

TAMIL NADU ELECTRICITY REGULATORY COMMISSION
(Constituted under section 82 (1) of the Electricity Act, 2003)
(Central Act 36 of 2003)

PRESENT:-

Thiru.S.Akshayakumar Chairman

Thiru.S.Nagalsamy Member

and

Thiru.G.Rajagopal Member

P.P.A.P. No.5 of 2012

M/s.SEPC Power Private Limited
Represented by its Vice President
3B, Nawazish
No.30, Khader Nawaz Khan Road
Nungambakkam
Chennai – 600 006.

... Petitioner
Thiru Rahul Balaji
(Advocate for the Petitioner)

Vs

The Tamilnadu Generation and Distribution
Corporation Limited
Represented by its Chairman and Managing Director
No.144, Anna Salai
Chennai – 600 002.

...Respondent
Thiru P.H. Vinod Pandian
(Standing Counsel for the Respondent)

Date of hearing : 16.04.2012, 02.05.2012, 31.07.2012, 8.10.2012,
27.11.2012, 13.12.2012,12.02.2013, 26.02.2014,
17.04.2014, 23.04.2014 and 21.07.2014.

Date of order : 30-04-2015

The P.P.A.P No. 5 of 2012 filed by the Petitioner under section 86 of the Electricity Act, 2003 and as per the orders of the Commission made in M.P. No.18 of

2010 and seeking approval of the Commission for the P.P.A. with TANGEDCO as amended by Addendum-2 came up for final hearing on 27- 07- 2014. The Commission up on perusing the above petition and the connected records and after hearing both sides passes the following order:-

ORDER

1. Prayer of the Petitioner:

The Prayer in PPAP 5 of 2012:-

“It is therefore humbly prayed that this Hon’ble Commission may be pleased to pass the order approving the Addendum 2 to the PPA incorporating the amendments as directed by this Hon’ble Commission in its order dated 9.5.2011 in MP 18 of 2011 and pass such further or other orders as this Hon’ble Commission may deem fit in the facts and circumstances of the case for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage – IV and thus render justice.”

2. Facts of the Case:

2.1. The petitioner’s project was one of the MOU based projects. After obtaining all the clearances including Techno Economic Clearance (TEC) of Central Electricity Authority (CEA) the Petitioner signed a Power Purchase Agreement (PPA) with TNEB (now TANGEDCO). On 21-3-1998 the Respondent TANGEDCO agreed in principle for the allocation of ESCROW. In letters dated 19-9-2000 and 8-11-2000 addressed to the Respondent TNEB, the petitioner pointed out the huge expenditure incurred by them on land lease and the impending expiry of validity of TEC and requested for immediate allocation of ESCROW. The PPA between the petitioner and the Respondent Board was first initialled on 29-01-1997 in accordance with GO. No.4 dated 07-01-1997 and it was finally signed on 12-2-1998. In G.O.Ms.No.114 dated 13-7-1998 the Government of Tamil Nadu (GoTN) ratified the signing of PPA. The Petitioner citing the delay in provision of ESCROW by

Respondent TANGEDCO, filed a Writ petition WP 7241 of 2001 at High Court of Madras. In view of developments that have taken place in the interim including coming into effect of Electricity Act 2003, the Petitioner sent a letter on 3-8-2009 requesting the Respondent TANGEDCO to confirm the taking up of the project for implementation. The Respondent TANGEDCO replied on 18-8-2009 confirming that the PPA has been signed and ratified. In that letter the Respondent TANGEDCO further stated that the petitioner is to take up the matter with the appropriate authority viz TNERC for necessary approval for implementation of the project. Hence the Petitioner filed M.P. No.18 of 2011 before the Commission.

2.2. The MP 18 of 2010 was admitted by the Commission on 11/6/2010. The Respondent TANGEDCO in their Counter Affidavit dated 22/8/2010 filed in the said M.P. stated as follows:

“This Hon’ble Commission may be pleased to pass an appropriate order in the light of the facts and circumstances stated and thus render justice.”

2.3. The Commission passed an interim order on 7-09-2010 in the said MP 18 of 2010 as below:-

“The Respondent Board is directed to furnish an additional affidavit whether they stand by the PPA executed with SEPC on 12-02-1998 as amended on 30-10-1998.”

2.4. Respondent TANGEDCO filed an additional counter affidavit on 22.9.2010 contending among others as below:

“4) It is respectfully submitted that the Respondent Board is treating this PPA as a concluded PPA and that the Respondent TANGEDCO stand by the said PPA due to the clarification issued by MoP and in the light of the series of events that are taken place. Further the Respondent TANGEDCO is desirous of procuring power from the Petitioner so as to meet the power requirement of the state. Subject to the condition that the Capital cost of the project shall not exceed the Capital cost approved in the PPA as per the Techno Economic Clearance letter dt 31.07.1997.

5) It is respectfully submitted that the PPA with the Respondent TANGEDCO was signed on 12.02.1998, and it was amended on 13.10.1998 before enactment of Electricity Act, 2003. In view of the above, the Hon'ble Commission may be pleased to pass an appropriate order and thus render justice."

2.5. In the Reply Affidavit filed by the Petitioner on 24.9.2010, it was specifically stated that the other IPP's who achieved Financial Closure were provided Escrow Cover substantiating the same with letters from Financial Institutions and banks which insisted on providing Escrow Cover for achieving financial closure.

2.6. The Commission after hearing both sides in the said M.P. No.18 of 2010 on 09-05-2011, observing that there is no need for issue of any direction in the matter as prayed by the Petitioner, issued the following directions:-

"1 The PPA shall be amended to correct the norms, as directed in para 10.4.3, so as to fall in line with the TNERC (Terms and Conditions for determination of tariff) Regulations – 2005 within a period of three months.

2 The project mile stones as set out in para 10.4.4 of para ix shall be complied with

3 The amended PPA shall be submitted to the Commission in terms of Section 86 of the Electricity Act 2003 for approval

4 Interim Order dated 7-9-2010 is merged with the order"

2.7. The Petitioner and Respondent TANGEDCO thereafter discussed and agreed on the amendments to the PPA as ordered by the Commission and the amended PPA was thereafter submitted by the Petitioner on 13.1.2012 as I.A.No.1 in MP 26 of 2011. Thereafter the Commission admitted the said petition as PPAP No.5 of 2012.

3. Details of the Project - profile:

The Petitioner has proposed to set up Power Project and the brief description of the Project as revealed from the Agreement as well as from the Petition submitted is as below :-

- (a) Capacity: 1 X 525 MW
(One number Coal fired Generating unit, including auxiliary equipment and associated facilities. One number Sub Critical steam Generator along with One set of Steam Turbine) Acknowledged as Base Load Stations
- (b) Location: To be established within VO Chidambaranar Port Trust Estate at Thoothukudi (VOCPT), Thoothukudi District, Tamil Nadu.
- (c) Access to the site: The site can be accessed by:
- Road: NH 7 connecting Chennai and Kanyakumari is very near to the Site.
 - Railway: Located at 10 Kms from Thoothukudi Broad Gauge Railway Station
 - Seaport: Located within the Port premises
 - Airport: Thoothukudi Airport is located 15 Kms fro the Site
- (d) Land for the project:
- Power Plant Land: 36.81 Ha of land for Power block is taken on lease from VOCPT.
 - Ash Pond Land: 300 Acres of land already acquired at Vadakku Karaseri Village, Srivaikundam Taluk, Thoothukudi District
 - Fore Shore Facilities: Required right of way and water front allocations are part of the allocations by VOCPT for which a separate Concession Agreement with VOCPT would be executed by Petitioner
- (e) Raw water Source: Captive desalination plant to be set up as part of the Project

- (f) Coal linkage: Long term coal supply agreement with Overseas Suppliers.
- (g) Cooling water The Project will adopt closed circuit cooling water system.
- (h) Environmental Clearance: The Company has obtained Environmental Clearances including CRZ Clearance required for the Project from Ministry of Environment and Forests / Government of India.
- (i) Consent Order: Consent to Establish the Project under Air Act and Water Act have been obtained from Tamil Nadu Pollution Control Board.
- (j) Financial Tie Up: Sanction letters received from M/s Power Finance Corporation and M/s Rural Electrification Corporation for Rupee Term Loan required for the Project.
- (k) Financial Closing Date: Shall be achieved within 6 Months of the approval of the PPA and Capital Cost fixation by TNERC.
- (l) Commercial Operation Date: Shall be achieved within 39 Months of Financial Closure.
- (m) Capital Cost of Project: To be fixed by TNERC.
- (n) Capital Cost Ceiling: The Completed Cost shall not exceed an amount to be fixed by TNERC on any account inclusive of variation in foreign exchange rate except for changes on account of rates of taxes and duties and change in law.
- (o) Sale of Power: Power would be sold to TANGEDCO as per the amended PPA to be approved by the TNERC based on the Commissions Tariff Regulation 2005.
- (p) Power Evacuation: To be evacuated by TANGEDCO through 2 X Single Circuit 230 KV Transmission Lines and 1 X Double Circuit 400 KV Transmission Lines.

4. Name change in the cause title of the P.P.A.P:

The petitioner formerly called "SPIC Electric Power Corporation Private Limited" having got its name changed as "SEPC Power Private Limited" with the Registrar of Companies after following the due process therefor, made an application to the Commission in I.A. No1 of 2012 in PPAP 5 of 2012 praying for amendment to cause title citing name and address change of the petitioner. The IA was heard on 18.10.2012 and after taking note of the no objection from the Respondent for the name and address change of the Petitioner the Commission ordered for the name and address change as prayed for in the I.A.

5. Contention of the Petitioner in the affidavit dated 13-01-2012:-

5.1. The Petitioner filed M.P.No.18 of 2010 with a prayer to direct the Respondent to act in accordance with the terms contained in the concluded Power Purchase Agreement (the "PPA") between the Petitioner and Respondent for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage-IV (the "Project").

5.2. M.P. No.18 of 2010 came to be ordered on 09-05-2011 with the following directions:

- i. The PPA shall be amended to correct the norms, as directed in para 10.4.3, so as to fall in line with the TNERC (Terms and Conditions for determination of tariff) Regulations – 2005 within a period of three months.
- ii. The project mile stones set out in sub-para 10.4.4 of para ix shall be complied with.
- iii. The amended PPA shall be submitted to the Commission in terms of section 86 of the Electricity Act, 2003 for approval.
- iv. Interim order dated 07-09-2010 is merged with this order.

5.3. After receipt of the certified copy of the order on 19-05-2011, the Petitioner proceeded to act in furtherance of the same and held discussions with the Respondent on capital cost and also the modality of the amendments to the PPA.

5.4. The Petitioner approached the Respondent, seeking confirmation regarding Respondent's stand on the capital cost and modalities of amending the PPA vide the Petitioner's letter SEPC/TNEB/2011, dated 29-06-2011. After further discussions with the Respondent on this and other issues, the Petitioner had submitted the draft of the amendments to the PPA vide its letters dated 26-07-2011 and 28-07-2011 and had submitted the finalized amendments to the PPA as ordered by the Commission in the form of Addendum 2 to the PPA from its side to the Respondent on 02-08-2011 for its approval for signing and thereafter submission to the Commission.

5.5. The letter dated 05-08-2011 addressed to the Respondent seeking its confirmation for the submission of the amendments to the Commission by 09-08-2011, the Petitioner was informed by the Respondent vide letter CE/PP/SE/PP/EE/AEE3/IPP/F.SEPC/D219, dated 06-08-2011 that the amendments submitted were being perused by various wings and once it is approved the same would be communicated to the Petitioner. The Petitioner was also informed that the approval of the various wings of the Respondent would be done only by the end of August 2011.

5.6. In view of the original deadline of 3 months for submission of the amendments as ordered by the Commission and considering the time required by the Respondent TANGEDCO in its letter dated 06-08-2011 for approval of the Addendum 2, the Petitioner filed a Miscellaneous Petition dated 08-08-2011 seeking time extension until 15-09-2011 for submission of amendments as ordered by the Commission.

5.7. The Petitioner on 08-08-2011 seeking extension of time limit for submission of Addendum 2 was since then numbered as M.P. No.26 of 2011. In the hearing held on 13-09-2011 in M.P. No.26 of 2011 for seeking extension until 15-09-2011, the Respondent informed the Commission that it requires 2 more months for obtaining the approval of its Board. The Commission was pleased to grant further extension of 60 days from 15th September 2011 as prayed by the Respondent. The Respondent on 11-11-2011 filed a petition with the Commission seeking further 2 months extension of time for submission of the amendments to the PPA informing that Board of TANGEDCO has to approve the amendments. The IA petition seeking further extension was numbered as I.A. No.1 in M.P. No.26 of 2011. The Commission granted additional time extension of 60 days from 14-11-2011 sought by the TANGEDCO and further directed that this would be the last extension.

5.8. The Petitioner has been continuously following up with the Respondent for the approval of Addendum 2 submitted on 02-08-2011. The Respondent had a discussion with the Petitioner on 10-09-2011. Based on the discussions, the Petitioner submitted its detailed item-wise response vide its letter SEPC/TNEB/2011, dated 12-09-2011 to the Respondent. The Respondent vide letter dated 13-12-2011 sought additional comments from the Petitioner over and above the discussions already completed on 10-09-2011. The Respondent vide its letter dated 13-12-2011 gave its proposal to the Petitioner and the Petitioner submitted its detailed response on 15-12-2011 to the various proposals of and accordingly submitted the revised Addendum 2 dated 15-12-2011. The Respondent again invited the Petitioner for a discussion on 27-12-2011 citing some more new and additional points for discussions. The Petitioner informed that further amendments cannot be considered in view of the deadline for filling of Addendum 2 and that those

points were not as per the Commission's order. The Petitioner followed up with a confirmatory letter dated 28-12-2011.

5.9. The Respondent in its letter dated 04-01-2012 informed the Petitioner that the Board of the Respondent has approved the proposed amendments to the PPA submitted by the Petitioner as Addendum 2. The Petitioner vide letter dated 06-01-2012 furnished 2 sets of the copies for execution and thereafter the Petitioner and the Respondent have executed and delivered the amendments to the PPA as Addendum 2 on 10-01-2012.

5.10. The Petitioner submitted the following with regard to compliance of the directions issued by the Commission in its order dated 09-05-2011 in M.P. No.18 of 2010.

(1) The PPA shall be amended to correct the norms, as directed in para 10.4.3, so as to fall in line with the TNERC (Terms and Conditions for determination of tariff) Regulations – 2005 within a period of three months.

(a) Target availability for recovery of full capacity (fixed) charges as directed in para 10.4.3 (a) has been amended to 80% vide clause (2) under definition of Standard PLF in Addendum 2.

(b) Target PLF for incentive as directed in para 10.4.3 (b) has been amended to 80% vide clause (1) under definition of Target PLF for incentive in Addendum 2.

(c) Incentive rate as directed in para 10.4.3 (c) has been amended to 25 paise per kwh (or Rs.250 per MW hr.) for generation in excess of 80% vide clause (6) of the Addendum 2.

- (d) Secondary Fuel Oil Consumption as directed in para 10.4.3 (d) has been amended to 2 ml per kwh in clause 2 under definition of Specific Consumption in Addendum 2.
- (e) Return on Equity as directed in para 10.4.3 (e) has been amended to 14% post tax in clause (8) under definition of Base Return on Equity as well as Adjusted Return on Equity in Addendum 2.
- (f) O & M expenses as directed in para 10.4.3 (e) has been amended as “The O & M and Insurance Expenses inclusive of contingency reserve shall be at 2% of capital cost, subject to approval by the Commission. Other terms related to O & M expenses shall be as per clause 25 of Regulations 2005”.

The Petitioner has taken a stand that the PPA clause is for O & M and insurance expenses which includes “all O & M costs and expenditure on insurance” whereas the direction by the Commission is for that component of O & M expenses alone.

Therefore, as per the provisions of the PPA , that component of the O & M costs relating to O & M expense shall be at 1% as per clause 25 with contingency at 0.5% as per clause 30 and insurance at 0.5% as per clause 31 of Regulations, 2005. Even in PPA/AP/1 of 2006 filed by M/s.Cuddalore Powergen Corporation Limited, the Respondent TANGEDCO had accepted O & M expenses including insurance at 2.12% of the capital cost stating that these are below CERC norms. Subsequently in the order passed by the Commission in PPA/AP/1 of 2006, these aspects of O & M and insurance expenses have been reviewed and adopted at 2%. Thus, the PPA clause relating to O & M and insurance expenses has been adopted at 2% of the capital cost which is in line with direction issued by the Commission and as clarified in its order in PPA/AP/1of 2006.

(2). Item (ii) of the directions of the Commission in order dated 09-05-2011 in M.P.No.18 of 2010 that the project milestones set out in sub-para 10.4.4 of para ix shall be complied with the Petitioner submitted that-

- i. The amendments directed by the Commission has been finalized by the parties and within the extended period set out by the Commission.
- ii With regard to tie up of finance within a period of nine months of signing of the amendments, the Petitioner submitted that “by the end of 9 months from the date of approval of the Addendum 2 by the Commission, or, if later, within 2 months from the date of provision of the alternate payment security mechanisms acceptable to lenders as required to be identified by the Respondent and accepted by the Petitioner. In lieu of existing payment support mechanisms defined in c (i) below.
- iii The existing PPA clause 5 provides for “The project shall be completed and have Commercial Operation Date (COD) within a period of 39 months from the financial closure”.
- iv The stand on the capital cost has been provided in clause 12 of the Addendum 2.

(3). Regarding the observation of the Commission in para 3 of the order in M.P. No.18 of 2010 that the petitioner has changed the mind and willing to execute the project without escrow-

- i. The Petitioner submits that it is willing to execute the project without Escrow Account (or) Tax Escrow Account (or) Escrow & Disbursement Agreement (or) Security and Hypothecation Agreement (or) GOTN Guarantee as provided for in the PPA (collectively referred to as “Existing Payment Support Mechanisms”) in case the above mechanisms could not be extended by the Respondent in its reasonable opinion;
- ii. The Petitioner further submits that “As a further support for Respondent’s payment obligations, the Petitioner and the Respondent would negotiate in good faith and agree on an alternate payment

security mechanism in case the Existing Payment Support Mechanisms as provided for in the PPA could not be extended in the reasonable opinion of the Respondent”.

- iii The Petitioner further submits that “Provided, however, that, the Respondent shall provide such alternate payment security mechanism, satisfactory to the Petitioner’s Lenders, and that such alternate payment security mechanisms are provided atleast two months prior to the anticipated Financial Closing Date of the project.”
- iv. The Petitioner further agrees to amend those clauses in the PPA relating to the above payment security mechanism, duly incorporating the alternate payment security mechanisms to be agreed and such amendments shall be submitted to this Commission for approval to the extent required.”

5.11. In the meantime, pending approval of the amendments by the Respondent, the following activities were taken up by the Petitioner towards putting up the project.

- a. Consent from Tamil Nadu Pollution Control Board to establish the project has been applied for and the same is in advanced stage of issuance.
- b. Land and site development activities: VOCPT vide letter date 14-07-2011 permitted the Petitioner to enter upon the site and proceed with site development activities and accordingly the Petitioner has commenced the site development activities.
- c. Draft tender documents prepared and ready for proceeding with ICB route tendering.

5.12. In para 3 of the letter dated 04-01-2012 of the Respondent it is stated that “in addition to the above, the issues related to depreciation, interest and financing charges and late payment charges will be taken up before the Commission for decisions and directions”. The Petitioner in the letters dated 28-12-2011 and

06-01-2012 has already informed the Respondent that these are new and are beyond the directions issued by the Commission.

6. Contention of the Respondent in the Counter Affidavit dated 16-08-2012:-

6.1. The Commission in its order dated 09-05-2011 in the M.P.No.18 of 2010 filed by the Petitioner, directed to make the following amendments in the PPA dated 12-02-1998, signed between erstwhile Tamil Nadu Electricity Board (now TANGEDCO) and M/s. SEPC Power Private Limited

1. The PPA shall be amended to correct the norms, as directed in paragraph 10.4.3, so as to fall in line with the TNERC (Terms and Conditions for determination of tariff) Regulations-2005, within a period of three months.
2. The project mile stones set out in sub-para ix shall be complied with.
3. The amended PPA shall be submitted to the Commission in terms of section 86 of the Electricity Act, 2003 for approval.
4. Interim order dated 07-09-2010 is merged with this order.

The Commission in paragraph 10.4.4 of the said order directed that the amendments directed in para 10.4.3 shall be finalized by the parties within a period of 3 months of the order and has also directed TANGEDCO, to take a clear stand on the capital cost of the project.

6.2. In paragraph 10.4.3 of the said order dated 09-05-2011, the Commission prescribed the norms of operation of the 1 x 525 MW imported coal based thermal project to be developed by M/s. SPIC Electric Power Corporation (P) Ltd. at Tuticorin, as follows:-

a	Target availability for recovery of full capacity (fixed charges)	80%
b	Target PLF for incentive	80%
c	Incentive	25 paise per kwh of generation in excess of 80%
d	Secondary fuel oil consumption	2 ml per kwh
e	Return on equity	14% post tax
f	O & M expenses	as per Clause 25 of Tariff Regulations, 2005

6.3. The Addendum-2 dated 10-01-2012 to the PPA provides that incentive would be paid if the generation exceeds the target PLF of 80%; wherein the target PLF for incentive has defined as Standard PLF. The Standard PLF has been defined in the PPA to include deemed generation which reads as follows:-

“Standard PLF: 80% during the Post-Stabilization period and 63.5% during the Stabilization period. Also referred to as Target PLF for FCC Regulations, 2005”

6.4. It can be interpreted that deemed generation can be considered upto 80% for payment of incentive. A clear order to the effect the deemed generation will not be considered for arriving at the PLF towards incentive payment will avoid unnecessary litigation.

6.5. The Petitioner and the Respondent had entered into an amendment (Addendum-2) dated 10-01-2012 to the PPA dated 22-01-1999 as per the Commission’s direction but for O & M expenses for which, the Petitioner seeks revision. The Petitioner in its letter dated 15-12-2011 requested for a ratio higher than the one ordered by the Commission in the order dated 09-05-2011 on the pretext that the Commission has ordered O & M expenses at a higher rate in the matter of capital cost of M/s.Cuddalore PowerGen Corporation Limited vide order

dated 24-04-2008 in PPA/AP/1 of 2006. The relevant portion of order dated 24-04-2008 is extracted below:-

“(16) (8) (a) The O & M Expenses and Insurance shall be 2% inclusive of contingency reserve with 4% escalation.”

6.6. The Petitioner’s request, relying on the above order dated 24-04-2008 of M/s.Cuddalore PowerGen Corporation Limited in PPA/AP/1of 2006, that the PPA clause relating to O & M and Insurance expenses may be amended as 2% of the capital cost is not acceptable to the Respondent.

6.7. The contention of the Petitioner is not acceptable to this Respondent as the same is not in line with the norm (f) stated by the Commission in para 10.4.3 of the order dated 09-05-2011 in M.P. No.18 of 2010 which provides for 1% of the capital cost only. However, the Respondent in order to expedite the project, agreed to execute the amendment in respect of O & M expenses as sought by the Petitioner with a rider that the rate of O & M expenses is subject to the approval of the Commission. The relevant portion of the provision not agreed to by TANGEDCO in the agreement is reproduced below for ease of reference.

“The O & M and insurance expenses inclusive of contingency reserve that shall be at 2% of capital cost, subject to approval by the Commission. Other terms related to O & M expenses shall be as per clause 25 of Regulations, 2005.”

6.8. The Petitioner is only eligible for 1% of the capital cost towards O & M expenses as ordered by the Commission vide order dated 09-05-2011 in M.P. No.18. In case of Petitioner’s request for revision of O & M rate is considered by the Commission so as to include contingencies and insurance at 0.5% each then, without prejudice to the contentions in the pre-para made by the Respondent, the Respondent wishes to submit that the Petitioner is not entitled at Contingencies at

0.5% because of the explicit provisions in the PPA which provides for reimbursement of expenses towards O & M and insurance only. The relevant portion of the PPA extracted for the Commission's reference:-

“O & M and Insurance Expenses” shall mean and amount equal to:

- (i) *all O & M cost and expenditure on insurance @ 2.5% of the capital cost for the first year and subject to escalation as per the provisions of the schedule ; or”*

The upward revision of capital cost due to exchange rate variation is the result of the delay made by the Petitioner in executing this project. This may be considered by the Commission.

6.9. In clause 10.4.4 of the order dated 09-05-2011 in M.P.No.18 of 2010, the Commission further directed the Respondent to take a clear stand on the capital cost of the project and amend the PPA, if necessary. In this regard, it is submitted that:

- (a) The ceiling cost is already approved by Board of TANGEDCO, GOTN and CEA dated 31-07-1997 for 321.779 Million USD, 145.893 Million DM and Rs.875.389 crs. totaling to Rs.1536 crores by considering an exchange rate Rs.35.5/USD and Rs.21/DM.
- (b) The capital cost when reworked by considering present day cost at an exchange rate of Rs.47.11/USD and Rs.59.31 / Euro (as DM converted in fixed Euro conversion rate of Euro 0.51097/DM) works out to Rs.2833 crs. for 525 MW, which works out to Rs.5.39 crs./ MW including coal jetty cost of Rs.331 crores consisting of 1 unit of the project.
- (c) In case of M/s.Cuddalore PowerGen Corporation Limited, the capital approved by the Commission is Rs.6004 crores, when the FERV is factored for comparison purpose, the capital cost works to Rs.6202 crores including the cost of Jetty and Taxes for 1320 MW consisting of 2 units.
- (d) The capital cost is compared after excluding cost of coal jetty and tax from both projects, the cost / MW works out to Rs.4.41 crores / MW

which is comparable with M/s.Cuddalore PowerGen Corporation Limited's project which works out to Rs.4.28 crores / MW.

- (e) Eventhough out of context and not pari-materia to compare, the above cost is lesser when compared with the estimated approved cost of M/s.Simhadri Power Project which is Rs.5,476 crores / MW. (Rs.5476.97 Crs / (2 x 500 MW) and the cost of ongoing TNEB projects which is ranging about Rs.5.5 crores / MW.

6.10. In view of the above facts, the capital cost of this Petitioner project which was already arrived and approved by TNEB, GOTN and CEA has not undergone any change hence, the same may kindly be approved. The two different capital cost per MW discussed in the order dated 09-05-2011 of the Commission are due to factoring of exchange rate increase considering the present day cost. Eventhough out of context, it is pertinent to note here that as per the Commission's order dated 09-05-2011, the capital cost of the project including financing cost shall have to be got approved from the Commission once EPC contractor is selected. As in M/s.Cuddalore PowerGen Corporation Limited power project, wherein the Commission was pleased to fix a cap on the capital cost to be incurred vide its order dated 25-04-2008 in PPA/AP/1/2006, a ceiling in capital cost may be fixed to this power project also.

6.11. Regarding the Alternate Payment Mechanism, the Respondent in letter dated 05-07-2012, proposed to provide "Direct payment backed by Letter of Credit" as alternate payment security mechanism as made available to other IPPs and requested the Petitioner's acceptance for the same. However, the Petitioner is yet to accept the suggestions made by the Respondent. If the backup Letter of Credit is acceptable to the Petitioner, the same will be made effective by the Respondent two months prior to the scheduled commercial operation date. The Petitioner is yet to

withdraw the Writ Petition No.7241 of 2001 filed before the High Court of Madras, praying to direct TANGEDCO to provide escrow cover.

6.12. The following additional issues also need to be considered:-

- (i) Interest on working capital may be ordered as per clause 27 of the Regulation 2005 viz. the rate of interest on working capital shall be on normative basis and shall be equivalent to the short term prime lending rate of State Bank of India as on 1st April of the relevant year.
- (ii) The fixed capacity charges may be ordered as per clause 36(2) of the Regulation 2005 consisting of the following components:-
 - a. Interest on Loan Capital
 - b. Depreciation
 - c. Return on equity
 - d. Operation and Maintenance Expenses
 - e. Interest on Working Capital

As per Regulation 41 (2), the Annual Capacity charges recoverable by the Generating Company be worked out by deducting other income as per Regulation 40 from the total annual expenses. The rate of depreciation as well as methodology may be ordered in accordance with Regulation 24 (Depreciation), the interest and financing charges may be ordered in accordance with Regulation 23. The Commission may also order that the late payment surcharge may be paid on simple interest basis without compounding monthly or quarterly.

7. Contention of the Petitioner in the Additional Affidavit dated 20-02-2014:-

7.1. Progress made with respect to the Project:

Land Lease and Captive Coal Jetty: The VOCPT have issued the confirmation order on 28-12-2012 confirming the allocation of land and water front area for setting up the project, construction of captive coal jetty and ancillary facilities on lease basis to SEPC. The Petitioner has paid the lease rent due as on date to VOCPT. The

Land Lease Agreement with VOCPT has been concluded and the same would be executed shortly. The agreement for Captive Coal Jetty with VOCPT would be executed thereafter.

Site Development Works:- M/s. Development Consultants Private Limited (DCPL), Chennai are assisting the Petitioner as Technical Consultants in execution of the Site Enabling Works which are progressing in a phased manner as below:

- (i) Site office has already been established by the Petitioner.
- (ii) Initial land filling work has been completed for taking up Civil Foundation Works.
- (iii) Work on compound wall and administrative building have been awarded and the contractor has commenced these works.
- (iv) **Construction water:-** Recommendation has been made to the Board of Tamil Nadu Water Supply and Drainage Board (TWAD Board) for sanctioning of Construction Water Sump & Pump-House for receiving and distributing of the above construction water has been established.
- (v) **Construction Power:-** Sanction has been accorded by Superintending Engineer / Tuticorin Electricity Distribution Circle of TANGEDCO for availing 500 KVA construction power at 22 KV and necessary fees for availing the supply has been paid. The Petitioner and TANGEDCO have commenced their respective works for effecting the construction power.

7.2. (a) **EPC Contract:** The Petitioner in compliance to the directions issued by the Commission in M.P. No.18 of 2010, followed the International Competitive Bidding (ICB) process for finalizing the EPC contractor and the progress thereof and the same was informed to the Respondent at various stages of the ICB process. Various steps undertaken in finalizing the EPC contractor are as below:-

Appointment of Consultant:- The Petitioner appointed M/s. Development Consultants Private Limited, Chennai (DCPL) in September 2012 as its engineering consultant to assist them in the selection of the EPC contractor by following the ICB

process. Based on the advice of M/s.DCPL, the Petitioner followed a two stage process wherein **Stage 1** comprised of short-listing of EPC bidders through Request for Pre-Qualification (RFPQ) process and **Stage 2** comprised of selection of EPC bidder through Request for Proposal (RFP) process.

Stage 1: RFPQ Process

- (i) Soliciting PQ Bids: M/s. DCPL prepared the RFPQ document (RFPQ reference SEPC/E2/2012 dated 28-09-2012) as well as press advertisement. The press advertisement was widely published as required by ICB Process as below.
 - (A) The New Indian Express (All India Edition) ;
 - (B) The Business Standard (All India Edition) ;
 - (C) The Financial Times (Worldwide Edition) ;
 - (D) The Financial Times Web Site (Worldwide) ;(The due date for receipt of the PQ bids was until 05-11-2012)
The aforesaid press publication was furnished to the Respondent.
- (ii) **Receipt of PQ Bids:** There was good response to the ICB process and as many as 14 bidders have obtained the RFPQ documents which were issued free of cost in order to solicit more bidders. As on the due date, PQ bids were received from 9 EPC bidders.
- (iii) **PQ Bids Opening:** The PQ bids were opened on 08-11-2012 in the presence of DCPL and were taken up for detailed scrutiny and evaluation. The EPC bidders who have submitted their PQ bids were:
 - (1) BGR Energy Systems Limited, India ;
 - (2) China National Machinery Import and Export Corporation, China;
 - (3) EDAC Engineering Limited, Chennai, India;
 - (4) ENERGO Engineering Projects Limited, New Delhi, India;
 - (5) ESSAR Projects Limited, New Delhi, India;
 - (6) ISOLUX Corsan India Engineering & Constructions Private Limited, Italy & India;
 - (7) LANCO Infratech Limited, New Delhi, India;
 - (8) MEGHA Engineering and Infrastructure Limited, Hyderabad

India and;

(9) NCC Limited, Hyderabad, India

- (iv) **Evaluation of PQ Bids:** The PQ bids were evaluated by DCPL and 1st set of comments seeking additional information from EPC bidders were submitted by DCPL. Clarifications were sought from EPC bidders setting the due date of receipt as 12-12-12. The responses received were further scrutinized by DCPL and further set of clarifications obtained in first week of January. Based on the clarifications provided by the EPC bidders along with remark of Petitioner, M/s. DCPL submitted their PQ Bid Evaluation Report on 27-02-2013.
- (v) **Short Listing of EPC Bidders:** M/s. DCPL in their PQ Bid Evaluation Report have finally recommended the following EPC Bidders as the qualified EPC bidders under **Stage 1** of the ICB process and accordingly the Petitioner accepted the recommended short list which contained:

- (1) ESSAR Projects Limited with BTG of Harbin (China) ;
- (2) ISOLUX Corsan Indian Engineering Private Limited with BTG of Alstom (Europe) / DEC (China) ;
- (3) LANCO Infratech Limited with Boiler by Harbin (China) and TG by Power Machines (Europe) ;
- (4) MEGHA Engineering and Infrastructure Limited with BTG of BHEL (India) / Doosan (Korea) ; and
- (5) NCC Limited – Power Division with BTG of BHEL (India) / Ansaldo (Europe)

The aforesaid details of short listing of EPC bidders as above by the Petitioner was furnished to the Respondent.

Stage 2 : RFP Process

- (i) **Soliciting the detailed bids:** The detailed Request for Proposal (RFP) document was prepared by M/s. DCPL which were issued to the five shortlisted EPC bidders as per the time timelines furnished below:-

- (A) Issuing the Request for Proposal (RFP) :28-02-2013
- (B) Site Visit: 14to18-03-2013
- (C) Pre Bid Conference (at Chennai) : 19-03-2013

(A) Extended due date for receipt of bids : 15-05-2013

The copy of the RFP document cited above was furnished to Respondent.

(ii) **Receipt of Bids:** As on the due date, bids were received from the following 3 EPC Bidders:

(A) M/s.LANCO Infratech Limited (MEIL) ;

(B) M/s.MEGHA Engineering and Infrastructure Limited ; and

(C) M/s.NCC Limited

DCPL and the Petitioner contacted other two EPC bidders for non-submission of their bids and the non-submission of their bids were reconfirmed.

(iii) **Bids Opening:** The 3 bids received were opened on 15-05-2013 in the presence of DCPL. The technical bids (cover 1) and Commercial Un-Priced Bid (cover 2) of all the three bids were opened and Priced Bid (cover 3) was continued to be in sealed form for opening at a later stage as per terms of the RFP. All the 3 sets of technical and Commercial Un-Priced bids that were opened were taken up for detailed scrutiny and evaluation.

(iv) **Evaluation of Bids – Technical & Commercial Un-priced:** The 3 bids (Technical and Commercial Un-priced) were evaluated by DCPL and 1st set of comments seeking additional information from the EPC bidders were submitted by DCPL. Clarifications from EPC bidders based on the inputs from M/s. DCPL were obtained and the responses were duly forwarded to M/s.DCPL. Based on the clarifications provided by the EPC bidders along with remark of Petitioner, M/s.DCPL submitted their:

(A) Bid Qualification Report on 14-06-2013

(B) Bid Evaluation Report on 19-08-2013.

The summary details regarding bids as provided by M/s.DCPL are as under:

LANCO Infratech Limited (M/s.LANCO)

- Tied up BTG with Harbin (Boiler) and Power Machines (TG) ;

- Bid submitted for BTG with an option for other reputed make also with the approval of Petitioner ;
- The bid submitted was compliant and was taken up for detailed discussions ;
- They have taken exclusions for payment for Construction Water & Power ;

MEGHA Engineering and Infrastructure Limited (M/s.MEIL)

- Tied up BTG with M/s.BHEL ;
- The bids submitted for BTG from M/s.BHEL ;
- The bid submitted was compliant and was taken up for detailed discussions ;
- The following exclusions were taken which are to be cost loaded.

Trucks for Ash Transportation
EOT Crane
Green Belt Development

NCC Limited – Power Division (M/s. NCC)

- Tied for BTG with M/s. BHEL ;
- The bids submitted for BTG from M/s. BHEL ;
- The bid submitted was complaint and was taken up for detailed discussions ;
- They have not taken any exclusions.

(v) Evaluation of Bids – Priced (Cover-3): The price bids were opened on 06-09-2013 in the presence M/s. DCPL and available EPC bidders and the bid prices as submitted by the EPC bidders are as under:

Sl. No.	EPC Bidder	Bid Price (Rs.Crores)
1	MEIL^	2918.00 (Excluding taxes and duty)
2	NCC^	3250.23 (Excluding taxes and duty)
3	LANCO *	Rs.3310 crores (Excluding taxes and duty)

^ M/s.MEIL and NCC have submitted their bid prices exclusive of taxes and duty as the same is extra as applicable from time to time as per terms of RFP.

* M/s. LANCO have submitted their bid inclusive of estimated T & D and with a condition that the T & D provided is estimated and actual T & D as applicable from time to time would be applicable as per RFP terms. In view of the same, bid prices exclusive of T & D alone are considered as per terms of the PPA.

Accordingly, M/s. DCPL submitted their Price Bid Evaluation Report based on which the Petitioner accepted the recommendation of DCPL and decided to select MEIL as the selected bidder for further discussions and thereafter to award the EPC Contract. Eventhough the prices were competitive and justified by M/s.DCPL, the Petitioner decided to discuss and negotiate further with the selected bidder prior to award of EPC contract. Accordingly, the selected bidder was invited for further discussions on the price and other details required for EPC contract.

(vi) Price Negotiation: During the initial discussions and correspondence as above, the selected bidder did not accept to offer discount. However, based on insistence by the Petitioner and as a way forward, the selected bidder offered a discount of 0.6% on the EPC bid price (exclusive of taxes and duty). M/s.DCPL after incorporation of the revised price of the selected bidder have also incorporated the cost loading for certain exclusions and the final price comparison is furnished below:

Sl. No.	EPC Bidder	Bid price after discount by L1 bidder (Rs.Crores)	Cost loading for exclusions (Rs.Crores)	Effective price for comparison (Rs.Crores)
1	MEIL	2901.00	13.15	2914.15
2	NCC	3250.23	0.00	3250.23
3	LANCO	3310.00	32.10	3342.10

(The bid prices are exclusive of taxes, duty and statutory levies which shall be charged extra at actual).

(vii) **Final selection:** All the three EPC bidders are competent and have submitted their technically compliant EPC bids. All the three EPC bidders have also confirmed for meeting the delivery schedule of 36 months from NTP in order to meet the Petitioner's commitment of 39 months from financial closing date. M/s. DCPL have also confirmed for the competitiveness of project cost discovered from the ICB process. The selected bidder is also the lowest after considering the cost loadings. The selected bidder have also offered BHEL make BTG which are proven and could be sourced in 100% INR terms by the Commission and Respondent. In view of the same, the Petitioner accepted to the EPC contractor and awarded the EPC contract in favour of selected bidder namely, M/s. Megha Engineering and Infrastructures Limited (MEIL).

(b) **Post selection:**

- (i) **Award of EPC Contract:** The Letter of Intent was issued to the EPC contractor vide Petitioner's letter dated 18-11-2013 and received the Letter of Acceptance from the EPC contractor on 22-11-2013.
- (ii) **Intimation of selection to TANGEDCO:** The Petitioner has intimated the selection of EPC Contractor as explained above to the Respondent vide Petitioner's letter dated 31-12-2013.
- (iii) **Signing the EPC contract:** Post the award of EPC contract and intimation to TANGEDCO, the Petitioner and the EPC contractor, as per terms of the RFP, have finalized the EPC contract.

7.3. **Fuel supply agreement:**

(a) **Appointment of CSA advisor:** The Petitioner appointed M/s. Price Waterhouse Coopers as the consultant for assisting the Petitioner in finalizing the amended coal supply agreement with the already approved coal supplier.

(b) **Coal Supply Agreement:** Several rounds of discussions have taken place between the Petitioner, Coal Consultant and coal supplier. The

term sheet is under final stages of signing which would be converted to Coal Supply Agreement (CSA) upon receiving comments / approvals. Changes in the terms and conditions of CSA after finalization would be submitted to Respondent TANGEDCO for its approval.

- (c) **Fuel Oil Supply Agreement:** Based on the Expression of Interest submitted in response to the Petitioner's request, it is informed that M/s. IOC Limited have tank-farm for the fuel oil and LDO very near to the project location which are the secondary fuel required for the project. They are also supplying the fuel oil and LDO required for existing power station of Respondent. Accordingly, agreement for the secondary fuel oil supply would be entered into with M/s. IOC Limited or other PSU Oil Companies on similar terms.

7.4. **Financing:**

- (a) Lead Financial Institution:

The Petitioner appointed M/s. Power Finance Corporation (PFC) as the Lead Financial Institution. M/s. PFC prepared the Project Information Memorandum and circulated it to the other institutions and banks.

- (b) **Loan Sanction:**

- (i) M/s. PFC have issued their sanction letter on 07-06-2013 sanctioning a Rupee Term Loan (RTL) of 1142 crores.
- (ii) M/s. REC have issued their sanction letter on 06-01-2014 sanctioning a RTL of 1125 crores.
- (iii) M/s. India Infrastructure Financial Services & M/s. Bank of India are processing for the sanction of the balance RTL.
- (iv) With the above tie up, the Petitioner would be completing the tie up all the loan capital in the form of Rupee Term Loan by the end of March 2014.

- (vi) Based on the ongoing discussions with lenders, further progress with respect to financing, signing of loan documents and achieving financial closure would follow the approval of the estimated capital cost and capital cost ceiling by the Commission.

7.5. Status on issues set out by the Commission at the hearing held on

12-02-2013:

The Commission in its daily order on 12-02-2013 in PPAP No.5 of 2012 was pleased to set out 4 issues viz.

Issue No.1: Freezing of capital costs in INR terms.

Issue No.2: Identification of other income

Issue No.3: Simple interest instead of compound interest for late payment and

Issue No.4: Interest rate

7.6. Issue No.1: Freezing of capital costs in INR terms:

(a) It is informed that subsequent to the hearing held on 12-02-2013, the Petitioner finalized the:

(i) EPC Contractor through ICB process as already put forth above and has finalized the EPC contract with EPC costs in INR terms only without any Forex fluctuations; and

(ii) Financing plan with 100% Rupee Term Loan tie up from Indian Financial Institutions and banks as already put forth above without any Forex fluctuations.

(b) Thus, the Petitioner has already taken action in terms of the issues set out to freeze the capital cost in INR terms as both the equipment costs and financing plan are done only in Indian Rupees without fluctuations in foreign currency as no foreign currency component is involved in the equipment as well as the financing costs. As per the abstract of the project cost estimates (the "Estimated Capital Costs") prepared in consultation with M/s. DCPL after finalization of the EPC contractor through ICB process as per the directions issued by the Commission in M.P. No.18

of 2010 and in INR terms as set out in the hearing held on 12-02-2013 in the present P.P.A.P., the hard cost of the project excluding soft costs and contingency (Estimated Capital Cost) is at Rs.3186/- crores.

7.7. The Commercial Operation Date (COD) of the project is 39 months from the Financial Closing Date (FCD). Considering the firm price for the construction period, a ceiling costs (the “Capital Cost Ceiling”) exclusive of soft costs may be fixed by the Commission as per Regulation 18 of TNERC Tariff Regulations by considering the estimated capital cost of Rs.3186 crores along with the normative contingency of Rs.79/- crores (at 2.5% of EPC and Non-EPC costs translating to Rs.3265/- crores as the Capital Costs Ceiling (exclusive of soft costs) along with the escalation as may be decided by the Commission.

7.8. The soft costs of the project comprising of Taxes & Duty (T & D) and Interest During Construction (IDC) and Financing Costs (FC) are to be incurred on actual basis with an understanding that:

- (i) T & D shall be on actual basis by taking into account of changes in law from time to time as required under Regulation 19 (1) (v) of TNERC Tariff Regulations substantiated by the audited accounts of the company at the time of approval of the actual completed capital costs as required under Regulation (18) (3) of the said Regulations; and
- (ii) The IDC & FC are based on the construction period of 39 months and draw down of loan from financial institutions like PFC and REC in proportion to the equity as per the D/E ratio in the approved financial package and shall be incurred in accordance with Regulation 23 of TNERC Tariff Regulations.

7.9. Issue No.2: Other income to be identified for reduction from the Annual fixed costs:

- (a) The Respondent submitted before the Commission during the hearing that as per Regulation 40, the “Income other than income from sale of electricity shall be treated as other income”. The Respondent informed that the above clause should be incorporated in the PPA.
- (b) The Commission advised that these other expenses to be identified upfront by the parties and such identified other income alone should go to reduce the recoverable Annual Capacity Charges. The Respondent and the Petitioner agreed in principle to revert on the same after identification.
- (c) At the discussions on 27-03-2013, the parties discussed and identified the following as the income other than income from sale of electricity viz-
 - (i) sale of fly ash ;
 - (ii) sale of scrap
 - (iii) sale of RO water and
 - (iv) CDM benefits.

The Petitioner stated that it incurs additional costs in effecting such sales / getting other incomes.

- (d) The Petitioner proposed that reasonable expenses incurred in effecting such sales / CDM benefits ought to be considered.
- (e) The Petitioner’s reiteration is setting off such reasonable expenses in affecting such sales / CDM, the balance from such sales shall be shared equally between the parties.

7.10. Issue No.3: Simple interest instead of compound interest for late payment:

- (a) The issue is with respect to Delayed Payment Surcharge and whether the interest would be calculated on simple interest or compound interest.
- (b) Under the PPA, Delayed Payment Interest are levied on the outstanding amounts due to the parties that remains unpaid for which the Respondent informed that the interest charges be calculated on simple interest basis and not on compound interest basis.
- (c) At the discussions on 27-03-2013, the Petitioner reiterated that it would accept to comply with the provisions of PPA (or) Regulations as may be decided by the Respondent.

The Petitioner's reiteration is that either the existing provisions in PPA (or) Regulations as may be opted by the Respondent may be incorporated.

7.11. Issue No.4: Interest rate for delayed payments:

- (a) As per clause 9.6 of the PPA, the Interest Rate for Delayed Payment is the "Rate charged from time to time on cash credits extended to the party to whom such payments is owed plus one half percent (0.5%)"
- (b) As per Regulations such interest rate is "A late payment surcharge at the rate of 1.25% per month shall be levied".
- (c) The Respondent prayed the Commission that the late payment interest rate be fixed at "Short Term PLR + 0.5%".
- (d) The Petitioner in principle agree with the Respondent's proposal.

It is therefore submitted to the Commission that the late payment interest would be Short Term PLR + 0.5% as proposed by the Respondent, provided that if at any time, the Short Term PLR ceases to exist, the late payment surcharge of 1.25% per month shall be applicable as per Regulations.

7.12. In view of the finalization of the EPC contract and based on the ongoing discussions with lenders, further progress with respect to financing, signing of loan documents and achieving financial closure could be made only after the Commission approves the amended PPA and the issues set out. The above facts may be taken on record and the Commission may be pleased to pass appropriate orders approving:

- (i) The Estimated Capital Cost at Rs.3186/- crores (excluding soft costs and contingency) ;
- (ii) The Capital Cost Ceiling (exclusive of soft costs) may be fixed by considering the Estimated Capital Cost (exclusive of soft costs) of Rs.3265 crores along with escalation as may be considered by the Commission.

- (iii) The balance revenue from other income (income other than from sale of electricity) streams, after setting off such reasonable expenses in affecting such sales be shared equally between the parties.
- (iv) The existing provisions in PPA (or) Regulations as may be opted by the Respondent may be incorporated with respect to interest for late payments.
- (v) The late payment interest at Short Term PLR + 0.5% as proposed by the Respondent, provided that, if at any time, the Short Term PLR ceases to exist, the late payment surcharge of 1.25% per month shall be applicable as per Regulations.
- (vi) Approve the Addendum 2 to the PPA incorporating the amendments as directed by the Commission in its order dated 09-05-2011 in M.P.No.18 of 2011.

8. Contentions of the Respondent in the Additional Counter Affidavit dated 26-03-2014:

8.1. The Commission in its order dated 09-05-2011 in M.P.No.18 of 2010 directed that:

- * The PPA shall be amended to correct the norms as directed in para 10.4.3. therein;
- * The project mile stones as set out in sub-para ix shall be complied with;
- * The amended PPA shall be submitted to the Commission in terms of section 86 of the Electricity Act, 2003 for approval within 3 months of the order.

8.2. The Respondent Board and the Petitioner signed the Amendment No.2 to the PPA on 10-01-2012 and the Petitioner submitted the amended PPA for approval of the Commission on 13-01-2012 which was subsequently numbered as P.P.A.P. No.5 of 2012.

8.3. In the counter filed by the Respondent on 16-08-2012, additional amendments to the provisions of the PPA pertaining to depreciation, fixed capacity charges, interest for late payment and interest for working capital were also sought. After the

arguments of the Petitioner and the Respondent on various dates the Commission in order dated 12-02-2013 set out the following issues:-

- a. Freezing of capital cost at Rs.5.39 crores / MW at the exchange rate indicated in the Addendum – II ;
- b. Other income to be identified for reduction from the annual fixed charges.;
- c. The delayed payment surcharge whether the interest would be calculated on simple or compound basis;
- d. Interest rate ;

8.4. As per the directions of the Commission, the Petitioner has withdrawn the Writ Petition No.7241 filed against Respondent, which was pending before the Madras High Court on 28-02-2013.

8.5. The issues arose for -

- a. The Petitioner in the additional affidavit has stated that the capital cost of the project will be Rs.3,265 crores inclusive of an amount of Rs.79 crores towards contingencies but excluding taxes and duties, interest during construction and financing cost. This works out to Rs.6.22 crores / Mw (excluding T & D, IDC and FC).
- b. As per Addendum No.2 to the PPA, the capital cost agreed between TANGEDCO and M/s. SEPC is Rs.5.39 crores / MW at an exchange rate as per Addendum-II. The Commission in daily order dated 26-02-2014 mentioned that in their order dated 12-02-2013 it had ordered both parties to freeze the capital cost @ Rs.5.39 crores / MW at exchange rate indicated in the Addendum-II to the PPA.
- c. The present capital cost proposed at the rate of Rs.7.77 crore / MW is very high.
- d. The capital cost of M/s. Cuddalore PowerGen Corporation Pvt. Limited was frozen at Rs.4.69 crores / MW by the Commission for the proposed 1320 MW, imported coal based power project at Cuddalore during 2008.

8.6. Through their additional affidavit the Petitioner has proposed a capital cost of Rs.3186 crores (excluding soft cost and contingency). Neither in the PPA nor in the Regulations there is provision for contingencies.

The approximate total capital cost of the project including soft cost and all other heads works out to Rs.7.77 crores / MW.

i)	Hard cost (525 MW)	:	Rs.3186 cr.
ii)	Taxes and Duties (as per agreed Addendum II)	:	Rs.186.24 cr.
iii)	Hard cost + Taxes & Duties	:	Rs.3372.24 cr.
iv)	Assuming Interest During Construction (IDC) for a construction period of 24 months @ 75% of the hard cost @ 13.5% interest (i.e. Rs.3372.24 x 75% x 13.5% x 2)	:	Rs.683.00 cr.
v)	Assuming financing cost of 75% of hard cost @ 1% processing fee (documentation) (i.e. Rs.3372.24 x 75% x 1%)	:	Rs.25.29 cr.
	Total Cost	:	Rs.4080.53 cr.
(works out to Rs.7.77 Crores / MW)			

This capital cost is 66% higher than the capital cost of Cuddalore Power Project and 44% higher than the capital cost agreed as per the Addendum-II.

8.7. The Respondent has been put to great hardship in meeting the State's power demand due to abnormal delay in the execution of this project which cannot be quantified and equated in terms of Rupees. Therefore, any cost overrun on account of time overrun cannot be passed on to the Respondent. In its daily order dated 26-02-2014, the Commission ordered to freeze the capital cost of the project at Rs.5.39 crores / MW (inclusive of all cost and exchange rate variation), at an exchange rate as per Addendum-II to PPA to be the ceiling capital cost.

8.8. Other Income: The Commission has also set out on the issue of identifying the other income for reduction in annual fixed charges. In their affidavit, the Petitioner has mentioned the following four items as other incomes namely, (i) Sale of fly ash, (ii) Sale of scrap, (iii) Sale of RO water and (iv) CDM benefits. The

Petitioner has suggested to set off the expenses to be incurred for such sale or CDM benefit and share the balance income in the ratio of 50:50 between M/s.SEPC and TANGEDCO.

Clause 40 of Commission's Tariff Regulations, 2005 defines other income as given below:-

"Income other than income from sale of electricity shall be grouped as other income"

Further the CERC Regulations for 2014-19 provides for sharing of the savings in norms such as (i) station heat rate (primary fuel); and (ii) auxiliary consumption between licensee and the generator in the ratio of 60:40. The Commission may order that the Respondent is entitled to 60% of the other income on account of the following six items, viz.,

- a) Sale of ash ; b) Sale of scrap ; c) Sale of RO water; d) CDM benefits;
- e) primary fuel; f) auxiliary consumption.

The identification of heads of other income is not exhaustive and that the Respondent should be permitted to include any other new income heads also, as and when identified.

8.9. Interest-simple / compound:

Clause 9.6 of PPA which deals with delayed payment surcharge and clause 47 of the Commission's Regulation, 2005 on interest on delayed payment are extracted below:

Clause 9.6 of PPA

"Late payment shall bear interest accrued from the date they became overdue at a rate equal to the rate charged from time to time on cash credits extended to the party to whom such payments is owed plus one half percent (0.5%), to the extent permitted by law".

Clause 47 of Regulation, 2005

“In case payment of capacity charges and energy charges by the beneficiary is delayed, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company”.

Both PPA provision as well as Regulations do not mention as to whether simple interest or compound interest is to be levied.

The Respondent prays to allow only simple interest. The rate of surcharge is the SBI PLR prevailing at the beginning of the year. If PLR regime stops then the rate as adopted by banks and agreed to between the Petitioner and the Respondent may be considered.

8.10. The Respondent is acceptable to the rate of interest on working capital at SBI base rate plus 350 basic points, in line with the CERC Regulation for 2014-19.

8.11. The Petitioner is yet to submit a copy of the executed EPC contract to this Respondent. The Commission may direct the Petitioner to furnish a copy of the EPC contract and permit the Respondent to file additional issues if any, after receipt of the EPC contract from the Petitioner. The Commission may also order to follow Regulation No.24 for calculation of depreciation, as prayed in the Respondent's earlier counter affidavit filed on 16-08-2012. In view of the above, the Commission may be pleased to pass appropriate orders in the light of the above facts with regard to the issues.

8.12. The Respondent prays-

- (i) To approve the amended PPA as per section 86 of the Electricity Act, 2003 (as amended)

- (ii) To fix the capital cost (Hard Cost including Taxes and Duty, Interest during construction and financing costs) at Rs.2833 crores @ 5.39 Crores / MW.
- (iii) The sharing of other income shall be in the ratio of 60% to Respondent TANGEDCO and 40% to Petitioner on the other income streams identified and yet to be identified.
- (iv) Levy of simple interest for belated payments as per TNERC Tariff Regulations, 2005.
- (v) The late payment interest shall be SBI PLR prevailing at the beginning of the year and if PLR regime stops then rates as adopted by banks and agreed to between TANGEDCO and M/s.SEPC.
- (vi) Interest on working capital may be at SBI Base Rate plus 350 basis points. In line with the CERC Regulation for 2014-19.
- (vii) Depreciation may be as per clause 24 of TNERC Tariff Regulation – 24.
- (viii) Orders on the issues already set out and argued so far and
- (ix) Such other orders as Hon'ble Commission may find deemed to be fit.

9. Contentions of the Petitioner in the Additional Affidavit filed as per the directions of the Commission on 17-04-2014:-

9.1. O & M:

The Commission took note of the decision of parties to leave it to the decision of the Commission and the Commission expressed a prima facie view that it shall be in line with earlier orders made in this regard in P.P.A./A.P./No.1 of 2006. The Petitioner submitted that the Commission may accordingly consider it and pass final order.

Incentive:

The Petitioner accepted with the stand of Respondent that incentive is chargeable only on actual generation and not on deemed generation. Issue resolved and can accordingly be included in the final order.

Capital cost:

The Respondent proposed for freezing the cost in INR terms instead of forex linked costs. The Commission was pleased to direct that the Company has already initiated the selection of EPC contract through ICB process and financing through lenders. Once the Petitioner reverts with these costs, order on capital cost would be passed. The Petitioner, however, agreed with proposal of TANGEDCO for fixing the capital cost in INR terms instead of forex linked costs. Capital cost issue was set for further discussion amongst the parties and order by Commission.

Alternate payment security mechanism:

The Petitioner agreed with alternate payment security mechanism proposed by the Respondent. The Petitioner also agreed to withdraw the W.P.No.7241 of 2001 which was then pending in High Court.

Depreciation:

The Respondent insisted on adopting depreciation in accordance with Regulation 24. The Petitioner agreed with the stand of the Respondent.

FCC to exclude land lease rentals:

The Commission was of the prima facie view that in case of Land by direct purchase, the same has to be included in capital costs and returns / interest are payable in tariff. In view of the same, land lease rentals are passing through in tariff as per policy. The Petitioner submitted that the Commission may accordingly consider it and pass final order including the land lease rentals.

Other income:

The Commission insisted that a blanket order cannot be issued and instead the parties were ordered to discuss, identify and incorporate such of those identified other expenses. The Petitioner informed that it would share such of those benefits with the Respondent. Issue was set for further discussion and order by the Commission.

Delayed Payment:

The Respondent argued that the late payment to be on simple interest as against monthly compound interest in PPA. The Petitioner informed that the banks charge interest on monthly basis as this is a working capital facility and accordingly insisted on retaining on monthly basis. Issue was set for further discussion and order by the Commission.

Interest Rate:

The Respondent argued to adopt short term PLR for working capital interest rate against cash credit rate of the Petitioner's bankers. The Petitioner accepted for the same. Interest rate issue was set for further discussion and order by the Commission.

9.2. When the petition was heard on 26-02-2014, the Commission ordered as below in the daily order:-

“Daily Order

Counsel for both sides were present. In the last hearing dated 12-02-2013, the Commission ordered both the parties to freeze the capital cost at Rs.5.39 crores / MW at the exchange rate indicated in the addendum to the PPA. The Counsel for the Petitioner confirmed that the pending case with the High Court was withdrawn and the copies have been submitted. The counsel for Respondent prayed adjournment for four weeks. The time prayed for is granted.”

The words “the Commission ordered both the parties to freeze” are to be read as “the Commission set out as an issue, the freezing of” vide Erratum dated 13-05-2014.

9.3. The Commission during the hearing held on 17-04-2014 directed to make submissions covering the following issues:-

- (1) Approval of the amended PPA ;
- (2). Project cost of the project ;
- (3). Tariff for the project ;
- (4). Project cost comparisons with various ongoing projects, Benchmark costs and cost as per PPA ;
- (5). Other issues set out by the Commission ;
- (6). New issues brought in by the Respondent TANGEDCO ;

In the hearing, the Counsel for the Petitioner placed before the Commission the typographical error in the daily order on 26-02-2014 and the need for correcting the error to the effect that the Commission set out the issue of freezing the capital cost at Rs.5.39 Crores / MW at the exchange rate indicated in the Addendum to the PPA.

The Commission after hearing the parties and after examining the Daily Orders on 12-02-2013 and 26-2-2014 confirmed that factual error put forth by the Counsel for the Petitioner and ordered correction of the same by way of Errata.

9.4. The issue of freezing of capital cost :-

- (i) Adoption of ICB costs as ordered by the Commission:

The project cost determined on ICB basis as ordered by the Commission which comes to Rs.3721 crores (excluding taxes / duties i.e. Rs.7.09 Crs. / MW).

- (ii) CERC Guidelines:

CERC guidelines provide for Benchmark Capital Costs for coal based thermal power plants which is for use by Regulators while determining the capital cost of coal based

thermal power plants. As per this CERC guidelines, the SEPC project cost in 2014 (and for completion in 2018) comes to Rs.3988 crores (excluding taxes / duties i.e. Rs.7.6 crores / MW).

(iii) Comparable Cost / Tariff:

The project cost is comparable with the other project costs adjusted for the costing year and technical features. Even though the Commission has directed the Respondent TANGEDCO to file a Written Submission on this, the Petitioner informed one such project that could be submitted to the Commission for ready reference is the 2 x 500 MW project being established by NLC TNEB Power Limited – NTPL (A JV of NLC and TANGEDCO) at Thoothukudi with 2009 cost of Rs.6.603 crores / MW of TANGEDCO which comes to Rs.8.034 crores / MW at normative escalation of 4% per year. Further ongoing TANGEDCO projects are around Rs.7.5 Crs/MW and tariff is also within current procurement costs of TANGEDCO.

(iv) Cost as per PPA:

The project cost in the PPA is escalated price which is escalated in accordance with the exchange rate prevailing from time to time and which when converted at the exchange rate of 1 USD = Rs.62.24 and 1 EURO = Rs.85.2 prevailing on 20-02-2014 at the time of filing of capital cost with TNERC works out to Rs.3328 crores (excluding taxes / duties). CERC guidelines on Capital Cost Benchmark for coal based thermal power plants provides a Firm Price Adjustment Factor (FPAF) of 10% which when used with the escalation linked price gives the firm price. Accordingly, the above escalation linked price of Rs.3328 crores at present when added with FPAF of 10% works out to a Firm Price of Rs.3660 crores (excluding taxes / duties i.e. 6.97 Crs / MW)

9.5. The following submissions are made to the Commission to decide on the capital cost.

Submissions by the Petitioner:

- (a) A firm capital cost without subjecting to any variations such that no other approvals on capital cost may be required at a later stage;
- (b) The tariff calculations for the above capital costs.
- (c) Whether the Petitioner is willing to accept for a tariff based PPA with certain terms and conditions and if so, the same should also be furnished.

Submissions by Respondent TANGEDCO

- (a) Capital cost of ongoing projects.
- (b) Tariff of recent long term purchases / concluded purchases.
- (c) Supply demand projections showing inclusion of this project if any.
- (d) Next hearing be after submission of the above and thereafter Respondent can revert on the same.

9.6. As to the issue of other income for reduction from the Annual fixed costs -

The Petitioner informed that the parties during earlier discussion identified 4 income streams which were identified as other income streams and the same could be shared in a proportion to be agreed. However, during the submission on 26-3-2014, the Respondent adds additional streams. The Petitioner further informed that every time the Respondent is coming up with new issues though the Commission has given comprehensive order for all the amendments in the PPA. Moreover the Respondent is choosing only those terms favourable to it without considering the related other provisions available. The Petitioner also informed that such insistence on new issues every time would only delay the financial closure as lenders have already appraised the project and have already issued sanction letters and they have

to assess such new issues every time. Regarding permitting the Respondent to include any new heads, it was submitted by the Petitioner that it defeats the very purpose of Daily Order of this Commission on 12-2-2013 to identify such issues upfront. The Commission may consider allowing only the four income streams identified with the conditions that the identification and inclusion of any new streams shall be subject to mutual discussions and agreement of the parties and these issues could be taken up after approval of the PPA and cost as prayed for both the parties.

9.7. As to the issue of Simple Interest instead of Compound Interest for delayed payment surcharge identified by the Respondent in their counter on 16-08-2012, the Petitioner reiterated on 17-04-2014 that these are working capital facility extended by the banks and they do charge interest on monthly rest basis. Interest on outstanding amount is charged on monthly basis. This being so, to seek simple interest is not justified. The Regulations as well as PPA provision clearly mention this aspect of monthly due and hence compounding of interest. Further, the late payment interest should be such that it encourages the Respondent to pay timely and not default.

9.8. Regarding the interest rate on working capital, the Petitioner agreed to the proposal of the Respondent during the hearing on 12-02-2013 and again during the discussions with the Respondent on 27-03-2014 and also stated it in the additional affidavit. The Petitioner also agreed for the proposal of the Respondent subject to the condition that the discount on invoice for LC payment is also maintained at 2% as per Regulation 46.

9.9. Submission on capital cost and tariff as ordered by the Commission on 17-4-2013:-

The Commission ordered for submission of the following details by the Petitioner:-

- (a) Revised firm capital cost for freezing firm and without subjecting to variations which may warrant further approval at a later stage;
- (b) Petitioner's stand for adopting a tariff per unit based cost in the PPA.

The Petitioner thereafter studied on the options as and accordingly, the revised and frozen capital cost without further variation on account of time (or) exchange rate (or) any other reasons other than the permitted variations which are statutory (or) financial and beyond the control of the Petitioner is submitted for fixation by the Commission along with tariff working for examining the impact of the capital cost submitted. The capital cost being submitted for freezing would vary only on account of variations in interest rate for loan by the lenders, changes in rates of taxes and duty from time to time and changes in law since this Petitioner has no control on these. Accordingly, the Commission may consider the following while freezing of the capital cost for the Petitioner:-

- (a) Variable capital cost in the PPA converted to firm INR basis by using the exchange rate prevailing as on 20-02-2014 along with firm price adjustment factor of 10% as per CERC guidelines translates to Rs.3865 crores (or) Rs.7.36 crores / MW as shown below:-

Sl. No.	Terms	USD	Euro	INR
1	Capital cost approved in the amended PPA (Definition of capital cost)	321.78	74.59	875.39

2	Exchange rate prevailing on 20-02-2014 (date of filing of capital cost petition)	62.24	85.198	1
3	Equivalent INR costs in crores as on 20-02-2014	2002.75	635.53	875.39
4	Margin of 10% permitted by CERC Guidelines for firm prices for coal based plants (crores)	200	64	88
5	Freezing of capital cost in INR terms (crores) in accordance with PPA and in line with CERC guidelines	2203.03	699.08	962.93
		3865.03 (7.362 Cr / MW)		

For the above capital cost, the levelised FCC / Unit and levelised tariff works

out as below:-

Levelised Tariff (30 years)	
FCC (Rs./Kwhr)	1.958
Tariff (Rs./Kwhr)	4.344
Levelised Tariff (15 years)	
FCC (Rs./Kwhr)	2.095
Tariff (Rs./Kwhr)	4.478

The above levelised tariff calculations are based on the data existing as on the date of this submission and on the basis of the terms contained in the PPA / TNERC tariff regulations.

Capital costs arrived at on the basis of ICB adopted by the Petitioner and based on directions of the Commission is set forth below:-

Sl. No.	Description	Cost (Rs.crores)
A	B	C
1	Land & Site Development	31
2	EPC Costs	31
3	Plant items not in EPC	3127
4	Estimated taxes and duty	294
5	Plant cost with taxes and duty	3452
6	IDC and financing costs	518
7	Project costs	3970
	Project cost (crs.Rs. / MW)	7.562

For the above capital cost, the levelised FCC / Unit and levelised tariff with the same assumptions and same VFC in (a) above works out as below:-

Levelised Tariff (30 years)	
FCC (Rs./Kwhr)	2.008
Tariff (Rs./Kwhr)	4.392
Levelised Tariff (15 years)	
FCC (Rs./Kwhr)	2.149
Tariff (Rs./Kwhr)	4.530

The capital cost of the project in 2014 on the basis of CERC Benchmark Cost (guidelines for fixation of capital cost for coal based plants) works out to Rs.4253 crores (or) Rs.8.1 crores / MW. For this CERC Benchmark cost, the 30 year levelised FCC / Unit is Rs.2.142 / Unit and levelised tariff is Rs.4.523 / Unit on the basis of same assumptions and same VFC.

The capital cost difference between the firm cost as per PPA and firm cost through ICB process is Rs.105 crores. The levelised FCC / Unit difference between the firm cost as per PPA and firm cost through ICB process is 5 paise / unit. The cost difference of Rs.105 crores (or) the levelised FCC / Unit difference of 5 paise / Unit may be attributed to several present day factors of the project which the Petitioner is not going into details and can only submit to the Commission that this additional cost / tariff is very meager, reasonable and justifiable. Accordingly, the firm capital cost of Rs.3970 cores determined through ICB process is submitted for fixation by the Commission for our project.

9.10. Cost comparison:

The Commission ordered for comprising the costs and tariff of this project with other projects and long term purchase costs of Respondent for which the Respondent was directed to file a written submissions. Based on the data obtained

from “Monthly report of Broad Status Thermal Power Projects in the Country” published by CEA for February 2014, the capital cost as on 2009 of the ongoing 2 x 500 MW project of NLC Tamilnadu Power Limited (A JV of NLC – TANGEDCO) is Rs.6602.7 (or) Rs.6.603 crores / MW which comes to Rs.8.034 crores / MW as on 2014 at normative escalation of 4%. The above cost is 2009 prices for two units whereas the Petitioners cost is 2014 prices for 1 unit. Though, the Petitioner’s project and NTPL project are coming up nearby, Petitioner’s project has longer conveyor and pipeline lengths. As per the directions of the Commission on 17-03-2014, the Respondent has to file written submission on capital cost of ongoing similar projects. The summary of the cost option submitted for approval along with cost comparisons are provided for ready comparison.

Sl. No.	Manner of Determination of Capital Cost	Cost	
		INR Crores	INR Crs. / MW
1	Firm capital cost sought for fixation – as per PPA & CERF guidelines for firm price adjustment factor – 2014 prices	3865	7.362
2	Capital cost on the basis of ICB Route ordered by the Commission – 2014 prices	3970	7.562
3	CERC Benchmark costs – 2014 prices	4253	8.1
4	NTPL 2 X 500 MW project cost – 2009 prices	6603 (2009 prices) 8034 (adjusted for 2014)	6.603 (2009 prices) 8.034 (adjusted for 2014)

9.11. The Petitioner also studied on the options advised by the Commission on fixation of tariff instead of capital costs and in this regard the following are submitted:-

- (a) The petition has been filed for approval of the amended PPA and fixation of capital cost.

- (b) The parties have already prayed the Commission for approving the amended PPA with certain modifications sought in terms submitted vide the petition for which also prayer has been made to the Commission for ordering.
- (c) The Petitioner has also completed the financial appraisal with the lenders and as such the lenders are insisting on the approved PPA and capital cost for signing the loan documents and thereafter achieving the financial closure. The PPA and tariff terms of the amended PPA were considered by the lenders as the base case model while appraising the project for financing. Any changes to the base case of two part tariff as per Regulations / amended PPA already considered during the appraisal by lenders would warrant appraisal to be conducted once again which may take atleast 6-12 months from the date of such approval by the Commission and eventually delay the achievement of financial closure thereafter. In view of the above and considering that substantial progress on the various project documents / agreements required for financial closure, it is requested that the present two part tariff as per the TNERC Regulations and amended PPA be continued.

9.12. Further, lot of time is being taken for closing out issues. The lenders to the project sanction loan to the project based on certain set of terms and conditions in the PPA and whenever such terms and conditions are altered, the appraisal is being done once again because of which the financing activity itself is delayed. In view of the submissions above, the Commission, in the interest of financial closure of the project and thereafter earlier implementation:-

- (a) May consider those terms and conditions which have been carried out by the parties in terms of directions issued by the Commission in its order on

09-05-2011 in M.P. No.18 of 2010 along with the terms and conditions for which there is already mutual agreement ; and

- (b) May direct that the new issues of the Respondent (or) the Petitioner, as long as such issues in the amended PPA are already consistent with the TNERC Tariff Regulations, 2005, the Commission may direct for such issues for amendment be taken up separately by the parties by mutual discussions and agreement and thereafter approach the Commission for appropriate orders.

10. Written Submission dated 25-06-2014 filed on behalf of the Respondent as directed by the Commission on 17-04-2014:-

10.1. The PPA was approved by the Government of Tamil Nadu on 13-07-1998. The Petitioner had filed W.P.No.7241 of 2001 during 2001 before the Hon'ble High Court of Madras, to direct the Respondent to provide escrow cover for the power project. Thus there was delay on the part of the Petitioner to develop the project.

10.2. The following IPPs signed PPAs around the same time and achieved financial closure without escrow cover. The capital cost of the IPPs are as below:-

- (i) M/s.GMR Diesel Power Project 196 MW of capacity – 4.35 crores / MW
- (ii) M/s.ST-CMS Lignite based Power Project 250 MW of capacity– 5.124 Crores / MW
- (iii) M/s.MPC Diesel Power Project of 106 MW capacity – 4.04 Crores / MW (tentative)
- (iv) M/s. SPC Diesel Power Project of 105.66 MW capacity – 4.02 Crores / MW (tentative).
- (v) M/s.PPN Gas Power Plant of 330.5 MW capacity – 4.07 Crores / MW (tentative).

10.3. Even after expressing willingness before the Commission to withdraw the W.P.No.7241 of 2001, the Petitioner withdrew the W.P. only on 28-02-2013 nearly after 2 years. The twelve years of delay in execution of the power project is solely attributable to the Petitioner as can be seen from the fact that other IPPs have commissioned their project.

10.4. If the Petitioner had achieved financial closure as done by other IPPs, the cost per MW of this power project would have been between Rs.4 crores to Rs.5 crores. The power project also might have been commissioned long back and helped TANGEDCO to tide over the power crisis during the crucial power shortage period. The Petitioner has now come forward to put up the project without escrow cover.

10.5. In M.P. No.18 of 2010 filed by the Petitioner, the Respondent in para 13 of the counter affidavit filed on 24-08-2010, has stated as follows:-

“13. It is respectfully submitted that, now the Petitioner have come forward to implement the project and subsequently as requested by the Petitioner, Tuticorin Port Trust have allotted a new land for the project during November 2009. The Respondent also accepts the change of location with the condition that, the change of location should not have any additional financial commitment to the Respondent. The land lease agreement to be executed between the Petitioner and Tuticorin Port Trust (TPT) has to be approved by the Respondent, and the Petitioner had been informed by letter dated 16-10-2009 that there shall not be any additional financial commitment to TNEB.”

10.6. In M.P. No.18 of 2010 filed by the Petitioner, in para 17 of the comprehensive counter affidavit filed during January 2011, the Respondent has stated as follows:-

“17. It is respectfully submitted that the Respondent had filed an additional counter affidavit on 22-09-2010 to set out the specific stand taken by TNEB. In view of the above, the Respondent Board is treating this PPA as a concluded PPA and the TNEB stand by the said PPA due to the clarification issued by MOP / GOI in their guidelines dated 15-02-2008 and 24-02-2010 and in the light of events that have taken place subsequently. Further the TNEB is desirous of procuring power from the Petitioner so as to meet the

power requirement of the State in case the project is established by the Petitioner, subject to the condition that the capital cost of the project shall not exceed the capital cost approved in the PPA as per the techno economic clearance letter dated 31-07-1997.”

10.7. While disposing the M.P.No.18 filed by the Petitioner by the order dated 09-05-2011, the Commission in para 10.4.4 directed as follows:-

“10.4.4. Capital Cost:

The capital cost of the project including financing cost shall be got approved from the Commission once the EPC contractor is selected. The selection of the EPC contractor shall be on the basis of international competitive bidding. The amendments directed by the Commission in para 10.4.3 shall be finalized by the parties within a period of 3 months of this order. The financing for the project shall be tied up within a period of nine months from the signing of the amended PPA. The commercial operation of the project shall be achieved within a period of 39 months as stipulated in the PPA. The Respondent stated that the capital cost of this project works out to Rs.5.398 crores per MW at the current exchange rate as against the cost of Rs.4.69 crores per MW approved by the Commission for Cuddalore Power Project. Subsequently, the TNEB in their counter affidavit filed on 31-01-2011, has modified their stand to say that the capital cost of the project shall not exceed the capital cost approved in the PPA. The TNEB is directed to take a clear stand on the issue and amend the PPA, if necessary to limit the capital cost at the rate of Rs.4.69 crores / MW.”

10.8. As stated in counter affidavit dated 26-03-2014, it is acceptable to the Respondent to freeze the capital cost at Rs.5.39 Crores / MW (inclusive of all cost and exchange rate variation), to be the ceiling capital cost, similar to the ceiling cost of Rs.4.69 Crore / MW approved by the Commission in respect of M/s.Cuddalore PowerGen Corporation Limited.

10.9. TANGEDCO's own plant is analogous to own house and IPP is analogous to leased house. The cost of own house projects and the cost of leased house projects, (proposed to be taken on lease) are not comparable as the factors regarding utility, liability, commitments, social obligation, flexibility, freedom, versatility, financial burden, residual asset value etc. are all different and therefore it

may not be correct, to see the TANGEDCO's plant and SEPC on same scale, even for comparison. Even though the Petitioner's power plant could not be compared with TANGEDCO's new power projects due to above said reasons, as directed by the Commission, the capital cost of Mettur Thermal Power Project Stage – III, North Chennai Thermal Power Project Stage – II, NTPC-TANGEDCO JV Project at Vallur (NTECL) and NLC-TANGEDCO JV Project at Tuticorin (NTPL) are submitted.

10.10. IPP concept was an one time aberration and did not get patronage as discoms consider them as a big burden. Therefore, long term power purchase by discom under Case I bidding without such burden, is not comparable with an IPP. The levelised tariff of TANGEDCO's power purchase on long term basis is Rs.4.91 / Unit.

10.11 The Petitioner's project was conceived as early as 1996 and even after two decades the project is yet to see the light of the day. TANGEDCO had been consistently hoping to get power from the Petitioner's project and included them in the projection for capacity augmentation so long. The Respondent had been put to hardship and had to face the difficult situation in the previous years due to non-execution of the project by the Petitioner. To overcome the deficit situation TANGEDCO had to resort to tender based procurements and even faced power cuts and load shedding. As per latest projections, TANGEDCO may be marginally surplus beyond 2017-18 but, TANGEDCO could still consider to take power from the Petitioner as there could always be spill over in the projections made. Now the issue is not about the capital cost at which M/s.SEPC can execute, but what is the extend of the capital cost TANGEDCO can agree to. Therefore, any increase in the capital cost of the project due to time overrun shall be borne by the Petitioner only and this

Respondent should not be burdened on account of cost overrun. TANGEDCO is agreeable to factor Rs.5.39 Crores / MW of capital cost in the tariff and beyond that, M/s.SEPC has to bear the difference in the capital cost, in respect of tariff fixation. Therefore, a cost of Rs.2833 crore may be fixed as the ceiling capital cost for the purpose of tariff.

10.12. Other income:

(a) Sale of fly ash ; (b) Sale of scrap ; (c) Sale of RO water ; (d) CDM benefits ; (e) Savings on primary fuel; and (f) Savings in auxiliary consumption are sorted out as sources of other income, and the Respondent is seeking sharing of the above benefits between the Respondent and the Petitioner in the ratio of 60:40. The Petitioner had requested to allow only four items viz (a) sale of fly ash ;(b) sale of scrap; (c) sale of RO Water and (d) CDM benefits . The Commission may allow all the items identified to be considered as other income as prayed in the counter dated 26-03-2014.

10.13. Interest on delayed payments:

Neither the PPA provisions nor the Regulations specifically mention as to whether belated payment surcharge is at simple interest or compound interest. This Respondent prayed the Commission to fix the same as simple interest. The rate of surcharge may be fixed as SBI base rate plus 350 basis points, as applicable to the period of delay.

10.14. Interest rate on working capital:

The Commission may fix the interest rate for working capital as SBI base rate plus 350 basis points in line with the present banking practice. It is not agreeable to the Respondent to downsize the rebate rate of 2.5% provided in the PPA.

10.15. The Petitioner is yet to submit a copy of the executed EPC contract to the Respondent. The Commission may direct the Petitioner to furnish a copy of the EPC contract and permit the Respondent to the additional issues if any, after receipt of the copy of the EPC contract from the Petitioner.

10.16. The total cost of the Respondent's recently completed projects are below:-

a	2 x 600 MW	NCTPS – Stage III	Unit 1	Rs.5.16 Cr/Mw
			Unit 2	Rs.6.72 Cr/Mw
b	1 x 600 MW	MTPS – Stage III	Rs.7.83 Cr/Mw	
c	3x500MW	NTECL at Vallur(JV)	Rs.6.12 Cr/Mw	
d	2x500MW	NTPL at Tuticorin (JV)	Rs.6.54 Cr/Mw	

11. Written submission filed on behalf of the Petitioner as per direction of the Commission on 21-07-2014:-

11.1. In the arguments on 12-02-2013, the Respondent proposed for freezing the cost in INR terms instead of forex linked costs which was prima facie accepted by the Petitioner and that such freezing could be done once the EPC contractor is selected through ICB process. During the discussions with the Respondent on 27-03-2013, the Petitioner informed that either the cost has to be frozen at present exchange rate with some margin or adopt the EPC cost from ICB process which was already initiated.

11.2. In the arguments held on 17-04-2014, the Petitioner put forth that the Respondent was relying on the daily order dated 26-02-2014 hosted by the Commission to fix the capital cost at Rs.5.39 crores / MW as per the exchange rate

indicated in the Addendum # 2. The said daily order was subsequently corrected by the erratum issued by the Commission on 13-05-2014 as below:-

ERRATUM

In the said daily order dated 26-02-2014 –

For “the Commission ordered both the parties to freeze” ;

Read “the Commission set out as an issue, the freezing of”.

Therefore, the very foundation for the submission for the Respondent, for seeking an expected price fixation of Rs.5.39 Crores / MW, was erroneous which is far below its own ongoing project costs.

11.3. In the hearing on 21-07-2014, the Petitioner advanced the arguments under the following key factors.

Provision of capital cost in the amended PPA:

- (a) The capital cost as defined in the original PPA signed on 12-02-1998 and as amended on 30-07-1998 is subjected to indexation / variation in foreign currency rates.
- (b) As per the order passed by the Commission on 09-05-2011 in M.P. No.18 of 2010 “The capital cost of the project shall be got approved from the Commission once the EPC contractor is selected.”
- (c) The definition of capital cost in the amended PPA on 10-01-2012 also did not undergo change as the capital cost of US \$ 321.779 Million plus EURO 74.593 Million plus Rs.875.389 crore agreed in the amended PPA was continued to be subjected to permitted variations / indexations in accordance with the exchange rate from time to time as was existing prior to amendment. However, the cost of Rs.5.39 crores / MW indicated in the table in para 12 of the Addendum 2 dated 10-01-2012 was based on one

such instance of exchange rate that too prevailing not on the Addendum 2 date of 10-01-2012 but based upon the exchange rate prevailing in July 2010 for reference only.

Facts relating to “Delay in Commissioning the Project by Petitioner:-

- (a) As per the terms of the amended PPA, the definition of Scheduled Commercial Operation Date is “The date falling 39 months from the Financial Closing Date” and the deadline for achieving the Financial Closing Date is stated as “..... *by the end of sixth month from the date of obtaining collateral arrangements satisfactory to the company or its lenders, or such later date the company may determine, the “Financial Closing Date” shall have occurred*”.
- (b) Thus, in the absence of collateral arrangements from the Respondent, as per the terms of amended PPA, the deadline for achieving the Financial Closure was not set by the Respondent and hence the delay in completion cannot be attributed to the Petitioner.
- (c) Further, as per terms of the PPA, delay in completion / achievement of COD and remedy for such delay are already provided for in the PPA. The issue of delay and remedy for such delay were in any case subject matter order dated 09-05-2011 in M.P. No.18 of 2010.

Facts on “Escrow Cover was not provided to other projects and they have achieved financial closure”.

- (a) The Escrow Cover was provided to other projects cited by the Respondent for achieving Financial Closure whereas the same was not provided to the Petitioner for achieving financial closure ;

- (b) The Escrow Cover was essential for achieving Financial Closure as the same was repeatedly insisted by Banks and Institutions as already informed by the Petitioner.
- (c) In any event the Respondent cannot claim a breach of its contractual obligations as a virtue.
- (d) Further, these aspects were already considered by the Commission in M.P.No.18 of 2010 based on which order was passed on 09-05-2011.

11.4. Comparison to CPCL

The capital cost has been frozen in the PPA of CPCL and the Commission in PPA / PA 1 of 2006 fixed the capital cost of CPCL by comparing capital cost of other projects prevailing in 2008. Likewise, the Commission may fix the capital cost of the Petitioner's project in 2014 by comparing capital cost of other ongoing projects prevailing now in 2014. The Commission may fix the capital cost for the project which shall be inclusive of all variations in foreign currency rates but exclude variations on account of taxes and duty and change in law which is not in control of the Petitioner or the Respondent.

11.5. Comparison of cost and tariff competitiveness:-

The Commission may fix the capital cost as required under TNERC Tariff Regulations, 2005. The relevant portion with regard to fixing the capital cost of the project is contained in sub-regulations (4), (6) and (8) under Regulation 18 of TNERC Tariff Regulations, 2005.

11.6. As per the Tariff Regulations and as per the Act, the following manner may be considered by the Commission while fixing the capital cost of generation projects :

- (a) Adopting the capital cost determined on the basis of International Competitive Bidding ordered by the Commission.
- (b) Fixing the capital cost on the basis of CERC Benchmark Cost (Guidelines for fixation of capital cost for Coal Based Plants) ;
- (c) Fix the capital cost on the basis of PPA converted at current exchange rate with a margin for firm price fixation at 10% as per CERC guidelines for conversion of variable cost to fixed cost.
- (d) Determining capital cost on the basis of ongoing similar projects.

It was further put forth that the costs determined in the above manner are already submitted to the Commission.

11.7. The capital cost of ongoing Ennore Expansion Thermal Power Project of TANGEDCO which was published in March 2014 comes to Rs.7.75 Crores / MW after considering the IDC and Financing costs. The levelised tariff determined on the basis of amended norms incorporated in the PPA as ordered by the Commission would result in lesser and comparable tariff to the Respondent. Considering the cost and tariff competitiveness of the Petitioner's project as already put forth in the Additional Affidavit filed on 23-04-2016, the Petitioner requested the Commission to fix the capital cost for Petitioner's project at Rs.3970 Crores which is the cost determined on the basis of ICB as ordered by the Commission (OR) such other costs as the Commission may determine based on the facts and circumstances put forth and in line with Acts and Regulations. The Commission may fix suitable other conditions on the above capital costs such as variations in foreign currency rates, taxes and duty and change in law as already considered for other projects such as CPCL.

11.8. It has already been submitted to the Commission in the hearing on 21-07-2014 that –

- (i) The lease rentals charged by Port is being fixed by them from time to time as per Major Port Trust Act of 1963 (As amended) which the Petitioner is bound to comply ;
- (ii) The Respondent is very well aware of the above fact as the Respondent is paying the same for its existing power station located in the land leased by Port ;
- (iii) With regard to reduction of lease rentals, the Petitioner submitted that it has in effect taken up with Port for charging the lease rentals as being charged to Respondent's power plant ;
- (iv) In this connection, it is submitted that a recommendation letter from the Respondent has already been sought.

11.9. Regarding other income, the Petitioner during arguments on 21-07-2014 submitted to the Commission that only 4 income streams were identified and now only the Respondent comes out with two more items namely, Savings in Fuel and Savings in Auxiliary Consumption.

11.10. Savings in Fuel and Auxiliary Consumption are not "Other Income Streams" as they are already covered by Tariff. Further, Auxiliary Consumption itself is factored into savings in Fuel if one were to go on annual average basis of determining these savings. The Respondent insisted on savings in Fuel and Savings in Auxiliary Consumption also to be shared in the ratio of 60:40. To a query of the Commission in this regard, the Petitioner informed that in the interest of moving forward in the project, the Petitioner prayed that this issue may be ordered

by the Commission as it deems fit provided these are considered on annual basis and after considering all the over-due amounts.

11.11. Simple Interest instead of Compound Interest for late payment:

The issue is with respect to interest payable on Delayed Payment and whether it would be calculated on the basis of simple interest or compound interest. In the hearing held on 17-04-2014, 25-06-2014 and 21-07-2014, the Petitioner reiterated that these are working capital facility extended by the Banks and they do charge interest on Monthly Rest Basis. The interest on outstanding amount is charged on monthly basis. This being so, to seek simple interest is not justified. The Regulations as well as PPA provision clearly mention this aspect of monthly due and hence compounding of interest. Further, the Late Payment Interest should be such that it encourages the Respondent to pay timely and not default. The Lenders also charge interest on interest for payments defaults which are payable quarterly basis. In view of the above and considering that the project need to move forward towards financial closure the Petitioner submitted that delayed payment interests be compounded quarterly basis instead of monthly basis. The Respondent reiterated the stand submitted in the affidavit and submitted to the Commission for passing appropriate orders. The Petitioner prayed that this issue be ordered by the Commission as it deems fit considering the facts explained. The existing provision in the PPA or provision of Regulations as may be opted by the Respondent is acceptable to the Petitioner.

11.12. Regarding the rebate, the Respondent did not agree to downsize the rebate of 2.5% provided in the PPA. On 21-07-2014, the Petitioner reiterated that in view of moving forward on the project, it is agreeable for the interest rate to be in line with

provisions of PPA (or) Regulation 27. However, the Petitioner requested that in view of acceptance of issues as per Regulations, the rebate may also be kept at 2% as per Regulation 46.

11.13. Clarity on O & M and Insurance Expenses:

As per the PPA, O & M Expenses shall be 2% of capital cost, subject to approval by the Commission. Other terms related to O & M Expenses shall be as per Clause 25 of Regulations 2005. The Petitioner's stand is that the PPA clause is for O & M and Insurance Expenses whereas the direction by the Commission is for adopting O & M Expenses alone. Therefore, as per the provisions of the PPA, that component of the O & M costs relating to O & M Expense shall be at 1% as per clause 25 with contingency at 0.5% as per Clause 30 and Insurance at 0.5% as per Clause 31 of Regulations, 2005. The Petitioner pointed out that in PPA /AP/1 of 2006 of Cuddalore project, the Respondent had accepted O & M Expenses including Insurance was at 2.12% of the capital cost stating that these are below CERC norms. In the order passed by the Commission in PPA/AP/1 of 2006, these aspects of O & M and Insurance Expenses have been reviewed and adopted at 2% by stating that O & M Expense shall be at 1% as per Clause 25 with contingency at 0.5% as per Clause 30 and Insurance at 0.5% as per Clause 31 of Regulations, 2005. Thus, the PPA Clause relating to O & M and Insurance Expenses has been incorporated as 2% of the capital cost which is in line with direction issued by the Commission and as ordered in PPA/AP/1 of 2006. The Respondent while appreciating the point of the Petitioner, however, interpreted that since the Commission has given specific direction to amend O & M Expenses as per Clause 25 of Regulations, 2005, the Respondent cannot on their own accept the said contention. Therefore, the O & M and Insurance Expenses including Contingency

would be accepted and incorporated as per the specific direction of the Commission when this Addendum 2 is approved. The Commission may accordingly consider O & M and Insurance Expenses at 2% as provided for in the amended PPA and as already ordered in P.P.A./A.P. No.1 of 2006.

11.14. Clarity on Incentive Payment:-

As per PPA, target PLF for incentive shall mean Standard PLF. The Respondent submitted to the Commission that a clear order to the effect that the deemed generation will not be considered for arriving at the PLF towards incentive payment be issued. The Petitioner accepted with the averments of Respondent that incentive is chargeable only on actual generation and not on deemed generation.

11.15. Alternate Payment Security Mechanism:

The PPA provided for Escrow Cover to meet the payment obligations. The Respondent submitted that it proposed "Direct payment backed by Stand by Letter of Credit" as the alternate payment security mechanism instead of escrow cover contemplated in the PPA. The Respondent submitted that the pending W.P. No.7241 of 2001 should be withdrawn before proceeding with further discussions on this. The Petitioner accepted with the alternate payment security mechanism proposed by the Respondent and also agreed to withdraw W.P. No.7241 of 2001 pending before the High Court of Madras. The Petitioner accordingly withdrew W.P. No.7241 of 2001 on 28-02-2013 and made a Written Submission on 11-03-2013 informing the Commission with a copy to the Respondent that the said W.P. No.7241 of 2001 was withdrawn on 28-02-2013. The Petitioner submitted that the Commission may consider the alternate payment security mechanism agreed by the parties and pass final order.

11.16. As per PPA, depreciation shall be in accordance with the rates of depreciation being provided for class of equipments comprising the project as further provided in Schedule 6 of the PPA. The Respondent submitted to the Commission that depreciation shall be in accordance with the Regulation 24 of the TNERC Tariff Regulations, 2005. The Petitioner agrees for adopting Regulation 24 in the matter of depreciation.

11.17. FCC to exclude Land Lease Rentals:

Land Lease Rentals are pass through in tariff as per the definition of FCC. The Respondent submitted to the Commission that FCC should exclude Land Lease Rentals payable to VOCPT. As per norms, the Land Costs are included in the Capital Cost of the project. In this case, VOCPT is not giving land on sale basis and instead gives land only on lease basis. In view of the same, either the cost of land should be included in capital cost (or) land lease amount should be a pass through in FCC as already agreed in the PPA. The Commission may consider Land Lease Rentals as part of FCC as already agreed in the amended PPA.

12. Written Submission filed on behalf of the Respondent as per direction of the Commission on 21-07-2014:-

12.1. The PPA was signed between the parties based on the Memorandum of Understanding dated 18-02-1995. During the year 2001, M/S.SEPC Power Private Limited had filed a Writ Petition (W.P.No.7241 / 2001) before the High Court of Madras and prayed to direct the Respondent to grant escrow cover for the power project. From thereon there was no progress in the development of the power project.

12.2. During this period M/s.GMR Power Corporation Pvt. Ltd. (196 MW), M/s.PPN Power Generating Company Pvt. Limited (330.5 MW), M/s. Samalpatti Power Company Pvt. Limited (106 MW), M/s. Madurai Power Corporation (106 MW) and M/s.TAQA Neyveli Power Company Private Limited (earlier M/s.ST-CMS Electric Company Pvt. Limited (250 MW), established their power projects without providing / operationalizing of escrow cover by the Respondent.

12.3. Due to non-payment of land lease rent by the Petitioner, Tuticorin Port Trust had cancelled the allotment of land to the Petitioner during 2003. However, during November 2009, a new land was allotted to the Petitioner by the Tuticorin Port Trust. Further, the Respondent has already informed the Petitioner through the letter dated 16-10-2009 that allotment of alternate land should not have any additional financial commitment to this Respondent.

12.4. Subsequently, during the year 2010 M/s. SEPC Power Private Limited has approached the Commission and filed a Miscellaneous Petition (M.P.No.18 of 2010) stating its willingness to execute the power project and prayed the Commission to direct the Respondent TANGEDCO to act in accordance with the terms contained in the concluded PPA.

12.5. The Commission in order dated 09-05-2014 in M.P.No.18 of 2010, the Respondent Board and the Petitioner M/s.SEPC signed the Addendum #2 to the PPA on 10-01-2012 and the Petitioner submitted the amended PPA for approval of the Commission on 13-01-2012 which was subsequently numbered as PPAP No.5 of 2012.

12.6. In the meantime, M/s.SEPC Power Private Limited withdrew the Writ Petition No.7241 of 2001 seeking escrow cover, filed before the Hon'ble High Court of Madras, on 28-02-2013. The Petitioner accepted "Direct Payment backed by Letter of Credit" as Alternate Payment Security Mechanism in lieu of escrow cover as proposed by the Respondent TANGEDCO vide his letter dated 27-09-2012.

12.7. As directed by the Commission in para 10.4.3 of the order dated 09-05-2011 in M.P.No.18 of 2010, the operating norms of the power project have been modified in line with the Tamil Nadu Electricity Regulatory Commission Regulations, 2005 and executed Addendum-II.

12.8. The various other tariff related issues raised by the Respondent in the counter filed on 16-08-2012 and 26-03-2014 in P.P.A.P. No.5 of 2012 and remains to be adjudicated by the Commission are as follows:-

- (a) Incentive
- (b) O & M and Insurance Expenses
- (c) Fixed capacity charges & land lease rent
- (d) Depreciation
- (e) Interest and Financing Charges
- (f) Other income
- (g) Simple interest for delayed payment surcharge
- (h) Interest rate on working capital
- (i) Freezing of capital cost.

12.9. Incentive:

Deemed generation will not be considered while arriving at the PLF for the purpose of incentive calculation. It has been prayed by the Respondent vide para 6 of the counter affidavit filed on 16-08-2012 that deemed generation shall not be

considered for arriving at the PLF towards incentive payments. This has been agreed to by the Petitioner vide para 7.4.2 of their affidavit dated 23-04-2014.

12.10. O & M Expenses:

The Respondent prayed the Commission that O & M expenses shall be as per clause 25 of the TNERC Regulations, 2005, which provides for 1% of the capital cost of the project towards O & M expenses. This stand of the Respondent is also in line with the directions of the Commission in para 10.4.3 (f) of the order dated 09-05-2011 in M.P.No.18 of 2010. The Petitioner is not eligible for 0.5% towards contingencies because such 0.5% contingencies were not mentioned anywhere in the PPA prior to amendment as already prayed vide affidavit dated 16-08-2012. Hence, the Respondent prayed the Commission to order 1% of capital cost towards O & M expenses.

12.11. Fixed capacity charges & Land lease rent:

The Respondent had prayed in para 19 (ii) of the counter dated 16-08-2012 that the fixed capacity charges may be ordered as per clause 36 (2) of the Regulation 2005. The Respondent prayed the Commission to rule that the land lease rent is reimbursable separately and not form part of fixed capacity charges, thereby getting reflected in the interest on working capital in the form of receivables.

12.12. Depreciation:

The Respondent prayed the Commission to rule depreciation as per clause 24 of the TNERC Regulation, 2005, for rate of depreciation as well as methodology, which has also been agreed to by the Petitioner in his affidavit dated 23-04-2014.

12.13. Interest and Financing Charges:

The interest and financing charges may be ordered by the Commission in accordance with Regulation 23 of TNERC Regulations 2005.

12.14. Other income:

The Respondent prayed the Commission vide the counter affidavit dated 16-08-2012 to fix the annual capacity charges as per clause 41 (2), which provides for deducting other income as per Regulation 40 from the total annual expenses. the other income defined in clause 40 of the TNERC Regulations, 2005 is as below:

“Income other than income from sale of electricity shall be grouped as other income.”

The following are identified as sources of other income as directed by the Commission’s Daily Order dated 12-02-2013:-

- (a) Sale of fly ash
- (b) Sale of scrap
- (c) Sale of RO Water
- (d) CDM benefits
- (e) Savings on primary fuel
- (f) Savings in auxiliary consumption.

Further, it shall be shared in the ratio of 60:40 between licensees and the generator.

The Commission may grant liberty to come before the Commission for approval of the methodology to be adopted in quantifying the above savings.

12.15. Simple Interest for delayed payment surcharge:

The Respondent prayed the Commission to fix the belated payment surcharge as simple interest and further it is prayed that the rate of surcharge may be fixed as SBI base rate plus 350 basis points as applicable to the period of delay as already prayed by the Respondent in the additional counter affidavit dated 26-03-2014.

12.16. Interest rate on working capital:

The Respondent prayed the Commission to fix interest rate for working capital as SBI base rate plus 350 basis points in line with the present banking practice as prayed in the Written Submission dated 25-06-2014.

12.17. Freezing of capital cost:

Due to delay in commissioning of the Petitioner's project, the Respondent had to purchase power from high cost IPPs. This Respondent has been put to great hardship in meeting the State demand. Any cost overrun on account of time overrun cannot be passed on to the Respondent. This Respondent prays the Commission to freeze the capital cost of the project at Rs.5.39 crores / MW (inclusive of all cost and exchange rate variation), at an exchange rate as per Addendum –II to PPA, to be the ceiling capital cost. The Commission may be pleased to direct the Petitioner to furnish a copy of the EPC agreement and land lease agreement to the Respondent.

13. Findings of the Commission:-

13.1 Findings of Thiru G.Rajagopal, Member-II

Issue No.1: Freezing of Capital cost:

- (1) The Petitioner has not filed a separate application seeking approval of Capital Cost and financing plan, but has sought approval of the amended PPA which includes Capital Cost which was submitted as Additional Affidavit.
- (2) Before going into the views and orders, let us first examine the provision in the PPA, Commissions order in MP 18 of 2010 and the position taken by the Parties on the issue relating to "Capital Cost" and "Freezing of Capital Cost".
- (3) The Capital cost as defined in page 104 of the PPA dated 12.2.1998 signed between Petitioner & Respondent reads as :

"means, the cost actually incurred by the Company in completing the project, provided that thethe estimated capital cost ceiling agreed upon by the Company and TNEB

(US\$ 321.779 Million plus DEM 145.893 Million plus Rs.875.389 Crores)..... which shall be converted at applicable exchange rate from time to time.”

“any increase or decrease in Project Cost resulting from changes in rates of foreign currencies..... from the levels setforth in Schedule 14 of the Agreement”

Further, continuing on page 105, it has been stated that:

“For purposes of determining the Capital Cost, all foreign currency loans and all foreign currency equity sources shall be converted at the applicable Base Exchange Rate (Weighted average current exchange rate from time to time). It is understood and agreed that any increase or decrease in Capital Cost due to changes in foreign currency exchange rates and taxes and duties shall be reflected in the amount of actual Capital Costs.”

Therefore, as per the PPA signed between the Petitioner and the Respondent, the Capital Cost is subjected to variation in foreign currency rates. This has not been denied by the Respondent.

(4) Having seen the above provision in the PPA, let us see what has been ordered by the Commission on 9.5.2011 in MP 18 of 2010.

Para 10.4.4. of the order states:

“The capital cost of the project shall be got approved from the Commission once the EPC contractor is selected. The selection of the EPC contractor shall be on the basis of International competitive bidding. The financing cost, which is part of capital cost shall be subject to approval by the Commission. The financing for the project shall be tied up within a period of nine months from the signing of the amended PPA as directed in para 10.4.3 of this order. The amendments as ordered by the commission shall be finalized by the parties within a period of 3 months of this order. The commercial operation of the project shall be achieved within a period of 39 months as stipulated in the PPA. The Respondent states that the capital cost of this project works out to Rs.5.398 crores per MW at the current exchange rate as against the cost of Rs.4.69 crores per MW approved by the Commission for Cuddalore Power Project. Subsequently, the TNEB in their counter affidavit filed on 31-1-2011, has modified their stand to say that the capital cost of the project shall not exceed the capital cost approved in the PPA. The TNEB is directed to take a clear stand on the issue and amend the PPA, if necessary, to limit the capital at the rate of Rs.4.69 crore / MW.”

- a. It can be seen from the above order that the Commission has issued directions to the Petitioner as well as to the Respondent. The direction to the Petitioner is to finalise the capital cost and then get the same approved from the Commission. The direction to the Respondent is to take a clear stand on the issue of capital cost and amend the PPA if necessary.
 - b. In continuation of the aforesaid directions issued by the Commission;
 - (i) The petitioner proceeded towards finalization of cost by selecting EPC Contractor by ICB Process, finalise financing and thereafter reverting to the Commission through additional affidavit on 20.2.2014 seeking fixation of Capital cost in each case as ordered by this Commission; and
 - (ii) The Respondent as per the counter on 16-08-2012 took a stand to continue with the same provisions on the capital cost which was indexed / linked to foreign exchange rate variations and the capital cost was not amended and from the averments made in the Counter. It can be inferred that Respondent was awaiting for the cost to be determined on the basis of ICB process commenced by the Petitioner.
- (5) Having seen the existing provision in the PPA and directions contained in the Order in MP 18 of 2010, we shall now see the provision of the Capital cost as defined in the amended PPA signed by Petitioner and Respondent.
- a. In Para 12 of the Addendum # 2 signed on 10.1.2012, the DEM Component of 145.893 Million was converted to Euro 74.593 Million by using the terminal exchange rate of 0.51129 Euro / DEM (Fixed Euro Conversion Rate) as furnished below the table on Capital Cost.
 - b. But for the incorporation of DEM to EURO at terminal exchange rate as stated above, the definition of capital cost in the amended PPA on 10.1.2012 was neither amended nor a clear stand was taken for freezing and the definition of the capital cost continued to remain the same as in the original PPA:
 - (i) The Capital cost is US\$ 321.779 Million plus EURO 74.593 Million plus Rs.875.389 crore which was continued to be subjected to

permitted variations / indexations in accordance with the exchange rate from time to time as was existing prior to amendment; and

- (ii) The capital cost of Rs.5.39 crores / MW indicated in the table in para 12 was based on one such instance of exchange rate that too prevailing not on the Addendum 2 date of 10.1.2012 but based upon the exchange rate prevailing in July 2010 as clearly made out in the addendum for reference only.

(6) Going by the averments of the Parties in the Petition and in the amended PPA, it can be inferred that;

- (a) In the amended PPA between Petitioner and Respondent, the capital cost is subject to permitted variations / indexations in accordance with the exchange rate from time to time;
- (b) The cost of Rs.5.39 crores / MW indicated in the table in para 12 of the Addendum 2 dated 10.1.2012 was based on one such instance of exchange rate that too prevailing not on the date of Addendum 2 but based upon the exchange rate prevailing in July 2010 for reference only.
- (c) The cost of Rs.5.39 crores / MW was neither frozen nor Respondent took a clear stand on freezing the cost in amended PPA.
- (d) Since the Capital Cost is subjected to permitted variations / indexations in accordance with the exchange rate in the PPA, the cost has to be frozen by the Commission now as was done for Cuddalore project being cited by Respondent.
- (e) The Capital Cost of Cuddalore Project was fixed by the Commission in 2008 by comparing the prevailing / ongoing project costs of other projects in 2008.

(7) The Petitioner in the Additional Affidavit filed on 20.2.2014 submitted a cost of Rs.3265 Crores (Exclusive of Taxes & Duty and Interest During Construction & Financing Charges) for fixation by the Commission stating that the same has been finalised in terms of para 10.4.4 of the order on 9.5.2011 in MP 18 of 2010. The Petitioner with regard to financing stated that they have tied up the major portion of loan from M/s. PFC and M/S. REC – financial institutions under Government of India. With respect to further progress towards

achieving financial closure, the petitioner in para 4.4 (b) (v) of the affidavit filed on 20-02-2014 stated that:

“It is submitted that the based on the ongoing discussions with Lenders, further progress with respect to financing, signing of Loan Documents and achieving Financial Closure would follow the approval of the Estimated Capital Cost by the Hon’ble Commission.”

- (8) The Respondent in the counter filed on 26.3.2014 prayed to the Commission to approve the amended PPA under Section 86 of Electricity Act, 2003 which also had the Capital Cost which was subjected to variations. However, with regard to capital cost, the Respondent took a stand to request the Commission for fixing the capital cost @ Rs.5.39 Crores / MW citing as though the Commission passed the order for freezing the cost at that levels when the Commission “has not ordered for freezing” and as only “set out the issue of Freezing of the Capital Cost”.
- (9) The Respondent furnished the following information in the Capital Cost of various projects and Tariff of its long term procurements in response to the orders of this Commission.

- a. Capital Costs of recently completed projects: Comparison of various project costs were provided as below:

Project	Year of completion Note 2	Capacity	Project Cost (Crores)	Cost / MW (Cr/MW)
NCTPS Stage II Note 1	2013	2 x 600 MW	8077	6.731
MTPS Stage III	2013	1 x 600 MW	4695	7.825
NTECL	2012-14	3 X 500 mw	9193	6.129
NTPL	2014	2 X 500 mw	6541	6.541

Note 1: As pointed out by the Petitioner, the costs have been corrected as per the filings of Respondent in these projects in MAP 1 of 2013.

Note 2: Completion dates were provided in written submissions of Petitioner.

(10) Commission's analysis of terms of the PPA, delay, Escrow cover and comparison to other project cost:

a. Terms of the amended PPA on Capital Cost:

As per the terms of the amended PPA, the capital cost of "US\$ 321.779 Million plus EURO 74.593 Million plus Rs.875.389 crore" is subjected to permitted variations in accordance with the current exchange rate. Thus, neither the Petitioner nor the Respondent chose to freeze the cost in their amended PPA even though opportunity was given by the Commission to Respondent to "... amend the PPA, if necessary, to limit the cost " In the absence of above freezing of cost in the PPA by the Parties, the Commission has to now freeze the cost as prayed for by the Petitioner and the Respondent.

b. Delay

The Commission expresses the prima facie view that the Project has been delayed. Even after these delays were considered and order in MP 18 of 2010, passed, there was further delay between ordering date and now. Further, the issues such as delay until MP 18 of 2010 were considered by this Commission in MP 18 of 2010 and raising these issues by Respondent is beyond the scope of the present petition as this amounts to review of order passed in MP 18 of 2010. Further, the PPA clause on completion and delay is very clear as per which the project shall be completed within 39 Months from the Financial Closing Date and the financial closure shall be achieved within 6 Months of providing Collateral Cover / Escrow cover. Since the Escrow Cover or the Alternate Payment Security mechanism was not provided, the actual commencement date was not set and hence, the delay cannot be totally attributed to Petitioner. However had the petitioner wanted the delay could have been reduced. This aspect is considered while fixing the capital cost of the project.

c. Comparison to other project cost:

The Respondent in MP 18 of 2010 was initially comparing the cost of Petitioners project with that of the Cuddalore project. However, when the commission directed the Respondent to take a clear stand on it in the amended PPA, the Respondent chose to have variable cost in the

amended PPA and now takes a stand for freezing of Capital Cost similar to Cuddalore project. Therefore, in case of Petitioner's project, freezing of Capital Cost has to be undertaken now as such freezing has not been done so far for the Project.

d. Comparison to recent completed cost of Respondent's project:

From the table in sub para (a) of para (9), for a total Capacity of 4300 MW, the total Capital Cost is Rs.28,506 crores which translates to Rs.6.63 crores / MW for completion in different years upto 2013 /14. Against this completed cost of Rs.6.63 crores / MW in 2014, the Petitioner sought for fixing at Rs.7.56 crores / MW and the Respondent expected a price fixation of Rs.5.39 crores which is for completion in 2017 – 2018 with regard to Petitioner's project. The cost of recent projects of the respondent is around Rs.7.75 crores per MW with EPC cost at Rs.6 crore per MW and IDC, financing and non-EPC cost calculated as Rs.1.75 crore per MW

e. Comparison to tariff of current long term purchase cost of Respondent.

From the sub para (b) of para (9), the levelised Tariff of current procurement cost is furnished as Rs.4.91 / Unit against which the 15 year levelised tariff sated in para 9.2.3 (b) of the additional affidavit dated 23.4.2014 comes to Rs.4.53 / Unit with fixed cost at Rs.2.15 / Unit. Though these two tariffs are outcome of two different processes, the fixed cost of Rs.2.15 per unit for the capital cost of Rs.3790 crores in the instant comparison may be relevant and is comparable.

(11) Commissions views and Conclusions on Capital Cost :

- (a) The relevant provision with regard to fixing the Capital Cost of the Project is contained in sub regulations (3), (4), (6) and (8) under Regulation 18 of TNERC Tariff Regulations 2005 (as amended) as furnished below:

"18. Capital Cost

(3) The actual capital expenditure on the date of commercial operation for the original scope of work based on audited accounts of the Company / licensee limited to original cost may be considered subject to prudence check by the Commission.

(4) Wherever Power Purchase Agreement or Agreement for transmission / wheeling provides for a ceiling of capital cost, the capital cost to be considered shall not exceed such ceiling.

(6) Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction stage, use of efficient technology and such other matters, for determination of tariff. In respect of capital cost based projects, a 50% of potential savings, if any, in interest during construction, due to completion of project ahead of schedule, may be allowed to be retained by the Generating Company / licensee and the balance 50% passed on as a lower tariff.

*(8) Restructuring of capital cost in terms of relative share of equity and loan shall be permitted during the tariff period provided it does not affect tariff adversely. Any savings in costs on account of subsequent restructuring shall be shared between the developers / licensees and the beneficiaries / consumers. **Provided that any person intending to establish, operate and maintain a generating station may make an application before the Commission for ‘in principle’ acceptance of the project capital cost and financing plan before taking up the project through a petition in accordance with the Tamil Nadu Electricity Regulatory Commission (Conduct of Business) Regulations 2004.***

- (b) In the instant case, the manner available for fixation of Capital cost as prayed by the Parties would be Prudency check of Capital costs (or) Costs determined as per PPA. The prudency check of Capital cost estimates can be done by comparing to benchmark cost (or) comparing to present costs of similar projects.
- (c) The table below summarises the capital cost determined on the basis of various methodology cited in para above:

Sl.No.	Manner of Determination of Capital Cost	Cost (In Indian Rupees)	
		Crores	Crs/MW
1	Adoption of Capital Cost based on ICB as ordered by the Commission	3970	7.56
2	CERC Benchmark costs – 2014 Prices (without 10% margin for freezing as per CERC guidelines furnished by the Petitioner)	3866	7.36

3	Capital Cost as per PPA converted at Exchange rate prevailing on the date of submission of cost to the Commission namely 20.2.2014 (Rs. 62.24 / USD & Rs 85.198/Euro) without 10% margin for freezing as per CERC guidelines sought by the Petitioner.	3514	6.69
4	Average cost of ongoing similar projects completed in 2014 (As given in sub para (9))	28,506	6.63

- (d) The Petitioner has sought for fixing Rs. 3970 crores (Rs.7.56 crores / MW) based on the price determined through ICB Process. The Commission in the order on 9.5.2011 in MP 18 of 2010 stated that "...the EPC Contractor shall be selected through ICB...". It can be seen from the order that the Commission only insisted on selection of the EPC Contractor on ICB basis and it never ordered for adopting the Capital Cost determined based on the ICB. The Respondent expects the Capital cost to be fixed at Rs.5.39 crores / MW levels based on the exchange prevailing on some other date for which such stand was not taken by the Respondent in the amended PPA. The Commission only set out the issue of Freezing the Capital cost and did not order for freezing the same at Rs.5.39 crores. Thus the Commission neither ordered for adopting the Capital Cost on the basis of ICB which is Rs.7.56 crores / MW nor ordered for freezing the capital cost at Rs.5.39 crores /MW. In view of the same, the Commission is not inclined to consider both of these costs for fixation.
- (e) After disallowing the 10% margin for freezing as per CERC guidelines sought by the Petitioner, the CERC Benchmark costs works out to Rs.3866 crores (7.36 crores / MW). This Commission considers the same as the upper limit for present cost fixation such that the Capital Cost to be fixed by this Commission shall not exceed the CERC Benchmark Costs.

(f) That leaves, Rs.6.69 crores / MW determined on the basis of the PPA Terms at current exchange rates and Rs.6.63 crores / MW based on 2013 – 2014 completed project costs of the Respondent to be considered while fixing the cost for the petitioner's Project as was done for Cuddalore Power. The Commission adopts the following to these two costs for bringing these cost on even terms for final determination :

(i) Capital Cost as per PPA:

The Capital Cost in row 3 above : Rs.3514 Crores
 Margin for Freezing * 3.3% or Rs.116 Crores
 Capital Cost to be fixed / freezed: Rs. 3630 crores (Rs
 6.92 crores / MW)

*(Instead of 10% Margin for freezing sought by the Petitioner citing as per CERC Guidelines, the Commission adopts a margin of 3.3% for freezing as was allowed by this Commission in the order in PPAP 1 of 2008)

Completed Projects of Respondent :

The completed Capital Cost in 2014 : Rs.6.63 crores / MW

Escalation for Completion in 2017 – 18 ^: 3.3% year over year
 which is Rs. 388 crs

Capital Cost Ceiling to be fixed : Rs.3868 crores which is
 Rs.7.37 crores / MW

^(3.3% Escalation/ Year for 3.25 Years or 39Months for SCOD as per PPA has been considered)

(g) Thus, this Commission is left with the following cost options for fixation for the Petitioner's Project:

Sl. No	Various Costs determined by the Commission as possible costs for fixation to Petitioner's Project	Cost (In Indian Rupees)	
		crores	crs/MW
1	Adoption of Capital Cost based on ICB as ordered by the Commission:	NOT CONSIDERED	
2	Adoption of Capital Cost based on the exchange rate in July 2010 as per Addendum 2	NOT CONSIDERED	
3	CERC Benchmark costs – 2014 Prices (as furnished in the petition but without the 10% margin for freezing)	3866	7.36

4	Capital Cost as per PPA converted at Exchange rate prevailing on the date of submission of cost to the Commission with 3.3% margin for freezing fixed by the Commission (Completion cost in 2017 – 18)	3630	6.92
5	Average cost of ongoing similar projects escalated at 3.3% year over year for completion in 2017 – 18	3868	7.37

- (h) From the above, it is very clearly seen that the Capital Cost from the PPA together with 3.3% margin for freezing (instead of 10% margin as per CERC benchmark guidelines cited by the Petitioner) at Rs. 3630 crores (OR) Rs.6.92 crores / MW is the lowest amongst the above prices and is also justifiable considering the current completed costs of Respondent. However the Commission is not inclined to admit the 3.3% margin over the cost arrived at based on the exchange rates and would limit it to Rs.3514/- crores to make the petitioner also bear a part of the cost of delay. Accordingly the Commission approves the Capital cost of the petitioner's project at Rs.3514/- crores.
- (i) The above capital cost of Rs.3514/- crores shall not exceed on any account inclusive of variation in foreign exchange rate except for changes on account of taxes and duties as per the amended PPA and change in law as per the terms of the amended PPA. The Petitioner shall furnish further break up for the Taxes and Duty along with the petition for approval of final completion cost.
- (j) The financial package to meet the above capital cost fixed shall be submitted to the Commission immediately after the Financial Closing Date.

Issue 2: Other income to be identified for reduction from the annual fixed charges

- (1) This issue was identified by the Respondent in their Counter on 16.8.2012. The Respondent in para 19 (iii) of the Counter Affidavit filed on 16.8.2012 states that

“The annual capacity charges recoverable by the Generating Company shall be worked out by deducting Other Income and it may be ordered as per Regulation 40 from the total annual expenses in accordance with Clause 41 (2).”

(2) Regulation 40 on Other Income states that

“Income other than income from sale of electricity shall be grouped as Other Income”

(3) Regulation 41 (2) on computation of FCC states that

“The annual capacity charges recoverable by the Generating Company shall be worked out by deducting Other Income as per Regulation 40 from the total annual expenses”

(4) The Commission in the hearing held on 12.2.2013 prima facie accepted for the proposal of Respondent subject to the condition that these are identified by the Parties upfront.

(5) While the Petitioner accepts for the above, it however sought that the income from the streams identified may be shared after accounting for reasonable expenses incurred by it.

(6) Commissions views and Conclusions

(a) The Commission prima facie accepts the prayer of the Respondent in deducting the Other Income from the recoverable annual capacity charges as per Regulation 41 (2) and Regulation 40;

(b) Accordingly, the income from the following income streams shall be shared in the ratio of 60% to respondent and 40% to Petitioner on annualized basis at the end of each year and shall take into account of delayed payment, penalties and damages and only after that savings shall be determined.

(i) Sale of Fly Ash;

(ii) Sale of Scrap;

(iii) Sale of RO Water' and

(iv) CDM benefits

(c) With regard to savings in Auxiliary Consumption and Fuel, it is clarified that savings in Fuel would capture the savings in Auxiliary consumption and accordingly orders that savings in Fuel Costs would be shared in the ratio of 60% to respondent and 40% to Petitioner on annualized basis at the end of each year and shall take into account of delayed

payment, penalties and damages and only after that savings shall be determined.

- (d) The Commission also concludes that any other income that are being identified shall be subject to mutual discussions and thereafter ordering by the Commission.

Issue 3: The delayed payment surcharge whether the interest would be calculated on simple or compound basis

- (1) The issue is whether to Compound the interest chares for delayed payment of respondent or only levy the simple interest. The provision in the amended PPA for delayed payment is:

“Late payments shall bear interest accrued from the date they became overdue at a rate equal to the rate charged from time to time on cash credits extended to the Party to whom such payments is owed plus one half percent (0.5%), to the extent permitted by law.”

- (2) Delayed payment surcharge in Regulations 47 of TNERC Tariff Regulations 2005 (as amended)

“In case payment of capacity charges and energy charges by the beneficiary is delayed, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.25% per month shall be levied by the Generating Company.”

- (3) This issue was identified by the Respondent in their Counter on 16.8.2012 and in para 19 (iv) of the Counter, the Respondent states that

“the Commission may be pleased to order that Late payment surcharge may be paid on Simple Interest basis without compounding monthly or quarterly”

- (4) The Petitioner informed that these are working capital facility extended by the Banks and Banks charge interest on Monthly Rest Basis and accordingly sought for either the existing provisions in PPA (or) Regulations as may be opted by the Respondent may be incorporated.

- (5) Commissions views and Conclusions

- (a) The Commission notes that in the case of domestic term loans, the principal and interest on the loan funds are repaid to the Lenders on quarterly basis and any default in repayment is compounded.

- (b) The Commission also notes the changing stand of Respondent on the Interest Rate to be adopted for Late payment. Originally, Respondent insisted on Interest rate as per regulations, it then modified to state that it shall be Short Term PLR and now proposes for SBI Base Rate Plus 350 Basis Points. Such a stand of Respondent would not result in logical conclusions of Issues set out by the Commission.
- (c) Accordingly, the Commission concludes that:
- (i) The Interest Rate to be adopted shall be 1.25% per each month of delay as per Regulations 47; and
 - (ii) Up-to first three months of delay, the late payment interest shall be calculated on Simple Interest basis and thereafter it shall be compounded. Alternately, we order that the late payments interest is compounded on quarterly basis which would also protect the interest of Petitioner in Quarterly repayment schedules as well.

Issue 4: Interest rate (Working Capital Interest Rate).

- (1) This issue was identified by the Respondent in their Counter on 16.8.2012. The Respondent in para 19 (9) of the Counter submits that;

“Interest on Working Capital may please be ordered as per Clause 27 of the Regulations 2005 viz, the rate of interest on working capital shall be on normative basis and shall be equivalent to the Short term PLR of SBI as on 1st April of the relevant year”

- (2) The Petitioner has agreed for the proposal of the Respondent for interest on Working Capital as per regulation 27 subject to the condition that the discount on invoice is also maintained at 2% as per Regulation 46
- (3) Commissions views and Conclusions: The interest on Working Capital and Rebate shall be as per Regulation 27 and 46 respectively.

Additional Issues:

- (1) Clarity on O & M and Insurance Expenses:

- (a) Provision in the amended PPA:

“The O & M and insurance Expenses inclusive of contingency reserve shall be at 2% of capital cost, subject to approval by the Commission. Other terms related to O &M Expenses shall be as per Clause 25 of Regulations 2005”

(b) Commissions view:

The O & M and Insurance Expenses in the original PPA prior to the ordering by the Commission as 2.5% . It is only at the insistence of this Commission that the O & M was identified. While the Commission was of a prima facie view that it shall be in line with the Regulations and earlier orders made in this regard in PPAP 1 of 2008 in clarification of the same. However, in view of the amendments dated 09-04-2014 to TNERC Tariff Regulations, the O&M and insurance expenses is to be kept at 1% of the capital cost as per the Regulation 25 including the subsequent adjustments provided in said Regulation 25.

(2) Clarity on Incentive Payment:

(a) Provision in the amended PPA:

Target PLF for incentive : Shall mean Standard PLF

(b) Stand of the Respondent:

The Respondent submitted to this Commission that a clear order to the effect that the Deemed Generation will not be considered for arriving at the PLF towards incentive payment be issued.

(c) Stand of Petitioner:

The Petitioner accepted with the averments of Respondent that incentive is chargeable only on actual Generation and not on Deemed Generation.

(d) Commission's view:

The Commission takes note of the acceptance of the parties on the issue and accordingly concludes that "the Incentive Payment is chargeable only on actual Generation and not on Deemed Generation".

(3) Alternate Payment Security Mechanism:

(a) Provision in the amended PPA.

Providing of Escrow Cover to meet the payment obligations.

(b) Stand of the Respondent:

The Respondent submitted to this Commission that it proposed “Direct payment backed by Stand by Letter of Credit” as the alternate payment security mechanism instead of escrow cover in the PPA and also insisted that the pending W.P.No.72401 of 2001 should be withdrawn.

(c) Stand of the Petitioner:

The Petitioner accepted with the alternate payment security mechanism proposed by the Respondent and also withdrew W.P. No.7241 of 2001 pending before the Hon’ble High Court of Madras.

(d) Commission’s view:

The Commission takes note of the parties on the acceptance and also notes the withdrawal of W.P.No.7241 of 2001 pending in High Court of Madras and accordingly accepts for adoption of “Direct Payment backed by Stand by Letter of Credit” as the alternate payment security mechanism instead of escrow cover in the PPA.

(4) Depreciation:

(a) Provision in the amended PPA:

Depreciation shall be in accordance with the rates of depreciation being provided for class of equipments comprising the project as further provided in Schedule 6 of the PPA.

(b) Stand of the Respondent:

The Respondent submitted to this Commission that Depreciation (manner as well as rates) shall be in accordance with Regulation 24 of TNERC Tariff Regulations, 2005. (as amended)

(c) Stand of Petitioner:

The Petitioner accepts for adopting Regulation 24 in total for Depreciation (both the manner as well as the rates) as provided for in TNERC Tariff Regulations, 2005. (as amended)

(d) Commission’s view:

The Commission takes note of the parties on the acceptance and accordingly concludes that the entire provision of Depreciation (Both

the rates as well as the methodology) in accordance with Regulation 24 of TNERC Tariff Regulations, 2005. (as amended)

(5) FCC to exclude Land Lease Rentals:

(a) Provision in the amended PPA:

Land Lease Rentals are pass through in Tariff as per the definitions of FCC.

(b) Stand of the Respondent:

The Respondent initially submitted to this Commission that the FCC should exclude Land Lease Rentals payable to VO Chidambaranar Port Trust and in the Written Submissions filed on 21-08-2014 modified to state that

“the Respondent prays to the Commission to rule that the Land Lease Rentals is reimbursed separately and not form part of FCC thereby getting reflected in the interest for working capital in the form of Receivables.”

(c) Stand of Petitioner:

The Petitioner submitted that as per norms and as per PPA, the Land Lease should be a pass through in FCC.

(d) Commission's View:

The Commission prima facie accepts the final stand of the Respondent and accordingly accepts that “Land Lease Rentals are pass through in Tariff as per policy” and further orders that “such Land Lease Rentals shall be reimbursed separately and accordingly shall not form part of FCC thereby getting reflected in the interest for working capital”

(6) Interest and financing charges :

(a) This issue was brought up by the respondent and the petitioner did not choose to argue / make any submission.

(b) The respondent prays for the same to be as per Regulation 23.

(c) The Commission accepts the submission of respondent for the interest and financing charges to be as per Regulation 23.

Other issues considered by the Commission

(1) Demand supply projections and justifications for the project:

(a) Since this petition for approval of the amended PPA and cost was submitted by the Petitioner, it was not submitted with the demand supply projections.

(b) The Respondent vide its letter dated 18-08-2009 informed the Petitioner that:

“The TANGEDCO is desirous that the proposed power plant should be put up by SEPC., so as to meet the power requirement of the state. Therefore, M/s.SEPC may take up the matter with appropriate authority / TNERC for necessary approvals, for implementation of the Project.”

(c) During the hearing held on 12-02-2013, the Respondent reiterated the earlier stand of Respondent that this project is required to meet the power requirement of the state.

(d) In the hearing held on 17-04-2014 and 21-07-2014, the Respondent was asked to submit the demand supply projections. The Respondent in para 18 and para 19 states as below:

“TANGEDCO had been consistently hoping to get power from the Petitioner’s project and included them in the projection for capacity augmentation so long”

“TANGEDCO could still consider to take power from the Petitioner as there could always be spillover in the projections made”

(e) Though a detailed Demand-Supply projections has not been submitted, the same is being perused in different petitions of the Respondent. Accordingly, the Commission would like to record the submission of respondent that this project of Petitioner is still required to meet the power requirement of the State and that respondent could still consider to take power from this project.

(2) Whether the Operating Norms and Tariff Parameters are in conformity with the Regulations.

(a) The Commission in its order on 09-05-2011 in M.P.No.18 of 2010 directed that:

“We direct that the PPA be amended to incorporate the above norms. The Regulation also stipulates in clause 28 that the norms of operation specified in these Regulations are the ceiling norms and the parties may agree for improved norms. Accordingly, improved norms committed in the PPA would apply. The Government of India notification dated 30th March 1992 permits the parties to adopt improved norms with regard to heat rate, etc.”

- (b) The parties have amended the PPA by incorporating such improved norms in the PPA in the form of Addendum 2 to PPA and thereafter submitted to the Commission for approval by virtue of which, this Commission is of the view that the Operating Norms are either in conformity with Regulations (or) improved over the Regulations.
- (c) However, in order to ensure that the amended PPA is in conformity with the Regulations a specific overriding clause to be incorporated such that if any terms and conditions of the amended PPA is not in compliance with the terms and conditions of the Regulations as ordered / clarified by the Commissions, then such of those deviated clauses shall be deemed to the extent required to bring it in conformity with the Regulations similar to the existing clause 3.1 (e) in page 92 of the PPA.
- (3) Fuel Supply and Cost effectiveness of the Project:
- (a) As per clause 6.1 (h) of the PPA, the Petitioner shall enter into CSA as *below:-*
- “enter into arrangements relating to supply, delivery and handling of fuel from off site locations to and including the unloading point at the Site through comparative bids reviewed by TNEB and not amend in any material respect any of the terms of Coal supply Agreement or such Coal Transportation or Coal Handling Agreement relating to the Coal cost and delivery terms without TNEB’s prior written consent and not settle or compromise any demand or claim made by it under the Coal Supply Agreement outside of the administration of the Coal Supply Agreement in the ordinary course of business without the prior written consent of TNEB such consent not to be unreasonably withheld or delayed ;*
- (b) As per clause 6.2 (h) of the PPA, the Respondent TANGEDCO shall approve the CSA as below:
- “give consent to the Coal Supply Agreements, Coal Transport Agreements and Coal Handling Agreements proposed by the Company within sixty (60) days of receipt thereof (TNEB is deemed to have given their consent if such consents are not received within sixty days);”*
- (c) Since the Commission is mandated to approve the price of electricity, the Coal Supply Agreement which is an essential component of price should have the approval of the Commission. Accordingly, the Commission orders that after the company firms up the Coal Supply

Agreement, it shall be submitted to the Commission for its final consent.

Grant of approval

Considering the above, the Commission accords approval to the amended Power Purchase Agreement in accordance with Section 86 of the Electricity Act, 2003 between the Petitioner and the Respondent subject to the following conditions:

Capital Cost

The Commission accords approval of the Capital Cost at Rs.3514 crores which shall include all variations in foreign exchange but exclude changes due to changes in Taxes and Duties and changes in law and as per other conditions as below:-

- (a) The Petitioner shall furnish the break up (component wise) for the actual Taxes and Duties along with petition for approval of the final completion cost.
- (b) For the purpose of the tariff payable by the Respondent in the PPA, in case the final completion cost (subject to changes due to changes in Taxes and Duties and changes in law) is:
 - (i) Less than the cost of Rs.3514 crores, then such lesser cost shall be considered as the Capital Cost for tariff ; and
 - (ii) More than the cost of Rs.3514 crores, then Rs.3514 crores (subject to changes due to changes in Taxes and Duties and changes in law) shall be taken as the capital cost for the tariff.
- (c) The Petitioner shall achieve financial closure within 3 months from the date of this order of the Commission and the Commercial Operation shall be achieved within a period of 39 months from such financial closure.
- (d) The financial package to meet the capital cost shall be submitted to the Commission immediately after financial closure.

Coal Supply Agreement

The Commission orders that the company firms up the Coal Supply Agreement in accordance with the PPA and submit the same to the Commission for the final consent.

Amendments to the PPA

The Commission orders the following amendments to be made in the amended PPA:

(a) Capital Cost

The definition of capital cost found in section 3.9 of Schedule 3 (from pages 104 to 106) shall be amended to incorporate the capital cost and its associated terms ordered in 14 (1) above.

(b) Operation & Maintenance and Insurance Expenses

The O & M and insurance expenses in Section 3.9 page No.112 of PPA and Section 8 page 6 of addendum 2 shall be 1% with 5.76% escalation per annum in accordance with Regulations 25 of TNERC Tariff Regulations, 2005 (As amended) as provided in the amended PPA.

(c) Incentive Payment

The “Incentive Payment” is chargeable only on actual Generation and not on “Deemed Generation”. No amendments are ordered on this account.

(d) Alternate Payment Security Mechanism

Clause 9.2 to Clause 9.5 of the PPA shall be amended to incorporate the Alternate Payment Security Mechanism namely “Direct payment backed by Stand by Letter of Credit” instead of existing “Escrow Cover / GOTN Guarantee”.

(e) Depreciation

The following shall be amended with regard to “Depreciation”

- (i) The definition of “Depreciation” found on section 3.9 of Schedule 3 (Page 109) shall be modified to incorporate whole of

Regulation 24 (Manner of Calculation of Depreciation as well as the rates) as per TNERC Tariff Regulations, 2005 (As amended);

- (ii) The “Depreciation Schedule” provided under Schedule 6 of the PPA (Pages 139 to 143) shall be replaced with the “Depreciation Schedule” provided in Annexure of TNERC Tariff Regulations 2005 (As amended).

(f) FCC Charges to exclude Land Lease Rentals

Since the Land Lease Rentals would be reimbursed separately, Land Lease Rentals shall not form part of FCC while calculating the interest on working capital in that component of Receivables. Accordingly at the end of definitions of “Land Lease Rentals” found in section 3.9 of Schedule 3 (Page 111), the following shall be added at the end “The Land Lease rentals shall be reimbursed by respondent separately and not form part of fixed capacity charges, thereby getting reflected in the interest on working capital in the form of Receivables”

(g) Other Income:

- (i) Income from the following income streams shall be shared in the ratio of 60% to Respondent and 40% to the Petitioner on annualised basis at the end of each year and shall take into account of delayed payment, penalties and damages and only after that savings shall be determined.

- A. Sale of Fly Ash;
- B. Sale of Scrap;
- C. Sale of RO Water and
- D. CDM benefits

- (ii) With regard to savings in Auxiliary Consumption and Fuel, it is clarified that savings in fuel would indirectly capture the savings in Auxiliary consumption. Accordingly, the Commission orders that savings in fuel costs would be shared in the ratio of 60% to the Respondent and 40% to the Petitioner on annualised basis at the end of each year and shall take into account of delayed

payment, penalties and damages and only after that savings shall be determined.

- (iii) Any other income that are being identified at a later stage by the parties shall be subject to mutual discussions and agreement of the parties and thereafter ordering by the Commission.
- (iv) The above provisions relating to other income ordered shall be incorporated as clause 3.7 (c) of the PPA.

(h) Late Payment Surcharge

- (i) The interest rate to be adopted for late payments in Clause 9.6 of the PPA shall be 1.25% per each month of delay in accordance with Regulation 47 and the late payment interest would be on simple interest basis for the first three months of delay and thereafter it shall be compounded on quarterly basis.
- (ii) The Rebate on the Invoice in Clause 9.2 (a) of the PPA shall be 2% in accordance with Regulation 46 of TNERC Tariff Regulations (As amended)

(i) Interest on Working Capital

The definition of “Working Capital Interest Rate” for determining the “Interest on Working Capital” in Schedule 3.9 found on Page 110 shall be amended to be in line with Regulation 27 of TNERC Tariff Regulations (As amended).

(j) Deadline for Achieving financial closure

The deadline for achieving financial closure shall be incorporated as “by the end of 3 (three) months from the date of the final order in PPAP No.5 of 2012” in opening para of Clause 3.2.1 as well as Clause 3.2.1 (g).

(k) Financial Package

The final financial package in INR terms without any foreign currency component shall be incorporated into the PPA upon achievement of financial closure as stated in 14 (1) (d).

(l) Interest Charges

The definition of interest charges found in Section 3.9 of page 103 of the PPA shall be in accordance with Regulation 23.

(m) Overriding Clause

Clause 3.1 (g) in page 92 of the PPA should be amended as:

“The parties hereby expressly agree that, notwithstanding anything contained in the Agreement, if any element of the tariff provided for in the Agreement shall be in deviation of, inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003 (as amended) and, in particular, TNERC Tariff Regulations, 2005, existing on the date of the agreement, such element shall be deemed to be amended to the extent required to bring it into compliance with the relevant provisions of the aforesaid Act / Regulations (the remaining portions shall be retained)

Tariff Adoption & Completed Cost

The tariff adoption petition as required under para 7(i) under Regulation 6 of TNERC Tariff Regulation, 2005 (As amended) shall be filed by the petitioner along with the actual completed cost at the time of the commercial operation.

sd/-
(G.Rajagopal)
Member-II

13.2. Findings of Thiru S.Nagalsamy, Member-I :-

I have gone through the order approved by my colleague Thiru G.Rajagopal, Member II and I concur with his findings except on two issues viz. (1) the Capital Cost and (2) Other Income. The orders of Thiru S. Akshayakumar, Chairman is not shown to me and hence I am not able to agree or disagree with him. I dwell upon the issues I have disagreed herein in detail:

I. Capital Cost:-

1. Fixation of Capital cost of a Power Plant is important because it decides the Fixed Cost of the electricity generated for the entire life period of 30 years.

More the Capital Cost, higher the Fixed Cost of electricity generated. Even a small increase in the capital cost increases the cost of electricity generated from the plant. Therefore, the Commission should be very careful in determining the capital cost. It is all the more important as this project is not approved based on competitive tender but on the Memorandum of Understanding (MoU) route i.e. just on nomination basis.

Initially, Tamil Nadu Petro Products Ltd. (TPL), a Joint Venture of TIDCO and SPIC was entrusted by Government of Tamil Nadu in 1995 to develop the TNEB's own Power project of Tuticorin Thermal Power Plant Stage IV. TPL signed MoU with TNEB on 18.2.1995. TPL started a Public Ltd. Company and converted into a Private Company by name of SPIC Electric Power Corporation (Pvt.) Ltd. The Petitioner in their original name of SPIC Electric Power Corporation (Pvt.) Ltd. had got the approval of Tamil Nadu Government, TNEB and Central Electricity Authority (CEA) on 31.7.1997 for setting up of a coal based Power Plant of 525 MW capacity on nomination basis without any competitive tender. The approved capital cost then was Rs.1536 crores. But the petitioner did not start the Project all these years. M.P.No.18 of 2010 was filed in 2010 by the petitioner in TNERC. Commission delivered its orders on 9.5.2011 to amend the Power Purchase Agreement (PPA) and resubmit the amended PPA within 3 months.

Accordingly, both SEPC, the petitioner and TANGEDCO, the respondent amended the original PPA vide Addendum No.2 on 10.01.2012. In the revised PPA the parties have agreed to the revised cost of Rs.2833 crores for 525 MW Power Plant which works out to Rs.5.39 crores per MW. The petitioner resubmitted the addendum 2 and amended PPA in TNERC on 13.01.2012 along with their petition P.P.A.P.No.05 of 2012 (Initially numbered as I.A No.1 of 2012 in M.PNo.26 of 2011). The prayer of the petitioner in P.P.A.P.No.5 of 2012 is reproduced below:

*“It is therefore humbly prayed that this Hon’ble Commission may be pleased to **‘pass the order approving the addendum 2 to the PPA’** incorporating the amendments as directed by this Hon’ble Commission in its order dated 09.05.2011 in M.P.No.18 of 2011 and pass such further or other orders as this Hon’ble Commission may deem fit in the facts and*

circumstances of the case for putting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage – IV and thus render justice.”

It is very clear that the prayer of the petitioner in this case is seeking approval of the amended PPA which includes the agreed Capital cost of Rs.2833 crores for 525 MW or Rs.5.39 crores per MW.

Meanwhile, the name of the Company was also changed to the present name of SEPC Power Private Ltd.

However, the petitioner in their additional affidavit filed on 21.02.2014 has claimed a capital cost ceiling of Rs.3265 crores translating into Rs.6.21 crores per MW. This excludes the soft cost of the project according to the petitioner. Again, in the yet another additional affidavit filed two months later on 23.4.2014, the petitioner has increased his claim to Rs.3970 crores which works out to Rs.7.56 crores per MW. The petitioner in their written submission filed on 21.08.2014 has re-affirmed the capital cost claim of Rs.3970 crores i.e. Rs.7.56 crore per MW. Thus the Petitioner is asking for the increased capital cost from Rs.2833 crores (Rs. 5.39 cr. per MW) to Rs. 3265 crores (Rs.6.21 cr. per MW) and then from Rs.3265 crores to Rs.3970 crores (Rs.7.5620 cr. per MW) contrary to the agreed PPA.

2. On the other hand, the respondent TANGEDCO in their counter filed on 16.08.2012, requested the Commission to approve the capital cost at Rs.2324 for 525 MW @ Rs.4.42 crores per MW as per the cost details provided in the filing taking into account the Foreign Exchange variation. However, the TANGEDCO in their additional counter filed on 26.03.2014 requested the Commission to fix the total capital cost at Rs.2833 crores @ Rs.5.39 crores per MW as per Addendum 2. The TANGEDCO in their written submission dated 25.06.2014 and 21.08.2014 also have requested to freeze the capital cost at Rs.5.39 crores per MW as per amended PPA i.e. addendum No.2 to PPA.

3. Now the important issue in front of the Commission is:

Whether to approve the capital cost for the project at

(a) Rs.2833 crores (Rs.5.39 crores per MW) as agreed to by both parties in the revised PPA or

- (b) at Rs.3265 crores i.e. Rs.6.21 crore per MW as claimed by the Petitioner in his additional affidavit filed on 21.2.2014 or
- (c) at Rs.3970 crores i.e. Rs.7.56 crores per MW as filed in the next additional affidavit dated 23.4.2014 and written submission dated 21.8.2014?

4. **Let us first discuss the claim of the petitioner.**

As per the original PPA signed in late 1998, the capital cost was Rs.1536 crores @ Rs.2.93 crores per MW. In their original petition filed during 2012, the petitioner prayed to approve the revised PPA wherein both SEPC and TANGEDCO have agreed for a capital cost of Rs.2833 crores @ of Rs.5.39 crores per MW. However, the petitioner has changed their mind in their first additional affidavit filed on 21.02.2014 and claimed a capital cost ceiling of Rs.3265 @ Rs.6.21 crores per MW excluding soft costs. Again, in the second additional affidavit filed by the petitioner on 23.04.2014 and the written submissions on 21-08-2014, the petitioner has increased their claim to Rs.3970 crores @ Rs.7.56 crores per MW.

5. Just because the Petitioner in their old name had an agreement signed with the Respondent in 1998, they cannot simply change the capital cost every time without ending. The impact of the time overrun and non-execution of the project resulting in non-supply of electricity at the crucial period of power shortage should also be taken into account. This has resulted in heavy financial loss to TANGEDCO.
6. The Central Government has notified the Tariff Policy on 06.01.2006. As per clause 5.1 of the Tariff Policy, ***all future requirement of power should be procured competitively by the Distribution licensees.*** Capital cost is one of the most important parameter in the project cost. Changing the capital cost again now and awarding the project to the petitioner is like awarding the contract now to a single person on nomination basis without any competition. This goes against the very preamble of the Electricity Act 2003 which emphasize on “**promoting competition**”. This is also against the guidelines specified by the Act for tariff determination in section 61 of the Act which is reproduced below.

“Section 61 The Commission shall be guided by the following

(c): *the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;”*

7. The petitioner’s project was conceived as early as 1995 and even after two decades the project is yet to see the light of the day. Therefore there is no efficiency and good performance as mandated by the Act. Hence there is no justice in the claim of the petitioner. More importantly, the petitioner cannot go beyond the very prayer of this petition. The prayer is “to pass order approving the addendum 2 to the PPA. The Addendum 2 of the PPA is signed by both the Petitioner SEPC and the Respondent, TANGEDCO fixing the capital cost at Rs.2833 crores i.e. 5.39 crores per MW and the petitioner cannot now ask for more than what is there in the prayer.

8. Now let us consider the contention of the respondent TANGEDCO. Initially they requested the Commission to approve the capital cost at Rs.2324 @ Rs.4.42 crores per MW. However, the TANGEDCO in all their later filings requested the Commission to fix the total capital cost at Rs.2833 crores @ Rs.5.39 crores per MW as approved by them in Revised PPA. The contentions of the TANGEDCO are:

“(i) The respondent has been put to great hardship in meeting the State’s Power demand due to abnormal delay in the execution of this project and it cannot be quantified and equated in terms of Rupees. Therefore, any cost overrun on account of time overrun cannot be passed on to this respondent.

(ii) The petitioner’s project was conceived as early as 1996 and even after two decades the project is yet to see the light of the day. The respondent had been put to hardship and had to face the difficult situation in the previous years due to non execution of this project by the petitioner. The TANGEDCO have resorted to tender based power procurement and even faced power cuts and load shedding.

(iii) Due to the delay in commissioning of this project, the respondent had to purchase power from high cost independent power producers (IPPs).”

9. The important argument put forth by the TANGEDCO is that the TANGEDCO is at loss due to the non-commissioning of this project in time by the petitioner. Had the project been commissioned in time the capital cost would

have been around Rs.2.93 crores per MW. If the Commission agrees for the capital cost of Rs.7.56 Crores as claimed by the petitioner, the TANGEDCO and in turn the consumer shall pay approximately 258% more fixed cost per unit than the original fixed cost for the next 30 years. Again as rightly reported by the TANGEDCO, they might have avoided high cost power purchase from Independent Power Producers (IPPs) to the extent of petitioner's project capacity of 525 MW. Further the electricity consumers in the state would have been freed from the suffering of load shedding. This cannot be calculated in terms of money as rightly argued by the respondent. In fact the very preamble of the Electricity Act 2003 and section 61 of the Act emphasize the "protection of consumers". Therefore, there is a clear substance in the argument of the TANGEDCO to freeze the capital cost at Rs.5.39 crores per MW. Moreover, both the parties agreed and signed the addendum 2 of PPA where the capital cost is fixed at Rs.2833 crores per Rs.5.39 crores per MW. Now the petitioner cannot go back from his agreement and demand more..

10. For the reasons discussed above, the Commission cannot approve the increased capital cost of Rs.3970 crores as claimed by the petitioner against the agreed and approved cost of Rs.2833 crores. If the increased cost of Rs.7.56 crores per MW is approved, the excess cost to be paid by TANGEDCO and to be passed on to the consumers through tariff increase is in the order of 45 paise per unit in fixed cost and total amount is Rs.4500 crores for 30 years. Even if it is agreed to my colleague's argument of Rs.6.92 crores the excess payment would be around Rs.3200 crores.

11. In the light of the analysis made supra, taking into account the provisions of the Electricity Act 2003 and the orders issued by the Commission already in a similar case, I come to the conclusion that Capital cost of Rs.5.39 crores per MW and total of Rs.2833 crores for 525 MW is reasonable and I approve this capital cost accordingly.

12. Interestingly it is to be noted that my learned colleague in Commission now, was in TANGEDCO and approved the argument to freeze the capital cost at

Rs.5.39 per MW. But, now in TNERC proposes to increase the capital cost contrary to his earlier decision taken on behalf of TANGEDCO.

II. Other income:

As per Tariff Regulation 40, all income other than income from sale of power shall be grouped as other income. As per Tariff Regulation 41(2), the annual capacity charges shall be worked out deducting other income from the total annual expenses. Hence it can be seen that there is no provision for sharing the other income between generator and the licensee but the entire income is to be deducted from the total expenses. This has to be corrected in the Agreement...

Conclusion:

From the analysis and arguments, narrated in the above paragraphs, I arrive at the conclusion that the capital cost has to be frozen at Rs.2833 crores for 525 MW or Rs.5.39 crores MW as agreed to by both the parties in their amended PPA and the other income has to be deducted from the total expenditure and not to be shared between the Petitioner and the Respondent.

Summary:

1. Capital cost fixation of a Power Project is so important that it affects the cost of power generation for 30 years and ultimately it burdens the consumers in the form of Tariff. Hence the scrutiny of this capital cost should be done more judiciously.
2. The project was conceived in 1995 approved in 1997 and the PPA was signed in 1998. But, the Petitioner could not set up the project all these 17 years thereby depriving the TANGEDCO of its cheaper electricity.
3. Due to the delay in executing this Power Plant, TANGEDCO suffered financially by purchasing costly power and the consumers suffered load shedding and Tariff increase.
4. The original project cost approved in 1997 was Rs.1536 crores for 525 MW.
5. Capital Cost agreed to and approved by both the parties as per amended PPA is Rs.2833 crores for 525 MW or Rs.5.39 crores per MW
6. The prayer of the petitioner is to approve this capital cost of Rs.2833 crores.

7. The prayer cannot be modified at this stage and ask for higher capital cost at Rs.3970 crores.
8. The loss due to this increased capital cost would be Rs.4500 crores by increasing the fixed cost per unit from 138 paise to 183 paise per unit.
9. My Colleague in the Commission was also part of the decision making in TANGEDCO in fixing the capital cost of Rs.2833 cores and he now determines in TNERC at Rs.6.92 crores per MW.
10. Rs.5.39 crores per MW and total of Rs.2833 crores for 525 MW approved by both the Petitioners and Respondents as capital cost is reasonable and I approve accordingly.

sd/-
(S.Nagalsamy)
Member-I

13.3. Findings of the Chairman:-

I have gone through the findings of the learned colleagues on this matter in PPAP No. 5 of 2012. There are two issues where there exist divergences of opinions among the members in their findings. Before proceeding on to decide as to which of the opinions is acceptable, let us briefly scan through the case.

This order on PPAP No.5 of 2012 is a consequential order passed by the Commission on 9-5-2011 in MP No. 18 of 2010. MP No. 18 of 2010 was caused by the petition filed by the same petitioner seeking to direct the respondent to act in accordance with the terms and conditions of the concluded PPA between the petitioner and the respondent for setting up of the 1 x 525 MW Tuticorin Thermal Power Project Stage IV under MoU route. The petitioner was seen to have obtained clearance from the respondent Board and GoTN on 4-2-1996 and 24-5-1997 respectively for enhancement of the capacity to 525 MW. Further, all clearances and approvals required for establishment of the project such as NOC from Tamil Nadu Pollution Control Board, aviation clearance, permission from Ministry of Power, Government of India to modify the plant design for imported coal, in principle

clearance from CEA, cost approval from GOTN, Techno Economic Clearance from CEA were all in place according to the petitioner.

The power purchase agreement between the petitioner and the respondent Board was signed on 12-2-1998. However, the allocation of escrow which was said to have been agreed in principle by the respondent on 21-3-1998 was not forthcoming. The petitioner had filed a writ petition in WP No. 7241 of 2001 before the Hon'ble High Court seeking allocation of escrow. In 2009 the petitioner changed his mind and decided to take up the project with alternative payment security mechanism instead of escrow and approached the respondent. The respondent in turn confirmed that the PPA has been signed and ratified and advised the petitioner to take up with the Tamil Nadu Electricity Regulatory Commission being the appropriate authority for approval for implementation of project.

The Commission in MP No. 18 of 2010 had examined the important question of whether continuing with the MoU route project would be permissible under law as the tariff policy issued by Government of India on 6-1-2006 mandated that all future requirement of power should be procured competitively and had come to the conclusion that this project will not be hit by the above said tariff policy basing its decision on,

- (i) the clarificatory letters issued by the Ministry of Power, Government of India on 28-3-2006, 15-2-2008 and 24-2-2010 wherein it has been held that it has been a concluded project before the issue of tariff policy in 2006 and there is no material change in the agreed terms and conditions of the concluded PPA and it is legally not correct to say that the tariff policy and procedures laid down thereunder as per the provisions of Electricity Act, 2003 is applicable and

- (ii) the Hon'ble APTEL's order in BRPL Vs DERC and BYPL Vs DERC and others in appeal Nos. 106 and 107 of 2009 that the Sections 62 and 63 of the Electricity Act 2003 are independent of each other and both MoU route and competitive bidding route are available to a licensee for procurement of power.

The Commission also directed the parties in the above MP No. 18 exercising the powers vested with it under Section 185 of Electricity Act 2003, to align the parameters of the project in line with the improved norms stipulated in its regulations wherever applicable and amend the PPA incorporating the same.

Therefore, it has been a conscious and foregone conclusion arrived at and ordered by the Commission in MP No. 18 of 2010 to permit to continue with the MoU route project to be promoted by the petitioner in terms of the concluded PPA signed on 12-2-1998 between the petitioner and the respondent. It is not open to the commission at this stage in this consequential order which can only be an adjuvant to the principal order to question the permission accorded by the Commission in MP No.18 of 2010 to continue with the MoU project construing it as a nomination on a single vendor as this aspect would have been well addressed in that order itself. The scope of this commission in this order will be limited to approving the capital cost of the project and addressing the other related prayers of the parties after ascertaining the fact that both the parties have complied with the directives of the commission ordered in the MP No. 18 of 2010.

Let us now look at the issues where differences persist.

1. Capital Cost

In MP No. 18 the Commission ordered as below in respect of Capital cost:-

“The capital cost of the project including financial cost shall be got approved from the Commission once the EPC contractor is selected. The selection of the EPC contractor shall be on the basis of international competitive bidding

.....

.....
.....

The respondent states, capital cost of this project works out to Rs.5.398 crores per MW at the current exchange rate as against the cost of Rs.4.69 crores per MW approved by the Commission for Cuddalore Power Project. Subsequently, the respondent in their counter affidavit filed on 31-1-2011 has modified their stand to say that capital cost of the project shall not exceed the capital cost approved in the PPA. The TNEB is directed to take a clear stand on the issue and amend the PPA if necessary to limit the capital cost at the rate of Rs.4.69 crores per MW.”

It is noteworthy that in MP No. 18 of 2010, Commission did not approve the capital cost even though the figure of Rs.5.398 crores per MW at the exchange rate prevailing then was mentioned by the respondent Board. The Commission had actually directed the petitioner to select EPC contractor through international competitive bidding and upon selection come back to it to get the capital cost approved. The respondent TNEB in its submission filed on 29-2-2010 in MP No. 18 stated that the respondent is desirous of procuring power from the petitioner subject to the condition that the capital cost of the project shall not exceed the capital cost approved in the PPA as per techno economic clearance letter dated 31-7-1997. The respondent has rightly sought for keeping the capital cost approved in PPA since any alteration to the agreed capital cost in the concluded PPA would endanger the legal enforceability of the PPA as held in the Ministry of Power letter dated 15-2-2008, relevant portion of which is extracted below:-

“It has been advised that the provisions of the Tariff Policy would not alter the legal enforceability of the already concluded contracts unless until it is mutually altered on agreeable terms and conditions”

Therefore, it becomes necessary for the parties to hold on to the techno economically cleared capital cost as indicated in the PPA. It has been submitted by

the respondent in their counter filed in July 2010 that the capital cost approved by CEA in its techno economic clearance comprises \$ 321.779 million, DM 145.893 million and Rs.875.389 crores. This has been worked out to be Rs.2324.08 crores (Rs.4.429 Cr/MW) by considering exchange rate of Rs.35.5 per USD and Rs.21 per DM prevailing at the time of issue of techno economic clearance and Rs.2833 crores (Rs.5.396 crore per MW) using exchange rate of Rs.47.11 per USD and Rs. 59.31 per Euro and Euro 0.51097 per DM. This figure of Rs.5.396 crore per MW was mentioned in MP No. 18. However, this has not been frozen in rupee terms in that order. The respondent was asked to take a clear stand and amend the PPA if necessary.

Let us now see what had happened post order MP No. 18 of 2010.

The following is the order and directions in MP No. 18.

“10.4.4. Capital Cost

The capital cost of the project including financing cost shall be got approved from the Commission once the EPC contractor is selected. The selection of the EPC contractor shall be on the basis of international competitive bidding. The amendments directed by the Commission in para 10.4.3 shall be finalized by the parties within a period of 3 months of this order. The financing for the project shall be tied up within a period of nine months from the signing of the amended PPA. The commercial operation of the project shall be achieved within a period of 39 months as stipulated in the PPA. The respondent states that the capital cost of this project works out to Rs.5.398 crores per MW at the current exchange rate as against the cost of Rs.4.69 crores per MW approved by the Commission for Cuddalore Power Project. Subsequently, the TNEB in their counter affidavit filed on 31-1-2011, has modified their stand to say that the capital cost of the project shall not exceed the capital cost approved in the PPA. The TNEB is directed to take a clear stand on the issue and amend the PPA, if necessary, to limit the capital cost at the rate of Rs.4.69 crore / MW.”

In compliance of the above directions both the parties had conducted discussions and signed addendum 2 to the PPA on 10-1-2012 incorporating the revised norms of operating parameters aligning with TNERC's tariff regulation wherever it was falling short retaining those which were better.

The Addendum 2 of the PPA contains the following with reference to the capital cost.

“(12) The existing provisions of Section 14.1 of Schedule 14 of PPA be replaced with the provisions as given below:-

14.1. Abstract of the Project Cost

Sl.	Description	Currency component costs			Total
		Foreign		Domestic	
		USD (Mill)	EURO (Mill)*	INR (Cr)	
1	2	3	4	5	
1	LAND AND SITE DEVELOPMENT	0.000	0.000	9.149	9.149
2	EPC COST	224.353	52.030	648.252	201.132
a)	EPC cost excluding Taxes and Duty	224.353	52.030	462.006	182.006
b)	Taxes and Duty for EPC costs ***	0.000	0.000	186.246	186.246
3	NON EPC COST	15.505	0.000	52.749	125.249
a)	Non-EPC cost excluding Taxes and Duty	15.505	0.000	52.749	125.249
b)	Taxes and Duty for Non EPC Costs	0.000	0.000	0.000	0.000
4	OVERHEADS	14.551	0.000	63.175	133.826
5	PROJECT COSTS EXCLUDING IDC AND FINANCING COSTS	254.409	52.030	773.325	234.409
6	IDC AND FINANCING COSTS	67.370	22.563	102.064	102.064
7	TOTAL PROJECT	321.779	774.5493	875.389	875.389

	COSTS				
	TOTAL PROJECT COST (CRORES INR / MW) **				

* The DEM as per the original TEC has been converted to EURO at the terminal exchange rate of 0.51129 Euro / DEM (Fixed Euro Conversion Rate)

** Total project cost at exchange rate of 1 USD = INR 47.11 and 1 Euro = INR 59.31 considered by TANGEDCO in July 2010 in the Counter Affidavit filed during August 2010 which comes to INR 2833 Crores

*** Includes total Customs duty @ 22% at Exchange Rate of 35.5 Rs/USD and 21 Rs/DEM as per TEC of CEA”

It is seen that even after signing of Addendum 2 the provision made in the original PPA to the definition of capital cost in page 104 and 105 therein as given below which stipulates that the capital cost would undergo corresponding changes with reference to the foreign exchange rates remained intact.

“Capital Cost:

means the cost actually incurred by the company in completing the project provided thatthe estimated capital cost ceiling agreed upon by the company and TNEB (USD 321.779 million plus DM 145.893 million plus Rs.875.389 crores)..... which shall be converted at applicable exchange rate from time to time”.

“For the purposes of determining capital cost, all foreign currency loans and all foreign currency equity sources shall be converted at the applicable Base Exchange Rate (weighted average current exchange rate from time to time). It is understood and agreed that any increase or decrease in capital cost due to changes in foreign currency exchange rates and taxes and duties shall be reflected in the amount of actual capital costs.”

In their counter affidavit date 16-8-2012 in PPAP No. 5 of 2012 the respondent as part of their submission filed the following:-

“14. Capital Cost :

It is respectfully submitted that this Hon’ble Commission in clause 10.4.4 of the order dated 9-5-2011 in MP No. 18 of 2010 further directed this respondent to

take a clear stand on the capital cost of the project and amend the PPA, if necessary. In this regard it is submitted that :

(a) the ceiling cost is already approved by Board or TANGEDCO, GOTN and CEA dated 31-7-1997 for 321.779 million USD, 145.893 million DM and Rs.875.389 crores totaling to Rs.1536 crores by considering an exchange rate Rs.35.5/USD and Rs.21/DM

(b) The capital cost when reworked by considering present day cost at an exchange rate of Rs.47.11 / USD and Rs.59.31 / Euro (as DM converted in fixed Euro conversion rate of Euro 0.51097/DM) works out to Rs.2833 Crores for 525 MW, which works out to Rs.5.39 crores / MW including Coal jetty cost of Rs.331 crores consisting of 1 unit of the Project.

.....
.....

15) In view of the above facts, the capital cost of the petitioners project which was already arrived and approved by TNEB, GOTN and CEA has not under gone any change hence, the same may kindly be approved. The two different capital cost per MW discussed in the order dated 9-5-2011 of this Hon'ble Commission are due to factoring of exchange rate increase considering the present day cost. Even though out of context, it is pertinent to note here that as per TNERC's order dated 09-05-2011, the capital cost of the project including financing cost shall have to be got approved from this Hon'ble Commission once EPC contractor is selected.

16. It is respectfully submitted that like M/s. Cuddalore PowerGen Corporation Limited power project wherein this Hon'ble Commission was pleased to fix a cap on the Capital Cost to be incurred vide its order dated 25.04.2008 in PPA/AP/1/2006, a ceiling in capital cost may be fixed to this power project also."

The capital cost as approved in TEC and incorporated in the concluded PPA executed on 12-2-1998 continues to remain unaltered in terms of the individual components of the various currencies namely, USD, DM (which has subsequently been converted into Euro after the formation of the European Union and Euro zone) and Indian Rupee. However the total value in terms of Indian Rupee undergoes dynamic changes with reference to the prevailing exchange rate of Indian Rupee against the respective currencies. One such figure arrived at Rs.5.39 crore per MW corresponds to the total project cost of Rs.2833 crores based on the exchange rates that prevailed in July 2010 as filed by the respondent in one of their filings in MP No. 18 of 2010.

The respondent in the same affidavit dated 16-8-2012 filed in this PPAP prayed for fixing a cap of the capital cost in terms of Indian Rupee as was done

earlier in the case of M/s. Cuddalore PowerGen Corporation Limited by the Commission. The capital cost of the Cuddalore PowerGen Corporation Limited project seemed to be fixed at Rs.6202 crores after factoring the prevailing exchange rates and allowing a margin of 3.3% on the above. The PPA between the respondent and M/S. CPCL itself has the following provision which sets the cap on the project cost.

“.....The completed cost shall not exceed Rs.6202 crores on any account inclusive of all variations in foreign exchange rate variations except for changes on account of rates of taxes and duties and change in law”.

In the present case on hand the respondent had made a request to the Commission to fix or freeze the capital cost as done in the case of Cuddalore PowerGen Corporation Limited. The petitioners had also expressed their inclination to freeze the capital cost.

Now it becomes necessary for the Commission to freeze the Capital Cost in terms of Indian Rupees. For this purpose the Commission may convert the foreign currencies into rupee equivalent basing on the exchange rates prevailing on a reference date and calculate the project cost. The capital cost so arrived at may be frozen as the cap. The issue thus becomes one of selecting the reference date corresponding to which the exchange rates can be considered for freezing the Capital Cost. There may be many dates contesting for consideration as below.

(i) Date of signing of original PPA	-	12.2.1998
(ii) Date of signing of Addendum 2 to PPA	-	10.1.2012
(iii) Date on which the Respondent requested for freezing capital cost in INR	-	16.8.2012
(iv) Date of filing affidavit by Petitioner requesting to approve the capital cost after finalization of EPC contractor	-	20.2.2014
(v) Last date of hearing of Commission	-	21.7.2014
(vi) Date of this order	-	30.4.2015

Thorough analysis reveals that date under (iv) above emerges as the most relevant date for consideration in view of the following

- (a) The Commission directed the petitioner to select the EPC contractor through ICB and upon selection approach the Commission for approval of Capital Cost. Accordingly the petitioner selected the EPC contractor and presented to the Commission the selection process, final selection of the EPC contractor and the price of the contract and prayed for approving the capital cost of the project on this date, namely, 20.2.2014.
- (b) It is in their affidavit filed on 20.2.2014 the petitioner had expressed willingness to freeze the cost of project in terms of INR even though they were seeking the freezing of cost of the project based on the EPC contract price.
- (c) In addendum 2 to PPA the cost of the project was not frozen even though there was an opportunity available to both the parties and a clause containing applicability of variations in foreign exchange rates on the capital cost does exist in the PPA even post signing addendum 2. Hence this makes the dates prior to this date (10. 1. 2012) of signing of Addendum 2 also out of contest.
- (d) The respondent has submitted before the Commission that the capital cost is to be fixed only after the EPC contractor has been selected by the petitioner.

Therefore it will be most appropriate to consider 20.2.2014 as the reference date.

Our analysis will not be complete unless we discuss on the relevance of considering yet another date. This corresponds to the date based on which the Capital Cost of Rs.5.39 Cr/MW had been arrived at. This reference date falls in July

2010. This date was considered in the counter affidavit filed by the respondent in MP No. 18 of 2010 to present an indicative capital cost for comparison purposes. The Commission did not freeze the cost at Rs.5.39 Cr/MW in MP No. 18 of 2010 but directed that the parties should come before the Commission after complying with the directives made thereunder to get the capital cost approved. In the addendum 2 signed in compliance with the directives of the Commission, this capital cost of Rs. 5.39 Cr./ MW, worked out based on this date has been indicated, but the condition stipulated in the original PPA that any increase or decrease in capital cost due to changes in foreign currency exchange rates shall be reflected in the amount of actual capital cost, has been retained. In other words, even post signing Addendum 2 the definition of capital cost, which stipulates that the variation in foreign exchange rates would apply, continues to remain unaltered. Therefore we may conclude that the reference date in July 2010 cannot be the relevant date for our consideration.

Hence under the circumstances 20.2.2014 appears to be the most relevant reference date for freezing the Capital Cost. The capital cost worked out based on this reference date is Rs.3514 crores.

Now let us see what the members have in their findings proposed.

Learned Member (II) in his findings has arrived at a figure of Rs.3514 Cr. as the permissible capital cost of the project which is the same as the capital cost derived through our analysis. Learned Member (II) has also analysed in detail the reasonableness of the cost. Hence I am not hesitant to agree with the Learned Member (II) in fixing the cap of capital cost at Rs. 3514 Cr.

Other Income

The second issue where differences exist between the learned members is 'other income'. Learned Member (I) states that the entire other income shall be passed on to TANGEDCO as per regulations. I am in agreement with this view and I concur with the findings of Learned Member (I) in this regard.

In respect of other issues both the Learned Members are in agreement and I concur with them.

14. Interim Orders:

The interim orders issued on 02-05-2012 and 13-12-2012 shall be merged with this order.

15. Appeal:-

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

sd/-
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission

