

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

D.R.P. No13 of 2012

Lanco Tanjore Power Company Ltd
(formerly Known as Aban Power Company Ltd)
3rd Floor, 25, G.N. Chetty Road,
T.Nagar, Chennai – 600 017.

... Petitioner
(Thiru N.L.Raja Senior Advocate
for Thiru P.Vinod Kumar,
Counsel for the Petitioner)

Vs.

1. Tamil Nadu Electricity Board,
Represented by the Chairman
800, Anna Salai
Chennai – 600 002
2. Tamil Nadu Generation and Distribution Corporation Ltd.
Represented by the its Director
144, Anna Salai
Chennai – 600 002

... Respondents
(Thiru M.Gopinathan
Standing Counsel for the Respondents)

Dates of hearing : 31-07-2012; 28-11-2012; 31-01-2013;
12-02-2013; 19-02-2014; 21-03-2014;
29-04-2014; 14-07-2014; 19-09-2017;
13-03-2018; 23-10-2018; 27-11-2018;
04-12-2018 and 21-12-2018

Date of Order : 04-01-2019

The DRP.No.13 of 2012 came up for final hearing on 21-12-2018. The Commission upon perusal of the petition, counter affidavit and connected records and after hearing the submissions of the both the parties, the Commission hereby makes the following:

ORDER

1. Prayer of the Petitioner in D.R.P No.13 of 2012:-

- a) The prayer of the Petitioner in the above DRP.No13 of 2012 is to direct the Respondents to permit the petitioner to use of Naphtha or any other compatible fuel as alternate / supplemental fuel to Natural gas to increase and maintain PLF of the Plant as contemplated in PP A dated 01.09.2003 and consequently amend the tariff related and other provisions of the PP A accordingly;
- b) In the event of the Commission not granting the relief (a) sought above, then alternatively direct the respondents to pay fixed charges on plant availability basis in accordance with the Notification dated 30-03-1992 of Government of India in future.
- c) To declare that the Petitioner is entitled to Fixed charges on Plant availability basis from November 2008 in accordance with the Notification dated 30.03.1992 of Government of India;

2. Facts of the Case:-

The petition has been filed to direct the Respondents to permit the Petitioner to use Naphtha as alternate fuel at its 113.2 MW power plant at Karuppur Village, Thanjavur District to be used as alternate to and or in addition to natural gas.

3. Contentions of the Petitioner:-

3.1 The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 mainly engaged in the business of generation and sale of electricity.

Tamil Nadu Industrial Development Corporation Limited, (TIDCO) wholly owned by Government of Tamil Nadu, had invited proposals for setting up liquid fuel based, short gestation power projects at various locations in Tamil Nadu on Build-Own-Operate basis under International Competitive Bidding process based on the guidelines dated 30.03.1992 issued by Ministry of Power, Government of India in exercise of the powers under section 43A(2) of the Electricity Supply Act, 1948.

3.2 Ministry of Power, Government of India in exercise of the powers conferred by sub-section (2) of section 43 A of the Electricity (Supply) Act 1948, through the Tariff Notification for Generating Companies dated 30.03.1992, provided the factors in accordance with which the tariff of sale of electricity by generating companies to the Board and other persons shall be determined.

3.3. The said Notification, provided for two part Tariff in respect of Thermal Power Generating Stations, (including Gas, Naphtha and other liquid fuel based stations) for sale of Electricity i.e., (1) recovery of annual Fixed Charges consisting of interest on loan capital, depreciation, operation and maintenance expenses, taxes on income, return on equity and interest on working capital at a normative level of generation, and (2) energy (variable) charges covering fuel cost recoverable for each unit of energy supplied based on norms of operations namely plant load factor, station heat

rate, auxiliary consumption, stabilization period, date of commercial operation etc. as specified in the notification.

3.4. In respect of generating stations awarded through Competitive Bidding, the said Notification, also provided that the full fixed charges component would be recoverable at levels determined by the State Government within the range of levels of the plant or unit availability as indicated in the Notifications for stabilization and subsequent periods as a percentage of availability factor.

3.5. The Petitioner submitted its bid and was selected by the TIDCO/Government of Tamil Nadu based on the tariff quoted and other parameters of evaluation to develop, procure, finance, construct, own, operate and maintain 132 MW (Contracted Capacity of 126.13 MW) Combined Cycle power project using Naphtha as fuel and sell the entire Electricity generated to the First Respondent.

3.6 Initially the power plant was envisaged to be set up at Vallur Village, Ponneri Taluk, Tiruvallur District, Tamil Nadu and Power Purchase Agreement (PPA) for the said project was entered on 20.05.1998 with First Respondent for sale of Electricity to the Board. The fuel proposed to be used by the Petitioner at its plant was Naphtha.

3.7 As per the terms of PPA dated 20.05.1998, the Petitioner was entitled to Tariff payment which consisted of monthly fixed charges and monthly variable

charges. The fixed charge for a tariff period was fixed price per kWhr of Electricity upto 80% of the plant load factor and incentive of Rs.0.50 paise for every unit of Electricity dispatched beyond PLF of 80% during the tariff period.

3.8 Subsequent to the execution of the PPA on 20.05.1998, due to increase in the price of the Naptha, the Petitioner was asked to find out the alternate fuel so as to reduce the unit cost of generation. At the instance of the First Respondent, the Petitioners identified Natural gas available from the Kuttalam Gas Fields of ONGC Ltd. in the Thanjavur District as alternative fuel to be used at the plant.

3.9 Petitioner approached the Ministry of Petroleum and Natural Gas (MoPNG), Government of India for allocation of natural gas for the project and the Petitioner was allotted 5,00,000 Standard Cubic Meters per Day (SCMD) of natural gas on Firm Basis for using it as fuel for power generation at its plant. Thereafter, the Petitioner and GAIL executed long term Gas Supply Contract dated March 28, 2002 for supply of 500000 SCMD of Natural Gas from Kuttalam gas fields of ONGC in Cauveri Basin to the Petitioner. The location of the plant was changed from Vallur village to Karuppur village in Thanjavur District which was in close proximity to Kuttalam gas fields from where natural gas was to be supplied to the plant. The Gas Supply Contract dated March 28,2002 expired on 31.12.2010 and a fresh Gas Supply and Transmission Agreement dated 29.12.2010 has been entered into with GAIL for a further period of 5 years.

3.10 The Government of Tamil Nadu approved the aforesaid selection and the necessary change of technology, fuel and also the shifting of the location of the

project from Vallur village to No.9, Karuppur village, Thiruvudaimaruthur Taluk, Thanjavur District of Tamil Nadu.

3.11 Consequent to the change of fuel and technology, the Power Purchase agreement dated 20.05.1998 signed in respect of the said Naphtha based Power project was amended and the present Power Purchase Agreement (PPA) was signed on 1.9.2003 with the First Respondent for a period of 15 years for sale of electricity in incorporating change of technology, change of location and fuel. The said PPA dated 01.09.2003 with its subsequent addendums continues to be in force.

3.12 The selection for setting up of the power project with the above changes entitled the Petitioner to develop, procure finance, construct, and own operate and maintain the natural gas based power project with a Combined Cycle capacity of net exportable generation of 113.2 MW electricity at Karuppur, Thanjavur District in Tamil Nadu.

3.13 After obtaining all the clearances, the Petitioner established the 113.2 MW Combined Cycle Gas Based Power Project by synchronizing Gas Turbine on 18.02.2005 and Steam Turbine on 11.08.2005 with TNEB grid. Since then, the Petitioner has been supplying entire electricity generated by the Petitioner's plant to Respondents at a levelised Tariff of Rs.2.32 per kWhr which is the cheapest tariff in the State among all IPPs.

3.14 Before allocation of natural gas to power projects in the Kuttalam gas fields, the availability of natural gas from the Kuttalam Gas fields was estimated by ONGC

at 1.3 Million Metric Standard Cubic Metres per day (MMSCMD) and based on such estimate gas allocations to the extent of 1.165 MMSCMD had been made to several power projects in the region including the Petitioner's power plant. Later on, during November 2003 ONGC informed that natural gas available in Kuttalam region gas fields was much less than originally projected and the actual availability of the gas was estimated to be about 0.7 MMSCMD only as against the original estimation of 1.30 MMSCMD.

3.15 Although the Petitioner is entitled to receive contracted quantity of 5,00,000 SCMD of natural gas from GAIL under the gas supply contract, the supply is subject to availability of gas and ability of GAIL to supply the gas to the Petitioner. The supply from GAIL has been steadily coming down due to natural depletion in Kuttalam gas fields. Although gas is also being drawn from the adjacent Narimanam gas fields based on a decision taken by the MoPNG, Government of India to meet the requirements of the consumers in Kuttalam region, the situation has not improved much.

3.16 The problems for the Petitioner was further compounded by the GAIL's introduction of Daily Nominated Quantity ('DNQ') method whereby the quantity of supply of gas on a given day is only notified to the consumer on the immediately previous day. On the other hand, any over drawal of gas by the Petitioner is also penalized under the DNQ method. The DNQ method of supply has also been incorporated in the present Gas Sales and Transmission Agreement dated 29.12.2010.

3.17 Going by the current trend of GAIL's gas supply and its pessimistic forecast for the future, maintaining availability or supply of contracted quantity of gas by GAIL from the existing sources to the Petitioner is difficult. Going forward, the supply of gas is expected to be between 65% to 70% of the contracted quantity, as per the projection of the ONGC in the coming years.

3.18 The Supply of gas to the Petitioner has been steadily declining since November 2008. As against the contracted quantity of 5.00 Lakh SCMD, the gas supply from GAIL to the Petitioner has been around 3.8 Lakh SCMD resulting in reduced generation of power with Plant Load Factor (PLF) of 65% to 75%. During the periods when the Second Respondent's plant at Kuttalam, was shut down, gas was diverted to other consumers in the region, the Petitioner during those periods had been able to maintain PLF above 85%. However, this is not a permanent feature. The overall available gas remains less than required, the Petitioner is unable to run its plant at its optimum capacity or efficiency. The projections for the future are also extremely concerning.

3.19 The PPA with the First Respondent obligates the Petitioner to run its plant at a very high sent out Plant Load Factor ('PLF') of 85% for becoming entitled to recover fixed charges in full. This PLF is very high when compared to the PLF of around 68.5% agreed by the Respondent with other similar IPP power plants in the State. The Respondent has entered into PPA with M/s. ST-CMS Electric Company, M/s. PPN Power Projects and M/s. Madurai Power Company Ltd. in which the stipulated PLF to be entitled to full fixed charges is only 68.5%. There are also similar PPA by

the State Utilities of other States where the prescribed PLF is less than 70%.

3.20 In order to achieve this high PLF of 85%, it is essential that there is uninterrupted supply of gas in contracted quantities to the Petitioner's plant. This high PLF of 85% as against 80% PLF stipulated in Naphtha based PPA dated 20.05.1998 was agreed upon with the assumption that GAIL would supply full contracted quantity of 5.00 Lakh SCMD of gas as per firm allotment. However, as stated earlier, since November 2008, the Petitioner has been receiving around 3.80 lakhs SCMD of gas (except during the TNEB's plant shut down), compelling the Petitioner to run its plant only at around 65 to 70% PLF as against the required PLF of 85% to recover full fixed charges.

3.21 The Petitioner has made several representations to the GAIL as well as to MoPNG requesting for remedial measures for supply of full contracted quantity. Looking at the situation, Second Respondent vide letter dated 11.05.2009, had written to GAIL requesting for the supply of the total contracted quantity to the Petitioner. However, there was no favourable response from GAIL. The reduced availability in gas resulting in reduced supply to the Petitioner is totally outside the control of the Petitioner.

3.22 The Petitioner submits that, there is also no alternate source of natural gas from where the Petitioner could procure the requisite quantity of gas at present to increase the generation of power and maintain the PLF at 85% to recover full fixed charges. Therefore despite the Petitioner's willingness to run its plant at optimum

capacity, on account of factors beyond the Petitioner's control, it has not been able to do so. The high PLF of 85% based on actual units sent out basis prescribed under the PPA for being entitled to full fixed charges has resulted in the Petitioner under-recovering fixed charges substantially.

3.23 The Petitioner submits that on account of the short supply/ cut in the supply of gas, the generating station of the Petitioner is not able to achieve 85% PLF. The plant has been performing and achieving lesser PLF corresponding to the quantity of gas received from GAIL. There was no improvement in supply position despite vigorous efforts by Petitioner thereby necessitating the expeditious identification of an alternate source of fuel for the operation of its plant on a priority basis. Despite utilization of 100% gas being supplied by GAIL to the Petitioner's plant to generate power, the Petitioner is not able to achieve the 85% PLF.

3.24 The Petitioner submits that the Respondents are also fully aware of the additional financial burden due to under recovery of fixed charges by the Petitioner arising out of the short supply of gas. The Petitioner submits that the PPA has in contemplation of such a possible eventuality provided a suitable provision in section 7.5 to the PPA dated 01.09.2003 on the alternate fuel to keep up the full uninterrupted operations of the plant.

3.25 Naphtha and LNG are the only available alternate fuels which can be used at Petitioner's plant. Of the said two alternates, Naphtha is the most ideal as its availability is not a concern. Naphtha is available locally in abundance near all

refineries unlike LNG which has to be imported and thereafter transported to the site. The usage of the alternate fuel (Naphtha) will be made to make up for non-availability/shortage of Gas so as to achieve 85% PLF. The time required for shifting to new technology which will enable the use of Naphtha at the Petitioner's plant will be approximately 17 months and hence there was a need for expeditious action on the part of the Respondents to ensure that the plant runs at its optimum capacity at the earliest.

3.26 The Petitioner submits that in the above stated circumstances, vide letter dated 27.08.2009 based on section 7.5 of the PPA, the Petitioner made a detailed representation to the First Respondent requesting for an in-principle approval for use of an alternate fuel in the place of natural gas and requesting for a discussion on selecting the alternate fuel. After conspicuous inaction for a considerable period of time, the Member (Generation), TNEB vide letters dated 22.09.2009 and 08.11.2009 sought additional particulars. Although the requisite details to enable a decision on the Petitioner's representation dated 27.08.2009 were already available with the Respondent, the Petitioner commissioned a detailed report from M/s. Fichtner Consulting Engineers Pvt. Ltd., who are reputed consultants, on the feasibility for usage of alternative fuels for the Petitioner's plant. The Petitioner forwarded the said report from M/s. Fichtner Consulting Engineers Pvt. Ltd., to the Respondents as early as on 23.12.2009. In terms of the report:

- a) The Gas Turbine installed is capable of operating on a dual fuel mode. That is either on Gas or Light Distillate at any given time;
- b) The installing additional equipment and up-gradation existing equipment is

required with capital expenditure upto Rs.53.98 crores;

c) Time required for establishing the project will be 14 to 17 months; Mixed Fuel mode with MNQC System using 70% Gas and 30% Naptha is recommended for implementation.

3.27 Since the Second Respondent had taken considerable time in taking a decision on the Petitioner's request, the Petitioner vide its letter dated 23.12.2009 requested the Second Respondent to consider making payment of Fixed charges based on plant availability factor as an interim measure till a decision on the alternative fuel is taken. The Second Respondent vide its letter dated 06.02.2010 rejected the Petitioner's request for payment of fixed charges on the basis of Plant Availability Basis.

3.28 Since there was no response from the Second Respondent on the request, the Petitioner addressed letter dated 29.05.2010 reiterating its request for an early decision on use of alternate fuel. Second Respondent kept on asking information on various aspects and the Petitioner furnished all the information sought by them without exception through the correspondence that took place between June 2010 and December 2010.

3.29 The Second Respondent vide letter dated 12.01.2011 informed that the Petitioner can make necessary arrangement for alternate fuel or whatever other appropriate alternative as and when there is non-availability of main fuel. The Petitioner addressed a letter dated 27.01.2011 informing the Respondents that it would be making arrangement for use of Naphtha as alternate fuel to natural gas as

per their advice vide their letter dated 12.01.2011 and sought to call for discussions for modalities. The Second Respondent called for meeting between the officials of the Petitioner and the Respondents with regard to the Petitioner's request and a meeting was held on 08.02.2011.

3.30 During the said meeting, the Petitioner explained in detail the necessity and urgency to approve the use of Naphtha as alternate fuel. In the said meeting the Respondents suggested that the Petitioner should sell part of the power to third parties so that there is no additional financial burden on the Board on account of the use of Naphtha as alternate fuel. The said suggestion of the Respondents being contrary to the terms of the PPA, and also unviable, was not acceptable to the Petitioner.

3.31 After the said meeting, the Second Respondent through the Chief Engineer Planning & RC addressed a letter dated 05.03.2011 stating that a further action on the Petitioner request for use of Naphtha as alternate fuel will be taken only after receiving a response from the Petitioner regarding a suitable proposal to operate the plant with Naphtha as mixed fuel without additional financial commitment and shortfall in revenue recovery to the Second Respondent by going for a third party sale.

3.32 The suggestion of the Respondent that the Petitioner should sell power generated at its plant to third parties is contrary to the terms of the PPA. As per Article 5 of the PPA, the Respondents are under an obligation to purchase the power

generated at the Petitioner's plant till 31st July 2020. The PPA does not provide for sale of power by the Petitioner to third parties.

3.33 On account of the Respondent's non response on this issue, the Petitioner is neither able to enhance the PLF in the plant nor is in a position to arrest the ever mounting additional financial burden to the Petitioner which was not contemplated in the PPA.

3.34 Lower PLF of the Petitioner's plant is entirely due to non-availability of the contracted quantity of gas and Petitioner has no control over the short supply of gas by GAIL. It is pertinent to mention that had the Petitioner not agreed to change in fuel from Naphtha to Natural gas to reduce the cost for the Respondent, the Petitioner would not have found itself in the present state of affairs as there is no shortage in the availability of Naphtha.

3.35 The Petitioner submits that Government of India guidelines in the notification dated 30.03.1992 in prescribing the two part tariff is to ensure that developer would recover not only entire capital expenditure during the life span of the project but also to provide reasonable return on the equity invested by him. The denial of payment of full fixed charges is not in tune with the above guidelines for recovery of principal, return on equity interest on borrowings and other operational and maintenance expenses by the Petitioner. The Respondents by refusing to accede to the Petitioner's request on use of alternate fuel is denying the Petitioner of its right to be entitled to full fixed charges by operating the plant at 85% PLF.

3.36 The Petitioner has under recovered substantial fixed charges from November

2008 to 15th June 2012. With such huge under recovery of fixed charges the Petitioner is unable to sustain its operations due to drastic fall in its cash flow and profitability.

3.37 The generating station is established, operated and maintained by the Petitioner exclusively for supply of power to the Respondents. In such circumstances, any under recovery of fixed cost and the additional cost of generation arising out of any shortfall in the contracted quantity of gas, would entitle the Petitioner to receive from Respondent to the extent under-recovered.

3.38 The Petitioner has already sustained considerable loss on account of the reduced supply of gas and had the Respondents taken a timely decision on the request made by the Petitioner, the mixed fuel facility would have been in place by now and the Petitioner would have been able to maintain the mandatory 85% PLF.

3.39 The Notification No. TNERC/TR/5/2 Dated 24.06.2005 issued by the Commission for Determination of Terms and Conditions of Tariff Regulations specify the Tariff setting principles under Para 4 of Regulations as follows:

4. *“The commission, while determining the tariff shall be guided by the following factors:-*

(i) (a) the principles and methodologies specified by the central commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation , transmission , distribution and supply of electricity are conducted on commercial principles

.....

(e) Safeguarding of consumers' interest and at the same time recovery of cost of the cost of electricity in a reasonable manner;

The Petitioner submits that payment of fixed charges presently being made to the Petitioner is not in tune with the above principles to ensure recovery of total cost of the project by the generator incurred for establishing the project with reasonable return thereon.

3.40 As per the Tariff Notification dated 30.03.1992, the power generating stations awarded through competitive bidding, are entitled to recover the full fixed charges at levels determined by the State Government based on plant availability factor and not on achievement of PLF. The above principle has not been followed by Respondent while fixing the basis for payment of fixed charges.

3.41 The Petitioner submits that the Respondents were fully aware that the Petitioner had incurred the expenses towards creating the capacity and in terms of the Guidelines of Government of India, IPPs are entitled to recover the full capacity charges, once the capacity is created for the benefit of the SEB and the Respondents having been the exclusive beneficiary of the power generated out of the capacity for their commercial advantage are obliged to recoup the Fixed Costs to the Petitioner in creating the generating capacity on commercial principles. The guiding principles followed in determining the tariff as reflected in the policy resolution, notifications and the guidelines of Government and the Hon'ble Commission are to ensure reasonable return on Capital Employed by the generating company based on which the Petitioner committed itself to the business of

generating electricity for and on behalf of the State Electricity Board.

3.42 On account of the stand taken by the Respondents on the request made by the Petitioner for use of Naphtha as alternate fuel, the Petitioner has no other option but to approach the Commission in terms of the provisions of the Electricity Act, 2003 seeking appropriate orders against the indifferent attitude of the Respondents to the reasonable demands of the Petitioner.

4 Counter Affidavit filed on behalf of the Respondents 1 and 2:-

In the counter affidavit file on 15-09-2012, the Respondents have submitted as follows:-

4.1 It is submitted that Tamil Nadu Industrial Investment Corporation had floated International Competitive Bidding (ICB) for setting up of small capacity, short gestation Multifuel Power Projects on Build, Own and Operate basis at 20 locations in the state of Tamil Nadu during the year 1995-96.

4.2 The said proposed projects shall be based on the Government of India's policy on liquid fuel fired power plants Notification dated 06.11.1995. As per this policy, the fuel of the power project shall be heavy fuel oils or natural gas. The norms of operation and tariff of the plants shall be as per the Government of India's Notification dated 30.03.1992 for sale of electricity by Generating Companies to the Board.

4.3 It is respectfully submitted that one of the bid conditions in the tender states as follows:

"3. CHOICE OF TECHNOLOGY AND FUEL

".....The bidder should take note of the Government of India's policy on liquid fuel fired power plants. The bidder shall take full responsibility to tie up the fuel linkage and to setup the infrastructure requirements for fuel transportation and storage..... "

4.4 Based the bids received the Power Purchase Agreement with the Petitioner was signed on 01.09.2003 with the approval of Government of Tamil Nadu, for the contracted capacity of 113.2 MW.

4.5 It is submitted that the contention of Petitioner for fixing the Plant Load Factor of their plant at a high level of 85% to recover the full fixed charges is a misconceived one. As per the amendment dated 23.05.1997, to the Government of India's Notification dated 30.03.1992, the PLF for recovery of full fixed charges for the gas/naphtha based power plant shall be 85-90%. Accordingly, with the mutual agreement only, the PLF for the Petitioner's project was fixed at 85%. Further, the PLF for achieving full fixed charges for the natural gas power project is at 85%. Further the PLF for achieving full fixed charges to M/s ST-CMS Electric Company (P) Limited is 80% and not 68.5% as alleged by the Petitioner.

4.6 The Power Purchase Agreement between the Petitioner and the Respondent has been entered based on the Notification of Government of India dated 06.11.1995 for the norms of operation for liquid fuel based power plants. The clause 4.3 of the above policy states as follows:

"The responsibility of either indigenous or imported fuel linkage would be that of the Independent Power Producer (IPP) and any fuel supply risks would have to be shared between the IPP/Fuel Supplier. The State Electricity Board will not take any fuel risk"

4.7 Hence, relying on the above clause of the guidelines, the Petitioner is not eligible for fixed charges on account of gas shortage. It is respectfully submitted that the original bid called by the Respondent during the year 1996 for setting up the power projects of the Petitioner and others was having the similar clause. Hence, any compensation as claimed by the Petitioner for shortage of fuel under force majeure clause is not applicable to this Respondent as per the above guidelines and as per Power Purchase Agreement.

4.8 It is respectfully submitted that there is no provision in the Power Purchase Agreement or Guidelines to compensate the non-recovered fixed charges.

4.9 It is respectfully submitted that the Petitioner's request for use of naphtha is not acceptable to the Respondent due to very high cost of generation using naphtha. The variable cost for generation of electricity using naphtha works out to Rs.12.20 per unit at the prevailing rate @ Rs.69,000 per ton, as on April 2012 and @ Calorific Value of 11,200 per Kcal/Kg). It is expected that the cost of naphtha may go further in the near future in line with the crude oil price.

4.10 It is respectfully submitted that the TNERC in the Tariff order dated 30.03.2012, in clause 7.1.20, for the year 2012-13, ordered that merit order dispatch

should be followed in respect of all high cost IPPs and approved only the fixed charges payable to them and ordered that wherever high cost IPPs are to be dispatched outside merit order, TANGEDCO shall obtain approval of the Commission in advance by furnishing justification for such action. In case of emergencies TANGEDCO is permitted to resort to such a practice but will approach this Commission within a week of such action along with the justification for such action. It is respectfully submitted that under these circumstances as per the orders of the TNERC, this Respondent cannot allow the Petitioner to go in for high cost fuel power purchase other than natural gas.

4.11 In the above condition, the Respondent is not accepting using naphtha as alternate/supplementary fuel as the Respondent will be unduly overburdened financially, which in turn is not in the interest of people of Tamil Nadu.

4.12 It is respectfully submitted that the section 7.4 of the PPA between the Petitioner and the Respondent dated 01.09.2003 states as follows:

“7. 4 vi). In case of the non-acceptance of the new fuel and new Fuel Supply Contract by the Board, the matter will be referred to Expert as per section 15.

vii). The Board and the Company may have the option to accept the decision of the Expert or not

a). If Board does not accept the Experts decision, this Agreement may terminate after the expiry of the existing Fuel Supply Contract and the Company has the right to sell the power to Third Parties subject to obtaining all

required approvals and permits as per clause 13.6.2. On such termination Board does not have any obligation as per clause 13.6.1.”

4.13 It is submitted that according to the above provision of the PPA, this Respondent has the right to accept or reject the alternate fuel suggested by the petitioner.

4.14 The Commission in its order dated 30.12.2011 in DRP No.14 of 2009 and MP No.1 of 2010 filed by M/s Penna Electricity Limited for similar prayer of this Petitioner ordered that TNEB the power purchaser need not compensate revenue loss due to gas shortage to the power plant of M/s Penna Electricity Limited and the company shall take up the issue with the fuel supplier only.

4.15 It is submitted that even if the Respondent accepts for naphtha as alternate/supplementary fuel, the power plant of the petitioner can generate and achieve only a PLF of 79% under mixed fuel operation, as per the feasibility report submitted by the Petitioner. This is 6% less than the present PLF of 85% for achieving full fixed charges, which will further increase the cost of generation using naphtha.

4.16 It is submitted that this Respondent is always ready to accept any alternate/supplemental fuel to power plant of the Petitioner provided that the cost of generation with the new fuel identified by the petitioner is not more than cost of generation with the fuel used at present.

5. Reply to the Counter filed on Behalf of the Respondents:

In the reply filed on 31-01-2013, the Petitioner has submitted as follows:-

5.1 It is submitted that the project was originally envisaged as Naptha based plant. There are no limitations on availability in respect of Naptha. However, at the instance of the first Respondent, Naptha was substituted with natural gas as the fuel for the plant. Unlike Naptha, natural gas is not available in plenty and is dependent on the gas wells.

5.2 It is submitted that the amendment notification dated 23.05.1997 and the notification dated 30.03.1992 of the Government of India speaks about Plant Availability Factor and not Plant Load Factor. The fixation of 85% PLF under the PPA to recover full fixed charges is contrary to the said notifications. The reliance placed by the Respondents on the said notifications is therefore totally misconceived. The contention of the Respondents that the PLF for achieving full fixed charges in respect of ST-CMS Electric Company {P} Ltd. is 80% is denied. It is reiterated that for ST-CMS Electric Company the PLF for achieving full fixed charges is 68.49% and not 80% as contended by the Respondents.

5.3 The project was initially accepted with Naptha as the fuel and subsequently, the fuel was changed to natural gas at the instance of the first Respondent. The availability of naphtha has never been in shortfall whereas the availability of natural gas has been scarce. This coupled with the high PLF of 85% to be entitled to fixed charges has resulted in substantial under recovery of fixed charges by the Petitioner. The Petitioner has not claimed any compensation under force majeure clause and

hence the contention of the Respondents that the Petitioner is not entitled to compensation under force majeure is without basis.

5.4 It is submitted that it is imperative, in the interest of the parties that there has to be some mechanism in place to make good of the under recovery by the Petitioner. The ultimate aim of the total project from the Petitioner's perspective is to ensure recovery of the project cost with reasonable return on equity. If the present situation is allowed to be continued the policy guidelines for encouraging the Private participation will be defeated. The Commission has powers to regulate the purchase and procurement process through agreements by the Respondents including the price.

5.5 It is submitted that the Respondents even while admitting that the Petitioner's project is governed by the provisions of the said Notification of Ministry of Power dated 30.3.1992 are denying now the assured returns and the entitlements guaranteed therein. In this regard, it is submitted that the Respondents have failed to note that the PPA has merged with the terms of the said Notification and the said statutory provisions has to prevail as the parties to a contract cannot agree to anything which is contrary to statutory provisions. The Petitioner submits that the above guidelines of Government of India would unmistakably show that the IPP would be entitled to get the fixed charges once the generating capacity is made available to the SEBs. The Petitioner also submits that these guidelines, in fact have been translated as a statutory provision under the Government of India Notification dated 30.03.1992 published in the gazette. The Petitioner submits that the said

notification, which has admitted by Respondent themselves, governs the Petitioner's case, also mandates the specified percentage on return on equity and the PPA to be a bankable one.

5.6 It is submitted that the Petitioner has only proposed use of naphtha as a supplement to natural gas to achieve the 85% PLF. Substitution of naphtha as the fuel for the plant has never been suggested by the Petitioner. There will be an increase in the variable cost by supplementing naphtha. However, since plant will be primarily run on natural gas and use of naphtha will be on need basis, the overall cost will not be too high.

5.7 In terms of the notification issued by the Government of India, IPPs are entitled to recover the full capacity charges once the capacity is created for the benefit of the SEB. The Respondents even while remaining as a silent spectator, have been receiving and utilizing the power for their commercial advantages and to discharges their statutory duty. In such circumstances, the Respondents irrespective of the contractual position under the PPA, are legally responsible and liable to pay the under recovered fixed charges as claimed by the Petitioner. In such circumstances, the Respondents cannot be allowed to ward off their responsibilities and the liabilities on technicalities contending that there are no provisions in the Power Purchase Agreement to compensate the losses of Fixed Charges due to shortage of fuel etc. It is submitted that, the use of Naptha and or any other compatible complementary fuel is essential not only to the benefit of the Respondents but also to reduce the ever mounting losses to the Petitioner arising

out of short supply in Gas. The Respondents are fully aware of the consequences of the shortage in the supply of Natural gas and the need for identifying and using alternate complementary fuel to maintain the operation in the plant to the advantage of both the Petitioner and the Respondents.

5.8 It is submitted that by not achieving 85% PLF on account of factors which are totally beyond the control of the Petitioner, the Petitioner is under recovering fixed charges. This is adversely affecting the Petitioner's financial position with huge amount of accumulated charges. The Petitioner submits that since the proposal is only to use naphtha as supplement to natural gas, the Commission can even consider passing appropriate orders for making provision for use of naphtha as 30% of the fuel as and when directed by the Respondents. The plant can be run at optimum on the available natural gas with entitlement to claim full fixed charges on plant availability basis. By doing so the Respondent can monitor and decide on the use of Naphtha based as and when there is requirement and at the same time the Petitioner will be able to recover full fixed charges.

5.9. It is submitted that the reliance on Article 7.4 of the PPA is totally misplaced. The said Article deals with and is applicable only in respect of selection of fuel supplier and finalization fuel supply contract. Article 7.5 of the PPA deals with change in fuel and is relevant for the present case and the request of the Petitioner.

5.10. The contention of the Respondents in the Counter Affidavit regarding the finding of the Commission in D.R.P. 14 of 2009 filed by Penna Electricity Limited is

misplaced. In the said case this ~ Commission did not reject the request for dual fuel. The Commission only observed that the techno economics will have to be seen with regard to the percentage of Naptha that can be used economically, additional capital cost involved and its impact on the fixed charge, etc. Since these details were neither worked out by the parties nor were they placed before the Commission, it was held that the Commission is unable to pass any order on this subject in the absence of such details. The Commission further held that it is for the parties to discuss this matter in detail and then come before the Commission if necessary. In the instant case the Petitioner has commissioned a detailed report from M/s.Fichtner Consulting Engineers Pvt Ltd. on the feasibility for usage of alternate fuel at the Petitioner's plant. The said report was discussed with the Respondents and has also been placed before the Commission.

5.11 That the Respondents are fully aware that the Combined Cycle Plant of the Petitioner cannot be operated with any other fuel other than Natural Gas and Naptha. The contracted quantity of gas supplied by GAIL (India) Ltd. to the Petitioner is under the Administered Price Mechanism (USD 4.20/MMBTU), which is considerable less than the market price of USD 5.75 and RLNG price of about USD 16.00 per MMBTU. The submission of the Respondent that it is ready to accept supplemental fuel provided the cost of generation is not more than the present cost is futile. The Respondents are very well aware that even if any excess natural gas was available, it would be supplied only at market driven price and hence the cost of generation even using excess gas (if it were available) would have been much more the present cost. In fact no other source of gas is available. GAIL or any other

supplier of gas does not have enough to supply any excess gas. As stated in the Petition, naphtha and LNG are the only alternate fuels. Naphtha on account of its availability is the most ideal alternate fuel. It is apparent that M/s. GAIL may not improve the supply of Gas to the Petitioner and the Petitioner as a prudent operator has to look for alternative not only to comply with its contractual obligations with the Respondents under the PPA but also to stop the ever mounting losses to them arising out of the present operations of the Combined Cycle Plant.

5.12. The Petitioner reiterates that the Respondent has entered into PPAs with other power projects in the State wherein the stipulated PLF entitled to full fixed costs is less than 70%. The very high PLF fixed in respect of the Petitioner is onerous especially in a situation like the present one when there is short supply of gas and the Respondent is not willing to consider the option of the Petitioner using Naphtha as supplemental fuel. It is submitted that Article 7.5 has been included in the PPA to address situations like the present one. However, due to Respondent's stand the Petitioner has to under recover fixed charges for absolutely no fault of theirs. The Petitioner further reiterates that in terms of the Tariff Notification dated 30.03.1992, the Petitioner's plant having been awarded through competitive bidding, is entitled to recover full fixed charges based on Plant Availability Factor. The said notification has force of law and it is a well settled proposition that the terms of a contract cannot be against law. The Petitioner submits that since the proposal is only to use naphtha as supplement to natural gas, the Commission can even consider passing appropriate orders for making provision for use of naphtha as 30% of the fuel as and when directed by the Respondents. The plant can be run at optimum on

the available natural gas with entitlement to claim full fixed charges on plant availability basis. By doing so the Respondent can monitor and decide on the use of Naphtha based as and when there is requirement and at the same time the Petitioner will be able to recover full fixed charges.

6. I.A. filed by the Petitioner:-

During the pendency of the Civil Appeal No.13451/2015 before the Hon'ble Supreme Court, challenging the appointment of Chairperson of the Commission (due to which the Commission refrained from hearing D.R.P. cases), the Petitioner filed an I.A. No.1 of 2016 in the said D.R.P.No.13 of 2012 with a prayer to appoint an Arbitrator for adjudicating the present D.R.P. The Petitioner also moved the Hon'ble High Court in W.P. 5196 of 2017 to direct the Commission to consider and disposal of the said I.A. The Hon'ble High Court in its order dated 31-07-2017 passed an order directing the Commission to consider the Petitioner's application in I.A.No.1 of 2016 and pass orders within six weeks from the date of receipt of a copy of the said order. Accordingly, the Commission in its order dated 13-03-2018 passed an order, dismissing the prayer of the Petitioner for referral of the dispute in D.R.P.No.13 of 2012 for arbitration.

7. Hearing held on 27-11-2018:-

The Counsel for the Petitioner not pressed the Petitioner on using alternative fuel and that the Respondent has argued that the Respondent has to make payments to the Petitioner based on the Plant Availability Factor and not on the Plant Load Factor. The Petitioner also pleaded that additional submissions with regard to the reviewed position will be filed within a week. Accordingly the Petitioner

has filed the above details on 18-12-2018.

8. Affidavit filed on behalf of the Petitioner:

In the Affidavit filed by the Petitioner on 11-12-2018, the Petitioner has filed the details regarding Gas Quantity, Gas Capacity, Gas received, Plant Load Factor and Plant Availability for the period between April 2012 to November 2018 for the consideration of the Commission as follows:-

Month	Contracted Gas Capacity 5 lakhs	Received Gas Quantity for the Month	Gas Received/ Average Day	PLF as per PPA	Availability
	SM ³	SM ³	SM ³	%	%
Apr-12	500000	15609329	520311	91.40	100.00
May-12	500000	15908482	513177	89.35	100.00
Jun-12	500000	15281048	509368	89.04	96.52
Jul-12	500000	11735871	510255	66.53	71.42
Aug-12	500000	16336531	526985	94.42	100.00
Sep-12	500000	15569319	518977	92.33	100.00
Oct-12	500000	15637753	504444	90.21	96.13
Nov-12	500000	15666680	522223	93.57	100.00
Dec-12	500000	15289524	493210	88.80	96.67
Jan-13	500000	15996065	516002	92.66	100.00
Feb-13	500000	13056077	466288	82.21	100.00
Mar-13	500000	10552899	340416	58.92	100.00
Apr-13	500000	10367342	345578	60.53	96.70
May-13	500000	11438107	368971	65.53	100.00

Jun-13	500000	10804225	360141	63.65	100.00
Jul-13	500000	9012888	360516	50.78	78.58
Aug-13	500000	13331813	430058	78.76	100.00
Sep-13	500000	13312636	443755	80.74	100.00
Oct-13	500000	12805999	413097	74.92	94.50
Nov-13	500000	12560245	418675	77.20	99.02
Dec-13	500000	12466232	402137	73.88	100.00
Jan-14	500000	12542433	404595	73.81	100.00
Feb-14	500000	10361518	370054	66.83	93.89
Mar-14	500000	12825302	413719	75.60	100.00
Apr-14	500000	13385594	446186	80.60	100.00
May-14	500000	14609000	471258	83.10	100.00
Jun-14	500000	9992278	499614	58.16	66.82
Jul-14	500000	8366895	334676	41.57	77.71
Aug-14	500000	9218367	297367	47.98	99.81
Sep-14	500000	9000399	300013	48.71	100.00
Oct-14	500000	9413722	303668	49.90	100.00
Nov-14	500000	9000643	300021	48.75	100.00
Dec-14	500000	8094709	261120	42.13	87.31
Jan-15	500000	9133856	294641	47.20	100.00
Feb-15	500000	8003323	285833	45.98	94.63
Mar-15	500000	14201515	458113	83.30	100.00
Apr-15	500000	14671229	489041	87.62	100.00
May-15	500000	12466604	402149	72.80	99.16
Jun-15	500000	11325922	377531	67.62	100.00
Jul-15	500000	11123328	358817	64.04	100.00

Aug-15	500000	11809252	380944	68.42	100.00
Sep-15	500000	7025399	351270	40.84	64.70
Oct-15	500000	10550315	340333	60.06	99.59
Nov-15	500000	10362403	345413	61.09	100.00
Dec-15	500000	10738815	346413	61.51	95.76
Jan-16	500000	10261724	331023	56.59	100.00
Feb-16	500000	9078837	313063	52.11	100.00
Mar-16	500000	10159842	327737	55.36	100.00
Apr-16	500000	8716170	290539	48.21	90.99
May-16	500000	11472443	370079	62.91	95.26
Jun-16.	500000	11314576	377153	63.31	100.00
Jul-16	500000	8935478	288241	45.71	98.88
Aug-16	500000	7992374	257819	38.92	96.21
Sep-16	500000	8659388	288646	45.57	99.72
Oct-16	500000	9708980	313193"	51.70	100.00
Nov-16	500000	8386933	279564	43.32	99.53
Dec-16	500000	8431545	271985	42.28	96.09
Jan-17	500000	9372422	302336	49.46	100.00
Feb-17	500000	8212874	293317	47.60	100.00
Mar-17	500000	8503060	274292	43.16	100.00
Apr-17	500000	8517615	283921	45.00	99.46
May-17	500000	1172372	293093	5.99	12.62
Jun-17	500000	9282476	320085	53.39	94.35
Jul-17	500000	9184097	296261	48.97	100.00
Aug-17	500000	9143672	294957	49.71	94.95

Sep-17	500000	8621404	287380	47.51	96.28
Oct-17	500000	9921733	320056	55.20	100.00
Nov-17	500000	9649521	321651	55.08	99.47
Dec-17	500000	10950553	353244	59.91	100.00
Jan-18	500000	8764848	282737	46.53	93.64
Feb-18	500000	8731927	311855	51.76	100.00
Mar-18	500000	9355871	301802	49.82	100.00
Apr-18	500000	8383439	279448	44.12	100.00
May-18	500000	8408017	271226	41.86	100.00
Jun-18	500000	8529747	284325	46.44	96.39
Jul-18	500000	12512636	403633	70.08	100.00
Aug-18	500000	12658096	408326	72.80	100.00
Sep-18	500000	11855042	395168	70.05	100.00
Oct-18	500000	13063047	421389	75.40	100.00
Nov-18	500000	13591009	453034	80.09	100.00

It is prayed that the Commission may be pleased to take the information provided on the Gas Quantity, Gas Capacity, Gas received, Plant Load Factor and Plant Availability on record, and pass such other order or orders as deemed fit in the circumstances of the case and thus render justice.

9. Findings of the Commission:-

9.1. We have considered rival submissions carefully in regard to the issues raised in this petition. On going through the facts of the case, we find that there is a striking similarity between the present case and the one relating to the petition filed by

M/s.Penna Electricity Limited in which a detailed order was passed by the Commission on 30.12.2011 which was taken on appeal thereafter to the Hon'ble APTEL in Appeal No.148 of 2012 and findings of the Commission was confirmed therein. Except for the change of technology sought for, we are of the view that the facts all most similar and therefore, we would like to decide the present case with reference to the decision of the Hon'ble Appellate Tribunal in the said case. In this connection, we are to further observe that all the issues raised in the present case, namely, inability of the generator to achieve PLF on account of short supply of gas by GAIL, the absence of provision in the PPA for payment of full fixed costs in cases where the generator fails to achieve PLF, fixing of responsibility as to fuel linkage, the bearing of the risk arising out of such fuel linkage with reference to the Govt. of India Notification, the entitlement of a generator to deemed generation in such cases were all subject matters of discussion in the said appeal before the APTEL. Hence, there is no need to delve deep into the present case, as the principal prayer of the petitioner herein for fixed charges arising out of failure on the part of GAIL to supply the contracted quantity of gas is squarely covered by the said judgement and almost all the issues which are similar to the ones raised herein were considered extensively by the Hon'ble APTEL in the said case ending with the dismissal of the prayer for fixed charges. The Hon'ble Appellate Tribunal also framed a question as to whether consequent to the change of fuel and technology a PPA is required to be amended and approved by a State Commission to ensure justifiable operating terms and conditions including payment of tariff to a generator. The following of the judgment of the Hon'ble APTEL are reproduced:-

“6. On these rival contentions, the following questions would arise for consideration: (a) Whether the Generator, the Appellant

is entitled to be paid the full fixed charges and actual variable charges in respect of the generation and operation of the Generating Station during the period between 1.7.2006 and 15.6.2009 during which period, the operational parameters of the Generating Station was affected on account of cut in the supply of contracted quantity by M/s. GAIL which resulted in non-achievement of 85% of the PLF? (b) Whether the amended PPA dated 25.8.2004 consequent to the change in Fuel, change in location and change in technology, was required to be amended and consequently required to be approved by the State Commission to ensure fair and justifiable operating terms and conditions including the payment of tariff therefor to the Generator?”

9.2. It is further seen from the judgement of APTEL referred herein that the Tribunal categorically held that in the absence of a clause in PPA to provide for payment of fixed costs to a generator for failure to achieve the PLF and in the absence of provision for deemed generation in the PPA or the statutory regulations, the relief for payment for fixed charges cannot be allowed. The relevant portion of the judgement of APTEL is extracted below;

“19. As pointed out by the learned Counsel for the Respondent, there is no clause in the PPA which provides for payment of full fixed cost to the Generator, if the Generator fails to meet the PLF as agreed to under the PPA. Any compensation by way of deemed generation or relaxed heat rate due to partial loading of machine due to shortage of fuel supply which is the sole responsibility of the Generator, is not applicable as per the Power Purchase Agreement dated 25.8.2004.

20. Further, we find no provision for compensation by way of deemed generation or relaxed operational norms due to operation of the power plant at partial load due to shortage of fuel in the 2004 Regulations of the Central Commission which were in force when the amended PPA was entered into between the parties or in the Station Commission’s Tariff Regulations of 2005 which were made effective subsequent to the signing of the PPA. Under these circumstances, the State Commission has correctly decided not to allow the claim of the Appellant for the

underpaid fixed and variable charges on account of shortage of gas.”

9.3. We find in the present case also that there is no provision in the PPA between the parties for payment of fixed charges arising out of failure on the part of the GAIL to supply the contracted quantity of gas. On the other hand, we find that as per the notification of the Govt. of India, the linkage of fuel is a sole responsibility of the generator and that the licensee has an option to agree or refuse the request for change of fuel. On a careful perusal of the documents filed before us, we are of the view that the terms agreed upon between the petitioner and the respondent do not provide for change of fuel resulting in higher cost of generation except upon mutual consent and that the procurer has the right of refusal for change of fuel. We have also considered other arguments advanced on behalf of the petitioner. The petitioner contends that it was only at the instance of the respondent that the change of fuel was agreed upon and that the entire power being meant for TANGEDCO, the fixed charges need to be borne by the respondent. In this connection, we have to state that these are the factors which should have weighed in the mind of the petitioner at the time of executing the PPA and its amendments. At this juncture, we cannot entertain such plea for the purpose of ordering relief. The contention regarding the PLF of other similarly placed IPPs has been made without any material proof. Even otherwise, the PPA being a mutual agreement, only the parties to such agreement can dispute a clause before the Commission and the petitioner being a stranger to the PPA and other terms and conditions for supply of power between TANGEDCO and other IPPs referred by the Petitioner cannot seek to challenge them indirectly in the present proceedings. The other contention that the

TANGEDCO being in a superior position with regard to the working knowledge of PPA, the petitioner had no doubt or disbelief in regard to genuineness of clauses and entered into the agreement in a mistaken belief, is also without substance. It is well settled that ignorance of law is no excuse and the contention that the petitioner was not conversant with the legal implications or after effects of such clauses of PPA has no legal legs to stand.

9.4. We find that as rightly contended by the respondent, the substitution of fuel with Naptha would inflate the cost of generation. It would also have a bearing on the retail tariff. As stated by the respondent in the counter affidavit, the acceptance of request for change of fuel would go against the merit order dispatch which requires the cheapest cost of energy to be procured in the first instance. It also follows that in such an event, the power generated by the petitioner using Naptha would have to be backed down in order to satisfy the principles of MoD leading to payment of fixed charges to the extent of backing down.

9.5. Further, the clause 7.5 of PPA, which provides for change of fuel for the reasons beyond the control of the company, also has a rider to the effect that such acceptance for change of fuel is only an option and not an obligation and hence, the Commission cannot force the licensee to accept the change of fuel. The said clause also provides in sub-clause (b) that such change over to alternative fuel should be effected without modification to fixed charges. On the question of deemed generation as provided in clause-7.6 of the PPA also, the petitioner has no case for the reason that as per the said clause, the entitlement to deemed generation is

subject to force majeure. The petitioner himself taken a position in his averments in the petition that the claim is not based on force majeure. The Hon'ble APTEL, in the judgement under reference, having rejected PPN's claim for non-pleading of force majeure, we see no reason to consider the case of the petitioner even on the ground of the deemed generation.

9.6. On the other hand, we find force in the contention of the respondent that as per the Gol notification, the fuel linkage is the responsibility of the generator and the risk arising out of failure to achieve fuel linkage has to be shared by the IPP / fuel supplier and not by SEB. Further, the petitioner has not rebutted the contention of the respondent that even if the change of fuel is allowed, still the petitioner would fall short of PLF by 6%. We have also considered the submission to the effect that it was only at the instance of TANGEDCO that the petitioner was forced to amend the PPA providing for change of fuel to gas but for which the question of non-availability of gas for generation would not have arisen. Here, we have to state that there is no merit in the said contention. The PPA is a mutual agreement between the parties and is governed by the provisions of the Contract Act and the Electricity Act which governs the parties. It is for the parties to the agreement to decide the reasonableness of a clause before entering. Unless, it is a clear case of fraud, misrepresentation, mistake of fact or the agreement is opposed to public policies or against provisions of law, the agreement cannot be rescinded by the parties themselves. Such being the case, the Commission cannot agree to the contentions of the petitioner in this regard. Further, we are of the view that the judgment of the Hon'ble APTEL in PPN's case has dealt with all the issues which are similar to the

ones herein and decided them. The operative portions of the judgment of the Hon'ble APTEL are re-produced for reference.

“23. Further, the claim by the Appellant on the basis of the Force Majeure cannot be accepted as the Appellant never initiated any proceedings under the Force Majeure as per the procedure incorporated in the PPA.

24. In other words, the inability of the Appellant to achieve 85% of the PLF due to shortage of gas cannot be said to be due to Force Majeure as claimed.

25. That apart, there is no material to show that the short supply of gas by M/s. GAIL to the plant of the Appellant was only due to the increased requirement of the gas by the Appeal No148 of 2012 Page 22 of 28 Electricity Board. Furthermore, the fuel supply risk would have to be shared between the independent Power Producer and Fuel Supplier and the State Electricity Board will not take any fuel risk. Therefore, the issue with regard to short supply cannot be said to be between the Appellant and Respondent but it was a dispute between the Appellant and M/s. GAIL. Therefore, the Appellant cannot be permitted to claim the underpaid fixed charges and underpaid variable charges just because M/s. GAIL who was a party to the Fuel Supply Agreement was unable to supply adequate quantity of the Gas to the Appellant in violation of the provisions in the Fuel Supply Agreement. For this act of short supply of gas, the Electricity Board cannot be held responsible.

Paras- 26 to 34 **XXXXXXXXXX**

35. We find that there is no provision for compensation for capacity charges and variable charges due to the fact that the plant was not able to maintain the normative availability/Plant Load Factor on account of shortage of fuel in the Central Commission's Tariff Regulations, 2004 which were in vogue when the amended PPA was entered into between the parties or in the State Commission's Tariff Regulations, 2005. Admittedly, the State Commission's Tariff Regulations were made effective subsequent to the signing of the PPA. The State Commission could not intervene in allowing amendment in the provisions of the PPA in this regard which were voluntarily agreed by both the parties and which are not in contravention to any provision of the Act or Rules or the Regulations.

36. Therefore, there is no infirmity in the findings of the State Commission in not agreeing to interfere with the provisions of

the PPA declaring the PPA unworkable with regard to compensation for fixed charges for the above period due to shortage of supply of gas.

37. Thus, this point is decided as against the Appellant.”

9.7. However, considering the fact that it has been the consistent stand of the petitioner throughout the petition that the present claim is necessitated to avoid under recovery of fixed charges and recover the fixed charges in full, we may consider whether the plant availability factor would come to the aid of the petitioner for the purpose of present relief.

9.8. In view of the same, the only question which arises for consideration is whether the contention of the petitioner that there is a line of distinction between plant load factor and plant availability factor. Going by the Govt. of India notification which speaks only about the plant availability factor whether a petitioner is entitled to fixed charges is a moot point for consideration. In this connection, we are to observe that the said contention is totally the misplaced one for the reason that both the plant availability and the plant load factor cannot be decided or determined without reference to fuel linkage. The mere fact that the plant was in readiness without linkage would not mean that the plant was in readiness in all respects for generation of energy entitling the petitioner to payment of fixed charges. In other words, the achievement of plant load factor is directly relatable to the achievement of desired level of generation. The plant availability too indicates readiness of the plant in all aspects including fuel linkage. We are of the view, that the petitioner has sought to mix up these two issues when both factors undoubtedly require fuel linkage. Without fuel linkage neither PLF nor the plant availability can be said to be achieved.

It is totally incorrect to assume that plant availability refers to readiness of a plant as such, without fuel linkage and other requirements for readiness. The essence of readiness of a plant very much lies in fuel linkage and also with all the other operational requirements. The mere readiness, without any of these requirements cannot constitute plant availability. Therefore, even assuming that plant availability is a distinct factor for the purpose of entitlement of fixed charges, we have no hesitation in concluding that the absence of fuel linkage in the instance case would disentitle the petitioner from claiming fixed charges when securing such fuel linkage is a sole responsibility of the petitioner as per the Govt. of India notification issued from time to time. In view of the above findings, the prayer for payment of fixed charges claimed in this petition is rejected. No costs.

Ordered accordingly.

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

(Sd)
(Dr.T.Prabhakara Rao)
Member

(Sd.....)
(G.Rajagopal)
Member

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

/ True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission