

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**

and

Thiru.G.Rajagopal

.... **Member**

M.A.P.No.3 of 2007

Tamil Nadu Electricity Board
Rep. by its Secretary
No.800, Anna Salai
Chennai – 600 002.

... Petitioner
(Thiru Yasod Vardhan
Senior Advocate for Standing
Counsel of the Petitioner)

Vs.

M/s.Madurai Power Corporation Pvt. Ltd.
(Formerly M/s.Balaji Power Corporation Pvt.Ltd.)
Flat No.G-1, 1, Seshadri Road
Alwarpet, Chennai – 600 018.

... Respondent
(Thiru Rahul Balaji,
Advocate for the Respondent)

Dates of hearing: 18-12-2012, 13-02-2013, 27-02-2014
30-06-2014, 19-09-2014, 29-12-2014
19-01-2015, 17-04-2015 and 05-10-2015

Date of Order: 29-12-2016

In the year 1992, section 43(A) was inserted in the Electricity (Supply) Act, 1948 (since repealed). The said section provided for the entry of private generating companies into the Power Sector and to enter into Power Purchase Agreements with the then existing State Electricity Boards. M/s.Balaji Power Corporation Pvt. Ltd. ventured into establishment of 106 MW Diesel Generating Power Plant at Samayanallur, Madurai District through MoU route and entered into a Power

Purchase Agreement with the TNEB (now TANGEDCO). On 10-02-1997, the name of the company has been changed as M/s.Madurai Power Corporation Pvt. Ltd. (MPCL). The exercise of fixation of capital cost in respect of the said power project was undertaken by the TNEB with the CEA as per then existing legal provisions. After the Electricity Act, 2003 came into force the function of fixing of capital cost of power projects came to be vested in the State Electricity Regulatory Commissions established under 2003 Act. The TNEB filed M.A.P.No.3 of 2007 with the Commission with the prayers *inter alia* to fix capital cost in respect of M/s.Madurai Power Corporation Pvt. Ltd. (MPCL) and for approval of the PPA between the TNEB and MPCL. In the meanwhile, MPCL filed W.P.No.8793 of 2008 challenging the validity of section 86(1) (f) of the Electricity Act, 2003 and another W.P.No.16359 of 2008 challenging the jurisdiction of the Commission to determine the capital cost. However, both the Writ Petitions were withdrawn by the MPCL on 21-08-2012 and thereby MPCL subjected itself to the jurisdiction of the Commission. Certain disputes arose between the Petitioner TNEB and the Respondent MPCL as to the admissibility or otherwise of certain items of expenditure for the purpose of capital cost. The Commission heard the above M.A.P. on 18-12-2012, 13-02-2013, 27-02-2014, 30-06-2014, 19-09-2014, 29-12-2014, 19-01-2015, 17-04-2015 and 05-10-2015. The Commission upon perusal of the petition and after hearing the submissions of the Petitioner and Respondent makes the following order:-

ORDER

1. Prayer of the Petitioner in M.A.P.No.3 of 2007:-

The prayer of the Petitioner in M.A.P.No.3 of 2007 is to-

- (a) fix the capital cost of the project as per clause 86 (1) of the Electricity Act, 2003 as mentioned in the Power Purchase Agreement (PPA) between the

Petitioner Board and the Respondent and on the basis of documents to be furnished by both the parties;

- (b) issue necessary direction to the Respondent to refund the difference that arises by virtue of the completed capital cost being fixed by the Commission.
- (c) direct the Respondent to pay the cost of this proceedings; and
- (d) pass such other further or other orders as this Commission may deem fit and proper and thus render justice.

2. Contentions of the Petitioner (TNEB) in Affidavit dated 28-09-2007:-

2.1. The Petitioner Tamil Nadu Electricity Board ("TNEB" or "Board") is a statutory body, which was originally established under the Electricity (Supply) Act, 1948 and functioning as State Transmission Utility and a licensee under the Electricity Act, 2003. The principal object with which the TNEB was established, was to establish, operate, maintain such generating stations and the lines, sub-stations and main transmission lines connected therewith as may be required with an avowed purpose of transmitting and distributing the electricity so generated, in the most efficient and economical manner with a particular reference to those areas which are not for the time being supplied or adequately supplied with electricity. The TNEB has established several hydro, and thermal stations for generating electricity and distribute the same to the public in general in a most economical manner. Thermal and Hydro power stations have been established after getting necessary approval from the State Government and the authorities concerned.

2.2. On 15.10.1991 by an Official Gazette Notification, section 43-A was introduced into the Electricity (Supply) Act, 1948. By virtue of the said section, for the first time, private power generating companies were permitted to enter into Power

Purchase Agreement (PPA) with the State Electricity Boards like TNEB. Sub-Section (2) of the said section 43-A provides that the tariff for such sale of electricity by a generating company like the MPCL, which sells the energy so generated by it shall be determined in accordance with the norms regarding the operation and Plant Load Factor (PLF) as may be laid down by the Authority, and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined from time to time by Notification in the Official Gazette by the Central Government.

2.3. After introduction of Section 43-A in the Electricity (Supply), Act, 1948, the Government of India issued a Notification on 30-03-1992, setting out the various norms/factors, based on which, the tariff for the sale of electricity to the State Electricity Boards, by the Power Generating Company, has to be determined. On a perusal of the said Notification, it is clear that the capital cost of the project has to be determined by the Central Electricity Authority (CEA), a body constituted under Section 3 of the Electricity (Supply) Act, 1948. Thus, it is clear that a private power generating company could enter into an agreement for the sale of the electricity so produced with the State Electricity Board and the tariff for sale of such electricity has to be determined as per the norms / factors laid down under the Notification dated 30-03-1992. The said notification prescribed that Central Electricity Authority (CEA) constituted under Section 3 of the Electricity (Supply) Act, 1948, as the Authority for the purpose of fixing tariff as well as the capital cost and based on the capital cost only, tariff could be arrived at.

2.4. On a perusal of the amendment introduced by way of Section 43-A to the said Act, as well as the Notification dated 30.03.1992 which provides for the various

norms and factors to be taken into account while arriving at the capital cost, the intention seemed to be that the capital cost on the basis of which, the tariff is calculated and paid by the State Electricity Board is to be reasonable, especially having regard to the consumers' interest as well. The TNEB had mooted out proposals to enter into Memorandum of Understanding (MOU) with various Private Power generating companies for the purpose of purchasing electricity from them. M/s.Madurai Power Corporation (formerly Balaji Power Corporation Pvt. Ltd.), the MPCL herein which was in the process of setting up a power generating station, approached TNEB for the purpose of selling its power to the TNEB. In fact, at that stage, the MPCL was proposing to establish a 100 MW Diesel Power Generating Plant at Samayanallur, Madurai District, Tamil Nadu. An amendment was issued by the Energy Department vide letter dated 10-02-1997 for the change in the name of the Company as M/s.Madurai Power Corporation Pvt. Ltd and change in capacity and to establish 106 MW IC Engine Power Plant.

2.5. Proposals were sent to Government of Tamil Nadu and the Government had, in principle, permitted the setting up of the project by the MPCL, subject to certain terms and conditions and issue of Techno Economic Clearance (TEC) by the CEA. Based on the permission granted by the Government of Tamil Nadu (GOTN), the MPCL appears to have placed its request before the CEA for giving a TEC for the said project. The CEA after going through the norms and the permission given by the GOTN accorded TEC dated 10-02-1998, subject to the conditions stipulated therein. The terms of the TEC are extracted hereunder:

“The above proposal. was considered by CEA on 20.01.98 and accorded Techno-Economic Clearance subject to the following:

The completed capital cost of the scheme shall not exceed US\$ 59.840 M +Rs.150.845 Cr at foreign exchange rate of IUS \$ = Rs.39.00

Interest during construction and the financing charges as per actuals but not exceeding the amount as detailed in the Annexure-I, unless otherwise revised by CEA while according concurrence after review of the financial package.

The abstract of Completed Capital Cost approved by Central Electricity Authority is furnished in Annex.I, summary of financial package at Annex.II, salient features at Annex.III.

The taxes and duties shall be as per actuals subject to the ceiling of Rs.48.165 crores which includes custom duty @22% at FE rate of Rs.39/US \$.

Equity raising charges for foreign equity shall be regulated in accordance with approval of Ministry of Finance.

The margins over LIBOR (London Inter Bank Offered Rate)/PLR indicated in the tentative financial package are firm and not be exceeded.

The final financial package shall not be inferior to the tentative financial package.

The projects shall be completed within a period of 17 months from the date of financial Closure with Commercial Operating Date of

<i>Unit I & II</i>	<i>-14 months</i>
<i>Unit III & IV</i>	<i>-15 months</i>
<i>Unit V & VI</i>	<i>-16 months</i>
<i>Unit VII</i>	<i>-17 months</i>

The concurrence of the Central Electricity Authority shall be considered by the Authority on submission of firm financial package and tying up of balance input / clearance within a period of six months from the date of this clearance.”

2.6. On a perusal of the TEC, it is clear that it is subject to review, after financial closure, and furnishing on a firm financial package (FFP) by the MPCL within a period of 6 months from the date of issue of the letter. After obtaining the said TEC, the MPCL started to tie-up all other requirements as contemplated under initialed PPA dated 11-02-1998. On several occasions, discussions between the parties took

place and on 21.05.1998, a PPA was entered into between the parties setting out the various terms for the establishment, generation and sale of energy to the Board. On 15.01.1999 Amendment I and on 19.04.2000 Amendment II were made to the PPA dated 21.05.98 wherein the capital cost ceiling of the project was mentioned as US \$ 59.84 M plus Rs.150.845 crores, (@ 1US \$= Rs 39.0) which was approved by GOTN and CEA.

2.7. It could be seen from the PPA that the parties had agreed that the sum of as US\$ 59.84 M plus Rs.150.845 crores, (@ 1US \$ = Rs.39.0) (adjusted for foreign currency exchange rate) provided therein shall be a provisional capital cost for the purpose of tariff calculation, pending finalization of the actual completed project cost by the CEA. The Provisional Capital cost filed by the MPCL Company was at USD 59.84 M at Ex.Rate of Rs.46.65 and Rs.159.1133 crores totaling Rs.438.28 crore. As the tariff payment based on provisional capital cost has been objected by the Audit since the completed capital cost furnished by the company i.e. US\$ 57.87 M at Ex.Rate of Rs.46.53 plus Rs.159.74 Cr. totaling Rs.429.01 Cr. is lesser, from the month of 4/05 tariff payment is being made considering Rs.429.01 Cr. as provisional Capital cost. It was further provided that for the purpose of finalizing of the capital cost, the MPCL shall permit access to papers, documents and records as may be considered necessary by the Board and the CEA, at the time of approval of the final cost. In other words, for the purpose of determining the actual completed capital cost than what was tentatively agreed to for the purpose of tariff calculation, the MPCL had agreed to furnish all the documentary proof of actual expenditure for arriving at the final completed capital cost incurred by the MPCL.

2.8. In the meanwhile, the Electricity Regulatory Commission Act, 1998 was promulgated and the said Act came into force on 02-07-1998. The Act was mainly

intended for establishment of Electricity Regulatory Commissions for rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmental benign policies and for matters connected therewith or incidental thereto. The Act further prescribed the powers and functions of the Regulatory Commissions, for the purpose of achieving the objectives and the intent with which the Act was passed.

2.9. The Government of India, Ministry of Power published two Notifications dated 22.03.1999, by virtue of the powers conferred on them, under section 51 of the Electricity Regulatory Commission Act, 1998, which read as follows:

Notification

“S.O. In exercise of the powers conferred by Section 51 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998), the Central Government hereby appoints in respect of the generating companies referred to in clause (a) or clause (b) of Section 13 of the said Act and the States of Orissa and Haryana, the 15th day of May 1999 as the date on which sub-section (2) of Section 43A of the Electricity (Supply) Act, 1948 (54 of 1948) shall be omitted. ”

A further notification was issued by the G.O.I. on 11-09-2000 which read as follows:-

Notification

“S.O. 825 (E)—In partial modification of the Government of India in the Ministry of Power’s Notification Number S.O. 1194, dated the 22nd March 1999, the date of omission of sub-section (2) of section 43-A of the Electricity (Supply) Act, 1948 (54 of 1948) in respect of the generating companies referred to in clause (a) or clause (b) of section 13 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) may be read as 24th day of July 1998.”

On a perusal of the above notifications, it is very clear that sub-section (2) of section 43-A of the Electricity (Supply) Act, 1948 has been omitted which in other words means that the power to fix the tariff has been vested with the Electricity Regulatory Commissions. The notification also states that the date of omission of sub-section (2) of section 43-A of the Electricity (Supply) Act, 1948 in respect of generating companies referred to in Clause (a) or (b) of Section 13 of the Electricity Regulatory Commission Act, 1998 (14 of 1998) may be read as 24.07.1998.

2.10. The execution of the project was commenced by the MPCL with initial energisation on 26.07.01 and the MPCL generating company declared its commercial operation of the power plant, after completion of test to prove its rating, with effect from 22.09.01. While the matter stood thus, the Electricity Act, 2003 came into effect on and from 10-06-2003. The power which was hitherto exercised by the CEA namely, fixation of the capital cost, (which in turn requires the determination of the tariff at which the electricity has to be purchased by the State Electricity Boards from various power generating companies) came to be vested with the Commission.

2.11. The Terms and Conditions for determination of Tariff Regulations, 2005 prescribes under Chapter II, the power to determine tariff and the various norms that go into it and Chapter III provides for the fixation of the capital cost and the various norms that are crucial for arriving at the said capital cost. The said Regulations also lay down the various other provisions for effectively complying with the provisions of the Electricity Act, 2003.

2.12. Based on the PPA as well as the amendments to the PPA dated 15.01.1999 and 19.04.2000, the capital cost ceiling was subject to the determination of the

actual completed capital cost by the CEA. In pursuance to the arrangements entered into between the parties, the MPCL on 19.12.2001 submitted the records to the CEA for fixing the final capital cost of the project and requested the CEA to fix the capital cost at Rs.429.013 Crores. The Company has furnished the total cost as US Dollars 57.87 million + Rs.1597.41 million at an exchange rate of Rs.46.53 / per US \$. These figures work out to Rs.429.013 crores.

2.13. Pending finalization of the capital cost, TNEB was making monthly energy bill payments provisionally. The CEA convened a meeting on 22-11-2005 at New Delhi in which officers of the CEA and the Board participated. An extract of the Record Notes of the discussions is reproduced below:

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

2.14. During the meeting a clarification was sought for by the Board from CEA on the following aspects:-

- (i) Arriving correct exchange rate;

- (ii) Restricting foreign equity: The CEA confirmed that foreign exchange rate protection should not be more than foreign equity envisaged in the tentative financial package for the estimated cost at the time of accord of TEC. Further CEA stated that any reduction in the hard cost shall be reduced to bring down to a level of 30%. Also regarding the issue of increase in foreign equity in completed cost, CEA stated that it was decided that FE rate protection on foreign equity shall be restricted to TEC level.
- (iii) Regarding the non-Engineering Procurement and Construction Civil works:- CEA stated that based on the scope of non-Engineering, Procurement and Construction items and taking in to the fact that the Company has not constructed the staff quarters, TNEB has made deductions.
- (iv) Regarding the issue of equity raising charges, CEA stated that the same shall be disallowed as the IPP has not raised any public issue in respect of foreign or Indian equity. Besides this, certain other clarifications were also raised by the Board in relation to restricting the expenditure to the amount to the TEC level expenses incurred which were already covered under EPC Contract & the expenditure that have no proof of bank transaction. The CEA confirmed the position as proposed/ understood by the TNEB. Based on the said clarifications issued by the CEA, the TNEB had arrived at a sum of Rs.413.660 crores as the capital cost and accordingly a proposal dated 27.01.06 was sent to the CEA.

2.15. In the Standing Committee meeting conducted by CEA on 13.01.2005 various expenditure were discussed. Regarding increase in Interest During Construction (IDC) due on non-creation of Security, CEA confirmed that it would not be allowed.

2.16. The CEA has been addressed for clarification regarding equity participation vide letter dated 21.10.2005 and addressed for clarification on Base Foreign Exchange Techno Economic Clearance e-rate non-Engineering Procurement Construction Civil Operators training and security trustee fee vide letter dated 31-07-2006.

2.17. The capital cost computation was done considering the following factors /definitions/Notification: i.e.,

- (a) Capital Cost as defined in the Power Purchase Agreement (PPA) Article 1;
- (b) Model calculation for determination of Capital Cost as defined in the PPA (Schedule S);
- (c) Change in Law as defined in the PPA;
- (d) Engineering, Procurement and Construction (EPC) Contract;
- (e) Proof of Bank transaction;
- (f) As per Power Purchase Agreement page 82, BFXR (Base Foreign Exchange Rate) has been arrived on weighted Average of foreign currency expended;
- (g) GOI. MoP Notification dated 30.03.1992 (especially para 1.2 para 1.3);
- (h) Limiting to Techno Economic Clearance cost;
- (i). Restricting Foreign equity participation, debt/ equity ratio as per tentative financial package furnished in Power Purchase Agreement page 135;
- (j) Disallowing expenses that were already covered and incurred in the Engineering, Procurement and Construction Contract; and
- (k) Disallowing expenses that were not under scope of the Company as per Engineering, Procurement and Construction Contract.

The amounts disallowed under various heads of accounts are furnished below:-

Sl. No.	Head of Account	Cost claimed by MPC		Arrived by TNEB		Disallowed		Remark
		Amount in Rs.		Amount in Rs.		Amount in Rs.		
		MUSD	Rs.	MUSD	Rs.	MUSD	Rs.	
1	Land & Preliminary Investigation		0.666		0.307		0.359	(a), (b)
2	EPC	53.75	64.2	53.75	63.6		0.593	(c)
3	Custom duty		56.433		56.433			Nil
4	Non EPC cost	0.36	6.531	0.15	6.023	0.21	0.507	(e), (f), (g), (i)
5	Overhead	0.35	12.189	0.3	8.659	0.05	2.206	(d),(h), (j), (k)
6	IDC	2.512	11.458	2.331	10.388	0.181	1.07	(l),(t), (m), (n), (w)
7	Financing charge	0.9	8.248	0.533	6.89	0.373	1.358	(o), (p), (q), (r), (s), (x)
Arrived Base Foreign Exchange Rate = 45.8								(u)
Equity eligible for ROE MUSD 17.73, Rs.7.66 Crore @ BFXR Rs.45.8								(v)

** Remark on disallowed amount furnished item No wise

(a) Land Cost: (Rs.0.3451 Cr.)

Land purchased is not used for quarters. It was stated in the letter dated 28-10-2005 of MPCL that the land is used for green belt. TNPCB in their letters dated 21-07-1995 and 14-05-1996 have stated that the unit shall have adequate space for development of green belt around battery limit of the plant. Since the land purchased is not within the battery limit of the plant, Rs.0.3451 Cr. towards land cost is disallowed.

(b) Site Clearance expense – Rs.0.0142 Cr.

It was reported that the amount was paid by paying cash. Out of site clearance expense of Rs.0.0257 Cr. claimed, 0.0142 Cr. is disallowed, as no receipt for having made the payment has been produced.

(c) EPC-on shore service (Rs.0.59 Cr.)

(i) It was reported that Rs.61,73,600/- had been paid to Wartsila by cheque drawn on Bank of Madura, on 05-05-2000. The payment is

after 25.04.2000 which is the financial closure date. So, the amount should have passed through the facility agent (i.e.) ICICI.

- (ii) The Company has not produced the details of bank transaction for Rs.0.59 Cr. and chalan for having remitted respective TDS.

- (d). Non EPC Civil works (Rs.1.43 Cr.)

The Company's responsibilities as detailed in "Schedule R" of supply agreement and "Schedule R" of service agreement have been considered and allowed. Other civil works are disallowed.

- (e). External Water supply (Rs.0.0553Cr.)

No proof of bank transaction, hence disallowed.

- (f). Construction Supervision (0.218 Cr)

No proof of bank transaction as furnished in Annexure G2, hence disallowed.

- (g). Operators Training (0.26 Cr.).

The expense incurred over and above TEC were disallowed.

- (h). Consulting Engineering (0.886 Cr)

No proof of bank transaction as furnished in Annexure G2. Hence disallowed.

- (i). Construction Insurance (Rs.0.84 Cr.)

As per para (E) of the service contract agreement at Schedule-N, the insurance policy shall comply with the insurance provisions as outlined in Article 10 of the PPA. As such, the amount shall be borne by the contractor. Hence the amount is disallowed.

- (j) Pre-Operative Expenses (0.42 Cr.)

Pre-Operative Expenses of Rs.1.75 Crore were recommended in the report dated 27.01.06 furnished to CEA towards no proof of bank transaction. Subsequently the same was re-audited by Auditor/BOAB/TNEB and recommended disallowance of Rs.0.42 Crore.

- (k). Development Expenses (0.21 Cr ..)
No proof of bank transaction. Hence disallowed.
- (l) PFC (MUSD 0.135613)
Additional interest @.1.05% has been excessively claimed by the company for non-creation of security. Hence the amount is disallowed.
- (m) ANZ Grindlays Bank (Rs.0.2664 Cr.)
Loan restricted to Rs.339.73 M. Hence excess interest is disallowed.
- (n) Interest paid to M/s.Wartsila India Ltd., (Rs.0.4181 Crore)
Not admissible as the interest is for delayed payment and as furnished in the Annexure G2. Hence disallowed.
- (o) Upfront fee (Rs 0.4181 Crore)
Loan amount as per FFP is considered. Hence proportionate excess fee is disallowed.
- (p) Equity raising charges (MUSD 0.37 + Rs.0.4287 Crore)
IPP has not raised any public issue. Hence disallowed.
- (q) Retainer Fee /Lead Manager Fee (0.2 Cr.)
No proof of bank transaction & hence the same is disallowed.
- (r) Processing fee (Rs 0.00253 Cr)
No invoice and proof of bank transaction & hence the same is disallowed.
- (s) Security Trust fee [Rs.0.05633 Cr.]
Excess claimed against Security Trust Agreement and hence the same is disallowed.
- (t) ICICI Interest on arrears (MUSD 0.034126)
The amount is disallowed, because it was due to non-payment of interest in time.
- (u) Base Foreign Exchange Rate:

TNEB has arrived BFxr on the weighted average of expended Dollar as furnished in PPA and rupee value reflected in foreign bill transaction advices issued by ICICI Bank. This works to Rs.45.80/USD. But the Company had arrived BFxr on the weighted average of inward Dollar (Equity & Loan) for EPC payments which is not in line with PPA.

(v) Equity

As detailed in Annexure G2, the following has been recommended

- a) Foreign equity has been restricted to 17.73 MUSD and the balance foreign equity has been converted to rupee equity at BFER (i.e. D not protected with FERV).
- b) The equity has been restricted to 30% and the loan is restricted to 70%.
- c) Promoters equity eligible for ROE has been recommended as Rs.7.66 Cr.

(w) Proportionately reduced IDC – MUSD 0.011+ Rs.0.386 Crore.

(x) Proportionately reduced financing charges:

MUSD 0.003 +Rs.0.2524 Crore

De-hors the capital cost fixed by the CEA, the Commission alone has been vested with the power to fix the capital cost under the Electricity Act, 2003. In fact, the PPA entered into between the parties dated 21.05.1998 under Art. 16.3, definition Clause, defines change in law as follows:-

- a) If as a result of a "Change in Law". the company suffers an increase in cost or reduction in net after tax return or other economic burden, as a result of any restriction on the ability to convert Rupees to Dollars in accordance with the Tariff, or remit funds in Dollar outside India, the aggregate economic effect of which exceeds the

equivalent of one hundred thousand Dollars (US \$ 100,000) in any Tariff year, the Company may notify TNEB and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupied in the absence of such cost increase, reduction in return or other economic burden and the Parties hereto shall meet and either agree on such amendments to this Agreement or alternative arrangements to implement the foregoing.

- b) If as a result of a "Change in Law", the Company enjoys a reduction in cost or increase in net after tax return or other economic benefit, the aggregate economic effect of which exceeds the equivalent of one hundred thousand Dollars (US \$ 100,000) in any Tariff year, the TNEB may notify the Company and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupied in the absence of such decreased cost, increase in return or other economic benefit; and the parties hereto shall meet and either agree on such amendments to this Agreement or alternative arrangements to implement the foregoing.
- c) If no such agreement has been reached within ninety (90) days after meeting pursuant to Article 16.3(a) or (b), the proposals of the parties shall be submitted to arbitration pursuant to Article 15, such that the Company shall be put in the economic position it would have occupied in the absence of such Change in Law.

Therefore, from the relevant clauses contained in the PPA, it is very clear that the Commission alone can fix the capital cost notwithstanding any fixation or cost

hitherto being done by the CEA because such an exercise has to be done by the Commission as per the Electricity Act, 2003..

Based on the documents furnished by the Respondent Madurai Power Corporation Pvt. Ltd. (MPCL) as well as the norms fixed under the Notification issued by the Government of India, PPA provisions and guidelines of CEA worked out the capital cost of the project as Rs.414.99 Crores restricting equity eligible for Return on Equity to Rs.414.99 Crores restricting equity eligible for Return on Equity to US \$ 17.73 M plus Rs.7.66 Crore at a Base Foreign Exchange Rate of Rs.45.8/US \$.

The MPCL submitted the Completed Capital Cost Application for approval wherein the company claimed Rs.429.01 Crores. The MPCL failed to furnish the required proof and documents to substantiate the actual expenditure. After careful consideration and detailed scrutiny of the proposal claimed by the MPCL, the TNEB proposed to allow a sum of Rs.414.99 crores. TNEB had not agreed for a sum of Rs.429.01 Crore which was claimed under various heads of accounts.

3. Contentions of the Respondent (MPCL) in Counter Affidavit dated 14-012-2012:-

3.1. Though the present M.A.P. was filed by the TNEB in 2007, the MPCL was unable to submit its reply before the Commission for the following reasons:-

(a) Pendency of W.P.No.16359 of 2008 in the Madras High Court:-

The Commission is a party to the proceedings before the High Court of Madras in W.P.No.16359 of 2008 wherein the MPCL had challenged the jurisdiction of the Commission to determine capital cost and the High Court was pleased to

issue interim stay on the proceedings until final hearing. Therefore, the MPCL was pursuing the matter in the High Court. However, in the interest of early determination of tariff and in the interest of the project, the MPCL has been advised to withdraw its W.P.No.16359 of 2008 and the High Court allowed the withdrawal on 21-08-2012.

(b) Writ Petition No.8793 of 2008 in the Madras High Court:-

The Commission is a party to the proceedings before the High Court in W.P. No.8793 of 2008 wherein the MPCL had sought a Writ to declare Section 86(1)(f) of the Electricity Act, 2003 as ultra-vires the Articles 14, 19(1)(g) of the Constitution of India and the High Court was pleased to issue interim stay on the proceedings. In the interest of early determination of tariff and in the interest of the Project, the MPCL has been advised to withdraw its W.P.No. 8793 of 2008 and the High Court allowed the withdrawal on 21-08-2012.

3.2. The PPA has to be in conformity with the Official Gazette Notification and Section 43-A of the Electricity (Supply) Act, 1948. The MPCL had submitted to the CEA, the final completed capital cost on December 19, 2001.

3.3. The definition of "Capital Cost" as provided in Appendix D of the PPA provides *interalia* that

"During the period between the Commercial Operation Date and the delivery of the Actual Cost Reports on completion of the Project (the "Actual Completion Costs Report") and its approval by the CEA, the Company will use US\$ 59.84 Million plus Rs.1508.45 Million (@ 1 USD=Rs.39.0) (adjusted for foreign currency exchange rates) as its provisional Capital Cost for purposes of tariff calculation. When the

Actual Capital Cost if finalized, the amount of overcharge or undercharge will be refunded or paid (as the case may be) in twelve equal payments at the time of the payment of the next twelve Billing Period payments after such finalization."

3.4. The MPCL has been submitting its tariff invoice as per the provisions of the PPA. The PPA already provided for refund or payment of amounts either overcharged or undercharged as may be finally determined on the basis of approved capital cost. In complete disregard to the provisions of the PPA, TNEB began to arbitrarily re-calculate the tariff invoices since the Provisional Capital Cost was objected to by its Audit Department. This is not as per the terms of the PPA and entirely impermissible.

3.5. As per Appendix D of the PPA, the MPCL had duly submitted to the TNEB all papers, documents and records, "as may be considered necessary by TNEB and CEA at the time of approval of final costs". Therefore the papers, documents and records were submitted for the approval of final costs by the CEA. The TNEB has wrongly assumed jurisdiction and purported authority to determine capital costs and has unilaterally deducted amounts from the payments towards tariff invoices raised by the MPCL.

3.6. The TNEB has been making only adhoc payments towards invoices raised by MPCL from time to time. As per the provisions of the PPA, until the finalization of capital cost and approval of the same by the CEA, payments shall be made as per Articles 8.3(b)(i) and 8.3(d) of the PPA by the TNEB against invoices raised by the MPCL based on provisional capital cost for the purposes of tariff determination.

3.7. Articles 8.3(b)(i) and 8.3(d) of the PPA are as amended by Addendum I dated 18-01-1999 are reproduced herein below:

Article 8.3(b)(i)

"8.3 Invoice

x x x x

(b) (i) Monthly Payments: On and up to the due date of the invoice, the Company shall be paid directly by TNEB for the full amount stated in the Invoice (Less 2.5% rebate if the payment is made before 5 Business days from the date of submission of Invoice and less 1% rebate if the payment is made after 5 Business days but before the Due Date)."

"(d) Disputes: In the event of any dispute as to all or any portion of an Invoice, TNEB shall nevertheless pay the full amount of the Invoice when due and may serve a notice on the Company that the amount of the invoice is in dispute, in which event the provisions of Article 15 shall be applicable "

3.8. The TNEB has not been making regular payments towards invoices raised by MPCL and such payments have not been made in full as per the provisions of the PPA. Furthermore, the TNEB has never provided the invoice reference against which any payment was being made for the tariff invoices from the date of the first tariff invoice dated 03-10-2001 until 31-03-2011 and hence MPCL had been accounting for payments on a first-in-first-out (FIFO) basis and has been informing the TNEB of the same via a statement as part of its monthly tariff invoice. The TNEB vide its letter dated 04-10-2011 changed this practice for the tariff year beginning 01-04-2011 and is advising the invoice to which a particular payment pertains to. MPCL, without prejudice to its rights and legal entitlements, is making adjustments in terms of the advice. There has been substantial delays in payments from the TNEB leading to accumulation of interest on delayed payments and also payments towards invoice amounts which are as yet outstanding.

3.9. MPCL had submitted to the TNEB vide its letter No. BPCL/SVP-IPP/142/2001 dated 29-03-2001, a Firm Financial Package (FFP) with the tariff working for the same upon achieving Financial Closure for the TNEB's approval. In response to the said letter, the TNEB replied vide its letter No. SE/IPP/EE/PP4/A2/F.SAMAYAA/DT14/01/dated August 30-08-2001 that since the completed capital cost of the project was to be submitted to the CEA within 3 months of the Commercial Operation Date (COD) "the corresponding Actual Financial Package will also be approved while approving the completed capital cost of the project. Hence the interim approval of Firm Financial Package is not necessary at this stage." Admittedly, the CEA convened a meeting on 22.11.2005 without the participation of the MPCL. Whilst the MPCL made its submission of completed capital cost to the CEA in December 2001, by the time the CEA held meetings with the TNEB, the Electricity Act, 2003 was already in force and the MPCL was not even made party to the proceeding at the meeting. This is not merely a violation of natural justice but also a violation of the provisions of the Electricity Act, 2003 since the CEA had no jurisdiction subsequent to the notification of the Electricity Act, 2003. After the Electricity Act, 2003 the TNEB could not have used the CEA's views and filed its petition on the basis of CEA's views for determination of capital cost.

3.10. This unilateral decision at the sole discretion of the TNEB had denied MPCL the opportunity to provide explanations to the TNEB in December 2001 itself or take any possible corrective actions, if it were so required. The FFP had gone through some changes vis-a-vis the Tentative Financial Package ("TFP") as approved by TEC and over a period of time (approximately three years) certain assumptions had changed and no further review was conducted by the TNEB at its option. The TNEB

has stated that based on the CEA's Record Notes, it has arrived at a sum of Rs.413.660 crores as the capital cost of the project. If the TNEB had any reason to doubt the calculations and data provided by the MPCL, the TNEB should have sought clarifications from MPCL, and after the Electricity Act, 2003 came into force the CEA's views could not be unilaterally relied upon by TNEB for determination of Rs.413.660 crores as the capital cost of the project as against the actual capital cost incurred on the project i.e.Rs.429.013 crores. Accordingly, it was also wrong and legally impermissible for the TNEB to submit the proposal dated 27.01.2006, to the CEA which is not in accordance with the provisions of the Electricity Act, 2003, because if the TNEB believed the Commission had the authority to determine capital cost then it should have approached the Commission instead of the CEA at that time in 2006.

3.11. The issues and decisions were unilaterally taken by the CEA in the presence of TNEB's officials and officials from the Ministry of Power (MoP). The CEA's Record Notes indicating certain opinions and decisions on some of the line items itself had factual errors and were not detailed in full nor were they discussed by the TNEB with the MPCL and therefore the TNEB's correspondence with CEA on various capital cost related issues are not binding on the MPCL. In the MPCL's letter to CEA on 19-01-2005 with Ref.No.MPC/MoP/2005, the MPCL had clearly raised objections to the proceedings of the Standing Committee Meeting for Final Completion Cost held on 13-01-2005 and MPCL had expressly mentioned that, "we are not agreeable to any decisions taken unilaterally without giving us justifiable reasons and sufficient time." Such unilateral decisions taken by CEA and the TNEB and renegotiation of completed capital cost are in violation of principles of natural justice and are in any event beyond its jurisdiction and competence and is to be entirely ignored.

3.12. After the Electricity Act, 2003 came into force, the TNEB could not refer matters for capital cost determination to the CEA and it ought not to have addressed the CEA for any clarification on equity participation and on base Foreign Exchange Rate, etc. TNEB should have at least approached the MPCL requesting to provide further clarifications/details. In the alternative TNEB should have approached the Commission since this Commission has jurisdiction pursuant to the Electricity Act, 2003 to determine capital cost.

- 3.13. (a) The definition of “capital cost” in Appendix D of the PPA provides that until the finalization of the actual cost, US\$ 59.84 million plus Rs.1508.45 million adjusted for foreign currency exchange rates as its provisional cost which shall be used for purposes of tariff calculation whereas the TNEB has not used these numbers and has evidently used a different number for paying the provisional tariff invoice (Rs.429.013 crores as capital cost for all items except for Income Tax which basis actually used is not known to MPCL);
- (b) The model calculation for determination of capital cost is provided in Appendix D and Attachment D(A) 1 and there is no Schedule S in the PPA;
- (c) Even after the Electricity Act, 2003 came into force which gave the Commission the jurisdiction to determine capital cost and tariff, the CEA and the TNEB held meetings and discussions without the participation of the MPCL and the TNEB unilaterally decided on the capital cost based on the CEA's views;
- (d) with respect to EPC Contract MPCL has not taken into consideration the default payments which were to be payable in case of default in payments

which arose due to MPCL's default as further elaborated in the following paragraphs;

- (e) the MPCL has submitted the requested details including proof of bank transactions and vouchers, receipts etc for the TNEB's reference and the TNEB has not sought further clarifications from the MPCL before filing its Petition before the Commission;
- (f) regarding BFxr, the MPCL has provided detailed responses in the following paragraphs;
- (g) GOI MoP Notification dated 30.03.1992 (especially para 1.2 and para 1.3);
- (h) the capital cost cannot be limited to the amount tentatively fixed at the time of TEC approval since various factors have changed including loan actually borrowed for the project, foreign exchange rates, etc.

3.14. The MPCL had submitted all details pertaining to the actual capital cost within 3 months of the COD of the project in the formats prescribed by the CEA. At the time of Project Construction, MPCL had purchased some land admeasuring 11.463 acres for a sum of Rs.34.52 lakhs closer to the Plant location for construction of staff colony. This land was originally intended for construction of staff quarters for the employees working in the power plant. The Staff colony was part of the projected capital cost. However, due to lack of good schooling facility and overall infrastructure development in the area, the idea of putting up the staff colony in this land was shelved. MPCL has consequently avoided the cost of constructing the staff colony in the total project cost by not constructing the same, which would have otherwise been allowed by the TNEB as part of capital cost. In addition, the MPCL has absorbed the recurring cost of housing for the entire PPA period of 15 years to be provided to the staff on its own account. MPCL has been required to comply with certain regulatory

requirements of Tamil Nadu Pollution Control Board (TNPCB) with regard to maintaining green belt and plantation of additional saplings on a continuous basis even if it is outside the battery limit of the plant, if no space is available within the plant premises as per TNPCB's consent letter dated 04-09-2003. But this additional requirement was met out of the balance area in the plant itself. The land acquired for setting up of staff colony can be used for development of additional green belt based on any further requirement of TNPCB. In light of the above facts the land cost of Rs.34.52 lakhs claimed towards capital cost may be allowed.

3.15. The TNEB wrongly seeks to disallow Rs.1.42 lakhs towards site clearance expenses already incurred on the sole ground that the same was paid in cash and no receipt was available. Vide MPCL's letter dated 30-05-2005 the MPCL had already informed TNEB that the project land had shrubs, lot of debris, construction waste, coal clinkers etc which needed clearing and for this purpose, the MPCL had hired the services of some JCBs and bulldozers (viz. services of M/s.Star Earth Movers) who were required to be paid in cash before commencing their work as is the normal industry practice for which bills have been furnished. The bills need to be allowed as they were sundry cash payments made due to the factors explained above. The expenses incurred towards site clearance also included labour payments and amounts paid as hire charges to earth moving equipment to clear the debris in the site which had to be necessarily in the form of wages and needed to be settled in cash and could not be made by cheques and hence this expense may be allowed.

3.16. The TNEB is proposing to disallow the amount towards EPC-onshore services for a completely unjustified reason stating that since the payment was made vide a

cheque in favour of the EPC Contractor on 05-05-2000 drawn on ICICI Bank Limited which is not the Facility Agent through the TRA (Trust & Retention Account) opened as per the project financing documents. Whilst the Financial Closure took place on 25.04.2000, considerable number of procedures were required to make the TRA account operational including RBI approval for operating the dollar denominated accounts as part of the TRA. In the interest of the project and for continuous smooth construction work, payments in relation to the project upto June 2000 (i.e. till the TRA mechanism was put in place) were made through the MPCL's existing account with Bank of Madura. The net amount of Rs.59 lakhs consists of a gross amount including tax to be deducted at source. Relevant documents relating to the bank transaction had already been handed over to the TNEB along with letter dated 13.04.2006. As per the regulations and the PPA, the TNEB is not concerned with the mode of payment towards costs incurred for the project so long as the payment has been made towards work completed for the project and for the computation of capital cost. Since the lenders of the project have also accepted this cost which was incurred before the TRA account was operationalised, the TNEB ought to accept this cost. Hence this expense is to be allowed.

3.17. The MPCL had submitted all details pertaining to the break-up of all expenses under non-EPC civil works to the tune of Rs.3.51 crores within 3 months of the COD of the project in the formats prescribed by the CEA. The TNEB has baselessly disallowed costs incurred in relation to civil works totaling to Rs.1.433 crores and has failed to provide a break-up of the costs vis-à-vis works that are being disallowed or tenable grounds in that regard. The scope for non-EPC civil works are mentioned in Schedule R of the two onshore EPC Service and Supply contracts and in addition to the said "Schedule R," certain others are mentioned in Clause 3 (1.3.1) (5) (4) of

“Schedule E” of the said Contracts in respect of work relating to grading and handover of the entire project site along with the compound wall and the raw water and fire water reservoirs in ready condition to the EPC Contractor at the time of issuing "Notice to Proceed". The CEA approved capital cost has provisions for the said Non EPC Civil works. Therefore, there is no justification for the TNEB to consider only “Schedule R” of the Supply Agreement and “Schedule R” of the Service Agreement when the civil works have been properly carried out and costs towards the same have been incurred as per the PPA and TEC approval. The TNEB is now seeking to cull out a portion of such expenses coming under “Schedule E” for disallowance which are also part of the obligations of MPCL and the work has already been completed and payment has been made for the purposes of the project. The works not covered under the scope of the EPC Contractor are the MPCL’s responsibility.

3.18. As per the TEC, an amount of Rs.5.125 crores under the head Non-EPC Civil works was approved for the project. Against this amount, MPCL has spent an amount of Rs.3.516 crores under this head Non-EPC Civil Works. These Non-EPC civil works are very essential to the Project which are carried out by the MPCL. The TNEB has disallowed Rs.1.433 crores out of the total Rs.3.516 crores actually spent under this head contending that it will allow only those items falling under the Non-EPC scope as provided for in the EPC Contracts. The TNEB has not considered all the other civil and related works which have actually been carried out on the project site which are necessarily falling under the scope of the project (and not the EPC Contractor) to be performed by the MPCL and the entire Rs.3.516 crores is well within the TEC budget, that too with a saving of around 30% of the budgeted costs. Therefore the above cost may be allowed.

3.19. The only reason for the TNEB to disallow the claim for External Water Supply is that no proof of bank transaction was provided. The proof of bank transaction is available and can be produced for verification as the same could not be produced earlier as the same could not be located and provided within the short time allowed by TNEB. This Petition was filed even while the MPCL was in discussions with the TNEB as to providing certain clarifications. Inasmuch as the capital cost petition is being heard, the proof would either be filed or furnished to the TNEB for verification.

3.20. The only reason for the disallowance of the claim for construction and supervision is that no proof of bank transaction was provided. The proof of bank transaction is available and can be produced for verification.

3.21. As per the TFP forming part of the head "Operators Training" amounts to 0.20 million USD + 2.50 million INR, working out to a total of Rs.1.181 crores at the foreign exchange rate of Rs.46.53. As against this budget, it has spent 0.15 million USD + 5.10 million INR, which works out to Rs.1.23 crores resulting in a marginal excess of Rs.0.049 crores. It has in fact saved on the foreign currency by organizing the ERP (MAMA) training at the plant site instead of sending the related staff abroad for such training as was contemplated at the time of the TEC. It was able to avoid foreign travel related expenditure and instead engaged Wartsila India to impart such training locally for day-to-day plant operations for hands-on training locally. The maintenance training was organized in Finland and the operations related ERP training was organized in the Plant site. By doing so, it was able to save a considerable expense and ultimately managed to keep the budget overrun to Rs.0.049 crores on an overall basis. If the operation related training had taken place

in Finland as contemplated at the time of the TEC, the total cost of the training would have exceeded the budget significantly. Therefore the marginal excess in rupee expenditure may be allowed considering the saving in foreign currency and the expenditure on training was very much essential and directly related to the Power Plant and part of the approvals.

3.22. The only reason for the disallowance of claim against Consulting Engineering is that no proof of bank transaction was provided and hence Rs.0.366 crores has been disallowed. All amounts paid to the consultant engineers (i.e. Fitchner, Geo Marine, Enviro Energy System, etc.) amounting to Rs.0.287 Cr has been paid through A/C payee cheques only. These payments were made for consultancy work of various types at the time of construction of the project and approximately 14 years have passed since such payments were made and therefore MPCL is unable to locate a few of the bank statements in this regard. Therefore fresh acknowledgements have been obtained or shall produce those available in our files from the consultant engineers wherever bank statements are not available for verification. This expense may be allowed. As regards the balance disallowance proposed of Rs.0.079 crores, the TNEB may provide the break-up details for the same so as to enable MPCL to provide the proof of payment.

3.23. The scope of EPC contractor is detailed in "Schedule N" of the EPC Supply agreement and Services agreement. The EPC contractor is required to take "Marine All Risk" and "Contractors All Risk" policies. These policies would cover the risk of material in transit from the suppliers ware house to the project site and risks attributed to contractor and the contractor's construction equipments and materials during construction. Article 10 of the PPA requires MPCL to obtain insurance policies

and coverages in respect of general liability upto Rs.10 crores, worker's compensation upto Rs.10 crores, automobile liability upto Rs.10 crores, property upto amounts not less than the project construction cost and replacement cost, and umbrella insurance cover upto Rs.10 crores and out of these some of the insurance coverages are taken by the contractor and some are taken by the MPCL (as the owner) under the EPC contract. Contractor has agreed to obtain certain policies as per "Schedule N" of the EPC Contract and the policies taken by the contractor have to be in compliance with Article 10 of the PPA such as they should be obtained on reasonable commercial terms and in the form and substance acceptable to the MPCL. The MPCL has not claimed the amounts paid by the contractor towards insurance premium as part of the insurance cost. The Contractor has paid for all the above insurance coverage as per the contract out of the contract price paid to them and hence such insurance cost covered under the scope of the EPC Contract is not grouped under the head Construction Insurance in this project cost and it forms part of the EPC costs. Under the circumstances, the TNEB cannot disallow any claim made by the MPCL in respect of the project cost. The loan documents of MPCL in relation to the project as executed with the Lenders stipulates the nature of insurance coverage to be undertaken with respect to the Project which is not limited to merely Contractors All Risk Insurance etc., covering the physical construction risk. The Insurance stipulation as per the Lending documents seeks to mitigate the overall risk in setting up the Project and not merely the risks covered under the EPC contract with respect to construction activity of the Project covered under the EPC scope. In light of the above stipulation in the loan documents, the additional insurance cost apart from the one envisaged under the EPC Contract has been budgeted under the head Construction Insurance in the Project Cost and being for the benefit of the project and directly related to it.

3.24. The MPCL admits that it has to bear any risk and losses occurring due to (1) consequential losses arising out of loss/damage to the property leading to delay in commissioning the Project resulting in Liquidated Damages becoming payable to the TNEB; (2) Loss of fixed charge recovery due to the delay in commissioning of the project; to protect the Lender's interest; and (3) third Party liability cover due to accidents involving personal bodily injury or property damage; all of which are not under the scope of the EPC Contractor. Therefore, the insurance cost claimed is an expense in addition to that which is envisaged under the EPC contract which has already been provided for in the budget and the TNEB's contention that only those heads of insurance covered under the EPC contract is allowable, is not in line with TEC approval as per TFP. If this was the case, then there was no need for TEC to have specified a separate line item for Construction Insurance as the insurance cost relating to those covered by the EPC Contractor gets covered in the EPC Cost itself. The TEC recognizing the need for additional insurance cover expenditure on items not covered by the EPC Contract has provided for this budget. The TNEB's contention that the insurance coverage as per those provided for in the EPC contract and Article 10 of the PPA shall only be allowed is not acceptable as they do not cover the entire risk to be insured for. The Commission may be pleased to note that the TEC provided for Rs.1 crore as a separate line item towards insurance in addition to those covered under the EPC contracts and the MPCL's claim of Rs.94.3 lakhs is well within the TEC approved amount and thus it is not correct for the TNEB to now disallow this claim of the MPCL since this cost has already been incurred for the purposes of the Project.

3.25. A detailed clarification on the Pre-operative Expenses have already been provided to the TNEB. The TNEB has merely stated in the Petition that certain

amounts have been disallowed by Board Office Audit Branch without providing any break-up details of the disallowance and the reasons thereof. TNEB may provide the detailed break-up of the proposed disallowance amount to enable MPCL to provide necessary proof of such transaction.

3.26. The MPCL has already submitted the details of the Development expenses to the TNEB including bank transaction statements and the voucher copies of all the years along with respective details for verification by the TNEB. The TNEB has not provided details as to the break-up amounts for which proof of bank transactions have not been made available to them. The TNEB may be directed to provide the detailed break-up of the proposed disallowance amount to enable MPCL to provide necessary proof of such transaction.

3.27. As per the lending documents for project finance, additional interest needs to be paid if the committed security for the loan is not in place. The TNEB was not forthcoming to provide the payment security mechanism as per the terms of the PPA and had not put into operation the Escrow Account nor had it established the Letter of Credit, which it is mandated to do as per the PPA. Despite the requirement in the PPA that Escrow and Letter of Credit facilities be established by TNEB, these payment security mechanisms have not been established. The MPCL is operating the project in these critical circumstances and is finding it extremely difficult to manage the finances and sustain the plant operations. Due to the failure of the TNEB to keep the committed payment security mechanisms in place, it was placed in a perennial default situation with its lenders. Further, the above security mechanism which has not been made available to the project by the TNEB till date since inception, not being consistent with the terms of the PPA, Power Finance

Corporation chose to exercise its right and levied an additional interest of 1.05% (including taxes) equivalent to a sum Rs.0.6328 crores as provided for in the Common Loan Agreement. The TNEB has contended that this interest has been excessively claimed for non-creation of security whereas the fundamental issue with respect to this cost is with the TNEB failing to create the committed security as per the provisions of the PPA and therefore the TNEB cannot disallow this item. In accordance with the principles of equity and justice, the MPCL cannot be penalised for an inability / inaction on the part of the TNEB and therefore this cost may be allowed.

3.28. The reasons for and details of the disallowance of Rs.0.2664 crores towards excess interest payment to ANZ Grindlays Bank have not been provided by the TNEB. The claim of IDC is as per the completed capital cost level and no further disallowance could to be made.

3.29. Since the payment security mechanisms have not been established till date and because of this reason, there was a delay in disbursement of loans during the construction stage of the project which resulted in non-payment of EPC contractors on the due dates. As per clause SC-23.5 of the Onshore EPC contract the MPCL is required to pay penal interest of 4% above the 6 months deposit rate offered by SBI, India which had worked out to 11% if payment was not made on the due date. Whilst this was solely due to default by the TNEB in keeping the payment security mechanism in operation, in order to avoid any further default by the MPCL under the EPC Contracts and to be in compliance of the same, the MPCL was forced to pay Warstila India Limited interest @ 11% p.a. amounting to Rs.41.81 lakhs. But for the default by the TNEB, the lenders would have disbursed the money on time and the

MPCL would have paid the EPC Contractor on time. The loan documents have been executed with the knowledge of the TNEB who is aware that it is a condition precedent to effectiveness and initial disbursement under section 3.1(v) of the Common Agreement dated 25-04-2000 that the escrow account is established and operationalized and "TNEB has performed its obligations under the Escrow Agreement". The EPC contract has also been provided to the TNEB who is aware of the terms therein. Therefore since this cost has been incurred by MPCL for reasons solely owed to the TNEB, the Commission may allow this cost. TNEB is taking advantage of its own wrongs, omissions and commissions which has resulted in default payments under the EPC Contracts. Further the disallowance of this amount of Rs.41.81 lakhs is completely unjustified since this amount is anyway much lower than the amount the MPCL would have paid to the lenders by way of IDC had the lenders made the disbursement on time for payment to Wartsila India Limited. MPCL had paid Wartsila India Limited interest at the rate of 11% per annum as against the average interest of 16.25% per annum payable to Rupee Lenders in the consortium. Despite the interest paid to Wartsila, the overall Interest During Construction was well within the amount as approved in TEC issued by CEA. Therefore, whilst TNEB cannot disallow interest paid to Warstila for reasons solely owed to TNEB, there is no justifiable reason even to permit such disallowance since the actual is less than the TEC approved IDC amount.

3.30. The MPCL was transparent at all times and had also submitted to the TNEB the FFP with the tariff working for the same upon achieving Financial Closure for the TNEB's approval. Without perusing the documents TNEB replied saying the interim approval of FFP was not necessary at this stage. The TNEB seeks to disallow an amount of Rs.41.81 lakhs by restricting the claim of Upfront fee to the TFP level

which works out to Rs. 2.77 crores (the actual working of how this figure is computed has not been provided by the TNEB) as against the actual expense of Rs.3.18 crores. There has been a significant change in the actual financing package as compared to the TFP and also the exchange rate ended up actually much higher at Rs.46.532/\$ as against the TFP rate of Rs.39/\$. Therefore the TNEB cannot use the TFP as the basis for arriving at the quantum of the loan imputed at the notional TFP exchange rate of Rs. 39/\$ which is much different to the actually incurred expenses. Since the loan documents have been executed with the knowledge of the TNEB and the said amounts have already been expensed in relation to the project, the actual cost of Rs.3.18 crores incurred in this regard which is the actual upfront fee of 1.05% paid to the Lenders on the loan and the bank guarantee fee for the foreign currency loans may be allowed.

3.31. As per Clause 3 (xi) of the TEC approval dated 10.02.1998, Equity raising charges for foreign equity is allowed as long as the same is in accordance with the approval issued by the Ministry of Finance. The MPCL was required to pay the equity raising charges for identifying the foreign equity participant. The MPCL obtained the prior approval of the Reserve Bank of India (RBI) in this regard and the payment was made pursuant to this approval from the RBI. The TNEB has failed to appreciate that equity could be raised from strategic investors, partners, etc. and not only by a public issue and also that no condition stipulating raising equity by public issue has been stated in the TEC approval. If the intent behind this expenditure was the cost associated with raising a public issue, then a foreign currency budget which has been approved by TEC would not be required. Therefore reimbursement is not limited to amounts spent for raising equity from public but also for raising equity from

other sources. Additionally, but for the identifying of the right Foreign Equity Partner, the MPCL would not have been in a position to financially close the project.

3.32. The MPCL had appointed ICICI Bank Limited as a Retainer and Arranger for support in tying up the debt portion of the project cost at a fee of Rs.5 lakhs per month commencing from 01-10-1997 till financial closure i.e. disbursement of the loan. Accordingly the MPCL has paid this amount and claimed this as part of the Project cost which is well within the TEC budget. Out of the actual amount of Rs.1.665 crores which was paid to ICICI Bank on a monthly basis is based on an agreement with ICICI Bank dated 29-09-1997. The TNEB is claiming that proof of bank transaction is not available for 4 monthly payments of Rs.5 lakhs each. The TNEB may provide details as to the break-up amounts for which proof of bank transactions is required by them based on which the MPCL shall produce the proof for verification.

3.33. The concerned proof of bank transaction for Rs.0.253 lakhs towards process fee is available for verification and shall be produced. The same may be allowed by the Commission.

3.34. Since the payment security mechanisms were not in place, one of the Lenders viz. ANZ Grindlays Bank stopped disbursement resulting in all lenders suspending their share of loan disbursal, leading to a delay in servicing all payments which were due to be paid by the Project. Since there was a delay in servicing the interest dues to ICICI Bank and based on the provision of the Domestic Foreign Currency Facility Agreement, the Bank claimed the Default Interest which had to be paid to them. But for the default by the TNEB, there would not have been any arrears

in the first place. Whilst this was solely due to default by the TNEB in keeping the payment security mechanism in operation and since the loan documents have been executed with the previous approval of the TNEB, the Commission may allow this cost.

3.35. The TNEB's contention that MPCL has arrived at the BFxr on the weighted average of Inward Dollar (Equity and Loan) for EPC payments is not in line with the PPA, is wrong. As per the definition for "Base Foreign Exchange Rate" in "Appendix D" of the PPA (as amended by Amendment-2) is defined as follows:

"BFxr or the "Base Foreign Exchange Rate" shall mean the currency exchange rate between US Dollars (or other applicable foreign currency) and Rupees utilized by the company in computing the Rupee Capital Cost for all capital assets paid for by the company in US Dollars (or other applicable foreign currency). If multiple exchange rates are utilized by the company for different assets or groups of assets, the BFXR shall be the weighted (according to the various amounts of US Dollars or other applicable foreign currency expended at different exchange rates) average of all exchange rates. "

The above definition is amply clear and means that BFxr is the exchange rate utilized by the MPCL in paying for its capital assets in US dollars. The MPCL has received dollars which have been accounted at the rate as on the date of receipt as evidenced by the Foreign Inward Remittance Certificate given by the Bank and such dollar receipts have been deposited in a dollar denominated account and the same dollars have been used to pay for the project dollar expenses, which transaction does not involve any foreign currency exchange or conversion. In actual terms, there is no additional income or loss to the MPCL as it has used the same dollars which it

received, to pay its dollar obligations. Therefore the effective rate which MPCL has used to "pay" for its capital asset is the rate at which it received by way of debt / equity. This is how the MPCL has accounted for the dollar outflows, which is as per the PPA definition. This is also the same basis on which the Accounting Standards prescribe accounting for capital assets which is what the MPCL has adopted for its books.

3.36. The MPCL has obtained approvals from RBI for maintaining dollar denominated accounts and hence all the dollar denominated equity contribution and the dollar denominated debt disbursements received by the company were deposited and held as USD in the dollar denominated account to ensure that the project does not suffer from any fluctuations in the forex rate between time of receiving the dollar and spending the same. The Project had a total dollar inflow by way of equity and loans to the tune of approx. MUSD 67.68 and a dollar outflow of MUSD 57.87 and since the inflow was higher than the outflow, the timing of the transactions were planned to ensure that dollars were not purchased in the market for an outflow. The procedure of maintaining the dollar denominated bank account operation has been confirmed by the TRA Agent viz. ICICI Bank Ltd vide its letter dated 09-03-2006.

3.37. Since it has maintained the foreign currency denominated dollar accounts into which all the dollar inflows viz dollar equity and dollar loans were maintained as dollar balances, the same such dollar inflows lying as foreign currency balances in these accounts were utilized to pay for the dollar outflows and thereby avoiding currency conversion and an exchange impact on the project cost. Since there is no open market purchase of dollars as on the date of the outflow and all payments were

made out of dollars held as such in the bank account, the MPCL has used the same exchange rate at which the dollar was received as per the FIRC for accounting the dollar outflows. This method does not create an artificial forex gain or loss due to the using of a notional rate on the date of paying the dollar which is different from the rate as confirmed by the FIRC at the time of receiving the dollars. This is the methodology accepted by the Accounting Standards and the books of accounts have been audited on this basis only.

3.38. The methodology suggested by the TNEB is to use a different exchange rate as on the date of the payment for a dollar transaction even though there is no market purchase of dollars on that date and the same dollar which were received as dollars and banked in the Dollar denominated accounts is being used to pay for the dollar outflow. This methodology brings into play: (1) a notional rate in booking the payment transaction by using an exchange rate which does not represent the rate at which the dollars were actually received; (2) an artificial gain or loss in booking each payment transaction which again needs to be adjusted against the respective line item of expense forming part of the Project cost only, as there is no other mechanism to dispose off this loss or gain as these are of a capital nature arising out of asset building and can only be capitalized; (3) the value of the capital asset reflects an artificial value based on the notional rate and does not reflect the actual value based on the actual rates of the dollars used.

3.39. Because of the dollar denominated accounts being maintained by the MPCL, the actual exchange rate used to pay for the capital asset as per the PPA is the actual exchange rate at which it received the dollar by way of equity or loan since the same dollar without any conversion has been paid while expensing the dollar.

3.40. The MPCL has been using this methodology, as prescribed, for its accounting purposes. The MPCL had also informed TNEB that it has been adopting the exchange rate appearing in the Foreign Inward Remittance Certificate certifying the date of receipt, number of dollars received the account into which the amount has been received and the exchange rate applied which is the rate on the date of the transaction. Each of the Foreign Inward Remittance Certificates have the actual exchange rate hand written by the authorized signatory of ICICI Bank Limited which is what the MPCL is utilizing in good faith for the purposes of calculating the projects capital cost incurred.

3.41. The FIRC or the transaction advise has an exchange rate printed, alongside which, another exchange rate is handwritten and authenticated by the Bank official which the Bank has certified to be the correct rate to be adopted since the printed rate is not the current rate and is the rate which is a notional rate fixed by FEDAI on a quarterly basis, as picked up by the Bank's software. ICICI Bank has issued two certificates dated 14-10-2004 and 18-11-2005 clarifying the position on which is the correct rate to be adopted for accounting the receipt dollars.

3.42. Based on this manual correction by ICICI Bank Limited in the FIRCs and as certified by them to be the correct rate to be adopted, the MPCL adopted the manually corrected and authenticated number whereas the TNEB has disputed the usage of the manually authenticated rate and written a letter to the Bank vide its letter dated 12-01-2006 seeking confirmation from the Bank, which was replied to by the Bank on 19-01-2006 confirming what was communicated by it through its earlier certificates.

3.43. In the meantime, the issue was being discussed at length by MPCL with TNEB trying to clarify the factual position. MPCL advised the TNEB to prove that the rates used by it are the most beneficial as compared to two other possible rates viz. (1) the rate which the Bank would have charged the Company had it purchased dollars on the transaction date from the market. MPCL secured a list of such rates from the Bank which it would have charged for the actual payment amount on the respective dates which is as per the Bank's certificate dated 10-01-2006; (2) RBI Reference Rates as on the date of each of the payment transaction date which the Company culled out of the Reference Rate Archive from RBI's website. MPCL prepared an analysis statement using all the three rates, i.e. (1) rates used by the Company as per the authenticated rate in the FIRC on the date of receipt of dollars; (2) ICICI Bank rate which it would have charged on the date of payment transaction; and (3) RBI Reference rate and demonstrated to the TNEB that the rates used by MPCL as per the receipt date FIRCs was the lowest capital cost as compared to the other two rates.

3.44 TNEB have failed to appreciate that the rates adopted by the MPCL was the most beneficial in terms of the lowest capital cost. On the 'contrary, the TNEB has adopted a mix of various types to its own advantage without applying any rate consistently and come up with a Bfxr of Rs.45.80/\$ and has also not provided the methodology of the different combination of rates it has adopted to come up with this rate. This is completely flawed in as much as it is solely calculated at bringing down the Bfxr without any logic. The MPCL has filed the FIRCs with RBI as part of its reporting of the allotment of shares to the Foreign Shareholder by using the manually authenticated exchange rate which has been accepted by RBI vide its letter dated

24-11-2003 which is enough proof for the validity of the FIRC's and the exchange rates used therein.

3.45. TNEB has restricted foreign equity to 17.73 million USD and the balance foreign equity has been converted to rupee equity at BFxr (i.e. USD not protected with FERV). This USD 17.73 million is the TEC approved number on 10.02.1998 based on Tentative Financial Package. The actual foreign equity brought into this project is MUSD 29.72 which was further reduced to the Central Electricity Authority approved cost level of MUSD 28.27. The project cost approved as per the TFP is based on an exchange rate of Rs.39/USD based on which the foreign equity was arrived at as MUSD 17.73 whereas the project BFXR actually ended up at Rs.46.53/ USD.

3.46. Equity as defined in "Appendix D" of the PPA includes the amount of the paid up share capital of the company including foreign equity and realized premium which may be maintained in dollar and rupee denomination separately as per the contribution made by each shareholder to the paid-up share capital of the MPCL and accordingly the foreign equity shareholder has brought in equity dollars corresponding to MUSD 28.27 at CEA level. Therefore the actual foreign equity as claimed amounting to MUSD 28.27 needs to be allowed.

3.47. As per the definition of the term Sponsor in the PPA, Balaji Power Corporation Private Limited, and any other legal person could be a sponsor / promoter as accepted by the lenders to the project. The definition of Sponsor in the PPA is provided below:

"Sponsor" shall mean Balaji Power Corporation Private Limited and any other legal persons nominated by Balaji Power Corporation Private Limited as a sponsor and accepted as such by the lenders."

3.48. At the time of Financial Closure all financing documents including the loan agreement and sponsor documents were scrutinized and approved by all the lenders in the consortium. In the Share Retention and Financial Support Agreement ("SRFSA") dated 25-04-2000, Covanta Energy India (Balaji) Limited ("CEIBL") Mauritius (formerly known as Ogden Energy India (Balaji) Limited) was nominated as the Sponsor. These lenders have accepted CEIBL as Sponsor and therefore CEIBL is squarely within the meaning of Sponsor as defined in the PPA. The MPCL has already submitted to TNEB, the Foreign Inward Remittance Certificates which has not been disputed earlier and therefore there is no justified reason for the TNEB to now restrict the USD sponsor equity to MUSD 17.73 as per the TEC which is based on the TFP and not the FFP. The PPA does not differentiate between who makes contribution towards promoter equity. The Equity as defined in "Appendix D" is equity brought into the project at actual.

3.49. TNEB has proposed to restrict equity to 30% and the loan is restricted to 70% as per the TEC approval and loan documentation. In actual terms the debt equity ratio for the project as per CEA completed cost worked out to 67.51: 32.49. The higher equity component of 2.49% is due to the fact that one of the lenders namely ANZ Grindlays Bank curtailed their loan exposure by about Rs.12.20 crores due to the TNEB's default in non-operationalization of Escrow and Letter of Credit. At that point of time since none of the other lenders were willing to bridge the shortfall because of the said default, the Sponsors were forced to bring in additional equity

over and above their share of the committed equity as per the lending documents. The lending documents required CEISL to bring this standby equity to ensure that the project completion was not hampered when any of the lenders did not make the disbursements in full, including due to default by the TNEB, which is the case in the present instance. Therefore, the only reason for the equity going up from 30 to 32.49% is on account of TNEB's non-operationalization of the committed security and therefore the claim of MPCL cannot be disallowed by TNEB for reasons solely owed to them. Therefore this equity component of 2.49% may be allowed, since this amount has already been utilized towards the project.

3.50. The TNEB has stated that Promoter's equity eligible for RoE has been recommended as Rs.7.6 crores. The Equity as defined in "Appendix D" is equity brought into the project at actual and return on equity ought to be calculated on that amount which is brought in as Equity at actuals. The ROE recommended by TNEB on Rs.7.6 crores is based only on one of the Promoter / Sponsor viz. Samayanallur Power Investments Private Limited. The TNEB has ignored the equity brought in by the other Promoter / Sponsor viz. Covanta Energy India Balaji Limited. While the TNEB is agreeable to convert the balance foreign equity in addition of the TEC approved foreign equity i.e. 17.73 MUSD to rupee equity at BFxr, it is inappropriate that the TNEB has restricted the equity eligible for RoE at Rs.7.6 crores. The Commission may accept promoter's equity eligible for RoE as MINR 88.72 plus MUSD 28.27 totalling Rs.139.388 crores.

3.51. Without providing any reasons and justification, the TNEB has proportionately reduced the IDC. The amount disallowed by TNEB under this head will depend on

the final capital cost approved by the Commission and hence this disallowance figure is not to be considered.

3.52. Without providing any reasons and justification, the TNEB has proportionately reduced the financing charges. The amount disallowed under this head will depend on the final capital cost approved by the Commission and hence this disallowance figure is not to be considered.

3.53. MPCL has already provided the TNEB with copies of all documents and correspondence for the determination of the capital cost of the project. On the contrary, the TNEB has unilaterally, against the principles of natural justice, disallowed various heads of capital cost on the grounds that the same has been disallowed without providing any reasons or explanation as to why the expense has been disallowed.

3.54. The issue of capital cost and the purported disallowances made by TNEB were discussed between the parties in a number of good faith negotiations. MPCL vide letter dated 07.02.2006 mentioned to TNEB that Rs.429.01 crores were actually spent on the project and in the long term interest of the project and to settle the issue with TNEB in good faith since amounts were outstanding from the TNEB for a long time, the MPCL agreed to a reduction of Rs.4.55 crores only to resolve the deadlock situation and not because this amount was not spent on the project. Since the matter has come up before the Commission, the letter dated 07.02.2006 is not to be taken cognizance.

4. Additional Affidavit dated 30-12-2014 filed on behalf of the Petitioner

TNEB:-

4.1. The Commission in its Daily order dated 27.02.2014 has directed as follows:-

"Counsel for both side were present. The counsel for the petitioner presented the case. Thiru. Yasod Vardhan, Senior Advocate appeared for TANGEOCO. While arguing the case, he mentioned about the difference in the understanding of the details regarding the exchange rate regulation and debt equity ratio. It was advised to the counsels of both the petitioner and the respondent to have one more meeting and try to resolve the issues which are still in dispute. The matter shall be listed thereafter."

4.2. Pursuant to the directions of the Commission, the representatives of the TNEB and the MPCL have held meetings on 06.09.2014 and 12.11.2014 and have been engaged in a continuous process of exchange of documents, verification and reconciliation and mutually agreeing on the completed capital cost as Rs.427.76 Crores (Copy of the Minutes of Meeting is furnished as Annexure containing 46 pages).

4.3. Regarding Debt Equity Ratio, both parties are agreeing to adopt a Debt Equity Ratio of 70:30 for the purpose of tariff. The excess equity over 30% (i.e. $32.49\% - 30\% = 2.49\%$) will have to be treated as debt and has to get paid interest at the weighted average interest rate for debt.

4.4. Regarding Foreign Exchange Rate Variation,(FERV) both parties are agreeing that FERV Protection will be accorded only for an equity of 17.73 Million US\$ in the tariff.

4.5. The Commission may approve (i) the Completed Capital Cost as Rs.427.76 Crores; (ii) the Debt Equity Ratio for the purpose of tariff as 70:30 as detailed in para 5; and (iii) the FERV Protection Cap as detailed in para 6.

5. Contentions of the MPCL in their Affidavit of Settlement dated 05-01-2015:-

5.1. As a consequence of the meetings held on 06-09-2014 and 12-11-2014, the parties have arrived at a mutually acceptable settlement in an amicable manner. Both the parties have agreed that the completed capital cost of the 106 Mega Watt power generating station-7 numbers, Wartsila 18V46 engines (15.143 Mega Watt each) at Samayanallur Power Board Complex, Paravai, Madurai-625 432 shall be Rs.427,75,89,092/- (\$ portion of capital cost of USD 57,816,400 at an exchange rate of Rs.46.53/\$ plus rupee portion of capital cost of Rs.158,73,92,000/-).

5.2. The Minutes of Meeting held between the parties for the finalization of the capital cost of the aforementioned project are furnished as "Annexure-A". The Minutes of the Meeting also disclose the detailed item wise deliberations undertaken by the parties and the final position adopted.

5.3. MPCL has accepted the capital cost as arrived at. TANGEDCO has also obtained all internal approvals and is agreeable to the same and served with a copy of such affidavit confirming the same.

5.4. The Commission may take on record the settlement arrived at between TNEB and the MPCL and accordingly pass orders in M.A.P. No.3 of 2007 by recording such settlement and approving the adoption of the completed capital cost of the

project at Rs.427,75,89,092/- (\$ portion of capital cost of USD 57,816,400 at an exchange rate of Rs.46.53/\$ plus rupee portion of capital cost of Rs.158,73,92,000/-).

6. Contentions of TANGEDCO (TNEB) in their Written Submission filed on 23-10-2015:-

6.1. To meet the growing demand of electricity, Government of India framed a policy to allow the private companies/generators in the power sector, during 1991. Based on the guidelines issued by Government of India, the initial batch of projects were awarded on the basis of negotiations between the State Electricity Board and power producer. This is otherwise known as the Memorandum of Understanding (MOU) route. This was permitted till 18.02.1995 by the Ministry of Power, Government of India. Pursuant to the guidelines issued by Government of India, a Memorandum of Understanding (MOU) was signed on 16.09.1994 and a Power Purchase Agreement (PPA) was executed on 21.05.1998 between Tamil Nadu Electricity Board (now TANGEDCO) and M/s.Balaji Power Corporation Ltd (now M/s.Madurai Power Corporation Limited) for a term of 15 years.

6.2. The norms for operation of the power project is as per the notification dated 30.03.1992. The Respondent MPCL's power project consists of 7 units of 15.143 MW Diesel Engines each, totaling to 106 MW. The project is located in the TANGEDCO owned land at Paravai village, Samayanallur, Madurai. The extent of land is 19.40 acres which is leased by the TNEB to MPCL for a period of 20 years from 29.01.1999. The capital cost of the project as per the CEA's Techno Economic Clearance (TEC) dated 10.2.1998 is 59.840 Million US\$ at an exchange rate of Rs.39/\$ plus Rs.150.845 Cr which works out to Rs.384.221 Crores. The project

achieved Financial Closure on 25.04.2000 and achieved Commercial Operation on 22.09.2001. As per the definition for "Capital Cost" given in the Appendix 'D' to the PPA, MPCL has to submit the completed cost of the project to TNEB and CEA, within a period of three months from the Commercial Operation Date of the project, for finalization by the Authority (CEA).

6.3. MPCL submitted their completed capital cost to CEA on 19.12.2001, as per PPA and TEC, seeking approval of the CEA for a capital cost of Rs.429.01Cr. Several meetings were held among CEA, TANGEDCO and MPCL towards finalization of the capital cost until 2005. Prior to enactment of Electricity Act 2003, the authority to determine the capital cost vested in the CEA now rests with the Commission.

6.4. The TNEB has filed MAP before the Commission seeking approval for fixation of Capital cost of the project of MPCL as per clause 86(1) of the Electricity Act 2003 and Appendix -D of PPA on 28.09.2007 and the same is numbered as M.A.P. No. 3 of 2007. The capital cost recommended by the (TNEB) TANGEDCO was Rs.414.99Cr with proposed disallowance for Rs.14.02 Crs under various heads in M.A.P No 3 of 2007. The majority of the disallowance was due to non-production of supporting documents by MPCL.

6.5. MPCL had filed Writ Petitions (WP.No.8793 of 2008 and W.P.No 16359 of 2008) challenging the jurisdiction of the Commission before the Hon'ble High Court of Madras and later withdrew the same during 2012 and came before the Commission for finalization of capital cost.

6.6. The Commission in their daily order dated 27.02.2014 directed to reconcile the claims between the parties. Accordingly, as directed by the Commission, to conduct reconciliation/negotiation talks, CMD/TANGEDCO constituted a committee comprising of officers in the level of HODs/Director.

6.7. Pursuant to the directions issued by the Commission in the present matter vide daily orders dated 27.02.2014, 30.06.2014 and 19.09.2014, the committee of the TANGEDCO and MPCL held meetings on 06.09.2014 and 12.11.2014 and were engaged in a continuous process of exchange of documents, verification and reconciliation and mutually agreed on the completed capital cost of Rs.427.76 Cr. An additional affidavit was filed by TANGEDCO furnishing the agreed position on 30.12.2014 before the Commission seeking approval for fixation of Capital cost of the project of the MPCL.

6.8. The Commission may approve the capital cost of Rs.427.76 Cr. with a Debt Equity Ratio of 70:30 for the purpose of tariff and capping the FERV protection to foreign equity of 17.73 million USD as agreed between the parties vide Minutes of Meetings dated 06-09-2014 and 12-11-2014 and the affidavit filed on 30-12-2014.

7. Written Submissions filed by MPCL on 26-10-2015:-

7.1. The petition has been filed seeking for fixation of capital cost of the project. The cause for filing the said petition arose due to the deadlock between the parties in agreeing upon the Capital cost. At the time of filing of the M.A.P., most aspects of the Capital Cost had been verified and agreed upon between parties. The petition set out certain issues that remained to be resolved.

7.2. Pursuant to the directions issued by the Commission in the present matter vide its daily orders dated 27.02.2014, 30.06.2014 and 19.09.2014 it resulted in the meeting of the representatives of the TNEB and the MPCL to resolve the balance issues which had remained pending due to various reasons. As the issues that required resolution were already identified, meetings dated 06.09.2014 and 12.11.2014 involving all involved personnel from both sides were held. In addition parties have engaged in a continuous process of exchange of documents, verification and reconciliation between 07.09.2014 and 11.11.2014 in order to arrive at a settlement.

7.3. As a consequence of these meetings, the parties have arrived at a mutually acceptable settlement in an amicable manner. Both the parties have agreed after due verification of all records by TANGEDCO that the completed capital cost of the 106 Mega Watt power generating station-7 nos. Wartsila 18V46 engines (15.143 Mega Watt each) at Samayanallur Power Board Complex, Paravai, Madurai-625 432 shall be Rs.427,75,89,092/- (\$ portion of capital cost of USD 57,816,400 at an exchange rate of Rs.46.53/\$ plus Rupee portion of capital cost of Rs.158,73,92,000/-

7.4. "Annexure A" which had been enclosed with the Affidavits dated 05.01.2015 & 17.04.2015 sets out the Minutes of Meeting held between the parties for the finalization of the capital cost of the aforementioned project. The minutes of meeting also disclose the detailed item wise deliberations undertaken by the parties and the final position adopted. The said Minutes of the Meeting are annexed with this order as Appendix.

7.5. A perusal of the settlement would demonstrate that parties both had not completed verification of accounts. During the course of the meetings all documents furnished were verified. A common system for resolution was agreed to and adopted with a view to a fair approach by both the parties. Therefore, wherever documents and accounts for the respective line items were furnished verification was conducted, TANGEDCO agreed to allow the items of expenditure where the required documents were physically available and wherever documents have not been furnished to the satisfaction of TANGEDCO, same has been disallowed. All of the said issues were agreed and therefore only such of the expenditures which have been verified have been actually incurred were admitted by TANGEDCO. All of the individual line items came to be resolved in this manner. All of the disallowances were agreed to by the project company with a view to achieving an amicable closure.

7.6. It is pertinent to state that all items which remained unresolved and which finally came to be resolved pursuant to the settlement are within the limit specified in the TEC. As such, the settlement results in a reduction of the capital cost and in overall to the benefit of TANGEDCO. MPCL has also agreed for such settlement in order to ensure an amicable resolution of all the issues and had given up substantial portion of the claims with a view to arrive at an amicable resolution.

7.7. The Commission may take the settlement of the accounts on record and approve the capital cost as finally determined pursuant to such exercise and to pass such further or other orders as the Commission may deem fit and proper in the circumstances of the case and thus render justice.

8. Findings of the Commission:-

TANGEDCO has filed the Petition for finalization of Capital Cost in respect of Madurai Power Corporation Pvt. Ltd. on 28-09-2007. The Respondent's power project consists of 7 Units of 15.143 MW Diesel Engines each, totaling to 106 MW. This project was executed through the MOU route based on the liberalization policy of the Government of India in the early 1990s. The terms and conditions of the PPA are broadly in line with the Government of India Tariff Notification dated 30-03-1992. The PPA was signed on 21-05-1998. The project is located in the land owned by TANGEDCO at Paravai Village, Samayanallur, Madurai. The project was declared under Commercial Operation on 22-09-2001.

The Electricity Act, 2003 was promulgated and the same came into effect on 10-06-2003. The above petition was filed under Sections 61, 62 and 86 of the Electricity Act, 2003. The prayer of the petitioner being to fix the Capital Cost of the project as per clause 86(1) of the Electricity Act, 2003 on the basis of documents to be furnished by both the parties. The Commission admitted these petitions on 18-12-2012 after withdrawal of the following Writ Petitions in the Madras High Court by the Respondent MPCL.

Writ Petition No.16359 of 2008 in the Madras High Court:

In W.P. No.16359 of 2008 before the High Court of Madras, the Commission is a party to the proceedings wherein MPCL had challenged the jurisdiction of the Commission to determine capital cost and the High Court was pleased to issue interim stay on the proceedings until final hearing. However, MPCL withdrew the Writ Petition No. 16359 of 2008 stating that they were advised so in the interest of

early determination of tariff and in the interest of the project and the High Court of Madras allowed the withdrawal on 21-08-2012.

Writ Petition No.8793 of 2008 in the Madras High Court:

The Commission is a party to the proceedings before the High Court in W.P. No.8793 of 2008 wherein the MPCL had sought a Writ to declare Section 86(1)(f) of the Electricity Act, 2003 as ultra-vires the Articles 14, 19 (1) (g) of the Constitution of India and the High Court was pleased to issue interim stay on the proceedings. In the interest of early determination of tariff and in the interest of the project, the MPCL was said to have been advised to withdraw its W.P. No. 8793 of 2008 and the High Court allowed the withdrawal on 21-08-2012.

The capital cost of the project as per the CEA's Techno Economic Clearance (TEC) dated 10-2-1998 is 59.840 Million USD at an exchange rate of Rs.39/USD plus Rs.150.845 Crores which works out to Rs.384.221 Crores.

The provisional capital cost filed by the MPCL was at 59.84Million USD at an exchange rate of Rs.46.65 and Rs.159.1133 crores totaling to Rs.438.28 crores.

It is seen that the Respondent MPCL had submitted to the CEA, the final completed capital cost on 19-12-2001 as Rs. 429.013 Crores comprising 57.87 MUSD at an exchange rate of Rs.46.53/USD plus Rs.159.74Crores totaling to Rs.429.013 Crores.

Initially, after scrutiny of documents, TANGEDCO had proposed to allow a sum of Rs.414.99 Crores with a disallowance of Rs.14.02 Crores and did not agree for Rs.429.013 Crores as completed capital cost stating that MPCL has failed to furnish adequate documents to allow the total expenditure of Rs.429.013 Crores.

The definition of "Capital Cost" as provided in Appendix D of the PPA provides interalia that

...“During the period between the Commercial Operation Date and the delivery of the Actual Cost Reports on completion of the Project (the “Actual Completion Costs Report”) and its approval by the CEA, the Company will use US\$59.84 Million plus Rs.1508.45 Million @ 1 USD = Rs.39.0) (adjusted for foreign currency exchange rates) as its provisional Capital Cost for the purpose of tariff calculation. When the Actual Capital Cost is finalized, the amount of overcharge or undercharge will be refunded or paid (as the case may be) in twelve equal payments at the time of payment of the next twelve Billing Period payments after such finalization”.

It has been stated by MPCL that the papers, documents and records were submitted for the approval of final costs by the CEA in December 2001. The CEA convened a meeting on 22-11-2005 without the participation of MPCL. Whilst MPCL made its submission of completed capital cost to the CEA in December 2001, by the time the CEA held meetings with the TNEB, the Electricity Act, 2003 was already in force and the MPCL was not even made party to the proceedings at the meeting. TNEB has stated that based on the CEA’s Record Notes, it has arrived at a sum of Rs.413.66 Crores as the capital cost of the project and accordingly sent a proposal to the CEA on 27-01-2006.

In MPCL’s letter to CEA on 19-1-2005 with Ref. No. MPC/MoP/2005, MPCL had clearly raised objections to the proceedings of the Standing Committee Meeting for Final Completion Cost held on 13-1-2005 and it has been stated that MPCL had expressly mentioned that “we are not agreeable to any decisions taken unilaterally without giving us justifiable reasons and sufficient time”. It has been stated by MPCL that such unilateral decisions taken by CEA and TNEB and renegotiation of completed capital cost are in violation of principles of natural justice and are in any event beyond its jurisdiction and competence and is to be entirely ignored.

It has been stated by MPCL that the issue of capital cost and the purported disallowances made by TNEB were discussed between the parties in a number of good faith negotiations and vide letter dated 07-02-2006 mentioned to TNEB that Rs.429.01 Crores were actually spent on the project and in the long term interest of the project and to settle the issue with TNEB in good faith since amounts were outstanding from the TNEB for a long time, MPCL agreed to a reduction of Rs.4.55 Crores only to resolve the deadlock situation and not because this amount was not spent on the project. Further, MPCL has submitted that since, the matter has come up before the Commission; the letter dated 07-02-2006 is not to be taken cognizance.

Both the parties agree for the capital cost to be fixed by TNERC. In the extract of the Record Notes of the discussion held on 22-11-2005 at New Delhi in which the officers of the CEA and TNEB participated is reproduced below:

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

The cost of the project fixed by the CEA in its TEC shall be the ceiling.

In the light of the above final capital cost furnished by MPCL is to be examined. MPCL claims its final Completed Capital Cost as Rs.429.013 Crores.

The Petitioner disputed admission of certain items in the above Capital Cost.

The issues that are to be resolved are as follows:

- i) Additional land purchased – Rs.34,51,866/-
- ii) Site Clearance Expenses – Rs.1,42,856/-
- iii) EPC Onshore Services – Rs.59,00,000/-
- iv) Non-EPC Civil Works – Rs.1,43,88,020/-
- v) External Water Supply – Rs.5,53,708/-
- vi) Construction Supervision – Rs.21,85,503/-
- vii) Operators Training – Rs.26,00,000/-
- viii) Consultancy Engineering – Rs.36,64,816/-
- ix) Construction Insurance – Rs.84,37,058/-
- x) Pre-operative expenses – Rs.42,67,348/-
- xi) Development Expenses – Rs.21,46,641/-
- xii) Additional interest paid to PFC – Rs.0.62 Crore
- xiii) Interest paid to ANZ Grindlays Bank – Rs.0.2664 Crore
- xiv) Interest paid to Wartsila – Rs.0.4181 Crore
- xv) Upfront Charges – Rs.0.4181 Crore
- xvi) Equity raising fee – Rs.2.086 Crores
- xvii) Retainers Fee – Rs.0.20 Crore
- xviii) Processing Fee – Rs.25,300/-
- xix) Security Trust Fee – Rs.5,63,288/-
- xx) ICICI Interest on arrears – Rs.0.16 Crore
- xxi) Base Forex (BFXR) Rate – Rs.4.225 Crores

Several hearings were conducted and the parties were asked to mutually arrive at consensus on the issues under dispute. It has been stated by both the parties that meetings dated 06-09-2014 and 12-11-2014 were held and they both have engaged in a continuous process of exchange of documents, verification and reconciliation between 07-09-2014 and 11-11-2014 and arrived at a settlement and signed the Minutes of the Meeting.

Let us now take up all the disputed issues one by one.

1. Additional Land Purchased – Rs.34,51,866/-

TANGEDCO contended that the land has not been utilized for construction of quarters for the staff. MPCL has responded that the land has been purchased to construct quarters for the staff. However, considering the infrastructure facilities available nearby the site, it dropped the project to construct staff quarters in the land and there is a reduction in the project cost by not constructing the staff quarters. MPCL has further stated that the land was used for maintaining the green belt as compliance to the requirements of TNPCB. However, the petitioner insists that utilization of land has not been for the purpose for which it was procured and therefore it is to be disallowed. This has been agreed to by MPCL too. The Commission accepts the position taken by TANGEDCO that as the utilization of the land was not for the intended purpose and hence to be disallowed. Hence this expenditure of Rs.34,51,866/- stands disallowed.

2. Site Clearance Expenses – Rs.1,42,856/-

Initially, TANGEDCO objected to the payment of the above amount in cash and further it has also stated that there were no documentary proofs for the above payment. MPCL has responded that these expenses were for site clearance for payments towards labour and hire charges towards Earth Moving Equipments to clear the debris in the site. Such payments are in the nature of wages and therefore it has to be paid in cash and furnished receipt and vouchers of Star Earth Mover towards hire charges for JCB, etc. TANGEDCO has verified all the proofs and finally admitted Rs.46,956/- and the balance Rs.95,900/- was sought to be disallowed as there was no documentary evidence. Commission accepts the above proposal to

limit the expenditure to Rs.46,956/- for which documentary evidence has been furnished by MPCL for inclusion in capital cost.

3. EPC Onshore Services – Rs.59,00,000/-

TANGEDCO contended that the above amount was paid towards onshore services by Bank of Madura but it should have been paid through ICICI and further there was no documentary proof furnished for the same. MPCL has responded that in the interest of the project and for continuous smooth operation, payments were made through Bank of Madura, since TRA account could not be made operational immediately on achieving the financial closure. MPCL furnished documentary proof for the above payment. TANGEDCO has verified the proof furnished for the same and declared that the payment is in order. Commission agrees to include the above payment in view of the reasons stated by MPCL and the documentary evidence furnished for the same by the MPCL.

4. Non-EPC Civil Works – Rs.1,43,88,020/-

Initially this item was not furnished to the Commission while furnishing the affidavit of settlement dated 05-01-2015 and Commission during hearing on 17-04-2015 has pointed out the same and directed the TANGEDCO to furnish the particulars relating to this item through an additional affidavit and accordingly TANGEDCO filed the same on 17.4.2015 itself and it was taken on file. TANGEDCO contended that the MPCL's responsibilities as detailed in Scheduled-R of Supply Agreement and Schedule-R of Service Agreement are to be considered and other Civil Works are to be disallowed. In response MPCL has submitted that under the head non-EPC Civil works, an amount of Rs.5.125 crores was sanctioned in TEC. Out of this amount of Rs. 5.125 crores, Rs.3.516 crores spent was well within the TEC limit with a saving of 30% and it has provided break up for all the expenses. There were expenses in addition to the above schedule which the MPCL had to incur as provided for under Clause 5, Item-4 of Schedule-E of the EPC Service Contract which is in addition to those specified in Schedule-R and therefore it should not be disallowed and provided documentary evidence and details for all such payments. TANGEDCO after verification of the documentary evidence has proposed for approval of the entire expenditure except Rs.3,41,381/- for which there was no documentary evidence. MPCL agreed for the above disallowance. The Commission

concurr with the views of the MPCL that MPCL's responsibilities are not limited to Schedule-R of supply agreement and Schedule-R of service agreement but would also include items in Schedule-E of EPC Service Contract. Therefore, the expenditure is to be admitted. However as sufficient documentary proofs were not furnished the sum of Rs.3,41,381/- as proposed by TANGEDCO is to be disallowed.

5. External Water Supply – Rs.5,53,708/-

TANGEDCO objected to the above for want of documentary evidence. MPCL has provided necessary documentary evidence for the above expenditure. TANGEDCO has verified and found the documentary proof submitted to be in order and hence proposed for approval of the same. As proof of payment has been furnished by MPCL to the satisfaction of TANGEDCO, Commission considers this expenditure for inclusion in the capital cost.

6. Construction Supervision – Rs.21,85,503/-

The following items under the above head were proposed to be disallowed by TANGEDCO for want of proof of payment:

- i. Man month charges – Rs.10,29,258/-
- ii. IB Maintenance charges – Rs.3,56,977/-
- iii. Supervision charges – Rs. 5,83,268/-
- iv. Mantech Travel – Rs.71,142/-
- v. Payment made to Taj Retreat, Madurai – Rs.44,858/-
- vi. Payment made to Mr. Ravi – Rs.1,00,000/-

MPCL has furnished documentary evidence in respect of these items. On verification of the documents TANGEDCO was fully satisfied with regard to items ii, iii, v & vi and recommends for inclusion. In respect of item (i) TANGEDCO considers there is no convincing proof for an amount of Rs.66,964/- out of Rs.10,29,258/-. For the same reason, TANGEDCO sought for disallowance of Rs.4,471/- under item (iv). This was accepted by MPCL. In the light of the above, Commission proposes to disallow to an extent of Rs.66,964/- plus Rs.4,471/- and admit the balance.

7. Operators Training – Rs.26,00,000/-

TANGEDCO contended that the INR expenditure incurred over and above TEC approval is to be disallowed. MPCL has responded that the overall training expenditure under the foreign component and INR component are to be seen in toto. There is reduction in the foreign component of the above expenditure and an increase in the INR component to the extent of Rs.26,00,000/-. Training was imparted locally to more number of people and there was a marginal excess in INR expenditure and MPCL has requested to allow the same considering the saving in foreign currency. TANGEDCO has examined the above stand put forth by MPCL and agreed to consider the above expenditure in toto taking both foreign currency and Indian currency components but it has stated that the exchange rate (BFXR) is to be taken at Rs.46.53/USD instead of Rs.48.01/USD considered by the MPCL and thereby TANGEDCO has disallowed Rs.2,73,500/- in the above component as it is in excess of the TEC approval which the MPCL has agreed to. The Commission considers the contention of MPCL that as they had restricted foreign exchange payment by conducting the training locally the expenditure for training incurred in Foreign Exchange and INR are to be combinedly considered. However, Commission disallows the expenditure of Rs.2,73,500/- incurred above the limit set in TEC.

8. Consultancy Engineering – Rs.36,64,816/-

The following are the items under the above head which the TANGEDCO has proposed to disallow for want of proof of transaction.

- i. Fitcher Rs.3,50,000/-
- ii. Geo-Marine Rs.1,26,900/-
- iii. Enviro Rs.5,96,096/-
- iv. Karpagavinayagam – Rs.7,91,820/-
- v. Balaji Distilleries – Shipping Division – Rs.18,00,000/-

MPCL has furnished evidences for proof of payment in respect of all the items. TANGEDCO has verified the proof furnished by MPCL and admitted all the items except the fifth item for a sum of Rs.18,00,000/- for want of proper documentary evidence for payment. Commission agrees for the above proposal.

9. Construction Insurance – Rs.84,37,058/-

TANGEDCO has contended that the above insurance cost is to be borne by the EPC contractor and hence objected to the claims. MPCL has responded that these are the insurances which are insisted by the lenders and therefore to be borne by MPCL only and it is within the scope of TEC approval which has allowed an amount of Rs.1 crore and furnished Loan documents, insurance policies, payment evidences, etc. TANGEDCO has verified all these documents and found that the Loan documents insist for this kind of insurance and further it is within the scope of the TEC approval and hence TANGEDCO has admitted the entire expenses of Rs.84,37,058/-. Commission concurs that the insurance policies as insisted by lenders as mandatory need to be taken by the project developers, the cost of which is to be included in the project cost.

10. Pre-Operative expenses – Rs.42,67,348/-

The following are the items of the above component which are proposed to be disallowed by TANGEDCO for want of proof of payment.

- i. Bank Charges – Rs.36,329/-
- ii. Bank Interest – Rs.44,021/-
- iii. Buildings – Rs.70,599/-
- iv. Business Promotion – Rs.5,18,619/-
- v. Depreciation – Rs.4,48,394/-
- vi. Donation – Rs.5,000/-
- vii. Electricity Charges – Rs.63,319/-
- viii. Interview Expenses – Rs.7,818/-
- ix. Furniture & Fixtures – Rs. 5,72,360/-
- x. Bank Interest for OD – Rs. 24,196/-
- xi. Interest paid to PFC – Rs. 27,534/-
- xii. LC Interest – Rs. 22,32,222/-
- xiii. Rates and Taxes – Rs.80,000/-
- xiv. Vehicle Maintenance – Rs.1,37,027/-

MPCL has furnished documentary evidence for the above items of expenses. TANGEDCO has verified the documentary evidences furnished by MPCL and admitted item Nos. vii, viii, xii & xiii in full and disallowed item no. i, ii, iv, v, vi, x & xi

in full. In respect of item ix, TANGEDCO has disallowed Rs.4,22,219/- and the balance of Rs. 1,50,141/- was allowed similarly in respect of item no. xiv, TANGEDCO has disallowed Rs.95,172/- and the balance of Rs.41,855/- was allowed. In respect of item no. iii, the original proposal of TANGEDCO was Rs.70,599/- however TANGEDCO has now taken a stand of disallowance Rs.3,06,600/- involving an additional disallowance of Rs. 2,36,001/- over and above the original proposal. MPCL has agreed for all the above proposals of TANGEDCO. Commission allows the above dispensation as these are based on documentary evidences.

11. Development Expenses – Rs.21,46,641/-:

The following are the items covered under the above broad head:

- i. Advance Written-off - Rs.30,460/-
- ii. Bank charges – Rs.25,170/-
- iii. Conference & Seminar expenses – Rs.61,500/-
- iv. Borewell expenses – Rs.68,935/-
- v. Conveyance – Rs.7,52,570/-
- vi. Business promotion – Rs.2,84,094/-
- vii. Donation – Rs.59,000/-
- viii. Depreciation – Rs.2,75,691/-
- ix. Interest on TDS – Rs.3,083/-
- x. Electricity Charges – Rs.81,844/-
- xi. Interest – Rs.29,673/-
- xii. License Fees – Rs.1,00,000/-
- xiii. Rent – Rs.25,000/-
- xiv. Travelling Expenses – Rd.3,18,739/-
- xv. Water line expense – Rs.30,882/-

Initially, TANGEDCO has proposed for rejection of all the above items for want of proof of payment. Subsequently, MPCL has furnished documentary evidence towards payment of these items. TANGEDCO has examined the documentary evidences and expressed satisfaction in respect of item nos. iii, iv, x, xii, xiii, xiv & xv and sought the remaining items namely item nos. i, ii, v, vi, vii, viii, ix & xi to be disallowed for want of sufficient proof for payment which MPCL has also

agreed. Commission accepts the above dispensation as only such of those expenses which are backed by sufficient documents could be admitted. When there is lack of proof such expenses are to be disallowed.

12. Additional interest paid to PFC – Rs.0.62 Crore:

This additional interest is for the period from 03.08.2000 to 22.09.2001. This additional payment is towards non creation of security. Hence, the additional interest was opposed by TANGEDCO.

MPCL has contended that as per the lending documents for projects finance, additional interest is payable if the committed security for the loan is not in place. However, TANGEDCO neither operationalized the Escrow Account nor established the Letter of Credit, as mandated in the PPA and hence Power Finance Corporation exercised its right as per the lending documents and levied an additional interest of 1.05% and this is payable by TANGEDCO.

The Financing documents were gone through by TANGEDCO and noted that clause 6.3.3 of the Domestic Foreign Currency Loan agreement and Clause 6.5 of the Rupee Facility Agreement provide for payment of additional interest for non-creation of security.

Further as per the amendment dated 20.7.2000 of clause 5.5 BB(iii) of common loan agreement the borrower had to pay excess interest for non-creation of security to the satisfaction of the lenders.

Escrow account was not operationalized and LC was not opened as mandated in the PPA. This has resulted in TNEB event of default under PPA until the said conditions were waived by the lenders.

Consequently TANGEDCO agreed to allow the expenditure, as the documentary evidence for payment has been furnished and they are in line with the lending documents.

Commission considers the above proposition justifiable as it is in line with the provisions of Lending Documents and accepts the same.

13. Interest paid to ANZ Grindlays Bank – Rs. 0.2664 Crore.

TANGEDCO contended that the interest amount is to be restricted to the loan amount indicated in the financial package, which is Rs.33.973 crores. However the amount disbursed by ANZ bank is Rs.34.30 crores.

MPCL has responded that as per the lending documents for project finance, additional interest needs to be paid if the committed security for the loan is not in place.

There is no finally approved Firm Financial Package. Actual loan amount that has been disbursed is Rs.34.30 crores. Loan documents provide for additional interest of 1.05% if adequate security is not created. No escrow was given by TANGEDCO. Hence, this expenditure needs to be considered for inclusion to the capital cost.

TANGEDCO examined the above statement of MPCL and found that the total loan drawn by the company for the project is lesser than the TEC norms of 70%. On these grounds the entire interest on the loan drawn by the company is to be considered and hence the entire interest claim has to be allowed. TANGEDCO agreed to allow the expenditure as the documentary evidence for payment have been verified and found correct. Commission accepts the above proposition as total loan drawn by MPCL is within the TEC norms by 70%.

14. Interest paid to Wartsila – Rs.0.4181 Crore.

TANGEDCO has contended that this claim is towards interest for delayed payment made by M/s. MPCL to M/s. Wartsila and hence the same cannot be admitted.

MPCL has responded that due to non-operationalization of Escrow account by TANGEDCO, there was a delay in disbursement made by the lenders during the construction stage of the project (from March 2001 to Sep 2001) which resulted in non-adherence of EPC contractor's payment on the due dates.

Clause 23.5 of the EPC contract states as follows:

“If payment of any sum payable by either party under the Supply Agreement is delayed beyond the due date for payment the other party shall be entitled without formal notice and without prejudice to any other right or remedy, to receive interest on the amount unpaid during the period of delay. The interest rate shall be 4% above the six months deposit rate offered by SBI, INDIA on the first business day on which such banks are open for business in India after the due date of payment of such delayed sum”.

Under the EPC contract interest has to be paid for any delay in settlement of EPC contractor's bills. In compliance with that condition interest was paid to Warstila India Limited interest @ 11% p.a. amounting to Rs.0.418 crores.

The interest rate charged by Wartsila India Limited is 11% p.a. as against the average interest of 16.25% p.a. payable to Rupee Lenders in the consortium.

Even after considering the interest paid to Warstila, the overall Interest during Construction is well within the amount as approved in Techno Economic Clearance issued by CEA. Therefore, this expenditure needs to be considered.

TANGEDCO examined the above response of MPCL and found that the EPC contract provides for interest and the delayed payment is due to delay in disbursement of loan by lender owing to non-opening of escrow account by TANGEDCO. The interest rate charged by Wartsila is lesser than the rate that would have been charged by lenders and this is beneficial to TANGEDCO. Considering these, TANGEDCO agreed to allow this expenditure. Commission accepts the above proposition since as per the EPC contract, interest for delayed payment due to delay in disbursement of lenders due to non-opening of Escrow account by TANGEDCO is payable.

15. Upfront Charges – Rs.0.4181 Crore.

TANGEDCO contended that upfront fee for the Loan amount beyond FFP is to be disallowed.

MPCL has submitted that as per the actual loan amount of 36.76 MUSD and 1175.69 MINR, the closing fee eligible as per TEC is 38.96 MINR. But the company restricted the lender's claim to 36.83 MINR and the upfront fee claimed roughly works out to 1.05% of the total loan as per the lending documents.

TANGEDCO has examined the lending documents and found an upfront fee of 1.05% of the loan sanctioned is to be paid as per the financial documents. Total loan assistance of ICICI is Rs.302.658 crores. The company has claimed a sum of Rs.3.18 crores which is 1.05% of the total loan assistance in line with the loan documents. The loan drawn for the project is lesser than the 70% which is fixed by CEA in the TEC. The entire debt is to be considered for the project. Accordingly the entire upfront fee paid in line with the loan documents is to be considered.

Commission accepts the above proposition as the upfront fee of 1.05% of the loan sanctioned is payable by the developer and as the loan drawn for the project is less than 70% which is fixed in TEC.

16. Equity raising fee – Rs.2.086 Crores:

TANGEDCO's stand is that MPCL has not raised any public issue and hence this amount is to be disallowed. MPCL in its response has stated that as per clause 3(xi) of TEC, Equity raising charges for foreign equity shall be regulated in accordance with approval of Ministry Finance. There is no specific condition in the TEC that raising of equity is only by public issue and the equity can be raised from strategic investors, partners, etc. and hence the above expenditure is to be admitted in the capital cost. TANGEDCO has gone through TEC, lending documents, etc. and stated that considering the TEC approval as the bench mark it has agreed to restrict the equity raising charges to the TEC level of 3,90,000USD against the claim of 4,57,000 USD which works out to Rs.1,78,07,400/- and to disallow the balance amount of Rs.30,59,220/- which MPCL has also agreed.

Commission is in full agreement with TANGEDCO that the equity raising fee shall be limited to the level prescribed in the TEC viz, Rs.3,90,000 USD and allows only Rs.1,78,07,400/- towards equity raising fee rejecting Rs.30,59,220/- which MPCL claims to have additionally incurred.

17. Retainers Fee – Rs.0.20 Crore:

TANGEDCO contended that this amount is to be disallowed for want of bank transaction details. Subsequently, MPCL has furnished all the payment details to TANGEDCO. TANGEDCO has gone through the above documents and stated that the total Arranger Fee claimed by MPCL is Rs.1.65 crores and the same is in line with the agreement between MPCL and ICICI. Further, TANGEDCO has stated that it has verified the documentary evidence for payment and proposed for admission of the same. Commission agrees to the above proposal since the expenditure is backed by necessary documentary evidences.

18. Processing Fee – Rs.25,300/-:

TANGEDCO contended that no proof of bank transaction/invoices was furnished by MPCL and therefore it is to be disallowed. MPCL has furnished the documentary evidence as requested by TANGEDCO. TANGEDCO has verified the documentary evidences and proposed for admission of the above expense in capital cost. Commission agrees for the above proposal since it is backed by documentary evidence.

19. Security Trustee Fee – Rs.5,63,288/-:

TANGEDCO contended that as per agreement the annual service charges to the Security Trustee is Rs.8,00,000/- but the company has claimed a sum of Rs.13,63,288/- and therefore the difference of Rs.5,63,288/- is to be disallowed. MPCL in its response has stated that the agreement provides for payment of Rs.1,60,000/- on signing the agreement on 25.4.2000. Apart from this an annual license fee of Rs.8,00,000/- is payable on half yearly basis. The above amount of Rs.13,60,000/- has been paid during construction period from 25.4.2000 to 21.9.2001 pertaining to three half yearly installments at the rate of Rs. 4,00,000/- amounting to Rs.12,00,000/- apart from Acceptance Fee of Rs.1,60,000/- and therefore there is no excess payment beyond the agreement. TANGEDCO has examined the terms of agreement and found that the payment is within the scope of the agreement and hence proposed for full admission of the above amount. TANGEDCO has also verified the documentary evidence for payment and found it

satisfactory. Commission agrees for above proposal of TANGEDCO as it is in line with the provisions of the agreement and is backed by payment proof.

20. ICICI interest on arrears – Rs.0.16 Crore:

TANGEDCO contended that it is relating to payment of excess interest for delayed payment of interest and therefore it is to be disallowed. MPCL has furnished the documents and advises received from ICICI to TANGEDCO and claimed that above interest is to be admitted in capital cost. TANGEDCO has verified the loan documents and found that additional interest is payable for non-creation of security to the satisfaction of lenders and therefore TANGEDCO has proposed for admission of above amount in full. Commission accepts the above proposal as it is within the scope of the loan agreement.

21. Base Forex Rate (BFXR) – Rs.4.225 Crores:

TANGEDCO has arrived at weighted average exchange rate of Rs.45.80 per USD based on the dollar expended by the company. MPCL in its response has stated that due to system error in ICICI bank in printing the FIRC, same forex rate for conversion has been made in the entire financial year. Therefore they have provided indicative forex in their communications. Accordingly, the company had taken the indicative rate furnished by ICICI for arriving at the BFXR. Necessary certificate issued by ICICI in this regard was also submitted to TANGEDCO. The BFXR so arrived at works out to Rs.46.53 per US\$.

Forex rates cannot be varied beyond certain limits by the scheduled or commercial banks with that of the rate allowed by the RBI. The BFXR rate works out to Rs.46.56 per US\$, if RBI reference rates are considered.

The details of forex inflow of debt and equity for the project with the rates furnished by M/s. ICICI have been furnished to RBI and this has been acknowledged by RBI.

There is no specific condition in the PPA that rupee expenses shall not be made by converting foreign currency and it is the prerogative of the company to choose the currency of convenience. The foreign currency inflow by way of dollar

equity and dollar debt is more than the forex expenses, which clearly reveals that the dollar had been converted for making Rupee payments.

MPCL stated that proportionate disbursement was made by the lenders as well as sponsors while capital was received and it necessitated for conversion towards rupee payments.

TANGEDCO informed that they have not considered the indicative rate mentioned in the Foreign Inward Remittance Certificates and taken the printed rates.

TANGEDCO stated that the entire forex expenses ought to have been met out against the already received dollar components in the form of equity and debt and shall not have incurred the expenditure in INR by converting the currency. The BFXR arrived so works out to Rs.46.30 per US\$ and insisted for adoption of the same.

After prolonged discussion TANGEDCO agreed to allow the company's computation of BFXR at Rs.46.53 per USD taking into account of the following:

- a) ICICI has agreed that there is a system error.
- b) The Base Foreign Exchange Rate works out to Rs.46.56/USD if the RBI rates prevailing on the date of expenditure is considered.
- c) The ICICI has given a certificate specifying the rates that would have been charged on the dates of expenditure for the dollar expenditure. The BFXR is Rs.46.62/USD if the ICICI rates are adopted.
- d) In as much as the BFXR arrived at based on the RBI rates and ICICI rates are higher than the rate claimed by M/s. MPCL viz., Rs.46.53/USD, TANGEDCO proposed to adopt Rs.46.53/USD as the BFXR of the project.

Commission accepts the above proposal of TANGEDCO in view of the fact that the method adopted by MPCL for arriving at the BFXR is in order and that the proposed rate is less than RBI/ICICI rates.

NEW ISSUES:

1.	Debt Equity Ratio	Both TANGEDCO and MPCL have agreed for the Debt Equity ratio of 70: 30 and to treat excess equity over 30% as Debt. The excess foreign equity brought in could only be considered as loan for which weighted average interest rate of debt should be applied.
2.	Restriction of FERV protection for Foreign Equity 17.73 MUSD	Foreign Equity mentioned in the TEC given by CEA is 17.73MUSD. Both TANGEDCO and MPCL have agreed for the protection of Foreign Equity up to the level of 17.73 MUSD.
3.	Liquidated Damages (LD) to be collected from the EPC Contractor.	Both TANGEDCO and MPCL have agreed that due to non-operationalization of escrow account MPCL could not draw any loan amount from any lenders during the period from March 2001 to September 2001. Hence, TANGEDCO accepted for the stand of non-recovery of LD from the 10% retention amount by MPCL.
4.	Restriction of Interest During Construction	Both TANGEDCO and MPCL have accepted that as all the Units were commissioned on the same day and the delay was also due to non-operationalization of escrow and non-opening of LC by TANGEDCO and hence, the restriction of Interest During Construction has not been made.

After conducting of meeting, both the parties filed their Affidavit of Settlement before the Commission. In the Affidavit of Settlement both the parties have agreed that the completed capital cost of the 106 MW power generations – 7 nos. Wartsila 18V46 engines (15.143 MW each) at Samayanallur Power Board Complex, Paravai, Madurai – 625 432 shall be Rs.427,75,89,092/-. The US Dollar portion of capital cost will be 57,816,400USD at an exchange rate of Rs.46.53/- per USD as stated in the above table plus a Rupee portion of capital cost of Rs.158,73,92,000/-.

i.e.	Dollar Portion	57,816,400USD	*	Rs.46.53/USD	=	Rs. 269,01,97,092/-
	Rupee Portion				=	Rs. 158,73,92,000/-

	Total		=	Rs. 427,75,89,092/-		-----

In view of the above discussion, Commission hereby approves the completed capital cost as stated above with the following directions:

- a) The Commission approves the completed capital cost for the project as Rs.427.76 Crores.
- b) The Debt Equity of the project shall be 70:30. The Equity excess over 30% of the total capital cost shall be treated as Debt for which a weighted average interest rate shall be applied for.
- c) The protection to Foreign Equity for allowing the FERV shall be limited to 17.73 MUSD as specified in the TEC approval given by CEA.
- d) Since both the parties have accepted that the LD need not be deducted from the Retention amount of the EPC Contractor for the reasons that no payment has been made for the period from March 2001 to September 2001 due to non-operationalization of the escrow account the same is accepted by the Commission.
- e) The restriction of Interest during Construction due to longer construction period shall not be made as both the parties have accepted that the delay for the longer construction period of the Units was on the part of TANGEDCO due to non-operationalization of escrow and Letter of Credit.
- f) The monthly invoices may be redrawn from the date of CoD.
- g) In the definitions in Appendix D, under the head Capital Cost it has been stated that*“When the Actual Capital Cost is finalized, the amount of overcharge or undercharge will be refunded or paid (as the case may be) in twelve equal payments at the time of the payment of the next twelve Billing Period Payments after such finalization”.*

However, in the case of MPCL, the 15 years term of the PPA was already completed on 21-09-2016 and the adjustment of overcharge or undercharge of amount cannot be done in the Billing period payments, the same can be done immediately within a period of three months from the date of issue of this order.

With the above ruling and directions in MAP No. 3 of 2007 relating to fixing of completed capital cost are finally disposed of. The completed capital cost as approved in this order will have to be taken into account for arriving at the tariff as per the PPA entered into between the parties.

There would be no order as to cost.

9. 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.....)
(G.Rajagopal)
Member

(Sd.....)
(S.Akshayakumar)
Chairman

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission