

**JOINT ELECTRICITY REGULATORY COMMISSION FOR
THE STATE OF GOA AND UNION TERRITORIES
GURGAON**

Coram

Dr. V.K. Garg, Chairperson

Sh. S.K.Chaturvedi, Member

Petition No. 89/2012

In the matter of

Petition for fixation of completed / actual capital cost of project and Tariff of the project of the petitioner- a Power Generating Company under Regulations 3(2)(a), 3(4), 12 and 36 of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Terms and Conditions for determination of Tariff) Regulations, 2009 read with sections 62(1) (a) and 63 of the Electricity Act, 2003.

And in the matter of

M/s Suryachakra Power Corporation Ltd.

Suryachakra House,

Plot No. 304-L-III, Road No.78,

Film Nagar, Jubilee Hills,

Hyderabad- 500096

Vs.

1. Electricity Department,
Rep. by its Superintending Engineer,
Port Blair, Andaman & Nicobar Islands.

2. Chief Secretary,
Andaman & Nicobar Administration Secretariat, Port Blair,
Port Blair, Andaman & Nicobar Islands.

Order

3rd July, 2013

Background of the project

The project is a diesel based power generation project, with generating capacity of 20 MW. Power is generated by using 4 DG set generators of 5 MW capacity each. Based on long term forecasts of peak load and energy requirements of Andaman and Nicobar Islands, Administration decided to set up a power project in South Andaman.

Accordingly, the A & N Administration obtained approval from CEA in the year 1995 for installation of 20MW Diesel Generating Station and subsequently opted to establish this project through private sector participation. In February 1995 open tenders were invited, in terms of the extant policies of the Union Government in respect of public bidding. Competitive bids were received from nine private power developers. M/s Suryachakra Power Corporation Ltd. (SPCL) was selected for setting up of 20 MW IPP at Bambooflat/Port Blair. The Salient features of the PPA read alongwith addendum are given below:

- A. Tariff Calculation - Tariff will be payable in Indian Rupees and shall be the sum of the fixed charge payment, the variable charge payment, incentive payment, foreign exchange rate adjustment and change in law adjustment.
- B. Annual Fixed Charge-includes interest on debt and working capital, depreciation, operation and maintenance (O&M) expenses, tax on income, return on equity of 16% at the normative PLF of 68.49% and exchange rate variations.
- C. Variable Charges - includes the cost of fuel at a station heat rate of 2010 Kcal/kWh, Lube Oil at the rate of 1.1 gm/kWh and auxiliary consumption of maximum 4.5%
- D. Incentive Payment - SPCL will get an additional payment @ 0.65% on equity for every additional 1% of PLF achieved over the normative PLF of 68.49%.
- E. Term - The PPA is effective for a period of 15 years from the date of commencement of commercial operation with an extension of the Term and the Effective Term for three further periods of five (5) years each.

The project achieved financial closure on 01/08/2000.

The Commercial Operation Date for the project was declared as 02.04.2003.

While the original estimate of the project cost was Rs.52.25 crores including Interest During Construction(IDC) considering the price level at the time of the bidding, the Project cost was revised at the time of signing PPA to Rs.63.14 crores. A & N Administration gave the sanction vide their letter dated 22.06.1997 for an estimated cost of Rs.63.14 crores. The petitioner claimed the completed project cost of Rs.85.10 crores. The petitioner started raising monthly tariff invoices with effect from May,2003 considering the completed project cost of Rs.85.10 crores, while the respondent (A & N Administration) was paying the tariff at the originally approved cost of Rs.63.14 crores only.Hence, payment of tariff was released after deductions by the respondent. The auditors of the petitioner in

their report dated 23.12.2004 certified an expenditure of Rs.83.67 crores as against the submitted project cost by the petitioner of Rs.85.10 crores.

Petition filed before the Commission:

There was a letter from A&N Administration to Secretary, JERC dated 07.01.2009 forwarding a brief note on completed cost of 20 MW IPP Power house with the submission for perusal, scrutiny and approval of the completed cost submitted by SPCL. In this context, the Commission noted the letter from CEA dated 04th March, 2008 addressed to A&N Administration citing Hon'ble High Court of Delhi Order that the State Electricity Regulatory Authority is to compute the completed capital cost and while fixing the tariff it must take the said completed cost into consideration. Hence, CEA proposed to return the Completed Cost documents to A&N Administration which were sent to CEA for fixation of completed project cost for further necessary action at A&N Administration end.

A petition under Section 86(f) of the Electricity Act, 2003 was filed by SPCL on 13.10.2009 before the Commission for direction to A&N Administration and ED-A&N to pay the long standing dues/for settlement of long pending issues/payments. The A&N Administration in their response filed a counter claim on 22.01.2010.

The Commission gave a final order on 12.07.2010 as under:

“Quote

- 1. The petitioner have filed affidavit dated 09.06.2010 for withdrawal of the petition on the premise that there is likelihood of favourable consideration of the claim by the respondent. Permission is also sought to renew the petition if negotiations fail.*
- 2. The respondents have filed affidavit dated 12.07.10 by way of reply stating that the respondent withdraws the reply to all documents including counter claims that they have made in the reply to the petition by the petitioner. However, they also want to reserve their right for filing the petition in the event of failure of negotiations.*
- 3. Since the parties are proposing to amicably resolve their long pending disputes through negotiations. The Commission feels there is sufficient ground to grant permission to the parties to withdraw their respective petition and counter claim with liberty to institute fresh petition and counter claim/petition in respect of the same subject matter.*
- 4. Before parting, the Commission hopes that the parties shall ensure proper and adequate supply of electricity to the consumer of the Union Territory irrespective of the progress or Outcome of the negotiations between the parties as the interest of the consumer is paramount which needs to be protected.*

5. *The petition as well as the counter claim are dismissed as withdrawn. No orders as to costs.*

6. *File be consigned”.*

Unquote

As the pending disputes could not be resolved among the parties, M/s Suryachakra Power Corporation Ltd. herein the petitioner filed the present petition (Petition no. 89/2012) on 29.11.2012 for fixation of completed/ actual capital cost of project and Tariff of the project of the petitioner- a Power Generating Company under Regulations 3(2)(a), 3(4), 12 and 36 of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Terms and Conditions for determination of Tariff) Regulations, 2009 read with section 62(1) (a) and 63 of the Electricity Act, 2003.

The Commission sent notice of the petition to Electricity Department- Andaman & Nicobar Islands herein the respondents for 17.12.2012. The respondents filed reply on 11.01.2013 to the petition contesting the petition on various grounds and prayed for dismissal of the petition.

The petitioner filed rejoinder to the reply of the respondent on 14.01.2013 and once again prayed for fixation of completed/ actual capital cost of project and Tariff of the project of the petitioner- a Power Generating Company under Regulations 3(2)(a), 3(4), 12 and 36 of the Joint Electricity Regulatory Commission for the State of Goa and Union Territories (Terms and Conditions for determination of Tariff) Regulations, 2009 read with section 62(1) (a) and 63 of the Electricity Act, 2003.

The Commission held previously nine hearings at Commission’s headquarters on (i) 17.12.2012 (ii) 15.01.2013; (iii) 31.01.2013; (iv) 18.02.2013; (v) 12.03.2013; (vi) 20.03.2013; (vii) 02.04.2013; (viii) 17.04.2013; and (ix) 14.06.2013 and passed the orders for the relevant hearings. The orders passed on the various previous occasions by the Commission are given below:

Quote (Hearing on 17.12.2012):

“1. The Counsel for the petitioner described about total claim, counter claims, withdrawal of earlier claims and counter claims by mutual consent and the numerous meetings taken place between the two sides without any conclusion of the problem. The Petitioner also brought to the notice of the Commission about the precarious position of all the four generating units for want of statutory maintenance which culminated in breakdown of generators and severe decline in supply of power resulting in power cuts

imposed on the island, causing inconvenience and hardship to the consumers, which is caused due to non-settlement of the long pending issues and non-payments of arrears.

2. The petitioner was asked about overhauling of different units and what is their state of preparedness for the same. The petitioner replied that overhaul is likely to cost about Rs. 12 Crores for all the four units and would be completed in 60 days time from the date of release of payment. The quotations were already submitted to the department. The Commission inquired whether the quotes are valid? The petitioner replied that quotes as of now are expired as the quotations are two years old and vendors have been extending validity from time to time and now vendors will agree, only after the money is deposited in advance with the State Bank of India. The Respondent was asked to confirm whether the quotes have been submitted to them, to which they replied in affirmative. The respondent was asked as to how are they going to manage power supply to the island during the period of overhaul of the units of IPP. The A&N Administration stated that they have alternative arrangement for supplementing the existing power supply arrangements.

3. The Petition is for determination of tariff of generator under Section 62(1) whereby the generator is generating and selling the entire power generated to the distribution licensee. It was asked from the respondent whether the generator is generating and selling entire power generated by it to the distribution licensee? This was confirmed by the respondent, who further stated that total requirement of main island is about 33 MW and M/s. Suryachakra is providing major part of the requirements, the rest is by own arrangements of the A&N Administration.

4. A&N Administration has already filed its ARR for 2013-14, which is to be decided before 31st March, 2013. Therefore, the tariff of M/s Suryachakra, the IPP supplying power to the distribution licensee M/s A&N Power Department, which constitutes a major part of the total ARR needs to be determined before the public hearings on such ARR of Power Department of A&N Administration taken up by the Commission. The Petitioner is directed to take further requisite action for determination of tariff under Section 62 and publish a summary of the petition and load the full petition on its website in public domain for the comments of stakeholders - within 21 days from the date of such uploading/publication.

5. The Commission asked both the parties to give their own Due and Drawn statement of arrears showing the balance outstanding, and the reasons for non-

settlement of the outstanding item-wise keeping in view the original PPA, authorized/forced variations, if any, financial impact of the various technical issues resolved by the CEA including capital cost operational parameter and treatment of city Bank loan and unsecured loans taken subsequent to the COD, etc.

6. The Commission asked about the Court case filed by a subsidiary of the State Bank of India as stated in the petition. Petitioner stated that the financial constraints caused to them due to non-payment of their tariff dues by the licensee i.e. the Power Department of A&N Administration, resulted in their inability to service the debts taken from the banks for the project and its operation from the Banks. This resulted - in a Court case Petition No.154/2011 admitted by the Hon'ble AP High Court filed by SBI Global Factors Ltd.

7. The petitioner also submitted interim applications dated 29/11/2012 and 14.12.2012 requesting the Commission for direction on arrears of tariff difference between Rs. 11.79 per unit claimed by the petitioner and Rs. 11.42 paid by the respondent and other arrears amounting to Rs.40.90 Crores as principal and an interest of Rs. 54.88 Crores thereon i.e. a total of Rs. 95.78 Crores to give him financial relief to facilitate overhaul of the units and running of the power station properly.

8. The respondent and the petitioner prayed for four weeks time to submit the due-drawn statement as para 5 above. The Commission considered the request, acceded the same and directed the petitioner to submit the computation on or before 10.1.2013.

9. The petitioner is directed to proceed, take further necessary action as per requirements of Section 62(1) and publish the brief summary of the petition as per para 4 above. Licensee and Secretariat of the Commission to take appropriate action accordingly.

10. The Commission observed that the matter is pending for settlement for almost 10 years since the operation of the plant and the ARR of the Respondent for the FY 2013-14 is to be finalised before 31.03.2013, hence the parties will not be allowed any time extension, which may result in adversely affecting the power supply to the consumers”.

Unquote

The Commission again held hearing at Commission's headquarters on 15.01.2013 and passed following order:

Quote (Hearing on 15.01.2013)

“Heard.Admitted.

M/s Suryachakra Power Corporation Ltd. filed data & information on 10.01.2013 as directed in the Commission order dated 17.12.2012. ED- Andaman & Nicobar – Respondent filed reply dated 11.1.2013 received in the Commission on 11.01.2013 in regard to the petition. The petitioner filed rejoinder to the reply dated 14.01.2013 received in the Commission on 14.01.2013.

The Commission looked at the process of determination of the cost of completed project for generation of 20 MW power through 4 DG sets of 5 MW capacity each by various agencies as ascertained from various documents submitted before the Commission. It is relevant to refer to the Minutes of the Joint Meeting of the Respondent and the Petitioner held on 17.04.2012 where both parties were present, took a cumulative stock of the development of the process, outcome of determination of cost of completed project and operational issues and the Minutes of the same have been duly approved by the licensee as well as the appropriate Government. As per the minutes, the CEA conveyed the completed cost of Rs. 80.38 Cr. in their letter dated 15.03.2012.

The Commission observed that the highest technical authority for the development of electricity sector in India i.e. Central Electricity Authority set up under Section 70 of Electricity Act, 2003, examined the cost over a period of 3 to 4 years. CEA in their first report referred to a Joint exercise done by a committee of A&N officers of Electricity Department and representative of the petitioner for computing completed cost of the project, based on the observations of M/s Karnataka Power Corporation Ltd. (KPCL), consultants appointed by the respondent. The completed cost of the joint exercise worked out to Rs. 76.14 Cr. It was further stated in the report on joint exercise that the increased expenditure on account of Audit & Accounts, IDC and preliminarily and capital issue expenses totaling of Rs. 8.82 Cr. needed commercial experts opinion to arrive at the extent of admissibility for inclusion in the completed cost over and above Rs. 76.14 Cr. CEA after due verification of records produced to them they arrived at the total cost of Rs. 75.60 Cr as communicated to A&N Administration on 03/11/2010 without considering increase in the cost of establishment and IDC due to delays on account of force majeure and delays on account of A&N Administration as claimed by SPCL, pending comments of A&N Administration.

The Commission observed that subsequently CEA revised the total expenditure, taking into account extended gestation period, as recommended by A&N Administration, to Rs. 80.38 Cr. including IDC. However considering that the total amount of funds tied

up for the project as worked out by CEA, to be Rs. 77.595 Cr. the completed cost was also limited to Rs. 77.595 Cr.(U.O. No. 1/AN/SS/Diesel/TPI/2011/1534 dated 16.05.2011).

The Commission also noted from the Minutes of the meeting held on 17.04.2012 referred above that CEA has conveyed the complete cost of Rs. 80.38 Cr. through their letter dated 15.03.2012. The said minutes also referred to a request made by the petitioner to the A&N Administration to consider the completed cost of Rs. 82.11 Cr. as final cost as per TANGEDCO (Second consultants to A&N Administration) recommendation dated 11.11.2011.

Thus, the Commission noted that the different figures of cost of the completed project were arrived at by the highest technical authority, namely, CEA and other agencies at different points of time ranging from 63.14 Cr. (at the time of signing of PPA), 75.60 Cr, 76.14 Cr., 77.595 Cr., 80.38 Cr. and 82.11 Cr.

The respondent was asked to explain how does a project gets COD and gets completed. The respondent replied that on the date of COD the generator generates and transmits power from the bus bar to the transmission line as per the contract but there are still a number of items called "bunch list" items which do not have a direct bearing on the COD of the project but a part of the project and need completion. Such works were completed after the date of COD and the expenditure was incurred on the same. The expenditure was to be incurred by the implementing agency because the first bill payment for the generation of the project becomes due after completion of one month or more and the realization may still take some time whereas all operational expenditures are to be incurred and the pending works need to be completed and paid for. The respondent accepted that this is the ground reality in the project execution and agreed to examine the different components of expenditure spent on the project works after the date of COD. For this, the petitioner will provide the requisite details as asked by the respondent. Petitioner agreed to do the same.

The petitioner informed the Commission that all the necessary details and documents were provided to A&N Administration on various occasions earlier. The Commission directed the respondent to give a comprehensive list of documents required by them within 3 days namely by 18 Jan., 2013 to be furnished by the petitioner within 7 days namely by 25th Jan., 2013. The respondent are to submit the statement of cost of the completed project in the form of affidavit by 30th Jan., 2013 to enable the Commission to determine the final project cost and tariff thereon.

The Commission once again emphasized the guiding objective of maintaining uninterrupted power supply in the island in the interest of the consumers especially beginning February, keeping in mind the ensuing examination period. The Commission made it evidently clear that it is the joint obligation of both the petitioner and the respondent.

The Commission had strictly directed the parties to do their homework properly and not to ask for time extension as they have been corresponding for the last ten years. This is the last and final time being given. If they fail to reach any conclusion, Commission may issue necessary directions to both the parties as it may deem fit”.

Unquote

Hearing on 31.01.2013 & 18.02.2013

The Commission heard the parties at length on 31.01.2013 and has gone through the petition, reply, rejoinder and documents placed on record carefully and thoroughly.

In response to the Commission’s order dated 15.1.2013, the respondent provided a list of information to be furnished by the petitioner i.e. M/s. Suryachakra Power Corporation Limited (SPCL) within three days of the hearing. M/s. SPCL provided all the information asked for by the respondent in the said list in the communication dated 18.1.2013 within 7 days of the receipt of ED-A&N’s letter i.e. by 26.1.2013. Thereafter, the respondent submitted reply on affidavit on 30.1.2013.

The abstract of project cost submitted by the respondent is the outcome of a five members’ committee appointed by the Chief Secretary, A&N Administration vide Order No. 217 dated 21.1.2013 which is said to have examined the legal framework of all claims with reference to PPA , Techno Economic Clearance (TEC), Report of the Karnataka Power Corporation (KPCL), Advice tendered by Central Electricity Authority (CEA), report of the Tamil Nadu Electricity Generation and Distribution Corporation Ltd. (TANGEDCO) etc.and submitted their report to A&N Administration on 25.01.2013

Description of items		Quantum of Expenditure Rs.Crores	Para Ref. of Committee report
Approved Cost		63.14	15, 17, 29 & 30
IDC	(-)	3.00	
Cost excluding IDC	(+)	60.14	
Increase in cost of Establishment due to extended gestation period	(+)	3.30	17
Increase due to Exchange Rate variation considering only 5.13 MUS\$ Rs.11.0445 per dollar.	(+)	5.67	Allowed as per actual utilization
Additional Transformer and Black Start DG Set – Work done after COD	(+)	0.31	22
Hard Cost excl.IDC		69.42	
Proportionate IDC on the hard cost of Rs.69.11 cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC/Project Cost		74.33	
Liquidated damage @5% on Rs.74.33 crores.	(-)	3.72	
Project Completed Cost.		70.61	

The said report indicated the financial deviation in approved items/works against TEC in a tabular form as under:

Sl. No.	Description	TEC Cost (Rs. Crs)	As SPCL (Rs. Crs)	Deviations (Rs. Crs)	M/s. Auditor Certified only (Rs. Crs)	SPCL only
1.	2	3	4	5	6	
1	Land & Site Development	0.630	6.253	5.62	6.250	
2	Building & civil Cons.	5.490	10.860	5.37	10.860	
3	Works cost including Taxes & duties	45.070	48.567	3.49	47.982	
5.	(b) Electricals	3.900	6.543	2.64	6.281	
	Misc. Project Cost					
6.	IDC	3.000	6.300	3.30	5.841	
7.	Preliminary & Capital issue expenses	1.850	6.210	4.36	6.200	
4.	Contingencies					
7.	Start up fuel for testing & commissioning	3.200	0.375	(-)22.82	0.253	
	Total cost	63.14	85.10	21.96	83.667	

Techno Economic Clearance cost	Rs. 63.14 crores
SPCL	Rs. 85.10 crores
Difference	Rs. 21.96 crores

The respondent prayed that the Hon'ble Commission may determine the project cost and tariff thereon in accordance with the provisions of PPA/Techno Economic Clearance issued by A&N Administration and the report of the five members committee constituted by the A&N Administration for the purpose of determination of the cost of the project which is appended with the affidavit as Annexure-I. The respondent vide para 7, 8(a) and 8(b) has submitted a comparative table of TEC cost claimed by SPCL, deviations, audit certificate of M/s. SPCL.

The respondent had engaged M/s Karnataka Power Corporation Limited (KPCL) Bangalore, a State power utility, in 2006. The consultant, M/s. KPCL concluded:

“The total increase in the project cost as furnished by the agency is at Rs.2196.41 lakhs. However, considering the above facts the increase in project cost amount to Rs.1169.79 is not justifiable. The balance amount of Rs.1026.62 lakhs could be considered subject to review and approval by CEA, New Delhi.”

Thus, M/s. KPCL arrived at a total cost of Rs. 63.14 crores + Rs.10.26 crores = Rs. 73.40 crores subject to approval by Central Electricity Authority (CEA) and competent authority (Para 12 of the respondent's reply dated 30.1.2013).

A joint exercise was done by the officials of Electricity Department, A&N Administration and SPCL for arriving at a reasonable cost in April, 2010 whereby it was jointly agreed as under:

Quote

- a. *The works cost of Rs.76.14 crores is broadly acceptable to both the parties and can be considered and recommended to the competent authority for further scrutiny and acceptance.*
- b. *As regards, increased expenditure on account of Audit and Accounts, IDC and Preliminary and Capital issue expenses, totaling to Rs.8.82 crores needs commercial expert opinion to arrive at the extent of admissibility for inclusion in the Completed Cost over and above Rs.76.14 crores.*

- c. However, the completion cost should not exceed more than the expenditure certified by the Auditor of SPCL.
- d. M/s. SPCL in their completed Cost increased the equity component to 31.09% as against the approved TEC provision of 30%. M/s. SPCL to restrict ROE on 30% of the investment and the balance to be treated as term loan for the tariff calculation.
- e. The foreign currency i.e. 9472653 DEM (equivalent US\$ 51,31,020.38 equivalent INR Rs.2227.70 lakhs which is utilized is frozen).

Unquote

Thereafter, the report/findings of M/s KPCL and the Report of Joint exercise were submitted to CEA for further scrutiny and advice. The CEA vide their letter dated 03.11.2010 after perusing the above documents arrived at the Completed Cost of Rs.75.60 crores. The relevant observations of **CEA as quoted from the Respondent’s affidavit dated 30.1.2013 are as follows:**

Para 15 Quote

“From the details as brought out above, the factor that can be considered to allow excess cost over approved cost is the exchange rate variation. In the approved cost of Rs.63.14 crores foreign component of US\$10.53 million was considered at the exchange rate of Rs.36 per US\$. The weighted average exchange rate during implementation of the project based on loan disbursement has been indicated as Rs.47.0445 per US\$. It is stated in the report of the Committee on Joint Exercise that the IPP has utilized less foreign currency i.e. 9472653 DEM (equivalent Rs.22.277 crores) and utilized more domestic currency compared to the approved estimates. Increase in cost to the extent of exchange rate variation over the original approved foreign currency i.e. US\$ 10.53 million may be considered even if the actual foreign currency utilized by the IPP is less considering that the actual expenditure is more than the approved cost as certified by the Chartered Accountants. This increase in cost works out to Rs.11.63 crores. Thus the completed cost of the project excluding IDC would work out to Rs.71.77 crores as follows:

Approved cost	Rs.63.14 crores
IDC	Rs.3.00 crores
Cost Excld IDC	Rs.60.14 crores
Increase due to Exchange Rate variation (10.53xMn US\$ x Rs.11.0445 per \$)	Rs.11.63 crores
Completed cost excl IDC	Rs. 71.77 crores

The IDC has been worked out based on above mentioned cost of Rs. 71.77 crores and taking the construction period as given in the PPA. The loan amount has been taken as Rs. 51.1374 crores based on the term loan as indicated in para 8 above(of CEA report). The pro-rata deployment of loan and equity has been considered. IDC works out to Rs. 3.83 crores as per details indicated at Annexure-2(of CEA report). Thus, the total completed cost works out to be Rs.75.60 crores. The completed cost has been arrived at without considering increase in cost of establishment and IDC due to delays on account of force majeure and delays on account of A&N Administration as claimed by the IPP, which may be considered after obtaining comments of A&N Administration,”

Unquote

16. In view of the above said advice of CEA the Administration carried out an exercise to ascertain the extent of delay on the part of each party i.e. delay attributable to A&N Administration and that attributable to M/s. SPCL. As per the said exercise the events attributable to the Administration had caused delay to the extent of 226 days for first two units and 174 days for the rest two units. Further events attributable to M/s. SPCL had caused delay to the extent of 146 days for first two units and 71 days for rest two units. This was communicated to CEA vide A&N Administration letter dated 01.04.2011.

17. The CEA after perusing the delayed gestation period as submitted by A&N Administration arrived at the Completed Cost as Rs. 77.595 crores **vide their letter (CEA) dated 23.05.2011**. The relevant observations of CEA are reproduced as follows”

Quote

“ as per the break-up details of the approved cost given in various documents, it is noticed that approved cost of preliminary and capital issue expenses was Rs.1.8525 crores which included a cost provision of about Rs.1.10 crores for the establishment. As per the completed cost certified by the Chartered Accountant, an expenditure of Rs.5.8137 crores has been incurred on preliminary and capital issue expenses which include Rs.4.7464 crores for establishment. Considering the extended gestation period as recommended by A&N Administration, the cost of establishment worked out to Rs. 4.40 crores on proportionate basis. Thus, the additional expenditure due to extended gestation period works out to Rs.3.30 crores. The completed hard cost of the project excluding IDC would work out to Rs.75.07 crores as per details given below:

<i>Approved Cost</i>	<i>Rs.63.14 crores</i>
<i>IDC</i>	<i>Rs.3.00 crores</i>
<i>Cost excld IDC</i>	<i>Rs.60.14 crores</i>
<i>Increase due to Exchange Rate variation (10.53 Mn.US\$ X Rs.11.0445 per \$)</i>	<i>Rs. 11.63 crores</i>
<i>Increase in cost of Establishment</i>	<i>Rs.3.30 crores</i>
<i>Completed Hard cost excld IDC</i>	<i>Rs.75.07 crores</i>
<i>IDC</i>	<i>Rs. 5.31 crores</i>

The IDC has been re-worked out based on the above mentioned hard cost of Rs.75.07 crores and taking extended gestation period as recommended by A&N Administration and the revised IDC works out to Rs. 5.31 crores as given in Annexure-I(of CEA report). Thus, the total expenditure including IDC works out to Rs. 80.38 crores. However, considering that the total amount of funds tied up for the project worked out to be Rs. 77.595 crores as per details given in our earlier comments, the completed cost could be limited to Rs. 77.595 crores.

Unquote

18. Even the aforesaid project cost of Rs. 77.595 crores was not agreed to by the company. Accordingly, the Member, CEA held a meeting on 14.02.2012 which was attended by Principal Secretary and SE (Ele.) A&N Administration at New Delhi. On the basis of the said meeting, CEA issued a letter dated 15.03.2012, with the remarks that the CEA's advice on Completed Project Cost amounting to Rs.80.38 crores may be treated as final, which has already been communicated to A&N Administration vide their letter dated 23.05.2011 and the fund tied-up aspects may be looked into by A&N Administration.

19. The A&N Administration also appointed a second consultant namely Tamil Nadu Electricity Generation and Distribution Corporation (TANGEDCO) to examine and provide expert comments vide letter dated 08.07.2011 on the following:

Examination by TANGEDCO with following terms of reference :

(a) Rs.4.02 crores loan said to have been availed from CITI Bank and Rs.2.052 crores loan said to have been availed from other sources and credits by M/s SPCL for the 20 MW project.

(b) To offer specific comments on the extended gestation period including the delay caused by the both the parties as recorded in the Admn's letter dated 01.04.2011.

TANGEDCO vide their recommendations dated 11.11.2011 concluded :

- (i) M/s. SPCL though deviated from achieving the milestone schedule (Appendix-C of the Power Purchase Agreement) had finally achieved COD on 18.02.2003 as per the recommendations of the Independent Engineer i.e. CEA vide their letter dated 18.02.2003.
- (ii) The Administration achieved compliance of the provisions of the Power Purchase Agreement (PPA) under clause 3.3(c)(i),(ii) and (v) (pageNo.23) and Clause 8.3 (page No.41) only on 10.12.2002 and 01.04.2003 respectively. Hence, achieving of COD by M/s SPCL on 02.04.2003 was well before the provision of 120 days and 30 days schedule given in above clauses of Power Purchase Agreement (PPA). Thus, imposition of liquidated damages as per clause 3.10 (page No.28) of Power Purchase Agreement (PPA) on M/s. SPCL for delay in achieving COD is not justifiable.
- (iii) The recommended cost of Rs. 3.865 crores against Rs. 4.02 crores availed by SPCL from CITI Bank in June, 2003 after COD, is reasonable and could be considered for inclusion in the completed cost.
- (iv) Out of Rs. 2.052 crores (other sources) the IPP has claimed a sum of Rs. 0.65 crore which was included and paid to M/s. BSES towards outstanding to their EPC Contractor and also given undertaking to capping in the final capital cost at Rs. 82.110 crores. Considering the above position, Rs. 0.65 crores could be considered for inclusion in the Capital cost.
- (v) There may not be any IDC Component on Rs. 3.865 crore and Rs. 0.65 crore recommended as this expenditure was incurred after COD.
- (vi) The completed cost now works out to be Rs. 82.110 crores (Rs.77.595 crores +Rs. 3.865 crores + Rs. 0.65 crores) which protects the full IDC Cost of Rs. 5.31 crores on the base cost of Rs. 75.07 crores.

The Respondent has analyzed in their reply quoted above the project completed cost analysis at different point of time conducted by different agencies.

CEA considered this report on 19.12.2011 and directed TANGEDCO to further examination of their earlier recommendations dated 11.11.2011:

Quote

“During the discussion it came out that certain documents relating to actual expenditure as originally certified by the statutory auditor in 2004 was not seen by TANGEDCO. Further, it came out that various orders for purchase of equipment placed in the

document submitted to TANGEDCO in their report have not been verified by them, although these have been relied upon by them for giving their recommendations. Some other issues were pointed out for their verification before CEA could give their comments on their findings. TANGEDCO agreed to review the recommendations based on the discussion in the meeting.”

Unquote

TANGEDCO after review revised its earlier recommendations dated 5.9.2012 as under:

Sl. No.	Description	Amount (Rs. In lakhs)	Recommendation of TANGEDCO
(a)	Additional transformer and black start DG Set	30.97	Allowed as per MOM dated 19.8.2003
(b)	Centrifugal separator	39.85	To consider under natural justice
(c)	Road culverts jetty bldg. and Civil cont.	88.54	Subject to approval from APWD
	Total	159.27	

According to respondent, petitioner’s claim at (b) and (c) above cannot be agreed as PPA does not have provision to consider expenditure on natural justice and certification by APWD for inclusion in the project cost.

The Respondent in their reply dated 30.01.2013 also indicated that a meeting was convened in the A&N Administration Secretariat on 17.04.2012 by the Principal Secretary (Power) wherein ED-A&C and SPCL participated and cost of Rs.77.595 crores was considered as provisional cost of the project for which both the parties agreed. Accordingly the Administration communicated the provisional project cost of Rs. 77.595 crores to M/s. SPCL vide their letter dated 18.05.2012.

The Commission has taken into account the following:

- i. PPA and Addendum I (dated 30.3.2009) & II (dated 18.08.2011) to PPA
- ii. Report dt. 24.4.2006 of KPCL
- iii. Advice of CEA regarding completed cost of Rs.75.60 crores excluding cost towards extended gestation period.
- iv. Advice of CEA for completed cost of Rs. 77.595 crores including cost towards extended gestation period.
- v. Report dated 11.11.2011 of TANGEDCO for assessing the quantum of the works done after COD and their cost.

- vi. Report dated 05.09.2012 of TANGEDCO for assessing the quantum of works done after COD and their cost submitted in pursuance of the CEA's directive dated 19.12.2011 to review their earlier proposal
- vii. The A&N Admn. Constituted a committee vide order No.3807 dt. 06.11.2012 for looking into the advice of CEA as communicated vide letter dated 15.03.2012 regarding completed cost of the project. This Committee after careful consideration of the provisions of PPA had, inter-alia, opined in their report dated 09.11.2012 that "Assessment/Computation of the final cost of construction of Bamboo Flat Power project is intrinsically and inalienably linked with the sources and quantum of fund arranged by the Company for carrying out the construction of the project."
- viii. The recommendation of TANGEDCO dated 11.11.2011 and subsequent revision on 05.09.2012 related to CITI Bank loan amounting to Rs. 4.02 crores. TANGEDCO allowed only Rs. 1.59 crores in the capital cost, whereas the Administration included only Rs.0.31 crore and did not include Rs.1.28 crore.

The Commission has further perused :

1. Minutes of the Meeting held by A&N Administration dated 5th June, 2002, 15-17th April, 2010, 12th November, 2010, 17th April, 2012 and Report vide Order No. 3807 dated 6.11.2012.
2. Minutes of the Meeting with CEA dated 19th August, 2003 and 27-28th April, 2006
3. Minutes of the Meeting with Ministry of Home Affairs dated 17th July, 2008
4. The Report of Karnataka Power Corporation Ltd.
5. The Report dated 11th November, 2011 of Tamil Nadu Electricity Generation and Distribution Corporation Ltd. along with their Review Report dated 5th September, 2012.

The Commission feels that the present analysis drawn and put up by the Respondent rather appears to be an after thought because the Table given in Page no. 9 of this order forwarded by their respondent is now not visible or available in any of the documents exchanged between the two parties over a period of last 15 years. It is also pertinent to mention that some of the Members of the Committee constituted by the Chief Secretary, A&N Administration vide Order No. 217 dated 21st January, 2013 and participants in joint meetings were also Members and participants in many of the meetings between the A&N Administration and M/s. SPCL for which formal Minutes of the Meetings were issued by the A&N Administration.

It is seen from the above that technically the most competent agency to give authentic view on the capital cost of the generation plants including thermal/diesel etc. is the Central Electricity Authority. The Authority under the Act is the most competent Authority on this subject, as also admitted by the Chief Secretary, A&N Administration in his letter dated 18th May, 2010 addressed to the Ministry of Power, Government of India.

Secretary (Power) A&N Administration in his letter addressed to Chairman, CEA dated 03rd May, 2010 and Chief Secretary, A&N Administration in his letter addressed to Secretary (Power), MOP, GOI dated 18th May, 2010, acknowledged as under :

Quote

This being a technical matter, which is beyond the competence of A&N Administration, needs to be examined by CEA to decide what should be the acceptable Completed Cost. In fact, in the absence of powers delegated to A&N Administration by Govt. of India, there is no other option in this matter.

Unquote

CEA concluded its comments and the completed cost of this project vide its letter dated 18/10/2010 as follows :

Quote:

Thus the total completed cost works out to Rs. 75.60 crores. The completed cost has been arrived at without considering increase in cost of establishment and IDC due to delay on account of force majeure and delays on account of A&N Administration as claimed by IPP which may be considered after obtaining comments of A&N Administration.

Unquote

Subsequently, CEA after perusing the delayed gestation period as submitted by A&N Administration arrived at the completed cost as Rs. 77.595 crores vide CEA letter dated 23.5.2011. Though the CEA concluded that the total expenditure including IDC worked out to Rs. 80.38 crores, the completed cost was restricted to Rs. 77.595 crores based on CEA approved tied up funds.

Quote

The IDC has been reworked out based on the above mentioned hard cost of Rs.75.07 crores and taking extended gestation period as recommended by A&N Administration and the revised IDC works out to Rs.5.31 crores as given in Annexure-1. Thus the total expenditure

including IDC works out to Rs. 80.38 crores. However, considering that the total amount of funds tied up for the project worked out to be Rs.77.595 crores as per details given in our earlier comments, the completed cost could be limited to Rs.77.595 crores.

Unquote

Moreover, CEA issued a letter dated 15.3.2012 with the remarks that the CEA's advice on completed project cost amounting to Rs. 80.38 crores may be treated as final, which has already been communicated to A&N Administration vide their letter dated 23.5.2011 and the funds tied up aspects may be looked into by A&N Administration.

The Commission has examined various correspondence of the A&N Administration with CEA and the Minutes of the Meeting with CEA/MHA pertaining to approval of the Completed cost and other issues raised by IPP (SPCL) on various occasions, - to mention a few – 19th August 2003, 27th& 28th April, 2006, 4th March, 2008, 17th July, 2008, 04th January, 2009, 3rd November, 2010, 16th May, 2011, 15th March, 2011 and 09th November 2012.

The total power availability in the A&N Islands is 83.71 MW of which 63.71 MW is owned by ED-A&N and 20 MW is purchased from the IPP (SPCL). 63 MW generated 105.36 million units including hydro capacity whereas 20 MW IPP generated 136.96 million units in 2011-12.

The Commission also noted that SPCL maintained a good level of PLF much above the PLF mentioned in the PPA (viz. 68.49%) consistently in the recent years.

The PLF year-wise achieved by SPCL as taken from the records submitted by them to the Commission is given in the table below:-

Year	PLF%
2003-04	65.88
2004-05	64.71
2005-06	60.37
2006-07	62.18
2007-08	64.09
2008-09	74.25
2009-10	76.49
2010-11	81.13
2011-12	80.23

The petitioner as well as respondent emphasized the immediate need for overhauling the three engines of the 20 MW Diesel generating Plant of the petitioner (SPCL) in quick rotation to ensure uninterrupted power supply during the examination period of the educational institutions commencing from February, 2013.

The Commission in their hearing of the petition on 17.12.2012 asked the petitioner about the case filed by a subsidiary of State Bank of India (viz. SBI Global Factors Ltd.) in the A.P. High Court, as stated in their petition. The petitioner stated that the financial constraints caused to them by non-payment of their tariff dues by the licensee viz. Electricity Department, A&N resulted in their inability to service the debts taken from the Banks for the project. This had resulted in a Court case. The petition of the subsidiary of State Bank of India was to wind up the petitioner Company (SPCL) for non-payment of dues was admitted by Hon'ble A.P. High Court.

The Commission in their orders dated 17th December, 2012 and 15th January 2013 observed that it attached utmost importance for maintenance of uninterrupted power supply in the Island in general and the examination period in particular. There cannot be any compromise on the maintenance of uninterrupted power supply. The Commission in its order dated 17.12.2012 asked the petitioner about overhauling of different units and what was their state of preparedness for the same. The petitioner replied that overhaul is likely to cost about Rs. 12 crores for all the four units and would be completed in 60 days time from the date of release of payment. The quotations were already submitted to the Department. To a query by the Commission regarding validity of the quotes, the petitioner replied that quotes as of now expired as the quotations are two years old and vendors will agree only after the money is deposited in advance with State Bank of India. The Respondent also confirmed that the petitioner had submitted them the quotes from their vendors.

The Commission observed that there are different options available before them :

- 1) One option is to allow status quo to continue and it may take months or in exceptional circumstances some years to resolve the dispute and arrive at a conclusion for fixation of completed cost and the tariff.
- 2) The other option available to the Commission is that the matter pertaining to fixation of completed cost of the project be examined by a third party expert agency including examination of issues of foreign exchange rate variation, liquidated damages etc., say, within a period of two months.

The Commission has already noted the precarious financial position of the petitioner, particularly with an impending High Court case for its winding up as well as the immediate need for overhauling of engines for the assured power supply. In both the above options, the Commission is of the view that there will be further deterioration of the power situation leading to misery and hardship to the residents of the Island.

The Commission further observed the fact that PPA does not have any remedial measures to deal with such a situation. This compels the Commission to think beyond the PPA to alleviate and avoid total breakdown of power supply in the Island. The Commission considered all the aspects of the impending situation and after full application of mind comes to the conclusion that a via media needs to be evolved to overcome the situation and create an even platform for both the parties to ensure the required uninterrupted power supply.

3) Pending the appointment of the expert and submission of report by him, the Commission may direct the Respondent to release an advance to the petitioner to undertake overhauling of the engines immediately to ensure uninterrupted power supply. The said advance can be adjusted against monthly tariff in a reasonable instalment basis.

Accordingly, the Commission feels that the third option appears to be the most appropriate in the circumstances described above.

The Commission considers that prima facie, the cost of Rs. 77.595 crores as decided by CEA till now and be used for providing provisional tariff (Annexure A). It is also pertinent to note here that the ED- A&N is also considering the same project cost as completed cost for the purpose of regulating the monthly tariff of the petitioner as at present.

The Commission asked the Department the details of monthly tariff as per invoice being paid to the petitioner and asked them to work out what is the amount left out of the O&M charges included in the invoice after following “**waterfallprinciple**” of payment for committed essential payments like salaries, material, statutory payments, etc.

It was stated by the Respondent that approximately Rs. 20 lacs would be available over a period of next five years for recovery in case any amount is given as advance/loan to M/s.

SPCL. The Commission examined the arguments of both the petitioner and respondent at length on the issue of maintenance of uninterrupted power supply, viz

- i) Time taken for overhaul;
- ii) Uninterrupted power supply in the absence of overhaul of IPP units by quick rotation;
- iii) The alternative of giving advance for overhaul; and
- iv) Feasibility of the recovery of such an advance through the components of tariff.

Thus the Commission concluded that :

The matter pertaining to fixation of completed cost of the project w.r.t. PPA, the various documents and the various recommendations done by CEA, KPCL, TANGEDCO, etc. be examined by a third party expert agency within a period of next two months.

Pending the appointment of expert and submission of report by him,

(A) The Commission directs the petitioner as under:-

1. Petitioner will maintain uninterrupted power supply
2. The petitioner will make an application to the respondent for releasing an advance of Rs. 10 crores in three instalments. First instalment being placed in a special account and Letter of Credit (LC) be opened on the contractor M/s. Caterpillar to initiate the work immediately and furnish a work schedule, completion date for each of the 4 generators. The revolving LC can be divided into three parts – first part i.e. 50% or Rs. 5 crores to be released at the placement of order – second part 25% or Rs. 2.5 crores to be released after the overhaul of the 2 engines and the balance 25% after the overhaul of the last 2 engines.

(B) The Commission directs the respondent as under:-

1. To obtain the approval of competent authority within one week from the application of the petitioner.
2. To open the LC on the contractor M/s. Caterpillar through a special account.
3. 50% payable on the placement of order, 25% payable on completion of overhaul of 2 engines and the balance 25% payable after the overhaul of the last 2 engines.

To release various payments flowing from capital cost w.r.t. to CEA recommended completed cost of Rs. 77.595 crores. Wherever CEA has given recommendation for release of payments w.e.f. a specific date, the payments will be released from the specified date. All other payments once recommended by CEA in principle are payable from the date of COD because what is payable today was payable yesterday as well. So there is no

rational/logic to deny the generator these payments which are linked & will flow from the capital cost as provisionally recommended by CEA.

The delayed payments, outstanding payments, withheld payments and interest of term loan/ working capital are payable on the same interest rates and terms on which the Electricity Department, A&N has recovered from M/s SPCL in compliance with the provisions contained in PPA.”

Unquote

Both parties were asked to report compliance by 11th March, 2013.

The matter was scheduled for hearing on 12th March, 2013.

“Quote (Hearing on 12.03.2013)

1. The parties filed submissions as directed by the Commission in the previous order dated 18.02.2013. In response to query of the Commission for compliance of the order dated 18.02.2013 the representatives of the petitioner submitted as under:-
 - i. Direction no. 1 of the order dated 18.02.2013 - complied.
 - ii. Direction no. 2 of the order dated 18.02.2013 - complied.
2. The representatives of the respondents stated at bar that the petitioner has complied both the directions issued by the Commission vide order dated 18.02.2013.
3. The representatives of the respondents to the query of the Commission for compliance of the three directions issued by the Commission to the respondents in the order dated 18.02.2013 submitted as under:-
 - i. Direction no. 1- Approval of Lt. Governor of UT of Andaman & Nicobar has been obtained. They failed to produce copy of the said approval if it had been obtained & an affidavit stating that approval has been given by the Lt. Governor. The Commission considered the submissions made by the representatives of the respondents and observed that the respondents failed to comply with this direction.
 - ii. Direction no. 2 of the order dated 18.02.2013 - not complied.
 - iii. Direction no. 3 of the order dated 18.02.2013 - not complied.
4. The representatives of the respondents on asking by the Commission for the reasons for non compliance of their directions given under order dated 18.02.2013 submitted that the respondents want to safeguard their financial interest by way of Bank Guarantee before releasing the amount to the petitioner. The Commission observed that the respondents neither filed application before the Commission for directions to the petitioner for

furnishing Bank Guarantee by the petitioner nor sent direct communication to the petitioner to this effect. They also failed to supply the format of the Bank Guarantee if any, and the amount for which the Bank Guarantee is required.

The Commission further observed that in another case, a Sanction Order was issued by Andaman & Nicobar Administration, by following the rules under GFR for submission of necessary security. It is seen that Sanction Order precedes the procedural matter of furnishing security/ bank guarantee as per GFR. However, in the instant case, it is observed that the Sanction Order is yet to be issued stating that the petitioner is reluctant to submit the bank guarantee/ FDR.

5. The representatives of the petitioner contented that this part of submission of the representatives of the respondents is not in compliance of order of the Commission dated 18.02.2013. They prayed the Commission to invoke provisions of section 142 of the Electricity Act, 2003 against the respondents and to take appropriate action against them for non compliance of the order dated 18.02.2013 of the Commission.
6. The Commission considered the submissions made by both the sides and after due application of mind on the facts and circumstances of the matter the Commission observed that the project of the petitioner was executed under BOOT model; also the overhauling and replacement of parts of the machinery/ equipments shall enhance life and value of the existing machinery/ equipments. The project is embedded on the land of the respondents and is under total physical control of Andaman & Nicobar Administration. The spares purchased and brought by the petitioner will be added/ replaced in the existing machinery/ equipment. Moreover, the payment of advance will be in the nature of “payment on account” i.e. payment as work proceeds and the recovery is by the respondent from the tariff revenue stream.
7. The Commission further observed that recovery of the advance will also be from monthly tariff paid by the respondents to the petitioner and therefore, the risk of non recovery or nonpayment is minimal. The order of the Commission dated 18.02.2013 is self explanatory and directs the respondents to release the advance amount in stages that the first such payment is only to the extent of 50% namely Rs. 5 Crs. at the time of placement of order. The subsequent two stages of release of amount is only after completion of overhaul of two engines each time. As such, the related risk is negligible. Any improvement in the generating asset (which is under BOOT) will benefit both the parties.
8. When the Commission enquired from the representatives of the respondents that as stated by the petitioner, if the petitioner furnishes Bank Guarantee of Rs. 5 Crs. whether the same is sufficient and satisfying. But the Commission is surprised to hear from the

representatives of the respondents that they were unable to reply without approval from the higher authorities with whom the file for release of advance money as per the order dated 18.02.2013 is pending, whereas earlier the respondent had said approval has been obtained.

9. After having heard both the sides at length, going through the written submissions filed by both the parties and after application of mind the Commission directed as under:-
 - i. The petitioner will furnish a revolving bank guarantee of Rs. 5 Crs. to the respondents in such a way that the Bank Guarantee amount will get reduced gradually by the amount recovery of advance by the respondents from the monthly tariff.
 - ii. The respondents shall release the amount as per the order dated 18.02.2013 of the Commission immediately on receipt of the Bank Guarantee but not later than one week of furnishing the Bank Guarantee.
10. The parties are directed to submit compliance report on or before 20.03.2013.
11. The respondents prayed for two months time for compliance of the directions of last two paras of the order dated 18.02.2013. The Commission observed that almost one month has already passed; therefore, the petitioner is directed to file compliance report in this regard on or before 18.04.2013 in enclosed formats Annexure "A" and "B".
12. The Commission further observed that the Commission is concerned for the uninterrupted and quality supply of electricity to the consumers in general and the examination period in particular but it appears that the commitment of the respondents to supply regular and uninterrupted quality electricity is short of expectation. The Commission further directed the respondents to depute a senior and responsible officer to attend the Commission's hearing on next date of hearing with proper authorization to give replies to the queries of the Commission.

Scheduled for hearing on 20.03.2013."

Unquote

"Quote (Hearing on 20.03.2013)

3. The petitioner in compliance of the order dated 12.03.2013 submitted that in pursuant to the said order they approached their bankers for furnishing requisite Bank Guarantee. State Bank of India in their letter dated 13.03.2013 stated that sanction order is required for furnishing the Bank Guarantee. But the respondents have not issued any sanction order. The respondents have not complied their part of the order dated 12.03.2013.

4. The respondents produced copies of the sanction order no. 909 dated 19.03.2013 and letters no. EL/PL/1-43 (b)(LC)/2013/1429 dated 16.03.2013, L/PL/1-43 (b)(LC)/2013/1430 dated 16.03.2013 and EL/PL/1-43 (b)/2013/1431 dated 16.03.2013 and format of Bank Guarantee. A perusal of the documents produced by the respondents shows that the order dated 12.03.2013 of the Commission is complied in part.

5. The Commission heard the representatives of the parties at length and has gone through the file as well as orders of the Commission dated 18.02.2013 and 12.03.2013 carefully and thoroughly and applied mind on the facts and circumstances of the present case.

The Commission observed that strangely, the Department has an indifferent attitude to solve the problem. The Commission expressed its concern in the earlier orders and now regrets to observe that only a part of the order has been complied as late as 19.03.2013, what should have been done following the Commission order of 18.02.2013 despite fragile condition of the generators and power supply to the people of island. The matter has been lingering on since almost a decade and needs immediate solution.

6. The representatives of the parties requested for 15 days time for complete compliance of the orders dated 18.02.2013 and 12.03.2013.

7. The respondents are directed to:-

- i. operationalise the order of the Commission dated 18.02.2013 in letter and spirit by 31.03.2013 for overhaul of the generators to provide uninterrupted power supply to the public;
- ii. ensure settlement of long pending arrears issue in terms of the orders dated 18.02.2013 and 12.03.2013.

Scheduled for hearing on 02.04.2013 at 11:00 AM.”

Unquote

“Quote (Hearing on 02.04.2013)

1. The petitioner submitted that their banker State Bank of India refused to issue revolving Bank Guarantee of Rs. 5 Crs. as per the orders dated 12.03.2013 and 20.03.2013 of the Commission, therefore, the petitioner is unable to furnish the requisite revolving Bank Guarantee of Rs. 5 Crs.

2. The representatives of the respondents in reply to the submissions of the petitioner submitted that they are ready and willing to release amount of Rs. 10 Crs. as per the orders of the Commission dated 18.02.2013, 12.03.2013 and 20.03.2013. But the petitioner refused to furnish the requisite revolving Bank Guarantee of Rs. 5 Crs. as per the orders of the Commission dated 18.02.2013, 12.03.2013 and 20.03.2013. They further submitted

that furnishing of revolving Bank Guarantee of Rs. 5 Crs. is condition precedent for release of advance amount. therefore, for want of compliance of their part of the order by the petitioner, the respondents are unable to perform their part of the orders dated 18.02.2013, 12.03.2013 and 20.03.2013.

3. The Commission heard the representatives of the parties at length and has gone through the pleadings of the parties, orders of the Commission dated 18.02.2013, 12.03.2013 and 20.03.2013 carefully and thoroughly and is of the opinion that petitioner has expressed its difficulty in producing the requisite Bank Guarantee and the respondents expressed their compulsion of requirement of the requisite Bank Guarantee as per the Govt. of India financial rules and orders of the Commission dated 12.03.2013 and 20.03.2013.
4. The Commission further observed that the petitioner in terms of letter No. 1FB/ADV/RM-1/20/782 dated 22.03.2013 of State Bank of India will relook as to whether it is economical for them to go for loan or Bank Guarantee. The petitioner will operationalize the same with due support and help from the respondents.
5. The representatives of the petitioner submitted that their two (2) units are in precarious condition. In support of their submission they submitted a letter dated 29.03.2013 from M/S Caterpillar which reads as under:-

Quote

“We as Caterpillar do not recommend continuing running the engine at the present condition due to the reasons which as experienced operators have also already elaborated.

Increased maintenance costs due to not carrying out the recommended scheduled maintenance.

By not carrying out the scheduled maintenance parts that are not part of the scheduled activities would also get affected like bearing wear resulting in damages to crankshaft, liner damages due to scuffing of piston ring wear and so on ...

By continuing to run the engine in present condition apart from increased maintenance costs it could lead to catastrophic failure of engine leading to personnel injury as well engine repair going beyond economical repairs”.

Unquote

6. On query of the Commission for the steps to be taken to face such eventuality the representatives of the respondents submitted that they have backup support of 5MW only to face such situation.
7. Petition No. 94/2013 for approval of Power Purchase Agreement between Electricity Department- Andaman & Nicobar Administration and M/s Suryachakra Green Fuels Pvt. Ltd.

under section 86 (1) (b) of Electricity Act, 2003 is scheduled for hearing on 17.04.2013. The parties vide order dated 12.03.2013 passed in the present petition are directed to submit statements/ information in Annexure "A&B" of the order dated 12.03.2013 by 18.4.2013

8. Both the petitions no. 94/2013 and 89/2012 are between same parties. The representatives of the parties prayed the Commission that they are to come to the Commission on 17.04.2013 for hearing in petition no. 94/2013, therefore, it will be convenient to the parties and the Commission to reschedule filing of statement/ information in annexure "A&B" of the order dated 12.03.2013 on or before 17.04.2013.
9. The Commission considered the prayer of the representatives of the parties and keeping in view convenience of the parties directed them to file statement/ information in annexure "A&B" of the order dated 12.03.2013 by 15.04.2013 duly supported by relevant documents with cross reference.
10. The Commission further directed the parties to file compliance report of the order dated 20.03.2013 on or before 17.04.2013.

Scheduled for hearing on 17.04.2013 at 11:00 AM."

Unquote

"Quote (Hearing on 17.04.2013)

6. The Commission in the order dated 2.04.2013 observed that respondent expressed their requirement of the Bank Guarantee as per the Govt. of India Financial Rules and orders of the Commission. The petitioner has expressed difficulty in producing the requisite Bank Guarantee. The Commission further observed that the petitioner will relook as to whether it is economical for them to go for loan or Bank Guarantee.
7. The petitioner has already submitted that they are unable to produce requisite Bank Guarantee and further submitted that SBI is willing to advance a loan to the petitioner. The parties in compliance of the order dated 02.04.2013 filed statement/ information on 15th & 16th April, 2013 in Annexure "A" & "B" of the order dated 12.03.2013.
8. The Commission has heard the representatives of the parties at length and has gone through the file carefully and thoroughly.
9. The Commission observed that there is a huge gap between the statements submitted by both the parties in Annexure "A" & "B".
10. Looking at the picture of amount claimed by the petitioner and recovery from the petitioner arrived at by the respondent, there is again a wide difference which calls for a thorough analysis & examination of the related documents.

11. For the understanding of the gap, the Commission asked for an invoice raised for any one month submitted by the petitioner and the payment order passed by the respondent thereon. Since the gap is again wide and could not be logically explained by the respondent, the Commission considered it appropriate and directed the respondent to submit a statement containing month-wise bills for the period from April 2003 to January 2013; invoice submitted, net payment, orders passed thereof, the recoveries made from each bill and a consolidated statement of the amount recovered, number of days for which such recovered sums were held by the respondent and interest due thereon for delayed payments as per PPA provisions. While this statement should have been prepared and submitted to the Commission in response to the orders dated 17.12.2012 and 18.02.2013 alongwith the "Due and Drawn" statement with supporting evidence and the details mentioned above but the same were not submitted. The respondent further wanted 10 days more time to submit the required detailed statement with all supporting documents/ vouchers, the Commission allowed the respondent to submit the same by 29th April, 2013.
12. The Commission observed that the fixed charges payable in the tariff namely O&M expenses, Depreciation, Debt servicing, Return on Equity and incentive are linked to project cost, which is yet to be finalized. There are also disputes with regard to fuel consumption (Heat Rate, Evaporation losses, ambient temperature) consumption of lube oil and working capital composition. The Commission also observed that both the parties submitted on various occasions different statements giving varying figures of "Due and Drawn" without any supporting documents.
13. The project cost based on which fixed charges for the monthly tariff are to be calculated, also has undergone changes during almost the last ten years from the date of commissioning of the plant. Both the parties are relying on PPA provisions and CEA orders; however, there is a difference of opinion with regard to interpretation of the same and the effective date of operation of these provisions/ orders. There was also difference of opinion with regard to Interest rate payable on term loans and working capital.
14. The respondent was effecting recoveries from the monthly bills of M/s Suryachakra Power Corporation Ltd. in case of any excess payment as per respondent's calculations/ admission, they were charging interest on recoveries as per PPA provisions, where as the petitioner complained that the respondent was not following the same provision/formula/practice for settlement of arrears of the petitioner. The Commission observed that the respondent made the payment of arrears to the

petitioner; by virtue of the payment of these elements of tariff, the respondent has acknowledged that the amount was due to the petitioner and as such the petitioner was also entitled for interest on delayed payments as in the case of recoveries by the respondent from the petitioner.

15. The Commission has observed that the issue of finalization of completed cost of the project of the petitioner was discussed /examined on different occasions during the last ten years by different agencies: (a few meetings/discussions held are listed below)

(i) CEA clarifications dated 19.08.2003/03.04.2004/29.04.2006/22.02.2008;

(ii) Meeting taken by Member (Thermal), CEA on 25.04.2005

(iii) Meeting held in the office of AS (NM), Ministry of Home Affairs, Govt. of India on 17.07.2008.

(iv) Karnataka Power Corporation Ltd. (KPCL) during April 2005 and April 2006;

(v) Central Electricity Authority (CEA) during March, 2008, October, 2010, May, 2011, March, 2012; and

(vi) TANGEDCO consultancy team visited Port Blair and discussed with both the parties during June, 2011; gave first report in Nov., 2011;

(vii) CEA held meeting in Dec., 2011 and Feb., 2012 regarding TANGEDCO first report and suggested reexamination by TANGEDCO on certain issues;

(viii) TANGEDCO reiterated their stand in June, 2012.

(Both KPCL and TANGEDCO were appointed by respondent as consultants), but no final decision was taken by A&N Administration so far on the reports given by their own consultants/ technical authority of GOI namely CEA.

16. In view of the above facts, the Commission suggested during the hearing that both the parties may suggest the name of three experts of their choice so that the issue may be referred to one of the experts to analyze, examine and submit the report to the Commission. The Commission also suggested that the expert to be nominated must have expertise in the field of power generation, tariff fixation, regulation framework, project implementation and Project Finance.

17. Both the parties left the matter to the discretion of the Commission. The Commission suggested the names of two experts namely Shri A.A. Khan, Ex- CMD, Power Finance Corporation, Ex- Member, APTEL and Shri H.L. Bajaj, Ex- Director (Commercial) NTPC, Ex- Chairman, CEA and Ex- Member, APTEL. The Commission would seek the consent of the experts depending on the availability and acceptance of the assignment. The fees/expenses are to be equally shared by the petitioner and

respondent, for which both the parties agreed during the hearing. The “terms of reference” of the assignment is enclosed in the Annexure. The expert may be requested to submit the report within a period of 6-8 weeks from the date of the mandate letter.

18. This order may be read alongwith the previous orders issued by the Commission on the Petition no. 89/2012.

19. The matter is scheduled for hearing on 14.06.2013.

Annexure

TERMS OF REFERENCE

Broad terms of reference:

Issues to be examined and final recommendation to be given by the expert:

- Capital cost of the project
- Issue relating to liquidated damages - - recoverability if any from the petitioner by the respondent
- Issue relating to foreign exchange for rupee funding in terms of prevalent exchange rate regime during the period 1995 to 2003 and consequential admissibility of exchange rate variations in the tariff.
- All tariff parameters which flow from the capital cost of the project
- Interest rate for debt servicing and interest on working capital.
- Operational parameters as per PPA/ addendum to PPA/ CEA decision which forms part of tariff.
- Payment/ recovery of amounts due, but not paid, withheld, denied, if any from the date they become due.
- Admissibility of interest on delay payments.
- Any other issue connected with finalization of project cost and determination of tariff payable to the petitioner.

All the components of capital cost, operational parameters and tariff elements as specified above are to be examined, analyzed and interpreted as per the provisions of Power Purchase Agreement (PPA) signed between M/s Suryachakra Power Corporation Ltd. and Andaman & Nicobar Administration as well as the various reports of CEA and consultant appointed by the A&N Administration.

Unquote

Shri H.L. Bajaj, Ex Member, APTEL was appointed by the Commission as Expert vide its letter dated 10th May, 2013. The above broad Terms of Reference was given to the Expert with a request to submit the report to the Commission by 10th June,2013. Shri H.L. Bajaj submitted his recommendations on the various issues referred to him, in his Report dt.10th June,2013 to the Commission after examination, analysis and interpretation of the provisions of PPA entered into between the Petitioner and the Respondent.

Facts of the case and the issues involved:

The facts of the case and the issues raised by both the parties, as analysed by the Commission as well as the expert appointed by the Commission, Shri H.L.Bajaj, are summarized below:

a) Delay in implementation, construction and commissioning of the project

“After the financial closure of the project on 1st August 2000, the project construction work began to be carried out according to the schedule in the PPA and was ready by April 2002. A meeting was held in the chamber of the Chief Secretary of the Administration on 5th June 2002 and taking an overall view of the plant and the evacuation system, it was agreed for COD of 1st & 2nd Units by the end of August 2002 and 3rd & 4th Units on 15th October 2002 or till the completion of construction of transmission line, whichever earlier, due to the ban imposed by Hon’ble Supreme Court on felling of naturally grown trees in A&N Islands, change in the transmission line and withdrawal of the foreign technicians by their respective governments due to War threat between India and Pakistan. ”

“ Due to the international border dispute between Indian and Pakistan, a war like situation had developed in India during June-July of 2002 and all Foreign Nationals of the equipment suppliers supervising erection were called back to their countries. Thus, experts from other countries, who were working on various aspects of the project including the German Expert, had to leave for their country. Further as per PPA Clause No.3.3 (‘c) (i) & (ii) the Respondent shall develop design, engineer, construct new transmission facilities and shall be commissioned ready for inter connection with the project not later than 120 days before the required commercial operation dated of 1st unit. However the above evacuation lines i.e., new double circuit panther lines were readied by the Respondent only by 10.12.2002 by which time the DG engines of plant were ready for trial runs i.e., by end of November 2002. The trial runs of individual DG set and also the parallel operation of DG sets was completed by 15th December 2002 as per the request of Respondent. During trial runs the Electricity Department's instructions were also implemented to prove the plant readiness. Acceptance tests for each engine for 72 hours operation and also all four engines parallel working as per the PPA was completed in the presence of CEA representatives and officials from Electricity Department by 18th February 2003. As per the request of Electricity Department the plant was run during peak periods in the month of January 2003 to meet the Islands power demand. However the Administration took 6 weeks and declared

only Provisional Commercial Operation Date on 01-04-2003 which was not as per the provisions of PPA.”

“As per clause 3.3 (C) (ii) of the PPA, the A&N Administration was obliged to the transmission facilities to be commissioned and ready for interconnection with the Project not later than 120 days before the required commercial operation of the Project. The Administration had claimed force majeure for the delay in achieving commissioning of the transmission facilities because of a supreme court order. The permanent transmission line was inspected of CEA only on 10.12.2002 for approval.

In terms of PPA, to ensure timely payment of tariff ANI Administration was bound to furnish an irrevocable , unconditional and revolving letter of credit in favor of the Petitioner, covering billing of 2 months. The letters of Credit ought to have been established in favor of and issued to the company not less than thirty (30) days prior to scheduled commercial operation date of the first unit and shall be maintained consistent herewith by the Administration at any and all times during the term of PPA. The Administration opened conditional letter of credits as given below , which were not acceptable to the Petitioner’s term lenders:

Date	L.C. No.	Amount
22.01.2003	IND/0156/01	Rs. 5,65,19,000
20.02.2003	IND/0156/02	Rs. 5,03,46,000

Because of lack of credit as per the terms of the PPA, the release of working capital limits got delayed accordingly commercial operation also got delayed Amendments to the above letters of credit were provided only on 07.04.2003 much after commercial operation date.”

“During the implementation and construction, the Petitioner’s ability to complete the timely commercial operations were impeded by number of external factors, which were beyond the control of the Project. The Supervisor from the original equipment supplier MAK-CAT, the entity responsible for commissioning the engines, was withdrawn from the Project site on 8th June 2002 due to the prevailing war-like situation at the Indo Pak border. All four engines had been run at this point and were partially loaded before the Supervisor left at the urging of the German embassy. This interruption in commissioning activities constituted a force majeure event under the PPA and the Petitioner notified the A&NI Administration of this force majeure event at the time. These events contributed to a delay in commissioning activity, which was beyond the control of the Petitioner. The war-like situation in the country and withdrawal of foreign nationals and the consequent deterioration of LO & DO piping has prolonged the plant commissioning activity. It is pertinent to mention that the delay was

mutually acceded to by the parties, as the cause was 'force majeure'.

As per Article 3.3 (b) (ii) (d) of the PPA, the A&NI Administration was required to provide support to the company by providing reliable construction power, to allow the Petitioner to effectively carry out the construction activity. Notwithstanding this obligation, power supply interruption occurred very frequently and for long durations, and these interruptions disrupted construction and caused delays in completion activities. The problem in obtaining reliable construction power had been brought to the notice of the A&NI Administration even by the EPC Contractor viz., Reliance Power Limited formerly known as M/s. BSES Ltd.

There was considerable delay in arranging for an Engineer from Central Electricity Authority (CEA) by the A&NI Administration even though the plant was offered for witnessing the acceptance testing from 14/12/2002. As per the request of Electricity Department the tests were conducted for one engine at a time and therefore the process took a long time. During conducting of tests also there was a gap of 15 days in getting replacement from CEA for witnessing the tests. Even under the above circumstances the acceptance tests were completed on 18th February 2003 and recommended by CEA but Provisional COD was declared only on 2nd April 2003."

b) Details of the variations/increase in actual capital cost and its reasons

b.1 Towards land/site development

"The reason for this variation is that there was an inadequate provision made in the sanctioned TEC/PPA. At the time of drawing up the PPA; there was inadequate information and data of site conditions. It was only when the actual work of land and site development began that the Petitioner had to face conditions that were completely unforeseen viz. before the land could be made fit for installation of the equipment, there was the requirement of removing and dredging slush that formed during the monsoons. This problem of slush had not been pointed out nor taken into account while finalizing the terms of the PPA or its execution. Further, the problem of slush would have been a perennially intermittent phenomenon, had the Petitioner not constructed storm water drainage systems all around the project site. The construction of a storm water drain was also not reckoned at the time of execution of the PPA.

After the PPA was executed, the A&NI Administration allotted 4.12 hectares of land, surrounded by mountains on three sides and Sea on the fourth side. The soil was investigated by Central Soil and Materials Research Station, Ministry of Irrigation, Government of India, pursuant to which they submitted their observations. They observed that the soil up to lift to 20ft is very soft.”

“There has been a cost escalation for the land/site development of the project. The details of the escalation are as follows:

	Approved	Actuals	Variation
Land and Site Development	63.00	625.39	287.39
Contingencies (IC)	275.00	---	---
Total	338.00	625.39	287.39

b.2 Buildings and Civil constructions :

The cost variation in buildings and Civil Constructions is as follows:

	Rs in lakhs		
	Approved TEC	As per Actuals	Variatio
Buildings	549.0	1000.0	536.71
Civil Constructio (IC)			

The variation of Rs.536.71 Lakhs is due to inadequate provision made in the TEC/PPA, mainly on account of providing pile foundations for all buildings and equipment because of change in design parameters suitable to the site conditions. This cost variation is also due to increased cost inflation over a period of 5 years from the year 1997.

b.3 Work cost:

There has been a variation in the cost of works provided under the PPA and the cost of works actually incurred.

The details are as follows:

	(Rs in Lakhs)		
	Approved TEC	As per Actuals	Variation
Work Cost			
Works Cost excluding and duties	3157.20 (F.C)	2227.70 }	2629.99}
Taxes and duties	1084.05 (633.60 I 450.45 I.C) 389.75 (I.C)		
Misc. Project Cost			
Total	4631.00	4856.68	225.68
Electrical	265.75 (I.C)	654.35	388.60

As some of the foreign equipment were indigenously available, the Company decided to procure those equipment, indigenously and executed EPCC contract accordingly. Hence the Company has utilized a part of the foreign component in Indian Rupees for procurement of the said equipment indigenously. The cost variation of Rs.225.68 lakhs is mainly due to increase in rates of foreign exchange and providing additional items of closed circuit cooling system with Cooling Towers instead of approved provision of direct cooling system. Other reasons are due to increased cost of inflation index over a period of 5 years from the year 1997.

- b.4 The reasons for cost variation of Rs.388.60 Lakhs in Electricals are due to providing PLC based control system instead of conventional systems and providing additional 1 no, power transformer of 10/12.5 MVA which have been recommended by CEA and increase in capacity of power transformers (2 nos.) from 10MVA to 12.5 MVA. Other reasons are due to increased cost of inflation index over a period of 5 years from the year 1997.
- b.5 The following major additional works were carried out to approve at technology equipment for the plant to make it reliable, modern and stable.
- A. Engine controls and protection with digital technology, with single point control and displays. Computer programming and displays, PLC controls for acquiring data and processing. Latest models of governing system and voltage regulation system.

- B. Increasing the chimney height from the approved 15 meters to 33.5 meters, to reduce the pollution in the dwelling areas of neighborhood and environment friendly and to keep the surrounding greenery intact.
- C. As per the project, seawater was proposed for secondary cooling of the engines because of insufficient availability of sweet water. As per the recommendations of the experts, closed circuit cooling with expensive cooling towers and a blow of 10% was adopted, to allow safe and natural marine growth.
- D. The sea is shallow near the project site. To ensure uninterrupted and problem-free running of the water cooling system became necessary to provide make-up water pump house at a distance of 135 meters into the Bay of Bengal.
- E. The project site is surrounded on three sides by mountain slopes. During rains, there is heavy inflow of water from the slopes, which threatened inundation and wash off of the project area during the rains. To protect the project from flooding, a deep and wide concrete drain of adequate capacity on three sides of compound was constructed to collect the water and pass it into to the sea. This project also required high compound wall with deep concrete foundation side protection to ensure its safety during heavy rainwater flooding, which was also not considered at the time of estimating the project cost.
- F. There have been additional jobs that were carried out as per instruction of Electricity Department, which were not a part of the TEC report like, supply of 33KV XLPE cables, providing check metering panel for export, additional 10/125MVA, 11/33KV Transformer and two numbers of 125 KVA Black DG sets.
- G. Certain works, which were not provided in EPCC contract, were implemented as per decisions taken at various meetings with Electricity Department, CEA and the Petitioner like; additional Black start DG of 125 KVA, additional auxiliary transformer of 1250 KVA with corresponding HT & LT switchgear, cables, Civil works etc., class Tri-vector meter for 4 DG sets and auxiliary transformers for accuracy of measurement along with 0.2 class CT and PT system etc.
- H. The HSD supplied by IOCL contained suspended material and was causing frequent chocking of filters . It became necessary to provide for a HSD Centrifuge of sufficient capacity and also standby unit.”

c) Interest During Construction

As per Petitioner, it is entitled to IDC as follows:

	Approved TEC As per Actuals Variation		
IDC	300.00	629.80	329.80

As stated by the Petitioner “The reasons for increase of IDC by Rs.329.80 Lakhs are due to increase of loan component in line with the increased project cost and increase in duration of project completion due to delay in declaring COD by the Administration and delay in opening of letter of credit by the Administration as per the terms of PPA and the force majeure condition.”

d) Other Causes and Effects

“The cost inflation index during the financial year 1996-97 is 305 and the same during the financial year 2002-2003 is 447. The inflation is 46.5%. In addition to the above, the inflation rate in Andaman Islands was higher because of logistical constraints. The cost of living in A&N Islands is also very high as compared to main land. These factors have also contributed to cost escalation. Specialists had to be brought from Germany for executing Governor checking and related necessary checks”

REPLY OF ANDAMAN & NICOBAR ISLANDS ADMINISTRATION (RESPONDENT)

REGARDING SUBMISSION OF STATEMENTS OF COST OF THE COMPLETED PROJECT:

- 4.3.1** “Chief Secretary, A&N Administration vide Order No. 217 dated 21.1.2013 constituted a five member committee for examining the issue of cost of construction of 20 MW Bambooflat Power House in the light of order dated 15.01.13 of the Honb’le Commission . The committee is said to have examined the legal framework of all claims with reference to PPA, Techno Economic Clearance (TEC), Report of the Karnataka Power Corporation (KPCL), advice tendered by Central Electricity Authority (CEA), reports of the Tamil Nadu Electricity Generation and Distribution Corporation Ltd. (TANGEDCO) etc. and submitted their report to A&N Administration on 25.01.2013. The statement of cost arrived at in respect of the construction of the project is as below:

Description of items		Quantum of Expenditure Rs. Crores	Para Ref. of Committee report
Approved Cost		63.14	15,17,29 & 30
IDC	(-)	3.00	
Cost excluding IDC	(+)	60.14	
Increase in cost of Establishment due to extended gestation period	(+)	3.30	17
Increase due to Exchange Rate variation considering only 5.13 MUS\$ Rs. 11.0445 per dollar	(+)	5.67	Allowed as per actual utilization
Additional Transformer and Black Start DG Set – Work done after COD	(+)	0.31	22
Hard Cost excl. IDC		69.42	
Proportionate IDC on the hard cost of Rs. 69.11 cr.	(+)	4.91	Revised on hard cost
Completed cost including IDC/Project Cost		74.33	
Liquidated damage @ 5% on Rs. 74.33 crores	(-)	3.72	
Project Completed Cost		70.61	

The Respondent has stated that the said report of the five member committee has been accepted by the Administration. The Respondent had prayed that the Hon'ble Commission may determine the project cost and tariff thereon in accordance with the provisions of PPA/Techno Economic Clearance issued by A&N Administration and the report of the five members committee constituted by the A&N Administration for the purpose of determination of the cost of the project as Rs 70.61 "

The detailed recommendations of the committee are given at Para 3.2.8 of this Report.

4.3.2 A&N Administration engaged M/s KPCL to assess the capital cost of the project. M/s Karnataka Power Corporation Ltd., (KPCL) Bangalore, submitted their report in April, 2006) , the relevant findings of which are reproduced as under:

*"(i) **Land & site development**- Based on the information/documents provided by the Agency and A&N Administration, there is no documentary evidence like approval from A&N Admn. during implementation period, towards the additional expenditure incurred by the Agency. However, the Agency should have assessed the site condition before bidding for the work*

*ii) **Building & Civil Construction**:- Based on the justification furnished by the agency and if the modification in the works are under taken by the Agency with the approval of A&N Admn., the additional expenditure could be considered.*

(iii) Works Cost; - Based on the information furnished by the agency and if the modifications in the works are undertaken by the Company with the approval of A&N Admn.', the additional expenditure could be considered for the revised project cost. However, the additional expenditure incurred on the Audit & Accounts amounting to Rs. 116.92 lakhs is not justifiable

(iv) Electrical - Based on the justification furnished by the agency and if the modified works are undertaken by the Agency with the approval of A&N Admn., the additional expenditure could be considered for the revised project cost, since this would reduced cost of O&M expenditure during the life of the plant.

(v)Interest during Construction - CEA while approving the Project Cost has considered the interest rates @ 18% p.a. for the domestic loan component and 9.82% p.a. for the foreign loan component. However, the actual weighted average interest rate works out to 7.41% p.a. (as detailed below), which is much cost effective as compared to the envisaged weighted average rate of interest @ 12.15% p.a.,

Lender	Amount (R& in Lakhs)	ROI	Amount (Rs in Lakhs)
SBI-FCL	1636.10	5.29%	86.54969
SREI-FCL	2108.64	4.94%	104.1668
SBI-RTL	1369.00	13.75%	188.2375
	5113.74	7.41%	378.954

Considering the above, the IDC could be restricted to Rs.300 lakhs as approved by CEA, even after considering the extended period of construction,

(vi) Preliminary and Capital issue expenses - The approved cost ofRs.185.25 lakhs by CEA towards the Preliminary and capital issue expenses could be considered which is reasonable.

(vii)Conclusion - The total increase in the Project Cost as furnished by the agency is at Rs. 2196.41 lakhs, However, considering the above facts the increase in project cost amounting to Rs.1169.79 lakhs is not justifiable. The balance amount of Rs.1026.62 lakhs could be considered subject to review and approval by CEA, New Delhi.

Thus the actual cost of the completion of the project arrived at by M/s KPCL was Rs. 73.40 crores (Rs 63.14 crores +Rs 10.26 crores). M/s KPCL had opined that this cost is subject to approval by CEA & competent authority."

4.3.3 JOINT EXERCISE BY A&N ADMINISTRATION AND SPCL

Subsequently a joint exercise was carried out by officials of Electricity. Department and representatives of M/s SPCL in April 2010 for arriving at reasonable/actual cost for the project. The findings of the said joint exercise are as follows -

"It is now jointly agreed for recommending the Capital Cost as below:-

- a. The works cost of Rs.76.14 crores is broadly acceptable to both the parties and can be considered and recommended to the competent authority for further scrutiny & acceptance,
- b. As regards, increased expenditure on account of Audit & Accounts, IDC and Preliminary & Capital issue expenses, totaling to Rs.8.82 crores needs commercial expert opinion to arrive at the extent of admissibility for inclusion in the Completed Cost over and above Rs. 76.14 crores.
- c. However, the Completion Cost should not exceed more than the expenditure certified by the Auditor of SPCL.
- d. M/s SPCL in their Completed Cost increased the equity component to 31.09% as against the approved TEC provision of 30%. M/s SPCL to restrict ROE on 30% of the investment and the balance to be treated as term loan for the tariff calculation.
- e. The foreign currency i.e., 9472653 DEM (equivalent US \$ 51,31,02038) equivalent INR Rs.2227.70 lakhs which is utilized is freed"

The report / findings of M/s KPCL and Report of Joint Exercise were submitted to CEA for further scrutiny and advice. The CEA vide their letter dated 03.11.2010 after perusing the above documents arrived at the completed cost of Rs 75.60 crores.

4.3.4 OBSERVATIONS of CEA

As per CEA, " the factor that can be considered to allow excess cost over approved cost is the exchange rate variation. In the approved cost of Rs.63.14 crores foreign component of US\$ 10.53 million was considered at the exchange rate of Rs.36 per US\$. The weighted average exchange rate during implementation of the project based on loan disbursement has been indicated as Rs.47.0445 per US\$. It is stated in the report of the Committee on Joint Exercise that the IPP has utilized less foreign currency i.e. 9472653 DEM (equivalent Rs.22.277 crores) and utilized more domestic currency compared to the approved estimates. Increase in cost to the extent of exchange rate variation over the original approved foreign currency i.e. US\$ 10.53 million may be considered even if the actual foreign currency utilized by the IPP is less considering that the actual expenditure is more than the approved cost as certified by the Chartered Accountants. This increase in cost works out to Rs.11.63 crores. Thus the completed cost of the project excluding IDC would work out to Rs. 71.77 crores as follows:

Approved Cost	Rs. 63.14 crores
IDC	Rs. 3.00 crores
Cost Excld IDC	Rs. 60.14 crores
Increase due to Exchange Rate variation (10.53xMn US\$ x Rs. 11.0445 per \$)	Rs. 11.63 crores
Completed cost excl IDC	Rs. 71.77 crores

The IDC has been worked out based on above mentioned cost of Rs. 71.77 crores and taking the construction period as given in the PPA. The loan amount has been taken as Rs. 51.1374 crores based on the term loan as indicated in para 8 above (of CEA report). The prorota deployment of loan and equity has been considered. IDC works out to Rs. 3.83 crores as per details indicated at Annexure-2 (of CEA report). Thus, the total completed cost works out to be Rs.75.60 crores. The completed cost has been arrived at without considering increase in cost of establishment and IDC due to delays on account of force majeure and delays on account of A&N Administration as claimed by the IPP, which may be considered after obtaining comments of A&N Administration,”

The CEA after perusing the delayed gestation period as submitted by A&N Administration arrived at the Completed Cost as Rs. 77.595 crores vide **their letter dated 23.05.2011** The relevant observations of CEA are reproduced as follows”

Quote

“as per the break-up details of the approved cost given in various documents, it is noticed that approved cost of preliminary and capital issue expenses was Rs.1.8525 crores which included a cost provision of about Rs.1.10 crores for the establishment. As per the completed cost certified by the Chartered Accountant, an expenditure of Rs.5.8137 crores has been incurred on preliminary and capital issue expenses which include Rs.4.7464 crores for establishment. Considering the extended gestation period as recommended by A&N Administration, the cost of establishment worked out to Rs. 4.40 crores on proportionate basis. Thus, the additional expenditure due to extended gestation period works out to Rs.3.30 crores. The completed hard cost of the project excluding IDC would work out to Rs. 75.07 crores as per details given below:

<i>Approved Cost</i>	<i>Rs. 63.14 crores</i>
<i>IDC</i>	<i>Rs. 3.00 crores</i>
<i>Cost Excl'd IDC</i>	<i>Rs. 60.14 crores</i>
<i>Increase due to Exchange Rate variation (10.53xMn US\$ x Rs. 11.0445 per \$)</i>	<i>Rs. 11.63 crores</i>
<i>Increase in cost of Establishment</i>	<i>Rs. 3.30 crores</i>
<i>Completed Hard cost excl'd IDC</i>	<i>Rs. 75.07 crores</i>
<i>IDC</i>	<i>Rs. 5.31 crores</i>

The IDC has been re-worked out based on the above mentioned hard cost of Rs.75.07 crores and taking extended gestation period as recommended by A&N Administration and the revised IDC works out to Rs. 5.31 crores as given in Annexure-I(of CEA report). Thus, the total expenditure including IDC works out to Rs. 80.38 crores. However, considering that the total amount of funds tied up for the project worked out to be Rs. 77.595 crores as per details given in our earlier comments, the completed cost could be limited to Rs. 77.595 crores.

Unquote

Even the aforesaid project cost of Rs. 77.595 crores was not agreed to by the Company. Accordingly, the Member, CEA held a meeting on 14.02.2012 which was attended by Principal Secretary and SE (Ele.) A&N Administration at New Delhi. On the basis of the said meeting, CEA issued a letter dated 15.03.2012, with the remarks that the CEA's advice on Completed Project Cost amounting to Rs.80.38 crores may be treated as final, which has already been communicated to A&N Administration vide their letter dated 23.05.2011 and the fund tied-up aspects may be looked into by A&N Administration.

4.3.5 OBSERVATIONS OF TAMIL NADU ELECTRICITY GENERATION & DISTRIBUTION CORPORATION (TANGEDCO)

The A&N Admn. also appointed a second Consultant namely Tamil Nad Electricity Generation & Distribution Corporation (TANGEDCO) to examine and provide expert comments vide letter dt.08.07.2011 on the following:

- (a) Rs.4.02 crores loan said to have been availed from CITI Bank and Rs.2.052 crores loan said to have been availed from other sources & credits by M/s SPCL for the 20 MW Project.
- b) To offer specific comments on the extended gestation period including the delay caused by the both the parties as recorded in the Admn's letter dated 01.04.2011.

The TANGEDCO after examining the said report opined vide their letter dt 11.11. 2011 as follows: -

“(i) M/s SPCL though deviated from achieving the milestone schedule (Appendix-C of the Power Purchase Agreement) had finally achieved COD on 18.02.2003 as per the recommendations of the Independent Engineer i.e, CEA vide their letter dt.18.02.2003.

(ii) The Administration achieved compliance of the provisions of the Power Purchase Agreement (PPA) under clause 3.3 (c) (i), (ii) and (v) (Page No.23) and Clause 8.3 (Page No.41) only on 10.12.2002 & 01.04.2003 respectively, Hence, achieving of COD by M/s SPCL on 02.04.2003 was well before the provision of 120 days and 30 days

schedule given in above clauses of Power Purchase Agreement (PPA), Thus, imposition of liquidated damages as per clause 3.10 (Page No.28) of Power Purchase Agreement (PPA) on M/s SPCL for delay in achieving COD is not justifiable.

- (iii) The recommended cost of Rs.3.865 crores against Rs.4.02 crores availed by SPCL from CITI Bank in June 2003 after COD, is reasonable and could be considered for inclusion in the completed cost.
- (iv) Out of Rs.2.052 crores (other sources) the IPP has claimed a sum of Rs.0.65 crore which was included and paid to M/s BSES towards outstanding to their EPC Contractor Project cost and also given undertaking to capping the final capital cost at Rs.82.110 crores. Considering the above position, Rs.0.65 crores could be considered for inclusion in the Capital Cost.
- (v) There may not be any IDC Component on Rs.3.865 crores and Rs.0.65 crore recommended, as this expenditure was incurred after COD.
- (vi) The completed cost is now works out to be Rs.82.110 crores (RS.77.595 crores + Rs.3.865 crores + 0.65 crores) which protects the full IDC Cost of Rs.5.31 crores on the base cost of Rs. 75.07 crores "

4.3.6 The A&N Admn submitted this report to Director (UT), CEA, vide letter dated 22.11.2011. The CEA then convened a meeting on 19.12.2011 and outcome of the meeting was forwarded vide letter Dt22.12.2011 in which the representatives of TANGEDCO and official of Electrical were also present. The relevant observation of CEA as recorded in the minutes of meeting are as follows

"During the discussion it came out that certain documents relating to actual expenditure as originally certified by the statutory auditor in 2004 was not seen by TANGEDCO. Further, it came out that various orders for purchase of equipment placed in the document submitted by TANGEDCO in their report have not been verified by them, although these have been relied upon by them for giving their recommendations, Some other issues were pointed out for their verification before CEA could give their comments on their findings, TANGEDCO agreed to review the recommendations based on the discussion held in the meeting",

4.3.7 REVIEW BY TANGENDCO

The TANGEDCO- after reviewing their earlier report dated 11.11.2011, submitted their revised recommendations on 05,09,2012 (Appendix-10), which are reproduced below:-

SI No.	Description	Amount (Rs. lakhs)	Recommendation of TANGEDCO
(a)	Additional transformer & black start DG Set	30,97	Allowed as per MOM dt.19.8.2003
(b)	Centrifugal separator	39.85	To consider under natural justice
(c)	Road, Culverts, Jetty Bldg. & Civil Contn,	88.45	Subject to approval from APWD
Total		159.27	

Note: Claims as at (b) and (c) above cannot be agreed as PPA does not have provision to consider expenditure on natural justice and certification by APWD for inclusion in the Project cost”

Thereafter, a meeting was convened in A&N Administration Secretariat on 17.04.2012 wherein SPCL had also participated. In the said meeting both parties agreed to the cost of Rs.77.595 crores to be considered as provisional cost of the project. The Administration accordingly communicated the provisional project cost of Rs.77.595 crores to M/s SPCL vide letter dated 18.05.2012.

4.3.8 RECOMMENDATIONS OF A&N ADMINISTRATION COMMITTEE

Keeping in view of the facts and provision of Laws as detailed in the preceding paragraphs the finding of the five member Committee set up by A&N Administration recommended as under :~

“(a) M/s SPCL was assigned the task of establishment of power project at Bamboo flat, Port Blair in pursuance of an elaborate process of tendering/bidding on the-basis of the lowest bid offered by the company, Consequently, an agreement was also executed between A&N Administration and M/s SPCL. Any post tender amendment/modification of the terms and conditions of NIT/RFP for the purpose of extending benefit to the bidder/contractor is against the guiding principles of fairness and transparency in public dispensation. Such an act vitiates/nullifies the very spirit of tendering process which is supposed to be fair, transparent and equitable. Thus, no benefit beyond the provisions of Techno-Economic Clearance and PPA can be allowed. Doing otherwise would mean extending unlawful benefit.

(b) M/s SPCL was required to establish the power project strictly in accordance with physical & technical limits prescribed in the Techno Economic Clearance (TEC) vide OM Dt.20.11.1997. No deviation was/is permissible beyond the terms of technical/ commercial

limits prescribed in the TEC except those which have been duly and formally approved by the Administration, in view of the provision of the Article-I(vii) & Appendix-D of the PPA read with the OM 20.11.1997.

(c) M/s SPCL have committed major deviations in regard to construction/estimates of the project vis-à-vis the prescribed limits in the Techno-economic Clearance. To the best of our knowledge the said deviations were not formally approved by the Administration/ CEA and therefore, any expenditure on account of such deviations is not legally admissible in the light of provisions of article-1 (vii) & Appendix- D of the PPA.

(d) As per the committee , “ *CEA had allowed benefit of foreign exchange rate variation to SPCL in respect of 10.53Million US Dollar, whereas M/s SPCL had actually utilized foreign component of 5.13 Million US Dollar. The difference between admissible amount of foreign exchange rate variation and benefit actually allowed by the CEA is around Rs. 6.00 crores. **The inclusion of Rs. 6.00 crores towards completed cost of the project is factually and legally unjustified, amounts to extension of unlawful benefit and is , therefore, required to be deducted from the total cost of the project.***”

(e) Receipt of loan agreement of Citi Bank loan duly signed by both parties i.e., M/s SPCL & Bank representative and its admissibility for inclusion in project cost.

(i) The CITI Bank loan agreement duly signed by their representative was submitted by SPCL vide their letter Dt.05.07.2011, which is contrary to the provision of Appendix-D of PPA, which lays down that the completed cost document with full financing agreements should be submitted within three months from the date of COD, In the instant, the said document was submitted in July, 2011 i.e after 8 years from the date of commissioning of the project. Since the requirement of Appendix-D is not getting fulfilled the said claim cannot be entertained.

(ii) The Claim of M/s SPCL for inclusion of an amount of Rs 4.02 crores availed from CITI Bank towards the cost of the project was also disallowed by the CEA on the ground that the said loan was availed for corporate purposes and that no evidence (proper documents) were provided in support of the loan. As such Rs 4.02 crores loan of CITI Bank cannot be considered as source of loan for the 20 MW Plant. The Committee is in agreement with the views of CEA.

(f) Since M/s SPCL had expressed disagreement with the advice of CEA restricting the Completed cost of the project as Rs 77.595 crores limiting to tied up fund, the Administration appointed the second consultant i.e., TANGEDCO, to specifically examine the loan availed by the Company after COD & the works carried out subsequent to COD. Accordingly, TANGEDCO examined the said claim and furnished their recommendation as below :

Si No.	Description	Amount (Rs. lakhs)	Recommendation of TANGEDCO
(a)	Additional transformer & black start DG Set	30.97	Allowed as per MOM dt 19.8.2003
(b)	Centrifugal separator	39.85	To consider under natural justice
(c)	Road, Culverts, Jetty Bldg. & Civil Contrn.	88.45	Subject to approval from APWD
Total		159,27	

The recommendation at (b) & (c) cannot be agreed to, as PPA does not have provision to consider expenditure on natural justice and for inclusion of expenditure being certified by APWD. Hence the only expenditure admissible is the cost towards additional transformer & Black start DG sets at a cost of Rs 30.97 If lakhs for the works done after COD i.e . 02.04.2003.

g) It is also pertinent to refer to clause 3.10 Article-3 of the PPA which provides for the levy of the Liquidated Damages (LD) on M/s SPCL for the delay attributable to the Company in achieving COD, reproduced in para(34) of the report. In the instant case the company events had caused a delay of 146 days in respect of first two units and 71 days in respect of rest of two units. The Liquidated damages (LD) on account of the said delay as calculated @ 5% on the project cost of Rs 74.33 crores , work out as Rs 3.72 crore. The said amount of Rs 3.72 crores is also required to be deducted from the total cost of the project in view of provision of clause (3.10) of Article (3) of PPA. (reproduced in para 34 of this report)

(h) Keeping in view of the above facts and provisions of PPA / Techno Economic Clearance the total cost of the project is worked out as follows:

Description of items		Quantum of Expenditure Rs. crores
Approved Cost		63.14
IDC	(-)	3.00
Cost excluding IDC		60.14
Increase in cost of Establishment due to extended gestation period.	(+)	3.30
Increase due to Exchange rate variation considering only 5.13 MUS \$ @ Rs. 11.0445 per dollar.	(+)	5.67 '
Additional Transformer and Black Start DG Set - Work done after COD	(+)	0.31
Hard cost excl. IDC		69A2
Proportionate IDC on the hard cost of Rs.SS.IIcr.	(+)	4.91
Completed cost including IDC / Project Cost		74.33
Liquidated damage @ 5% on Rs. 74.33 crores.	(-)	3.72
Project Completed Cost		70.61

Thus the Committee is of the considered view that the **actual cost** of the Completion of the project is Rs 70.61 crores

3 COMPARATIVE STATEMENTS OF COST AS ARRIVED BY VARIOUS COMMITTEES

In the past, various reports have been provided based on committees/ consultants each with different figures of cost of the completed project. The details of costs as worked out at different point of times are given hereunder:

S. No.	Committee/ Consultant	Year	Project Cost	Remarks
1.	M/s KPCL [Karnataka Power Corporation Ltd.]	June 2004	Rs. 73.40 Cr + Balance left to A&N Admn	
2.	Joint Exercise between Petitioner & Respondent	April 2010	Rs. 76.14 Cr + Balance Rs. 8.82 Cr in respect of IDC & prelim expense was left to be examined by the CEA.	
3.	CEA, New Delhi	Nov, 2010	Rs. 75.60 Cr as hard cost without taking into consideration the increase in cost of establishment and IDC on account of delays from both the sides	CEA Letter Ref: DPD/UT/374-6 (A&N)/2010/2181-83 dated 03-11-2010
4.	CEA, New Delhi	May, 2011	Rs. 77.595 Cr not considering the tied-up funds of Rs. 4.02 Cr & Rs. 2.05 Cr.	CEA Letter Ref: UO No. 1/AN/SS/ Diesel/TPI/2011/ 1534 dated 16-05-2011
5.	M/s TANGEDCO (Tamil Nadu Electricity Generation & Distribution Company]	Nov, 2011 1 st Report	Rs. 82.11 Cr	.
6.	CEA, New Delhi	March 2012	Rs. 80.38 Cr without taking into cognizance of the two tied up loans and leaving them to be looked into by A&N Administration	CEA Letter Ref No. DPD/UT/374-6 (A&N)/2012/648 dated 15-03-2012
7.	M/s TANGEDCO [Tamil Nadu Electricity Generation & Distribution Company]	June, 2012 2 nd Report	Rs. 82.11 Cr reconfirmed as final project cost	
8.	M/s TANGEDCO [Tamil Nadu Electricity Generation & Distribution Company]	Oct, 2012 3 rd Report	Rs. 79.439 Cr + other issues to be taken care by Electricity Department	
9.	A&N Admns Five member committee	Jan, 2013	Rs. 70.61 Cr as final project cost	

5.0 OTHER POINTS OF DISPUTES BETWEEN THE PETITIONER AND THE RESPONDENTS.

4.1 ISSUE OF REBATE

The Clause No.8.4 of the PPA under the Chapter, Article Billing 86 Payment, reads as follows.

“Rebate

(a) *If payment in full of a Tariff Invoice and all other amounts due In respect thereof*

is made on or prior to the date which is the fifth Business day after the Date of presentation of the Tariff Invoice to THE ADMINISTRATION pursuant to Article 8.2 (which presentation may be by facsimile transmission) by wire transfer payment or otherwise such that, in any such case, there shall be immediately available funds in an amount equal to the full amount due to the Company in the Company's account on such date which is such fifth Business Day, THE ADMINISTRATION shall be allowed a rebate equal to 2.5% of the amount of the Invoice Amount of such Tariff Invoice paid on such date. For payments within a period of one month on presentation of bills by the generating company, a rebate of 1 % shall be allowed.

(b) If the Company shall receive all such amounts not later than such fifth Business Day in immediately available funds, such rebate, if any, may be taken by THE ADMINISTRATION as a credit against the Tariff Invoice which is then due (and no overdue) and then being paid.

(c) Notwithstanding the foregoing, THE ADMINISTRATION shall not be allowed a rebate under this Article 8.4, unless the Letter(s) of Credit specified in Article 8.3 and the Collateral Arrangements are, at the time such rebate is to be allowed, being maintained by THE ADMINISTRATION in accordance with Article 8.3.

3.1.2 The Petitioner has submitted that, while making payment of all the monthly tariff invoices submitted so far by the Petitioner, i.e. from the inception of the power plant on 02.04.2003 onwards till date, the Respondents have been deducting/withholding amounts from Petitioner's invoices regularly. Further, despite having not paid the full invoice amount, still the Respondents have proceeded to deduct amounts towards rebate. This rebate has been calculated at the rate of 2.5% of the full invoice amount.

3.1.3 Clause 8.2 of the PPA in Sub-Clause (a) mandates that even if the Respondents are disputing/not agreeable about the amount raised in the tariff invoice, still they shall not deduct any amounts from the said invoice. In the event of such dispute, the Respondents can, after making the full payment raise a dispute/claim regarding the disputed amount by issuing a notice to the Petitioner. As contended by the Petitioner, there has never been a FULL payment of the invoice as envisaged in Clause 8.2 of the PPA, the Respondents are not eligible for any rebate. Moreover, as per Petitioner while calculating the rebate, the total invoice amount was taken into account.

3.1.5 The Petitioner in its support has quoted the decision of Tamil Nadu Regulatory Commission, in a case entitled GMR Power Corporation Ltd., Vs. Tamil Nadu Generation and Distribution Corporation Ltd., in DPR No.10/2008 as held the in its Order dated 16.10.2010 as follows:-

“(1). If the Respondent had made full and timely payment against the reworked monthly invoices, he would be deemed to have been eligible for rebate.

(2). If the Respondent has availed of rebate for any payment less than the full payment, he is liable to refund the rebate along with the interest at the rate the prescriber in clause 8.6 of PPA from date of deduction from the date of refund.”

The decision of TNERC has been vetted by the Appellate Tribunal as well.

5.1 RESPONDENT SUBMISSIONS

As per the provision of clause (8.4) Article-8 (Page No.42) of the PPA the Respondent is entitled for a rebate of 2.5% of the invoice amount if the payment of the full invoice amount is made on or before the fifth business day after the receipt of the tariff invoice.

The Respondent has all along been releasing the payments within the stipulated time of five business days of submission of the monthly tariff invoice by the Petitioner. The Respondent is entitled for rebate in accordance with the provision of clause (8.4) Article-8 (Page No.42) of PPA and thus the said rebate has been availed lawfully.

Only that much amount of the tariff bill can be released by the Respondent which is in conformity with the provisions of Appendix-D of the PPA, Releasing of payment/claims beyond the purview/ provisions of the PPA would be unlawful for which Respondent will be answerable to various agencies like CVC, CAG etc.

The Petitioner invariably includes in their monthly tariff invoices undue claims viz., Water Charges, Octopi charges, HSD handling/ transportation losses, HSD consumption at enhanced station heat rate @ 2080 kcal/kwh, enhanced interest rates @18% on working capital and@ 12.15% on Debt, enhanced project cost (Rs.80.38 cores), cost of HSD and Lube oil for the period which is supplied by the Respondent accounted in variable charges as well as in working capital etc Hence the Respondent only allows such payments in the monthly tariff invoice which are in accordance with the provisions of Appendix-D of PPA. The Respondent is legally neither obliged nor authorized to allow any claim which is beyond the above said provisions of PPA.

It has further been submitted by the Administration that the Petitioner had not complied with its request to submit the invoices only with admissible claim and till date continues to submit the invoices including undue claims.

It is submitted that the Petitioner while submitting the invoices/bills is legally required to adhere to the provisions at Appendix-D of PPA and cannot include any claim which is beyond the provisions of the said Appendix-D. However, the Petitioner has consistently being submitting the invoices, while deviating from the provisions of Appendix-D. Hence the Respondent had restricted their invoices in accordance with the provisions of Appendix-D and released only that amount of tariff which is in conformity with the provisions of the Appendix-D of PPA within the stipulated time of five business day.

Respondent further submitted that the Petitioner is concocting preposterous claims which cannot be entertained/accepted in view of the relevant provisions of Law (PPA). Thus the claim of Petitioner that he is entitled towards refund of rebate/ deductions is misconceived, erroneous and is, therefore, denied.

5.2 INTEREST ON DELAYED PAYMENT (Late Payment)

5.2.1 The Petitioner in its submission have stated the following:

Clause No.8.6 of PPA stipulates that *“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 percent (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 accrued from day to day 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 therefore by the payee”.*

It is stated by the Petitioner that the Respondents have never adhered to the said mandate of the PPA. Further, the Respondents on the one hand are relying upon the contractual provisions of the PPA to claim interest for the alleged excess payment, and on the other they are refusing to pay any interest claimed by the Petitioner under the very same clause of the PPA..

In its support, the Petitioner has submitted that in the judgment of the TNERC mentioned above, the issue regarding payment of interest on delayed payments has also been decided by holding as follows:

(1) *If the Respondent had made payment equal to the invoices claimed within in the stipulated period, the Respondent is not liable to pay interest*

(2) *If the payment by the Respondent is less than the quantum indicated in the invoice then the Respondent is liable to pay interest on short fall.*

(3) *If the payment made by the Respondent was in excess of the quantum indicated in the invoice within the prescribed period then the Respondent would be entitled to interest at the rate in the prescribed in the PPA.”*

5.2.2 In its reponse the Respondent has stated the following:

Regarding the claim of Petitioner relating to payment of interest on delayed payment it is submitted that there has been no intentional/deliberate delay on the part of the Respondent in releasing the amount of the tariff for which the Petitioner was entitled. The Respondent have been making the payment of all dues well in time in accordance with the provisions of PPA, thus no interest on delayed payment is admissible.

It is further submitted that Petitioner has claimed the interest on delayed payments largely on the following accounts viz. (a) Completed cost (b) HSD density at

ambient temperature, (c) HSD transportation/ handling losses (d) pass through amounts, (e) water charges etc. The comments of the Respondent in respect of each of the items are as follows :

a. **Completed Cost** : The completed cost of the project has not yet been finalized hence the question of claiming delayed interest on this account is unlawful and, therefore, denied.

b) **HSD density at ambient temperature** : Upon the advice of the CEA and directives of MHA a new provision for conversion of HSD density from weight to volume was incorporated in the PPA considering the density at ambient temperature by issuing an addendum-2 to PPA on 18.08.2011. It is respectfully submitted that the Respondent had settled all the arrears on this account from April, 2007 onwards immediately after the receipt of the supplementary invoice, hence any claim in respect of interest on delayed payment on this account is unlawful, unjustified and therefore denied.

c) **HSD handling/transportation losses** : As this claim is not in accordance with the provisions of PPA hence the delayed interest claim on this account is erroneous, unlawful and therefore denied.

d) **Interest on debt servicing & working capital** : It is respectfully submitted that as per the provisions of the PPA the interest on debt services and working capital had to be paid on the actual liability incurred by the Petitioner on this account. However Petitioner since the submission of their first monthly invoice till date had unilaterally claimed the interest on this account as per the rates prescribed in the model calculation, which is only illustrative. It is further submitted that the Petitioner has submitted his claim with actual interest rate only on 25.02.2013, thus any claim of delayed interest on pass through amount is not tenable, since the Petitioner had never made the claims in their regular monthly invoice on the actual interest rate and had tried to take the advantage of more than actual liability by claiming the interest rate as per model calculation. Thus such an erroneous, unlawful claim of the Petitioner is not sustainable in the eyes of law and therefore cannot be allowed.

5.3 **INTEREST ON WORKING CAPITAL:**

5.3.1 Petitioner has submitted that interest on working capital shall be calculated and paid to the Petitioner, on the basis of the PPA, irrespective of any interim arrangement as regards fuel procurement made by the Respondents with the IOCL. The Petitioner is entitled to the said interest as per the bank rates prevailing in the State Bank of India, who is the prime lender of the Petitioner. This would also be as per the terms, of the PPA.

5.3.2 The Respondent submits that the Petitioner has inflated the claim regarding interest on working capital by not calculating the working capital estimate as per the factual position. The working capital estimate of the Petitioner includes the cost of HSD, average stock of HSD & Lub oil, despite the fact the HSD and Lub oil are being supplied by the Respondent since August'2008 & Dec'2009 respectively. The inclusion of HSD & Lub oil cost after Aug'2008 has also inflated the receivable component of working capital heavily. The receivable component has got further inflated due to repeated inclusion of claims like water charges, Octroi, HSD transportation & handling losses, income tax etc. in their invoices. Further the claims such as Octroi, HSD transportation & handling losses are not admissible as per the provisions of PPA. The Respondent has thus reworked the working capital estimate as per factual position by disallowing the inadmissible amount and has calculated the interest on working, capital as per the bank documents submitted by the Petitioner vide their letter dated 01.04.2013 . It may be emphasized that the Petitioner by way of claiming the interest on working capital @18% since the inception of the plant has drawn more receivables from the Respondent in an unlawful manner by intentionally not submitting the documents showing actual interest paid to the bank on working capital along with their monthly invoices. The actual interest rates paid on working capital as per the documents submitted by the Petitioner varies from 12.75% to 17%.

5.4 **COMPENSATING THE LOSSES OF HSD OIL DUE TO EVAPORATION/HANDLING/TEMPERATURE VARIATION**

5.4.1 The Petitioner has submitted that as per the PPA entered with the Respondents and the Fuel supply agreement with Indian Oil Corporation Limited (IOCL), the Petitioner has to purchase High Speed Diesel (HSD), which is the fuel required for power generation, from IOCL. IOCL supplies HSD to the Petitioner, through road tankers of 12KL/20KL capacity from its terminal which is around 50 km away from the plant.. Petitioner had claimed that it is incurring immense loss every month as considerable amount of HSD oil is being lost due to long transportation/ evaporation/handling/ temperature variation from a far of distance.

The Petitioner had requested the Respondents to consider the above aspect, on numerous occasions, but to no avail. In its support the Petitioner cites the notification of the Government of Andaman and Nicobar bearing G.O. No. 121/91 dated 27.12.1991 which prescribes that a loss of 0.25% on the annual average sale of HSD shall be allowed when the HSD is transported between 0 to 600 Kilometers.

It is further submitted that despite the said GO, the Respondents have been continuing to refuse to consider the losses incurred by the Petitioner. Till July 2008, HSD was being

procured as per the PPA and the Fuel Supply agreement with effect from August 2008, the Respondent made an ad-hoc arrangement of purchasing the fuel from IOCL and the same is continuing till date.

5.4.2 The Respondent submits that it is obliged to make/release only that payment for which an obligation is cast upon the Respondent to release/pay under the relevant provisions of the PPA. All those payments which were admissible in the light of the provisions of PPA have been released by the respondent. There is no provision, whatsoever, in the PPA regarding payment of HSD Evaporation/Handling/Temperature variation losses. Any claim on account this is therefore not sustainable in the eyes of law and thus can't be allowed. The CEA vide their letter date 22.01.2013 has also conveyed that there is no provision in the PPA to allow such additional cushion for compensation against the evaporation/ handling/ temperature Variation etc.,

5.5 REIMBURSEMENT OF FEES PAYABLE TO PORT MANAGEMENT BOARD FOR UTILIZING COOLING WATER JETTY OF POWER STATION

As per the PPA at Article I under Clause (xxxxvii) "O&M Expenses" means any expenditure incurred in operation & maintenance of the generating station including manpower, spares, consumables [including water] insurance & overheads.

The Petitioner's power project has a jetty built on the sea-bed, which is used for drawing of sea-water for the purposes of cooling the engines. The construction of the jetty for the purposes of cooling the engine has been agreed upon by the parties to the PPA, vide communication dated 15.03.2001.

The sea bed where the jetty is constructed belongs to the Port Management Board (PMB) and PMB charges a monthly fees amounting to Rs.8,438/-. The Petitioner is incurring this cost every month and wants to be reimbursed by the Respondents.

Further, in addition to the PMB fees, every month at an average of Rs.3,350/- is being paid by the Petitioner to the Andaman Public Works Department towards water charges. This works out to a yearly amount of Rs. 39,600/-. Moreover, occasionally during summer when there is severe water scarcity, the Petitioner has had to arrange for water through tankers or third party private vendors. The Petitioner is claiming this amount be reimbursed as well as 'O&M' expenses.

5.6 OCTROI CHARGES FOR RELEASE OF CONSIGNMENT

The Petitioner has to transport all the spares required to operate the Power generating station from various places of mainland India. While transporting the same into Port Blair, the Municipal Council of Port Blair levies Octroi Charges on the Petitioner. This practice has begun from mid of 2009. It is pertinent to mention here that as the power station is located outside the Municipal Council limits, the Petitioner is exempt from

paying Octroi Charges, still the Municipal Council has been levying Octroi on the Petitioner. It is respectfully submitted that the Petitioner has paid, till date an amount of Rs. 4,51,555/- to Municipal Council, Port Blair as Octroi for the transportation of the normal consumable spares as well as spares for DG3 48000 hrs maintenance.

5.7 HSD-AMBIENT TEMPERATURE

5.7.1 The Petitioner had requested the Respondents in 2007 to allow the Petitioner to change the variable cost of HSD oil calculations from the month of May 2007 to the basis of density being measured at the ambient temperature and accepting the same. The Respondents began paying for the density on the ambient temperature with effect from April 2007. However, the Respondents refused to pay for the period between April 2003 and April 2007 on the ground that as the Petitioner had not raised the invoice before April 2007 therefore the Petitioner is not entitled to claim for the said period. For considering the claim of Petitioner for calculation of tariff on HSD density at ambient temperature, the exact temperature in respect of delivery of each consignment is necessarily required. The Petitioner has not been able to furnish invoices issued by IOCL reflecting thereon exact temperature at the time of delivery of the consignment, without which the claim cannot be examined/considered

5.7.2 The CEA in its letter dated 29th September 2008 has advised A&N Administration for taking density of HSD oil at ambient temperature for computing its volume since April 2003 i.e. Commissioning of the Plant and making payment accordingly

5.8 RENOVATION & MODERNISATION PROGRAMMES

5.8.1 As per the Petitioner, the plant require refurbishment restoring the components of the power generating station to its former good condition to bring the power station equipment to its near to original condition so as to achieve an increase in their life.

5.8.2 The 20 MW diesel based power plant is in operation since 2nd April 2003. As the power plant is very close to the sea, the salinity around the plant is very high. Further the secondary cooling systems for the engine, utilizes sea water. This has led to increased rusting of the steel structures despite frequent painting with anti-corrosive paints.

5.8.3 The Petitioner has already written a letter dated 29.11.2012 to the Respondents in this regard. However there has been no response to this letter by the Respondents.

5.9 DAMAGES FOR LOSS OF OPPORTUNITY

The Petitioner has stated to be facing financial difficulties. As per the Petitioner, Respondents did not pay the Petitioner, amounts as required under the PPA and as agreed upon between the parties, the Petitioner had to take enormous loans to pay towards keeping the power project functional. As on date, the Petitioner is incurring a loss of almost 50 paise for every unit of electricity generated.

Had the Respondents honoured their obligations under the PPA, the Petitioner would have earned sufficient profits to declare reasonable dividends to its shareholders. As such the Petitioner is entitled to be paid by the Respondent by the amount of Rs. 20 Crs as damages for the loss of the business opportunity.

6.0 Incentive for generation above normative PLF

The Petitioner has claimed incentive on equity, quoting the following provisions of PPA:

Quote

“Incentive payment for any billing period shall be calculated at 0.65% equity for every 1% increase in PLF over the normative PLF of 68.49%”

Unquote.

However, as per A&NI (the Respondent) the provision of PPA is to be read with clause (8) of Article-16, which provides that :

Quote

“The Company has taken no deviation from the Govt. of India tariff notification and in any case any deviations are noted at subsequent dates then the provisions of Government tariff notification shall prevail”

Unquote.

Accordingly, as per A&N, the Petitioner is required to adhere to this provision of the PPA. As per the Govt. of India tariff notification, dated 30.03.1992 & subsequent amendment dated 26.02.1997, attached to PPA as Schedule-1(d), the additional incentive of return on equity shall be 0.7 percent for each percentage increase above the normative level of 6000 hours/kw/year. For ready reference relevant para of the notification dated 30.03.1992 is reproduced as follows :

Quote “The additional incentive of return on equity of 0.7% for each percentage increase above the normative level of 6000 hrs/kw/year, mentioned above shall be maximum ceiling. It shall be open to the Generating companies and Boards or other power purchasers to negotiate and fix a suitable lower additional incentive, within the above ceiling” **Unquote.**

7.0 ISSUE OF LIQUIDATED DAMAGES FOR DELAYED COD

7.1 Andaman & Nicobar Island administration vide letter dated 20.11.97 had accorded sanctions to the proposal to M/s Suryachakra Power Corp. Ltd. (SPCL – Petitioner) at an estimated completed cost of US \$ 10.53 million plus Rupees 25.232 crore totaling to Rs. 63.14 crore. Regarding commissioning schedule, it was stipulated in the sanctions letter that the project shall be completed in a period of 24 months from the date of clearance from CNE (Committee for Non-Plan Expenditure) with unit 1&2 to

be commissioned in 19 months, unit 3 in 21 months and the last unit no. 4 within 24 months from the date of clearance of CNE.

CNE vide their dated 25th September, 1998 had informed their approval of the project with a recommendation that it the Ministry of Finance to provide Rs. 391.63 crores in the non-plan budget of the Territory spread over a period of 15 years during the meeting held on 4th September, 1998 on this subject.

In the PPA (Power Purchase Agreement) signed for the project between Andaman & Nicobar Island Administration and M/s SPCL, the project milestone schedule (Appendix- C, Page No. 80 of PPA) envisaged as follows :

S. No.	Milestone	Date
1.	Financial closing	Four months from the date of fulfillment of conditions precedent as mentioned in Article 1 Clause (Lxi) 3 at Page 17 PPA.
2.	Effective Date	Same as financial closing date.
3.	Commercial Operation date of the first and second units.	19 th month after the financial closing.
4.	Commercial Operation Date of the third units.	24 th month after the financial closing.
5.	Commercial operation date of the fourth units.	24 th month after the financial closing.
6.	Commercial Operation Date	24 th month after the financial closing of the project.

As per above, the COD works out as under:

First two units – 1.3.2002 (577 days)

Rest two units - 1.8.2002 (730 days)

The financial closure was achieved on 01.08.2000 (Zero date / Effective date)

As against the said milestones all the four DG Sets of 5 MW each achieved Commercial Operation in April 2003.

7.2 Chronological Events/Reasons for delay and force Majeure as submitted by M/s SPCL (Annex I of CEA,s letter dated 3.11.20100

1. Evacuation facilities were supposed to be ready by 1st November 2011 i.e. 120 days prior to the scheduled commercial operation date i.e. 1st March 2002 as per article 3.3 (c) (v) of PPA. However the evacuation facilities were not ready on the scheduled date .

2. A&N vide letter dated 7.12.2001 has informed that Supreme Court prohibited cutting of tree vide its order dated 11th October 2001 and covers under force majeure.
3. Refer point 1 above, the evacuation facilities should be ready by 1st November 2001 but Supreme Court order were issued on 11th October, 2011. No major work was carried up to the court order date and it is not possible to complete the evacuation facilities within 20 days. We have not received any further intimation when the prohibition was lifted by Supreme Court and when the evacuation facilities were ready.
4. Since the delay in evacuation facilities were not a force majeure event , we requested for payment of fixed charge, but A&N has not paid.
5. A&N supposed to open letter of credit as security 60 days before COD, which they have not opened .
6. SPCL, requested several times for Operating procedures / manual for inter connection facilities and A&N has not provided.
7. A&N informed on 20th May 2002, that existing transmission line strengthened to receive 6 MW To 7 MW of power.
8. SPCL informed A&N that the existing 53 km. line is not reliable and requested for new 33 kv. transmission line as per the provisions of PPA.
9. EPC Contractor (BSES limited) informed on 3rd June 2002, that the plant is ready for synchronization and commencement of operation and ready for synchronization and commencement of operations and ready to complete the acceptance test (72 hours per DG Set) by 20th June 2002, provided the arrangement for synchronizing of machines is made available. We requested A&N vide our letter dated 3rd June 2002 enclosing copy of BSES Limited Letter.
10. All the 4 DG Sets were run with auxiliary equipment loaded up to 2.5 MW to 3 MW in June 2002 . At this stage on 8th June 2002, the German Embassy send a message to German technicians working on commissioning of project , to leave India because of war like situation between India and Pakistan. Hence Germans left the country and DG sets were shutdown. This is a force majeure as per PPA.
11. The German Technicians came in October 2002 and notice pitting & rusting in lube oil piping and need repickling & passivation.
12. SPCL on several occasions requested A&N to organize engineer form CEA for witnessing during conducting of Acceptance Test. Dates were fixed several times and rescheduled due to non availability/ arrival in time of CEA engineer for supervising the Tests.
13. Finally Acceptance test for individual DG sets were conducted from 8th January 2003 to 4th February 2003 and for all the sets for 72 hours on 18th February 2003.

14. Thereafter also A&N took a very long time in declaring COD in spite of directive from CEA and finally declared provisional COD on 1st April 2003.

From the chronological events as detailed above it is evident that the delay in commissioning of the plant in the stipulated time period was not from the IPP side but entirely from A&N side in not complying the conditions of the PPA by them. Moreover, there was no Force Majeure from the A&N side as claimed by them. As such IPP will not accept the imposition of liquidated damages levied on it.

Further it is also pertinent to mention here that the A&N has failed in providing reliable construction power for the IPP continuously during the construction activity and delay in opening of Letter of Credit in time as per provisions of PPA resulting in delay in commissioning of the plant.

7.3 Extracts of A&N Administration letter dated 1.4.2011 addressed to CEA forwarding their comments on delayed gestation period ;

“ADMISSIBLE GESTATION PERIOD

a) First Two Units – The milestone schedule as per PPA the first two set COD should be in 19 months from financial closure date. Since the financial closure date is 01.08.2000, the COD should be on 01.03.2002. As per this a total of 577 days gestation period admissible as per PPA. The 53 km transmission (Tiger) line was completed and ready by 01.05.2002. But the supervisor of MAK CAT, Germany (Engine manufacturer) was withdrawn due to war like situation at Indo-Pak border during first week of June, 2002. Further, the Hon'ble Supreme Court ordered ban for felling of naturally grown trees resulting in change of original alignment of Panther Transmission line & was modified to be re-done. The COD was therefore modified vide MOM dt. 05.06.2002 for first two set to 31.08.2002. Due to which this period of 184 days from 01.03. 2002 to 31.08.2002 stands admissible. However, M/s SPCL could not get back their Supervisor, MAK CAT by 31.08.2002, and could reach Port Blair by October, 2002, though the war like situation was there for only about a fortnight. The A&N Admn. completed the double circuit Panther transmission line on 10.12.2002 and M/s SPCL was ready with their first two unit only on 13.12.2002. The extended gestation period from 31.08.2002 to 13.12.2002 for 104 days is therefore not admissible. The period from 13.12.2002 to 08.01.2003 for 26 days taken by independent engineer (CEA) to reach Port Blair was not under the control of either party and hence should cause no effect on IDC or LD. The testing started w.e.f. 08.01.2003 and completed in all respect on 18.02.2003 and this 42 days also not considered to be admissible as these testing are essential and must be completed before COD.

Further, M/s SPCL w.e.f. 18.02.2003 was ready for COD and CEA also recommended for COD w.e.f. 18.02.2003 but the COD could be declared only on 01.04.2003 for 42 days gestation period also stands admissible in favour of M/s SPCL.

Hence, a total no. of 226 days extended gestation period for first two set could be considered due to various factors but 146 days extension cannot be considered for first two units and M/s SPCL will have to pay L.D. for this delay for first two units as per PPA.

(b) Rest Two Units : As per milestone schedule the rest two units COD should be in 24 months from financial closure date of 01.08.2000. Accordingly, the rest two units, the COD should have been on 01.08.2002 and therefore a total of 730 days gestation period is admissible as per PPA,

During first week of June, 2002 due to the war like situation referred above, supervisor of MAK, CAT, Germany (Engine manufacturer) were called back. Further, the Hon'ble Supreme Court ordered ban on cutting the naturally grown trees resulting in modification of original alignment of double circuit Panther transmission line. Due to the above facts alongwith many; other issues, a meeting was taken by the CS, A&N Admn. and vide MOM dt. 05.06.2002 the COD of rest two units were rescheduled to 15.10.2002. Hence this extension from 01.08.2002 to 15.10.2002 for 76 days become admissible. Since the Double circuit panther transmission line could be completed only on 10.12.2002, this period from 15.10.2002 to 10.12.2002 for 56 days also to be considered as eligible extension of gestation period. Since, M/s SPCL could place their rest two units for testing and complete all testing on 18.02.2003, this period for 10.12.2002 to 18.02.2003 for 71 days cannot be considered.

Further, M/s SPCL w.e.f. 18.02.2003 was ready for COD and CEA also recommended for COD w.e.f. 18.02.2003 but the COD could be declared only on 01.04.2003 by A&N Admn. This period from 18.02.2002 to 01.04.2003 for 42 days gestation period also stands admissible in favour of M/s SPCL.

Hence, a total no of 174 days extended gestation period for rest two units could be considered but 71 days cannot be considered for rest two units and M/s SPCL need to pay LD for these 71 days for rest two units as per PPA.”

7.4 Extracts of TANGEDCO report dated 11.11.2011

The Electricity Department of Government of Andaman & Nicobar Islands had requested the services of the Tamil Nadu Generation and Distribution Corporation Ltd. (formerly Tamil Nadu Electricity Board) in the matter of examining the Power Purchase Agreement entered into by Andaman & Nicobar Islands administration with M/s Suryachakra Power Corporation Ltd. for the 4 x 5 MW Diesel Generating Plant established by them at Bamboo Flat Island on a build own and operate basis.

The scope of work besides others included **“comments on the extended Gestation period including the delay caused by both parties as recorded in the Administration letter dt. 01.04.2011”**.

The observations of TANGEDCO on the Justification for Extended Gestation Period due to delay in establishing power evacuation facilities and LC opening are given hereunder:

“Clause 3.3.0 (i), (ii) and (v) of Power Purchase Agreement, stipulates that the administration is obliged to cause the transmission facilities by laying and rerouting new transmission lines etc., for drawing and receiving electricity produced by Independent Power Producer 120 days before COD of the first engine / power station, i.e. 19 months from the financial closure date of 01.08.2000 for Unit I & II and 24 months for Unit III & IV. But the COD was extended till 31.08.2002 mutually for Unit I and II and till 15.10.02 for Unit III and IV as per MOM dt. 05.06.20002. Accordingly, the Andaman Administration should have completed and offered a new transmission line by 01.04.2002 as per MOM dt. 05.06.2002 which was not done by the Administration. Without readiness of the transmission facilities, matching parameters set forth in Appendix E of Power Purchase Agreement, it is not appropriate to expect the Independent Power Producer to commence operation of the units. As seen from the records, the double circuit panther transmission line was ready only by 10.12.2002 and Independent Power

Producer was ready to commence the required tests on the engines by the above date. However, the Independent Engineer who was to witness these tests as per Power Purchase Agreement clauses could not arrive by that date i.e., 13.12.2002, the date fixed for commencing the Performance Tests on the engines jointly by both Independent Power Producer and A & N Administration as seen from the record of the discussions held on 09.12.2002 by the above both the parties. However the Independent Engineer from CEA arrived to site only on 07.01.2003 and completed by 18.01.2003. As such these period / days i.e. from 01.09.2002 to 08.01.2003 totalling to about 180 days cannot be accounted to Independent Power Producer. The Independent Engineer who had arrived to witness the above test has arrived only 27.01.2003 and the tests on the rest of two engines was started on 28.01.2003 and completed by 04.02.2003. Thus there was a gap of 11 days for conducting the tests on the rest of two engines, the fault of which does not lie upon the Independent Power Producer and as such the period of the delay of 11 days is also not attributable to Independent Power Producer.

Further as per Power Purchase Agreement, LC has to be opened by A&N Administration one month before the COD i.e. before 01.04.2003 whereas LC was initially opened only on 01.04.2003, the delay of which is also attributable to Administration.

To sum up as per MOM dt. 05.06.2002, COD should have been achieved by 31.08.2002 for Unit I and II and by 15.10.2002 for III and IV. But this was not achieved due to non-completion of power evacuation facilities and LC opening. The consultant has taken all these aspects into consideration for arriving at the days recommended for admission / not recommended for admission for Unit I to IV as in Annexure II of this report.

We therefore suggest no change and offer no comments in addition to what Andaman has finalized on dated 01.04.2011.”

However TANGEDCO had further opined at para 4.0 that :

“The administration achieved compliance of the provisions of the Power Purchase Agreement (PPA) under clause 3.3(c) (i), (ii) and (v) (age No. 23) and clause 8.3 (Page No. 41) only on 10.12.2002 & 01.04.2003 respectively. Hence achieving of COD by M/s SPCL on 02.04.2003 was well before the provision of 120 days and 30 days schedule given in above clause of Power Purchase Agreement (PPA). Thus imposition of liquidated damages as per clause 3.10 (Page No. 28) of Power Purchase Agreement (PPA) on M/s SPCL for delay in achieving COD is not justifiable. “

From the above, it is seen that the above recommendation of TANGEDCO is at variance with the statement made earlier viz., “We therefore suggest no change and offer no comments in addition to what Andaman has finalized on dated 01.04.2011.”

8.0 Petition for winding up the Company SPCL:

The petitioner submitted that as the respondent was not paying the full amount of invoice claim, there is a financial crisis and the petitioner is facing bankruptcy.

The Commission noted in the petition submitted by SPCL that one of the unsecured creditors of SPCL namely SBI Global Factors Ltd. has filed a petition for winding up of SPCL before the High Court of Andhra Pradesh. The case came for hearing in the A. P. High Court on 5.3.2012

and the petition was admitted. It was stated by the petitioner that the said petition is pending.

Recommendations of the expert appointed by the Commission:

Shri H.L. Bajaj, the expert appointed by the Commission submitted his report on 10.06.2013 to the Commission. He has examined, analyzed and interpreted the various issues as listed in the Terms of Reference given to him by the Commission in his appointment letter. The expert was provided with relevant documents on this issue. Besides, the expert heard both the petitioner and the respondent on May, 31, 2013 and June 1st, 2013 in order to give a fair chance to the parties to highlight their respective concerns. The parties were directed by the Expert to file their written submissions after the meeting and also to exchange the same between themselves with a copy to the Commission.

While making his recommendation, the Expert has largely guided by the Power Purchase Agreement, amendment to PPA, agreements reached post PPA as reflected in the Minutes of the Meeting (MOM) held between the parties, letters from CEA, reports of both the consultants appointed by A&N Administration namely TANGEDCO and KPCL. The Expert has also stated in his recommendation that since, A&N Administration does not have full fledged establishment like the State Governments which are equipped with exclusive departments dealing with the subject of power, due cognizance has been given by the expert to the views of the CEA as also to the reports of TANGEDCO and KPCL being State Governments bodies having considerable expertise with them.

The summary of the recommendations of the Expert on each of the issues identified in the Terms of Reference is given below:

ISSUE 1 CAPITAL COST OF THE PROJECT INCLUDING FOREIGN EXCHANGE RATE VARIATION:

Recommendation:

The increase in the US Dollar rate of Rs.11.0445 per USD is recommended to be considered as the foreign exchange variation and applied to the actual foreign currency loan drawal of 7.96 million USD. The increase in cost due to foreign exchange variation on the loan availed works out to Rs.8.79 crores (approx.) as against the increase allowed by CEA of Rs. 11.63 crores. However, it has to be ensured that the inward Foreign Currency remittances were actually made through Banking channels and documentary evidence produced thereafter.

In view of the analyses of the Expert and the fact that the issue has been examined in depth with documentary evidence by TANGEDCO-a State Government entity, it is

recommended that Citibank loan to the extent of Rs.2.8915 Crs. (Rs.3.865Crores allowed by TANGEDCO MINUS Rs.57.20 lakhs towards extra expenditure on construction of Jetty and Rs.39.85 lakhs towards the cost of Centrifugal separator not approved by the 5 member committee of A&N) and unsecured loan of Rs. 0.65 Crs. may be considered as funds tied-up along with Rs.77.595 crores already considered by CEA. However, total project cost will be limited to Rs. 80.38 Crs as decided by CEA.

ISSUE 2 RELATING TO LIQUIDATED DAMAGES ...Recoverability ,if any, from the Petitioner by the Respondent

Recommendation:

TANGEDCO has concluded that ' Thus imposition of liquidated damages as per clause 3.10 (Page No. 28) of Power Purchase Agreement (PPA) on M/s SPCL for delay in achieving COD is not justifiable.' As SPCL achieved the COD on 2.4.2003, which is within the period of 120 days of availability of new transmission lines and within 30 days of opening of LOC, one tends to agree with the recommendation of the consultant appointed by the Administration. Agreeing with the recommendations of TANGEDCO, recommended that the imposition of Liquidated Damages is not justified.

ISSUE 3 Foreign Exchange Variation

This issue has been covered under Issue 1 itself.

ISSUE 4 ALL TARIFF PARAMETERS WHICH FLOW FROM THE CAPITAL COST OF THE PROJECT

4.1 Tariff for Diesel generators has the following components:

Fixed Cost and Variable cost

Fixed cost comprises of: Return on Equity, Interest on Loan, Depreciation, Interest on Working Capital, O&M expenditure and Incentive.

Variable Charges include cost of Fuel and adjustment on account of variation in price or heat value of fuels.

All the aforementioned parameters are well defined in the PPA ,once the project Capital Cost is finalized, the Tariff parameters will be based on the provisions of the PPA.

Issue of Incentive is another issue raised by the Petitioner which is discussed below:

4.2 INCENTIVE

From a conjoint reading of the aforesaid clause of the PPA and the Government notification which inter alia states that '*the additional incentive payable shall not exceed 0.7 per cent of paid up and subscribed capital*' it is clear that the incentive of 0.65% is applicable on equity as defined and not on the 'return on equity' as pleaded by the respondent.

ISSUE 5 INTEREST RATE FOR DEBT SERVICING AND INTEREST RATE ON WORKING CAPITAL

5.1 INTEREST ON DEBT

As per provision of the PPA (Appendix D), Interest on Debt is defined as:

Quote

“Interest on Debt “shall mean the interest, bank commissions actually payable on Debt borne by the Company, arising after the Commercial Operation Date of each unit in commercial operation after taking into account the actual repayment liability with respect to Debt, under the terms thereof and includes the actual Rupee equivalent of such liability on Foreign Debt, at the then Current Foreign Exchange Rate applicable thereto, and shall cease as soon as Debt is fully paid.

Unquote

Thus it is clear beyond doubt from a plain reading of the above provision of the PPA that the interest on Debt is reimbursable in the monthly tariff billing, on the basis of actual interest amount paid by the Petitioner. It is seen from the Petitioner’s submission that the loan agreements with the lenders provide for floating rate of interest. Along with each monthly invoice, the Petitioner is required to provide necessary documentary evidence in support of its claim to the Administration, from the respective lenders, for the: prevailing rate of interest ,repayment of loan ,interest amount due on the reduced balance of loan after repayment and the interest amount actually paid by the Petitioner.

5.2 INTEREST ON WORKING CAPITAL

Appendix D to the PPA provides that;” Working Capital may be referred to as Clause 3.0 of CEA norms dated 14.12.1995”. As per the estimate of cost of generation given in Annexure IV to PPA, Working Capital consists of:

1. Thirty days Primary Fuel cost.
2. Sixty days Lube Oil cost;
3. O&M for one month;
4. Maintenance Spares at actual but not exceeding one year’s requirement less value of 1/5th of initial spares already capitalised and;
5. Receivables equivalent to two months average sale of electricity.

It is seen from the Written Submissions of both the parties that the Administration had started supplying HSD and Lube oil at the request of the Petitioner from July 2008 and January 2009 onwards respectively. Since the respondent is providing HSD and Lube Oil, while calculating the Working Capital requirements, these elements are not to be included.

As per the documents and Written Submissions provided by the Petitioner, SPCL has taken a WC loan from SBI on floating interest rate basis. The interest on WC is payable on actual basis on furnishing documentary proof of payment to the Bank.

ISSUE 6 OPERATIONAL PARAMETERS AS PER PPA/ADDENDUM TO PPA/CEA DECISION WHICH FORMS PART OF TARIFF

Recommendations:

HEAT RATE: Heat Rate beyond 2010 kcal/ kWh is presently not recommended. However, in future the aforementioned suggestion of the CEA regarding the major overhauling and subsequent determination of Heat Rate and its consideration by the Regulatory Commission may be pursued.

LUBE OIL CONSUMPTION : No change in the specific lube oil consumption is recommended as of now as norms are decided over the life of the plant. While initially the lube oil consumption may be less than the normative value, over the years it may exceed the norm value but as norms are decided based on the average over the life of the plant, on the whole it would average out.

DENSITY OF HIGH SPEED DIESEL :The principle of ambient temperature related to density for determination of quantum of fuel has been agreed. The same has also been applied since April, 2007. In case of reliable verifiable authentic data giving from ambient temperature at the time and dates of respective despatches from April, 2003 to April 2007 may be made available by the Petitioner to the satisfaction of the Administration, there seems no reason why correction should not be applied retrospectively. Recommended accordingly.

ISSUE 7 PAYMENT/RECOVERY OF AMOUNTS DUE , BUT NOT PAID,WITHHELD,DENIED,IF ANY FROM THE DATE THEY BECAME DUE

7.1 The Capital Cost now recommended and other recommendations, if approved, will become the basis for tariff determination w.e.f. the COD. The amount thus worked out month wise will be the Tariff due as per PPA. Actual payments made when compared with the benchmark month wise due tariff will determine the amount of Arrears/Recoveries.

7.2 The payment of arrears to the Petitioner will be made along with the interest on delayed payments as per terms of the PPA. Similarly, recoveries from the Petitioner by the Administration will also be made along with interest as per terms of the PPA.

ISSUE 8 ADMISSIBILITY OF INTEREST ON DELAYED PAYMENTS

This has been covered under Issue 7 above.

ISSUE 9 ANY OTHER ISSUE CONNECTED WITH FINALIZATION OF PROJECT COST AND DETERMINATION OF TARIFF PAYABLE TO THE PETITIONER

9.1 REFURBISHMENT OF THE PLANT

Recommendation:

It is recommended that the plant having completed 10 years of operation, it is the right time for renovation of the plant after carrying out R&M study and Cost benefit analysis and proposal submitted to the Hon'ble Commission for taking prior in principle approval before proceeding with the actual works. For this purpose the Petitioner should make a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension, financial package, phasing of expenditure, schedule of completion, estimated completion cost and any other information considered to be relevant and file a petition before the Hon'ble Commission.

9.2 JETTY and Plant Drainage, Boundary Wall

Recommendation:

It has been seen that the PPA scope of work includes construction of Jetty, land development, plot drainage etc. In view of this it is recommended that no additional payment is admissible to the Petitioner on account of construction of Jetty, drainage, boundary wall.

9.3 O&M Expenditure

Recommendation:

As per provisions of the PPA ,it is evident that the following charges being claimed as extra by the Petitioner are not admissible

Water Charges,

Octroi Charges: (Administration may, however provide support to the Petitioner for exemption of Octroi charges as the plant is outside the bounds of Municipal Committee.)

Port management Board

Increase in O&M expenses other than the escalation provided in the PPA.

9.4 REBATE

Recommendation:

In view of the fact that the Capital cost was not finalised, both parties have been working with various figures of the Capital Cost, as also other tariff related parameters, therefore, the Invoices raised were being paid by the Administration on the basis of DUE PAYMENT as decided by the Administration. It is recommended that the REBATE may be applicable retrospectively since COD, on *all Tariff Invoice amounts released* within the PPA stipulated time for availing the Rebate.

9.5 ISSUE REGARDING THE PETITIONER'S CLAIM OF LOSS OF OPPORTUNITY

As there is no provision regarding LOSS OF OPPORTUNITY CLAIM, this claim of the petitioner may not be acceded to.

9.6 HSD Handling /Transportation Losses

As there is no provision in the PPA regarding payment of HSD evaporation losses as also viewed by CEA vide letter dated January 22,2013 that there is no provision in the PPA to

allow compensation for evaporation losses, it is recommended that no compensation on account of HSD Handling/Transportation losses is payable.

The Commission scheduled for a hearing on 14/06/13 after the receipt of the Expert Report on this issue. The copies of the Expert Report were handed over to both the parties on 14/06/13 free of cost and the Commission directed both the parties to give their written submissions by 24 th June,13.

QUOTE: (HEARING ON 14/06/13)

Commission has received report dated 10.06.2013 from Shri H.L. Bajaj an expert appointed by the Commission vide order dated 17.04.2013. Counsel for the respondents submitted that as per Regulation 21 (iv) of JERC (Conduct of Business) Regulations, 2009 the parties are entitled for supply of copies of the report of the expert. He further submitted that they are also entitled to file version either in support or in opposition to the report. The Commission directed that copies of the report of the expert dated 10.06.2013 be supplied free of cost to the parties today positively.

Counsel for the parties submitted that they want to file their version either in support or in opposition to the report and prayed for 15 days time for filing the same. The Commission considered request of counsel for the parties and directed the parties to file their version either in support or in opposition to the report on or before 24.06.2013 with advance copies to the opposite parties.

The petitioner - M/S Suryachakra Power Corporation Ltd. has submitted additional affidavit dated 13.06.2013 with a prayer that there is an urgent need to stop the respondents from deducting amount from monthly invoice raised by the petitioner in contravention with terms of the PPA and repay the amount of Rs. 58,38,345/- deducted from invoice of the petitioner for the month of May, 2013 with interest as per the provisions of the PPA.

Copy of the additional affidavit supplied to the respondents. Counsel for the respondents prayed for 15 days time for filing reply to the additional affidavit of the petitioner. The Commission considered the request of learned Counsel for the respondents, acceded the same and directed the respondents to file reply to the additional affidavit of the petitioner on or before 24.06.2013 with advance copy to the petitioner.

Scheduled for hearing on 26.06.2013 at 3:00 PM.”

UNQUOTE

The Petitioner as well as the Respondent filed their written submissions on 24/06/13.

During the hearing on 26th June,13, **the counsel for the petitioner informed** the Commission that some of the recommendations of the Expert given in Part III of his report dated 10/06/13 are acceptable to the petitioner as under:

-- Issue # 4 (ALL TARIFF PARAMETERS WHICH FLOW FROM THE CAPITAL COST OF THE PROJECT & INCENTIVE)
--Issue # 5 (INTERST RATE FOR DEBT SERVICING AND INTEREST RATE ON WORKING CAPITAL),
--Issue # 6(OPERATIONAL PARAMETERS AS PER PPA/ADDENDUM TO PPA/CEA DECISION WHICH FORMS PART OF TARIFF_) excluding Density of HSD,
-- Issue# 7(PAYMENT/RECOVERY OF AMOUNTS DUE, BUT NOT PAID,WITHHELD, DENIED,IF ANY FROM THE DATE THEY BECAME DUE),
--Issue # 8 (ADMISSIBILITY OF INTEREST ON DELAYED PAYMENTS) and
Issue # 9 excluding the recommendation on “Rebate”:
(ANY OTHER ISSUE CONNECTED WITH FINALIZATION OF PROJECT COST AND DETERMINATION OF TARIFF PAYABLE TO THE PETITIONER, namely, REFURBISHMENT OF THE PLANT, JETTY and Plant Drainage, Boundary Wall, O&M Expenditure, ISSUE REGARDING THE PETITIONER’S CLAIM OF LOSS OF OPPORTUNITY, HSD Handling /Transportation Losses).

However, the petitioner raised certain objections & observations on the rest of the recommendations given by the Expert.

The counsel of the respondent informed the Commission that the respondent is in agreement with some of the recommendations of the Expert summarized under Part III of his report as under:

-- Issue # 4(ALL TARIFF PARAMETERS WHICH FLOW FROM THE CAPITAL COST OF THE PROJECT & INCENTIVE)
--Issue # 5 (INTERST RATE FOR DEBT SERVICING AND INTEREST RATE ON WORKING CAPITAL),
--Issue # 6(OPERATIONAL PARAMETERS AS PER PPA/ADDENDUM TO PPA/CEA DECISION WHICH FORMS PART OF TARIFF) excluding Density of HSD,
Issue # 9:
(ANY OTHER ISSUE CONNECTED WITH FINALIZATION OF PROJECT COST AND DETERMINATION OF TARIFF PAYABLE TO THE PETITIONER, namely, REFURBISHMENT OF THE PLANT, JETTY and Plant Drainage, Boundary Wall, O&M Expenditure, Rebate, ISSUE REGARDING THE PETITIONER’S CLAIM OF LOSS OF OPPORTUNITY, HSD Handling /Transportation Losses)

The balance issues for which the petitioner and respondent expressed their concerns, observations and objections are dealt below issue wise:

Issue # 1&3 capital cost of the project including foreign exchange rate variation:

Expert’s recommendation on this issue:

The increase in the US Dollar rate of Rs.11.0445 per USD is recommended to be considered as the foreign exchange variation and applied to the actual foreign currency loan drawl of 7.96 million USD. The increase in cost due to foreign exchange variation

on the loan availed works out to Rs.8.79 crores (approx.) as against the increase allowed by CEA of Rs. 11.63 crores. However, it has to be ensured that the inward Foreign Currency remittances were actually made through Banking channels and documentary evidence produced thereafter.

In view of the analyses of the Expert and the fact that the issue has been examined in depth with documentary evidence by TANGEDCO-a State Government entity, it is recommended that Citibank loan to the extent of Rs.2.8915 Crs. (Rs.3.865Crores allowed by TANGEDCO MINUS Rs.57.20 lakhs towards extra expenditure on construction of Jetty and Rs.39.85 lakhs towards the cost of Centrifugal separator not approved by the 5 member committee of A&N) and unsecured loan of Rs.0.65 Crs. may be considered as funds tied-up along with Rs.77.595 crores already considered by CEA. However, total project cost will be limited to Rs. 80.38 Crs as decided by CEA.

Submissions by the Petitioner on the issue:

As regards to the Capital cost of the project including Foreign Exchange Rate variation, it is to submit that the petitioner has availed Rupee Term Loan & Foreign Currency loans as appraised by State Bank of India. All the contract EPCC, loan documents etc., were submitted to the Respondent in 2000 itself and got acknowledged vide its letter dated 31.01.2000 and 24.02.2000. based on the written consent from the Respondent the Registered mortgage land was entered with the Lenders/ Institution. The petitioner has totally utilized 7.96 Million USD out of the PPA provided component of 10.53 Million USD. The Inward Remittances of the said amount of 7.96 Million USD starting from 2000 onwards is reflected in the Statement of Account maintained in State Bank of India, Port Blair Branch, bearing Account No. 050376. It is pertinent to mention that the Respondents are claiming that the petitioner has utilized only 5.13 million USD for the import of Foreign Equipments and that the balance of 2.81 million USD, which were converted into INR as per the GOI/ RBI norms and utilized for payment of custom duty, freight charges etc. for the import of the equipment cannot be allowed. In this regard, it is submitted that the cost of the equipment would be inclusive of the custom duty, freight charges etc., which are absolutely essential for importing the equipment. In other words, the total expenditure incurred for importing the equipment would form a part of the cost of the equipment.

Clause (xvii), Article-1 & Appendix- D of PPA provides that foreign currency shall be utilized for importing the equipment as such a amount of 10.53 MUSD provided for import of equipment covers not only the cost of imported equipment to be purchased, but also includes the duties & taxes etc. like custom duty, handling & transport charges upto site. The above will clearly justify the utilization of foreign of currency to the tune of 7.96 MUSD by the petitioner. Therefore, the learned Expert has rightly recommended foreign exchange variation for 7.96 MUSD. The Learned Expert has also recommended that utilization of 7.96 MUSD by the

petitioner has to be ensured by considering whether the inward foreign currency remittances were actually made through banking channel. Owing to the above the petitioner confirms that the foreign currency loan disbursements from 2000 onwards were credited to SBI, Port Blair account No. 050376 by SBI & SREI, Kolkata.

The petitioner is in agreement with the recommendation of Learned Expert on the quantum of project Cost arrived. However, it is submitted that the CEA while working out the IDC in their report dated 16.05.2011, has considered the IDC applicable to only 226 days for Units 1 and 2 & 174 days for Units 3 and 4 but not for the whole period of extended gestation period. The extended gestation period of 146 & 71 days for the first 02 units & rest 02 units respectively now been allowed by the Learned Expert. Therefore, IDC for that period & preliminary capital expenditure ought to be allowed to the Petitioner. Thus the capital cost of the project works out Rs. 83.66 Crores. However, as the petitioner has agreed to limit its claim to Rs. 82.11 Crores, in its letter dated 09.11.2001, and Petitioner requests the Hon'ble Commission to consider the capital cost of Rs. 82.11 Crores.

Submissions by the Respondent on the issue:

In this regard it is submitted that the respondents during the course of discussion with the expert on 31.05.2013 & 1.06.2013 as well as in their written submissions had emphasized that the exchange rate variation has to be allowed only on 5.13 mUSD, in view of the provision of PPA clause (xxii) (vii) of Article-1 which lays down that:

“for the purpose of determining the completion cost all foreign currency loans and all foreign currency equity sources shall be converted into rupees at the exchange rates applicable at the time of physical occurrence of the event. In – case the actual incurred cost is less than the ceiling cost of Rs. 37.908 Crores i.e. 10.53 mUSD foreign currency components of the PPA, the lesser cost shall be taken as the completion cost”.

It is further relevant to refer to clause (xvi), Article -1 & Appendix- D of PPA, which provides that foreign currency will be utilized only for importing the equipment. For ready reference above said provisions of PPA is reproduced as follow:

“Capital cost means subject to Article 3.11 and Article 3.10 (d) of the agreement, the cost (expressed in rupees) actually incurred by the company in completing the project will be as follows:

Sl. No.	Item	Cost in MINR	Cost in MUS Dollar Price at Rs. 36.00
1.	Imported eq.	379.08	10.53
2.	Indigenous eq.		
3.	Mec. Elec. Civ. And sub station	252.32	
	Total	631.40	10.53

Which is as per foreign exchange rate assumed in June, 1997 and shall be included as “Capital Cost” except to the extent that the Administration approves such excess costs as not having been attributable to the company, to the company’s suppliers or contractors. In determining the amount of cost actually incurred in completing the project, account shall be taken of (i) any increase or decrease in capital cost resulting from changes in the rates of exchange of the foreign currency in which the project expenditures are authorized to be incurred from the level set forth in A&N Administration’s TEC”.

It is evident that PPA authorizes utilization of the foreign exchange only for expenditure set forth in the TEC, which in the instant case is for the import of equipment. The petitioner in their written submissions as well as during the course of the discussion with the expert admitted the utilization of only 5.13 mUSD for the purposes of import of the equipment. The petitioner however claims to have availed/ utilized 7.96 mUSD as foreign currency loan. The balance foreign currency of 2.83 mUSD (7.96 MUSD- 5.13 MUSD) is claimed to have been utilized for other project expenses like duties, transportation, loading, unloading etc. It is submitted that the provisions of the PPA/ TEC clearly states that foreign currency is to be utilized only for the import of equipment. The completed cost documents submitted by the petitioner confirm utilization of 9825973 DEM equivalent INR 22.277 Crores (equivalent to 5.13 MUSD) as foreign currency. Hence, the utilization of foreign currency is to be restricted to 5.13 MUSD instead of 7.96 MUSD and exchange rate variation should be allowed accordingly.

In the light of the above it is humbly prayed that the Hon’ble Commission while deciding the issue of capital cost/ cost of completion of project may kindly take into account the above submissions of the respondents and allow foreign exchange variation on only 5.13 mUSD for which the petitioner is legally entitled. Allowing benefit of foreign exchange rate variation over and above 5.13 mUSD would be unlawful and detrimental to the interest of public money/ state exchequer.

Respondent’s submissions on Treatment of Citi Bank and secured loan

The expert at page No. 78 (Part-II) & at page no. 102 (Part-III) of the report has considered the report of TANGEDCO submitted on 11.11.2011 and recommended that CITI bank loan to the extent of Rs. 2.8915 crores and unsecured loan of Rs. 77.595 crores already considered by CEA. In this context it is submitted that as per the direction of CEA, TANGEDCO had reviewed/ modified their report dated 11.11.2011, withdrawing their earlier recommendations. TANGEDCO in their revised report dated 5.09.2012(Annexure – R) had recommended only Rs. 1.59 crores out of CITI bank loan. However, their recommendation of Rs. 1.59 crores was on the ground of natural justice, approval from APWD etc., which were not supported by the PPA provisions. There is no provision in PPA for making payment on the basis of natural justice and/ or with the approval of APWD. The expert in his report at page no. 74

(Part-II) has also recorded the revised recommendation of TANGEDCO dated 5.09.2012 but has ignored/ overlooked the said revised recommendation/ report. Since TANGEDCO itself had reviewed/ modified their earlier recommendation dated 11.11.2011 as per the advice of CEA dated 22.12.2011, it is not fit and proper to extend unlawful benefit to the petitioner amounting to Rs. 3.5415 crores (Rs. 2.8915 crores + Rs. 0.65 crores) as recommended by the expert, since the report dated 5.09.2012 of TANGEDCO is in supersession of report dated 11.11.2011.

As the report submitted by TANGEDCO dated 11.11.2011 was subsequently modified/ superseded by report dated 5.09.2012, the earlier report has ceased to be valid and legally tenable. The Ld. Expert has erred grossly by placing reliance on a report which has already been reviewed / superseded by the TANGEDCO itself.

It is pertinent to mention that though CEA worked out the expenditure of the project considering the extended gestation period to Rs. 80.38 crores, but had consciously limited the completed cost to Rs. 77.595 crores based on the fund tied up for the project, which was communicated vide letter dated 23.05.2011 (Annexure – R2) because the petitioner had failed to furnish satisfactory documentary evidence to substantiate his claim of having incurred cost of more than Rs. 77.595 crores.

The recommendations of CEA as well as TANGEDCO have to be considered and interpreted in the light of relevant provision of PPA. Since PPA is the basic and fundamental law on which the entire fabric of transactions between the respondents and petitioner are based, no recommendation/ report can override the relevant provisions of PPA. Only that recommendation/ report can be legally accepted which is in accordance of relevant provision of PPA. As stated above the report dated 11.11.2011 was superseded by the report dated 5.09.2012 of TANGEDCO and therefore, cannot be the basis for arriving at capital cost of the project.

Thus recommendation of the Ld. Expert to enhance the completed cost to Rs. 80.38 crores is factually incorrect and therefore, cannot be accepted.

Commission's analysis and findings on the issue:(FERV)

The Commission observed that CEA allowed Foreign Exchange Rate Variation (FERV) considering 10.53 m USD foreign component included in the approved cost of 63.14 crores. The petitioner in their submissions stated that they have utilized 7.96 m USD equivalent of foreign currency loans. The respondent in their submissions stated that FERV has to be allowed only on 5.13 mUSD utilized for the purpose of import of the equipment.

The Expert also in his report has analyzed the issue as below:

Quote

“It is a normal industry practice to take foreign currency loan not just for the purpose of import of capital goods and /or offshore services, but also on

considerations of loan availability, cheaper interest rates, better terms & conditions as compared to the domestic loans as a source of funding the project. It is stated by the petitioner in the instant case that the loan in foreign currency was availed to the extent of 7.96 million USD, though they utilized only 5.13 million USD for import of foreign component. A&N Administration has been insisting that FERV should be limited only to the extent of cost of imported equipment. The Petitioner asserts that they have utilized 7.96 M US\$ equivalent of foreign currency loans on which FERV is to be allowed. Therefore, the petitioner has utilized the balance portion towards other project related expenditure by converting the foreign currency loan into Indian Rupees.

The exchange rate variation is calculated on the actual loan drawal and not on the sanctioned loan or the estimated loan. While CEA in their report considered 10.53 M US\$ foreign component included in the approved cost of Rs.63.14 crores, it is seen that at the project implementation stage, (i) the import –indigenous mix of the equipment had changed; and (ii) the actual foreign currency loan availed also had come down.

Accordingly, the foreign exchange rate variation is allowed only on the actual foreign currency loan amount availed towards the funding of the project, not restricting only to the import of equipment. As seen from the CEA Report, the exchange rate considered at the time of approval of the project cost was Rs.36 per USD, whereas the weighted average exchange rate during the implementation of the project based on loan disbursement as considered by CEA was Rs. 47.0445 per US\$. The CEA Report while allowing Rs.77.595 crores as “funds tied up” gives the break up of loan and equity. As per the Report, the foreign currency loans taken from SBI and SREI are Rs.1636.10 lakhs and Rs.2108.64 lakhs respectively. The total foreign currency loan amount in Indian currency, therefore, works out to Rs. 3744.74 lakhs i.e. Rs.374.474 M. Taking the weighted average exchange rate considered in the CEA Report referred to above at 1US\$=Rs.47.0445, the equivalent foreign currency loan in US\$ works out to 7.96 MUS\$(374.474/47.0445).

In view of the aforementioned, the increase in the US Dollar rate of Rs.11.0445 per USD is recommended to be considered as the foreign exchange variation and applied to the actual foreign currency loan drawal of 7.96 million USD. The increase in cost due to foreign exchange variation on the loan availed works out to Rs.8.79 crores (approx.) as against the increase allowed by CEA of

Rs. 11.63 crores. However, it has to be ensured that the inward Foreign Currency remittances were actually made through Banking channels and documentary evidence produced thereafter”.

Unquote

The Commission noted that the definition of “Capital Cost” as given in Article –I of the Power Purchase Agreement (PPA) clause (xvi) definition as below:

“Capital cost means subject to Article 3.11 and Article 3.10 (d) of the agreement, the cost (expressed in rupees) actually incurred by the company in completing the project will be as follows:

Sl. No.	Item	Cost in MINR	Cost in MUS Dollar Price at Rs. 36.00
1.	Imported eq.	379.08	10.53
2.	Indigenous eq.		
3.	Mec. Elec. Civ. And sub station	252.32	
	Total	631.40	10.53

Which is as per foreign exchange rate assumed in June, 1997 and shall be included as “Capital Cost” except to the extent that the Administration approves such excess costs as not having been attributable to the company, to the company’s suppliers or contractors. In determining the amount of cost actually incurred in completing the project, account shall be taken of (i) any increase or decrease in capital cost resulting from changes in the rates of exchange of the foreign currency in which the project expenditures are authorized to be incurred from the level set forth in A&N Administration’s TEC.....”.

The Annexure –I to PPA gives the abstract of the project cost. As per the abstract of the project cost, the foreign components were detailed as under:

Work cost

a.	works cost excluding taxes and duties	\$ 8.77 MUSD (Rs. 315.72 MINR)
B.	Electricals	-
c.	Taxes and duties	\$ 1.76 MUSD (Rs. 63.36 MINR)
	Sub Total	(379.080 MINR)

Thus, the works cost including taxes and duties is mentioned in the Abstract of the Project Cost in both US Dollar and Indian Rupees denominations. The works cost including taxes and duties is 10.53 m USD equivalent to Rs. 379.080 millions (at 1 USD = Rs. 36.00 as per Article –I referred above). The PPA recognizes that the project cost includes the “Landed Cost” of the

imported equipment including taxes and duties and incidentals to bring the equipment to the project site. The Commission also observed that the petitioner has submitted that the petitioner has utilized only 5.13 million USD for the import of Foreign Equipments and that the balance of 2.81 million USD, which were converted into INR as per the GOI/ RBI norms and utilized for payment of custom duty, freight charges etc. for the import of the equipment.

Thus, going by the provisions of the PPA as mentioned above, and considering the rationale given by the Expert in his report, the Commission allows FERV of 7.96 million USD equivalent to Rs. 8.79 Crores at Rs. 11.0445 per USD being the increase in the USD as discussed above.

Commission's analysis and findings on the issue: (Citi Bank and Unsecured Loan)

The Expert in his report as allowed Citi bank loan to the extent of Rs. 2.8915 Crs. While the Expert has relied on the report submitted by TANGEDCO, the State Govt. entity who has examined the issue in depth with the documentary evidence and their site visit, the Expert has not considered the extra expenditure of Rs. 57.20 lakhs on the head "construction of Jetty" and Rs. 39.85 lakhs towards the cost of "Centrifugal separator" not approved by the Five Member Committee of A&N Administration. Accordingly, even though TANGEDCO has allowed Rs. 3.865 Crs., the Expert has recommended only Rs. 2.8915 Crs. towards the funding of the Project out of Citi Bank Loan. The Expert has also allowed Rs. 0.65 Cr. being the outstanding liability to the EPC contractor (M/s BSES Ltd.), payable by the petitioner as part of unsecured loan for the purpose of funding of the Project.

The Commission noted that the petitioner has not made any observation on the recommendation of the Expert in this regard.

The respondent has stated in the written submissions that the Expert has consider the report of TANGEDCO dated 11.11.2011 whereas TANGEDCO has revised their report with drawing earlier recommendations. The revised TANGEDCO report dated 05.09.2012 had recommended only Rs. 1.59 Crs. out of Citi Bank Loan. However, the respondent stated that their recommendation of Rs. 1.59 Crs. on the ground of natural justice, approval for APWD etc., which were not supported by the PPA provisions. The respondent further submitted that the Expert has erred grossly by placing reliance on a report which has already been reviewed/ superseded by the TANGEDCO itself. Thus, according to the respondent, the recommendation of the Expert to enhance the completed cost to Rs. 80.38 Crs. is factually incorrect and therefore, cannot be accepted.

CEA vide their letter no. DPD/ UT/ 374-6 (A&N) 2012/648 dated 15.03.2012 observed that "CEA advice on completed project cost amounting Rs. 80.38 Crs. may be treated as final which have already been communicated to A&N Admn. Vide this office letter dated 23.05.2011 and the fund tie up aspect may be looked into by A&N Administration". Later it was observed

that A&N Administration has appointed TANGEDCO as their consultants with the following scope of work:

“To examine and provide expert comments on Rs. 4.02 Crs. loan availed from Citi bank and Rs. 2.052 Crs. Loan availed from other sources/ credits by M/s SPCL for the 20 MW project for onward submission to CEA in finalizing the completed cost;

To comment on the extended gestation period including the delay caused by both the parties.”

TANGEDCO consultancy team visited Port Blair on 6th June, 2011 and during the stay from 6th June, 2011 to 11th June, 2011 followed by further seeking of clarifications on financial documents, perusal of papers/ documents furnished by both SPCL and ED- A&N.

TANGEDCO submitted their first report on 11.11.2011 after consultations with officials of A&N Administration.

The Commission observed that TANGEDCO while submitting their detailed report on 11.11.2011 they have given Annexure – I attached with the report which gave a detailed statement showing utilization of Citi Bank Loan of Rs. 4.02 Crs taken by the petitioner. In view of the different version of the consultant, the Expert appointed by the Commission and the respondent, the Commission did a prudential check of each item of expenditure detailed in Annexure –I as referred above, to see whether the expenditure is incurred towards the project.

The Commission observed that on the date of Commissioning of the plant (COD) the generator generates and transmits power from the bus bar to the transmission line as per the contract but there are still a number of items called “punch list items” which do not have a direct bearing on the COD of the project but a part of the project and need completion -for example, supporting works like construction of approach Road for movement of goods and employees.

Such works were normally completed after the date of COD and the expenditure was incurred on the same. Certain payments with regard to the supply and erection of plant and machinery, civil work etc. will be payable by the project executor after COD depending upon the payment terms and conditions as per their contract with suppliers etc. like retention money to be paid after performance guarantee period, payment on achievement of milestones specified in the contract etc.

With the above rationale and prudential check of the Commission, the Commission allows Rs. 2.8915 Crs. towards the funding of the project out of Citi Bank loan for which the petitioner will also get interest on debts servicing as per the Citi Bank Loan agreement entered by the petitioner. The interest component of the tariff is discussed in a separate para below in this order.

The petitioner claims 2.052 Crs. as unsecured loan which issue was thoroughly examined by TANGEDCO in their report submitted on 11.11.2011. TANGEDCO has stated in the report that the petitioner have claimed that out of Rs. 2.052 Crs. a sum of Rs. 0.65 Cr was incurred by them towards the portion of outstanding liability to the EPC Contractor of the project cost through their own revenue generation for which TANGEDCO has verified the agreement with M/s BSES (i.e. EPC Contractor), work completion certificate, ledger accounts, invoices and Bank Scroll and BSES (now M/s Reliance Infrastructure Ltd.) in their letter dated 31.10.2011 as forwarded to TANGEDCO in Andaman & Nicobar Administration letter dated 09.11.2011. As such the Commission allows Rs. 0.65 Cr. of unsecured loan as one of the funding sources for the Project.

In view of the above findings of the Commission, the completed cost of the Project is arrived at below:

S. No.	Description	Amount (Rs. Cr.)
1.	CEA approval as per funds tied- up basis	77.595
2.	Less: Foreign Exchange Rate Variation approved by CEA and included above	(-) 11.630
		65.965
3.	Add: Foreign Exchange Rate variation as ascertained by the Commission based on Foreign currency loan utilization	(+) 8.790
		74.755
4.	Add: Citi Bank loan as per utilization	(+) 2.8915
5.	Add: Unsecured loan as decided by the Commission	(+) 0.65
	Completed cost of the Project as approved by the Commission	78.2965

Sources of funding of the project as approved by the Commission are given below:

Funding of the project

(As approved by the Commission)

S. No.	Particulars	Amount (Rs. Lakhs)
1.	Loan approved by CEA	
	- SBI Foreign currency loan Rs. 1636.10	
	- SREI Foreign currency loan Rs. 2108.64	
	- SBI Rupee Term Loan Rs. 1369.00	5113.74
2.	Citi Bank Loan (289.15 Lakhs & unsecured Loan (65.00 Lakhs) now approved by the Commission	354.15

	TOTAL LOANS	5467.89
3.	Equity	2361.76
	Completed cost of the Project as approved by the Commission	7829.65

Issue #2 Relating to Liquidated Damages:

Expert’s recommendation on this issue:

TANGEDCO has concluded that “Thus imposition of liquidated damages as per clause 3.10 (Page No. 28) of Power Purchase Agreement (PPA) on M/s SPCL for delay in achieving COD is not justifiable”. As SPCL achieved the COD on 2.4.2003, which is within the period of 120 days of availability of new transmission lines and within 30 days of opening of Letter of Credit, one tends to agree with the recommendation of the consultant appointed by the Administration. Agreeing with the recommendations of TANGEDCO, recommended that the imposition of Liquidated Damages is not justified.

Submissions by the Petitioner on the issue:

The Petitioner is in complete agreement with the consideration as well as the recommendation of the Learned Expert. The sequence of events and the records in the case clearly establish that the delay in the COD of 13 months for Unit 1 and 2 and 8 months for Units 3 and 4 was caused because of the Respondent Administration. As per the PPA, Clause 3.3 (c), the Respondent was obliged to develop, design, engineer, construct, procure and finance the Transmission facilities and keep it ready for interconnection with the project, not later than 120 days BEFORE the required COD. The COD as per the PPA was to be achieved on 01.03.2002 for Unit 1 and 2 and 01.08.2002 for Unit 3 and 4. However, the Respondent Administration made the Transmission facilities ready only on 10.12.2002. The Petitioner achieved COD on 02.03.2003, which within 120 days of the Respondent Administration providing the Transmission facilities for interconnection. Thus, it is evident that the delay in commissioning of the plant was entirely because of the Respondent Further, the Respondent Administration was also obliged to provide LC facilities 30 days prior to the COD, whereas the LC was provided on 01.04.20003, that is 30 days AFTER the COD.

Submissions of the petitioner regarding deemed generation charges:

It is respectfully submitted that the Learned Expert has not dealt with the issue of deemed generation charges, which the Respondent is liable to pay to the Petitioner, for the extended gestation period.

In Article 2 Clause 3.3 (c) (iii) of the PPA, it is stipulated that “if the COD is delayed because the Transmission facilities are not commissioned and ready for interconnection, the Administration shall pay fixed charges (less return on equity) upon the normative level of generation during the period of any such delay, measured from the time at which the commercial operation date of such unit would have been achieved but for the Administration’s delay, to the time at which the commercial operation date of such unit is actually achieved.”

It has been established and even held so by the Learned Expert that the delay in achieving COD was because the Transmission facilities were not made available by the Respondent to the Petitioner for interconnection. Because of this, the COD got delayed by 13 months for Unit 1 and 2 and by 8 months for unit 3 and 4. As such, the Petitioner is entitled for fixed charges, minus the ROE, for the said periods. The Petitioner had raised the claim for payments as per Clause 3.3 (c) (iii) on 07.12.2001. However, the Respondent has made no payment and declined by the Respondent.

It is submitted that in Article 8 Clause 8.6 of the PPA, it is clearly mandated that all payments made belatedly would bear interest at the rate of 0.5% above the cash credit rate. Therefore, the Petitioner is entitled to the fixed charges (less RoE) for unit 1 and 2 for the period of 01.03.2002 till 01.04.2003 and for Unit 3 and 4 from 08.01.2002 till 01.04.2003.

Submissions by the Respondent on the issue:

As per the computation of the respondents the delay of 146 days for 1st two units and 71 days for rest of the two units is attributable to the petitioner for which the petitioner is liable for paying Liquidated damages to the respondents and the said liquidated damages are liable to be deducted from the total cost of the construction of the project in view of the provision of clause 3.10 of the PPA.

In the light of the above submission, the respondents humbly pray the Commission to revise the recommendation of the Ld. Expert on account of Liquidated damages.

Commission's analysis and findings on the issue: (Liquidated Damages)

The Expert has recommended for waiver of Liquidated Damages as the petitioner achieved the COD on 2.04.2003, which is within the period of 120 days of availability of new transmission lines and within 30 days of opening of Letter of Credit by the respondent.

The Commission observed that financial closure was achieved on 01.08.2000.

As per PPA, the first two units were to be commissioned in 19 months and next two units in 24 months from the financial closure date thereby the target date were 1.3.2002 (Unit 1 & 2) and 1.8.2002 (unit 3 & 4). However, the commissioning schedule was modified vide MOM dated 05.06.2002 to 31.08.2002 and 15.10.2002 respectively due to factors like war like situation and ban on felling of trees. The Commercial operation date (COD) was finally declared as 02.04. 2003.

Clause 3.3.0 (i), (II) and (v) of PPA stipulates that the Administration is obliged to cause the transmission facilities by laying and rerouting new transmission line etc., for drawing and receiving electricity produced by IPP 120 days before COD of the first engine /power station. Accordingly, the line should have been ready by 1.4.2002 to meet the revised schedule of 31.8.2002 for the first two units. A&N Admn. informed on 20.5.2002 that existing transmission line was strengthened to receive 6 MW to 7 MW of power. But SPCL informed A&N Admn. that the existing 53 km line was not reliable and requested for new 33 kv. Transmission line as

per the provisions of PPA. However, the A&N Administration completed the double circuit Panther transmission line on 10.12.2002. M/s SPCL sent a letter to A&N Administration on 09.12.2002 regarding readiness to conduct acceptance test of all four units.

The process of organizing for testing, actual conducting of acceptance tests and final approval took its time and COD could be declared only on 2.4.2003. The provision of 120 days of readiness of the Transmission line is kept to take care of such commissioning procedures and third party inspection. Further, Administration opened the letter of Credit on 1.4.2003 which as per PPA should have been opened one month before COD.

Thus, the Commission observes that imposition of liquidated damages as per clause 3.10 (Page No. 28) of Power Purchase Agreement (PPA) on M/s SPCL for delay in achieving COD is not justifiable.

Commission's analysis and findings on the issue: (Deemed Generation Charges)

The Commission noted that the petitioner has submitted a claim for deemed generation charges as per PPA provisions as the petitioner is not liable for the delay in commissioning of the project and also in view of waiver of liquidated damages.

The Commission also noted in the submissions made by the respondent, they have annexed Minutes of the Meeting (MOM) held in the chamber of Chief Secretary, A&N Admn. at Port Blair on 5.06.2002 wherein it was agreed by both petitioner and respondent that the transmission line was likely to be completed by Oct., 2002 and till then generation from 3rd & 4th Units cannot be utilized. It was also recorded in the (MOM) that M/s SPCL agreed to defer COD of 3rd & 4th units to 15th Oct., 2002 or till the completion of construction of transmission line which ever was earlier.

The Commission observed that due consideration is to be given to the agreements reached during the meeting especially taken at the highest level of Chief Secretary, even though the same are not followed by an amendment to the PPA. The Commission has noted that there was an agreement with respect to the deferment of COD of the generating units. Having accepted the decision in the meeting by both the parties, the Commission observed that the petitioner cannot claim deemed generation charges at this stage till both the parties were ready for commissioning i.e. 10th December, 2002. However, the Commission also observed that though the line and the generating sets were physically completed, unless CEA inspection was done, there could not be any "interconnection". Commissioning of the plant of the Petitioner was declared only on 02.04.2003.

It is seen that the transmission line was ready on 10.12.2002 whereas the petitioner informed the respondent that their all four units were ready for performance test on

09.12.2002. Thus, it is noticed by the Commission that the respondent has defaulted in their obligation to provide transmission line 120 days before the COD.

Therefore the Commission concludes that the petitioner is eligible to receive the deemed generation charges in terms of 3.3 (c)(iii) of PPA beyond 10.12.2002 and upto COD namely 02.04.2003.

Issue # 6 DENSITY OF HIGH SPEED DIESEL:

Expert's recommendation on this issue:

The principle of ambient temperature related to density for determination of quantum of fuel has been agreed. The same has also been applied since April, 2007. In case of reliable verifiable authentic data giving from ambient temperature at the time and dates of respective despatches from April, 2003 to April 2007 may be made available by the Petitioner to the satisfaction of the Administration, there seems no reason why correction should not be applied retrospectively. Recommended accordingly.

Submissions by the Petitioner on the issue:

As recommended by the Learned Expert the reliable verifiable authentic data indicating the ambient temperature data from April 2003 to April 2007 was obtained on the request of the Respondent from the Regional Meteorological Department, Kolkata for calculating the density at respective ambient temperature for processing the supplementary invoice. However the above temperature data was not acceptable to Respondent on the plea that the data was not authenticated on each page. Then the Petitioner again obtained the hourly temperature data from 11:00 Hrs to 14:00 Hrs from the MET with attestation and seal of DDGM, MET and submitted to Respondent. The Respondent has also later cross checked vide their letter dated 10.07.2012 with the MET and in turn the MET Responded positively vide their letter dated 22.07.2012.

However the Respondent was not convinced with the above data and wanted the data from 08:30 Hrs to 20:00 Hrs. As such again the required data was obtained from 07:00 Hrs to 20:00 Hrs for the period April 2003 to March 2007 from MET, Kolkata vide their letter dated 22.01.2013 and the same was submitted to Respondent vide letter dated 28.01.2013. Based on the hourly ambient temperature provided by MET, Kolkata and exact loading time of the consignment at IOCL, Port Blair the Petitioner has again submitted revised invoice vide letter dated 18.02.2013 for an amount of Rs.8,80,79,379/- (Rs.2,68,44,561 Principle + Rs.6,12,34,618 Interest on delayed payment @ actual interest rate).

A statement indicating the details of time of the Tanker filling at IOCL terminal, its temperature & density @ 15⁰C and corresponding its density at ambient temperature of each consignment day wise has also been submitted to the Respondents.

As the reliable, verifiable & authenticated hourly temperature data of Port Blair station/ area from April`2007 to March`2007 obtained from MET Kolkata have already been furnished by the Petitioner to the satisfaction of the Respondent which is in line with the direction/

recommendation of the Learned Expert in his report, the Hon`ble Commission may issue suitable direction to the Respondent for accepting the same even at the lowest temperature at that point of time in arranging the payment arrears in this regard.

Submissions by the Respondent on the issue:

The petitioner in its project report submitted in June, 1995 had indicated the unit of measurement of HSD consumption as Rs./Kg. The said report was approved by the Standing Committee on Power Purchase Agreement (SCOPPA) of CEA, Ministry of Finance–Committee on Non- plan Expenditure approval and by the respondents. The petitioner being a power company had adequate expertise for examining technical and commercial aspect of the project and it is presumed that the petitioner would have examined this aspect well before submitting their bids/tender. The petitioner can't wake up after a decade and ask respondents to modify the technical parameters / norms of the project and to rewrite the contract deed /PPA.

This issue was first raised by the petitioner only in 2007 which was deliberated in MHA. The decision of MHA taken in the meeting held on 17.07.2008 is reproduced below:

“HSD calculation is based on Kg i.e weight where as normal supply from IOCL to IPP is in Ltrs. (i.e volume). Therefore standard formula has to be devised for converting Ltrs. into Kg so as to facilitate in making payments in respect of HSD received by IPP from IOCL at ambient temperature. The procedure/formula so finalized by CEA should form part of PPA. In this process IOCL should be formally consulted”.

Upon the advice of the CEA and directive of MHA a new provision for conversion of HSD density from weight to volume was incorporated in the PPA, considering the density at ambient temperature by issuing an Addendum-2 to PPA on 18.08.2011.

However, as regards consideration of the claim of petitioner for calculation of tariff on HSD density at ambient temperature for the period from April, 2003 to March,2007 is concerned , it is submitted that reliable ,verifiable authentic data of ambient temperature at the time and dates of delivery of each consignment from IOCL is necessarily required for arriving at density at ambient temperature. The petitioner has not been able to furnish invoices issued by IOCL reflecting thereon reliable, verifiable authentic data of ambient temperature of HSD & corresponding density at the time of delivery of each consignment, without which the claim cannot be examined/considered. It is further pointed out that the temperature details at the time of delivery of HSD consignment are not even available in IOCL depot, Port Blair. In the absence of the above said vital information, the said claim cannot be settled. Though the petitioner had submitted record relating to temperature as issued by Meteorology Department, Kolkata, yet the said record is not relevant for arriving at exact density at ambient temperature. Readings/recordings of reliable, verifiable & authentic data of ambient temperature at the time of delivery of each consignment are essentially required for consideration of the claim, which are not available in the record submitted by the petitioner

from Meteorology Department. Since Addendum-2 to PPA allows measurement of consumption of HSD in volume only with effect April,2007, no benefit whatsoever on this account can be extended retrospectively from April'2003 to March'2007. Extension of any such benefit will be unlawful. Accordingly, the amendment to PPA was consciously given effect from April, 2007 onwards as the petitioner was able to provide reliable, verifiable authentic data of ambient temperature and corresponding density of HSD of each and every consignment dispatched from the IOC terminal only from April, 2007 onwards. The petitioner has so far not able to furnish authenticated data from IOCL indicating actual ambient temperature and corresponding density of HSD at the time of delivery of each and every consignment for the period from April, 2003 to March, 2007. Rather, the petitioner expects respondents to settle the claim relying on data other than IOCL data. As a government entity it is not appropriate to adopt different yardsticks at different points of time for settling a petitioner's claim on same issue. Since this issue has huge financial implication, adopting varying yardsticks to provide benefit to the petitioner against the existing provisions of law/PPA, is not only legally impermissible but will also attract objections from other agencies including CAG.

Thus the claim of petitioner for HSD density at ambient temperature for the period from April'2003 to March'2007 is not sustainable in the eyes of law and therefore cannot be accepted.

Commission's analysis and findings on the issue:

The Commission noted that the petitioner is claiming HSD density at ambient temperature for the period from April'2003 to March'2007. It is also noted the amendment to PPA was given effect from April, 2007 onwards. The respondent's contention is that the same is not payable as the petitioner has so far not able to furnish authenticated data from IOCL indicating actual ambient temperature and corresponding density of HSD at the time of delivery of each and every consignment for the period from April, 2003 to March, 2007. During the hearing on 26.06.2013 the petitioner informed the Commission that the relevant records are not available with IOCL (from which HSD was supplied to the petitioner) for the period from April, 2003 to March, 2007. However, the petitioner informed that the reliable, verifiable & authenticated hourly temperature data of Port Blair station/ area from April'2003 to March'2007 obtained from MET Kolkata have already been furnished by the Petitioner.

The Commission also noted that the petitioner in their submissions have stated that initially the respondent wanted authentication on each page of the data provided by Regional MET department, Kolkata. The Petitioner stated that they again obtained the hourly temperature data from 11:00 Hrs to 14:00 Hrs from the MET with attestation and seal of DDGM, MET and submitted to Respondent. The Respondent has also later cross checked vide their letter dated 10.07.2012 with the MET and in turn the MET Responded positively vide their letter dated 22.07.2012. However the Respondent was not convinced with the above data and wanted the data from 08:30 Hrs to 20:00 Hrs. As such again the required data was

obtained from 07:00 Hrs to 20:00 Hrs for the period April 2003 to March 2007 from MET, Kolkata vide their letter dated 22.01.2013 and the same was submitted to Respondent vide letter dated 28.01.2013.

The Commission observed that in the Minutes of the Meeting chaired by Pr. Secretary, Power, A&N Admn. on 17.04.2012, it was recorded that proposal had already been submitted to Administration dated 16.03.2012 for getting “in principle” approval for payment of arrears of HSD consumption on the basis of MET data.

The Commission observed that the above sequence of events only shows that the respondent showed an unfair attitude. If the respondent was not to approve MET data in lieu of IOCL data, then they should not have asked for authentication of MET data, change of hourly data etc. from the petitioner. It only shows that the respondent knowingly demanded additional data/ information which were not to be accepted by them. This is a deplorable relationship between the utility and the project executor in a BOOT Project.

The Commission observed that the India Meteorological Department, is the Govt. department, specializing in the sphere of MET data, whose data are utilized by different Govt. departments/ agencies, Airlines, Airports Authority of India, DGCA etc. as authentic data. The Commission does not find any reason why the A&N Admn. is not recognizing MET data in the absence of non- availability of the records at IOCL end. As such, the Commission directs the respondent to accept the authenticated MET data submitted by the petitioner for the purpose of calculation of density of HSD.

Issue # 9 Rebate:

Expert’s recommendation on this issue:

In view of the fact that the Capital cost was not finalised, both parties have been working with various figures of the Capital Cost, as also other tariff related parameters, therefore, the Invoices raised were being paid by the Administration on the basis of DUE PAYMENT as decided by the Administration. It is recommended that the REBATE may be applicable retrospectively since COD, on *all Tariff Invoice amounts released* within the PPA stipulated time for availing the Rebate.

Submissions by the Petitioner on the issue:

The Learned Expert has therefore recommended that the treatment of the Rebate would from the date of the COD and not henceforth. Further the Learned Expert has also noted that if the Administration has been making unjustified deductions they are liable to make balance payments with interest.

The Petitioner is required, under the terms of PPA executed on 20-11-1997, to submit an invoice to the Respondent at the beginning of every month for all amounts receivable during the previous month. If the Respondent makes payment within 5 working days of receipt of the invoice, he is eligible for a rebate of 2.5% of the invoiced amount. Under the PPA the rebate is an incentive for full and prompt payment of tariff invoices, and can be availed by the Respondent if and only if the payment of tariff invoices are made in full and within the time

prescribed as per clause Article – 8.4 (a) of PPA. Full payment of tariff is mandatory in terms of clause 8.2 (b) of PPA notwithstanding get the Respondent disputes the accuracy of tariff invoice or supplementary invoice. Non-payment of in full of any tariff invoice amounts to fundamental breach of payment obligation under the said clause 8.2 and 8.3 as applicable. The Respondent has failed to pay any invoice in full since the first invoice raised in April 2003 and therefore the Respondent was not entitled to deduct any amount towards rebate from the tariff invoices. Nonetheless, the Respondent availed rebate whenever any amount was paid to the Petitioner as if it was its vested right to avail rebate from any and all payments made to the Petitioner pursuant to tariff invoice. Thus the rebate availed were unlawful and in gross violation of the applicable provisions of PPA. The Petitioner is therefore entitled to the entire rebate availed by the Respondent together with interest thereon in terms of PPA.

It is submitted that Respondent has been deducting amounts every month from the invoices raised by the Petitioner from the month of April 2003. The total amounts that has to be refunded under the account of Rebate including interest thereon amounts to Rs.38,39,67,093/-.

The Petitioner further submits that the Respondent is bound by the provisions of the PPA to pay the full amount of the monthly invoices to avail the applicable Rebate. (i) Under Article 8.2 (a) the payments are to be made to in full for every invoice by due date (ii) Under Article 8.2 (b) of the PPA the payments are to be made in full when due, even after a portion of invoices is disputed. (iii) Under Article 8.3 (a) & (b) (i) of the PPA the Letter of Credit is to be established covering two months estimated billing.

From the above clauses it is clear that in order to dispute an invoice the Respondent is first obliged to make full payment of an invoice when due and then raise the dispute. The Respondent has no authority what so ever to make any reduction from the invoice by unilaterally determining disallowances. The PPA provides that if an invoice is not paid when due, the IPP is within its right to draw upon the Letter of Credit and if this was insufficient at any point of time. The Rebate of 2.5% is an incentive to ensure prompt and full payment and his an exception general rule requiring payment in full on due date. This can be only claimed upon the strict compliance with the conditions for its applicability and does not accrue as a matter of right to the Respondent whenever he makes a part payment. The above mechanism has been agreed between the Petitioner and Respondent primarily to ensure assured timely cash flow and promptitude. Hence it is evident the timely cash flow and promptitude of action are the essences of the PPA.

It is submitted that Rebate is not compensation for interest. The Rebate of 2.5% is for payment made within five days resulting in the payment being made 25 days ahead of due date. In other words, the Rebate of 2.5% is an incentive to ensure prompt and full payment which is a pre-requisite for projects of this type which involves huge investment requiring certainty of cash flows and prompt payments.

The contention urged by the Respondent that the Article 8.2 (a) should be read to mean that the Rebate would be available to the extent of payments made even as a part payment for the invoice amount made within in a 5 days is not tenable.

The Respondent admittedly has not been paying the full amount of the invoice and it is merely stating that it has been making the substantial / admissible claims of the invoice. This act of Respondent is completely contradictory to the provisions of the PPA which stipulate that the Respondent is eligible for the Rebate of 2.5% only if the full payment is made within 5 days from the date of Invoice. This is also a declared position of Law as laid down by the Hon'ble Appellate Tribunal for Electricity in Appeal No.177 of 2010 and 176 of 2012. It needs to be reiterated that Hon'ble Appellate Tribunal has also in Appeal No.176 of 2012 mentioned above held, in fact and circumstances which is exactly similar to the instant case that the power producer would be entitled to refund of the rebate with interest thereon.

Submissions by the Respondent on the issue:

The recommendation of the Ld. Expert is in accordance with the provisions of PPA and is acceptable.

Commission recommendations on this issue:

Relevant clauses of PPA dealing with rebate are given below:

Quote

8.2 Billing and payment disputes

(a) Billing payment. The company shall prepare and submit (by facsimile transmission or otherwise) to THE ADMINISTRATION not later than the fifth Business Day after each metering Date an invoice (a "Tariff Invoice") for the payments due to the company under this agreement (Other than those due in respect of Supplementary Invoice but including the billing period ending immediately prior to such Metering Date), along with the corresponding Record of Meter Reading detailing Electricity and Deemed Generation and THE COMPANY'S calculation in accordance with the provisions of Appendix D of such payments due to the company for such Billing period. Payment due in respect of supplementary Invoice shall be paid in accordance with section 8.6. The aggregate amount of the payments due to the Company for such billing period as set forth in the applicable Tariff Invoice ("The Invoice Amount") which terms shall also mean, with reference to any Supplementary Invoice, the aggregate amount of the payments due to the company under such supplementary Invoice) shall be due and payable by THE ADMINISTRATION.

(b) Payment of disputed Amounts; Resolution of Disputes. If THE ADMINISTRATION disputes the accuracy of Tariff Invoice of a supplementary invoice, the Administration shall nevertheless pay the full amount of such Invoice but may serve notice on the company that an amount submitted under such Invoice is disputed and the parties shall use their best

efforts to resolve the disputes in accordance with Article 15 within the time limits set forth therein.

(c) Payment upon Resolution of Disputes, if upon the resolution of disputed amount, the company is required to reimburse the Administration, the Company shall make such payment to the Administration with interest thereon. Such interest shall be payable at the rate which is one half per cent (0.5%) above the applicable Cash Credit Rate Calculated for the period from date of receipt of such amount is paid to but excluding the date of on which the administration is reimbursed. To the fullest extent permitted by the law of India THE ADMINISTRATION hereby irrevocably waive the right to disputes any tariff Invoice or Supplementary Invoice after a period of one hundred and twenty days from the date on which the ADMINISTRATION received such Invoice, unless THE ADMINISTRATION is able to demonstrate that it could not reasonably have been aware of an error in such Invoice during such period.

8.4 Rebates.

(a) If payment in full of a tariff Invoice and all other amounts due in respect thereof is made on or prior to the date which is the fifth Business day after the Date of presentation of the Tariff Invoice to THE ADMINISTRATION pursuant to Article 8.2 (which presentation may be by facsimile transmission) by wire transfer payment or otherwise such that, in any such case, there shall be immediately available funds in any amount equal to the full which is such fifth Business Day, THE ADMINISTRATION shall be allowed a rebate equal to 2.5% of the amount of Invoice Amount of such tariff Invoice paid on such date for payments within a period of one month of presentation of bills by the generating company, a rebate of 1% shall be allowed.

(b) If the Company shall receive all such amounts not later than such fifth Business Day in immediately available funds, such rebate, if any, may be taken by the ADMINISTRATION as a credit against the Tariff Invoice which is then due (and overdue) and then being paid.

(c) Notwithstanding the foregoing, THE ADMINISTRATION shall not be allowed a rebate under this Article 8.2 unless the Letter (s) of credit specified in Article 8.3 unless the Letter(s) of Credit specified in Article 8.3 and the Collateral Arrangements are at the time such rebate is to be allowed, being maintained by THE ADMINISTRATION in accordance with Article 8.3

As per Article 8.4 of the PPA If payment in full of a Tariff Invoice and all other amounts due in respect thereof is made on or prior date which is the fifth Business day after the Date of presentation of the Tariff Invoice to The Administration pursuant to Article 8.2The Administration shall be allowed a rebate of 2.5% of the amount of the Invoice Amount of such Tariff Invoice paid on such date for payment within a period of one month on presentation of bills by the generating company, a rebate of 1% shall be allowed.

Now let us turn to Article 8.2 which stipulates that the *Tariff Invoice for the payments due to the company under this agreement.....* which means that the IPP cannot raise invoice for any amount expecting that the Administration will pay in full in order to enjoy rebate. The amount for which the Invoice has to be raised has to be the AMOUNT DUE. The Administration has submitted that the petitioner was raising invoices including the cost of fuel and lube oil which was being supplied on free charge basis. The Administration has been verifying the AMOUNT DUE before the release of payment as part of bill passing checks. The Commission observes that it is a routine prudential check. However, if the Administration has been making unjustified deductions, they are liable to make balance payments with interest.

The Petitioner has cited judgment of the Appellate Tribunal for Electricity in Appeal No.176 of 2011 dated February 22, 2013. This judgment may not hold good in the present petition as in the decided case by the Hon'ble APTEL, the Tamil Nadu Generation and Distribution Company was allowing substantial ad hoc amount which was not accepted by the Hon'ble Tribunal. In the case of TANGEDCO Vs. PPN Power Generating Company Pvt. Ltd., PPN Power Company has been raising the invoices form time to time and the Electricity Board has been paying only ad hoc amount without providing any detail for such ad hoc payments. However, in the present petition A&N Administration was paying the NET amount after making deductions of what it considered not due at that time.

The Commission disposes of the petition with directions as under:

- 1) The completed cost of the project is fixed at Rs. 7829.65 Lakhs.
- 2) The Liquidated Damages are not recoverable from the petitioner.
- 3) Beyond 10.12.2002 and upto the end of COD namely 02.04.2003, the petitioner is eligible to receive the deemed generation charges in terms of 3.3 (c) (iii) of PPA.
- 4) The incentive of 0.65% is applicable on the "amount of equity" as defined in the PPA and "not on the return on equity" as pleaded by the respondent, for every 1% increase in annual PLF over normative PLF.
- 5) The interest on Debt is reimbursable in the monthly tariff billing, on the basis of actual interest amount paid by the Petitioner. Along with each monthly invoice, the Petitioner is required to provide necessary documentary evidence in support of its claim to the Administration, from the respective lenders, for the prevailing rate of interest, repayment of loan, interest amount due on the reduced balance of loan after repayment and the interest amount actually paid by the Petitioner. For the purpose of the debt portion of the project cost, the loan amounts from Citi Bank and Unsecured Loan as approved by the Commission are to be included.
- 6) **Interest on working capital:** It is seen from the Written Submissions of both the parties that the Administration had started supplying HSD and Lube oil at the request of the

Petitioner from July 2008 and January 2009 onwards respectively. Since the respondent is providing HSD and Lube Oil, while calculating the Working Capital requirements, these elements (Thirty days primary fuel cost & sixty days Lube Oil cost) are not to be included. As per the documents and Written Submissions provided by the Petitioner, SPCL has taken a WC loan from SBI on floating interest rate basis. The interest on Working Capital is payable on actual basis on furnishing documentary proof of payment to the Bank.

- 7) HEAT RATE: Heat Rate beyond 2010 kcal/ kWh is presently not recommended. However, in future the aforementioned suggestion of the CEA regarding the major overhauling and subsequent determination of Heat Rate and its consideration by the Commission may be pursued.
- 8) LUBE OIL CONSUMPTION: No change in the specific lube oil consumption is recommended as of now as norms are decided over the life of the plant. While initially the lube oil consumption may be less than the normative value, over the years it may exceed the norm value but as norms are decided based on the average over the life of the plant, on the whole it would average out.
- 9) Density of HSD: The Commission directs the respondent to accept the authenticated MET data submitted by the petitioner for the purpose of calculation of density of HSD.
- 10) The Capital Cost as well as all operating parameters as approved by the Commission and the various tariff elements as enumerated in the PPA which flow from Capital Cost will become the basis for tariff determination with effect from the COD. The amount thus worked out month wise will be the Tariff due as per PPA. Actual payments made when compared with the “benchmark month wise due tariff” will determine the amount of Arrears/Recoveries.
- 11) The payment of arrears to the Petitioner will be made along with the interest on delayed payments as per terms of the PPA (as followed by the respondent on the recovery from the petitioner in the past). Similarly, recoveries from the Petitioner by the respondent will also be made along with interest as per terms of the PPA.
- 12) **REFURBISHMENT OF THE PLANT:** The plant having completed 10 years of operation, it is the right time for renovation of the plant after carrying out R&M study and Cost benefit analysis and proposal submitted to the Commission for taking prior “in principle” approval before proceeding with the actual works. For this purpose the Petitioner should make a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension, financial package, phasing of expenditure, schedule of completion, estimated completion cost and any other information considered to be relevant and file a petition before the Commission.
- 13) **The following charges being claimed as extra by the Petitioner are not admissible:**
Water Charges, Octroi Charges: (Administration may, however provide support to the

Petitioner for exemption of Octroi charges as the plant is outside the bounds of Municipal Committee.) Reimbursement of fees payable to Port management Board and Increase in O&M expenses other than the escalation provided in the PPA.

14) **REBATE:** In view of the fact that the Capital cost was not finalised, both parties have been working with various figures of the Capital Cost, as also other tariff related parameters, therefore, the Invoices raised were being paid by the Administration on the basis of payment considered by them as due unilaterally as decided by the Administration. The rebate is applicable retrospectively since COD, on *all Tariff Invoice amounts released* within the PPA stipulated time for availing the Rebate. Any under-payment / over-payment be regulated by a para no. 11 of the directions as above in this order.

If "amount paid" within the PPA stipulated time for availing the Rebate is equal or more than "Due amount" as calculated as per this order, then "Rebate" availed by A&N Admn. be retained by them. If "amount paid" (x) within the PPA stipulated time for availing the Rebate is less than the "Due Amount"(y) as calculated as per this order, then "Rebate" availed on excess of (y-x) be refunded alongwith the interest as per PPA provisions.

15) Loss of Opportunity claim: As there is no provision in the PPA regarding loss of opportunity claim, this claim of the petitioner is rejected.

16) As there is no provision in the PPA regarding payment of HSD evaporation losses as also viewed by CEA vide letter dated January 22, 2013 that there is no provision in the PPA to allow compensation for evaporation losses no compensation on account of HSD Handling/Transportation losses is payable to the petitioner; also, the same decision holds good in respect of HSD supply by the respondent to the petitioner.

17) **Both the parties are directed to submit compliance report in this regard to the Commission within a fortnight.**

18) **Disposal of additional affidavit filed by M/s SPCL dated 13.06.2013:**

The petitioner - M/S Suryachakra Power Corporation Ltd. has submitted an additional affidavit dated 13.06.2013 with a prayer that there was an urgent need to stop the respondents from deducting amount from monthly invoice raised by the petitioner in contravention with terms of the PPA and repay the amount of Rs. 58,38,345/- deducted from invoice of the petitioner for the month of May, 2013 with interest as per the provisions of the PPA.

Copy of the additional affidavit was supplied to the respondents. Counsel for the respondents prayed for 15 days time for filing reply to the additional affidavit of the petitioner. The Commission considered the request of learned Counsel for the respondents, acceded the same and directed the respondents to file reply to the additional affidavit of the petitioner on or before 24.06.2013 with advance copy to the petitioner.

The respondent submitted the reply on 24.06.2013.

The Commission noted that the formula for calculation of fixed charges payments for any billing period is laid down in Appendix D to PPA.

“Fixed charge Payment” with respect to any billing period in any Tariff year shall be

$$\frac{\text{Estimated Annual Cost x D x (A/B)}}{\text{Number of days in such Tariff year}} - C$$

Where

- A= PLF calculated (rounded to the fourth decimal place) over all billings period between and including the first billing period in such tariff year, and to the end of the applicable period (the billing period for which fixed charge payment is being calculated) in such tariff year, provided that A shall not exceed NPLF.
- B= 68.49% (NPLF)
- C= the sum of all fixed charge payments due and paid for all prior billing periods in such tariff year.
- D= the number of days elapsed in such tariff year through the last day of such billing period.

The respondents have given in the reply that the PLF achieved during the month of April, 2013 was much below the normative PLF on account of shutting down of three units out of the four units of SPCL. The respondent had also apprehended that in view of the bad condition of the DG sets, continuous/ reliable generation upto the normative PLF level could not be achieved by the petitioner. The respondent also has given in their reply that they were constrained to restrict the fixed charges for the month of April, 2013 to the amount payable corresponding to achieve PLF in accordance with the PPA provisions.

The Commission examined the PPA provisions in this regard and concluded that for the purpose of payment of monthly fixed charges, the monthly PLF is to be reckoned with. However, the Annual PLF will also be calculated at the end of each financial year and the monthly adjustments will be set off there against.

19) The Commission further reiterates its earlier directives to both the parties about their joint responsibilities to maintain uninterrupted power supply to the consumers in the Islands.

Sd/-

(S.K.Chaturvedi)
Member

Sd/-

(Dr. V.K. Garg)
Chairperson