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

PRESENT:-

Thiru S.Akshayakumar …. Chairman

Thiru G.Rajagopal …. Member

and

Dr.T.Prabhakara Rao …. Member

M.P.No.39 of 2015

Tamil Nadu Generation and Distribution
Corporation Limited
Represented by the Chief Engineer / PPP
144, Anna Salai
Chennai – 600 002.

… Petitioner
(Thiru Yasodh Vardhan
Senior Advocate for Thiru M.Gopinathan,
Standing Counsel for TANGEDCO)

Vs.

GMR Power Corporation Ltd.
Represented by its Managing Director
No.1, Pulianthope High Road
Basin Bridge
Chennai – 600 112.

… Respondent
(Thiru Alok Shanker,
Counsel for the Respondent)

Dates of hearing : **13-11-2015, 29-12-2015, 28-01-2016, 05-02-2016, 28-04-2016, 06-05-2016 28-06-2016, 29-08-2016, 09-09-2016 28-09-2016, 21-11-2016 and 12-10-2017**

Date of Order : **04-01-2019**

This Miscellaneous Petition has been filed by the Petitioner pursuant to the direction of the Hon'ble Supreme Court in its order dated 24-04-2014 in Civil Appeal Nos. 3201-3202 of 2012 referring the matter to this Commission for computing and

deciding the claims in the light of the orders passed by Hon'ble APTEL in Appeal No.177 of 2010 dated 28-02-2012. The Commission upon perusing the records and after hearing the submissions of both parties hereby passes the following:-

ORDER

Facts of the Case:-

1.1. M/s.GMR Power Corporation Pvt. Ltd., (i.e.M/s.GMR) the Respondent herein has filed a petition before this Commission in D.R.P.No.10 of 2008 with the following prayers:-

(a) to adjudicate the claims of the petitioner (i.e. M/s.GMR) and direct the respondent (i.e.TNEB) to make payment of a sum of Rs.431,54,35,531/- (Rupees four hundred thirty one crores fifty four lakhs thirty five thousand five hundred and thirty one only) as per schedule-I (as on 30th June 2008) along with interest as per Article 8.6 of the PPA till the date of payment.

(b) to direct the respondent to revise the land lease rental in conformity with Government notification / guidelines dated 4th June 1998.

(c) to restrain the respondent from making any deduction from the tariff and supplementary invoices contrary to the provisions of the PPA

(d) to direct the respondent in future to pay all tariff invoices in full as per the PPA

(e) to alternatively, refer the claim of the petitioner as set out in schedule-I to an Arbitrator(s) appointed by this Commission

(f) to direct the respondent to pay costs

(g) to pass any such further and consequential reliefs which are deemed fit and proper in the facts and circumstances of the case.

1.2. Subsequently, M/s.GMR Power Corporation Pvt. Ltd., had filed an I.A.No.6 of 2008 in the said D.R.P.No.10 of 2008 to amend the prayer. Accordingly, the prayer was amended modifying the claim in the D.R.P.No.10 of 2008 as follows:-

(i)	Land Lease Rentals	:	Rs. 66,25,56,939/-
(ii)	Minimum Alternate Tax (MAT)	:	Rs. 15,16,67,605/-
(iii)	Interest on Working capital	:	Rs. 46,02,93,241/-
(iv)	Reconciliation of Accounts	:	Rs. 8,34,48,424/-
(v)	Start/Stop claim	:	Rs. 44,12,00,000/-
(vi)	Rebate	:	Rs.1,75,36,39,954/-
(vii)	Unauthorised deduction of entry tax	:	Rs. 11,71,46,165/-
(viii)	Interest on delayed payment	:	Rs. 66,45,37,890/-
	Total	:	Rs.4,33,44,90,219/-

1.3. The amended claim of Rs.433.45 crores filed by the Petitioner (i.e. M/s.GMR Power Corporation Ltd.) in the said I.A.No.6 of 2008 was further brought down to Rs.424.98 crores in the statement filed during the hearing on 18-09-2009 before the Commission. The revised claim is as follows:-

			Rs.in Crores
(1)	Land Lease Rent	-	89.81
(2)	MAT	-	14.95
(3)	Interest on working capital	-	46.03
(4)	Reconciliation of accounts	-	8.35
(5)	Start / stop charges	-	44.12
(6)	Rebate	-	164.01
(7)	Entry tax	-	11.71
(8)	Interest on delayed payment	-	46.00
	Total	-	424.98

1.4. The decision of the Commission in its order dated 16-04-2010 on the above issues may be briefly summarized as follows:-

A. Rebate:-

1.4.1. M/s.GMR Corporation is required, under the terms of the PPA executed on 12-09-1996, to submit an invoice to the erstwhile TNEB at the beginning of every month for all amounts receivable during the previous month. If the TNEB makes

payment within 5 working days of receipt of the invoice, it is eligible for a rebate of 2.5% of the invoice amount. The PPA further stipulated that rebate would be admissible, only if the TNEB establishes a Letter of Credit. The PPA was amended with effect from 01-03-2000 to provide additionally for a rebate of 1% for settlement of invoices between the 6th day and 30th day. This amendment did away with Letter of Credit as a pre-condition for availing rebate. The first and second Units of M/s.GMR were commissioned on 31-12-1998. The third Unit was commissioned on 30-01-1999. The fourth and the last Unit was commissioned on 15-02-1999. The invoices for the first and the second Units were due in February 1999. The invoices for the third and the fourth Units were due in March 1999.

1.4.2. The bird's eye view of M/s.GMR's claim is:

Clause of PPA	Breach	Submission	Document relied	Amount claimed
8.3 (a), (b) and (c) of PPA. ------------------- 8.3 (b) (i) of addendum–2 to PPA.	i) TNEB did not open LC and availed rebate between 1999 to 2000. ------------------- ii) TNEB made payments only short payments and delayed between 2000 to 2005. ------------------- iii) TNEB made only short payments between 2005 to 2008.	TNEB not entitled to rebate on any bill till 2002 since no LC was opened and thereafter made only delayed or short payments and not eligible for availing rebate.	Letter by TNEB to GMR, dated 10-09-2001 expressing their financial strain and inability to make full payments. ------------------- Letter by GMR to TNEB explaining various instances of unlawful rebates availed by TNEB.	Rs.164,01,33,394

1.4.3. The Commission ruled on this issue as follows:-

(1) As lease rent was recovered from monthly tariff invoices by the TNEB with the consent of M/s.GMR, the TNEB will be deemed to have made full payment, if he had retained 15 paise per unit between 18-12-1999 and 23-02-2001 and if it had recovered lease rent along with applicable penalty for the period (as and when M/s.GMR failed to make advance payment of lease rent as stipulated in Clause 3.1 of LLA).

(2) M/s.GMR is directed to rework the monthly invoices for the period covered by the D.R.P.No.10 of 2008 as per the direction in (1) above and submit them to the TNEB within two months of the order.

(3) If the TNEB had made full and timely payment against the reworked monthly invoices, it would be deemed to have been eligible for rebate.

(4) If the TNEB has availed of rebate for any payment less than full payment as defined in (1) above, it is liable to refund the rebate along with interest at the rate prescribed in Clause 8.7 / Clause 8.6 of the PPA from the date of deduction till the date of refund.

(5) The TNEB is not entitled for rebate in the case of 41 ad-hoc payments effected between 28-12-2001 and 28-03-2005; TNEB is directed to refund the rebate with interest at the rate prescribed in Clause 8.7 / Clause 8.6 of the PPA from the date of deduction till the date of refund.

(6) The TNEB is directed to make payment within six months of receipt of the claim from the Petitioner in six equal monthly instalments.

B. Interest on working capital

The brief statement of claim by M/s.GMR Power Corporation Ltd., under this head is as follows:-

Clause of PPA	Breach	Submission	Document relied	Amount claimed
Appendix-D definition of working capital.	TNEB discarded Deemed Generation in calculating PLF achieved by the Petitioner	PLF includes deemed generation also as per definition of PLF.	Letter by GMR to TNEB, dated 01-07-1996 objecting for computation of interest on working capital less than 85% PLF.	Rs.46,02,93,241
Definition of PLF. Definition of Deemed Generation.	TNEB agreed to consider 85% PLF for calculating interest on working capital but failed to follow the same.	As per PPA, the company is supposed to be available for dispatch at 85% PLF at all times and hence it is only rational to calculate interest on working capital at 85% PLF.	Letter dated 19-07-1996 to consider working capital at 85% PLF.	
Article 6.3 (a) and (b) (i)	TNEB gave lesser dispatch instructions even though the company has been always available at minimum 85% PLF.	The company should not be penalized for obeying the terms of PPA by made itself available at 85% PLF at all times.	TNEB sent letter to GMR, dated 30-07-1996 agreeing for claiming working capital based on 85% PLF.	

On the above issue, the Commission ruled as follows:-

(1) Deemed generation qualifies for addition to the physical generation for the purpose of interest on working capital.

(2) M/s. GMR is directed to submit their claim along with interest on account of short payment of interest on working capital for the period from 01-04-2002 to the TNEB in accordance with the ruling within two months of this order. Interest on the claims shall be governed by Clause 8.6 of the Addendum 2 to the PPA governing late payments. Interest is payable from the date when the claim became originally due. The TNEB is directed to settle the claim within six months of receipt of the claim in six equal monthly instalments.

C. Start-Up Costs

1.4.5. The bird's eye view of M/s.GMR's claim is as follows:-

Clause of PPA	Breach	Submission	Document relied	Amount Claimed
6.3 (a) and (b) of PPA.	TNEB failed to pay start-up costs for each start-up in excess of 10 start- ups per unit.	Petitioner submitted details of start-ups and calculation for claiming reasonable costs for excess start-ups vide communication dated 13-03-2000	Start-Stop details and details of expenses sent by GMR to TNEB.	Rs.44.12 crores.

1.4.6. On the above issue, the Commission ruled as follows:-

(i) M/s. GMR and the TNEB are directed to reconcile the number of start-ups for the period from 1st April 2005 to till date within 15 days of the order.

(ii) M/s. GMR is directed to submit its claim for start-up cost accruing from 1st April 2005 to till date to the TNEB within a period of two months thereafter at the rate of Rs.76,677 per start-up and the TNEB is directed to make payment within a period of six months of receipt of the claim in six equal monthly instalments.

(iii) M/s.GMR is eligible to claim interest in accordance with clause 8.6 of Addendum 2 of the PPA.

(iv) M/s. GMR and the TNEB are at liberty to mutually negotiate the start-up charges prospectively.

D. Entry Tax:-

1.4.7. The bird's eye view of M/s.GMR's claim, is as follows:-

Clause of PPA	Breach	Submission	Amount claimed
8.2 (b) of PPA and 8.3 (d) of addendum-2 to PPA.	In the event of any dispute, TNEB shall pay the full amount of Tariff Bills and shall raise dispute as per Dispute Resolution Mechanism. But TNEB made unilateral deduction in the Tariff Bills.	HPCL had reversed the concessions and demanded back the amount. Petitioner (i.e.M/s. GMR) has to pay the amount back to HPCL. Unilateral deductions by TNEB are against PPA.	Rs.11,71,46,165
16.3 of PPA	In case the company suffers as a result of the change in law, TNEB has to place the company in the same economic position as it would have been in the absence of such change in law.	Despite the fact that HPCL reversed the concessions, TNEB failed to repay the deductions on account of Entry Tax.	

1.4.8. The Commission ruled on the above issue as follows:-

The TNEB is directed to refund Rs.10.04 crores directly to HPCL, since the money legitimately belongs to HPCL and Rs.1.67 crores to M/s. GMR being interest recovered from it within a period of 2 months of the Order.

E. Land Lease Rent (LLR):-

1.4.9. The bird's eye view of M/s.GMR's claim is as follows:-

Issue	Clause of PPA	Breach	Submission	Document relied	Amount Claimed	Judgment in support
Land Lease Rent	17.1 (b)	TNEB failed to give effect to GOI notification allowing LLR as pass through.	TNEB should have been given effect to GOI notification immediately & treated the LLR as pass through.	GOI notification dated 17.04.1997	Rs.89,80,52,446	[1994 (2) SCC 594] [AIR 2006 SC586] [AIR 1966 SC 735] [2007 (8) SCC 1]
	3.3(b)(i)	TNEB failed to grant site lease on the terms and conditions to the satisfaction of the company	(i) GMR made representation to TNEB to give effect to the GOI notification to treat LLR as pass through.	Letter by GMR to TNEB, dated 19.12.1998		
			(ii) TNEB should have revised the LLR as 2% of the Market value as per GO. 460 dated -----	GO. 460 dated ------		

1.4.10. The Commission ruled on the above issue as follows:-

1.4.10.1. The summary rejection of the plea of M/s. GMR for "pass through" of lease rent on 26-11-1998 by the TNEB is violative of clause 17 (1) of the PPA and

the GOI Notification dated 17-04-1997 issued under the authority of section 43(A) (2) of Electricity (Supply) Act, 1948. M/s. GMR is entitled to pass through of the lease rent with effect from 17-04-1997, the date on which the notification of the Government of India came into effect.

1.4.10.2. The quantum of lease rent is determined as below:-

(a) From 19-12-1996 to 18-12-1999 - Rs.30,73,943/- per month.

(b) From 19-12-1999 to 09-03-2005 - lease rent of 2% of land cost and an additional surcharge of 23% of the lease rent (additional surcharge of 23% has to be borne by the TNEB).

(c) From 10-03-2005 - 14% of land cost per month.

(d) From 19-12-2005 onwards - 14% of the land cost per month.

1.4.10.3. The TNEB is entitled to retain the lease rent recovered from M/s.GMR from 19-12-1996 to 16-04-1997. Clause 3 of Appendix-D of the PPA shall be amended in accordance with the Notification dated 17-04-1997 of the Ministry of Power, Government of India.

1.4.10.4. M/s.GMR is permitted to claim lease rent with effect from 17-04-1997 as determined in para (1) above as pass through item.

1.4.10.5. Whatever lease rent has been paid by or recovered from M/s.GMR from 17-04-1997 to till date will be refunded to it with interest at the rate prescribed in clause 8.7 of the PPA for the period upto 29-02-2000 and interest at the rate prescribed in clause 8.6 of Addendum-II of the PPA with effect from 01-03-2000.

1.4.10.6. M/s. GMR has been allowed “pass through” of land lease rent with effect from 17-04-1997. This will entail refund of rent realized from HPCL by

M/s.GMR in terms of Article 3 of the sub-lease agreement. Such refund would be admissible, only if that rent has been absorbed by the HPCL without it being passed on to the TNEB through M/s.GMR in some form or the other. The TNEB, M/s.GMR and the Sub-lessee are directed to sort out this issue. They may come up before the Commission, should there be any dispute on this issue.

1.4.10.7. Prospectively, the rent for the sub-lessee is fixed at Rs.100/- per year in accordance with Article 3 of the land sublease agreement.

1.4.10.8. M/s.GMR is directed to submit its claims to the TNEB in accordance with this ruling within two months of the order. The TNEB is directed to make payment within six months of receipt of the claim in six equal monthly instalment.

F. Minimum Alternate Tax:-

1.4.11. M/s.GMR has filed a claim for reimbursement of Minimum Alternate Tax (MAT) of Rs.14,95,48,790/- as on 30-06-2008. This was the amount outstanding as on 30-06-2008 for the dues upto the financial year 2006-07.

1.4.12. The Commission ruled on this issue as follows:-

M/s.GMR Power Corporation Ltd. is directed to submit within two months, the list of outstanding claims on account of Minimum Alternate Tax to the TNEB. The TNEB is liable to pay interest in accordance with the PPA from the date when the original supplementary invoice submitted by M/s. GMR was due for payment. Interest is payable till the date of actual payment by the TNEB. The TNEB is directed to make payment within six months of the claim in six equal monthly instalments.

G. Interest on delayed payment:-

1.4.13. The bird's eye view of M/s. GMR's claim is as follows:-

Clause of PPA	Breach	Submission	Document relied	Amount claimed
Interest on Late Payments: 8.6 of Addendum-2 to PPA. Billing & Payments : 8.2 (b) of PPA and 8.3 (d) of addendum-2 to PPA.	TNEB made several deductions in Tariff Bills contrary to the terms of PPA.	Late payments shall bear interest equal to PLR charged by working capital bankers. TNEB made several payments beyond due date on which they obligated to make payments & liable to pay interest in terms of 8.6 of addendum-1 to PPA.	TNEB's letter to GMR, dated 10-09-2001 expressing financial constraints to make full payments in time.	Rs.45,99,69,583

1.4.14. The Commission ruled on this issue as follows:-

1.4.14.1. M/s.GMR is directed to exclude the 15 paise per unit from the invoices for the period from December 1999 to 23-02-2001 and exclude lease rent from the first invoice right upto August 2008 and re-submit the invoices to TNEB within 3 months of the Order.

1.4.14.2. If the TNEB had made payment equal to the re-worked invoices as indicated in para (1) above within the grace period of 30 days, the TNEB is not liable to pay interest.

1.4.14.3. If the payment made by the TNEB was less than the quantum indicated in the re-worked invoices, then the TNEB is liable to pay interest on the shortfall.

1.4.14.4. If the payment made by the TNEB was in excess of the re-worked invoices as indicated in para (1) above within the grace period of 30 days, the TNEB would be entitled to interest at the rate prescribed in the PPA.

1.4.14.5. The ad-hoc payments of the TNEB will be adjusted against the outstanding as on that day and if there is still a balance outstanding, that balance will be construed as late payment and will qualify for interest.

1.4.14.6. The TNEB is directed to make payment of interest within 6 months of submission of the claim by M/s.GMR in six equal monthly instalments.

H. Reconciliation of Accounts:-

1.4.15. The bird's eye view of M/s.GMR's claim is as follows:-

Clause of PPA	Breach	Submission	Amount claimed
Billing & Payments : 8.2 (b) of PPA and 8.3 (d) of addendum-2 to PPA.	TNEB made only ad hoc payments of Tariff bills on several occasions.	TNEB agreed to pay the dues after reconciliation of accounts but has not paid the same.	Rs.8,34,48,424.

1.4.16. The Commission ruled on this issue as follows:-

1. The Commission directed that both M/s.GMR and the TNEB jointly carry out the reconciliation of accounts as on 30-06-2008 within 3 months of the order. M/s.GMR will submit its claim within a month of reconciliation and thereafter the TNEB is directed to make payment within a period of six months.

2. Against the said orders of the Commission dated 16-04-2010, TANGEDCO (formerly TNEB) filed an Appeal No.177 of 2010 before the Hon'ble Appellate Tribunal for Electricity, New Delhi with a prayer to set-aside the order of the Commission dated 16-04-2010. During the pendency of the appeal, TANGEDCO has paid a sum of Rs.537 crores (inclusive of interest) to M/s GMR, as per order dated 19.11.2010 of Hon'ble APTEL.

3. During the pendency of the Appeal Petition in APTEL, TANGEDCO filed an Interim Application No.205 of 2011 in the said Appeal No.177 of 2010 before the Hon'ble Tribunal, bringing to the notice of Hon'ble Tribunal about the credits availed by M/s.GMR from their fuel supplier viz Hindustan Petroleum Corporation Limited, and prayed that M/s GMR be directed to pass on the said credits to TANGEDCO with interest, from the respective dates of availing of the said credits.

4. The Hon'ble Tribunal by the judgment dated 28.02.2012, allowed the I.A.No.205 of 2011 in Appeal No.177 of 2010 with the following directions:

> *"17.10. Accordingly, the interest to be computed on the amount of fuel invoices payable by the Respondent No.1 to the Respondent No. 3 for the period of number of days of credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the Respondent No.3, should be set off against the interest on delayed payment due to the Respondent No.1 from the appellant in terms of the order of the State Commission........."*

"17.12 .... Accordingly we direct the Respondent No.1 [GMR] and Respondent No.3 [HPCL] to reconcile the same within a period of 30 days from the date of this judgment. In case any freight subsidy/discount was given, the same with interest calculated at the rate agreed in the PPA shall be paid by the Respondent No.1 [GMR] to the Appellant [TNEB] within 30 days of the date of reconciliation or adjusted in the amount payable by the Appellant [TNEB] to the Respondent No.1 [GMR].

5. Against the above order dated 28.02.2012 of APTEL, M/s.GMR filed a Civil Appeal No.3201-02 of 2012 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India in its order dated 24-04-2014 has passed the following orders:-

"3. Since this exercise is merely in the nature of computation and calculation, the same would basically lie within the domain of a Chartered Accountant. Hence, we deem it appropriate with the consent of the counsel for both the parties to refer this dispute of computation to the Tamil Nadu Electricity Regulatory Commission ("TNERC" for short) for examining the contesting claim of the parties insofar as the quantum of amount is concerned."

6. TANGEDCO had submitted before the Hon'ble Supreme Court the detailed calculations of the credit amount to be passed on by M/s.GMR to TANGEDCO (in terms of APTEL order dated 28.02.2012 vide its affidavit dated 09-04-2014). M/s.GMR also submitted their workings to the Hon'ble Supreme Court in their affidavit dated 23.04.2014.

7. Contentions of the TANGEDCO:-

The TANGEDCO in its petition dated 07-08-2014 has submitted as follows:-

7.1. The amounts computed as receivable by TANGEDCO from M/s.GMR works out to Rs.284.87 crores.

7.2. HPCL has allowed credit period to M/s.GMR, for the fuel invoices, during various years as detailed below:-

Credit Period	No. of days of credit per invoice
December 1998 to April 1999	25
May 1999 to August 1999	30
September 1999 to March 2001	45
April 2001 to December 2001	60
January 2002 to February 2002	75
March 2002 to March 2007	90
April 2007 to May 2012	75
June 2012 to July 2012	60
August 2012 to November 2012	45
December 2012 to till date	30

7.3 The Interest enjoyed by M/s.GMR on the value of fuel invoices for the duration of the credit days extended by HPCL is the credit.

7.4. The credit is calculated on a monthly basis, as the product of (a) the total value of fuel invoices raised during a billing month, (b) rate of interest charged by M/s.GMR to TANGEDCO as per PPA for interest on delayed payment as applicable from time to time and (c) the credit days allowed by HPCL for that month.

7.5. TANGEDCO is entitled to interest on the credit from the day on which the credit becomes due, till the date of actual payment by M/s.GMR. For the purpose of this affidavit, TANGEDCO has (a) incorporated invoices received upto 14-02-2014 (expiry of initial term of PPA) and (b) calculated the interest upto 31-07-2014.

7.6. Accordingly, the value of the credit availed by M/s.GMR, payable to TANGEDCO works out to Rs.157,04,23,877/- (Rupees one hundred and fifty seven crores four lakhs twenty three thousand eight hundred and seventy seven only). The interest on the credit amount works out to an amount of Rs.120,93,92,485/- (Rupees

one hundred and twenty crores ninety three lakhs ninety two thousand four hundred and eighty five only) for the period upto 31-07-2014.

7.7. Accordingly, M/s.GMR is liable to pay TANGEDCO a total amount of Rs.277,98,16,362/- (Rupees two hundred and seventy seven crores ninety eight lakhs sixteen thousand three hundred and sixty two only) in relation to the credit period allowed to them.

7.8. The details of amount receivable by TANGEDCO from M/s.GMR in relation to the credit period allowed to M/s.GMR on yearly basis from December'1998 to till 14-02-2014 is an amount of Rs.277,98,16,362/-.

7.9. In respect of the freight subsidy enjoyed by M/s.GMR from HPCL, the Hon'ble APTEL at Para 17.12 of the order dated 28.02.2012, directed M/s.GMR and HPCL to reconcile the amount of freight subsidy for the period from April 2001 to August 2001 and to pass on the same to TANGEDCO with interest calculated at the rate agreed under the PPA within 30 days from the date of reconciliation of the amount payable.

7.10. The value of the freight subsidy allowed to M/s.GMR by HPCL for the period from April 2001 to August 2001, as per the letter of HPCL dated 29.07.2011 is an amount of Rs.2,66,07,599 (Rupees two crores sixty six lakhs seven thousand five hundred and ninety nine only).

7.11. The interest on the above amount of freight subsidy works out to an amount of Rs.4,23,11,216/- (Rupees four crores twenty three lakhs eleven thousand two hundred and sixteen only) for the period upto 31.07.2014.

7.12. M/s.GMR is liable to pay a total sum of Rs.6,89,18,815/- (Rupees six crores eighty nine lakhs eighteen thousand eight hundred and fifteen Only) (inclusive of interest on the amount of freight subsidy for the period till 31.07.2014) in relation to the freight subsidy enjoyed by it during April 2001 to August 2001.

7.13. In light of the aforementioned facts and calculations, M/s.GMR is liable to pay a total amount of Rs.284,87,35,177/- (Rupees two hundred and eighty four crores eighty seven lakhs thirty five thousand one hundred and seventy seven only) to TANGEDCO calculated as on 31.07.2014. M/s.GMR is also liable to pay further interest thereon till the date of actual payment. The summary of claims is as follows:-

Sl. No.	Particulars	Amount (in Rs.)	Interest payable thereon (in Rs.)	Total credits to be passed by M/s.GMR to TANGEDCO (in Rs.)
1	Value of Credit	157,04,23,877/-	120,93,92,485/-	277,98,16,362/-
2	Freight Subsidy availed	2,66,07,599/-	4,23,11,216/-	6,89,18,815/-
	Total	159,70,31,476/-	125,17,03,701/-	284,87,35,177/-

Note: Interest calculated upto 31-07-2014.

8. Contention of TANGEDCO in its Petition dated 29-12-2015:-

8.1. The TANGEDCO in its petition dated 29-12-2015 has further submitted as follows:-

The Hon'ble APTEL in its order dated 28-02-2012 (in Appeal No.177 of 2010 filed by TANGEDCO) has held as follows:-

> *"17.9. We notice that the respondent no.3 allowed some grace period for payment of fuel bills by the respondent No.1 in relaxation to the terms and conditions of the FSA. Admittedly no amendment was signed between the respondent No.1 (i.e.* M/s. GMR) *and 3 (i.e. HPCL) which necessitated the approval of the appellant. The invoice on account of interest on working*

capital or variable charges were not impacted by the grace period for payment allowed by the respondent No.3 to the respondent No.1 in terms of the PPA. However, when the appellant's claim for interest on delayed payment of invoice which included the components of Interest on Working Capital and Variable Charges has been allowed, the grace period allowed to the respondent No.1 by the respondent No.3 will result in unjust enrichment of the appellant in respect of the interest on delayed payments. When the fuel price is a pass through in the tariff, it is logical that the impact of credit on account of grace period for payment allowed by the respondent No.3 should also be passed on to the appellant in setting-off the interest on account of the delayed payments due to the respondent No. 1 from the appellant.

17.10 Accordingly, the interest to be computed on the amount of fuel invoices payable by the respondent No.1 to the respondent No.3 for the period of no. of days of credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the respondent No. 3 should be set off against the interest on delayed payment due to the respondent No.1 from the appellant in terms of the order of the State Commission. The amount shall be reconciled by the appellant (i.e. TNEB) and the respondent No. 1 within 30 days of this judgment The rate of interest shall be the same as stipulated in the PPA. The amount of interest calculated on the various fuel invoices of the respondent No. 3 for the grace period shall be paid by the respondent No. 1 to the appellant within 30 days of reconciliation of the accounts or adjusted in the amount payable by the appellant to the respondent No.1."

8.2. During the pendency of the appeals before APTEL, a sum of Rs.537 crores, the entire amount due in terms of the order of the Commission had been paid to M/s GMR by TANGEDCO. In view of this, the issue of adjustment /set-off of the interest was not possible. M/s GMR thus became liable to pay the sums due in terms of the order of the Hon'ble Tribunal in IA No.205 of 2011.

8.3. Aggrieved by the aforesaid Order dated 28.02.2012 in IA No.205 of 2011, M/s GMR had preferred appeals, in Civil Appeal Nos. 3201-02 of 2012. Prayer of M/s GMR in CA Nos.3201-02 of 2012 was as follows:

"Allow and admit the Civil appeal against the impugned order dated 28.02.2011 passed by the APTEL, New Delhi only to the limited extent it allowed application (I.A. 205/2011 in Appeal No.177/2010) filed by the Respondent No.1".

8.4. The Hon'ble Supreme Court in the order dated 24.04.2014 has expressly held that they are not disturbing the impugned judgment and order passed by the Appellate Tribunal. In other words, the order of APTEL in IA No. 205 of 2011 has been affirmed. It is significant to note that TANGEDCO has preferred an appeal before the Hon'ble Supreme Court against the judgment and order of APTEL in Appeal No 177 of 2010 and the same is pending as Civil Appeal No.4913 of 2012. Thus the issues raised in the said Appeal are sub-judice before the Hon'ble Supreme Court and were not decided in the Civil Appeals filed by M/s GMR. The judgment in Civil Appeal Nos. 3201-02 of 2012, thus, arise out of and deal with the issues decided in IA No. 205 of 2011 alone.

8.5. During the pendency of GMR's Civil Appeals, the Hon'ble Supreme Court had directed both parties to file the computation of amount due as per the order. While, the TANGEDCO had filed the memo of calculation, M/s.GMR had initially failed to comply with the directions of the Hon'ble Supreme Court by not filing their workings. The TANGEDCO had submitted the computation along with an affidavit dated 09.04.2014. In paragraph 7 of the said affidavit, the payment made by the TANGEDCO, during the pendency of the appeals before APTEL, as per the order of the Commission has been referred to. It was only after the order of the Hon'ble Supreme Court dated 22.04.2014 that M/s GMR chose to give the calculations on 23.04.2014.

8.6. It is well settled that after adjudication of the lis, the computation can be relegated for determination in execution proceedings. After holding that the order of APTEL in IA No. 205 of 2011 does not warrant interference, the Hon'ble Supreme Court had relegated to the Commission the determination of the actual amount due.

It is well settled that the executing court cannot go beyond the judgment/decree. Thus, what has been remanded for determination is only the computation of the amount due to TANGEDCO. The allegations to the contrary by M/s. GMR are against the judgment of the Hon'ble Supreme Court.

8.7. The Commission has to determine the amount due on the basis of the order in IA No.205 of 2011. It will also be clear from the fact that the Hon'ble Supreme Court has expressly observed that the said exercise of computation and calculation would basically lie within the domain of a Chartered Accountant. Para 3 of the order of the Hon'ble Supreme Court is extracted below:

> *"Since this exercise is merely in the nature of computation and calculation the same would basically lie within the domain of a Chartered Accountant. Hence, we deem it appropriate with the consent of the counsel for both the parties to refer this dispute of computation to the Tamil Nadu Electricity Regulatory Commission (‘TNERC' for short) for examining the contesting claim of the parties in so far as the quantum of amount is concerned”.*

8.8. In terms of the Supreme Court's judgment, it is an accounting exercise alone that requires to be undertaken. The contention of M/s.GMR that the remittance of the case to the Commission shows that the same is not in the nature of execution and that the Commission has the prerogative to re-open the entire case to ascertain the entitlement of TANGEDCO for any credit is untenable and contrary to the judgment of the Hon'ble Supreme Court.

8.9. M/s.GMR, after submitting the calculations before the Hon'ble Supreme Court, is taking a different stand now .Their contention that this was without prejudice to the issues raised in the letter dated 23.04.2014 is without merits as the said letter was also before the Hon’ble Supreme Court . After going through the documents furnished by both the parties the Hon'ble Supreme Court had decided not to disturb

the orders of the Hon'ble Appellate Tribunal. Since M/s.GMR had disputed the working furnished by TANGEDCO, the Hon'ble Supreme Court thought it appropriate to remit the matter to the Commission for deciding the amount receivable by TANGEDCO.

8.10. In para 17.10 of the order, the Hon'ble APTEL has directed that the interest has to be worked out for the number of credit days given with respect to the terms of the FSA for the respective fuel invoices. Accordingly, the amount have been computed. The Chartered Accountant's certificate dated 26-07-2014 annexed to the petition shows the methodology of the computation. The computation by M/s.GMR goes beyond the ambit of the Hon'ble Supreme Court's order and the scope of remittal.

9. Reply of M/s.GMR (hereinafter in paras 9,10 and 12 referred to as GPCL)**:-**

9.1. M/s. GMR in their reply has submitted as follows:-

9.1.1. As TANGEDCO filed an IA directly in APTEL its alleged claims has not passed through test of adjudication. The application proceeds erroneously on the premise that no adjudication is required. There is a dispute between the parties with respect to impact of the grace period on the tariff invoices raised by the GPCL. Hence, the same requires adjudication.

9.1.2. The claims of the TANGEDCO are based entirely on conjectures and have no basis. The rights and obligations of GPCL and TANGEDCO are governed by the Power Purchase Agreement ("PPA") entered into between the parties. The interest on working capital and variable charges under the PPA were not affected by the grace period allowed by the HPCL.

9.1.3. APTEL directed that the impact of the grace period should be passed on to TANGEDCO and set-off against the interest on account of delayed payment payable to GPCL. Accordingly, the impact of the 'grace period' on the liability of TANGEDCO would have to be first adjudicated and in the event any benefit is found in the hands of GPCL, then the same would have to be set-off against the interest on account of delayed payment payable by TANGEDCO.

9.1.4. It is settled law that the interest on delayed payment is paid to compensate a party who is entitled to certain monies and has been deprived of the use of the same. The Supreme Court in Central Bank of India Vs. Ravindra, (2002) 1 SCC 367 reviewed the basis for levy of interest.

9.1.5. Clearly, the principles for awarding interest as per the terms of contract are well settled and there is no relation between the interest on delayed payment with a corresponding expense to be incurred by the party claiming interest. The above principles have been consistently been applied by APTEL and in the matter of Ispat Industries Ltd. vs. MERC in Appeal Nos.70 & 110 of 2008 order dated 05.08.2010. Relevant part of the order is extracted hereunder for ready reference:

> *"18. The gist of the principles relating to the payment of interest laid down by the Hon'ble Supreme Court would be summarized as follows:*
>
> *(i) Even in the case of security deposit, the interest is payable. Since the amount is held as security, the security amount should bear the same interest as admissible on fixed deposit of scheduled banks.*
>
> *(ii) In an action by way of restitution, it is the duty of the court to give full and complete relief to the party. In other words, the court has not only the power but also has a duty to order for interest.*
>
> *(iii) The interest on equitable grounds can be awarded in appropriate cases. The rate of interest awarded in equity should neither be too high nor too low.*

(iv) The general provision of section 34 of Civil Procedure Code being based upon justice, equity and good conscience would authorise the redressal forum like the State Commissions as well as the National Commissions to grant interest appropriately.

(v) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation by calling it by any name. It can be called interest, compensation or damages. This is the principle of section 34 of the Code of Civil Procedure.

(vi) It is well settled law that when the party is entitled to the principal amount, which was retained by the other party, the said party is entitled to get back the principal amount as well as the interest".

9.1.6. The above principles were also applied by APTEL in its order dated 28.02.2012 relied on by the Petitioner as the basis of its claims. The relevant part of the order is extracted hereunder for ready reference:

"13.7. We do not agree with the contention of the appellant that the respondent No.1 has to establish incurring of any loss before claiming the interest on late payment. The respondent No.1 is entitled for interest for the money due to it on a particular date but illegally held back by the appellant. Further, the PPA also stipulated payment of interest on late payments from the date they become due.
13.8. x x x x x
13.9. The seventh issue regarding interest on delayed settlement of invoices is also decided against the appellant."

9.1.7. Clearly, APTEL rejected the contention of the TANGEDCO that interest for delayed payment can be awarded only after establishing actual loss having been incurred by GPCL. Liability to pay interest on the outstanding amount was a contractual stipulation and TANGEDCO's stand that the interest on delayed payment should be set-off against the gain from grace period allowed by HPCL is entirely baseless and is contrary to the provisions of the PPA. On the issue of impact of grace period a similar plea was raised by TANGEDCO in the matter of PPN Power. The Supreme Court (2014) 11 SCC 53 rejected the application filed by TANGEDCO

praying for impleadment of IOCL (fuel supplier in that case) and directed to refund Rs.240 crores against the various discounts offered by IOCL.

9.1.8. It is pertinent to state that the Hon'ble Supreme Court in order dated 24.04.2014 (in the Civil Appeal Nos.3201-02 of 2012) it is noted that a dispute has arisen between the parties. It is settled law that once a dispute has arisen between a generating company and a distribution licensee it has to be adjudicated upon by the appropriate Regulatory Commission. .

9.1.9. It is submitted that no financial benefit accrued to GPCL by extension of the credit period allowed in terms of the FSA entered into between HPCL and GPCL. The Tariff and supplementary invoice raised by GPCL on TNEB as per PPA terms had no financial impact on account of extended credit by HPCL to GPCL and APTEL has confirmed in Para 17.9 of its order dated 28.02.2012. The computation by TANGEDCO is incorrect, ignores the provisions of the PPA and the FSA that are binding on the parties.

9.1.10. It is submitted that TANGEDCO failed to pay tariff invoices on the due dates in full and only paid 7 out of 197 invoices by their respective due dates. The non-payment of tariff invoices was a wilful and deliberate act in breach of the PPA which is evident from the Board notes of TANGEDCO recorded in the order of the Commission dated 16.04.2010.

9.1.11. As a result of the non-payment of tariff invoices, GPCL was left with no option but to approach HPCL seeking extension of the credit period towards making payment of the fuel supplied by it. Since, GPCL was the single largest off-taker of

the fuel from HPCL and the fact that the fuel supplied to GPCL was residual fuel from the refinery, HPCL extended the credit period. This was done only to ensure that refinery continues to operate and the residual fuel is evacuated from the refinery and GPCL continues to meet its PPA obligation in the interest of grid and public at large even after blatant continuous violations by TANGEDCO.

9.1.12. An extended time for payment of invoices was allowed by HPCL as a business decision considering the extreme financial hardship faced by GPCL due to non-payment of tariff invoices by the TANGEDCO and its implications on performance by GPCL of its duties and obligations under the PPA and FSA.

9.1.13. The extended period for making payment for the fuel off-taken by the Appellant was a gratuitous act. An act is gratuitous when there is no legal consideration in return. A legal consideration is different from motive for doing an act.

9.1.14. HPCL allowed an extension in the time for making payment for off-take of fuel with the intention that the same shall result in continued off-take of LSHS, which is a residual product in its plant.

9.1.15. GPCL has paid all the fuel invoices raised by HPCL in full and there was no financial benefit as a result of the grace period for making payments. The cost of the fuel which was considered for determining the variable charge under the tariff invoice raised by the Appellant and the amount paid by the Appellant pursuant to the bills raised by HPCL was same.

9.1.16. In any event, any interest paid to the fuel supplier by the generating company has not been recovered from TANGEDCO. The terms and conditions of payment are entirely between GPCL and HPCL and any impact on GPCL of delayed payment was not a pass-through in tariff under the PPA. In the event, any monetary benefit that was received by the generating company had to be passed on to TANGEDCO and the same was done from time to time which is recorded in the order of APTEL. Extension of time for making payment did not affect the variable charge payable under the PPA. The same is confirmed by the order of APTEL. Therefore, the hypothetical credit impact assumed by TANGEDCO to have been received by GPCL is being used to withhold payment of tariff invoices raised by GPCL which remain unpaid till date.

9.1.17. TANGEDO's alleged claim must be based either on the provision of the contract entered into between the parties and/ or the applicable law. Neither the provision of the PPA nor any law has been cited to substantiate the claim of the petitioner TANGEDCO. The claim is based on assumed benefit accrued to GPCL from the grace period. Neither in contract nor in law any claim is made out and the present petition is merely an abuse of process, another method of holding back payments due to GPCL.

9.1.18. As per the PPA, GPCL can raise Tariff invoices only as per the provisions of the PPA. The heads under the PPA against which payments were made by TNEB are as under:

(a) the Fixed Charge Payment; plus
(b) the Variable Charge Payment; plus
(c) the Incentive Payment, if any; plus
(d) the Foreign Exchange Adjustment; and plus
(e) the Change-in-Law Adjustment;

9.1.19. Further, GPCL can raise Supplementary Invoices towards recoveries other than the above which includes late payment surcharge payable if invoices raised by the generating company are not paid by their respective due date by TNEB.

9.1.20. The fixed charge payable under the PPA is determined in accordance with the formula specified in Appendix B to the PPA. A review of the formula would make it clear that it is not dependent upon payment terms between the fuel supplier and the generating company. The Fixed charge is calculated to include the following: (a) Interest on Debt; (b) Depreciation; (c) Return on Equity; (d) O&M and Insurance Expenses; (e) Interest on Working Capital (f) Income Tax and (g) Other Taxes.

9.1.21. Interest on Debt, Depreciation, Return on Equity, O&M and Insurance Expenses, Income Tax and Other Taxes are not variables and are not dependent on the payment dates agreed between the fuel supplier and the generating company.

9.1.22. Interest on Working Capital is computed in accordance with the formula in the PPA. The same is dependent on the 'working capital' calculated as per the PPA and the interest rate in the working capital loan agreement.

9.1.23. The working capital is the amount which shall cover the cost of the following:

(i) fuel stocks actually maintained but limited to 30 days of consumption;
(ii) sixty days consumption of stocks of lubricating oil;
(iii) O&M and Insurance Expense for one month;
(iv) allowance for maintenance spares as per the PPA.

9.1.24. The interest on working capital is not dependent on payment terms agreed between the fuel supplier and generating company and there was no impact on fixed

charge payable under the PPA by virtue of the grace period given by the fuel supplier/ HPCL.

9.1.25. The variable charge is calculated on the basis of the weighted average cost of fuel during the billing period. A review of the formula in the PPA, would clarify that the variable charge does not take into account the date on which payment were to be made to the fuel supplier under the fuel supply agreement. Thus, the grace period allowed by the fuel supplier did not have any impact on the variable charge.

9.1.26. A review of the formula for variable charge and fixed charge shows that the late payment surcharge, if any, paid by generating company to the fuel supplier was not a pass through and was borne by the generating company.

9.1.27. Further, APTEL in the order dated 28-02-2012 has also expressly held that interest on working capital and variable charge are not impacted by the grace period allowed by the fuel supplier to the generating company.

9.1.28. Thus, no amount other than what is due to GPCL in terms of the PPA was billed and thus there has been no unjust enrichment on account of variable charge or interest on working capital payable to GPCL does not arise.

9.1.29. TANGEDCO is reading the order of APTEL in a piece-meal manner. In any event, the direction by APTEL was unambiguous that only if credit has been received that the same should be taken into account and benefit thereof alongwith interest at the rate specified in the PPA should be passed on to the Petitioner.

9.1.30. No monetary benefit including the freight subsidy which was received by GPCL was retained by it. GPCL passed on the monetary credit received by it in the tariff invoices. TANGEDCO has neither produced any documentary evidence to establish its claim that the credit was received by GPCL nor the same was not passed on to TANGEDCO. The claim in relation to freight subsidy is baseless and should be rejected.

9.1.31. It is clear that no case is made out by TANGEDCO in relation to its alleged claims. The alleged claims do not take into account the PPA and FSA entered into by GPCL.

9.2. During the hearing on 05-02-2016, M/s.GMR has addressed the Commission on the ambit and scope of the reference made by the Supreme Court in its order dated 24-04-2014. Relying on the decision referred in paras-12.5, 12.6 and 12.7, M/s.GMR in their written submission have submitted as follows:-

9.2.1. The matter has been referred to this Commission for-

(a) computing
(b) deciding the contesting claims of the parties in the light of the order passed by APTEL and *in accordance with law.*

The expression “in accordance with law” would include-

(a) adjudication of the matter in accordance with Electricity Act, 2003;
(b) in terms of the contract i.e. the Power Purchase Agreement, Fuel Supply Agreement.
(c) The judgment of the Supreme Court dated 4th April, 2014 in Civil Appeal No. 4126/ 2013 (TANGEDCO vs. PPN Power Generating Co. Pvt. Ltd.).

9.2.2. The Supreme Court has super-imposed its order dated 24th April, 2014 and has substituted the order of re-conciliation passed by APTEL for adjudication by the Commission of the contesting claims of the parties in accordance with law.

9.2.3. The Order of the Supreme Court has to be read as a whole. There is a distinction between observation in an order and the ultimate direction given. It is clear that the Supreme Court has noted that parties are not *ad idem* and disputes had arisen between the parties on the amount which has to be paid or adjusted against the contesting claim of the parties.

9.2.4. This issue therefore, requires adjudication which had to be done in terms of Section 86(1)(f). The purpose of adjudication is to determine the quantum to be adjusted/set-off under the terms of PPA.

9.2.5. One of the disputes which has to be decided is the impact of the grace period on tariff, if any. While the case of GMR is that the grace period was only an extension of time and did not result in any financial benefit, the case of TANGEDCO is that this resulted in a benefit.

9.2.6. In this context, it is relevant to mention that the APTEL (in para 17.9) has held that grace period has no impact on the interest on the working capital and on variable charges payment. This finding of APTEL has not been challenged by TANGEDCO.

9.2.7. Moreover, in similar circumstances, an application filed by TANGEDCO in the case of PPN Power Generating Co. Ltd., was rejected by the Supreme Court vide its judgment dated 24.04.2014. This judgment is binding on TANGEDCO.

9.2.8. Resultantly, in terms of the orders of the Supreme Court dated 24th April, 2014, the dispute which has arisen between the parties, has to be adjudicated and

the contesting claims of the parties has to be decided by the Commission in accordance with law.

10. Contentions of M/s.GMR:-

M/s.GMR Power Corporation Ltd. (hereinafter in their para referred as "GPCL") in their Petition dated 26-07-2016 have submitted as follows:-

10.1. At the outset, M/s.GPCL reiterates that they are not liable to pay any amount to TANGEDCO as a result of additional period for payment which was allowed to it by HPCL, the fuel supplier to the Project.

10.2. GPCL had to fulfill its payment obligations under the FSA irrespective of whether TANGEDCO made timely payments or not, during the operation of the PPA. In the event, GPCL committed a default under the FSA (including non-payment by TANGEDCO) and it failed to maintain 85% availability of the generating station, TANGEDCO could have terminated the PPA.

10.3. During this period TANGEDCO was in continuous default in making the payments under the PPA for the power supplied by GPCL. In order to continue supply of power, GPCL sought additional time-relaxed payment term from HPCL which was allowed by HPCL to ensure continuous off-take of LSHS.

10.4. Seen in this context, it is evident that there is no co-relation between payments made under the FSA and the interest on delayed payments payable by TANGEDCO to GPCL under the PPA and they operate in different fields.

10.5. The fact that no financial benefit accrued to GPCL is also demonstrated by the fact that the payment terms between HPCL and GPCL did not impact any of the head under which invoice could be raised by GPCL. The heads under the PPA against which payments were made by TNEB are as under:

(a) the Fixed Charge Payment; plus
(b) the Variable Charge Payment; plus
(c) the Incentive Payment, if any; plus
(d) the Foreign Exchange Adjustment; and plus
(e) the Change-in-Law Adjustment;

10.6. As per PPA, GPCL can raise supplementary invoices towards recoveries other than the above which includes late payment surcharge payable in the event invoices raised by the generating company are not paid in due date by TANGEDCO.

10.7. Fixed charge payment under the PPA is determined in accordance with the formula set out in Appendix-D to the PPA. The formula is not linked to the payment terms between the fuel supplier and GPCL. The Estimated Annual Costs (Fixed charge payment) includes the following: (a) Interest on Debt; (b) Depreciation; (c) Return on Equity; (d) O&M and Insurance Expenses; (e) Interest on Working Capital (f) Income Tax and (g) Other Taxes.

10.8. Interest on Debt, Depreciation, Return on Equity, O&M and Insurance Expenses and Income Tax and Other Taxes are not variables and are not dependent on the payment dates agreed between the fuel supplier and GPCL as the generating company.

10.9. Interest on working capital is calculated as per the formula in the PPA. This depends on the 'working capital' calculated in terms of the PPA and the interest rate

as per the PPA provisions. Working capital covers the following components on normative basis:

(i) fuel stocks actually maintained but limited to 30 days of consumption;

(ii) sixty days consumption of stocks of lubricating oil;

(iii) O&M and Insurance Expense for one month;

(iv) allowance for maintenance spares as per the PPA.

(v) Receivables equivalent to two (2) months average billing for sale of electricity produced by the project.

10.10. Clearly, interest on working capital too does not depend on payment terms agreed between the fuel supplier and generating company.

10.11. Accordingly, there is no impact on Fixed Charge payment under the PPA by virtue of the grace period given by the fuel supplier i.e. HPCL.

10.12. Variable charge payment for each billing period shall include the cost of fuel and cost of lubricant oil. The cost of fuel is calculated on the basis of the weighted average cost of fuel during the billing period. Variable charge payment do not take into account the date on which payment is to be made to the fuel supplier under the FSA. Thus, grace period allowed by the fuel supplier has no impact on the variable charge payment. This has been upheld in the judgment of APTEL in its order dated 28-02-2012. On the similar principle, the late payment surcharge whenever paid by GPCL (generating company) to HPCL (the fuel supplier) was not passed on to TANGEDCO.

10.13. The claim made by TANGEDCO is without justifiable basis and hence, the computation submitted by TANGEDCO is also incorrect and full of errors. The computation of TANGEDCO is incorrect inter alia for the following:

Single Due Date Vs. Different Progressive Date

10.13.1. TANGEDCO in its computation for calculating the benefit of extended credit period has wrongly assumed single due date for monthly payments. As per the terms of FSA executed between GPCL and HPCL, the monthly fuel invoices were to be paid progressively on three different dates, i.e., on 11th, 21st of the same month and 1st day of the following month as per clause 7.2 (a) of the FSA. This is a material aspect which has not been considered by TANGEDCO which has wrongly proceeded on the basis of a single due date. This is a fatal error which goes to the root of the calculations.

Domestic Vs. Imported Fuel

10.13.2. GPCL had separate payment arrangement for imported fuel as compared to domestic fuel. TANGEDCO failed to take into account the effect of payment arrangement in the case of imported fuel. It is submitted that in the case of imported fuel, GPCL was to make 90% of the import value on the proforma invoice within 7 days from the date of arrival of the vessel. Accordingly, for imported fuel, GPCL was making advance payment and hence there was no extended credit for imported fuel. TANGEDCO has calculated the extended credit period benefit even for imported fuel. This demonstrates that TANGEDCO's approach is flawed.

10.13.3. TANGEDCO has claimed interest on interest which is not allowed in the PPA.

10.13.4. TANGEDCO has failed to take into account additional bank charges incurred towards letter of credit.

10.14. GPCL did not get any financial benefit as a result of the increased credit period allowed by HPCL. Without prejudice to the above, as per the order of the Commission, GPCL is filing its computation of the alleged benefit it received from HPCL. GPCL has examined the claims of TANGEDCO and computed the additional loss that it would have incurred in the event the additional time for making payment was not allowed by HPCL. All the fuel invoices received from HPCL, date of payments made thereunder and all tariff invoices raised by GPCL and payments made thereunder have been analysed in detail for the first time and the computation by GPCL has been a time taking and exhaustive exercise.

10.15. The memo of calculation/ statement is prepared on the basis of the following facts and circumstances involving payment of fuel invoices to HPCL by GPCL; and the reimbursement of the same was claimed as fuel charges from TANGEDCO.

10.15.1. APTEL vide its order dated 28.02.2012 upheld the order of the Commission and declared that GPCL is entitled to recover the interest for default in payments by TANGEDCO.

10.15.2. As per the Hon'ble APTEL's order, GPCL and TNEB had to reconcile their accounts/ claims in respect of the extended credit benefit and freight subsidy and necessary adjustment/ set off shall be made against the default interest payable by TANGEDCO under the PPA.

10.15.3. GPCL, while computing the amount for extended credit period has taken the exact credit period. In this regard, it is submitted that as per the FSA the monthly fuel invoices were to be paid on 11th, 21st and 1st day of the following month.

10.15.4. Owing to separate and distinct payment terms as compared to domestic fuel supply, the credit period for imported fuel has been computed separately.

10.15.5. While computing the extended credit period, the cost towards bank charges incurred by GPCL for opening letter of credit in connection with the extended credit period, has been adjusted on month to month basis.

10.15.6. TANGEDCO's claim is based on notional extended credit period received by GPCL on the monthly fuel invoices. TANGEDCO cannot claim from GPCL more than the actual amount received or due to GPCL towards delayed payment charges on fuel invoices.

10.15.7. As regards the claim of TANGEDCO for passing on the benefit of freight subsidy / discount for the period from April 2001 to August 2001 amounting to Rs.2,66,07,599/-, GPCL submits that as per its records, it has not received any such benefit from HPCL. Nevertheless, GPCL has written to HPCL seeking the details of freight subsidy / discount extended by HPCL to GPCL. Against such letter, HPCL has informed GPCL vide its email dated 31-05-2016 that it is unable to trace out any papers / records pertaining to freight subsidy extended to GPCL for the relevant period. In these circumstances, the claim of TANGEDCO towards the freight subsidy/ discount is denied.

10.16. The computation being furnished by GPCL is not an admission of any benefit that has accrued to GPCL. The amount as computed is the additional loss that would have been incurred by GPCL in the event HPCL had not extended the credit period and therefore there was no question of the same being passed on to TANGEDCO. The total additional loss that would have been incurred by GPCL in the event the credit period had not been extended would be Rs.49,28, 89,735/-.

10.17. GPCL is entitled to interest on the delayed payment of the tariff invoices and supplementary invoices in terms of the order of the Commission as well as Hon'ble APTEL. Furthermore, TANGEDCO has failed to make payment towards start stop charges since July 2010 and accordingly TANGEDCO is liable to make payment of Rs.191.02 crores towards charge for delayed payment of tariff / supplementary invoices and start and stop charges calculated as on 30-06-2016. This calculation is without prejudice to GPCL's right to claim further amount as per the terms of the PPA on account of any further delay in payment by TANGEDCO.

10.18. In view of the breach / default by TANGEDCO referred above, TANGEDCO be directed to release entire monies i.e. Rs.191.02 crore.

10.19. As is evident from the computations furnished, GPCL and TANGEDCO have fundamental differences in computation of the "impact of grace period" for payment of fuel invoices. This would require adjudication by the Commission as per section 86 (1) (f) of the Electricity Act, 2003.

11. Written submissions on behalf of TANGEDCO:-

The TANGEDCO in its Written Submission dated 16-12-2016 has stated as follows:-

11.1. In I.A No.205 of 2011 decided along with Appeal No 177 of 2010, the Hon'ble APTEL by judgment dated 28.02.2012 held in paragraph 17.9 that when the claim of M/s.GMR for interest on delayed payment of invoice which included the components of interest on working capital and variable charges had been allowed, the grace period allowed to M/s.GMR by HPCL would result in unjust enrichment of the M/s.GMR in respect of the interest on delayed payments. Accordingly, the interest to be computed on the amount of fuel invoices payable by M/s.GMR to HPCL for the period of number of days credit given with respect to the terms of the FSA for the respective invoices of fuel raised by HPCL should be set off against the interest on delayed payment due to M/s.GMR from the TANGEDCO in terms of the judgment in the Appeal. The amount was to be reconciled within 30 days. Similarly, if any freight subsidy/discount was given, the same with interest calculated at the rate agreed in the PPA, was directed to be paid by M/s.GMR within 30 days of reconciliation/ adjustment.

11.2. During the pendency of the appeals, a sum of Rs.537 Crores being the amount payable inclusive of interest as per the order of the Commission was paid to M/s.GMR and hence the question of adjustment did not arise. Upon computation, M/s.GMR was liable to pay the sums due to the TANGEDCO. This has also been stated in the affidavit dated 09.04.2014 filed in the Hon'ble Supreme Court.

11.3. Against the portion of the judgment allowing the interlocutory application in IA No 205 of 2011 by the Hon’ble APTEL, M/s.GMR filed a Special Leave Petition

before the Hon'ble Supreme Court, The Hon'ble Supreme Court by an order dated 22.04.2014 directed the parties to furnish their calculations as to how much amount had been received by M/s.GMR from HPCL towards grace period and how much amount had been received from TANGEDCO on account of delayed payment of invoices. By an order dated 24th April 2014, it was held that the order of the APTEL in I.A.No. 205 of 2011 did not require to be disturbed. Thus the judgment in IA 205 of 2011 has become final. As the parties had not agreed on the computation, the exercise of computation and calculation though held to primarily lie within the domain of a Chartered Accountant, was deemed appropriate with the consent of parties to be remitted to the Commission. Both the parties were granted liberty to file their memo of calculation within a period of four weeks.

11.4 M/s.GMR's contention that the law laid down in PPN's case should be applied while deciding the computation is contrary to law and the judgment in this case. The decision in the case of PPN was delivered on 4th April 2014 and in different circumstances that were not applicable to this case. The decision in this case in Civil Appeal Nos. 3201-3202 of 2012 was rendered subsequently on 24th April 2014. M/s.GMR was aware of the judgment in PPN's case as it has been referred to in the computation statement given to the TANGEDCO's counsel by M/s.GMR's counsel on 23rd April 2014, as directed by the Hon'ble Supreme Court. M/s.GMR has not filed any review and has accepted the judgment dated 24th April 2014. The judgment of the Hon'ble APTEL has been affirmed by the Hon'ble Supreme Court. The law has thus been laid down and the only exercise that requires to be done is computation. It is not open to M/s.GMR to raise contentions against the judgment as it would amount to reviewing the final decision of the Hon'ble Supreme Court.

11.5. The details of the credit period allowed by HPCL to M/s.GMR were indicated in their letters dated 29.07.2011 and 07.04.2014 annexed to this petition as A2 and A3. The method of computation of interest has been set out in paragraphs 17 to 19 of this petition. The value of the credit availed by M/s.GMR and payable to the TANGEDCO works out to Rs.157,04,23,877/-. The interest on the credit works out to Rs.120,93,92,485/- as on 31.07.2014.

11.6. The value of the freight subsidy allowed to M/s.GMR for the period from April 2001 to August 2001 was set out in HPCL's letter dated 29.07.2001. Value of the freight subsidy works out to Rs.2,66,07,599/- and the interest to Rs 4,23,11,216/-.

11.7. The total amounts payable under various heads as set out in para 28 of this petition aggregate to Rs.284,87,35,177/- (interest being computed till 31.07.2014). Future interest is also liable to be paid by M/s.GMR.

11.8. The judgment of Hon'ble APTEL is categorical that on M/s.GMR's claim for interest being allowed, the grace period allowed by HPCL will result in unjust enrichment. Unjust enrichment has been stated to mean retention of a benefit by a party that is unjust or inequitable. It is said to occur when a person retains money that in justice, equity and good conscience belongs to someone else. It is not founded upon any contract or tort but falls within the realm of quasi-contract [(2005) 3 SCC 738- para 31 to 35] .Upon the prompt payment or payment with interest by TANGEDCO of the sums due under the invoices, the grant of grace period by HPCL results in the retention of the money or benefit by M/s.GMR that is unjust and inequitable as it belongs to TANGEDCO. The interest earned during the grace period on the sums paid by TANGEDCO amounts to unjust enrichment. The computation of

the TANGEDCO has been done based on the judgment. The contention of M/s.GMR that there is no provision in the contract for such payment is untenable as the doctrine of unjust enrichment has been held by the Hon'ble Supreme Court to lie within the domain of quasi contract and not within the realm of contract.

11.9. In the computation given to the TANGEDCO on the 23rd April 2014 during the pendency of the proceedings before the Hon'ble Supreme Court *relying on the Report, under the head 'Notional interest savings* calculation on account of extended credit' the figure given by M/s.GMR was Rs.122,43,08,015 against the principal sum of Rs.152,14,12,940 claimed by TANGEDCO. The difference of Rs.29.71 crores was said to be on account of the actual payment dates being taken into account by M/s.GMR and in respect of imported fuel, 90% of the value being required to be paid within 7 days of arrival of the vessel.

11.10. M/s.GMR has filed a Report given by M/s Grant Thornton India LLP purportedly quantifying the notional impact of the extended credit period provided by HPCL to M/s.GMR. The consultant has set out the methodology adopted based on their own interpretation of the judgment of Hon'ble APTEL. This would be evident from Section C of the said Report with title heading 'Basis of Computation'. It has been stated therein that the methodology involved (i) monthly calculation of notional interest due to extended credit and (ii) calculation of monthly interest on delayed payments from TANGEDCO with respect to fuel for supply of power and (iii) post computation of (i) and (ii), the minimum of the two amounts was considered as amount of notional interest for extended credit period. Such an interpretation is flawed and contrary to the judgment of Hon'ble APTEL, since the Hon'ble APTEL has held that the interest to be computed on the amount of fuel invoices payable by

the Respondent No.1 (i.e.M/s.GMR) to Respondent No.3 (i.e. M/s.HPCL) for the period of no. of days credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the Respondent No.3 (i.e.M/s.HPCL) should be set-off against the interest on delayed payment due to the Respondent No.1. (i.e.M/s.GMR) from the Appellant (i.e.TANGEDCO) in terms of the order of the State Commission.

11.11. The judgment does not restrict the adjustment of unjust enrichment amount to the interest received from TANGEDCO on delayed payments with respect to fuel invoices alone. The adjustment was against the interest payable by TANGEDCO in respect of the delayed payment of invoices which included the components of interest on working capital and variable charges. Thus, the computation of interest for extended credit period done by the consultant by restricting the interest payable by M/s.GMR to the minimum of the two amounts as set out above is contrary to the judgment of Hon'ble APTEL.

11.12. M/s.GMR, in para 18, of affidavit by way of objection has stated that the computation of TANGEDCO has purportedly not taken into account the actual dates of payment, the payment in respect of imported fuel, the additional bank charges and that interest on interest is inadmissible in terms of the PPA.

11.13. In the computation of M/s.GMR's consultant, the sums under the head "Interest on delayed payment from TANGEDCO-Fuel and Supplementary Invoices (A)" total is Rs 151,32,11,917/-; the sums under the head "Notional Interest benefit from HPCL" total is Rs.119,34,82,533/- and the sums under the head "Notional interest benefit from HPCL post BG cost(B)" total is Rs.108,13,89,896/-. The

minimum of A and B as sought to be taken by the consultant is untenable for reasons set out above.

11.14. In any event as per the very report now filed by M/s.GMR, the amount of interest benefit from HPCL post BG cost would come to Rs.108,13,89,896/-. In the computation served upon TANGEDCO during the pendency of the civil appeals before the Hon'ble Supreme Court, the amount computed by M/s.GMR after taking account all of the above. was Rs.122,43,08,015/-.

11.15. M/s.GMR has also contended that amounts are purportedly due to the M/s.GMR as per the judgment in Appeal No 177 of 2010. Against the judgment in the Appeal No. 177 of 2010 which TANGEDCO has filed before the Hon'ble Supreme Court in Civil Appeal No.4913 of 2012 is pending as on date. The computation which is the subject matter of determination pursuant to the decision of the Hon'ble Supreme Court concerns and relates only to the proceedings arising out of IA 205 of 2011. This has also been reiterated in the affidavit filed by TANGEDCO dated 26.04.2012.

11.16. HPCL by its letter dated 29.07.2011 had expressly stated that the freight subsidy /discount for the period from April 2001 to August 2001 amounted to Rs.2,66,07,599/-. The email now produced stating that HPCL is unable to trace the papers / transactions related to freight subsidy cannot be relied upon.

11.17. In (2007) 3 SCC 545, it has been held in para 9 that interest is not a penalty or punishment but the normal accretion on capital. For the reasons set out therein,

TANGEDCO will be entitled to interest on the amounts withheld and the same would be in consonance with equity and justice.

12. Written Submissions on behalf of M/s.GMR :-

In its Written Submission dated 05-01-2017, M/s.GMR has stated as follows:-

12.1. TANGEDCO failed to pay Tariff Invoices on time. In fact, only 7 out of 191 invoices were paid on time.

12.2. In view of the delay in payment of Tariff Invoices, GPCL approached the fuel supplier (i.e. HPCL) and availed of an extended credit period (a grace period).

12.3. The basis of TANGEDCO's calculations is two letters dated 29.07.2011 and 07.04.2014 sent by HPCL containing the number of days/credit period given to GPCL. The calculations did not consider the fact that the FSA provided different progressive dates i.e. on 11th, 21st day of the month and 1st day of the subsequent month for making payment of fuel invoices.

12.4. There are three fundamental errors in the computation made by TANGEDCO:-.

12.4.1. TANGEDCO has proceeded only on the basis of a single due date of payment. But under the Fuel Supply Agreement, there are three different dates of payment –11th, 21st of the same month and the 1st of the following month.

12.4.2.. GPCL has two sources of fuel supply - domestic and imported fuel. This distinction has not been kept in mind by TANGEDCO. As far as imported fuel is concerned, upfront payment is made without any credit period.

12.4.3. HPCL has given credit period (grace period) to GPCL for which it had provided a Bank Guarantee and/or Letter of Credit. For this, finance charges were incurred. This amount had to be deducted from the calculations submitted by TANGEDCO.

12.4.4. GPCL submits a Tariff Invoice which includes the fuel invoice every month to TANGEDCO. For the purposes of the present case, only the fuel invoice component is to be taken into account.

12.4.5. As per the order passed by APTEL, there should be a set off between the interest on delayed payment of fuel invoices charged by GPCL from TANGEDCO and notional benefit of grace period enjoyed by GPCL from HPCL. This has to be calculated on a month-wise basis and the lower of the two has to be taken into account as the direction given by APTEL is to set off to the extent of interest on delayed payments on fuel invoices charged by GPCL to TANGEDCO.

12.4.6. TANGEDCO has charged interest on interest. There is no provision for charging interest on interest for the extended credit period (grace period). This is evident from the Order of APTEL which insofar as freight subsidy is concerned. For freight subsidy, APTEL has directed payment of interest whereas no such direction has been given qua fuel invoices for the grace period. The difference in the

operative direction given under the two heads makes it clear that interest on interest was not awarded.

12.5. The Supreme Court in Islamic Academy of Education Vs. State of Karnataka (2003) 6 SCC 697 was interpreting the judgment in T.M.A. Pai Foundation Vs. State of Karnataka and held as under:-

> "***Interpretation of a judgment***
>
> *139. A judgment, it is trite, is not to be read as a statute. The ratio decidendi of a judgment is its reasoning which can be deciphered only upon reading the same in its entirety. The ratio decidendi of a case or the principles and reasons on which it is based is distinct from the relief finally granted or the manner adopted for its disposal. (See Executive Engineer, Dhenkanal Minor Irrigation Division Vs. N.C. Budharaj [(2001) 2 SCC 721])".*

12.6. In Padma Sundara Rao Vs. State of Tamil Nadu [(2002) 3 SCC 533] it is stated: (SCC p. 540, paragraph 9)

> *"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537: 1972 AC 877: (1972) 1 All ER 749 (HL)] (Sub nom British Railways Board v. Herrington). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. "*
>
> *(See also Haryana Financial Corpn. Vs. Jagdamba Oil Mills [(2002) 3 SCC 496].)*

12.7. In General Electric Co. Vs. Renusagar Power Co. [(1987) 4 SCC 137] it was held: (SCC p. 157, paragraph 20)

> *"As often enough pointed out by us, words and expressions used in a judgment are not to be construed in the same manner as statutes or as words and expressions defined in statutes. We do not have any doubt that when the words 'adjudication of the merits of the controversy in the suit' were used by this Court in State of UP. Vs. Janki Saran Kailash Chandra [(1973) 2 SCC 96 : AIR 1973 SC 2071 : (1974) 1 SCR 31] the words were not used to take in every adjudication which brought to an end the proceeding before the court in whatever manner but were meant to cover only such adjudication as touched upon the real dispute between the parties which gave rise to the action. Objections to adjudication of the disputes between the parties, on whatever*

ground, are in truth not aids to the progress of the suit but hurdles to such progress. Adjudication of such objections cannot be termed as adjudication of the merits of the controversy in the suit. As we said earlier, a broad view has to be taken of the principles involved and narrow and technical interpretation which tends to defeat the object of the legislation must be avoided.

It will not, therefore, be correct to contend, as has been contended by Mr.Nariman, that answers to the questions would be the ratio to a judgment. The answers to the questions are merely conclusions. They have to be interpreted, in a case of doubt or dispute with the reasons assigned in support thereof in the body of the judgment, wherefor, it would be essential to read the other paragraphs of the judgment also. It is also permissible for this purpose (albeit only in certain cases and if there exist strong and cogent reasons) to look to the pleadings of the parties."

12.8. The Supreme Court held that interpretation of a judgment must be done in light of the Constitutional and Statutory provisions (Bharat Petroleum Corpn. Ltd. Vs. Maddula Ratnavalli, (2007) 6 SCC 81). The Supreme Court in CCE Vs. Allied Air-Conditioning Corpn. (Regd.), (2006) 7 SCC 735 held that the judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. (See Mehboob Dawood Shaikh Vs. State of Maharashtra [(2004) 2 SCC 362 : 2004 SCC (Cri) 551].

12.9. The entire judgment must be read as a whole, and in the light of the relevant statutory provisions. Hence, the order of the Supreme Court in a proceeding under Section 125 of the Electricity Act has to be seen along with other provisions of the Electricity Act *inter alia* including sections 86 and 94 of the Act.

12.10. The present petition was filed before the Commission pursuant to the order of the Supreme Court which recorded that "a dispute has arisen between the contesting parties". Accordingly, the present petition requires adjudication under section 86 (1) (f) of the Act on merits of claims of TANGEDCO to ascertain the basis and calculations furnished by it.

12.11. Reliance is also placed on the judgment of the Supreme Court in M.I.Builders (P) Ltd. Vs.. Radhey Shyam Sahu, (1999) 6 SCC 464 at page 529, wherein the following observation was made:

> "*73. .... Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."*

The expression "in accordance with law" is a term of art and its meaning has been settled in various judgments.

12.12. The Supreme Court in Hari Shanker Vs. Rao Girdhari Lal Chowdhury, 1962 Supp (1) SCR 933 held that:

> *"8. The phrase "according to law" refers to the decision as a whole and is not to be equated to errors of law or of fact simpliciter. It refers to the overall decision which must be according to law which it would not be, if there is a miscarriage of justice due to a mistake of law. The section is thus framed to confer larger powers than the power to correct error of jurisdiction to which Section 115 is limited. But it must not be overlooked that the section inspite of its apparent width of language where it confers a power on the High Court to pass such order as the High Court might think fit, is controlled by the opening words, where it says that the High Court may send for the record of the case to satisfy itself that the decision is "according to law". It stands to reason that if it was considered necessary that there should be a rehearing, a right of appeal would be a more appropriate remedy, but the Act says that there is to be no further appeal."*

12.13. The Supreme Court in Provincial Transport Services Vs. State Industrial Court, Nagpur, (1963) 3 SCR 650: AIR 1963 SC 114: held that,

> *".......... The question is whether the dismissal of the employee without an enquiry was "in accordance with law". If it is not, the Labour Commissioner would have jurisdiction. If the dismissal without such an enquiry be in accordance with law the Labour Commissioner would have no jurisdiction to interfere with the order of dismissal made by the management. The learned Attorney General argues that a dismissal*

made in accordance with the ordinary law of contract as between Master and Servant must be held to be "in accordance with law" within the meaning of this Schedule, and the fact that any industrial law as evolved by the courts in industrial adjudication under the Industrial Disputes Act should not colour our consideration of the matter. As at present advised, we are unable to see why the word "law" in this phrase "in accordance with law" as used in Schedule 2 should be given a restricted connotation so as to leave out industrial law as evolved by the courts.

In dealing with industrial disputes under the Industrial Disputes Act and other similar legislation. Industrial Tribunals, Labour Courts, Appellate Tribunals and finally this Court have by a series of decisions laid down the law that even though under contract law, pure and simple, an employee may be liable to dismissed, without anything more, industrial adjudication would set aside the order of dismissal and direct reinstatement of the workmen where dismissal was made without proper and fair enquiry by the management or where even if such enquiry had been held the decision of the Enquiring Officer was perverse or the action of the management was malafide or amounted to unfair labour practice or victimisation, subject to this that even where no enquiry had been held or the enquiry had not been properly hold the employer would have an opportunity of establishing its case for the dismissal of the workman by adducing evidence before an Industrial Tribunal. It seems to us reasonable to think that all this body of law was well known to those who were responsible for enacting the C.P. and Berar Industrial Disputes Settlement Act, 1947 and that when they used the word "in accordance with law" in clause 3 of Schedule 2 of the Act they did not intend to exclude the law as settled by the Industrial Courts and this Court as regards where a dismissal would be set aside and reinstatement of the dismissed workmen ordered. If the word "law" in Schedule 2 includes not only enacted or statutory law but also common law, it is difficult to see why it would not include industrial law as it has been evolved by industrial decisions. We are therefore prima facie inclined to think that the first contention raised by the learned Attorney General that it was not necessary in law to hold an enquiry before dismissing this employee in view of the terms of his employment, cannot be accepted ....”

12.14. It is clear from a reading of the Order that Court proceeds on the basis/notes that parties are not *ad-idem* and disputes had arisen between the parties on the amount which has to be paid or adjusted against the contesting claim of the parties. Accordingly, it is submitted that this Commission is required to decide all issues arising from the pleading to do substantial justice in the matter and put to rest the entire matter.

12.15. TANGEDCO has relied on order of APTEL to submit that (a) as a result of grace period allowed by HPCL for making payments of the fuel invoices there has been an "Unjust Enrichment" to GPCL, (b) Freight Subsidy has been availed by GPCL and the same has not been passed on to TANGEDCO and (c) interest on the heads (a) and (b) above.

12.16. The submissions made by TANGEDCO are neither factually correct nor based on the correct interpretation of the APTEL order. The relevant portion of the APTEL order is extracted herein below for ready reference:-

> *"17.9. We notice that the respondent No.3 allowed some grace period for payment of fuel bills by the respondent No.1 in relaxation to the terms and conditions of the FSA. Admittedly no amendment was signed between the respondent No. 1 and 3 which necessitated the approval of the appellant. The invoice on account of Interest on Working Capital or Variable Charges were not impacted by the grace period for payment allowed by the respondent No.3 to the respondent No.1 in terms of the PPA. However. when the appellant's claim for interest on delayed payment of invoice which included the components of Interest on Working Capital and Variable Charges has been allowed, the grace period allowed to the respondent No.1 by the respondent No.3 will result in unjust enrichment of the appellant in respect of the interest on delayed payments. When the fuel price is a pass through in the tariff. it is logical that the impact of credit on account of grace period for payment allowed by the respondent No. 3 should also be passed on to the appellant in setting off the interest on account of the delayed payments due to the respondent No.1 from the appellant.*
>
> *17.10 Accordingly. the interest to be computed on the amount of fuel invoices payable by the respondent No. 1 to the respondent No.3 for the period of no. of days of credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the respondent No.3 should be set off against the interest on delayed payment due to the respondent No.1 from the appellant in terms of the order of the State Commission. The amount shall be reconciled by the appellant and the respondent No.1 within 30 days of this judgment. The rate of interest shall be the same as stipulated in the PPA. The amount of interest calculated on the various fuel invoices of the respondent No.3 for the grace period shall be paid by the respondent No.1 to the appellant within 30 days of reconciliation of the accounts or adjusted in the amount payable by the appellant to the respondent No.1.*
>
> *...........................*
>
> *17.12. The respondent No.1 has denied that any credit on account of freight subsidy/discount had been given by the respondent No.3. However, we notice that the respondent No.3 in its letter dated 29.07.2011 to the appellant*

has indicated freight subsidy/discount for the period April, 2001 to August, 2001 amounting to Rs.2,66,07,599/-. Accordingly, we direct the respondent No.1 and respondent No.3 to reconcile the same within a period of 30 days of the date of this judgment. In case any freight subsidy/discount was given, the same with interest calculated at the rate agreed in the PPA shall be paid by the respondent No.1 to the appellant within 30 days of the date of reconciliation or adjusted in the amount payable by the appellant to the respondent No.1".

12.17. Admittedly, there is no provision under the PPA or the FSA which justifies the basis of the claim made by TANGEDCO in the present petition. Thus the claim of TANGEDCO has to be tested on the touchstone whether there is any basis under the order passed by APTEL.

12.18. APTEL vide the order dated 28.02.2012 has directed to pass-on the benefit of "impact of credit on account of grace period for payment allowed" by HPCL to TANGEDCO "in setting off the interest on account of the delayed payments". Therefore, the exercise that is first required to be undertaken is to quantify the impact (if any) of credit on account of grace period.

12.19. GPCL did not get any financial benefit as a result of the grace period of payment allowed by HPCL. This is evident from an analysis of heads under which payments have been made to GPCL under the PPA. The heads under the PPA against which payments were made by TNEB are as under:

(a) the Fixed Charge Payment; plus
(b) the Variable Charge Payment; plus
(c) the Incentive Payment, if any; plus
(d) the Foreign Exchange Adjustment; and plus
(e) the Change-in-Law Adjustment.

12.20. As per the PPA, GPCL can raise supplementary invoices towards recoveries other than the above which includes late payment surcharge payable in

the event invoices raised by the generating company are not paid by their respective due dates by TANGEDCO.

12.21. Fixed Charge Payment under the PPA is determined in accordance with the formula set out in Appendix D to the PPA. The formula is not linked to the payment terms between the fuel supplier and GPCL. The Estimated Annual Costs (Fixed Charge Payment) includes the following: (a) Interest on Debt; (b) Depreciation; (c) Return on Equity; (d) O&M and Insurance Expenses; (e) Interest on Working Capital (f) Income Tax and (g) Other Taxes.

12.22. Interest on Debt, Depreciation, Return on Equity, O&M and Insurance Expenses and Income Tax and Other Taxes are not variables and are not dependent on the payment dates agreed between the fuel supplier and GPCL as the generating company.

12.23. Interest on Working Capital is calculated as per the formula in the PPA. This depends on the "working capital" calculated in terms of the PPA and the interest rate as per the PPA provisions. Working Capital covers the following components on normative basis:

(i) fuel stocks actually maintained but limited to 30 days of consumption;
(ii) sixty days consumption of stocks of lubricating oil;
(iii) O&M and Insurance Expense for one month;
(iv) allowance for maintenance spares as per the PPA.
(v) Receivables equivalent to two (2) months average billing for sale of electricity produced by the project.

12.24. Clearly, Interest on Working Capital, too, does not depend on payment terms agreed between the fuel supplier and generating company.

12.25. Accordingly, there is no impact on Fixed Charge payment under the PPA by virtue of the grace period given by the fuel supplier i.e., HPCL.

12.26. Variable charge payment for each billing period shall include the cost of fuel and cost of lubricant oil. The cost of fuel is calculated on the basis of the weighted average cost of fuel during the billing period. Variable charge payment does not take into account the date on which payment is to be made to the fuel supplier under the FSA. Thus, grace period allowed by the fuel supplier (HPCL) has no impact on the variable charge payment. This aspect has been recognised by APTEL in its order dated 28.02.2012. On the similar principle, the late payment surcharge whenever paid by GPCL to HPCL (the fuel supplier) has not been passed on to TANGEDCO as such payments are not covered under any of the heads of payments specified in the PPA.

12.27. The Fixed and Variable Charges paid to GPCL were not impacted by the grace period for payments allowed by HPCL. This goes to the very root of the matter and belies the contention of TANGEDCO that amendment of the terms of FSA were done on their back. Further, delayed payment surcharge paid to GPCL in terms of the provisions of the PPA were not dependent on actual loss incurred by GPCL.

12.28. The contention of TANGEDCO that delayed payment surcharge should be paid only if the CPCL is able to prove actual loss was rejected by APTEL vide the same order being relied on now by TANGEDCO.

The relevant portion of the said order is as follows:-

"The PPA stipulates interest on delayed payment if any amount is due to a party. The relevant clause 8.7 of the PPA is reproduced below:-

"8.7 Late Payments - If any amount due hereunder from one party ('the payer') to another party (the 'payee') is not paid when due, there shall be due and payable to the Payee interest at the rate which is one half cent (0.5%) above the cash credit rate, from and including the date on which such payments was due to but excluding the date on which such payment is paid in full with interest. All such interest shall accrue from day today and shall be calculated on the basis of a 365 day year, compounded monthly, and paid on demand. If no due date is specified under this agreement with respect to any amount due under this agreement, the due date thereof shall be fifteen (15) days after demand is made therefor by the Payee"

The above clause was substituted by clause 8.6 by Addendum 2 w.e.f 01.04.2000 as under:

"8.6 Late Payments - Late payments shall bear interest accrued from the date they became over due at a rate equal to the prime lending rate charged by the working capital bankers from time to time on cash credits extended to the party to whom such payment is owed, to the extent permitted by law. "

x x x x x x

13.5. The PPA clearly provides for interest for late payments. Thus, we feel that there is no infirmity in the findings of the State Commission in this regard.

13.6. Learned counsel for the respondent No. 1 has referred to the judgment of this Tribunal dated 05.08.2010 in Appeal nos. 70 & 110 of 2008 in the matter of Ispat Industries Ltd. vs. MERC. In this judgment this Tribunal has held as under:

"A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for such a deprivation through interest. In an action by way of restitution, it is the duty of the court to give full and complete relief to the party by ordering for interest as well".

In view of the above findings of the Tribunal, interest on delayed payments is required to be paid by the appellant.

13.7. We do not agree with the contention of the appellant that the Respondent No.1 has to establish incurring of any loss before claiming the interest on late payment. The Respondent No.1 is entitled for interest for the money due to it on a particular date but illegally held back by the appellant. Further, the PPA also stipulated payment of interest on late payments from the date they become due.

....

13.9. The seventh issue regarding interest on delayed settlement of invoice is also decided against the appellant."

12.29. The interest on delayed payment is paid only to compensate a party which is entitled to certain monies and has been deprived of the use of the same. The

Supreme Court in Central Bank of India Vs. Ravindra, (2002) 1 SCC 367 reviewed the basis for levy of interest and held that:

> *"Interest and its classes*
>
> *37.Black's Law Dictionary (7th Edn.) defines "interest" inter alia as the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of the borrowed money. According to Stroud's Judicial Dictionary of Words And Phrases (5th Edn.) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money. In Secy., Irrigation Deptt., Govt. of Orissa v, G.C. Roy [(1992) 1 SCC 508] the Constitution Bench opined that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages ... this is the principle of Section 34 of the Civil Procedure Code. In Sham Lal Narula (Dr) v, CIT [AIR 1964 SC 1878: (1964) 7 SCR 668] this Court held that interest is paid for the deprivation of the use of the money. The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd [(1947) 1 All ER 469: 1947 AC 390 (HL)] All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab speaking through Tek Chand, J in CITv. Dr Sham Lal Narula [AIR 1963 Punj 411: (1963) 50 ITR 513] thus articulated the concept of interest: (AIR p.414, para 8)*
>
> *"8. The words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another in its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money. ... In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable. "*
>
> *It is the appeal against this decision of the Punjab High Court which was dismissed by the Supreme Court in Dr Sham Lal Narula case [AIR 1964 SC 1878: (1964) 7 SCR 668]".*

12.30. There are three divisions of interest as dealt in section 34 CPC. The division is according to the period for which interest is allowed by the court, namely,- (1) interest accrued /due prior to the institution of the suit on the principal sum adjudged; (2) additional interest on the principal sum adjudged, from the date of the suit to the date of the decree, at such rate as the court deems reasonable; (3) further interest on the principal sum adjudged, from the date of the decree to the date of the payment or to such earlier date as the court thinks fit, at a rate not exceeding 6 per cent per annum. Popularly, the three interests are called pre-suit interest, interest pendente lite and interest post-decree or future interest. Interest for the period anterior to institution of suit is not a matter of procedure; interest pendente lite is not a matter of substantive law (see Secy., Irrigation Deptt., Govt. of Orissa Vs. G.C Roy [(1992) 1 SCC 508] SCC para 44-iv). Pre-suit interest is referable to substantive law and can be sub-divided into two sub-heads: (i) where there is a stipulation for the payment of interest at a fixed rate; and (ii) where there is no such stipulation. If there is a stipulation for the rate of interest, the court must allow that rate up to the date of the suit subject to three exceptions: (i) any provision of law applicable to money lending transactions, or usury laws or any other debt law governing the parties and having an overriding effect on any stipulation for payment of interest voluntarily entered into between the parties; (ii) if the rate is penal, the court must award at such rate as it deems reasonable; (iii) even if the rate is not penal, the court may reduce it if the interest is excessive and the transaction was substantially unfair. If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except on proof of mercantile usage, statutory right to interest, or an implied agreement. Interest from the date of suit to the date of decree is in the discretion of the court. Interest from the date of the decree to the date of payment or any other earlier date appointed by the court is again in the discretion of the court to award or

not to award as also the rate at which to award. These principles are well established and are not disputed by learned counsel for the parties. We have stated the same only by way of introduction to the main controversy before us which has a colour little different and somewhat complex. The learned counsel appearing before us have agreed that pre-suit interest is a matter substantive law and a voluntary stipulation entered into between the parties for payment of interest would bind the parties as also the court excepting in any case out of the three exceptions set out herein before.

12.31. Liability to pay interest on the outstanding amount was a contractual stipulation and TANGEDCO's stand that the interest on delayed payment should be set-off against the gain from grace period allowed by HPCL is baseless and is contrary to the provisions of the PPA and the order passed by APTEL.

12.32. The issue of impact of grace period was considered in the matter of PPN Power judgment reported as (2014) 11 SCC 53. The Supreme Court rejected the application filed by TANGEDCO praying for impleadment of IOCL (fuel supplier in that case) and direction to refund Rs.240 Crores against the various discounts offered by IOCL. Relevant part of the order is extracted hereunder for ready reference:

> *"58. This now bring us to applications for impleadment of IOCL and for direction. I.A.No.6 of 2013 is for the impleadment of IOCL. It is submitted that during the pendency of these proceedings, the respondents have received rebates, discounts, credits, refunds in the fuel price being extended by fuel supplier i.e. Indian Oil Corporation Ltd. (IOCL). Such benefits have been received by the respondent from January 2001 till date It is pleaded that the respondents have failed to give details about the discounts and credits received the benefit of which ought to have been passed on to the appellant. Therefore, IOCL be made parties to respondent No.2 to the present appeal. IA.No.5 of 2013 seeks direction to IOCL to furnish details of all the documents of the matter. Further directions are also sought on the respondent to refund a*

sum of Rs.240 crores paid by the appellant under the order passed by the State Commission along with interest at the rate as mentioned in PPA.

59. The respondents in a common counter statement to the applications have submitted that the applications are not maintainable. The applications have been evidently preferred purely as dilatory tactics, to delay and deny substantial payments that are due and payable to the respondent pursuant to the orders passed by the State Commission which have been upheld by APTEL. We are not inclined to entertain either of the applications at this stage. The issue sought to be raised in both the applications ought to have been raised by the appellant at the relevant time. The applications are, therefore, accordingly dismissed. "

12.33. HPCL's (after repeated requests from GPCL) stand was that there were no documents available to show that any freight subsidy has been extended to GPCL. This is consistent with the stand of GPCL that all credits received by GPCL from fuel supplier has been passed on to TANGEDCO.

12.34. The judgment of APTEL had clearly provided that freight subsidy, if availed had to be passed on to TANGEDCO with interest. As per the records of GPCL it did not receive any freight subsidy. Even HPCL in its email dated 31.05.2016 has categorically stated that it is unable to trace any records pertaining to freight subsidy. There is no material on record to show that alleged freight subsidy was received by GPCL. In the absence of any basis of the claim of freight subsidy, GPCL cannot be made liable for the same. In any event, the onus is on the claimant to demonstrate that freight subsidy was actually passed on to GPCL by fuel supplier.

12.35. The direction of APTEL qua Freight Subsidy was that freight subsidy if any availed by GPCL must be passed on to TANGEDCO. As no freight subsidy was availed by GPCL, the claim of TANGEDCO on this count must be rejected.

12.36. The value of the fuel invoices for the duration of credit days extended by HPCL is the credit and it has been calculated on monthly basis as the produce to (a) total value of fuel invoices raised during a billing month; (b) rate of interest charged by GPCL to TANGEDCO for delayed payments and (c) credit days allowed by HPCL.

12.37. The calculation submitted by TANGEDCO is incorrect and suffers from patent errors and infirmities, namely, TANGEDCO in its computation did not consider the payment due dates as mentioned in FSA. As per the FSA, payment of fuel invoices received during a month were to be made in three tranches i.e. one third of the total supply was to be paid on the 11th day of the month, further one third on the 21st day and final amount taking into account total supply on the 1st day of the subsequent month. Instead of applying the actual payment terms, TANGEDCO has simply taken the credit period allowed by HPCL vide its letter dated 29th July 2011 and 7th April 2014. This was done to artificially inflate the alleged value of the credit period.

12.38. TANGEDCO did not take into account the distinct payment terms for imported fuel as compared to Domestic fuel. GPCL was required to make payment equal to 90% of the value of the proforma invoice within 7 days. The extended credit period was not applicable to imported fuel and GPCL was making advance payments to HPCL.

12.39. The computation submitted by TANGEDCO did not take into account the actual date of payments and considered the total credit period allowed and not the actual credit period availed by GPCL. In other words, the actual dates of payment of

fuel invoices by GPCL to HPCL are to be considered while computing the (notional) value of the credit period.

12.40. The credit period extension was allowed only after adequate financial security in the form of Bank Guarantee and / or Letter of Credit was furnished by GPCL for the outstanding amount. As a result, GPCL incurred charges for providing and maintaining Bank Guarantee and / or Letter of Credit. The finance charges incurred by GPCL for availing the extended credit period has not been considered by TANGEDCO in its computation of the (notional) value of the credit period availed by GPCL.

12.41. The impact of credit period is nothing but a notional value of interest that GPCL would have paid to HPCL in the event the credit period had not been extended. TANGEDCO's case that they are entitled to interest on the amount of notional interest saved by GPCL is contrary to the order of APTEL which does not allow recovery of interest on the notional value of the credit period. The claim for interest for all practical purpose amounts to claiming interest on interest.

12.42. In the event the Commission on the basis of documents on record computes the impact of credit on account of grace period, then the amount so determined would have to be set-off from delayed payment surcharge paid to GPCL.

12.43. The APTEL order does not direct setting-off such amount with interest. The fact that no interest is payable on computed amount of impact of credit period becomes further clear if the language used by APTEL in Para 17.9 and Para 17.12 of the order is contrasted.

12.44. GPCL passed on all financial benefit it received from HPCL in the tariff invoices. The extended credit period for making payment under the FSA did not result in any financial benefit to GPCL. All the fuel invoices raised by HPCL were paid in full on or before the expiry of the extended credit period (GPCL paid interest to HPCL for delayed payments which have not been recovered from TANGEDCO). There is no co-relation between payments made under the FSA and the interest on delayed payments payable by TANGEDCO to GPCL, under the PPA as they operate in different fields.

12.45. A detailed exercise was undertaken by Grant Thornton (an independent Accounting and Consulting Firm). The report was submitted by GPCL along with the summary sheet and supporting calculations on 26.07.2016. The memo of calculation was prepared after thoroughly reviewing each of the fuel invoice (raised by HPCL), payments made thereon and Tariff invoices (raised by GPCL). The principles on which the calculations have been made are as under:

(a) APTEL vide order dated 28.02.2012 upheld the order of the Commission and declared that GPCL is entitled to recover the interest for default in payments by TANGEDCO.

(b) GPCL while computing the extended credit period has taken the exact credit period. In this regard, it is submitted that as per the FSA, the monthly fuel invoices were to be paid on 11th, 21st of every month and 1st day of the following month.

(c) Distinct payment terms as compared to domestic fuel supply, the credit period for imported fuel has been computed separately.

(d) While computing the extended credit period, the cost towards bank charges incurred by GPCL for opening letter of credit in connection with the extended credit period, has been adjusted on month to month basis.

12.46. In order to arrive to the computation as submitted by GPCL, the following steps are required to arrive at the impact of HPCL notional credit benefit. Since, TANGEDCO in its claim had computed the value of the credit on monthly basis, GPCL also calculated the notional value of the credit period for each month.

12.47. GPCL computed the interest on delayed payment charges on fuel and supplementary invoices received from TANGEDCO on month to month basis. In other words, total interest paid by TANGEDCO in a particular month was computed taking into account the actual payments made by TANGEDCO. As the instant claim of TANGEDCO is confined only to the fuel invoices, the interest paid by TANGEDCO proportionate to fuel invoices only has been considered.

12.48. Thereafter, GPCL computed the notional value of the interest that GPCL would have paid to HPCL in the event credit period was not extended. Taking into account different payment terms for imported fuel, and payment terms under the FSA as already elaborated above (i.e. number of days extended credit period received - after rationalising it with 3 payment due dates of 11th / 21st / 1st day of the subsequent month as per FSA provision x SBI PLR).

12.49. Amount so determined pursuant to para 11.48 is reduced by the bank charges costs incurred to furnish bank guarantee and/ or LC to avail the extended credit period on month on month basis.

12.50. Amounts determined as per para 12.46 and 12.47 and para 12.49 above are then compared in terms of the APTEL order and interest actually paid by TANGEDCO (Para12.46 and 12.47) is set-off from interest that GPCL would have paid to HPCL reduced by costs therefor (Para 12.48 and Para No.12.49). In terms of the direction of APTEL, the notional values of the credit received from HPCL has to be set off against interest paid by TANGEDCO. The entitlement of TANGEDCO in terms of APTEL order is limited to the interest actually paid by TANGEDCO in a month, subject to the maximum of value of the interest that would have been paid by GPCL.

12.51. In certain months the interest paid by TANGEDCO is higher than the notional value of the credit benefit granted by HPCL. In such months no amount exceeding the notional value of the credit benefit can be considered for computing the benefit availed by GPCL as the direction of APTEL was to set-off the interest paid by TANGEDCO from the impact of grace period.

12.52. Finally, the computation of sum total of monthly value of notional credit period arrived as above, works out to Rs.49.29 crores.

12.53. GPCL computed the notional values of the credit period for each month taking into account the credit period availed, cost of fuel and bank charges incurred. Thereafter, the values of interest paid by TANGEDCO in the same month was compared with the values of the notional benefit received from HPCL. Thereafter, in "setting off" the interest paid by TANGEDCO from the benefit received by GPCL in terms of APTEL order, the benefit of the interest paid was taken into account to calculate the benefit to GPCL.

12.54. A summation of this number reflects the additional loss which would have been incurred by GPCL in the event credit period was not extended by HPCL. Furnishing the computation pursuant to the order of the Commission is neither the admission of any benefit accruing to GPCL nor is a willingness to pass-on the said amount to TANGEDCO.

12.55. Unjust enrichment is a legal doctrine based on the general equitable principle that no one should be allowed to profit at another's expense. In other words, a person should pay for the reasonable value of any benefits, whether property or services, that he or she has been unfairly received and kept from another person.

12.56. The Supreme Court in Sahakari Khand Udyog Mandal Ltd. Vs. CCE & Customs, (2005) 3 SCC 738 laid down that:

> "*31. Stated simply, "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.*
>
> *32. The doctrine of "unjust enrichment ", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity."*

12.57. The Patna High Court in Bijay Metal Works Vs. The State of Bihar & Ors. 2016(1) PLJR 797 discussed the law on unjust enrichment and noted as under:-

> *"20. "Unjust enrichment" has been defined in Black's Law Dictionary, 8th Edition (Bryan A.Garner), as a benefit from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or should recompense. It is unjust retention of a benefit to the loss of the another or retention of money or property of another against the fundamental principles of justice or equity or good conscience."*

12.58. Unjust enrichment could be said to occur only if benefit received by a party is caused as a result of unjust loss to another party. Claim for delayed payment surcharge by GPCL was a contractual provision and was not dependent on any other provision as has been clearly concluded by APTEL in the order dated 28-02-2012. Payment of delayed payment surcharge was a contractual consequence of non-payment of invoices as per their respective due date. Neither the Commission (order dated 16-04-2010) nor APTEL (order dated 28-02-2012) found any weight in the submission of TANGEDCO that GPCL was not entitled to delayed payment surcharge.

12.59. The findings are final and binding. Notwithstanding the order from the Commission having been confirmed by APTEL, TANGEDCO has illegally withheld payments due to GPCL. TANGEDCO in its submissions has not disputed that it has withheld payments to GPCL of undisputed amounts. These amounts due as on 30th September 2016 under the following heads are as under:

Sl.No.	Particulars	Total (in Rs.Crore)
1	Start Stop Invoice	16.45
2	Interest on delayed payment	172.49
3	Invoice for Nil Dispatch	1.43
4	Invoice for differential rates	1.27
	Total	191.64

12.60. There is no basis for withholding amounts due under the PPA and the same amounts to blatant non-compliance of the earlier order passed by the Commission and confirmed by APTEL.

12.61. The Supreme Court in the recent Judgment of Kailash Nath Associates Vs. DDA, (2015) 4 SCC 136 discussed the law on damages in case of breach of contract and held as under:

> *"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*
>
> *43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

12.62. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found, *inter alia*, in section 73 of the Contract Act. Since section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the section.

12.63. Even in case of breach of a contract, damages can be awarded only if there is actual loss suffered by an innocent party and not otherwise. Neither the law nor equity entitles any party to claim monies which it is not otherwise entitled to. GPCL suffered due to breach of contract by TANGEDCO and no loss was ever suffered by TANGEDCO, as it continued to enjoy uninterrupted power despite blatant non-compliance of the PPA provisions. In the event any monies are awarded to TANGEDCO the same would amount to rewarding them for breach of contract and would cause unjust enrichment and loss to GPCL.

13. Findings of the Commission:-

13.1. Now we can discuss in detail with respect to the issue covered in I.A. No. 205 of 2011 in APTEL's Order dated 28th February 2012, in Appeal No. 177 of 2010 filed before Hon'ble APTEL.

Hon'ble APTEL's Order in Appeal No. 177 of 2010 & I.A. No. 205 of 2011, dated 28th February 2012

***"17. Discussion on I.A. No.* 205 of 2011**

TANGEDCO filed an I.A. No. 205 of 2011 on 05-09-2011 before the Hon'ble APTEL in the Appeal No. 177 of 2010. In the above I.A., the Appellant TANGEDCO has represented to the Hon'ble APTEL and the same are extracted below:

Para 17.1 The appellant (TANGEDCO) in the above IA has submitted as under:

(i) According to the Fuel Supply Agreement entered into between the respondent no. 1 and the respondent no. 3, the payment has to be made during the month on 1st, 11th and 21st of the month.

(ii) According to clause 3.1 (xiii) of the PPA dated 12-09-1996 between the appellant and the respondent no.1 any amendment to the FSA shall be made only with the prior approval of the appellant.

(iii) The Government of India, Central Vigilance Commission in the letter dated 22-01-2010 addressed to the Chief Secretary, Government of Tamil Nadu referred to the representation received from some persons and requested their reply regarding various credits availed by the Respondent No. 1 (GMR) from respondent no. 3(HPCL).

(iv) The appellant made a request to both the Respondent No.1 and the Respondent No.3 for providing the details. Eventhough the Respondent No.1 did not provide the details, the Respondent No.3

(HPCL), by its letter dated 29-07-2011 has furnished the credit given to the respondent no. 1 (GMR) for the fuel supplied to them from December 1998 till date.

(v) The details of credit given by the Respondent No.3 to the Respondent No. 1 as submitted by the appellant (TANGEDCO) are as under:-

"Period	*No. of days*
a. From December 1998 to April 1999	*25 days*
b. From May 1999 to August 1999	*30 days*
c. From September 1999 to March 2001	*45 days*
d. From April 2001 to December 2001	*60 days*
e. From January 2002 to February 2002	*75 days*
f. From March 2002 to March 2007	*90 days*
g. From April 2007 onwards	*75 days"*

(vi) The Respondent No.1 M/s. (GMR) should have informed the appellant and should have got the FSA amended with the approval of the appellant. Had these facts been brought to the notice of the appellant they would have got the PPA suitably amended or modified to entitle the appellant for appropriate extension of time for availing the rebate and/or relating to the clause on delayed payment. This is important as major portion of invoice covers only the variable charge payments.

(vii) In addition the respondent no. 3 (HPCL), has also disclosed the other credits passed on to the respondent no. 1 as under:

"a Reimbursement of Sales Tax difference for the Period from December 1999 to July 2002 Rs.8,01,63,792/-

b. Reimbursement of Sales Tax difference for the Period from August 2002 to December 2006) Rs.9,25,59,416/-

c. Freight subsidy/discount Rs.2,66,07,599/-

d. Price discount Rs.2,64,98,745/-

e. Entry Tax Rs.13.6 Crores

x x x x x x ..... ''

"17.9. We notice that the respondent no. 3 (HPCL) allowed some grace period for payment of fuel bills by the respondent no. 1 in relaxation to the terms and conditions of the FSA. Admittedly no amendment was signed between the respondent no. 1 and 3 which necessitated the approval of the appellant. The invoice on account of Interest on Working Capital or Variable Charges were not impacted by the grace period for payment allowed by the respondent no.3 to the respondent no.1 in terms of the PPA. However, when the appellant's claim for interest on delayed payment of invoice which included the components of interest on Working Capital and Variable Charges has been allowed, the grace period allowed to the respondent no.1 by respondent no. 3 will result in unjust enrichment of the appellant in respect of the interest on delayed payment. When the fuel price is a pass through in the tariff, it is logical that the impact of credit on account of grace period for payment allowed by the respondent no. 3 should also be passed on to the appellant in setting off the interest on account of the delayed payments due to the respondent no. 1 from the appellant.

17.10 Accordingly, the interest to be computed on the amount of fuel invoices payable by the respondent no.1 to the respondent no. 3 for the period of no. of days of credit given with respect to the terms of the FSA for the respective invoices of fuel raised by the respondent no. 3 should be set off against the interest on delayed payment due to the respondent no.1 from the appellant in terms of the order of the State Commission. The amount shall be reconciled by the appellant and the respondent no. 1 within 30 days of this judgment. The rate of interest shall be the

same as stipulated in the PPA. The amount of interest calculated on the various fuel invoices of the respondent no. 3 for the grace period shall be paid by the respondent no. 1 to the appellant within 30 days of reconciliation of the accounts or adjusted in the amount payable by the appellant to the respondent no. 1.

17.11 ……………[x x x   x x x]

17.12 ………………………..However, we notice that the Respondent No.3 in his letter dated 29-07-2011 to the Appellant has indicated freight / discount for the period April 2001 to August 2001 amounted to Rs.266,07,599/-. Accordingly, we direct the respondent no.1 and respondent no. 3 to reconcile the same within a period of 30 days of the date of this judgment. In case any freight subsidy/discount was given, the same with interest calculated at the rate agreed in the PPA shall be paid by the respondent no. 1 to the appellant within 30 days of the date of reconciliation or adjusted in the amount payable by the appellant to the respondent no.1".

13.2. It is observed that in para 17.10. Hon'ble APTEL has directed to compute the quantum of interest on the amount of fuel invoices payable by the respondent no. 1 (GMR) to respondent no. 3 (HPCL) for the period of no. of days credit given with respect to the terms of FSA for the respective invoices of fuel raised by the respondent no. 3 and should be set off against the interest on delayed payment due to the respondent no. 1 from the appellant in terms of the order of the State Commission.

13.3. After issue of the Order by the Commission in D.R.P. No. 10 of 2008, dated 16th April, 2010, M/s.GMR submitted its claim to TANGEDCO on 30th April, 2010.

The details of claim made by M/s.GMR are as follows:

Sl. No.	Particulars	Principal Amount (in Rs.)	Interest (in Rs.)	Total Amount Due (in Rs.)
1.	Rebate	115,15,95,232/-	75,44,61,655/-	190,60,56,887/-
2.	Interest on Working Capital	48,54,78,547/-	19,09,71,906/-	67,64,50,453/-
3.	Start up Charges	22,45,86,933/-	4,46,14,600/-	26,92,01,533/-,
4.	Entry Tax	1,66,77,689/-	-	1,66,77,689/-
5.	Land Lease Rentals(LLR)	64,95,33,156/-	46,54,39,183/-	111,49,72,339/-
6.	Minimum Alternate Tax	20,63,44,211/-	9,39,83,744/-	30,03,27,956/-
7.	Interest on Delayed Payment(IDP)	47,96,18,305/-	-	47,96,18,305/-
8.	Reconciliation of Accounts	5,34,76,557/-	-	5,34,76,557/-
	Total	326,73,10,630/-	154,94,71,089/-	481,67,81,719/-

13.4. The original claim till 30th June 2008 filed before TNERC in respect of above heads was Rs.431,54,35,531/-. Whereas the claim submitted by GMR to TANGEDCO after issue of the Orders by the Commission in D.R.P. 10 of 2008, dated 16th April 2010 is Rs.481.68 Crores. The claim in the above heads including interest has been calculated upto 30th April 2010.

13.5. It is observed that as per the directions of this Commission in DRP No. 10 of 2008, dated 16th April 2010, TANGEDCO has paid the claim of Rs.481.68 Crores with further interest in full by November 10, 2011.

Claim submitted on 30th April 2010 : - Rs. 481.68 Crores

Amount settled by TANGEDCO towards above : claim with further interest - Rs.537.00 Crores

13.6. Hence, set off as directed by Hon'ble APTEL in this case towards Interest on Delayed Payment due to GMR does not arise as TANGEDCO has settled the

outstanding claim which arose due to DRP No. 10 of 2008 in full by various instalments.

13.7. In the present computation, the Commission restricts itself to the calculations of Notional interest in respect of extended credit period upto February 2014 only. The interest liability of GMR would continue until the actual date of payment of amounts due.

13.8. Now let us discuss the issue of methodology of calculation of interest as per the direction given in para-17.10 of the Hon'ble APTEL's Order in Appeal No. 177 of 2010 which is follows:

"17.10.Accordingly, the interest to be computed on the amount of fuel invoices payable by the respondent no. 1 to the respondent no. 3 for the period of no. of days of credit given with respect to the terms of FSA for the respective invoices of fuel raised by the respondent no. 3 should be set off against the interest on delayed payment due to the Respondent No.1 from Appellant in terms of the order of the State Commission .....".

Against the above orders of the APTEL, Appeal has been filed by M/s.G.M.R. before the Supreme Court in C.A.Nos.3201&3202 of 2012. The orders of the Hon'ble Supreme Court dated April 24, 2014 in the above Civil Appeal Nos.3201&3202 of 2012 is as follows:

"1. Having heard learned counsels for the parties at some length, we are of the view that the impugned judgment and order passed by the Appellate Tribunal for Electricity ('APTEL' for short) is not required to be disturbed by us.

2. *However, a dispute has arisen between the contesting parties in regard to the computation of the amount that would be payable or adjustable against their contesting claim in the event the principle applied by the APTEL is followed.*

3. *Since this exercise is merely in the nature of computation and calculation, the same would basically lie within the domain of a Accountant. Hence, we deem it appropriate with the consent of the counsel for both the parties to refer this dispute of computation to the Tamil Nadu Electricity Regulatory Commission ("TNERC" for short) for examining the contesting claim of the parties in so far as the quantum of amount is concerned.*

4. *Both the parties are at liberty to file their memo of calculation before the TNERC within a period of four weeks from the date of receipt of this order by exchanging and furnishing their figures which they have arrived after their computation/calculation.*

5. *We, therefore, dispose of these appeals by referring the matter to the TNERC for computing and deciding the claims in the light of the order passed by APTEL and in accordance with law, which should be done expeditiously but not later than a period of 90 days from the date of submission of the memo of calculations by the contesting parties before the TNER Commission."*

13.9 In the present case, Hon'ble APTEL has given directions as to the methodology of calculation to be adopted by both the parties in para no. 17.10 of its order dated February 28, 2012 in Appeal No. 177 of 2010 as extracted in para 13.1 above. Further, Hon'ble Supreme Court in its Order dated April 24, 2014 in para 5

has directed the Commission to compute and decide the claims in the light of the order passed by APTEL and in accordance with law.

13.10. In view of the above directions of both Hon'ble APTEL and Hon'ble Supreme Court, Commission is restricting itself to computation of interest on the fuel invoices payable by the respondent no. 1 (GMR) to respondent no. 3 (HPCL) for the no. of days credit given with respect to the terms of FSA for the respective invoices of fuel raised by the respondent no. 3 (HPCL) and the credit amounting to Rs.2,66,07,599/- (Rupees two crores sixity six lakhs seven thousand five hundred and ninety nine only) on account of freight subsidy/discount given by HPCL.

13.11. With the above background, let us move on to the issue relating to the credit period availed by GMR over and above the FSA entered into between GMR and HPCL.

13.12. The Fuel Supply Agreement (FSA) entered into between GMR and HPCL contains all the terms relating to the supply of fuel for generation of energy. Article 7 of the FSA, dated December 4, 1996 entered into between HPCL and GMR, deals with the "Invoicing and Payment" terms which are as follows:

"***Article 7. INVOICING AND PAYMENT:***

7.1 Invoicing

On the first day of each month, the Seller shall deliver to the Buyer an invoice for the Fuel delivered to the Day Tanks during the previous month and the Fees payable pursuant to Section 6.2 of the Tariff Period most recently ended each, an "Invoice". Each Invoice shall contain the information

specified in Paragraphs 1.3 and 1.4 of Appendix B. All Invoices shall be issued by the Seller to the Buyer directly.

7.2 Payment Term

a) On the eleventh (11th) day of each month, the Buyer shall issue a cheque in favour of the Seller in an amount representing one-third of the cost of the Agreed Delivery Amount for that month, adjusted by reference to the Invoice for the previous month to add the Fees and any underpayment or to deduct any overpayment made by the Buyer during the previous month and any disputed amounts which the Buyer has paid and has not subsequently deducted from such payments. On the twenty-first (21st) day of each month, the Buyer shall issue a cheque in favour of the Seller in an amount representing payment for one-third of the cost of the Agreed Delivery Quantity for that month. On the first (1st day) of each month, the Buyer shall issue a cheque in favour of the Seller in an amount representing payment for one-third of the cost of the Agreed Delivery Quantity for the previous month. If any cheque is due to be issued by the Buyer on a Day other than a Business Day it shall instead be issued on the next Business Day.

i.e. i) On 11th – 1/3rd of cost of Agreed Delivery Amount for that month. (after adjustment of previous month fees, etc.)

ii) On 21st - 1/3rd of cost of Agreed Delivery Amount for that month

iii) On 1st of each month – 1/3rd of the cost of previous month

13.13. Hence, in the present case as per the Hon'ble APTEL's Order in I.A. No.205 of 2011, interest amount is to be computed on the amount of fuel invoices payable by the respondent no. 1(M/s.GMR) to respondent no. 3 (M/s.HPCL) for the period of no. of days credit given with respect to the terms of FSA for the respective invoices of fuel raised by the respondent no. 3(M/s.HPCL).

13.14. Before going into calculation, let us analyse the clauses provided in the PPA related with Late Payment.

13.15. The PPA entered into between TANGEDCO and GMR deals with the Late Payment clause and how to calculate the interest for the delayed payment.

13.15.1. Initially from the date of PPA to February 29, 2000, the rate of interest to be charged is as per Article 8.7 of the PPA entered into between TANGEDCO and GMR which is as follows:

> ***"8.7 Late Payments:***
>
> *If any amount due hereunder from one Party (the Payer) to another Party (the Payee) is not paid when due, there shall be due and payable to the Payee interest at the rate which is one half cent (0.5%) above the Cash Credit Rate, from and including the date on which such payment was due to but excluding the date on which such payment is paid in full with interest. All such interest shall accrue from day to day and shall be calculated on the basis of 365 day year, compounded monthly, and paid on demand. If no due date is specified under this agreement with respect to any amount due under this Agreement, the due date thereof shall be fifteen (15) Days after demand is made therefor by the Payee."*

13.15.2. On March 1, 2000, GMR and TANGEDCO signed a second Addendum to the PPA. As per the said Addendum, 'Late Payments is covered in Article 8.6 and the same is effective from March 1, 2000 onwards. It provides as follows:-

> ***"8.6 Late Payments:***
>
> *Late payments shall bear interest accrued from the date they became overdue at a rate equal to the prime lending rate charged by the working*

capital bankers from time to time on cash credits extended to the party to whom such payment is owed, to the extent permitted by law".

13.16. Hence, in terms of the provisions of the above PPA and FSA interest has to be calculated for the fuel supplies made during the term of PPA as different Credit Period were extended for different periods during the term of the PPA.

13.17. In the computation submitted by GMR dated July 26, 2016, GMR has stated that it has incurred bank charges towards opening of Letter of Credit for the purpose of obtaining extended credit period.

13.18. The Letter of Credit has been dealt with in the FSA dated December 4, 1996. Clause 7.3 of FSA deals with Letter of Credit. It reads as follows:-

"*7.3 Letter of Credit:*

In this Agreement, "Letter of Credit Amount" shall mean during each Tariff Year, an amount equal to -

1/24(U+V+W)

U = Estimated annual fuel cost (to be recomputed each time there is a change in APM Price)

V= Throughput charges

W= Estimated, Inventory Fee (to be recomputed each time there is a change in Interest Rate)

The Buyer at its own cost and expense shall maintain a stand-by, irrevocable, revolving Letter of Credit for the sole benefit of the Seller. The Letter of Credit shall be established in favour and issued to the Seller 30

days prior to the COD of the first Unit and shall be maintained consistent herewith by Buyer at any and all times during the Term. The Letter of Credit will be provided by Buyer to Seller on the basis that:

i. In the event an invoice due and payable by the Buyer pursuant to the term of this Agreement is not paid in full by the Buyer within 3 days of the due date, the LC may be called by the Seller for payment in full of the due and unpaid Invoice and any interest thereon as determined pursuant hereto.

ii. The amount of the LC shall be equal to the LC Amount.

iii. After each call on any LC, the Buyer shall not later than the close of business on the 3rd Business Day next succeeding such call, cause such LC to be renewed and replenished to its full amount as required hereunder.

iv. The LC shall be issued by a Scheduled Bank in Chennai."

13.19. M/s.GMR in its submission dated July 26, 2016 in para 20 (e) has stated that while computing the extended credit period, the cost towards bank charges incurred by it for opening letter of credit in connection with the extended credit period, has been adjusted on month to month basis. It has also been pleaded by M/s. GMR that,

The credit period has been extended by HPCL to GMR till date (i.e. 7th April 2014) (date of letter of HPCL). The details of credit period as per HPCL's letter dated 7th April, 2014, (in continuation to its letter dated 29th July, 2011) is as follows:

From April 2007 to May 2012	75 Days
From June 2012 to July 2012	60 Days

From August 2012 to November 2012	45 Days
From December 2012 to 7th April 2014	30 Days

In the above letter, HPCL has also confirmed that no discount was extended to the extended credit period (i.e. from April 2007 to 7th April 2014).

13.20. COMPUTATION OF INTEREST BY GMR:

13.20.1. As per GMR's submission, it is contended that it is not liable to pay any amount to TANGEDCO as a result of additional period for payment which was allowed to it by HPCL the fuel supplier to the Project. However, as directed by the Commission, it filed its computations and in para 20(f) of its Objection to the memo of computation of TANGEDCO along with memo of computation on behalf of GMR dated July 26, 2016 has stated that the claim of TANGEDCO is based on notional extended credit period received by GMR on the monthly fuel invoices. TANGEDCO cannot claim from M/s.GMR more than the actual amount received or due to M/s.GMR towards delayed payment charges on fuel invoices.

13.20.2 .M/s.GMR has further contended that the submissions of TANGEDCO is also incorrect and full of errors citing the following as reasons:

a) Single Due Date vs. Different Progressive Date:

TANGEDCO in its computation for calculating the benefit of extended credit period has wrongly assumed single due date for monthly payments. As per the terms of FSA executed between GMR and HPCL the monthly fuel invoices were to be paid progressively on three different dates, i.e. on 11th, 21st of the same month and 1st day of the following month as per clause 7.2 (a) of the FSA entered into between M/s. GMR and M/s. HPCL. This material aspect has not been considered by

TANGEDCO which has wrongly proceeded on the basis of a single due date. This is a fatal error which goes to the root of the calculations.

b) Domestic vs. Imported Fuel:

M/s.GMR had separate payment arrangement for imported fuel as compared to domestic fuel. TANGEDCO had failed to take into account the effect of payment arrangement in the case of imported fuel. In the case of imported fuel, GMR was to make 90% of the import value on the pro-forma invoice within 7 days from the date of arrival of the vessel. Accordingly, for imported fuel, GMR was making advance payment and hence there was no extended credit for imported fuel. TANGEDCO has calculated the extended credit period benefit even for imported fuel. This demonstrates that TANGEDCO's approach is flawed.

c) Interest on Interest:

TANGEDCO has claimed interest on interest which is not allowed in the PPA.

d) Bank charges:

TANGEDCO has failed to take into account additional bank charges incurred towards letter of credit.

13.20.3. GMR has also submitted its memo of calculation and has stated that the calculation is prepared on the basis of the following facts and circumstances involving payment of fuel invoices to HPCL by it and the reimbursement of the same was claimed as fuel charges from TANGEDCO:-

i) Hon'ble APTEL vide its order dated 28th February 2012 upheld the orders of the Commission and confirmed the Order's of the State Commission in D.R.P. No. 10 of 2008, Order dated 16th April, 2010.

ii) As per the Hon'ble APTEL's Order, GMR and TANGEDCO had to reconcile their accounts/ claims in respect of the extended credit benefit and freight subsidy and necessary adjustment/ set off shall be made against the default interest payable by TANGEDCO under the PPA.

iii) GMR while computing the extended credit period amount has taken the exact credit period. As per the FSA the monthly fuel invoices were to be paid on 11th, 21st of the same month and 1st day of the following month, every month for the supplies made during the month.

iv) Owing to separate and distinct payment terms as compared to domestic fuel supply, the credit period for imported fuel has been computed separately.

v) While computing the extended credit period, the cost towards bank charges incurred by GMR for opening letter of credit in connection with the extended credit period has been adjusted on month to month basis before arriving the interest due for that month.

vi) It is stated that TANGEDCO's claim is based on notional extended credit period received by GMR on the monthly fuel invoices. TANGEDCO cannot claim from GMR more than the actual amount received or due to GMR towards delayed payment charges on fuel invoices.

vii) It is stated that the date up to which the interest is considered is the actual Payment Date or Credit Period end date whichever was earlier.

viii) It is stated that the number of Days calculation is derived from subtraction of two variables: (a) Date up to which interest is computed minus (b)Date of payment as mentioned in the FSA. For the purpose of computation of interest, days in a year are assumed to be 365 days.

ix) It is stated that the Bank Prime Lending Rate (BPLR) has been considered.

(a) For the period from April 1999 to February 2000 interest is compounded on a monthly basis.

(b) From March 2000 onwards interest is calculated on simple interest basis i.e. for each month interest due is arrived.

x) Date of Invoice, amount of Invoice and the date of payment made by GMR were given.

xi) GMR has calculated the notional benefit on account of the extended credit period that would be passed on to TANGEDCO as 49.29 cr considering the following:-

(a) Month-wise (based on Tariff Invoice) Interest on Delayed Payment from TANGEDCO – relating to Fuel,

(b) Interest on Supplementary Invoice

(c) Bank charges incurred was apportioned on monthly basis. The total Bank charges incurred during the period(i.e. as per the submissions of GMR i.e. upto March 2014) is Rs.11,20,92,631/-

(d) Interest on Delayed Payment from TANGEDCO – Fuel and Supplementary Invoices (A)

(e) Notional Interest benefit from HPCL,

(f) Notional Interest benefit from HPCL post BG cost (B) and

(g) Finally GMR arrived the minimum of (A) or (B) each month.

(h) The total amount of Minimum of (A) or (B) for the period from April 1999 to February 2014 i.e. (Term of PPA) is Rs.49,28,89,735/- or Rs.49.29 Crores.

13.20.4. TANGEDCO in its additional set of documents submitted the letter with the memo of calculations made by GMR, in which it is stated that the Notional Interest savings calculations on account of extended credit as per TANGEDCO is Rs.152.14 Crores and as per GMR is Rs.122.43 Crores.

13.21. <u>TANGEDCO's COMPUTATION OF INTEREST:</u>

13.21.1. As per the submissions of TANGEDCO, it is stated that they have relied on the letter received from HPCL relating to the credit period given by HPCL. Further, they have also relied on the freight discount intimated in the said letter. The interest for the credit period is calculated on a monthly basis, as the product of (a) the total value of fuel invoices raised during a billing month, (b) rate of interest charged by GMR to TANGEDCO as per PPA for interest on delayed payment as applicable from time to time and (c) the credit days allowed by HPCL for that month.

13.21.2. TANGEDCO has stated that it is entitled to interest on the credit from the day on which the credit becomes due, till the date of actual payment by GMR. For the purpose of this affidavit, TANGEDCO has (a) incorporated invoices received upto 14-02-2014 (expiry of initial term of PPA) and (b) calculated the interest upto 31-07-2014.

13.21.3. Accordingly, TANGEDCO has calculated the value of credit availed by GMR, payable to TANGEDCO as Rs.157,04,23,877/-. The interest on the credit amount as Rs.120,93,92,485/-. The total of principal and interest as on July 31, 2014 is Rs. 277,98,16,362/- attributable to the extended credit period for the period from December 1998 to July 31, 2014.

13.21.4. The value of freight subsidy allowed to GMR by HPCL for the period from April 2001 to August 2001, as per HPCL's letter dated 29-07-2011 is Rs.2,66,07,599/- and the interest on the above amount of freight subsidy is Rs.4,23,11,216/- as on July 31, 2014. As per TANGEDCO's contention, the total sum due relating to freight subsidy is Rs.6,89,18,815/-. They have not agreed for the submission of GMR towards the email dated May 31, 2016 received from HPCL stating that HPCL is unable to trace papers/transactions related to freight subsidy for the year 2001.

13.21.5. As per the written submissions of TANGEDCO, they have stated that they are entitled for an amount of Rs.284,87,35,177/- towards extended credit period and freight subsidy (Rs. 277,98,16,362/- + Rs.6,89,18,815/-).

13.21.6. During the hearing before the Commission, TANGEDCO has accepted that as the details of payment made by GMR to HPCL relating to fuel is not available with it the interest from the date of invoice has been calculated. Further, it has stated that the terms of payment relating to Import fuel supply is also not available and hence it has calculated the interest from the date of fuel invoice even for the import fuel.

13.21.7. During the hearing, TANGEDCO has also accepted for the additional Bank charges incurred towards the extended credit period.

13.22. Commission's analysis on the methodology adopted by both the parties and views are as follows:

13.22.1. On checking the methodology adopted by both the parties, Commission felt that the calculations of TANGEDCO for arriving at the interest cannot be totally considered, as TANGEDCO did not consider the payment terms of FSA between

HPCL and GMR. Further, it is understood that the actual date of payment of fuel invoices by GMR to HPCL may not be available with TANGEDCO. In its workings, TANGEDCO further calculated the interest for import fuel taking the credit period in full but GMR in its submission dated 26th July, 2016, in para 18 (b) has stated that in respect of import fuel, GMR has to make payment of 90% of the import value of the pro-forma invoice within 7 days from the date of arrival of the vessel.

13.22.2. An analysis of the computation made by GMR, reveals the following:

(a) GMR calculated the interest on delayed payment from TANGEDCO with respect to Fuel portion (Primary fuel cost from Tariff Invoices) and Supplementary Invoices.

(b) Bank Charges/LC paid by GMR relating to the month have to be accounted.

(c) The number of days for which interest is to be charged are to be determined in the light of different dates of payment for the same invoice.

(d) While calculating the Credit period end date, GMR has computed the credit period end date starting from 15th of the month for which Fuel is supplied.

(e) If the extended credit period end falls on a holiday, the remittance is to be effected on the previous working day. For the purpose of computing the due dates, Sundays and National Holidays (15th August, 2nd October and 26th January) are considered as Holidays and every calendar month is assumed to have 30 Days.

(f) Detailed analysis of the above leads the Commission to arrive at the following decision for determining the appropriate value that needs to be paid by GMR as directed by Hon'ble APTEL

(g) The computation has to be made in accordance with the terms of the FSA, actual grace period extended by HPCL, actual date of payment of fuel invoices made by GMR to HPCL and invoices relating to imported fuel have to be excluded as per the submissions of GMR in their written submissions dated July 26, 2017.

(h) In the computation it has been stated by GMR that the earlier of credit period or date of payment to HPCL has been considered for determining the number of days for calculating the interest for the extended credit period. But the number of days contained more than the number of days of credit period offered by HPCL during the respective period.

(i) In certain cases during 2001-02, the number of days was around 334 days, 303 days, 272 days, 245 days, 181 days, 150days, 120 days, etc. Further, interest has been calculated for those days. In respect of such abnormal delayed payment, Commission has restricted the calculation of interest upto the number of days credit during that period for the above delayed payments and has not considered the abnormal delayed days for computing the interest due.

(j) In respect of supply of Import Fuel, Commission agrees with GMR that TANGEDCO should not charge interest for the Import fuel supply. In the computation submitted by TANGEDCO, it has considered computation of interest for the Import fuel as well. But during the hearing, TANGEDCO has agreed that since they do not have the payment details made by GMR to HPCL they have computed the interest for the Import fuel.

(k) As per the Invoices submitted, the fuel procured through Import source can be seen during the FY2008-09, FY2010-11 and FY2011-12.

(l) Commission in its computation has not considered the interest for the amount of Import fuel whenever advance payment is made by GMR as stated in their submissions that 90% payment is made relating to the import value on the pro-forma invoice within 7 days from the date of arrival of the vessel.

(m) GMR has claimed that for availing additional credit period, they have incurred additional bank charges / Letter of Credit. GMR has apportioned the interest month-wise and deducted the bank charges before arriving the minimum amount eligible for that month. The total bank charges relatable up to the term of PPA (October 1999 to February 2014) as submitted by GMR is Rs. 10,84,06,595/- and this has to be set off against the interest due.

(n) Further, Commission is not agreeable to the method of arriving interest eligible for the month i.e computing the Interest on delayed payment from TANGEDCO (based on Tariff Invoice relating to Fuel cost) and Interest on Supplementary Invoice. The need for computation of Interest on Delayed Payment from TANGEDCO in respect of Fuel and Supplementary Invoice does not arise as TANGEDCO has settled GMR Rs.537 Crores under various heads including the Interest on Delayed Payment as per the orders of the Commission in DRP 10 of 2008 and as per the directions of Hon'ble APTEL while hearing the matter in the Appeal No. 177 of 2010.

Following the principles as stated above the Commission proceeded to calculate the total sum payable by M/s. GMR to TANGEDCO as on February 2014

being the end of agreement period between the parties. The yearwise calculations are given at Annexure (A) to this order.

13.23. Therefore, Commission finally arrived at the notional interest benefit from HPCL upto February 2014 of Rs.125,47,56,969/- (from April 1999 to February 2014) and the Cost of BG and/or LC (from April 1999 to February 2014) at Rs.10,84,06,595/-. Therefore, Notional Interest benefit from HPCL after Bank charges/LC Cost (from April 1999 to February 2014) works out to Rs.114,63,50,374/-(Rupees one hundred and fourteen crores sixty three lakhs fifty thousand three hundred and seventy four only). This is against the notional interest arrived by GMR at Rs.49.29 Crores (from April 1999 to March 2014) in their latest computations.

13.24.The eligible notional interest amount receivable by TANGEDCO towards the extended credit period after deducting the bank charges is Rs114,63,50,374/- (Rupees one hundred and fourteen crores sixty three lakhs fifty thousand three hundred and seventy four only)

13.25.The 2nd issue is related to the Freight Subsidy and the interest payable on such freight subsidy.

13.26. Further, GMR has not considered the Freight subsidy/ discount extended by HPCL as stated in the HPCL's letter dated 29-07-2011 amounting to Rs. 2,66,07,599/- citing the email dated 31-05-2016 from HPCL stating that they are unable to trace papers/transactions related to freight subsidy for the year 2001.

13.27. In respect of this freight subsidy/discount, Commission is of the view that the email of HPCL dated 31-05-2016 stating that they are unable to trace papers/transactions related to freight subsidy cannot be taken for consideration. In as much as HPCL had indicated in their earlier letter dated 29.07.2011 which had also been filed before Hon'ble APTEL that they had extended a freight subsidy/discount of Rs.2,66,07,599/- to M/s. GMR, it is for the GMR to prove that no such freight subsidy has been extended by HPCL since the present stand of HPCL that they are unable to trace the papers/transactions during 2016 is not acceptable. The Interest towards this freight subsidy till to February 2014 is Rs.4,06,66,101/-. Hence the total amount due towards the principal and interest up to February 2014 on account of freight subsidy is Rs.6,72,73,700/-.

Commission has restricted itself while calculating the interest in respect of extended credit period and freight subsidy. It is pertinent to mention here that the Interest is payable till final settlement of the sum due.

With the above, the M.P.No.39 of 2015 is finally disposed off.

(Sd ....)	(Sd......)	(Sd........)
(Dr.T.Prabhakara Rao)	**(G.Rajagopal)**	**(S.Akshayakumar)**
Member	**Member**	**Chairman**

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission