exceed the cost of fuel under the Long Term Fuel Supply Agreement.”

The TNEB in their submission dated 10-11-2011 in para 16 submits that the fuel supply agreement was submitted for approval of TNEB on 7-5-1997 and the same was approved by TNEB / TANGEDCO on 6-8-1998. It is also seen from their submissions and also their arguments before the Commission that they were waiting for the amendment to the PPA for revising the heat rate for approval of the FSA.

TNEB has stated in their written submissions that the PPA was signed on 3-1-1997 and after that a Notification dated 28-4-1997 was issued by Government of India enabling negotiation of normative parameters like station heat rate and the same had to be followed by TNEB / TANGEDCO. Till such time the applicability of the same was clarified by the Government of India vide Notification dated 27-7-1998 by stating that, the Notification will apply only to the PPAs signed on or after the Notification Viz., 9-6-1998, they were pushing amendment to SHR.

From the examination of the submission by both the parties and the provisions of the PPA, the Commission observes as under:-

- 1) The FSA was submitted to TNEB by PPN for approval on 7-5-1997 and it was eventually approved on 6-8-1998.
- 2) The TNEB was pursuing of reduction of heat rate from 2000 Kcal/Kwhr to 1900 Kcal/Kwhr. This was finally agreed to between the parties on 6-8-1998 and on the same day the FSA was approved by TNEB.

3) Examination of various clearances by the CEA brings out yet another dimension to this episode. The issue of using 100% Naphtha as fuel was under consideration for some time between the CEA, PPN and TNEB. The approval of CEA for use of Naphtha as fuel to facilitate achieving financial closure by PPN was issued on 15th May 1998. This was communicated by CEA vide letter No. 2/TNE13/91-PAC/4860-81 dated 15th May 1998. The above letter permits modification of condition No. (vi) of the original TEC issued on 24-11-1995 after extensive correspondence between CEA, PPN and TNEB. The CEA's letter dated 15th May 1998 is extracted below:-

CENTRAL ELECTRICITY AUTHORITY

MINISTRY OF POWER

SEWA BHAWAN, RAMAKRISHNAPURAM, NEW DELHI – 110 066.

No. 2/TN/13/91-PAC/4860-81

Dated 15th May, 1998

OFFICE MEMORANDUM

Subject: Pillaiperumalnallur CCGT Plant (330.5 MW) in Tamil Nadu by

M/s. PPN Power Generating Company – Deletion of condition of

techno-economic clearance – regarding

The techno-economic clearance accorded by CEA vide letter of even number 2407-16, dated 24-11-1995, is, inter-alia, subject to signing of gas supply agreement by M/s DMPC with PY -1 and PY-3 gas producers as condition (vi). The request of the Company for deletion of this condition in view of non-availability of firm indications about the gas reserves and gas production rates, which are likely to be available only by mid-1998, and recommendation of the TNEB in this regard, vide their letter No. SC/IPP/EE/PPH/A1/F.PPN PPA/D-1206/96, dated 22-11-96, were considered by the Authority. The Authority decided to delete this condition to

facilitate the company to achieve financial closure based on Naphtha as fuel. The company will, however, make full use of indigenous natural gas within a definite time frame.

Sd/-.....
(Vijoy Kumar)
Secretary

1. Director, M/s PPN Power Generating Co., IIIrd Floor, Jhava Plaza, 1A,
Nungambakkam High Road, Chennai – 600 034.
2. Chairman, Tamil Nadu Electricity Board, 800, Anna Salai, Chennai -600 002.
3. Secretary (Energy), Govt. of Tamil Nadu, Fort St. George, Chennai – 600 009
4. Chief Secretary, Govt. of Tamil Nadu, Chennai.
5. Secretary, Ministry of Power, Govt. of India, SS Bhawan, N. Delhi-110 001.
6. Joint Secretary (IPC) /Thermal), MOP, SS Bhawan, N. Delhi – 110 001.
7. Advisor (Energy), Planning Commission, Yojana Bhawan, N.Delhi-110 001.
8. Member (Planning/Thermal /Power Systems/E&C/Grid Operation/Hydro), CEA, N. Delhi.
9. CE(TA/SPA/R&CA/TCD/Legal/TM/EP), CEA, N.Delhi.
10. CE(PAO), CWC, Sewa Bhawan, New Delhi.

A perusal of the above letter of CEA indicates that permission to use Naphtha as fuel for achieving financial closure was accorded only on 15th May 1998. This implies that the approval for FSA could not have been given before this date when the permission to use 100% Naphtha was given. If the agreed period of 45 days as per clause 3.2 (e) of the PPA is considered for approval of the FSA, the FSA should have been approved by the TNEB by end of June 1998. The FSA was actually approved on 6-8-1998 i.e. with a delay of 37 days. In addition to Notification dated 9-6-1998 of the Government of India regarding negotiation of heat rates better than the normative parameters prospectively had also created

confusion with regard to its applicability prior to that date. Under these conditions approval of FSA with Naphtha as 100% fuel could be possible only after 15th May 1998. In any case, PPN have ultimately agreed to the reduction of heat rate as sought by TNEB on 6-8-1998 and the FSA was also approved on the same date. With better co-operation between the parties, the entire thing could have been better handled and this escalation in cost could have been avoided. At best the responsibility for delay could be fixed on TANGEDCO for a period of 37 days. The financial closure was originally scheduled for 30th June 1998 but it was actually achieved on 7-12-1998 and the Notice to proceed was issued on 1-1-1999. The total delay in achieving financial closure and issue of Notice to proceed is 184 days out of which 37 days are accountable to TNEB and for the balance period the responsibility should be taken by PPN. Accordingly, the escalation cost of Rs.18.76 crores should be apportioned to the parties in proportion to the respective delays for which they were responsible. TNEB shall bear Rs.3.77 crores and the balance amount of Rs.14.99 crores shall have to be borne by M/s. PPN.

16.3 Others amounting to Rs.3.114 crores

TNEB has agreed during the hearing to withdraw its objections and also confirmed that the same can be allowed as a part of capital cost in their submission dated 10-11-2011. Therefore, there is no need to discuss this issue further.

16.4 Construction Power and water Rs.2.05 crores

The argument of M/s. PPN was that this is within the EPC price and therefore cannot be deducted, as suggested by TNEB. TNEB referred to clause 2.28 of the general terms and conditions of contract between PPN and Marubeni Corporation wherein it is stipulated that contractor shall make provisions at its own cost for the supply of potable and non potable water, electricity, etc.

We have already dealt with the 3 contracts entered into Viz., Foreign Supply Contract, Local Supply Contract and Local Erection Contract while dealing with the issue of service charges in para 16.1. The total cost of 3 contracts is equal to the approved cost of EPC by TNEB. As long as the lumpsum fixed price contract is accepted, in our view there is no need for deduction of the construction power and water which has been shown as Rs.2.05 crores. Therefore, in the light of the above, the argument of TNEB that an amount of Rs.2.05 crores towards the construction power and water needs to be disallowed is not correct. Since this is a part of EPC contract and included in the EPC price.

EPC Cost – Withheld LD – Rs.11,52,30,000/-

This issue was a part of the Evaluation Committee Report wherein the Evaluation Committee suggested that this claim becomes admissible. In this connection the Commission would like to refer to the submission of M/s. PPN dated 10th November 2011. The Submission of M/s. PPN at page 59 refers to the items of dispute in the descending order of value. In this list the disputed items relating to EPC contract has been indicated as Rs.54.42 crores with the following subheads.

1. Service Charges	::	Rs.30.49 crores
2. Escalation	::	Rs.18.76 crores
3. Others	::	Rs. 3.12 crores
4. Construction, Power and Water	::	Rs. 2.05 crores

Total	::	Rs.54.42 crores

Page No.59 and 60 of M/s. PPN's written submission is the overall summary of the disputed items and nowhere else the Liquidated Damages appear. From this, the Commission concludes that Liquidated Damages of Rs.11,52,30,000/- is a non-issue and therefore the Commission does not deal with this matter further. TANGEDCOs written submission dt. 10-11-2011 also concedes that this LD charges is admissible as a part of capital cost.

17 Pre-operative Expenses

The disputed items under pre-operative expenses as dealt with in the report of the Evaluation Committee are given below.

(i) Depreciation	::	Rs.2,69,36,317.00
(ii) Guest House Expenses	::	Rs. 26,80,009.00
(iii) Hospitality Expenses	::	Rs. 9,79,895.00
(iv) Hire Purchase Interest	::	Rs. 16,29,497.00
(v) Interest	::	Rs.4,24,64,323.00
(vi) Interest on working capital	::	Rs. 31,11,161.00
(vii) Money Transit Insurance	::	Rs. 71,401.00

(viii) Front End Fee	::	Rs. 26,18,750.00
(ix) Professional Charges	::	Rs. 30,77,601.00
(x) O&M and Maintenance Expenses	::	Rs. 5,33,253.00
(xi) Travelling and conveyance	::	Rs. 72,19,102.00
(xii) Club Membership Fee	::	Rs. 12,00,000.00
(xiii) Community Project Expenses	::	Rs. 8,75,000.00
(xiv) Donation	::	Rs. 65,200.00
(xv) Donation eligible for IT	::	Rs. 5,25,000.00
(xvi) Others	::	Rs.2,75,26,715.00

Total		Rs.12,15,08,224.00

Amongst the above items certain items have been agreed to be withdrawn by M/s. PPN and these items are listed below.

a) Guest House Expenses (Page 130 of written submission dated 10 th November 2011)	::	Rs. 26,80,009.00
b) Hospitality Expenses (Page 130 of written submission dated 10 th November 2011)	::	Rs. 9,79,895.00
c) O&M Repairs and Maintenance (Page 132 of written submission dated 10 th November 2011)	::	Rs. 1,57,415.00
d) O&M Repairs and Maintenance (Page 132 of written submission dated 10 th November 2011)	::	Rs. 3,75,838.00
e) Community Project Expenses (Page 134 of written submission dated 10 th November 2011)	::	Rs. 8,75,000.00
f) Donation (Page 134 of written submission dated 10 th November 2011)	::	Rs. 65,200.00
g) Donation eligible for IT	::	Rs. 5,25,000.00

(Page 134 of written submission dated 10th November 2011)

The rest of the items are discussed one by one in the following paragraphs.

17.1 Pre-operative Expenses – Depreciation Rs.2.69 crores

Depreciation claimed by M/s. PPN as part of Pre-operative Expenses relates to furniture, computers, vehicles etc., Whether these equipments are required for construction of a project cannot be gone into after 10 years or so. Any project would require certain office and officials at the time of construction. Though it could be a very small establishment when a contract is awarded on EPC basis, there will be a requirement for furniture, computer and conveyance. This could be entirely booked to the project and on completion of the project a credit could be given to the capital cost of the project by the residual value or sale proceeds of such assets. Alternatively, depreciation of the assets could be booked to the capital cost of the project. In view of this the Commission does not find any aberration in the procedure followed.

M/s. TANGEDCO raised another issue with regard to charging of depreciation on Straight Line Method or on Written Down Value Method. They also referred to para 17 of the Judgement of the Hon'ble Appellate Tribunal of Electricity in Appeal No.97 of 2010 to suggest that the depreciation should be charged on the basis of Straight Line Method. Since we are not determining the tariff in this petition and deciding the capital cost of the project, Straight Line Method of depreciation may not be mandated. Since the Accounting Standards permit the use of either method of depreciation for the purpose of accounting and

if Written Down Value method has been consistently followed, there should not be any objection in following either of the methods. In view of this, depreciation as part of the pre-operative expenses amounting to Rs.2.69 crores cannot be disallowed.

17.2 Hire Purchase Interest Rs.0.16 crores

TANGEDCO has stated that the Hire Purchase loans were taken between 1996 and 1998 and the interest of Rs. 0.16 crores also relates to the same period. Further they contend that this loan has been repaid prior to the receipt of scheduled loans drawn for the project after the financial closure has been achieved. Their contention is that these expenses should have been made out of equity. The contention of M/s. PPN is that TANGEDCO is asking for the RC books of the cars under hire purchase but they have agreed to provide the original copies of the HP Agreement, working sheets for interest, closure of agreement by way of letter from the hire purchase provider. In the light of this they argued that inclusion of hire purchase interest of Rs.0.16 crores is a part of the pre-operative expenses in the capital cost. They also submitted that Om Sindhoori Capital Investments Company Limited is not a sister company of M/s. PPN.

The Commission has already considered the depreciation of vehicles, furniture, computer etc as a part of the capital cost in para 2.1 of this order. It is not clear whether the depreciation is charged on the basis of total cost including hire purchase interest. In this regard, letter dated 24.12.2008, as referred by

PPN itself was referred to. Against the item of HP Interest M/s. PPN has stated as follows:

“Certificate of receipt of HP Interest is in Annexure-9” This is a Statement furnished by M/s. PPN. The depreciation of these items covered by Hire Purchase is allowed separately, and the capital cost of these items of hire purchase would have included the hire purchase interest. Allowing of hire purchase interest in the capital cost would amount to double accounting. Hence Hire Purchase interest of Rs.0.16 crores is not allowed by the Commission, as a part of capital cost. Further, the same was not found in their submission.

17.3 Pre-operative Expenses – Interest Rs.4.25 crores

According to the submission of M/s. PPN in page 135 of their submissions dated 10th November 2011, the actual interest amount in dispute is Rs.4.07 crores after they have agreed to the disallowance of Rs.0.18 crores under this head. TANGEDCO in their submissions have contended that M/s. PPN have raised advance for share capital on which they have claimed interest of Rs.4.07 crores. They further contend that as against the equity to be brought in, PPN appears to have borrowed loan and has shown as advance towards equity and on that whatever interest has been capitalized has been shown as equity. The scheduled loan tied up for the project appears to have been received by PPN from December 1998 and whereas this advance towards equity has been re-paid during November 1998. They further relied on the condition of CEA namely that

the project shall be executed in accordance with the approved financial package and no change shall be made without the prior approval of the concerned State Government and Central Electricity Authority. TANGEDCO further contends that when they submitted that PPN is not entitled to interest claimed under pre-operative expenses as the same is borrowed for servicing the equity deployed which was also subsequently repaid by equity for the project. When this submission was made, M/s. PPN promised to revert back but did not do so till completion of the arguments on 20.10.2011 although this issue was raised on 17.8.2011. In view of this TANGEDCO suggested that this interest of Rs.4.07 crores should be disallowed. In their reply by their submission dated 10th November 2011 at page 135 M/s. PPN have pointed out that all the details like interest working statements were furnished and therefore this interest cost should be allowed. This issue was also raised by the Commission during the hearing on 17.8.2011 as to whether any interest bearing instrument was used for construction and later on converted as equity. To this M/s. PPN stated that they will file the same in their written submissions. The written submission as referred to above i.e. page 135 of submission dated 10th November 2011 does not touch upon this issue. The Commission is of the view that the equity investment during construction does not earn any return and return on equity becomes admissible only after the commercial operation of the project. The financial closure of the project was achieved on 7.12.1998. Consequently, any drawal from the approved lenders would have commenced only after the date of financial closure and completion of other formalities. Any investment prior to that date, as per the

approved financial package of the authority will have to be from the owner's equity. Accordingly, this interest of Rs.4.07 crores claimed as a part of pre-operative expenses is not allowed by the Commission.

17.4 Pre-operative expenses – Interest on working capital – Rs.31,11,161/-

Page 136 of submission dated 10th November 2011 of M/s. PPN states that of the total of Rs.0.31 crores, they have accepted dis-allowance of Rs.0.02 crores leaving a balance of Rs.0.29 crores to be allowed under this head. M/s. TANGEDCO in their submission dated 10th November 2011 contested that the CEA's approval dated 18-12-1995 has provided for rolling stock up to the date of commissioning to be funded through owners cost and after commissioning it is paid through tariff. TANGEDCO further stated that the CEA's letter dated 18-12-1995 permitted capitalizing of IDC and finance charges only and not any other interest as claimed by PPN and accordingly they argued for dis-allowance of this amount. M/s. PPN have stated that the TANGEDCO has failed to distinguish between interest on working capital that forms part of tariff and interest on the borrowings of the petitioner during the build up of its working capital, interalia for procurement of fuel required for testing prior to synchronization and until COD is achieved. They have also stated that spares (other than initial spares) have to be built up prior to COD to enable testing, synchronization, reaching COD and operating continuously thereafter. They further stated that infirm power supplied leads to build up of debtors prior to COD.

This needs to be examined in the context of the approval of the CEA for the capital cost and provisions in the PPA with regard to capital cost and interest on working capital. The clarification on the TEC vide letter dated 18th December 1995 by CEA provides for over heads to cover rolling stock / operational equipment / chemicals, O & M mobilization / training, construction management and establishment. IDC and financing charges have been clarified separately which is stated to be subject to review by CEA on submission of final financial package for approval of the CEA. Letter dated 21st March 1996 from the CEA provides for certain spares and the cost of such spares has been indicated. Similar provision for spares exists in the CEA's letter dated 15-5-1998.

Now let us examine the definition of capital cost as contained in the PPA. This definition includes cost of initial spares procured prior to the applicable commercial operation date to the extent such cost does not exceed three percent (3%) of the total equipment cost and item (d) of the definition of the capital cost provides for cost of start up fuel. Further, the definition of capital cost includes a sentence which states that capital cost shall not include other elements of working capital.

From a conjoint reading of the provision of the techno economic clearance and the definition of capital cost in the PPA, it becomes clear that cost of start up fuel will get adjusted when the infirm power is billed at the variable cost in accordance with the Government of India tariff notification dated 30th March 1992. Therefore, the addition of cost of start up fuel in the capital cost is off set by the revenue from the infirm billing and any excess revenue, as per the

notification, shall go to reduce the capital cost by the amount of excess revenue. The specific provision in the PPA that capital cost shall not include other elements of working capital makes it clear that no interest other than the IDC is permissible to be capitalized. In view of this, the Commission does not allow interest on working capital of Rs.0.29 crores which is claimed as pre-operative expense. This was also disallowed by the evaluation committee on the grounds that the officials of M/s. PPN were not able to furnish the documentary support in PPA, TEC, etc to claim working capital and interest on working capital prior to COD.

17.5 Pre-operative expenses, front end fee – Rs.0.26 crores

The contention of TANGEDCO was that PPN is not eligible for working capital prior to COD and therefore any fees related to the working capital prior to COD shall also be disallowed. M/s. PPN argued that interest on working capital is a part of owners cost and hence the front end fee there on is also to be allowed. They have also relied on the finding on the EC that they have provided the precise details for verification to TNEB / TANGEDCO and therefore this expenditure may be allowed. The findings of the evaluation committee is that the requirement of TNEB as expressed in the meeting on 6-1-2009 has been fulfilled and TNEB have not informed any defects on the records furnished by PPN and therefore the points of PPN have to be admitted. The Commission in the previous para has arrived at the conclusion that the interest on working capital as a part of pre-operative expenses cannot be allowed. Consequently, any loan raised for the purpose of build up of any working capital prior to COD, which may lead to

payments of any related fees for raising such loan amount, cannot also be permitted. Hence the Commission disallows the front end fee of Rs.0.26 crores as a part of pre-operative expenses.

17.6 Pre-operative expenses - professional charges – Rs.0.30 crores

The TANGEDCO has argued that for want of bank evidence this amount is disputed by them. From this it is clear that they have no objection for payment of the same in principle but are only insisting on the payment proof. M/s. PPN in their submissions have stated that this payment relates to professional charges rendered by Kelley, Drye & Warren, overseas counsel. They further stated that the invoice and the payment proof relating to the same were provided to TNEB vide their letter dated 24-12-2008. M/s. PPN further stated that overseas remittances can only be remitted through banking channels and the proof of such payment has been evidenced by the bank debit advice, outward telegraphic transfer copies, independent Chartered Accountant certificate as well as the exchange control forms submitted while effecting payment.

According to TNEB / TANGEDCO this amount has been claimed towards professional charges incurred for the preparation of shareholders agreement. TNEB objects to the admission of this amount as a part of capital cost in view of the fact that necessary vouchers have not been produced by PPN on the plea that Standard Chartered Bank have shifted their accounting package. TNEB / TANGEDCO wanted to examine two documents Viz., Bank Statement and Invoices. According to TANGEDCO, PPN has provided only invoices and TDS

payment challans as an alternate proof and correspondence with Kelley Drye and Warren.

M/s. PPN have pointed out that the payment relate to professional charges rendered by Kelley Drye and Warren, overseas counsel. They have also indicated that these details were provided vide their letter dated 24-12-2008. They further submit that overseas remittances can only be remitted through banking channels and the proof of such payment has been evidenced by the bank debit advice, outward telegraphic transfer copies, independent chartered accountant certificate as well as the exchange control forms submitted whilst effecting payment.

The Commission has considered the arguments of both the parties and also examined in detail the submitted invoices vide PPN letter dated 24-12-2008. Perusal of the correspondence enclosed with the referred letter indicates that payment to the tune of US \$ 105,000 is covered by these letters. TDS deposit with the banks amounting to Rs.1,36,988/- on 7-11-97 and Rs.1,47,863/- on 22-12-97 have also been submitted. The Commission is not aware of the exact rate of taxation on the date when they were deposited. The invoice indicates two different works Viz., consultancy services for assistance in shareholders agreement amounting to US \$ 50,000 and another claim for consultancy service in EPC contract negotiation amounting to US \$ 55,000. A separate claim has also been made under development expenses amounting to Rs.0.32 crores. TNEB had related this Rs.0.32 crores to the professional charges for Gas Contract paid to M/s Kelley Drye and Warren. However, they have linked the

same invoices towards the professional charges claim separately amounting to Rs.0.30 crores. The submission of PPN however talks of US \$ 50,000 towards consultancy for shareholders agreement and US \$ 55,000 towards consultancy for EPC contract negotiation. The pleadings of TNEB / TANGEDCO does not help in any manner to arrive at the correct picture. Since the payments are stated to have been made through banking channels and income tax has been remitted on these payments, the Commission has no other option but to allow this amount of Rs.0.30 crores as a part of capital cost.

17.7 Pre-operative expenses – travelling and conveyance – Rs.0.72 crores

TANGEDCO in their submissions have indicated that PPN has not furnished vouchers in respect of Rs.0.72 crores. They also stated that they got the TA bill expenses audited through a neutral source and even after that they have suggested disallowing Rs.0.72 crores against this item of expenditure.

On the contrary PPN have indicated that they had provided the vouchers relating to voluminous transactions which the TNEB could not verify. They have listed about 11 items to suggest that the TNEB is attempting to disallow this amount without proper reasons. During the hearing on 17th August 2011 both the parties have confirmed that they will review the same and revert back to the Commission within a week or 10 days. However, both the parties are sticking on to their own version without assisting the Commission in concluding this issue in an appropriate manner. Both the parties cannot expect the Commission to examine each and every voucher for allowing or rejecting the claim. Under these

circumstances, both the parties will have to take the responsibility in assisting the Commission in deciding this issue. The Commission is left with no choice but to allow only 50% of Rs.0.72 crores, which is in dispute, as pre-operative expenses – travelling and conveyance and reject the balance half of Rs.0.36 crores.

17.8 Pre-operative expenses – Club membership fee – Rs.0.12 crores

TNEB in their submission stated that the club membership fee is stated to be for more than 10 years and PPN claiming the entire expenditure in one year is not correct and if at all it can be spread over the useful life of the membership period. Therefore they prayed that the Commission may hold this head of claim cannot be added to the capital cost. From the submission dated 10th November 2011 of M/s. PPN, it is observed that the club membership is taken in the name of PPN, so that the membership gets transferred automatically to an incumbent, when an existing employee entitled to the same leaves employment. They further stated that the club membership is primarily provided to senior employees of the petitioner to hold business meetings with various visitors, including international business counter parts, in connection with the project.

From the submission by both the parties it transpires, that the club membership is atleast for a period of 10 years. Construction period of the project is 27months. Subsequent to the declaration of Commercial operation of the project, all expenses are to be met by the project company from the fixed O & M expenses provided for in the PPA. If the club membership fee of Rs.12 lacs meant for 10 years, is allocated over a period of 27 months of construction

period, the proportionate club membership fee may work out to Rs.2.25 lacs. TEC and the PPA are drawn up on broad parameters and does not deal with issues like club membership fee, etc. Keeping also in view the small amount involved, either party could have gracefully handled this issue. The Commission is not admitting this amount as a part of capital cost.

17.9 Pre-operative expenses – others – Rs.2.75 crores

From the submission of TANGEDCO dated 10th November 2011, the pre-operative expenses – others comprises of the following :-

(i) Communication expenses	:	Rs.1,08,57,899
(ii) Repair & Maintenance	:	Rs.1,66,40,544
(iii) Insurance		
(Electrical installation)	:	Rs. 6,318
(iv) Insurance		
(Electrical Equipments)	:	Rs. 19,687
(v) Insurance Medical R. Ram	:	Rs. 2,258

(vi) Total	:	Rs.2,75,26,716

This was proposed to be disallowed by TNEB when the same was under discussion before the evaluation committee. However, subsequently data was provided by PPN and now there are disputes about individual items. It should be borne in mind that we are discussing about expenditure incurred between 1998 and 2001 in the year 2011. The counter arguments of M/s. PPN is that during

the proceedings before the EC, TNEB handed over to PPN two sheets dealing with the amounts therein for which proof of payment had not been submitted and these sheets represented one of the many ledger extracts provided by PPN to TNEB, during the bi-partite capital cost verification exercises. According to PPN, they pointed out then and there, in the EC that the sheets handed over by them, were infact monies received by the petitioner as advance for share capital and hence were not included in the capital cost. Monies received for capital cost are credits, whilst capital expenses were debits in the expenditure accounts and only debits were included in the capital cost claimed and therefore proof of payment are not necessary for monies received by the petitioner. It is their argument that thereafter the TNEB had asked for break up of expenditure under communication expenses, repairs and maintenance expenses, insurance – electrical installation, insurance- electrical equipments, insurance – medical R. Ram which approximately total to the amount of claim under pre-operative expenses – others. If the details of the claim of Rs.2.75 crores is by misunderstanding of the advance for share capital then this issue will not survive. However, if this issue is actually related to the 5 heads of expenditure which were raised by TANGEDCO during the proceedings before the EC in 2008 and 2009, the next question would be as to why this issue was not raised earlier during the proceedings before the CEA or even during the bi-lateral discussion between the parties for settling the capital cost. In view of this, the Commission is not in a position to accept the arguments of TANGEDCO in this regard and allows the pre-operative expenses - others of Rs.2.75 crores as a part of capital cost.

17.10 **Pre-operative expenses - money transit insurance – Rs.71,401**

This issue was discussed in the evaluation committee during which the TNEB has stated that they are not allowing this amount as there is no proof for payments. The report of the EC observes that in the joint meeting on 6-1-2009, PPN officials stated that the Standard Chartered Bank has shifted their package and hence they are not able to produce the bank statement for the period 1995 – 1999 and they furnished alternate proof of insurance policy document indicating the premium amount and TNEB in their letter dated 4-3-2009 stated that the approval of higher authority will be obtained to admit the claim. The EC report also concludes that in the joint meeting on 30-3-2009 TNEB official agreed for the claim and based on the facts furnished above, the claim of PPN is admitted by the EC. This issue was not subsequently agitated by the parties before the Commission in various hearings and this issue also does not figure in the final submissions made by the parties on 10th November 2011. Accordingly the position which existed when the report was submitted by the evaluation committee is treated as final and the money transit insurance of Rs.71,401/- is approved as a part of the capital cost by the Commission.

17.11 **Land Rs.43,00,000:** Evaluation committee report states that M/s. PPN has agreed for the disallowance amounting to Rs.0.43 crores. No further submission has been made by either of the parties in their final submission dt 10.11.2011 and therefore the status as obtained in the evaluation committee

report is treated as final and land cost of Rs.43 lacs will not form part of the capital cost as agreed to by M/s. PPN.

17.12 Forward cover premium – Rs.2,43,10,000

This matter was also discussed in the EC during which TNEB took the position that they have disallowed the amount of Rs.2.431 crores towards forward cover premium as there is no provision in the PPA and the company has not obtained prior permission from TNEB for taking forward cover premium policy. PPN was always claiming the forward cover premium as a part of the capital cost. However, when the matter came up before the Commission in their final submission dated 10th November 2011, under Sl. No. 4 in page 221, M/s. PPN have stated as follows:-

“However, in view of the respondent insistence that its approval had not been taken, the petitioner, at the hearing on 19-10-2011, agreed to the disallowance.”

In view of the agreement by PPN for disallowance, forward cover premium of Rs.2.43 crores shall not form part of the capital cost.

17.13 Development expenses Rs.6,90,00,000

During the examination by the evaluation committee, development expenses of Rs.6.90 crores was not allowed by TNEB as PPN has not furnished relevant documents such as invoice, order document. According to the EC report, the PPN officials have furnished the relevant documents for the verification of TNEB

and TNEB in their letter dated 24-2-2009 stated that the company has not produced the cash receipt for payment and payment proof for Rs.3,54,346/- since there is no provision in the Final Financial Package (FFP) for these payments, this claim was not accepted by TNEB. The response of PPN in their letter dated 10-3-2009 was that TNEB only wanted bank proof for the payment made but is now changing track selectively. PPN does not obtain cash receipts for payments made through the banking channels and authorized dealers and by the same token, TNEB should disallow the entire EPC payment and IDC and financial charges since cash receipt for the same is not available. The EC report also deals with the objection of the TNEB that there is no provision in the FFP and the internal note of CEA for payments of development expenses whereas PPN position was that the FFP does not deal anything other than financing terms.

This issue was argued before the Commission on various days and in the final submission on conclusion of the hearing, on 10-11-2011 TNEB raised the following issues.

1. Professional charges for gas contract paid to Mr. Kelley, Drye & Warren Rs.0.32 crores accepted based on the journal vouchers and bills vide PPN letter dated 24-12-2008.
2. Professional charges for 'Project import' paid to Inder Shipping Service (P) Ltd Rs. 0.01 crores accepted by TNEB since bill attached.
3. O&M SPM (Single Point Mooring) Contract paid to PSEG India (P) Ltd Rs.2.73 crores.

TNEB's position is that the purpose for which the amount has been spent is not known to TNEB / TANGEDCO and if details of payments are furnished the same will be allowed even today subject to verification.

4. Project development expense paid to PSEG India (P) Ltd Rs.0.43 crores accepted based on the bill attached.
5. Project promotion service paid to PPN Holdings Rs.3.41 crores not accepted.
6. TNEB has further stated that no documents relating to the payments made to O&M SPM contract paid to PSEG India (P) Ltd and project promotion service paid to PPN Holdings is submitted.

In the light of these arguments they prayed for not allowing the amounts of Rs.2.73 crores and Rs.3.41 crores respectively for two items.

PPN in their arguments and in their final submission have stated that the only objection raised by TNEB was payment proof for Rs.3,54,346/-. TNEB has been changing positions from time to time and in any case dispute involving an amount of Rs.3,54,346/- cannot give TNEB excuse to disallow the entire expenditure of Rs.6.91 crores and prayed for allowing the development expenses in full.

Development expenses involving a dispute of Rs.6.9 crores was discussed in the above paragraphs. TANGEDCO had agreed for allowance of the following under Development expenses :-

- Professional charges for Gas Contract paid to M/s. Kelley, Drye and Warren amounting to Rs.0.32 crores.
- Professional charges for “Project Import” paid to Inder Shipping Service (P) Ltd amounting to Rs.0.01 crores.
- Project development expenses paid to PSEG India (P) Ltd amounting to Rs.0.43 crores.

TANGEDCO has objected to the payment of the following items:-

- O & M SPM (Single Point Mooring) Contract paid to PSEG India (P) Ltd amounting to Rs.2.73 crores.
- Project promotion service paid to PPN Holdings amounting to Rs.3.41 crores.

These issues were examined by the Commission in detail. The allowance of TANGEDCO on the three items discussed above is based on bills / vouchers and the other two items were not agreed to and the argument of TANGEDCO is that no bills have been submitted as proof. Per contra, PPN argued that the initial objection of TNEB was only to the tune of Rs.3,54,346/- and now they are raising new issues.

The two items which have not been agreed to by TANGEDCO are discussed in detail:-

1. O & M SPM (Single Point Mooring) Contract paid to PSEG amounting to Rs.2.73 crores :

The Commission has examined the EPC contract which was made available. It is observed from this contract that there are three provisions in the EPC contract as follows under the head Marine Work / Construction Jetty:

Foreign Supply Contract, USD	:	23,854,000
Local Supply Contract, INR	:	108,969,000
Local Erection Contract, INR	:	163,454,000

From these three provisions, which are substantially high, the Commission is of the view that Single Point Mooring arrangement as far as construction is concerned is adequately taken care in the provisions of EPC contract. The head which is being discussed here is Operation & Maintenance Single Point Mooring Contract. Any O & M expense is a part of Operation and Maintenance expenses which arise after the COD of the plant and is separately provided for as O & M expense in the fixed charge component of the tariff. In view of this, Commission is of the view that this amount of Rs. 2.73 crores should not be included in the capital cost.

As far as the project promotion service paid to PPN Holdings, it was explained by PPN that this is the salary paid to the Managing Director over the entire development and construction period spreading over a few years. In view of this, the Commission allows the project promotion service paid to PPN Holdings amounting to Rs.3.41 crores as a part of capital cost.

17.14 Construction Insurance : Rs.5.65 crores

TNEB in their submission dated 10th November 2011 have expressed the following views:-

“ On behalf of TNEB / TANGEDCO, though it was contended that this amount claimed by PPN under this head of claim is not eligible to be added to the capital cost, on behalf of PPN placing reliance on page 25 clause 26 under the heading “Other conditions” of the Financial Agreement dated 7-12-1998 which reads as follows(Annexure F1):

“The Borrower shall take a comprehensive insurance package including coverage for loss of profit or revenue, third party liability insurance, etc. in respect of the power plant to the satisfaction of the Lead Institution.”

It was contended that based on the above clause only this policy was taken. Further reliance was also placed on the conditions mentioned in the PPA found at Page 18 under the heading “Specified Insurance charge” which reads as follows (Annexure F.2):

“The Project costs incurred by the Company for public liability insurance, currency risk insurance, builder’s risk insurance and any other insurance required for financing, in each case to the extent required by the Lenders and any other insurance specified in Article 12 hereof, and in any other case, to the extent selected by the Company and approved by TNEB / TANGEDCO which approval shall not be unreasonably withheld.”

When the above provisions are contained both in the financial documents and in the PPA, the eligibility of the amounts claimed under this head of claim is not disputed by the Board.”

Since the TNEB has conceded to the eligibility of the amount of Rs.5.65 crores towards construction insurance, based on the provisions of the PPA and the financial agreements, the Commission allows the amount of Rs.5.65 crores towards construction insurance as a part of capital cost.

17.15 Finance Charges :

When this issue was debated before the evaluation committee the following items were discussed.

	(Rs. in crores)
(a) Management fee	Rs.0.688
(b) DGP	Rs.4.167
(c) Closing fee	Rs.0.170
(d) Other Guarantee fee	Rs.0.453
(e) Annual Agency Fee	Rs.0.067

Total	Rs.5.545

The evaluation committee recommended the allowance of management fee of Rs.0.688 crores and deferred guarantee payment of Rs.4.167 crores. PPN in their submission dated 10th November 2011 have indicated the amount of dispute under the head financial charges as Rs.5.31 crores with the following break up.

	Crores
Guarantee commission	Rs. 4.17
Management fee	Rs.0.69
Other Guarantee fee	Rs.0.45

Total	Rs.5.31

From this it is observed that the closing fee and the Annual Agency Fee which were under dispute when the matter was before the evaluation committee is not being claimed by M/s. PPN now. Accordingly these two items will not form part of the capital cost. The submissions of the parties with regard to other 3 items are further discussed.

Finance charges - guarantee Commission : Rs.4.167 crores

TNEB / TANGEDCO stated that no certificate was provided by PPN for the amounts paid to the guarantors Viz., IDBI, IFCI, BOB & IDFC. However, after COD along with the quarterly bills, PPN is producing a statement to the said effect. Since the details were not furnished by PPN, TNEB is not willing to allow this as a part of capital cost.

Per contra, PPN have stated that the guarantee commission is the payment on the outstanding foreign currency loan principal and interest at every quarter made by the petitioner to the deferred payment guarantors. DPG, Viz. IDBI, IFCI, BOB and IDFC had guaranteed foreign currency rate pursuant to the financing documents. They further stated that the TNEB had verified the bank payment proof and therefore they cannot insist on receipt from the banks and financial institution.

TNEB in their submission have included office memorandum dated 15-5-1998 of the CEA indicating the approved Final Financial Package. This approval indicates allowance of management fee for deferred payment guarantee to IFIs @ 3.15% of total loan including interest and DPG fees to IFIs @ 1.6%. From this approval it is clear that the deferred guarantee payment is payable and therefore the amount of Rs.4.17 crores is allowed as a part of the capital cost.

Management Fee : Rs.0.69 crores

TNEB in their submission has stated as follows:-

As per the financial agreement dated 7-12-1998, Article II Clause 2.3 provides for a management fee @ 3.15% on the amount of Principal and interest amount of guarantee assistance sanctioned on or before the date of signing this agreement. The disputed amount of Rs.0.688 crores is stated to be on account of the exchange rate difference between what is considered by PPN and as considered by TANGEDCO. The TNEB had requested PPN to furnish necessary primary evidence Viz., the bank voucher showing the total USD paid along with its exchange rate, to ascertain the actual expenditure incurred in lieu of bank statement, being secondary evidence. No such document was produced by PPN. PPN in their submission have stated that weighted average exchange rate has been accepted by both the parties based on the observations of CEA and therefore this amount cannot be disallowed. The Commission observes that if all the transactions are converted based on the weighted average exchange rate then there should not be any variations in the total amount. The weighted average exchange rate may also be acting as a reference for future exchange rate variations calculations. In view of this, the Commission approves the management fee of Rs.0.69 crores as a part of finance charges and also capital cost.

Other Guarantee Fee: 0.453 crores

The evaluation committee has disallowed this amount based on the submissions of the parties. TNEB in their submissions have stated that an advance payment of 10% as mobilization advance was paid to EPC contractor by PPN and PPN further informed that advance payment to be made, as per RBI guidelines, in foreign exchange outside India has to be supported by a bank guarantee and therefore the payment made by PPN for the purpose of bank guarantee was to meet the statutory requirements. The view of TNEB/TANGEDCO was that the statutory provisions were existing even before the execution of EPC contract and therefore this cannot be covered under change in law. At this ground TNEB sort to reject this claim.

On the contrary, PPNs view was that this expenditure is not incumbent on the EPC contractor in terms of the EPC contract as the bank guarantee is a statutory requirement. In order to implement the project, the petitioner undertook this liability as this expenditure has been incurred statutorily and for the implementation of the project may be permitted.

After examining the arguments of both the parties the Commission comes to the conclusion that the other guarantee fee of Rs.0.453 crores may have to be allowed as a part of capital cost as the same was not a part of the EPC cost and was actually incurred as statutory requirement.

17.16 Initial fuel purchase and start up power: Rs.2.61 crores

TNEB has submitted that M/s. PPN have claimed fuel consumption and startup power charges upto 26-4-2001 i.e. upto COD. They also submitted that the cost of Naphtha, HSD and startup power totals to Rs.22.48 crores. Infirm power billed to TNEB / TANGEDCO and paid by TNEB was Rs.15.38 crores. Balance amount is Rs.7.09 crores. TNEB further submitted that as per PPN's letter dated 18-12-2004, startup fuel (Naphtha and HSD) amounted to Rs.2.14 crores and if startup power charges of Rs.2.35 crores is added to startup fuel cost total works out to Rs.4.49 crores. As discussed above, the difference between Rs.7.09 crores and Rs.(2.14 +2.35) crores, which is Rs.2.61 crores, is being claimed as initial fuel and startup power cost in the capital cost. The same is objected to by TNEB as details for Rs.2.60 crores have not been furnished. TNEB also relied on CEA letter of May 2005 and claimed that only startup fuel upto synchronization be capitalized. Since the CEA's letter enclosed as Annexure H2 to the submission of TNEB dated 10th November 2011 is an unsigned letter, the Commission is not able to rely on the same. The TNEB further argued that receipt of Rs.15.38 crores has only been deducted towards infirm energy charges by PPN in lieu of revenue of Rs.15.77 crores (the difference appears to be the discount for prompt payment as agreed to between the parties). TNEB also stated that PPN has agreed for the short reduction and will correct the revenue from sale of infirm energy as Rs.15.77 crores. Relying

on the annual report for the period 2001 – 02, TNEB pointed out that the charges for initial fuel and startup power is Rs.21.02 crores as against claim of Rs.22.48 crores resulting in excess claim of Rs.0.46 crores.

PPN in their submission has agreed to the infirm power charges as Rs.15.77 crores instead of Rs.15.38 crores. They also referred to the definition of capital cost which, interalia, included cost of startup fuel. PPN pleaded for allowing initial fuel charges and startup power cost of Rs.2.61 crores after adjusting Rs.0.39 crores which is on account of the rebate provided for timely payment. For deciding this issue, the Commission would like to examine the definition of capital cost, treatment of infirm power, etc. Capital cost of the project is arrived at on the date of commercial operation of project and not on the date of synchronization. Infirm power is the power which is injected into the grid after synchronization and upto the date of COD. In this particular case COD is 26-4-2001 and this COD relates to the combined commercial operation of both the gas turbine and the steam turbine generators. The infirm power is billed at the agreed station heat rate of 1900 Kcal/Kwhr as per the PPA, which is the heat rate normally applicable after the COD. During the initial operation there will be many trippings and starts. 90 days time is allowed from the date of synchronization to commercial operation of the steam turbine in combined cycle mode and therefore it is quite likely that fuel consumption may be more than the normative fuel consumption corresponding to agreed station heat rate of 1900 Kcal/Kwhr. It is therefore appropriate to allow this additional fuel requirement upto the date of COD for the reasons explained above. However, TANGEDCO, after referring to the Annual accounts for the FY 2001 – 02 have pointed out the expenditure under the head shall be Rs.21.02 crores and not 22.48 crores. In view of this an amount of Rs.(22.48 – 21.02) crores i.e. Rs.1.46 crores is disallowed in addition to the disallowance of Rs.0.39 crores already agreed to by PPN under this head. Therefore total disallowance on this account is Rs.1.85 crores.

Miscellaneous item : Rs.0.96 crores

TNEB in their submission have stated that changes were made to the EPC contract for certain modifications to the Naphtha tank and additional load bank for the emergency diesel genset. TANGEDCO had objected for not getting the change order approved from them and further objected to shifting of this additional expenditure from the EPC contract to the owners cost. When the issue was before the evaluation committee, PPN have stated that the EPC contract has been approved by TNEB and the EPC contract permits change order and the change order itself was informed to TNEB and therefore this may be allowed as owners cost. TNEB / TANGEDCO have submitted that no such approval was sought for carrying out these additional works. PPN in their final submission has stated that documents to establish that TNEB, infact, recommended the change order items to the Energy Department, Government of Tamil Nadu for concessional custom duties were provided. TANGEDCO, however, argued that no specific approval was given for change order and recommendation to the Government for concessional custom duties cannot be considered as approval to the change orders.

For deciding this issue, the Commission had to examine the scope of modification to the EPC contract. The PPA entered into between the parties as defined in “Approved modifications” is as follows:-

“Approved Modifications - From time to time, any capital improvements or change orders under the Construction Contract, approved by TNEB and CEA (to the extent required by law) or required by a Change of Law, provided however, that any capital improvements to step up the efficiency of the Project

beyond the original efficiency shall not be considered as Approved Modifications. TNEB shall have the right to approve the financing required for the Approved Modifications, which approval shall not be unreasonably withheld or delayed.”

From this definition, it is clear that any capital improvements or change orders under the construction contract, approved by TNEB and CEA (to the extent required by law) or required by a change of law will only qualify as approved modifications. Any capital improvements to step up the efficiency of the project beyond the original efficiency shall not be considered as approved modifications. Further, this definition also envisages that TNEB shall have the right to approve the financing required for the approved modifications which approval shall not be unreasonably withheld or delayed. From the submissions made by the parties before the Commission, the Commission observes that both the parties did not cover this aspect with respect to PPA provision of “Approved Modifications”. In the absence of specific approval of TNEB / TANGEDCO for the modifications, the Commission does not approve the miscellaneous items amounting to Rs.0.96 crores for the purpose of capital cost.

In view of the clear provisions available in the PPA, the Commission is not going into the dispute between the parties with regard to approval or non approval of the EPC contract by TANGEDCO.

Establishment – Rs.0.34 crores

TANGEDCO in their final submission have stated that their only defense against this head is the non availability of proof and the claim relates to the period 1994-95 and 1995 – 96.

PPN, before the evaluation committee, have stated initially that this payment related to ESI, PF, etc for the above mentioned years. Subsequently, they informed the EC that this payment related to salaries only.

PPN in their final submission dated 10th November 2011 have stated that they have furnished the following documents on 10-3-2009 and again on 15-4-2009 to TNEB.

- 1) A statement of reconciliation;
- 2) A CA Certificate in support;
- 3) A certificate from HDFC Bank in support;
- 4) A bank statement supporting the payment; and
- 5) A bank debit slip for payment of TDS relating thereto.

During the arguments on 19-10-2011 TNEB clarified that they will check and revert back on this issue on 20th October 2011. However, they did not clarify on that day and even in their final submission have only stated that their only defense against this head is the non availability of proof. They did not rebut the claim of PPN with regard to submission of the above referred 5 documents.

Evaluation committee in its report has observed that PPN in their letter dated 10-3-2009 stated that the company has already provided proof of payment to TNEB and a copy also furnished now. EC concluded that based on the facts furnished above, the claim of PPN has been admitted. Since documents for

proof of payment has been furnished by PPN, the Commission allows the establishment expenditure amounting to Rs.0.34 crores as a part of capital cost.

Customs duty : Rs.12,20,000/-

The final submission made by PPN on 10-11-2011 in pages 59 -60 does not include claim of Customs duty of Rs.12,20,000/-. The EC report also clearly states that PPN had agreed for disallowance of this amount. Accordingly, the custom duty of Rs.12,20,000/- will not form part of the capital cost.

IDC and financing charges:

This is one of the items of dispute between the parties. Both the parties have agreed that this can be arrived at on a proportionate basis to arrive at the completed capital cost. The Commission proposes the following methodology. The capital cost at the Base Exchange Rate approved by the CEA in its TEC

Hard Cost	:	Rs.978.50 crores
IDC & FC	:	Rs.143.20 crores

Total	:	Rs.1121.70 crores

The breakup of the provisional capital cost of Rs.1379.25 crores agreed to between the parties for raising the invoices is as follows:-

Hard Cost	:	Rs.1172.42 crores
IDC & FC	:	Rs. 206.83 crores

Total	:	Rs.1379.25 crores

The percentage of IDC with respect to total cost in the provisional capital cost agreed for raising invoices is calculated as 14.99%. The IDC as a percentage of the hard cost is 17.64%. The total disallowance in hard cost works out to Rs.29.78 crores as discussed in various paragraphs of this Order. The hard cost after disallowance is worked out as Rs.1142.64 crores. IDC and Financing charges on this at the rate of 17.64% works out to Rs.201.56 crores. The completed capital cost as arrived at by the Commission now after disallowance is Rs.1344.21 crores.

Summary of ruling and directions :-

- 1) The Commission approves the completed capital cost for this project as Rs.1344.21 crores.
- 2) This approved capital cost shall be divided into foreign debt, foreign equity, Indian debt and Indian equity in the same proportion in which the provisional capital cost was divided.
- 3) Monthly invoices shall be redrawn from the date of CoD and then annual invoices for each year shall be prepared.

4) Monthly invoices shall also be corrected for the capacity ratios as directed in Order dated 17-6-2011 in DRP No. 12 of 2009. The invoices shall be redrawn and the final settlement shall take place within three months.

With the above ruling and directions MAP No. 1 of 2007 and MAP No. 2 of 2008 relating to fixing of completed capital cost are finally disposed off. The completed capital cost as approved in this order will have to be taken into account for arriving at the tariff as per the PPA entered into between the parties.

There would be no Order as to cost.

Appeal:-

An appeal against this order lies to the Appellate Tribunal for Electricity as per section 111 of the Electricity Act, 2003 within a period of forty five days.

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

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission