TAMIL NADU ELECTRICITY REGULATORY COMMISSION

(Constituted under Section 82(1) of the Electricity Act 2003)
(Central Act 36 of 2003)

PRESENT

Thiru. S. Kabilan	**-**	**Chairman**
Thiru. R. Rajupandi	**-**	**Member**
and		
Thiru K. Venugopal	**-**	**Member**

DRP No.10 of 2008

GMR Power Corporation Ltd.,
Regd.Office
Skip House 25/1
Museum Road
Bangalore 560025 … Petitioner

Counsel for Petitioner
Thiru Gopal Jain

Vs

Tamil Nadu Electricity Board
Electricity Avenue
144, Anna Salai
Chennai-600 002 ….. Respondents

Counsel for Respondents
Thiru G.Masilamani
Advocate General
Thiru K.Surendranath,
Thiru R.Muthukumarasamy
Senior counsel
Thiru H.S. Mohamed Rafi

Dates of hearing: 13-8-2008, 14-8-2008, 10-11-2008, 5-12-2008 12-1-2009, 1-4-2009, 18-6-2009, 19-6-2009, 9-7-2009, 30-7-2009, 15-9-2009, 16-9-2009, 17-9-2009, 18-9-2009, 8-10-2009, 9-10,2009, 21-10-2009, 22-10-2009 and 16-11-2009

Date of Order: **16-4-2010**

PART – I

GENERAL ISSUES

I DRP No.10 of 2008

The petitioner has listed the following prayers:

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

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

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

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

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

f) to direct the respondent to pay costs

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

II. IA No.6 of 2008 in DRP No.10 of 2008

The prayer was amended in IA No.6 of 2008 modifying the claim as follows:

i) Land Lease Rentals	:	Rs. 66,25,56,939/-
ii) Minimum Alternate Tax (MAT)	:	Rs. 15,16,67,605/-
iii) Interest on Working capital	:	Rs. 46,02,93,241/-
iv) Reconciliation of Accounts	:	Rs. 8,34,48,424/-
v) Start/Stop claim	:	Rs. 44,12,00,000/-
vi) Rebate	:	Rs.175,36,39,954/-
vii) Unauthorised deduction of entry tax	:	Rs. 11,71,46,165/-
viii) Interest on delayed payment	:	Rs. 66,45,37,890/-

Total:		Rs.433,44,90,219/-

III IA No.6 of 2008 in DRP No.10 of 2008

This was disposed of on 5th December 2008 as follows:

"In the above IA No.6 of 2008 in DRP No.10 of 2008, the entire matter will be heard including the question of admissibility of the amendment petition as well as the merits of the original petition and the amendment petition. Main arguments will also include arguments on the admissibility of the amendment petition".

IV. IA No.2 of 2008 in DRP No.10 of 2008

The prayer in IA No.2 of 2008 is to

a) direct the respondent to secure the amount claimed in schedule - I by depositing the same or furnishing a bank guarantee.

b) direct the respondent to pay Rs.57.12 crore outstanding dues towards tariff invoices raised by the applicant.

c) restrain the respondent from making any unauthorized deductions/ set offs / short payment / irregular payment on tariff invoices raised by the applicant and to make timely payment of the same.

V. IA No.2 of 2008 in DRP No.10 of 2008

This was disposed of by the Commission on 13-8-2008 with the following Interim Order:

> *"The petitioner shall pay the monthly lease rent as per the last payment within the time stipulated in the land lease agreement. He shall raise the tariff invoices against TNEB within the time stipulated in the power purchase agreement. The component of interest on working capital incorporated in the tariff invoice shall be as per the formula adopted in the latest invoice. The TNEB shall make the payment within the time stipulated in the power purchase agreement and claim rebate, if the deadline prescribed in the PPA is adhered to".*

VI. IA No.4 of 2008 in DRP No.10 of 2008

The prayer is for production of certain documents to the petitioner by the respondent Board.

VII. IA No.4 of 2008 in DRP No.10 of 2008

This was disposed of on 12th January 2009 with the following Order:

> *"1. The prayer in IA No. 4 of 2008 in DRP No. 10 of 2008 is to direct the Respondent Board to produce the documents mentioned in items (i) to (vii) in paragraph 2 of the said IA No.4.2. Paragraph 2 of the said IA No.4 is reproduced below for easy reference.*
>
> *"2. The petitioner states that the Respondent may be directed to produce, submit, inter-alia, the following documents.*
>
> *(i) All notes put up to the Board of Directors / members, minutes of Board Meetings and file notings pertaining to Land Lease Rental, Refund of MAT, Rebate, Interest on Working Capital, Entry Tax, Interest on delayed payments, full payment of tariff invoices, Reconciliation of Accounts for the period 1996 to August 2008.*
>
> *(ii) All communications addressed to and received from the Government of Tamil Nadu including directions and orders given in respect of revision of land lease rental and refund of excess payment towards land lease rental.*
>
> *(iii) All communications addressed and received from concerned Collectors / District Authorities in respect of valuation of land falling in various surveys connected with the lease land given to the petitioner by the respondent.*
>
> *(iv) Terms of the reference of the Expert Committee appointed to go into reasonableness of land lease rental levied by the Respondent.*
>
> *(v) Copy of the study report dated 21-3-2005 of the Committee headed by Justice David Christian including its Annexures, representations made by the petitioner and the respondent and all the materials details pertaining to the same.*
>
> *(vi) All file notings, memos and minutes pertaining to the claims made in the petition.*

(vii) All internal file notings and notes and communications put up to the Chairman / Board of Directors pertaining to the notice dated 23-06-2008 and the reminder dated 02-07-2008 sent by the petitioner."

3. The Respondent Board in their counter-affidavit briefly stated as follow :

(a) Before entertaining the application for production of documents etc. with reference to land lease rental, the issue has to be decided as to whether the dispute relating to land lease rental, would fall within the jurisdiction of this Hon'ble Commission. Even assuming, without admitting, that this Hon'ble Commission would have jurisdiction to entertain this dispute, the documents sought for are not produceable as evidence within the meaning of Sec. 94(1) (b) of the Act, 2003.

(b) The documents sought for with reference to claims 2 to 8 are also not produceable as evidence under sec. 94 (1) (b) of the Act, 2003.

(c) The direction sought for, for the production of records at this sage is both not maintainable and premature.

(d) The documents mentioned in para 2 are general, vague and sweeping in nature. In any event, the applicant cannot claim for the production of documents which are in the nature of file noting, internal correspondences and such similar documents, which are purely internal correspondences and materials intended for administrative use purposes of this Respondent alone. Such documents shall not become binding enforceable documents between the applicant and the respondent.

(e) It is the duty of the applicant to specifically state the nature of each documents and also explain and satisfy this Hon'ble Commission as to how each one of the document sought for is germane, relevant and enforceable against the respondent for adjudication of the dispute connected therewith. In the absence of the same, the applicant is not entitled to seek production of documents alleged to be in the custody of the opponent viz. the Respondent herein.

(f) The direction sought for in para 4 of the application, namely, to give inspection of documents to the Chairman and to produce and file these documents before this

Hon'ble Commission are not maintainable under sec.94 (1) (b) of the Act.

4. The Learned Advocate General Thiru. Masilamani representing the Respondent Board contended that the Commission has no jurisdiction to go through the Land Lease. He stated that the petitioner is not entitled to ask for the entire records of TNEB in this proceeding which would enlarge the scope of the jurisdiction of the Commission. He further stated that the petitioner is entitled to ask for germane and relevant documents. He pointed out that the expression "producible" in section 94 (1) (b) of the Electricity Act 2003 would mean only those documents which are necessary for evidence and that the said section 94 (1) (b) does not provide for inspection of records of Respondent Board. The petitioner by way of reply to the above arguments of Learned Advocate General stated that discovery would mean inspection. He referred to a Supreme Court decision according to which all disputes can be entertained by the Commission. He further noted that the PPA would prevail over land lease agreement. The Commission would rule on this issue later. The petitioner pointed out that these documents would help the Commission in arriving at a proper decision and that section 94 empowers inspection of documents.

8. <u>Findings of the Commission</u>

It is to be noted that under Section 96 of the Electricity Act 2003 (Act 36 of 2003) the Commission may specially authorize any Gazetted Officer to enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973 in so far as it may be applicable. As per section 94 (1) (b) of the Act, the Commission has got the powers of a civil court under the CPC in respect of discovery and production of any document or other material object produceable as evidence. Rule 15 of Order XI CPC which relates to inspection of documents reads as follows:

15. "Every party to a suit shall be entitled ***at or before the settlement of issues*** *to give notice to any other party, in whose pleadings or affidavits reference is made to any document or who has entered any document in any list annexed to his pleadings to produce such document for the inspection of the party giving*

such notice, or his pleader, and to permit him or them to take copies thereof, and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit." All the documents as mentioned in para 2 of the said IA are not mentioned in the counter-affidavit of the Respondent Board. As per rule 1 (5)of Order XIV CPC, the Court shall, reading the plaint and the written statements and after hearing the parties, ascertain upon what material proposition of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. As per regulation 31 (3) of TNERC – Conduct of Business Regulations 2004, the order of Commission shall interalia contain the points or issues for determination.

9. <u>Conclusion</u>

Both the petitioner and Respondent Board are directed to frame draft issues to be decided by the Commission in the said DRP: 10 of 2008 for the approval of the Commission. If and when any document is found to be relevant for deciding the issues involved in the instant case, the Commission will authorize an officer of the Commission to take copies of such document in terms of section 96 of the Act. With the above observations, IA No.4 of 2008 is finally disposed of without costs.

VIII. The amended claim of Rs.433.45 crores filed by the Petitioner in IA.No.6 of 2008 was further brought down to Rs.424.98 crores in the statement filed during the hearing on 18-9-2009. The statement was served on the Respondent by the Petitioner. The revised claim is as follows:-

			Rs. in Crores
1)	Land Lease Rent	-	89.81
2)	MAT	-	14.95
3)	Interest on working capital	-	46.03

4)	Reconciliation of accounts	-	8.35
5)	Start / stop charges	-	44.12
6)	Rebate	-	164.01
7)	Entry tax	-	11.71
8)	Interest on delayed payment	-	46.00

	Total	-	424.98

IX. HISTORY OF THE PROJECT

(1) In 1990's the Government of India adopted a liberal Industrial Policy, as a result of which, private companies and corporate bodies were permitted to undertake production of electricity. Supply of electricity to consumers is to be done by Electricity Boards to consumers at regulated price. Since the state undertakings were reluctant to increase the price of electricity supplied to the consumers and since the Government both State and Central, were inclined to supply electricity to agriculturists at subsided rates, all the Electricity Boards were running on loss. All these factors were taken into consideration and Government of India formulated a policy as per which, private enterprises were allowed to engage in production of electricity. Previously only hydel projects were the sources for production of electricity and therefore, comparatively the cost of production was kept to the minimum. But, after exhaustion of natural resources available, other sources had to be tapped for production of power. Thanks to modern technologies, electricity is being produced by use of coal and other fuel, like diesel, naphtha, etc. Even Atomic Energy has been used for production of electricity and projects have come up in India. While private entrepreneurs were allowed to generate electricity by making use of coal, diesel and other petroleum products, the prices were still regulated by the Electricity (Supply) Act 1948. The private producers known as Independent Power Producers were permitted return on equity of 16%. So, even

while allowing private enterprises in the field of production of electricity, their capacity to make profit is regulated. This is also only in accordance with the policy of the Government both Central and State, to supply electricity to poor people who cannot afford to pay a high price. Therefore, the fact remains that a substantial section of consumers is provided with electricity at subsidized price.

(2) The TNEB advertised an invitation in 1994 for setting up a diesel engine power project in the private sector in Tamil Nadu in pursuance of the Industrial Policy of the Government of Tamil Nadu for setting up 100 MW Diesel Engine Power Projects at Basin Bridge, Arni and Samalpatti. In response to the above Notification, the petitioner signed a Memorandum of Understanding (MoU) on 13-1-1995 with the TNEB for setting up a diesel based power plant with a capacity of 200 MW at Basin Bridge, Chennai. Techno Economic Clearance (TEC) was granted by the Central Electricity Authority (CEA) on 10-7-1996. A Power Purchase Agreement (PPA) was executed by the petitioner and the TNEB on 12-9-1996. The PPA was amended by Addendum 1 on 26-2-1999 and Addendum 2 on 1-3-2000. Land Lease Agreement was executed on 26-3-1997. The project, as per the PPA was to be completed in 28 months from the effective date, failing which liquidated damages at the rate of Rs.1.056 lakhs per day of delay for the first 180 days and thereafter Rs.4.56 lakhs per day for each day of delay was leviable. Financial closure was achieved on 18-6-1997. The first and second units were commissioned on 31-12-1998. The third unit was commissioned on 30-1-1999 and the fourth unit was commissioned on 15-2-1999.

X. General issues

The Commission, after hearing both parties, framed the following general issues for decision:-

1. Whether the Commission has jurisdiction to adjudicate the present dispute?
2. Whether the claim is barred by limitation?

XI. JURISDICTION

(A) Contention of the Petitioner

(1) The Commission alone has jurisdiction to adjudicate a dispute between a generator and a distribution licensee under Section 86 (1) (f) of the Electricity Act 2003. The judgement of the Supreme Court in Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited, 2008 (4) SCC 755 is clear on this. The relevant portion is extracted:-

> *"Hence on harmonious construction of the provisions of the Electricity Act 2003 and the Arbitration and Conciliation Act 1996, we are of the opinion that whenever there is a dispute between a licensee and a generating company only the State Commission or Central Commission (as the case may be) or Arbitrator nominated by it can resolve such a dispute ....."*
>
> *"However since the Electricity Act 2003 has come into force with effect from 10-06-2003, after this date all adjudications of disputes between licensees and generating companies can only be done by the State Commission or the Arbitrator (or Arbitrators) appointed by it . After 10-06-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the Arbitrator (or Arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an Arbitrator appointed by it. This is because there is no restriction in Section 86 (1) (f) about the nature of the dispute"*

(2) The order of the Commission in DRP No.7 of 2008 in PPN Vs TNEB, which is based on the above judgement of the Supreme Court, has been upheld by the Appellate Tribunal for Electricity. That order of the Commission has not been challenged by the TNEB and therefore they are bound by the order of the Appellate Tribunal for Electricity.

(B) Contention of the Respondent

(1) The Respondent contests the jurisdiction of the Commission to entertain the present case. The claim of the petitioner is for recovery of money. Being a money suit, the petitioner ought to have approached a Civil Court. The Commission has no jurisdiction to pass any decree. As per Section 9 of the Code of Civil Procedure 1908, a Court shall have jurisdiction to try all suits of civil nature excepting suits, which are either expressly or impliedly barred. The PPA was executed by the petitioner much before the enforcement of the Electricity Act 2003 and therefore the Commission has no jurisdiction to entertain a dispute thereon. Section 145 of the Electricity Act 2003 bars the jurisdiction of Civil Courts only in matters relating to Section 126 and 127. The jurisdiction of Civil Courts is not ousted in respect of other matters.

(2) The judgement of the Supreme Court in Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited is hit by the doctrine of per incuriam. The said judgement does not refer to the earlier judgements of the Supreme Court and has not dealt with various other relevant provisions of the Arbitration and Conciliation Act 1996 and other special enactments. The said judgement came to be passed in the context of validity and legality of appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act 1996. The ratio behind the judgement is not with reference to the facts involved in the present case for money claim under Section 86 (1) (f).

(3) Combined reading of Sections 86 (1) (f) and 158 of the Electricity Act, 2003 makes it clear that the intention of the legislature is not to confer jurisdiction on this Commission for resolving a dispute in the nature of passing decree or an award as that of a Civil Court or that of an Arbitrator. Article 15.2 of the PPA provides for arbitration of disputes. The petitioner has chosen to by-pass Article 15.2 of the PPA by approaching the Commission under Section 86(1)(f) of the Electricity Act 2003.

(C) Ruling on jurisdiction

(1) The Electricity Act 2003 has been enforced from 10th June 2003. Section 86 of the Act lists the functions of the State Commission. Section 86(1)(f) entrusts adjudication of disputes between the licensees and generating companies to State Commissions. The Electricity Act 2003, being a special Act, overrides any other Act in regard to adjudication of disputes between the licensees and generating companies. The petitioner has approached this Commission for dispute resolution and therefore the Commission is well within its powers to entertain the petition. The dispute between the generator and the licensee has been brought before us in July 2008. In 2008 (4) SCC 755 , the Supreme court in paragraph 60 of the judgement has ruled as follows:

> *"However, since the Electricity Act 2003 has come into force with effect from 10-6-2003, after this date, adjudication of disputes between licensees and the generating companies can only be done by the State Commission or the Arbitrator (or Arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of disputes between the licensees and generating companies by any one other than the State Commission or the Arbitrator (or Arbitrators) nominated by it".*

(2) We do not accept the contention of the respondent that the above judgement of the Supreme Court is hit by the doctrine of per incuriam and that the ratio behind the judgement is not with reference to the facts involved in the present case for money claim under Section 86(1)(f) of the Electricity Act 2003. The above judgement has not been over ruled so far. The law of the land is laid down by the Supreme Court as per Article 141 of the Constitution of India. The law declared by the Supreme Court is binding on all Courts within the territory of India and we are no exception.

(3) Therefore, adjudication of the present dispute falls within the jurisdiction of this Commission.

XII. LIMITATION

(A) Contention of the Petitioner

(1) The Limitation Act, 1963 does not apply to proceedings before quasi judicial bodies (refer 1985(3)SCC 590; 2008 (7) SCC:169; AIR 2000 SC 2023; AIR 1980 SC:1037 and 1985 (3) SCC 590.) The Supreme Court in a catena of cases referred to above has held that Limitation Act does not apply to appeals or applications before quasi judicial tribunals. In the case of *Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Dept. & Ors.*, (2008) 7 SCC 160 the Supreme Court held that the schedule prescribes limitation only for court proceeding and not for proceedings before a tribunal or quasi-judicial body. In *Nityanand Joshi v. L.I.C.* 1969 (2) SCC 199 the Supreme Court has held that in the absence of any period of limitation prescribed under the Electricity Act, the Limitation Act cannot be applied to proceedings before the Commission.

(2) The Electricity Act is a self contained code. This Hon'ble Commission has been created under this Act. This Act does not prescribe a period of Limitation for instituting claims. Under Section 86 (1) (f) of Electricity Act 2003 no period of limitation is prescribed. Where no period of limitation is prescribed under a special statute by necessary implication it stands excluded. In 1997 (6) SCC:73 The Supreme Court has held that "In the absence of any specific limitation provided thereunder, necessary implication is that the general law of limitation provided in the Limitation Act, (Act 36 of 1963) stands excluded".

(3) The rationale for not prescribing limitation is to have expert bodies adjudicate on merits. Therefore, the Limitation Act has no application so far as Special Courts are concerned. The Supreme Court in 2004 (11) SCC:456 held that the provisions of the Act are not applicable to proceedings before bodies other than courts such as quasi judicial Tribunal or

even any executive authority the Act primarily applies to civil proceedings or some special criminal proceedings. The plea of limitation raised by the Respondent is contrary to the scheme of the Act, and the well settled legal position. This is yet another attempt by the Respondent to wriggle out of its contractual breaches and consequences thereof.

(4) The Respondent in the alternative has argued that the claims raised by the Petitioner suffer from delay and laches. This is not so as the Petitioner bonafide was vigorously pursuing the matter with the Respondent on an on going basis. The Petitioner has, in good faith, pursued each of its claims which is evident from the detailed correspondence exchanged between the parties as well as various developments, which took place over this period. The Petitioner made a detailed representation on all its claims to the Chairman of Respondent Board in January, 2008. The Chairman of the Respondent had assured the Petitioner that these issues would be looked into but eventually reneged on this assurance.

(5) In the early 1990s, private sector participation was permitted in the electricity sector. The Petitioner was the successful bidder/developer and awarded this project at that time. The primary objective of the Petitioner was to implement, operate and manage the project, secure its investment, establish its credibility and build and nurture a long term relationship with the Respondent (as the PPA was for a period of 15 years).

(6) The Petitioner wanted to avoid disputes and litigation at the start of the project and during initial years of commercial operation, exercised utmost restraint even in most compelling circumstances believing in all earnestness that litigation should only be a measure of last resort. Disputes/litigation casts a shadow on the project. This, in turn, brings uncertainty which creates avoidable risks. As the Petitioner acted with resilience and promptitude, the question of delay and laches does not arise.

(7) The tenor of the Respondent's argument before this Commission is that the Petitioner, for every breach, should have taken recourse to litigation. This would have harmed the project and in turn public interest. The Respondent's attempt is to push the parties to litigation rather than discharging its contractual obligations and respecting the rights of and interests of the investors, which runs contra to the GOTN's policy objectives. This is also demonstrative of the Respondent's attitude towards private investors.

(8) The Petitioner as a developer of the project had invested over Rs.800 Crores. Large amount of these monies were raised from Banks and Financial Institutions. The Petitioner had entered into long term agreements with fuel suppliers and O&M Contractors, and had built an establishment and infrastructure to operate and maintain the project to discharge its obligations under the PPA. This was done primarily to ensure successful commissioning and operation of the power plant which in turn, would augment the capacity of power in the State, which was reeling under shortage of power.

(9) The Petitioner attaches great importance and significance to the smooth and continued operation of the power plant in order to supply electricity generated to the State rather than being trigger happy and acting like an ordinary money Lender. Raising disputes and resorting to litigation would have strained the relationship between the parties, affected the investor confidence, hampered the operation and maintenance of the project and eventual generation of electricity. In turn, this could have triggered defaults in the long term obligations under taken by the Petitioner with the lenders and fuel suppliers, and would have defeated the very purpose of setting up the project.

(10) Though the Respondent chose to argue that the Petitioner should have pulled the trigger for every breach and enforced its remedies including terminating PPA and resorting to third party sale of electricity, in reality, the Respondent was not in a position to face the consequences of any such argument. Such an argument borders, to say the least, on an irresponsible statement by a statutory authority, which is also a State utility and custodian of public interest. On the part of the Petitioner, it could not have acted like an ordinary money lender and resorted to multifarious litigations. The fact that the Petitioner has repeatedly shown indulgence or extended cooperation to the Respondent in times of its need and exercised extreme restraint on its part, cannot be held against the Petitioner. In the facts and circumstances of the case, none of the claims raised by the Petitioner suffers from any delay or laches.

(11) On account of Respondent's clear and categorical admission of its liability and continued failure to settle its contractual dues in full, the claims of the Petitioner are alive and subsisting. These acts of omission and commission on the part of the Respondent have given rise to a continuing wrong, to be adjudicated upon by this Hon'ble Commission. In National Research and Development Corporation. Of India –vs- Chrome International, MANU/DE/7254/2007, the Hon'ble Delhi High Court has held that *"It is only on the agreement coming to an end, that the petitioner would be entitled to claim accounts and such accounts could be claimed for the whole period of agreement.* ***A contrary view would imply that on each default, the petitioner would be required to file a petition for reference of all disputes to arbitration which in my considered view cannot be accepted"***

(12) The Respondent's attempt to import the principles of the Limitation under the Arbitration and Conciliation Act, 1996 is an attempt to read into the Electricity Act which is impermissible. Such an

attempt will destroy the legislative intent. Proceedings under the Electricity Act, 2003 are governed by the provision of this Act alone. The present dispute is being adjudicated under the Electricity Act and not under the Arbitration and Conciliation Act, 1996, especially since this Commission is deciding the matter itself.

(B) Contention of the Respondent

(1) It is respectfully submitted that the relief claimed by the petitioner is barred by limitation. It is submitted that a money claim can be maintained only for a period of 3 years, immediately preceding the date of filing of the petition as per Article 136 of the Limitation Act.

(2) It is submitted that under the pretext of raising a dispute under section 86(1)(f) of the Electricity Act, 2003, the petitioner cannot make an attempt to escape the period of limitation as contemplated under the Limitation Act pleading that no limitation is prescribed under the Electricity Act, 2003.

(3) It is submitted that this Hon'ble Commission have got trappings of a court and the law of limitation will apply while adjudicating a dispute under section 86(1)(f) of the Electricity Act, 2003.

(4) It is further submitted that when the petitioner is forced to approach the civil court for claiming the present relief, the petitioner will be bound by the period of limitation before the civil court. The petitioner cannot seek to avail a remedy before this Hon'ble Commission which is otherwise barred before a civil court under the law of limitation. It is further submitted that this Hon'ble Commission may be pleased to appreciate the delay

and laches on the part of the petitioner in the inordinate delay in approaching this Hon'ble Commission for the various relief sought in the petition.

(5) It is further submitted that if there is no applicability of limitation act while adjudicating a dispute under section 86(1)(f), it would lead to uncertainty of any dispute and the litigants will be sleeping over their rights for an indefinite period and every grievance will remain indefinitely unresolved, which would lead to a situation that anyone excepting the respondent board can claim anything at anytime by keeping all the issues always alive for an indefinite period.

(6) It is further submitted that even assuming though not admitted, that the law of limitation would not apply while adjudicating a dispute under section 86(1)(f) of the Electricity Act, 2003, this Hon'ble Commission may have to prescribe a reasonable period for the purpose of limitation for approaching this Hon'ble Commission in respect of any relief or remedy.

(C) <u>Discussion on Limitation</u>

(1) We wish to observe that whenever the legislature intended to provide for limitation, it has been done explicitly as revealed by the following enactments:

a) Section 39 of Advocates Act, 1961 provides that Sections 5 and 12 of the Limitation Act, 1963 shall apply to appeals under Sections 37 and 38 of the Act.

b) Section 171 of Ajmer Tenancy and Land Records Act, 1950 provides that Sections 4, 5 and 12, sub-section 2 of Section 14 and sub-sections 1 and 2 of Section 17 of the Indian Limitation Act, 1908 shall apply mutatis mutandis to applications and other proceedings under the Act.

c) Section 37 of Arbitration Act, 1940 stipulates that all the provisions of the Indian Limitation Act, 1908 shall apply to Arbitration as they apply to proceedings in Court.

d) Section 43 of the Arbitration and Conciliation Act, 1996 stipulates that the Limitation Act, 1963 shall apply to Arbitration as it applies to proceedings in Court.

e) Section 45-O of Banking Regulation Act, 1949 provides for special period of limitation.

f) Section 65 of Chit Funds Act, 1982 prescribes the period of limitation.

g) Section 23 – A of the Coal Mines (Nationalisation) Act, 1973 stipulates that the provisions of Sections 5 and 12 of the Limitation Act, 1963 shall apply to appeals under Section 23.

h) Section 23–A of Coking coal Mines (Natiolnalisation) Act, 1972 stipulates that the provisions of Sections 5 and 12 of the Limitation Act, 1963 shall apply to appeals under Section 23.

i) Section 10–GE of Companies Act 1956 stipulates that provisions of the Limitation Act, 1963 shall apply to appeals made to the Appellate Tribunal.

j) Section 60–A of the repealed Electricity Supply Act, 1948 deals with the period of limitation in certain cases.

k) Section 71(5) of Food Safety and Standards Act, 2006 stipulates that provisions of the Limitation Act, 1963 shall apply to an appeal made to the Tribunal.

l) Section 60 of the Information Technology Act, 2000 stipulates that the provisions of the Limitation Act, 1963 shall apply to an appeal made to the Cyber Appellate Tribunal.

m) Section 75 of the Major Port Trust Act, 1963 deals with Limitation Act, 1963.

n) Section 24 of Recovery of Debts due to Banks and Financial Institutions Act, 1993 stipulates that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to an application made to the Tribunal.

o) Section 15–W of the Securities and Exchange Board of India Act, 1992 stipulates that the provisions of the Limitation Act, 1963 shall apply to an appeal made to a Security Appellate Tribunal.

p) Section 22–D of Securities Contracts (Regulation) Act, 1956 stipulates that the provisions of the Limitation Act 1963 shall apply to an appeal made to Securities Appellate Tribunal.

q) Section 36 of Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 adopts the provisions of the Limitation Act, 1963.

r) Section 43 of Special Economic Zones Act, 2005 adopts the period of limitation prescribed by the Limitation Act, 1963.

(2) The Hon'ble Supreme Court in UTTAM NAMDEO MAHALE Vs. VITHAL DEO & ORS. has held as follows: [1997 (6) SCC 73] [1997 AIR 2695]

> *"Section 21 of the Mamalatdar's Court Act does not prescribe any limitation within which the order needs to be executed. In the absence of any specific limitation provided thereunder, necessary implication is that the general law of limitation provided in Limitation Act (Act 36 of 1963) stands excluded. The Division Bench, therefore has rightly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise."*

(3) This Commission deems it appropriate to refer to the Order of the Central Electricity Regulatory Commission delivered on 12th November 2008 in Madhya Pradesh Power Trading Company Vs. Principal Secretary, Energy Department, Government of Uttar Pradesh and others. Paras 26 to 35 of the Order deal with the applicability of Limitation Act, 1963. They are extracted below:

> *"26. Next we consider the objection of limitation or delay and laches. The Act is a special Act and does not provide for any period of limitation for filing of the application before the Commission. The Limitation Act, 1963 (the Limitation Act) consolidates the law for limitation of suits and other proceedings. We are conscious that the Hon'ble Supreme Court has consistently held the view that the provisions of the Limitation Act are not applicable to the proceedings before the quasi judicial bodies and tribunals. In LS Synthetics Ltd Vs Fairgrowth Financial Services Ltd & others [(2004) 11 SCC 456], the Hon'ble Supreme Court held as under:*
>
> *"33. The Limitation Act, 1963 is applicable only in relation to certain applications and not all applications despite the fact that the words "other proceedings" were added in the long title of the Act in 1963. The provisions of the said Act are not applicable to the proceedings before bodies other than courts, such as quasi-judicial tribunal or even an executive authority. The Act primarily applies to the civil proceedings or some special criminal proceedings. Even in a Tribunal, where the Code of*

Civil Procedure or Code of Criminal Procedure is applicable; the Limitation Act 1963 per se may not be applied to the proceedings before it. Even in relation to certain civil proceedings, the Limitation Act may not have any application. As for example, there is no bar of limitation for initiation of a final decree proceedings or to invoke the jurisdiction of the Court under Section 151 of the Code of Civil Procedure or for correction of accidental slip or omission in judgments, orders or decrees; the reason being that these powers can be exercised even suo motu by the Court and, thus, no question of any limitation arises."

27. The issue of applicability of the Limitation Act was also considered in Nityananda M. Joshi Vs LIC [(1969) 2 SCC 199] wherein the question was examined with reference to applicability of Article 137 thereof. The Hon'ble Supreme Court held that the Limitation Act deals with the applications before the courts and the labour court, a quasi judicial body under the Industrial Disputes Act, was not a court within the meaning of the Limitation Act and hence Article 137 of the Limitation Act was not applicable. The observations of the Hon'ble Supreme Court are extracted below:

"3. In our view Article 137 only contemplates applications to Courts. In the Third Division of the Schedule to the Limitation Act, 1963 all the other applications mentioned in the various articles are applications filed in a court. Further Section 4 of the Limitation Act, 1963, provides for the contingency when the prescribed period for any application expires on a holiday and the only contingency contemplated is "when the court is closed." Again under Section 5 it is only a court which is enabled to admit an application after the prescribed period has expired if the court is satisfied that the applicant had sufficient cause for not preferring the application. It seems to us that the scheme of the Indian Limitation Act is that it only deals with applications to courts, and that the Labour Court is not a court within the Indian Limitation Act,1963."

28. The issue was again considered in Sushila Devi Vs Ramanandan Prasad [(1976) 1 SCC 361] with reference to applicability of Section 5 of the Limitation Act to an application made before the Collector. Here also, the Hon'ble Supreme Court held that the Collector was not a court though certain powers under the Code of Civil Procedure were vested in him. The Hon'ble Supreme Court concluded that Section 5 of the Limitation Act could not be invoked in the proceedings before the Collector. These observations of the Hon'ble Supreme Court are extracted hereunder:

"The third ground on which the decision of the High Court rests relates to the applicability of Section 5 of the Limitation Act, 1963. We do not see how Section 5 could be invoked in connection with

the application made on October 17, 1965 by the first respondent. Under Section 5 of the Limitation Act an appeal or application "may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

The Collector to whom the application was made was not a court, though Section 15 of the Act vested him with certain specified powers under the Code of Civil Procedure; also, the kind of application that was made had no time limit prescribed for it, and no question of extending the time could therefore arise."

29. Another case in which this issue was considered is reported as Sakuru Vs Tanaji [(1985) 3 SCC 590]. In this case also the Hon'ble Supreme Court held that the Limitation Act does not apply to the appeals or applications before quasi judicial Tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under Code of Civil Procedure or Criminal Procedure Code, as per the observations extracted below:

"……the provisions of the Limitation Act, 1963 apply only to proceedings in "courts" and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. ……..."

30. "As noted above, the Act does not specifically lay down period of limitation for adjudication of disputes under clause (f) of sub-section (1) of Section 79. In the light of the above decisions of the Hon'ble Supreme Court, the Limitation Act cannot be invoked to decide the bar of limitation in the present petition."

31. "Notwithstanding the fact that the Limitation Act does not govern the proceedings before the quasi judicial authorities like the Commission, the courts have repeatedly held that the parties should approach for enforcement of their rights within a reasonable period. It has been held that any inordinate delay is fatal to the claim when raised. A classic example of this proposition of law is judgment of the Hon'ble Supreme Court dated 22.9.1964 in CA No. 140/64, titled Smt. Naraini Devi Khaitan Vs State of Bihar. This case had its origin through the proceedings before the High Court under Article 226 of the Constitution for

enforcement of fundamental rights. The Hon'ble Supreme Court held that if the petitioner is guilty of laches and there are other relevant circumstances to indicate that it would be inappropriate to exercise its prerogative jurisdiction under Article 226, ends of justice may require that writ should be refused. However, the matters are left to the discretion of the court which must be exercised judiciously and reasonably. The observations of the Hon'ble Supreme Court are extracted below:

"It is well-settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High Court would naturally like to give relief to him; but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that a party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court; in this matter too discretion must be exercised judiciously and reasonably."

32. A similar proposition of law was laid down in P.S. Sadasivaswamy Vs State of Tamil Nadu [(1975) 1 SCC 152] as seen from the extracts placed below:

"…….A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters. ……..."

33. In Rabindra Nath Bose Vs Union of India [(1970) 1 SCC 84] the Hon'ble Supreme Court refused to grant relief in a petition filed before it under Article 32 when the petitioner approached the Supreme Court after the lapse of a number of years, as noted from the following observations:

"It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution-makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay. We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."

34. "We proceed to examine whether there has been an unreasonable delay in the applicant approaching the Commission for adjudication of dispute. This matter is to be considered in the light of facts on record. Examined from this angle, we note that the question of compensation was first agreed to between the parties in the meeting dated 6-1-1976 held under the aegis of Member (Hydro-Electric), CEA for the period from 1-9-1967 to 30-9-1974. Subsequently, in the meeting held on 7/8-6-1977 between the representatives of UPSEB and MPEB the specific rates for compensation were agreed to which included the period from 1-10-1974 and onwards. Chief Secretary, Government of Madhya Pradesh in his DO letter dated 30-4-1991 addressed to the Secretary, Deptt. Of Energy, Government of Uttar Pradesh pointed out that an amount of Rs.15.47 crore as on September 1990, was payable by the State Government of Uttar Pradesh for non-supply or under-supply of power from the generating stations, after adjustment of an amount of Rs.16.13 crore paid by UPSEB up to January 1989. This establishes that the respondents had generally settled the applicant's claim pertaining to the period up to December 1988. It appears that payments amounting to Rs.28.61 crore were made by UPSEB thereafter also. This compensation payable by UPSEB was discussed in a meeting held on 9-9-1994 under the Chairmanship of Minister of State for Energy, Madhya Pradesh, whereat it was stated on behalf of MPEB that, as on 1-7-1994, an amount of Rs.41.874 crore was payable by UPSEB. In response, UPSEB suggested that after disallowing an amount of Rs.20.62 crore demanded on account of interest, only a sum of Rs.21.254 crore was payable. At the said meeting it was decided that the two sides should reconcile the amounts payable/receivable. In a subsequent meeting held between UPSEB and MPEB on 29-8-1996, this matter was again discussed, when

it was stated on behalf of UPSEB that a sum of Rs.9.56 crore was payable till September 1994, against MPEB's claim of Rs.48.464 crore, including interest of Rs.20.62 crore. Once again the matter came up at the fifth meeting of the Standing Committee of the Central Zonal Council held on 18-2-2000. At that meeting, the representative of the second respondent accepted the liability to pay an amount of Rs.34 crore, without interest. It was, however, decided that the dispute should be resolved by 30-6-2000. In yet another meeting held on 8/9-9-2005 and attended by the representatives of MPSEB and the respondents, including the State Government of Uttar Pradesh, the question of payment of dues for retention of Madhya Pradesh's share of the generating stations was discussed between the officials of two sides, when the respondents agreed to pay the amount after reconciliation. The last meeting the minutes of which are held on record, took place on 7/8-6-2007. At this meeting as well, the representative of the second respondent accepted to make payment of dues after reconciliation."

35. "From the above noted facts, it emerges that the respondents, in particular the second respondent, have always acknowledged their liability to pay compensation. However, no payments were made since they had either been insisting on reconciliation of the amount payable or were taking the plea of non-availability of funds. The respondents as public authorities who failed to supply electricity to the State of Madhya Pradesh, and themselves consumed its share, cannot be permitted to defeat the legitimate claim of the applicant, another public authority, on technical pleas of limitation etc. At no stage, there was any denial of the liability to pay the compensation. Even before us, they have accepted to pay the compensation, but of lesser amount than that claimed. The applicant has been pursuing its claim and the respondents have all along accepted the liability to pay compensation. The unresolved issue was only the quantum of compensation, which was payable after reconciliation of accounts. Under these circumstances, it cannot be held that the applicant's claim suffers from delay and laches. In our opinion, the applicant and its predecessors have been diligently and reasonably pursuing the claim for compensation."

(D) Ruling on Limitation

As held by the Hon'ble Supreme Court in the judgement referred to in para (2) above and as ruled by the Central Electricity Regulatory Commission in para (3) above, this Commission holds that

the Limitation Act, 1963 would not apply to proceedings before this Commission. Claims should be examined from the angle of delay and laches. That is to say that relief should be sought at the earliest opportunity, depending on facts and circumstances of each case.

PART – II

REBATE

(A) Facts of the case

(1) The Petitioner is required, under the terms of the PPA executed on 12-9-1996, 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. The PPA further stipulated that rebate would be admissible, only if the Respondent establishes a Letter of Credit. The PPA was amended with effect from 1-3-2000 to provide additionally for a rebate of 1% for settlement of invoices between the 6th day and 30th day. This amendment did away with Letter of Credit as a pre-condition for availing rebate. The first and second Units of the Petitioner were commissioned on 31-12-1998. The third Unit was commissioned on 30-1-1999. The fourth and the last Unit was commissioned on 15-2-1999. The invoices for the first and the second Units were due in February 1999. The invoices for the third and the fourth Units were due in March 1999.

(2) The Petitioner consented in his letter dated 18-12-1999 addressed to the Respondent for deduction of 15 paise per unit pending finalization of capital cost by the Central Electricity Authority (CEA). The CEA determined the capital cost of the project of the Petitioner on 23-2-2001. The Respondent, however, continued the deduction upto March 2005. The Petitioner, further, submitted 41 letters to the Respondent between 28-12-2001 and 28-3-2005 consenting to deduction of rebate in regard to ad-hoc payments.

(3) The TNEB decided on 29-6-2001 unilaterally to limit the settlement of invoices @ Rs.2.25 per unit. This rate was enhanced to Rs.2.50 per unit in the Board Meeting held on 8-1-2005. The arbitrary limit of Rs.2.50 per unit was withdrawn with effect from 1-4-2005.

(4) The Chairman, TNEB intimated the Petitioner on 10-9-2001 that the TNEB was undergoing temporary financial strain resulting in its inability to make full payment against tariff invoices. He assured the Petitioner that payments as obligated under the PPA would be made in full effective from January 2002. The TNEB in its letter dated 17-9-2003 admitted that as on 16-9-2003 Rs.99.75 crores was due to the Petitioner, against which Rs.32.51 crores was released. Again, the TNEB on 8-1-2004, confirmed that the balance due to the Petitioner as on 31-12-2003 was Rs.55.35 crores.

(5) The Petitioner submits that the Respondent availed of rebate contrary to the provisions of the PPA.

(B) Contention of the Petitioner

(1) For the period 1999-2001 the respondent deducted an amount of Rs.22.26 crore even though it was not entitled to any rebate on account of short payment / part payment. For the period 2002-05 it further deducted an amount of Rs.44.54 crore as rebate. The total amount of rebate deducted by the respondent from payments made to the petitioner for the period from April 1999 to June 2008 comes to Rs.117.83 crores. In view of the admitted breach by the respondent of its contractual obligations of settling tariff payments in full, the petitioner is entitled to amounts illegally deducted towards rebate of Rs.117.83 crore from the respondent.

(2) 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 payments of Tariff Invoices are made in full and within the time prescribed, as per Clause 8.5 (a) (prior to Addendum 2 to PPA, Volume I page 106 & 107) and Clause 8.3(b) (post Addendum 2 to PPA, Volume I page 272). Full Payment of Tariff Invoices is mandatory in terms of Clause 8.2(b) (prior to Addendum 2 to PPA, Volume I Page 104) and Clause 8.3(d) (post Addendum 2 to PPA, Volume I, page 272) of PPA notwithstanding that the Respondent disputes the accuracy of a Tariff Invoice or a Supplementary Invoice.

(3) Non Payment in full of any Tariff Invoice amounts to fundamental breach of payment obligations under the said Clause 8.2 (Volume-I, page 104) or 8.3(b) (Volume I, page 272) as applicable. This disentitles the Respondent from claiming any Rebate under Clause 8.5 (a) (prior to Addendum 2 to PPA, Volume I page 106) and Clause 8.3(b) (post Addendum 2 to PPA, Volume I page 272) of PPA and also attracts interest on late payments under Clause 8.7(prior to Addendum 2 to PPA, Volume I page 107) and Clause 8.6 (post Addendum 2 to PPA, Volume I page 274) of the PPA.

(4) Prior to Addendum 2 (01-03-2000), the Respondent had to fulfill the additional conditions precedent stipulated in Clause 8.5(c) (Volume I page 107) of PPA as well, to be eligible for Rebate. These conditions inter alia required the Respondent to establish and maintain Letter of Credit and Collateral Arrangements, but this was not done. Further, the Respondent has failed to pay any Invoice in full and within the time. 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 Invoices. Also, the Respondent abused its dominant position, exercised undue influence and coercion, subjected the Petitioner to economic duress, obtained certain purported consent letters from the Petitioner and availed Rebates even while making ad-hoc and delayed payments.

(5) Thus, the Rebates availed were unlawful and in gross violation of the applicable provisions of PPA. The Petitioner is therefore entitled to claim the entire Rebate availed by the Respondent together with interest thereon in terms of PPA. Even after giving benefit of reduction of 15 paisa per unit until approval of capital cost by CEA and deduction of Land Lease Rentals from Tariff Invoices, at best, there are only 7 instances out of 191 payments in all, wherein the Respondent could possibly avail Rebate. Even after giving the benefit of these 7 instances to the Respondent, the Petitioner is entitled, as on 30-06-2008, to claim Rs. 1,135,628,459 (Principal) together with interest thereon amounting to Rs 504,504,934, aggregating Rs1,640,133,394/-. The Petitioner has filed a detailed statement in support of this claim, which is at Page No.51 to 62 of the Additional Statement of Claims filed by the Petitioner on 18th September 2009. The

Petitioner is also entitled to further interest from 01st July, 2008 till the payment on the said sum of Rs.1,640,133,394/-.

(6) During the course of the arguments, the Learned Counsel for the Respondent conceded that there have been short payments, delayed payments and ad-hoc payments of Tariff Invoices. The statement filed by the Petitioner on 18th September 2009 has also not been rebutted by the Respondent.

(7) The main contentions on behalf of the Respondent were that,

(i) the amounts claimed in Tariff Invoices were not in accordance with provisions of PPA,

(ii) the Respondent was entitled to deduct from Tariff invoices, any amount that it considered as not claimed in accordance with PPA and therefore it could avail Rebate on whatever payment that it made to the Petitioner and

(iii) Petitioner had, while receiving ad-hoc payments towards Tariff Invoices, voluntarily given about 41 letters, consenting to Rebate.

(8) As regards the first contention, the only submission made on behalf of the Respondent was that the Interest on Working Capital claimed by the Petitioner in the Tariff Invoices was not as per provisions of PPA. In particular, it was contended that the Petitioner has claimed Interest on Working Capital at 85% PLF, whereas it was entitled to claim at much lesser rate depending on the actual electricity supplied (without considering Deemed Generation). The Respondent acted as a Judge in its own cause and arrogated to itself the right to unilaterally disallow payments under the Tariff Invoices at will and still claim Rebates. The Respondent's contention regarding Petitioner's claim for Interest on Working Capital is another attempt to avoid making contractual payments. This has been separately dealt with under the

head Interest on Working Capital. In any event, the Respondent's eligibility to claim Rebate was subject to full and prompt payment of Tariff Invoices. As the Respondent made short delayed and ad-hoc payment of Tariff Invoices it was not eligible to any Rebate.

(9) As regards the second contention, it is pertinent to mention that Respondent's Board, without any reference or regard to the PPA or even to its existence, consciously and brazenly decided to pay all the IPPs in the State including the Petitioner at an ad-hoc rate of Rs. 2.25 per unit irrespective of the Tariff Invoices, that too, subject to availability of funds and only after availing the Rebate. The Board Notes dated 29-06-2001, 13-05-2002 and 30-08-2003 produced by the Respondent pursuant to the directions given by the Hon'ble Commission amply reflect this. These decisions taken by the Respondent's Board are unconscionable and were a breach of faith, and amounted to a deliberate and willful breach of the PPA. This disentitled the Respondent from claiming any Rebate. All amounts availed of by the Respondent are thus illegal and in breach of the provisions of the PPA. The 41 consent letters relied on by the Respondent were not given by the Petitioner voluntarily and of its free consent. The same were given under compelling circumstances characterized by undue influence, coercion and economic duress by the Respondent. This was an abuse of its dominant bargaining position. By the aforesaid decisions taken by the Respondent's Board, the Petitioner was subjected to extreme financial hardship and distress. There was no reason whatsoever for the Petitioner to offer any such consent letters voluntarily and in the normal course, that too when it was passing through severe financial hardship caused by Respondent's failure to pay Tariff Invoices in full as per PPA. Any argument that those letters were given voluntarily defy logic or business prudence when seen in context and in the correct perspective.

(10) The Petitioner having invested large Capital in implementing the Project and having incurred various ongoing long term obligations towards its Lenders, Fuel Suppliers, O&M contractors besides maintaining its own establishment, so as to be in a position to perform and discharge its obligations under the PPA and also to realize return on its investment, would not have given any such consent letters voluntarily or out of free consent. The fact that the Petitioner gave 41 purported consent letters would not legitimize those letters. On the contrary, these letters and the facts and circumstances in which the same were obtained by the Respondent are demonstrative of the persistent/repeated and continued undue influence exerted and the extent of coercion and economic duress to which the Petitioner was repeatedly subject

(11) The documents and facts brought out on record demonstrate beyond any iota of doubt the fact that during the period between 2001 and 2005 (during which the purported consent letters were given by the Petitioner), the Petitioner was virtually put on ventilator. In order to survive and to sustain the operations and to discharge its obligations under the PPA to operate and maintain the Project and supply the electricity to the Respondent, the Petitioner was forced to give in to the undue influence and coercion exerted by the Respondent. The Respondent was undoubtedly in a dominant position, the Petitioner on the other hand had contractual obligations to various parties and its survival and credibility was at stake. In order to get at least some payment as and when the Respondent had funds, while competing with other IPP's who were also vying to get a share of such available scarce funds, the Petitioner was left with no option but to give the said letters. The refusal to do so would have serious and irreparable loss and damage to the Petitioner and would have cascading disastrous effect on operation and maintenance of the Project. The facts and documents brought out on record also demonstrate that the Respondent was only releasing payments that were barely sufficient (many a time even inadequate) to meet the variable cost.

(12) The Petitioner had to approach the Respondent each time it had to meet its critical financial obligations to Lenders, Fuel Suppliers, O&M contractors and payment of Taxes etc. Only upon establishing such acute need for funds the Respondent would release ad-hoc payments that too subject to availing Rebate. This fact is established by the aforesaid Board Notes which show deliberate and willful breach of the PPA (i.e., Board said avail of 2.5% rebate even on short payments). This clearly demonstrates the absence of free consent within the meaning of Section 14, coercion within the meaning of Section 15 and undue influence within the meaning of Section 16 of the Indian Contract Act, 1872. Compelling circumstances were created by the Respondent which it took advantage of and arm twisted the Petitioner into submission. In the facts and circumstances, the burden to establish the purported letters are not tainted by coercion or undue influence and that the same were obtained out of free consent rests on the Respondent. Therefore, all the purported consent letters obtained by the Respondent stand vitiated and the Respondent cannot rely on such letters. This legal and contractual position is clearly supported by the decision of the Honourable Supreme Court in National Insurance Co. Ltd., -vs- Boghara Polyfab P. Ltd., (2009 (1) SCC 267) relied on by the Petitioner.

(13) The Petitioner is therefore entitled to claim the total amount of Rebate amounting to about Rs 15 crores availed by the Respondent on the basis of such purported consent letters, together with interest thereon, as per the provisions of PPA.

(14) On the basis of the above, the Respondent is not entitled to claim any Rebate, much less, to deduct any amount towards Rebate from the Tariff Invoices:

(i) During the period 1999 to 2000, as the Respondent did not establish and maintain the Letter of Credit and Collateral Arrangements as required under Clause 8.5 (c) (Volume I page 107) of the PPA,

(ii) During the period 2000 to 2005 as the Respondent's Board decided to make short payments and ad-hoc payments only, that too subject to availability of funds. Consequently none of the Tariff Invoices was paid in full and within the time specified for claiming Rebate and

(iii) During the period 2005 to 2008 as the Respondent has not made full payment of Tariff Invoices and resorted to certain unauthorized deductions.

(15) The Petitioner has at the very outset submitted that the Limitation Act, 1963 does not apply to dispute resolution proceedings before this Hon'ble Commission. Without prejudice to this established legal position, it would also be pertinent to note that the Respondent's contention that there are delays and laches in claiming the amounts deducted by way of Rebate are unsustainable and any deliberation on this issue is only academic. Assuming but not conceding that the provisions of the Limitation Act, 1963 apply to the Petitioner's claims arising out of the Tariff Invoices, none of the claims made by the Petitioner based on the Tariff Invoices including the Rebate claim suffers from any delay or laches. In this regard, Respondent's letters dated (i) 10-09-2001 (volume I page 377), (ii) 17-09-2003 (volume II page 183) and (iii) 08-01-2004 (volume II page 98) which are acknowledgements in writing give rise to a fresh period of limitation each time such acknowledgement in writing was made by virtue of the provisions of Section 18 of the Limitation Act,1963.

(16) There are about 191 payments made by the Respondent towards Tariff Invoice outstanding as per details provided at page 2 to page 16 of the Additional Statement of Claim filed by the Petitioner on 18th September, 2009. Each of these payments amounts to acknowledgement by payment under Section 19 of the Limitation Act, 1963 and gives rise to a fresh period of limitation each time such payment is made. Further, in view of the provisions contained in Section 59, 60 and 61 of the Indian Contract Act, 1872, which recognize the statutory right of appropriation of payment available to a creditor and which, inter alia, permit the Petitioner to appropriate any payment made by the Respondent in a manner that the Petitioner wishes to appropriate (including appropriation towards time barred debts), none of the claims arising out of Tariff Invoices, including the present Rebate claim, suffers from any delay or laches and is not time barred. The Learned Counsel for the Respondent conceded this legal position during the course of final arguments.

(17) The following chart gives a bird's eye view of the Petitioner's claim:

Issue	Clause of PPA	Breach	Submission	Document relied	Amount Claimed	Judgment in support
Rebate	8.3 (a), (b) and (c) of PPA [running page 106 & 107 of Vol-I] and 8.3 (b) (i) of addendum -2 to PPA [running page 272 of Vol-I]	i) TNEB did not open LC and availed rebate between 1999 to 2000. ii) TNEB made payments only short payments and delayed between 2000 to 2005. iii) TNEB made only short payments between 2005 to 2008.	TNEB not entitled to rebate on any bill till 2002 since no LC was opened and thereafter made only delayed or short payments and not eligible for availing rebate.	Letter by TNEB to GMR, dated 10.9.2001 expressing their financial strain and inability to make full payments. [running page 377 of Vol-I] Letter by GMR to TNEB explaining various instances of unlawful rebates availed by TNEB. [page 134 to 136 of Vol-II]	Rs. 164,01,33,394	2009(1) SCC 267

(C) Contention of the Respondent

(1) Respondent has been making regular payments every month within the specified date to enable it to claim rebate as per PPA It is the usual practice of the petitioner to raise invoices for the amounts not contemplated under PPA or for an increased amount in complete violation of PPA. As such the respondent had to disallow such amounts claimed in the invoices before passing the bills. The allegation of unauthorised deduction and non-payment/short payment or delayed payment is denied.

(2) As per the object behind the notification dated 30-3-1992, issued by the Government of India, the rebate of 2.5% was introduced only due to the fact that the tariff for the generator is already loaded with the interest on working capital (2 months receivables).

(3) The respondent Board is legally entitled for the rebate of 2.5% as the generator is already enjoying the interest on the working capital based on the average actual PLF achieved. The rebate is primarily to be linked with the interest on working capital and rebate was allowed for the Board only to avoid any double payment. In other words, the idea behind the concept of rebate at 2.5% and giving 2 months receivables as component of interest on working capital are to ensure that the generator do not suffer any loss on account of any delay in making payment by the Board.

(4) As per the Addendum 2 to the PPA dated 1-3-2000 on and up to the due date of invoice, the company shall be paid directly by TNEB for the full amount stated in the invoice (Less 2.5% rebate if the payment is made before 5 business days from the date of submission of invoice and less 1% if the payment is made after 5 business days but before due date).

(5) It is submitted that for the sake of convenience, the entire period can be broadly divided into three categories.

i. Category A: from the date of COD to the second addendum to the PPA
ii. Category B: from the date of addendum i.e 1-3-2000 to 31-3-2005
iii. Category C: from 1-4-2005 to 2008.

(6) Category A: In respect of period falling under Category A, though LC was not opened by the Board, the petitioner did not insist for the opening of the LC for availing rebate.

The letters written by the petitioner are highlighting that the Board is not eligible for rebate on account of the delayed payment and not in respect of non opening of LC by the Board.

The petitioner has also not insisted for opening of LC as evident from letter dated 23-2-1999 volume 6 page No. 216.

The petitioner has agreed to deduct 15 paise per unit as against the tariff invoice pending finalization of capital cost and agreed for the deduction of rebate by the Board. The capital cost was finalized on 23-2-2001. The respondent Board deducted 15 paise per unit till 2005, which was not questioned by the petitioner.

The respondent Board has been insisting on the petitioner to make necessary amendment from the year 1997 onwards in respect of payment for avoiding LC and for direct payment. This is evident from the letter dated 19-8-1997 volume 6 page No. 203.

(7) Category B: The petitioner has given consent to the Board for availing rebate from 28-12-2001 to 28-3-2005 by giving series of letters 1 to 40 for the ad-hoc payments. Having given the consent, the petitioner is now estopped from going back.

The petitioner is not justified in making a statement that the respondent board obtained the consent letter under coercion and undue influence.

The petitioner has not chosen to retract the consent letters at the earliest point of time if there was any alleged coercion or undue influence.

The petitioner has given the consent letters only on appreciating the precarious financial position of the Board and agreed to receive ad-hoc payments.

The petitioner is also aware of the financial position of the Board and accepted for receiving ad-hoc payments and allowing the Board to avail rebate at 2.5%.

The respondent Board made ad-hoc payments uniformly after availing rebate for similarly placed IPPs also.

The petitioner has not established the element of coercion, dominant position and significant bargaining power alleged to have been exercised by the Board.

As the petitioner has agreed for retention of 15 paise and for deduction of rebate, it is not fair on the part of the petitioner to question the deduction of rebate due to doctrine of estoppel.

The petitioner also by its explicit conduct and by its implied consent varied /altered the provisions of the PPA enabling the Board to avail the rebate in respect of ad-hoc payments.

The petitioner is barred from raising this issue of availing the rebate as he has altered the terms of the contract (PPA) by his own conduct.

The respondent Board was making part payments due to its difficult financial position and the same was also accepted by the Petitioner by practice.

The Petitioner has also given its concurrence for availing of rebate by the Board by its various letters. Hence, the petitioner cannot now aver that those letters were obtained under coercion. The petitioner now cannot dispute those rebate amounts.

(8) Category C: As per the clause 8.3 of Addendum 2 to the PPA at page No. 272 volume No. I, the company has to submit its invoice in terms of the PPA. The relevant clause reads as follows:

"*The company shall submit …. for all the amounts accrued in the preceding month under tariff and other applicable sections in this agreement for the monthly tariff payment "….*

The respondent Board is bound to make the payment only if the invoice is submitted only within the four corners of the PPA.

The petitioner has not submitted the invoice strictly in terms of the PPA. For example: the petitioner has claimed interest on working capital at the rate of 85% of the PLF , which he is not entitled to claim as per PPA.

(9) From the letter dated 18-1-2008 given by the petitioner in volume No. 2 at page 119, the petitioner has not made any claim in respect of rebate.

(10) It is submitted that as per Article 7.3, the petitioner is entitled to go for sales to third parties upon TNEB default. If the petitioner was really aggrieved by the conduct of the Board in not paying the tariff invoice as per the PPA, the petitioner always could have invoked Art. 7.3. of PPA. Admittedly, in the instant case, the petitioner has not chosen to exercise the right conferred under Art. 7.3 as the petitioner was not really aggrieved.

(11) The respondent submits that admittedly all the balance outstanding amount payable on account of earlier ad-hoc payments are fully paid by the Board within a reasonable time and there is no arrears on account of ad-hoc payments.

(D) <u>Delay and Laches</u>:-

(1) The Respondent submits that the Petitioner has filed the claim for rebate before the Commission as late as in July 2008, although the Respondent has been availing of rebate from February 1999 and therefore the claim is barred by limitation.

(2) In this context, we wish to refer to the letter of the Chairman, TNEB dated 10-9-2001 extracted below:-

> "*Please refer to the discussions TNEB had with your promoters on 21st August 2001.*
>
> *As discussed, TNEB is currently undergoing temporary financial strain resulting in its inability to make full payment against tariff invoices. However, tariff payments as obligated under the PPA shall be made in full starting January 2002 and so continue thereafter. TNEB acknowledges that arrears of overdue payments need to be made to you in full being the balance payable over and above the part payments made till December 2001, and agrees that these will be paid starting from January 2002.*
>
> *Your invoices have been accepted for payment in full by TNEB. The part payment currently made is an interim payment as opposed to full payment according to the PPA rate and does not in any manner prejudice your right to receive payment against invoices raised by the Company conforming to the terms and conditions of the PPA, the residual portion of the said invoices being now outstanding. TNEB herewith accepts liability to pay the said outstanding and reconfirms its commitment to meet all of its contractual obligations under the PPA.*
>
> *TNEB appreciates your concern over the level of part payment of invoices being currently made which is insufficient to meet your payment obligations. TNEB has already discussed and reached an understanding with your company on the level of interim payment with respect to your project's requirements and payments to lenders on due dates."*

(3) The TNEB admitted in the above letter its inability to make full payment against tariff invoices and assured the Petitioner of full tariff payments effective from January 2002. TNEB acknowledged in the letter that arrears of overdue payment needed to be made in full, being the balance payable over and above the part-payments made till December 2001. The letter went on to add that part-payment was an interim payment as opposed to the full payment according to the PPA rate and it did not in any manner prejudice the right of the Petitioner to receive payment against

invoices raised by the Petitioner conforming to the terms and conditions of the PPA.

(4) In this context, we need to refer to Sections 18 and 19 of the Limitation Act, 1963 (36 of 1963) extracted below:-

"18. Effect of acknowledgment in writing – (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

"19. Effect of payment on account of debt or of interest on legacy – Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:"

The first invoice was due in February 1999. Assuming a limitation period of 3 years, the claims would have been barred in February 2002. As the TNEB acknowledged its liability on 10-9-2001 before the expiry of 3 years, a fresh period of limitation of 3 years shall accrue from 10-9-2001, that is upto 9-9-2004, for all the claims pending as on 10-9-2001 in terms of Sections 18 and 19 of the Limitation Act 1963.

(5) The TNEB on 17-9-2003 addressed another letter to the Petitioner quoted below:-

TAMIL NADU ELECTRICITY BOARD
ACCOUNTS BRANCH

From	*To*
K.Malarvizhi, B.A.(Corp.), ACA,	*M/s.G.M.R.Power Corporation*
Financial Controller/Accounts	*(P) Limited*
800, Anna Salai	
Chennai 600002	

Letter No.X/DFC/Cost/IPP/Adhoc/ dated 17-9-2003

Sir,

Sub: TNEB-IPP-Payment of admitted claim-regarding.

Ref: Lr.No.X/DFC/Cost/IPP/Adhoc/ dated 4-9-2003.

In continuation of the reference cited the details for the claim admitted but not paid upto to 31-8-2003 in respect of your account as on 16-9-2003 is furnished below:

Retention due to adoption of Rs.2.25 per unit Payment system		*Rs.24.59 crores*
Retention @ 15 paise per unit Pending finalization of capital cost.		*Rs.75.16 crores*

	Total:	*Rs.99.75 cores*

Against this now a sum of Rs.32.51 crores gross is being paid now vide cheque No.591112 dated 17-9-2003 to meet out your debt obligations as requested, receipt of which may kindly be acknowledged.

Yours faithfully,

sd/-……..
FINANCIAL CONTROLLER/ACCOUNTS

(6) The TNEB stated in the above letter that the claims admitted but not paid upto 31-8-2003 was Rs.99.75 crores. A part-payment of Rs.32.51 crores was made on 17-9-2003 leaving a balance of Rs.67.24 crores. The TNEB made part payment against claims outstanding as on 17-9-2003 and therefore, even if we assume that the Limitation Act, 1963 would apply, all the claims pending on 17-9-2003 would enjoy a fresh period of limitation of 3 years that is upto 16-9-2006, in terms of Sections 18 and 19 of the Limitation Act 1963.

(7) The TNEB again addressed the Petitioner on 8-1-2004 as follows:-

TAMIL NADU ELECTRICITY BOARD

From

Ms. K. Malarvizhi, B.A., ACA.,
Financial Controller,
Tamil Nadu Electricity Board,
Chennai 600 002

To

M/s. GMR Power Corporation (P) Ltd
Chennai.

Lr.No.X/CFC/Cost/IPP/GMR/Balance/04 dt. 08.01.2004

"*Sub: Confirmation of Balance on Tariff Billing as on 31-12-2003.*

Ref: Your Lr.GMR/631/03-04, dated 8th January 2004.

With reference to the above, it is hereby confirmed that the balance due to M/s. GMR Power Corporation (P) Ltd., on Tariff Bills, as on 31-12-2003 is Rs.55,35,34,285/- (Rupees Fifty Five Crores Thirty Five Lakhs Thirty Four Thousand Two Hundred and Fifty Eight only). Besides this, claims not admitted (under verification) is Rs.1,76,84,061/- (Rupees One Crore Seventy Six Lakhs Eighty Four Thousand and Sixty One only) as detailed below.

1. Entry Tax on Lube	*-*	*Rs.1,39,54,690/-*
2. Entry Tax on Normative	*-*	*Rs.37,29,371/-*

This confirmation is subject to audit, without prejudice to recover any excess admission of claim/payment identified later.

for Financial Controller/Accounts

The TNEB confirmed in this letter that the balance due to the Petitioner as on 31-12-2003 was Rs.55.35 crores. These were the dues outstanding as on 31-12-2003, the balance having been paid prior to that date. Therefore, even assuming that Limitation Act, 1963 would apply, in terms of Sections 18 and 19 of the Limitation Act, 1963, the claims pending as on 8-1-2004 would enjoy a fresh period of limitation of three years upto 7-1-2007.

(8) A note for the 879th Board meeting of the TNEB held on 24-3-2005 mentioned that as on 22-3-2005 the

outstanding claim of the Petitioner was Rs.32.02 crores The Board resolved to make payments in full as per the PPA terms to all the IPPs with effect from 1-4-2005. As the Board admitted that the dues of the Petitioner outstanding as on 22-3-2005 was Rs.32.02 crores, a fresh period of limitation of three years would accrue from 22-3-2005 upto 21-3-2008.

(9) The note for the 879th Board meeting of the TNEB held on 24-3-2005 mentioned that as on 22-3-2005 the outstanding claim to the Petitioner was Rs.32.02 crores. Subsequently, the Respondent has furnished the following information:-

1. Retention between 9-3-2005 and 31-3-2005 due to part payment of tariff at the rate of Rs.2.50 per unit
   Retained on 16-4-2005 Rs.9.58 crores
2. Admission of O & M expenses relating to 2004-05
   Petitioner's account credited on 2-12-2005 Rs.0.08 crores
3. Entry Tax relating to 9-8-2005 to 9-9-2005
   Petitioner's account credited on 2-12-2005 Rs.0.45 crores
   Total Rs.42.13 crores

The above dues of Rs.42.13 crores were liquidated on 24-3-2005, 10-11-2005 and 17-2-2006 in instalments of Rs.30.40 crores, Rs.10 crores and Rs.1.73 crores respectively. Thus, the entire arrears of Rs.42.13 crores were liquidated on 17-2-2006. The Petitioner filed the claim petition for rebate on 25-7-2008, which is well within the limitation period of three years.

(E) Ruling on delay and laches

The claim for rebate does not suffer from delay and laches and even if we assume that Limitation Act, 1963 would apply, the claim has been filed within the limitation period of three years.

(F) Analysis of the case

(1) The Respondent questions the very basis of the rebate of 2.5% on the ground that the invoice of the Petitioner provides for receivables for two months. According to him, 2.5% rebate is a matter of right – whether the payment is made in time or not, whether the payment is made in full or not. While there may be logic in the contention of the Respondent, the fact that he has executed a PPA with the Petitioner, which provides for rebate of 2.5% and 1% respectively for timely and full payment, estops the Respondent from raising this plea. The Respondent is bound by the contract, which he has voluntarily executed with the Petitioner.

(2) The PPA for the period from 12-9-1996 to 1-3-2000 stipulates that rebate is admissible to the Respondent, only if he establishes a Letter of Credit. The second addendum to the PPA, which came into effect from 1-3-2000, did away with this requirement. The Respondent asserts that while the Petitioner had been questioning the rebate availed of by the Respondent during this period on grounds of delayed payment, he did not raise the question of Letter of Credit. The letter of the Petitioner dated 23-2-1999 addressed to the Respondent has been cited as an instance, which does not talk about Letter of Credit. On the other hand, the Respondent in his letter dated 19-8-1997, almost a year after the execution of the PPA, addressed to the Petitioner insisted on doing away with the Letter of Credit. We have perused the correspondence of the Petitioner between January 1999 upto March 2000, that is between the date of commercial operation and the date of amendment to the PPA. He has not questioned the rebate by linking it to the Letter of Credit. The Petitioner raised this issue of Letter of Credit on 1-6-2001, more than a year after the amendment to the PPA. Therefore, we conclude that the Petitioner by his conduct has acquiesced in the practice of the Respondent not opening the Letter of Credit This disentitles him from linking rebate with

Letter of Credit. In the result, rebate has to be related to timely payment and full payment by the Respondent.

(3) The Petitioner in his letter dated 18-12-1999 addressed to the Respondent consented for deduction of 15 paise per unit pending capital cost finalization by the CEA. The CEA determined the capital cost of the project of the Petitioner on 23-2-2001 and therefore the letter of the Petitioner entitled the Respondent to retain 15 paise per unit for the period upto February 2001. That is, the invoice from March 2001 onwards should be based on the cost approved by the CEA. But, the Respondent continued the 15 paise per unit deduction upto March 2005. This is contrary to the consent of the Petitioner and therefore we hold that the TNEB was in the wrong in deducting 15 paise per unit beyond March 2001 upto March 2005.

(4) The Petitioner submitted 41 letters to the Respondent between 28-12-2001 and 28-3-2005 consenting to deduction of rebate of 2.5% in regard to ad-hoc payments. The rebate involved in these 41 consent letters is about Rs.15 crores according to the Petitioner. The Petitioner submits that these consent letters were marked by the absence of free consent within the meaning of Section 14 of the Indian Contract Act 1872. They were delivered under coercion within the meaning of Section 15 and undue influence within the meaning of Section 16 of the Indian Contract Act 1872. The Petitioner cites the judgement of the Hon'ble Supreme Court in National Insurance Company Limited Vs. Boghara Polyfab Private Limited – (2009) (1) SCC 267.

(5) The relevant paragraphs are extracted below:

> *"27. Although it may not be strictly in place but we cannot shut our eyes to the ground reality that in a case where a contractor has made huge investments, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his*

liability towards the banks; financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No-Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts."

"28. Further, necessitas non habet legem is an age-old maxim which means necessity known no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

"25. In several insurance claim cases arising under Consumer Protection Act, 1986, this Court has held that if a complainant / claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, under influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In United India Insurance Co. Ltd. vs. Ajmer Singh Cotton & General Mills – 1999 (6) SCC 400, this Court held:"

"25. The mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom the complaint is made would be justified in granting appropriate relief. In the instant cases the discharge vouchers were admittedly executed voluntarily and the complainants had not alleged their execution under fraud, undue influence, misrepresentation or the like. In the absence of pleadings and evidence the State Commission was justified in dismissing their complaints."

"26. But what is of some concern is the routine insistence by some Government Departments, statutory Corporations and Government Companies for issue of undated 'no due certificates' or a full and final settlements vouchers acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims, as a condition precedent for releasing even the admitted dues. Such a procedure requiring the claimant to issue an undated receipt (acknowledging receipt of a sum smaller than his claim) in full and final settlement, as a condition

for releasing an admitted lesser amount, is unfair, irregular and illegal and requires to be deprecated"

"27. Let us consider what a civil court would have done in a case where the defendant puts forth the defence of accord and satisfaction on the basis of a full and final discharge voucher issued by plaintiff, and the plaintiff alleges that it was obtained by fraud / coercion / undue influence and therefore not valid. It would consider the evidence as to whether there was any fraud, coercion or undue influence. If it found that there was none, it will accept the voucher as being in discharge of the contract and reject the claim without examining the claim on merits. On the other hand, if it found that the discharge voucher had been obtained by fraud / undue influence / coercion, it will ignore the same, examine whether plaintiff had made out the claim on merits and decide the matter accordingly. The position will be the same even when there is a provision for arbitration. The Chief Justice / his designate exercising jurisdiction under Section 11 of the Act will consider whether there was really accord and satisfaction or discharge of contract by performance. If the answer is in the affirmative, he will refuse to refer the dispute to arbitration. On the other hand, if the Chief Justice / his designate comes to the conclusion that the full and final settlement receipt or discharge voucher was the result of any fraud / coercion / undue influence, he will have to hold that there was no discharge of the contract and consequently refer the dispute to arbitration. Alternatively, where the Chief Justice / his designate is satisfied prima facie that the discharge voucher was not issued voluntarily and the claimant was under some compulsion or coercion, and that the matter deserved detailed consideration, he may instead of deciding the issue himself, refer the matter to the arbitral tribunal with a specific direction that the said question should be decided in the first instance."

(6) The Respondent contends that the Petitioner is not justified in making a statement that the Respondent Board obtained the consent letter under coercion and undue influence. The Petitioner has not chosen to retract the consent letters at the earliest point of time, if there was any alleged coercion or undue influence, the Respondent asserts. The Petitioner, according to the Respondent, has given the consent letters only on appreciating the precarious financial position of the Board and agreed to receive ad-hoc payments. The Petitioner, says the Respondent, was aware of the financial position of the Board and accepted ad-hoc payments and allowed the Board to avail rebate at 2.5%. The Respondent Board states that it made ad-hoc

payments uniformly after availing rebate for similarly placed IPPs. The Petitioner, according to the Respondent, has not established the element of coercion, dominant position and significant bargaining power alleged to have been exercised by the Board.

(7) The consent letters were given by the Petitioner between 28-12-2001 and 28-3-2005. The Petitioner argues that the Respondent was in a position to dominate the will of the Petitioner and use that position to obtain an unfair advantage. We need to observe here that the contract between the TNEB and the Petitioner is not a contract between equals. The TNEB is undoubtedly in a dominant position, being a large Public Sector Enterprise, with State-wide jurisdiction commanding enormous resources. The inequality is inherent in the contract. The Petitioner was well aware of this reality, when the contract was executed. The moot question is whether the Petitioner has been able to prove coercion or dominant influence excepting the assertion in the present petition before the Commission. The consent letters were delivered between 28-12-2001 and 28-3-2005, more than 3 years before the present petition was filed. There was adequate time during this interregnum of 3 years to retract the consent alleging coercion or dominant influence. The Petitioner did not choose to do that. Therefore, we tend to support the contention of the Respondent that Petitioner has not chosen to retract the consent letters at the earliest opportunity. In the result, we hold that the Petitioner's claim of coercion or dominant influence fails.

(8) A fundamental issue missed by both the Respondent and the Petitioner herein is the admissibility of rebate in the case of ad-hoc payments covered by the 41 consent letters. There are two types of invoices prescribed by the PPA. The first one is the tariff invoice defined in Clause 8.2./ Clause 8.3 of the PPA, which covers all the payments accrued in the

preceding month under tariff as per Appendix D of the PPA. Typically, the components of a tariff invoice are fixed charges, variable charges and incentives. The other type of invoice is the supplementary invoice defined in Clause 8.6 / Clause 8.7 of the PPA. Foreign exchange adjustment, change-in-law adjustment, year-end estimated cost adjustment etc. are typically the components accommodated in a supplementary invoice. Clause 8.6 / Clause 8.7 of the PPA states that rebate available in respect of a tariff invoice shall not be available in case of a supplementary invoice, unless such supplementary invoice relates exclusively to sale of electricity.

(9) Payments are due either against a tariff invoice or a supplementary invoice. There is nothing like an ad-hoc invoice or an ad-hoc payment contemplated in the PPA. As a matter of fact, these ad-hoc payments effected by the Respondent are nothing but releases of funds, withheld against previous tariff invoices / supplementary invoices raised by the Petitioner. These funds legitimately belong to the Petitioner, unless they had been disputed by the Respondent. Theoretically, the Respondent can hold up payment due against a tariff invoice / supplementary invoice and release it in several ad-hoc doses, appropriating rebate against each such release, apart from claiming rebate against the main tariff invoice. This is what the Respondent did in the case of a few tariff / supplementary invoices. The 41 ad-hoc payments effected by the TNEB are not against any invoice submitted by the Petitioner and therefore the question of rebate does not apply to these 41 ad-hoc payments. The very foundation of rebate availed of by the TNEB being non existent, we have no hesitation in setting aside the rebate availed of by the TNEB in the 41 ad-hoc payments.

(10) The Respondent submits that he is bound to make full payment against an invoice, only if the invoice conforms to the PPA. This is a dangerous proposition, because the Respondent wants to arrogate to himself the authority to determine what constitutes a legitimate claim

under the PPA. He wants to exercise the powers of an adjudicator. Dispute Redressal Mechanism is available to the Respondent under the PPA, which is meant to tackle such eventualities. He never exercised this option. The PPA is emphatic that the invoice shall be paid in full before raising a dispute. Therefore, we have no hesitation in dismissing the plea of the Respondent to decide what constitutes a legitimate component of an invoice.

(11) The Respondent submits that the Petitioner is entitled to go for sales to third parties upon TNEB default in terms of Art. 7.3 of the PPA. If the Petitioner, according to the Respondent, was really aggrieved by the conduct of the Board not paying the tariff invoice as per the PPA, the Petitioner always could have invoked Art. 7.3 of PPA. Admittedly in the instant case, the Respondent claims, the Petitioner has not chosen to exercise the right conferred under Art. 7.3 as the Petitioner was not really aggrieved. We consider this as an argument of despair and an argument in the extreme. While the TNEB never exercised its option to invoke dispute resolution mechanism available in the PPA, it expects the Petitioner to resort to an extreme option of invoking Art. 7.3. Therefore, we do not consider that this option is worthy of serious consideration.

(12) Let us, now, refer to the following extracts from the notes of the Board meetings of TNEB held on 29-5-2004, 8-1-2005 and 24-3-2005, which speak volumes of the thinking of the Respondent:-

> *"Summing up, it is submitted that, as of now, Board is settling the bills at Rs.2.25 per kwh plus O&M charges, disregarding the invoice rate per kwh, the balance is withheld by the Board under two heads viz.*
>
> *(a) 15 paise per kwh, due to non finalization of capital cost and*
>
> *(b) The balance amount"*
>
> *[Page 4 of the 870th Board meeting held on 29-5-2004]*

"However, payment is released only at Rs.2.25 per unit duly availing 2.5% rebate thereon retaining the balance of admitted claim as payable, as approved by the Board in the 846th meeting held on 29-6-2001 as item No.59. The same system of payment with regard to the payment of bill amount on the due date is adopted still.
As approved by the Board in its 855th meeting held on 13-5-2002 as item No.28 Debt/Interest obligations as well as O&M charges as and when it is necessary is also paid from such accumulated admitted claim balance subject to availability of funds duly availing 2.5% rebate thereon."

[Page 3 of the 877th Board meeting held on 8-1-2005]

"As per the payment terms of the IPP, the Board shall release the admitted claim to the IPPs in full on the due date (i.e. 5th working day of the Board from the date of receipt of the bill at TNEB) for payment and may avail 2.5% rebate thereon. But though the claim is processed and admitted within the due date, only part payment at Rs.2.50 per kwh is being released on the due date of payment duly availing 2.5% rebate and the balance is released subsequently to honour their debt obligation, based on their request subject to availability of funds. But the rebate of 2.5% is uniformly availed even on all such payments till date."

[Page 3 of the 879th Board meeting held on 24-3-2005]

"However consent letter has been obtained from all the IPPs (except M/s. PPN Power Generating Company Ltd.) for availing 2.5% rebate on such adhoc payment as and when it is released. In respect of M/s. PPN Power Generating Company Ltd., they have received the payments after availing rebate on such adhoc payments, but refused to give any acceptance letter for the same."

[Page 4 of the 879th Board meeting held on 24-3-2005]

These Board notes throw ample light on the part-payment of invoices and pre-determined claim of rebate of 2.5% on all invoices. It is evident from the notes of the Board Meetings that the contractual obligation between the various IPPs and the TNEB have not been brought out nor has the legal implication of violating the contract been spelt out in the Board notes. It is amazing that there has been absolutely no legal input in the various Board notes. The result was total

disregard for contractual obligations and the ignorance of consequences of such defaults.

(13) The 846th Board Meeting held on 29-6-2001 decided to limit the payment for power for the IPPs @ Rs.2.25 per unit irrespective of their entitlements. The 855th Board Meeting held on 13-5-2002 decided to avail 2.5% rebate on all payments. The Board note of 865th meeting reveals that investors from USA, who had invested in the equity of the IPPs, had been seeking full payment as per PPA through various authorities such as the Government of India, Indian Ambassador to USA, Congressmen and Senators of USA, US Consulate General in Chennai and through Indo-US Business Council. It also talks of an amendment to the US Federal Foreign Aid Bill seeking to place restriction on assistance to Tamil Nadu consequent to the default in payment of IPPs. Para 8 of the note for the 865th Board Meeting held on 30-8-2003 decided to continue the retention of 15 paise per unit for the IPPs until the capital cost was finalised. The 870th Board Meeting held on 29-5-2004 turned down the plea of the TNEB to raise the part payment of tariff from Rs.2.25 per unit to Rs.2.85 per unit. The 877th Board Meeting held on 8-1-2005 decided to raise the part payment of tariff from Rs.2.25 per unit to Rs.2.50 per unit. The 879th Board Meeting held on 24-3-2005 decided to make payment of admitted claims of IPPs in full from March 2005 bill onwards.

(14) It is crystal clear from the proceedings of the above Board meetings that the TNEB availed of 2.5% rebate in a routine, pre-determined manner. There was no application of mind. Rebate was not related to tariff invoices. As per the decision of the Board, 2.5% rebate has to be availed of against all invoices, come what may. This was the tone and tenor of the Board notes. The Petitioner, therefore, was helpless and confronted with the mechanical claim of 2.5% rebate in all tariff invoices by the TNEB. We

do not have to go far to establish that the claim of 2.5% rebate of the TNEB is arbitrary, unfair and unjust. It is a total disregard of and contempt for law.

(15) Yet another point that emerges from the Board notes of the above meetings is that the officials of the TNEB went far beyond the mandate of the Board in continuing the 15 paise per unit deduction beyond the date of capital cost determination by the CEA. This is a clear violation of the directive of the Board. We have referred to this earlier in para F (3).

(G) Ruling on Rebate

(1) As lease rent was recovered from monthly tariff invoices by the TNEB with the consent of the Petitioner, the Respondent will be deemed to have made full payment, if he had retained 15 paise per unit between 18-12-1999 and 23-2-2001 and if he had recovered lease rent along with applicable penalty for the period (as and when the Petitioner failed to make advance payment of lease rent as stipulated in Clause 3.1 of LLA).

(2) The Petitioner is directed to rework the monthly invoices for the period covered by this Petition as per the direction in (1) above and submit them to the Respondent within two months of the order.

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

(4) If the Respondent has availed of rebate for any payment less than full payment as defined in (1) above, he is

liable to refund the rebate along with interest at the rate prescribed in Clause 8.7 / Clause 8.6 of the PPA from the date of deduction till the date of refund.

(5) The Respondent is not entitled for rebate in the case of 41 ad-hoc payments effected between 28-12-2001 and 28-3-2005; he is directed to refund the rebate with interest at the rate prescribed in Clause 8.7 / Clause 8.6 of the PPA from the date of deduction till the date of refund.

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

PART - III

INTEREST ON WORKING CAPITAL

(A) Facts of the case

(1) The first and second units of the plant were commissioned on 31st December 1998, the third unit on 30th January 1999 and the fourth and last unit was commissioned on 15th February 1999.

(2) Interest on working capital is one component of fixed cost, the others being interest on debt, depreciation, return on equity and O & M and insurance expenses. Fixed cost (estimated annual

cost) is defined in Clause 3 of Appendix-D of the PPA. Working capital has been defined in Clause 1.2 of Appendix-D of the PPA to cover the following:-

(a) Fuel stocks as are actually maintained but limited to thirty days consumption.

(b) Sixty days consumption of stocks of lubricating oil.

(c) O & M and insurance expenses for one month.

(d) An allowance for maintenance spares in an amount equal to the actual cost of maintaining a reasonable inventory of spares in accordance with prudent utility practice, provided that, during the first five tariff years following the CoD there shall be deducted from such cost one-fifth of the portion of capital cost allocated to initial maintenance spares and provided further that during a tariff year the maintenance spares allowance shall not exceed one percent (1%) of capital cost and

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

(3) The Petitioner is required under Clause 3(a) of the PPA to submit an invoice every month to the Respondent for all the amounts accrued during the preceding month. Thus, interest on working capital is a component of monthly invoices. The Respondent admitted the liability on account of interest on working capital upto 31st March 2005 as per the claims raised by the Petitioner. The Accountant General during the course of the audit of the accounts of the TNEB raised an objection on 6th June 2005 stating that Rs.5.37 crores has been paid in excess by the TNEB towards interest on working capital for the years 2002-03, 2003-04 and 2004-05 and sought the comments of the TNEB. The TNEB apparently did not clarify the objection but straight away started giving effect to the objection raised by the audit. The audit had remarked that the actual plant load factor of previous three years which ranged from 47% to 76% should be reckoned for the purpose of admitting interest on working capital. The TNEB, on this basis, curtailed the claim of the Petitioner and recovered Rs.5.37 crores as excess payment towards interest on

working capital for the period 2002-03, 2003-04 and 2004-05 out of the tariff invoice of October 2005. But, when the Petitioner protested, the recovery of Rs.5.37 crores was reversed by the TNEB on 16-11-2005. The relief of the Petitioner was short-lived. The TNEB again deducted Rs.9.95 crores from the invoice of January 2006 on account of excess payment of interest on working capital for the past period. Aggrieved by this deduction, the Petitioner filed this petition with the Commission on 25-7-2008.

(B) Contention of the Petitioner

(1) The petitioner is entitled to claim interest on working capital at lower of the amounts associated with generation of electricity of not more than 7446 hours times of dependable capacity (85 % of PLF) and preceding 3 years average of actual PLF achieved. However in light of the CEA norms and in view of payments to other Independent Power Producers (IPP) at 68.50 % PLF, the petitioner in good faith made an offer to the respondent to settle its claim in this regard. This offer was not accepted by the respondent.

(2) Under the PPA, the Petitioner is entitled to claim Interest on Working Capital as part of its Tariff Invoice. The Respondent was paying Interest on Working Capital at 85% PLF till March 2005 in discharge of its obligations under the PPA. Both parties were ad idem in their understanding of the relevant provisions of the PPA in this regard.

(3) All of a sudden the Respondent started disallowing a major portion of Interest on Working Capital from the Tariff Invoice relating to electricity supplied from April 2005 without any intimation to the Petitioner.

(4) When the Petitioner objected to the short payment of Tariff Invoices, the Respondent for the first time sent a letter dated 24th May 2005 (Volume II page 75) enclosing certain Audit remarks of the Accountant General. The Respondent informed the Petitioner that a sum of Rs 5.37 Crores will be deducted from the next Tariff Invoice.

(5) The Audit remarks did not refer to any of the provisions of the PPA or disclose the basis for the underlying remarks. Instead of responding to the said remarks in an appropriate manner and apprising the AG of the relevant provisions of the PPA, the Respondent took the easy route of resorting to deduction of the substantial part of amounts paid on account of Interest on Working Capital right from 2002-03 till March 2005 unilaterally. This is totally in breach of the PPA.

(6) The Petitioner objected to the same by its letter dated 09th June 2005 (Volume II page 79 & 80). In spite of the same, the Respondent continued to deduct substantial part of Interest on Working Capital from monthly Tariff Invoices and also deducted a sum of Rs 9.95 Crores on 15th November 2005. The Petitioner strongly protested against this. The Respondent thereupon reversed the same and credited the sum of Rs 9.95 Crores back to the Petitioner the very next day [i.e. 16th November 2005] (Vol I, page 382, 382A)

(7) The Respondent, again unilaterally deducted the same sum of Rs 9.95 Crores on 17th February 2006 (Vol, page 393, 394) and continued to deduct substantial part of Interest on Working Capital from the monthly Tariff Invoices. This action was restrained by this Hon'ble Commission by an order dated 13th August 2008.

(8) What is evident from the above is that no dispute arose between the parties as such, as regards Interest on Working Capital claimed by the Petitioner in monthly Tariff Invoices.

(9) The genesis of the dispute lies in remarks of the Accountant General, a stranger to the contract with no understanding of the commercial bargains on which the Petitioner and Respondent had entered into the PPA. The AG's remarks were misconceived and totally *de hors* the relevant provisions of the PPA.

(10) The Respondent conveniently took shelter behind such remarks to gain undue advantage, in breach of the clear provisions of the PPA. As an after thought, the Respondent sought to claim that the Interest on Working Capital can be claimed only on the lower of (i) 85% PLF and (ii) the average of the preceding three years Gross Actual Energy. In this regard, the Respondent contended that the words 'actual PLF achieved' appearing in the proviso to the definition of Working Capital (Volume I Page: 150) should be read to mean PLF excluding Deemed Generation, that is Gross Actual Energy.

(11) This interpretation is absurd since, for determining the actual PLF achieved, the PLF will have to be computed in accordance with the definition of PLF in Appendix 'D' (Volume I, Page:149). In short the Respondent's contention to read PLF in the said proviso as Gross Actual Energy is clearly impermissible and far fetched. The Gross Actual Energy and PLF are two distinctly different terms defined and used separately throughout the PPA and the same are not interchangeable.

(12) The Gross Actual Energy is one of the components of the PLF, the other component being Deemed Generation which is distinct and separately defined in the PPA.

(13) As per the provisions of the PPA, PLF includes Deemed Generation in all circumstances except for the purpose of computation of Incentive Payment (Volume I, Page:146), for which, it is clearly provided that the PLF shall be reduced to the extent of Deemed Generation. The very fact that such reduction has been specifically provided for the purpose of Incentive Payment makes it amply clear that in the first place Deemed Generation is included and is an integral component of PLF. Therefore, except for the purpose of Incentive Payment, actual PLF achieved shall and shall always mean the Gross Actual Energy plus the Deemed Generation as is clear from the very definition of PLF.

(14) Under the PPA, the Respondent cannot give Dispatch Instructions below 85% of the Rated Capacity. However, depending on the Annual Declared Availability by the Petitioner, the actual PLF achieved could be higher than 85% or equal to or lower than 85%. The actual PLF could be lower than 85% only in the event that the Annual Declared Availability is less than 85% of the Rated Capacity.

(15) The Petitioner's annual Declared Availability has always been higher than 85% of the Rated Capacity and particulars in this regard are contained in Pages:39-40 of Vol-I. The proviso to the definition of Working Capital seeks to restrict the PLF for the purpose of Interest on Working Capital to:

i) 85% only if the actual PLF is equal to or higher than 85%, and

ii) the actual PLF achieved, if the same is less than 85%.

(16) The parties were fully *ad idem* till the 7th year of operation of the PPA and there was no difference in understanding as regards the exact import of the said proviso and the Petitioner's eligibility to claim interest on Working Capital at 85% PLF.

(17) During the course of the arguments, a feeble attempt was made on behalf of the Respondent to contend that for the purpose of said proviso Deemed Generation shall be excluded while computing PLF and that PLF should be read as Gross Actual Energy. The same is wholly misconceived and untenable.

(18) The second contention that the Petitioner was not entitled to claim both Interest on Working Capital and Start and Stop expenses is again contrary to the provisions of the PPA. Based on Clause 6.3(b) (ii) (Volume I, Page:100), the Respondent sought to argue that the Petitioner can either claim interest on Working Capital or Start and Stop expenses but not both. The Respondent relied on certain letters where the Petitioner had made certain conditional offers relating to percentage of PLF for the purpose of calculating Interest on Working Capital. These were never accepted or acted upon by the Respondent. At this stage the Respondent cannot be allowed to rely on these letters.

(19) The said Clause 6.3 (b) (ii) (Vol I, page 100) relied on by the Respondent clearly and unequivocally supports the Petitioner in as much as the said provision makes it clear that the Respondent's ability to issue Dispatch Instructions, otherwise than as specified in Clause 6.3 (b) (i) (Vol I, page 100), is subject to the Respondent allowing the Petitioner's Project to achieve minimum PLF of 85% and not otherwise. Thus, the PLF

assured to the Petitioner under the PPA is 85% and the same is a condition precedent for issuing any offline Dispatch Instruction.

(20) There is no linkage between interest on Working Capital and Start and Stop expenses, they are distinctly different and operate independently of each other. The Interest on Working Capital is to compensate the Petitioner for maintaining the components of Working Capital required to generate and supply electricity at a minimum of 85% of Rated Capacity while Start and Stop expenses are meant to indemnify/compensate the Petitioner for the additional cost incurred for backing down and resuming the generation of electricity pursuant to the Dispatch Instructions issued by the Respondent from time to time.

(21) The Petitioner is entitled to Interest on working Capital at 85% PLF only. Beyond 85% PLF, the Respondent can issue Off line Dispatch Instructions subject to the limitation on number of such instructions specified in the said Clause 6.3 (b) (ii) and the Respondent will have to compensate the Petitioner for the increased costs incurred by the Petitioner in giving effect to such instructions.

(22) The Petitioner is therefore entitled to claim Interest on Working Capital at 85% PLF. Beyond 85% PLF, the Petitioner is not paid Interest on Working Capital. Start-stop expenses will have to be paid to the Petitioner for the increased cost incurred by it in accordance with the PPA.

(23) For the reasons aforesaid, the Petitioner is entitled to claim interest on Working Capital at 85% PLF. The action of Respondent in disallowing any portion of the Interest on Working Capital was

clearly in breach of PPA. The amounts due to the petitioner on account of Interest on Working Capital disallowed, as on 30-06-2008, is Rs.460,293,241/- as per the details provided [Page: 42-46 of the Additional Statement of Claim filed by the Petitioner on 18-09-2009]. The said amount will carry further interest from 1st July 2008 till payment thereof.

(24) It is apparent from the above that the Respondent sought to raise an issue with regard to the Interest on Working Capital only sometime in May 2005. The Petitioner protested against this. The matter was then discussed between the parties. The Respondent deducted Rs.9.95 Crores in the month of February 2006 thereby precipitating the issue. The Petitioner made several representations to the Respondent claiming Interest on Working Capital at 85% PLF as per its entitlement under the PPA. This claim was filed by the Petitioner in July 2008 and the same does not suffer from any delay or laches, and not barred by time.

(25) The following chart gives a bird's eye view of the Petitioner's claim on Interest on Working Capital:

Clause of PPA	**Breach**	**Submission**	**Document relied**	**Amount Claimed (in Rs)**
Appendix-D, definition of Working Capital [running page 150 of Vol-I] Definition of PLF [running page 149 of Vol-I] Definition of Deemed Generation [page 142 & 143 of Vol-I]	TNEB discarded Deemed Generation in calculating PLF achieved by the petitioner. TNEB agreed to consider 85% PLF for calculating Interest on Working Capital but failed to follow the same.	PLF includes Deemed Generation also as per definition of PLF. As per PPA the company is supposed to be available for dispatch at 85% PLF at all times and hence it is only rational to calculate Interest on Working Capital at 85% PLF.	Letter by GMR to TNEB, dated 1.7.1996 objecting for computation of Int. on Working Capital on less than 85% PLF [running page 68 to 71 of Vol-II] and Letter dated 19.7.1996 to consider Working Capital at 85% PLF [running page 72 of Vol-II]	46,02,93,241

Article 6.3. (a) and (b) (i) [running page 100 of Vol-I]	TNEB gave lesser dispatch instructions even though the company has been always available at minimum 85% PLF.	The company should not be penalized for obeying the terms of PPA by made itself available at 85% PLF at all times.	TNEB sent letter to GMR, dated 30.7.1996 agreeing for claiming Working Capital based on 85% PLF [running page 73 of Vol-II]	

(C) Contention of the Respondent

(1) Upto 01-04-2005 it had paid the entire amount as claimed in the invoice, even though the invoices were not raised in accordance with the PPA in respect of the interest on the working capital, throughput charges, interest on debt etc. Only after 01-04-2005, the Respondent started disallowing the claims which were not in accordance with the PPA, but paid the amounts raised as per the PPA in full, by availing 2.50% rebate on the amount paid, as the same was paid well within the time prescribed in Article 8.3 of Addendum-2 of the PPA.

(2) The PPA signed between the Petitioner and the respondent contains the methodology for paying interest on working capital.

(3) As per Appendix D(D-11) of PPA vide page 150 of Vol 1, the components of working capital has to be limited to the lower of (i) amounts associated with the generation of electricity of not more than 7446 hours (85%)of dependable capacity and (ii) preceding three year tariff year average of actual PLF achieved (excluding initial tariff year and stub tariff year).

(4) The definition for Plant Load Factor found in Art. 1 (inner page D-10 of the PPA Page 149 of volume 1) deals with the Gross Actual Energy. The definition of PLF includes Gross Actual Energy plus all deemed generation during such period. The word Gross Actual Energy is clearly spelt by making a clear distinction with Deemed Generation. A normal literal English meaning is to be construed as there is no definition for actual PLF.

(5) As per the above clause, the interest on working capital has to be arrived only to the extent of actual PLF achieved. In the instant case, the actual average PLF achieved preceding three years ranges from 46.85 % to 76.11%. The petitioner has been claiming flat rate of 85% throughout the period though the actual PLF is lesser than the 85%.

(6) The fixation of 85% PLF is the maximum ceiling limit and that will not vest any right on the petitioner to claim flat rate of 85% throughout the period.

(7) It is evident from the provisions of PPA cited above; the introduction of word “actual” for calculation of PLF and the exclusion of the initial stub year would prove the case of the respondent Board. In other words, the intention of the parties is to take the actual PLF achieved and not the flat rate of 85%.

(8) It is submitted that the term “PLF and the term normative PLF alone are defined in the PPA. The term actual PLF is not defined in the PPA. The petitioner cannot take advantage of the same.

(9) The contention of the petitioner that the deemed generation is to be taken into account may not hold the ground since, the word “average of actual PLF achieved” is incorporated in the PPA.

(10) If the petitioner’s view is adopted then the need for excluding the initial tariff year and stub year has to be explained.

(11) Further the need for adding the word actual PLF achieved in the clause also needs to be explained.

(12) Hence, the respondent submits that the component of working capital should be calculated based on the average of the actual PLF achieved by the Petitioner.

(13) It is also evident from the respondent’s letter dated 30-7-1996 vide page 73 of Volume II that working capital will be based on the actual PLF achieved in the previous three years or 85% whichever is lower.

(D) Delay and laches

The TNEB recovered Rs.5.37 crores on 15-11-2005 towards excess payment of interest on working capital during 2002-03, 2003-04 and 2004-05. This cut was reversed the very next day that is, on 16-11-2005. Again, TNEB deducted Rs.9.95 crores from the monthly invoice of January 2006 paid during February 2006 towards excess payment on interest on working capital. The cause of action arose in February 2006. The petitioner has filed this claim for interest on working capital on 25-7-2008. Even assuming that

limitation applies to this claim, the Petitioner is well within the limitation period of three years and therefore there is no legal hitch in considering his claim of short payment of interest on working capital

(E) Ruling on delay and laches

The claim for interest on working capital does not suffer from delay and laches and even if we assume that the Limitation Act, 1963 would apply, the claim has been filed within the limitation period of three years.

(F) Analysis of the case

The limited issue for consideration is whether deemed generation should be added to the generation physically achieved by the Plant.

(1) Clause 1.2 of Appendix D of the PPA defines working capital. The proviso clause of this definition reads as follows:

> *"Provided that, the above components of Working Capital shall be limited to the lower of (i) amounts associated with the generation of Electricity of not more than seven thousand four hundred and forty six (7,446) hours times Dependable Capacity and (ii) preceding three Tariff Year average of actual PLF achieved, (excluding Initial Tariff Year and Stub Tariff Year). Further provided that for the Initial Tariff Year, Stub Tariff Year and Succeeding Years (i) above is applicable."*

(2) The first limb of the proviso provides for working capital associated with generation of electricity of not more than 7446 hours times dependable capacity. In plain words, this would mean that working capital associated with 85% capacity utilization shall be reckoned. The Respondent interprets the word "actual PLF" in the second limb of the proviso as PLF physically achieved by the petitioner. On the other hand, the petitioner

contends that the interpretation should be with reference to the definition of Plant Load Factor, which includes deemed generation. The issue narrows down to this difference in the interpretation.

(3) To understand the issue, we need to extract the following definitions:

> *"Plant Load Factor" or "PLF" shall mean the ratio expressed as a percentage, for a billing period or a tariff year, with respect to a unit (during the initial year only) or the project, of (A) the sum of (i) gross actual energy, plus (ii) all deemed generation during such period, plus (iii) for the purposes only of paragraph 5 (b) (ii) of Appendix D, all gross actual energy which would have been generated by the project, but was not generated, during any time the project was not or was generating at less than NPLF due to any event of force majeure (except an event of force majeure described in Section 12.1(b)(1)(i) and (ii)} calculated as the product of (u) the number of hours the event of force majeure was in effect, and (v) the average of the declared availability during such period, to (B) the product of (x) the period hours in such period, and (y) rated capacity (in Kw). All references to rated capacity shall be to rated capacity after all re-performances of the rated capacity test permitted under the provision of this agreement."*
>
> *{Clause 1.2 of Appendix D of the PPA}*
>
> *"Deemed Generation" and "DG" shall mean, with respect to the project during a deemed generation period, the difference, in KWH, between (x) product of (i) the lower of (x) Declared Availability of the Project (in MW) in the Deemed Generation Period, (y) Rated Capacity (unless it cannot be determined, for example, due to the occurrence of an event of Force Majeure), and (z) Observed Capacity, (ii) the number of Period Hours in the Deemed Generation Period, and (iii) one thousand (1,000) and (y) Gross Actual Energy produced by the project during such Deemed Generation period. "DG_1" shall mean the Deemed Generation for period hours; accordingly, $DG_1 = (D_1` * PH_1 * 1,000) – (Gross\ Actual\ Energy)$, where D = the lower of (x) Declared Availability of the Project (in MW) in such period, (y) Rated Capacity (unless it cannot be determined, for example, due to the occurrence of an event of Force Majeure) and (z) Observed Capacity: provided that, in accordance with existing Electricity Notification-Tariff, for the time being, no Incentive Payment shall be payable by TNEB to the Company in respect of Deemed Generation, provided, further, that, Incentive Payment shall be payable by TNEB to the Company in respect of Deemed Generation. If permitted after the date hereof by Indian Legal Requirements. So long as no Incentive Payment is payable by TNEB for Deemed Generation, for PLF computation, Deemed*

Generation to the extent required to enable the Company to achieve NPLF in a Tariff Year would be taken.

{Clause 1.2 of Appendix D of the PPA}

"Actual Energy" or "AE" shall mean, with respect to a Unit or the Project for any period, the amount of energy, measured in Kwh by the Metering System in accordance with Section 9.1 of the Agreement at the Interconnection Point during such period. "$AE_{u,m}$" shall mean Actual Energy in Billing $Period_m$, produced by $Unit_u$, or the Project."

{Clause 1.2 of Appendix D of the PPA}

"Gross Actual Energy" shall, with respect to a Unit (during the Initial tariff year only) or, subsequently, the Project, for any period, be equal to Actual Energy divided by the difference between unity and APCF, i.e.

$$\text{Gross Actual Energy} = \frac{\text{Actual Energy}}{I - APCF}$$

{Clause 1.2 of Appendix D of the PPA}

"Declared Availability" and "DA" shall mean, for any Settlement Period, the aggregate amount of gross electrical capacity of all units, expressed in MW, measured at Rated Grid Conditions at the generator terminals of the Units, which the Company has most recently declared in an Availability Notice or a Revised Availability Notice for that settlement period, to represent the amount of gross electrical capacity the Company expects could be delivered to TNEB if all units were fully loaded."

{Clause 1.2 of Appendix D of the PPA}

"<u>Dispatch</u>"

(a) The Company shall follow the Dispatch Instructions issued in accordance with this Agreement. TNEB shall only issue Dispatch instructions which are in the interest of an integrated grid operation consistent with the Technical Limits and the avoidance of a Project shutdown consistent with the provisions of this Agreement. TNEB shall not issue part-load Dispatch Instructions to the Company other than those expressly provided for in Section 6.3 (b). Deemed Generation attributable to compliance with Dispatch Instructions shall be calculated by the Company on the basis of the Dispatch Instructions.

(b) Except in the event of an emergency affecting the Grid System.

(1) during the initial Tariff Year, Stub Year and during the first five (5) Tariff Years, at a load below ninety per cent (90%) of Rated Capacity;

(2) during the next succeeding five (5) Tariff Years, at a load below eighty seven point five per cent (87.5%) of Rated Capacity; and

(3) during the next succeeding five (5) Tariff Years, at a load below eighty five per cent (85%) of Rated Capacity."

{Clause 6.3.of PPA}

"1.6. Full fixed charges shall be recoverable at generation level of 6000 hours / kw / year. Payment of fixed charges below level of 6000 hours / kw / year shall be on prorata basis. There shall not be any payment for fixed charges for generation level above 6000 hours / kw / year. For generation of above 6000 hours / kw / year, the additional incentive payable shall not exceed 0.7 per cent of return on equity, for each percentage point increase of Plant Load Factor above the normative level of 6000 hours / kw / year. While computing the leval of generation, the extent of backing down, as ordered by the Regional Electricity Boards shall be reckoned as generation achieved. The payment of fixed charges shall be on monthly basis, proportionate to the electricity drawn by the respective Boards and other person. Necessary adjustment based on actual shall be made at the end of each year."

{Notification dated 30th March 1992 of the Ministry of Power, Government of India)

(4) Declared availability refers to the capacity which the petitioner makes available periodically. In the instant case, the petitioner has commissioned four units each with capacity of 50 MWs. The petitioner is required to declare whatever units are available for generation. If, for example, one unit is not available, then his declared availability would be 150 MWs instead of 200 MWs. The Dispatch Instructions of the respondent are governed by clause 6.3 of the PPA, which requires the Respondent not to issue Dispatch Instructions, which will call upon the petitioner to operate below 90% during the first five years, below 87.5% during the next five years and below 85% during the next five years. This obliges the Respondent to ensure dispatches above 90% during the first five years, above 87.5% during the next five yeas and above 85% during the next five years. This casts a corresponding duty on the petitioner to ensure capacity availability for operation above 90% during the first five years, above 87.5% during the next five years and above 85% during the next five years. Further, this clause provides that if the Respondent directs the petitioner through Dispatch Instructions to operate below 90%, 87.5% and 85% respectively, the petitioner would be entitled to the credit of deemed generation in

addition to the actual generation. This is the meaning of the following sentence in clause 6.3 (a):

> *"deemed generation attributable to compliance with Dispatch Instruction shall be calculated by the company on the basis of Dispatch Instructions".*

(5) This reading is reinforced by clause 8.3 (a) of the addendum II to the PPA which is extracted below:-

> *"8.3 Invoices – (a) Billing: The company shall submit to TNEB after the first day of each month that commences after the Commercial Operation Date and Invoice ("Invoice") for all the amounts accrued in the preceding months (or partial month) under tariff and other applicable sections in this Agreement for the monthly tariff payments (as per Appendix D) which became due during the preceding month. Each Invoice shall show the due date ("Due Date") of the Invoice to be the dat that is not earlier than thirty days after submission of the Invoice by the Company for review by TNEB. The company shall certify the amount of Deemed Generation to which the company is entitled during the preceding month. TNEB shall have access to all relevant information and records of the company to confirm the accuracy of any invoice or certificate of Deemed Generation."*

This clause stipulates that the company shall certify the amount of deemed generation, to which the company is entitled, during the preceding month.

(6) "Plant Load Factor" has been defined as the ratio of the Gross Actual Energy plus the Deemed Generation to the product of rated capacity and the duration in hours of that period. Gross Actual Energy has been defined as the ratio of Actual Energy generated by a Unit (or the Project) to the gross energy available for use after deducting the power consumed by the auxiliaries. It is significant to note that whereas both the terms "Gross Actual Energy" and "Actual Energy" have been defined in Clause 1.2 of Appendix-D of the PPA, in the case of Plant Load Factor no such distinction has been made. "Plant Load Factor" has been defined in Clause 1.2 of Appendix-D of the PPA, but "Actual Plant Load Factor" occurring in the definition of working capital in clause 1.2 of Appendix-D of the PPA has not been

defined. Therefore, actual plant load factor should be interpreted with reference to the definition of plant load factor.

(7) Clause 1.6 of the Notification dated 30th March 1992 of the Government of India mandates that while computing the level of generation, the extent of backing down as ordered by the Regional Electricity Boards shall be reckoned as generation achieved. This is a clear indication that deemed generation is to be added to the generation physically achieved for the purpose of recovery of fixed cost, of which one component is interest on working capital.

(8) The Respondent contends that the definition of working capital concedes that the working capital for the initial tariff year, stub tariff year and succeeding two tariff years shall be fixed at 85% (referred to in the first limb of the proviso) and therefore the second limb of the proviso should be interpreted to mean the Plant Load Factor physically achieved. "Initial tariff year" has been defined in Appendix-D of the PPA as the period commencing on the commercial operation of the first Unit and ending on the commercial operation of the last Unit. In the instant case, the first and second Units were commissioned on 31-12-1998 and the last unit was commissioned on 15-2-1999 and therefore the initial tariff year would cover the period from 31-12-1998 to15-2-1999. "Stub tariff year" has been defined as the period commencing from the commercial operation date of the last Unit to the March 31st first occurring after the commercial operation of such Unit. In the instant case, the last Unit was commissioned on 15-2-1999 and therefore stub tariff year shall cover the period from 15-2-1999 to 31-3-1999. "Tariff year" has been defined to mean the initial tariff year, the stub tariff year, each period of twelve months following the end of the stub year and the period between the penultimate tariff year and the end of the Term, whether or not of twelve months duration. The second limb of the proviso excludes initial tariff year and stub tariff year for the computation of three tariff year averages precisely because full

capacity is not available during the initial tariff year and the stub year generally falls short of twelve months. Capacity figure of 85% was considered for an initial tariff year, stub tariff year and succeeding two tariff years because the initial tariff year would not have witnessed full capacity installation, stub tariff year generally falls short of twelve month period and therefore the three year average period would not reflect the achievable capacity. Viewed in this context, it is perfectly logical to concede 85% of capacity utilization for the purpose of working capital during the initial tariff year, stub tariff year and succeeding two tariff years.

(9) A conjoint reading of the various provisions of the PPA and the Notification of the Government of India dated 30th March 1992 makes it clear that Deemed Generation is to be added to the Actual Generation for computing the Plant Load Factor. Our interpretation is reinforced by Clause 9 of the PPA executed by the Respondent with M/s. PPN four months later. The relevant clause is extracted below:-

> *"*Interest on working capital
>
> *With respect to any year shall mean an annual allowance for working capital interest expense equal to :*
>
> *WCIR x (FS + OM + MS + R)*
>
> *Where: WCIR = Working Capital Interest Rate as set forth in Article 1 of this agreement.*
>
> *FS = thirty (30) days of Alternate Fuel stocks*
>
> *OM = operation and maintenance expenses for one (1) Month as calculated for purposes of FCC.*
>
> *MS = maintenance spares as defined in Article 1 of this Agreement*
>
> *R = receivable equivalent to two months average billing for Sale of electricity (but not including any part of such billing for Taxes) computed as the sum of monthly tariff payments (excluding taxes) for the*

twelve (12) months period immediately preceding the Fixed charges computation date, divided by six (6). Initially, and until twelve months of monthly tariff payments have been received by the company, R shall equal:

$$\frac{85.0 \times \text{Tariff for the year} \times (\text{Capacity} \times 1000 \times 8760)}{6}$$

Provided that FS and R shall be limited to a amounts associated with generation of not more than 7446 hours times capacity."

This PPA provides for interest on working capital at the flat rate of 85% PLF.

(G) Ruling on interest on working capital

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

(2) The Petitioner is directed to submit his claim along with interest on account of short payment of interest on working capital for the period from 1-4-2002 to the Respondent in accordance with the ruling within two months of this order. Interest on the claims shall be governed by Clause 8.6. of the Addendum 2 to the PPA governing late payments. Interest is payable from the date when the claim became originally due. The Respondent is directed to settle the claim within six months of receipt of the claim in six equal monthly instalments.

PART – IV

START-UP COSTS

(A) Facts of the case

(1) The start-up cost are dealt with in Clause 6.3 (b)(ii) of the PPA as follows:-

"(ii) There shall be no more than 50 off line dispatch instructions per Unit per Tariff Year which require the Company to restart a Unit after it has been backed down. TNEB shall pay the Company, under a supplementary invoice, the Companies reasonable start-up costs for each start-up in excess of ten (10) start-ups per Unit, at a start-up charge calculated in according with Appendix-M; this Clause will have an overriding effect over the dispatch instructions specified in 6.3(b)(i) subject however to TNEB allowing the Project to achieve PLF of 85%."

The Petitioner operates four Units. As per this Clause, the TNEB is entitled to ten start-ups for each unit for each Tariff Year free of cost. Start-ups exceeding 10 upto 50 for each Unit for each tariff year shall be billed to the account of TNEB in accordance with the charges prescribed in Appendix-M of the PPA. The charges for start-up shall be billed under a Supplementary Invoice.

(2) Supplementary Invoice has been defined in Clause 8.7 of Addendum-2 to the PPA as follows:-

*"8.7 **Supplementary Invoices** - Amount owned by TNEB pursuant to this agreement and not billed by the Company in the Tariff Invoice, including Year-End Estimated Cost Adjustment Amount, the payments described in Section 4 of Appendix-D, foreign exchange adjustment payment, costs in respect of fuel and other amounts which are indicated in this agreement to be payable by a "Supplementary invoice" may be billed at any time by means of supplementary invoice (a "Supplementary Invoice"), which shall be payable to the Company. Rebate shall not be applicable with respect of any supplementary invoice unless such supplementary invoice relates exclusively to sale of electricity after the commercial operation date of the first Unit in commercial operation and any portion of the invoice amount with*

respect to any supplementary invoice shall be due and payable by TNEB within a due date (30) days of receipt by TNEB of the applicable Supplementary Invoice."

(3) Clause 6.6 of the PPA deals with Dispatch Instructions in excess of 50. The Clause is extracted below:-

*"6.6 **Breach.** Unless due to an emergency if Dispatch instructions are issued in contravention of any of the forgoing provisions.*

(a) TNEB shall indemnify the Company for the increased costs relating to any fuel consumption, auxiliary power consumption and other operating costs reasonably incurred by the Company, in backing-down and resuming generation and any such increased costs incurred in connection with the period of reduced generation. TNEB further recognizes and agrees that it will pay for any charges incurred by the Company under its fuel supply agreement as a result of dispatch instructions, that the Company cannot otherwise recover under Appendix-D"

(4) The petitioner on 13th March 2000 addressed the Respondent indicating the cost per start up as Rs.76,677.20 as below:

Total start up cost

S.No.	Item	Qty.	Cost/Unit	Total
1.	LDO	3.0 Tons	Rs.15,540/Ton	Rs.46,620.00
2.	LSHS	1.8 Tons	Rs.10,456/Ton	Rs.18,820.80
3.	CLO	100 Ltrs.	Rs.61.50/Ltr.	Rs. 6150.00
4.	Electric power	1589.5 units	Rs.3.20/unit	Rs. 5086.40

Total start up cost: Rs.76,677.20

(5) The petitioner indicated the stoppages ordered by the Load Despatch Centre as 27 for the period 1999. This figure has not been denied by the Respondent and has been included in their typed set. The Respondent did not react to the letter, particularly the start up cost. Appendix M of the PPA is reproduced below:-

Appendix M

Computation of start-up charges

(The details shall be worked out as per detailed design and engineering to be furnished later)

(6) The Petitioner states that upto June 2008, the Respondent issued a total of 4700 start up instructions. The Petitioner submitted a supplementary invoice on 8th May 2008 claiming start up expenses from March 2001 upto March 2008 for a sum of Rs.44.12 crores. Thereafter, the Petitioner has been submitting supplementary invoices for start up expenses on monthly basis. The Petitioner quotes the PPA to support his contention that the start up expenses can be raised any time.

(7) Arguments on DRP.No.10 of 2008 were closed on 16th November 2009 and Orders were reserved by the Commission. Thereafter, the Respondent informed the Commission that he had constituted a committee to determine the start-up charges for the purpose of adducing further evidence in this case. The Commission informed the Respondent on 17th December 2009 that arguments were over and Orders have been reserved and no further evidence would be admissible.

(B) Contention of the Petitioner

(1) Start-Stop pertains to backing down and resuming generation of electricity based on Respondent's offline Dispatch Instructions issued pursuant to Clause 6.3 (b) (ii) (Volume I page 100) read with Clause 6.6 (a) (Volume I Page 101) of the PPA. The Petitioner submits that when stop instruction is received from the Respondent, the DG load is gradually reduced to minimum of around 5 MW and then desynchronized from the grid taking about 30 minutes.

(2) During this ramp down of engine load, additional auxiliaries like auxiliary blowers get started for a safe shut down. After desynchro, the engine speed is reduced to zero RPM while the other critical lube and cooling water pumps continue to run for additional 30 minutes in order to cool down the engine combustion components and avoid thermal shock. This operation from ramp down up to stoppage of all auxiliaries results in additional consumption of fuel, lube and auxiliary power.

(3) The approximate time taken for an engine during this safe stop operation is around 78 minutes. Similarly, on receipt of start instruction from the Respondent, the engine is prepared for start up by initializing the various unit auxiliaries like cooling water pump, lube oil pump etc., the engine is ready to start after all the permissive are ensured and take approximately 6 to 7 minutes to ramp up from zero RPM to its rated RPM of 103.4. During this period, additional lubrication is ensured for a safe start. Subsequently on synchro of the engine with the Grid, the loading ramp up is initiated by DCS and it takes approximately 45 to 50 minutes to reach full load.

(4) During this complete 60 minutes of start-up operation, additional lube, fuel and auxiliary power are consumed by the engine more than what it would have otherwise consumed during normal operation at around full load. The total time duration taken for a stop – start operation is approximately 138 minutes, during which an engine generates an average of 45 to 48 MW, whereas, if operating at full load the same engine generates 48 MW in one hour. The pertinent point to be noted here is that during one stop-start operation, even though the energy generated is equivalent to energy generated in normal operations, due to the additional time duration of 1.3 hours and the excessive consumption of lube oil, fuel and auxiliary power, the Petitioner is entitled to be indemnified for the additional cost so incurred to back down and resume generation during a stop-start operation.

(5) In addition to the fuel, lube and auxiliary power as consumed during start up, in long run the engines are also subjected to excessive wear and tear, breakages/damages of the heavy combustion components namely piston rings. These engines being slow speed and very large duty type are susceptible to increased wear and tear if subjected to large number of start – stops during their lives.

(6) As per Appendix M of the PPA, the Petitioner has vide its letter dated 13th March 2000 (Volume IV, page 32 to 39) has provided to the Respondent the details of start-stop expenses along with the number of start-stops during the first Tariff Year. In the said letter, the basis of arriving at the individual start-stop expenses has also been provided to the Respondent. The Respondent, at no point in time has raised any issue on the same.

(7) In terms of the said clause 6.3 (b) (ii) of PPA (Volume I, page 100) the Respondent cannot give more than 50 Offline Dispatch Instructions per Unit per Tariff Year. However, the Respondent resorted to giving instructions without any regard whatsoever to the provision of the said Clause 6.3 (b) (ii) and also to the safety of the engine operations. The instructions so issued average around 600 per Tariff Year as against the permissible 200 instructions. As of June 2008, the total number of such start up instruction was about 4700. This was in gross breach of the provisions contained in the said clause 6.3 (b) (ii), sufficient to trigger the consequences provided in Clause 6.6 (a) and (b) of PPA (Volume I, page 101). However, the Petitioner has so far not invoked the same and has only claimed start-stop expenses.

(8) The Petitioner submitted a Supplementary Invoice on 8-05-2008 claiming start-stop expenses due upto March 2008 and has since been submitting the Supplementary Invoices for start-stop expenses on monthly basis. It is pertinent to mention that in terms of Clause

8.6 (pre-Addendum 2, Volume-I, Page:107) and Clause 8.7, (post-Addendum 2, Volume-I, Page:275) of PPA, the Petitioner is entitled to claim start-stop expenses at any time. The Respondent, however, failed to pay the start-stop expenses claimed by the Petitioner. During the course of instant proceedings the Respondent sought various details with regard to the Petitioner's claim for start-stop expenses and the same have all been provided and copy thereof has also been produced before this Hon'ble Commission.

(9) As submitted on behalf of the Respondent during the course of arguments, there is no serious dispute with regard to the number of off line Dispatch Instructions given by the Respondent to the Petitioner and Petitioner's entitlement to be indemnified for the additional costs incurred in giving effect to the same. The Petitioner has provided to the Respondent and to this Hon'ble Commission, the full particulars of its claim. The Petitioner is therefore entitled to the amount as claimed.

(10) As already contented and established the provisions of the Limitation Act, 1963 will not apply to the instant proceedings before this Hon'ble Commission. Further, in terms of the provisions contained in the said Clause 8.7 of PPA (Vol I, page 107), the Petitioner is entitled to claim start-stop expenses at any time and accordingly the claim was made by way of Supplementary Invoice dated 08-05-2008 for the start-stop expenses due up to March 2008. Therefore, the instant claim of Rs.44.12 Crores brought before this Hon'ble Commission in July 2008 for recovery of start-stop expenses is in no way barred by time nor does it suffer from any delay or laches.

(11) The following chart gives a bird's eye view of the Petitioner's claim:

Clause of PPA	Breach	Submission	Document relied	Amount Claimed
6.3 (a) and (b) of PPA. [running page 100 of Vol-I]	TNEB failed to pay start-up costs for each start-up in excess of 10 start- ups per unit.	Petitioner submitted details of start-ups and calculation for claiming reasonable costs for excess star-ups vide communication dated 13-3-2000	Start-Stop details and details of expenses sent by GMR to TNEB [running page 32 of Petitioner's rejoinder]	Rs. 44.12 crores.

(C) Contention of the Respondent

(1) It is respectfully submitted that as per Art. 6.3(b) (ii) of PPA, there shall be no more than 50 off line dispatch instructions per unit per Tariff year which require the petitioner to re-start a unit after it has been backed down. The respondent shall pay the petitioner, under a supplementary Invoice, the company's reasonable start-up costs for each start-up in excess of ten (10) start-ups per unit, at a start-up charge calculated in according with Appendix M. With regard to computation of start up charges furnished in the Appendix M, it is stated that "The details shall be worked out as per the detailed design and Engineering and to be furnished later". However the same has not been incorporated later.

(2) The company has not claimed the start stop from COD to March 2008. Only in their letter dated 9-05-2008 the company has claimed the start up charges.

(3) The company in their letter dated 27-6-2006, at page 398 of volume 1, with regard to claim of interest on working capital, stated that it would claim increased costs in accordance with the provisions of PPA, which would be materially higher than the over billing of

interest on working capital component. Therefore, the company has treated the claim of start stop charges only as an alternative to the claim of the interest on working capital.

(4) It is submitted that as per Art. 6.6 of PPA, the respondent Board shall indemnify the company for the increased costs relating to any fuel consumption, auxiliary power consumption and other operating costs reasonably incurred by the company, in backing down and resuming generation and any such increased costs incurred in connection with the period of reduced generation. The respondent Board further recognizes and agrees that it will pay for any charges incurred by the company under its fuel supply Agreement as a result of Dispatch Instructions, that the company cannot otherwise recover under Appendix D.

(5) As per the above provision, the petitioner company has not invoked / exercised its option for claiming increased cost relating to the fuel consumption /auxiliary consumption for the reduced generation/backing down/resuming generation. Therefore, the petitioner cannot maintain the claim for start stop expenses alone without invoking Art. 6.6.

(6) The respondent Board has verified the number of start-stop of the machines and has given a provisional data before this Hon'ble Commission during the course of the oral arguments. Also the same been reconciled by both TNEB and GMR and the revised details were filed before Hon'ble Commission.

(7) It is further submitted that the respondent Board constituted an expert committee headed by Member (Generation), CE(PPP), SE(PPP), EE (Project), AEE(Hydro), for examining the claim of the start stop expenses made by the petitioner. The committee inspected the petitioner's plant on 25-11-2009 and they have sought certain details from the

petitioner. Further the issue has been examined in detail by stopping the machine and by restarting the machine to assess the reasonable expenses. In the circumstances, they may be permitted to file a detailed final report separately.

(D) Delay and laches

The start-up costs are billable under supplementary invoice as per the PPA. The Petitioner contends that the PPA allows supplementary invoices to be raised any time. We need to distinguish, in this context, supplementary invoices from monthly invoices. Monthly invoices are required to be submitted on the first working day of the following month. A distinction has been made in regard to start-up cost, because these are not regular charges. The Respondent is entitled to first ten start-ups free of cost per Unit per Tariff year. Therefore, billing is due only from the eleventh start-up and that is the reason why supplementary invoice has been allowed a grace time. "Any time" cannot be interpreted to mean a time, which is un-related to the occurrence of the event. The Commission believes that beginning from the 11th start-up, the Petitioner ought to have raised supplementary invoices for the chargeable start-ups of the previous month, just as he has been doing since May, 2008. The Petitioner submitted a supplementary invoice on 8th May 2008 claiming start up expenses from March 2001 upto March 2008 for a sum of Rs.44.12 crores. There is no explanation or justification furnished by the Petitioner for the failure to raise supplementary invoices for start-up cost in due time. Supplementary invoice for start up charges of April 2005 is due in May 2005. Therefore, the Commission decides that the claim of the Petitioner should be allowed only for three tariff years prior to March 2008, that is, start-up cost should be allowed only for three tariff years with effect from 1-4-2005. This corresponds to the limitation period of 3 years prescribed in the Limitation Act 1963.

(E) Ruling on delay and laches

The delay in submission of the supplementary invoice on 8-5-2008 has not been justified by the Petitioner and therefore his claim is limited to a period of three years.

(F) Analysis of the case

(1) It is pertinent to record herein that the TNEB has resorted to a large number of stop instructions. The Petitioner puts the figure at 4700. This is not seriously disputed by the Respondent. Such a large number of stop instructions is attributable to the high variable cost of the plant of the Petitioner. Whenever the TNEB was compelled to tone down the quantum of generation, on account of fall in power demand, merit order dispatch dictated that high cost units, such as that of the Petitioner, be shut down first. By and large, the variable cost of generation of TNEB's own units has been much lower than the IPPs. But, the TNEB failed to weigh the cost of shutting down the generation of the plant of the Petitioner against the benefits. The cost of shutting down seems to outweigh the benefits. As the load center personnel of the TNEB, who were charged with the task of dispatch of start / stop instructions, were, perhaps, unfamiliar with the contractual obligations of the PPA, they went on merrily stopping the plant without realising the cost involved in exercising such an option.

(2) As regards the quantum of start up charges, it is pertinent that although the petitioner notified the Respondent in March 2000 about the quantum of start up charges as Rs.76,677 per start up, the Respondent did not react nor did he suggest an alternative figure. The PPA provides for consultation between the Petitioner and the Respondent for

determining start up charges. The Respondent, having chosen to forego this opportunity, is bound by the figure of Rs.76,677 per start up. This figure should be applicable for the chargeable start ups for the period from 1st April 2005 till date, although the Petitioner has raised invoices at higher rates of Rs.95,122 for 2005-06, Rs.1,09,158 for 2006-07, Rs.1,13,115 for 2007-08 and Rs.3,04,444 for 2008-09. As regards the number of start ups, there is no serious disagreement between the Petitioner and the Respondent. By and large, the figures tally. The Petitioner and Respondent are at liberty to prescribe the charges under Appendix 'M' after mutual discussion prospectively.

(G) Ruling on start-up costs

(1) The Petitioner and the Respondent are directed to reconcile the number of start ups for the period from 1st April 2005 till date within 15 days of the order.

(2) The Petitioner is directed to submit his claim for start up cost accruing from 1st April 2005 till date to the Respondent within a period of two months thereafter at the rate of Rs.76,677 per start up and the Respondent is directed to make payment within a period of six months of receipt of the claim in six equal monthly instalments.

(3) The Petitioner is eligible to claim interest in accordance with Clause 8.6 of Addendum 2 of the PPA.

(4) The Petitioner and the Respondent are at liberty to mutually negotiate the start-up charges prospectively.

PART – V

ENTRY TAX

(A) Facts of the case

(1) The story begins with the enforcement of the Tamil Nadu Tax on Entry of Goods into Local Areas Act, 2001 (Act 20 of 2001) with effect from 1-12-2001, which subjected fuel and lubricating oil purchased by the Petitioner from Hindustan Petroleum Corporation Limited outside Tamil Nadu and moved to the depot of the petitioner in Chennai to Entry Tax. As the Petitioner imported the goods into Tamil Nadu for consumption, he was liable under the law to pay the entry tax. The entry tax was levied at 16% with effect from 1-12-2001. The rate was reduced to 3% in the case of the petitioner with effect from 1-4-2002.

(2) HPCL offered reimbursement of 3% to the petitioner to neutralize the effect of entry tax from 1-12-2001 upto 31-12-2006. The Comptroller and Auditor General objected to this reimbursement on the ground that the petitioner has secured reimbursement from the Respondent for the entry tax. In response to the observation from the audit of the Comptroller and Auditor General, HPCL on 16-5-2008 reversed all the credit notes on account of reimbursement totalling Rs.36.37 crores. The petitioner had availed reimbursement to the extent of Rs.29.26 crores out of the total Rs.36.37 crores. The petitioner refunded Rs.19.22 crores out of Rs.29.26 crores to HPCL, by which time, the Respondent, acting on the same audit note, recovered Rs.10.04 crores from the Petitioner. The actual recovery effected by TNEB from the Petitioner in December 2007 was Rs.11.71 crores, which included principal of Rs.10.04 crores and interest of Rs.1.67 crores. HPCL, not being aware of the recovery effected by the Respondent, demanded the balance Rs.10.04 crores

(equal to Rs.29.26 crores minus Rs.19.22 crores) from the Petitioner. The Petitioner now claims that the TNEB should refund Rs.11.71 crores, of which Rs.10.04 crores would be passed on to HPCL.

(3) The High Court of Madras struck down the Tamil Nadu Tax on Entry of Goods into Local Areas Act, 2001 in March 2007. The present dispute relates to the period from 1-12-2001 to 31-12-2006.

(B) Contention of the Petitioner

(1) Under the PPA, the Respondent is liable to reimburse the Petitioner inter-alia Entry Tax incurred by the Petitioner in connection with fuel procurement. The Petitioner has accordingly claimed the Entry Tax incurred during the period from Dec 2001 to Mar 2007 and the Respondent has reimbursed the same to the Petitioner.

(2) Hindustan Petroleum Corporation Limited (HPCL), the fuel supplier had extended certain commercial discount equivalent to 3% of entry tax to the Petitioner. The same was availed by the Petitioner during the period in which due to short payment, delayed payment and ad-hoc payments, the Petitioner was subjected to severe financial constraints.

(3) The Accountant General while auditing the books of HPCL had raised some time in the year 2007 objections to the said commercial discount and directed HPCL to recover the same from the Petitioner. There upon, HPCL has reversed the total credit aggregating to Rs.36.37 Crores and demanded the same from the Petitioner. However, the Petitioner had availed the credit only to the extent of Rs.29.26 crores, and as such communicated to HPCL that actual credit availed was Rs.29.26 Crores only which has been accepted by HPCL.

(4) While the discussions between HPCL and the Petitioner regarding the credit reversed by HPCL were in progress, the Respondent also received an audit query based on the discount extended by HPCL and in turn demanded from the Petitioner payment of Rs.10.04 crores.

(5) The Respondent inspite of Petitioner's objection and inspite of the fact that under the provisions of PPA it has no power or authority to deduct the said sum of Rs.10.04 crores from the Tariff Invoices went ahead and deducted the said sum together with interest aggregating Rs.11.71 crores from the Tariff Invoice for the month of November 2007. The said deduction is in violation of Clause 8.3 (d) and Clause 8.9 (Volume I, Page; 272 and 275) of PPA respectively as these provisions mandate full payment of Tariff Invoice and also prevent the Respondent for making any deduction of Tariff Invoice. It is pertinent to mention that the said discount part of the Tariff Invoice amount which the Respondent could not have deducted from the Tariff Invoice. The Respondent is therefore liable to refund the said amount together with interest thereon from the date the same was deducted from the Tariff Invoice till refund thereof.

(6) While the position is as above, HPCL insisted and demanded refund of Rs.29.26 crores out of which the Petitioner has already paid to HPCL a sum of Rs.19.22 crores and also undertaken to pay the balance amount of Rs.10.04 crores upon the same being recovered from the Respondent herein.

(7) The Petitioner's submission is that both HPCL and the Respondent cannot claim the same amount from the

Petitioner. As far the Respondent, it had an obligation to reimburse to the Petitioner, the entry tax paid by the Petitioner. The commercial discount having been extended by HPCL, the same will have to be returned to HPCL consequent on the reversal by HPCL based on the Accountant General's objections.

(8) In the circumstances the Petitioner submits that the deduction of Rs.11.71 crores by the Respondent, from the Tariff Invoice for the month Nov 2007, is clearly in breach of provisions of PPA and same ought to be refunded by the Respondent to the Petitioner, which the Petitioner would in turn pass on to HPCL to square up its obligation, vis-a-vis HPCL. The Petitioner further submits that he has no objection, if the Respondent is directed to pay the said amount directly to HPCL. The Petitioner would abide by the decision and directions of this Hon'ble Commission.

(9) The following charge gives a bird's eye view of the Petitioner's claim.

Clause of PPA	Breach	Submission	Amount claimed
8.2 (b) of PPA (running page 104 of Vol-I) and 8.3 (d) of addendum-2 to PPA (running page 272 and 273 of Vol-I)	In the event of any dispute, TNEB shall pay the full amount of Tariff Bills and shall raise dispute as per Dispute Resolution Mechanism. But TNEB made unilateral deduction in the Tariff Bills.	HPCL had reversed the concessions and demanded back the amount. Petitioner has to pay the amount back to HPCL. Unilateral deductions by TNEB are against PPA.	Rs.11,71,46,165
16.3 of PPA (running page 129 of Vol-I)	In case the company suffers as a result of the change in law, TNEB has to place	Despite the fact that HPCL reversed the concessions, TNEB failed to	

	the company in the same economic position as it would have been in the absence of such change in law.	repay the deductions on account of Entry Tax.	

(C) Contention of the Respondent

(1) It is respectfully submitted that Entry Tax is payable by the ultimate end user.

(2) As seen from the records entry tax is paid by the Petitioner to the GOTN.

(3) The Respondent has reimbursed the entry tax of a sum of Rs.49.67 crore (including interest for the delayed payment Rs.81,29,170/-) as and when the Petitioner submitted the proof of payment.

(4) The exemption from entry tax was granted to HPCL by G.O. Ms. No.27, Commercial Taxes dated 27th March 2002. If the importer is HPCL then entry tax is liable to be paid by the HPCL. But, it apparently transpires that the importer is the petitioner and the petitioner has paid the entry tax.

(5) The entry tax has been struck down by the Hon'ble Madras High Court in batch of cases in the year 2007.

(6) In the absence of any validating Act being passed by the legislature for validating the entry tax already collected, the Petitioner is entitled to get refund only from GOTN and the refund is to be passed on to the Respondent Board.

(7) In the instant case the HPCL has given credit of Rs.10,04,68,476/- only against the entry tax at the rate 3% as evident from the HPCL's Credit Note Nos. (1) 5000222 dated 28-2-2006 (2) 6000020 dated 30-6-2006, (3) 6000042 dated 30-9-2006 and (4) 6000117 dated 31-12-2006.

(8) The Respondent Board came to know vide letter dated 16-5-2006 sent by HPCL to the Petitioner that a sum of Rs.36.37 crore was credited by HPCL vide its series of documents dated 31-3-2003 to 31-12-2006. The said credit of Rs.36.37 crores should have been passed on to the Respondent Board as per the undertaking given by the petitioner at page 173 of Volume III and as per Art. 3.1 (xvii) of the PPA at page No.84 of volume 1.

(9) It is submitted that as per the undertaking given by the Petitioner vide page No.173 of Volume No.3, any reduction or concession in taxes, duties for the purchase of fuel supply if claimed by the Petitioner and allowed by the authorities concerned, should be passed on to the Board.

(10) In the instant case, even assuming that the credit of Rs.36.37 crores given by HPCL is towards price discount, the same should have been passed on to the Board.

(11) The Petitioner has not made out under what circumstances HPCL, gave credit for entry tax and reversed the credit later.

(12) It is submitted that the Respondent Board has written several letters to the HPCL seeking details for the credit and reversal of credit. The Petitioner is duty bound to claim all the refund amounting to Rs.49 crores paid by way of entry tax from the GOTN and pass on the same to the Respondent Board, as the levy of entry tax has been struck down by the High Court.

(13) The Respondent Board is not liable to refund the said Rs.10.04 Crores as the entry tax is itself scrapped and no liability arises on that account for reimbursement/refund.

(14) It is submitted that only in the course of the arguments; the Petitioner filed the proof for making the payment of Rs.25 crores to the HPCL consequent to the reversal of the credit given by the HPCL under entry tax account.

(15) The Petitioner and the HPCL have not given any required particulars for the credit as well as the reversal of Rs.36.37 crores to the Respondent Board in spite of repeated requests.

(16) No material has been available for payment of Rs.10.04 crores by GMR to HPCL. Hence, the question of reimbursement of Rs.10.04 crores does not arise.

(17) Deputy Accountant General (RA-TNEB) in letter dated 26-5-2005 stated that incorrect reimbursement of entry tax has been proposed to be included in the Audit Report (Commercial for the year 2004-2005 vide page 178 of Volume III). GOTN vide various letters requested to sent action taken report on the Audit para as the same is pending for more than two and half years.

(18) AG Audit also issued slip to recover Rs.10.04 crores from GMR vide page No.184 of Volume III. As the basis of reversal of Entry Tax by HPCL was not revealed, HPCL, Accountant General / O/o AG (C&RA), Energy Department/GOTN had been informed to furnish a copy of Audit Report for reversing the Entry Tax.

(19) Unless HPCL got benefited it would not give credit to GMR. Hence, the larger issues are to be crashed down.

(D) Delay and laches

The TNEB recovered Rs.11.71 crores from the Petitioner in December 2007, which is demanded by the Petitioner in this DRP No.10 of 2008 filed in July 2008.

(E) Ruling on delay and laches

The claim for refund of the recovered entry tax of Rs.11.71 crores does not suffer from delay and laches and even if we assume that the Limitation Act, 1963 would apply, the claim has been filed within the limitation period of three years..

(F) Analysis of the Case

(1) Clause 16(3) of the PPA reads as follows:-

16.3 Change-in-Law:

"(a) If, as a result of a Change-in-Law, the company suffers an increase in costs or reduction in net after tax return or other economic burden (including, without limitation, as a result of any restriction on the ability to convert Rupees to dollars in accordance with the Tariff, or remit funds in Dollars outside India, the aggregate economic effect of which exceeds the equivalent of one hundred thousand Dollars (US$100,000) in any Tariff Year, the Company may so notify TNEB and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupied in the absence of such cost increase, reduction in return or other economic burden; and the Parties hereto shall meet and either agree on such amendments to this Agreement or alternative arrangements to implement the foregoing."

(2) Clause 4(c) of Appendix D of the PPA reads as follows:-

"Total Fuel Cost:-

The cost of Fuel and Lubricating Oil shall be calculated on a weighted average basis and shall include all fixed and variable payments made pursuant to any Fuel Supply Agreement or agreement for the supply of transportation of Lubricating Oil during the applicable Billing Period, including any charges borne by the Company with respect to take-or-pay, capacity payment or other obligations arising from the Company's failure to take a minimum amount of fuel under the Fuel Supply Agreement or other such agreement for the supply or transportation of Lubricating Oil, as a result of any Emergency (unless caused by a Non-Political Event), or other curtailment required by TNEB load dispatch centers, and any taxes, duties, royalties and cess, the cost of any indemnities and all other fuel related costs, which are computed by the fuel supply company on the basis of unit of Fuel or Lubricating Oil supplied. Notwithstanding the foregoing, TNEB shall not be required to make any payments on account of charges borne by the Company with respect to take-or-pay, capacity or other obligations arising from the Company's failure to take a minimum amount of fuel under any Fuel Supply Agreement or Lubricating Oil pursuant to any agreement for the supply or transportation of the same, as a result of a Forced Outage due to a failure of the Company's equipment, except where such failure of the equipment arises out of a condition on the Grid System that results in the Project

operating outside the Technical Limits or an Indian Political Event. Provided however, that no minimum off take charge in respect of lubricating oil would not be payable by TNEB to the Company."

(3) Clause 3 (vii) of the Appendix-D of the PPA is extracted below:-

"3. <u>Estimated Annual Costs</u>

Estimated Annual Costs shall be determined prospectively for each Tariff Year during the Term in which there is Billing Period by the Company and shall represent the agreed upon estimated total amount of the following items for such Tariff Year:

(i) Interest on debt
(ii) Depreciation
(iii) Return on Equity
(iv) O&M and Insurance expenses
(v) Interest on working capital
(vi) Income tax and
(vii) Other taxes"

(4) Clause 16(3) of the PPA makes it clear that since the Entry Tax was imposed after the execution of the PPA by a change in law, the Petitioner is protected against the levy. As the Entry Tax is directly payable by the Petitioner, it will not form a part of the bill of HPCL in terms of Clause 4(c). On the other hand, Entry Tax will be covered in "Other Taxes" appearing in Clause 3(vii) of Estimated Annual Cost. Thus, under the scheme of things Entry Tax is to be claimed directly by the Petitioner from the Respondent.

(5) M/s. HPCL informed the Petitioner on 8-4-2002 as follows:

"Kindly refer to your letter No.GPCL/HPCL/00/02 dated 6.5.02 on the above subject.

We have in depth examined the issue of Entry Tax and liability thereof effective December 2001. As has been mentioned in our earlier letter, the liability of

payment of entry Tax under Tamil Nadu Tax on Entry of Goods into Local Areas (Tamilnadu Act o.20/2001) would rest with GMR Corporation only. Hence it is for GMR Corporation to take up the same with Commercial Tax Authorities and get the reimbursement from TNEB
As regards the commercial arrangements in accordance with FAS entered into between HPCL and GMR Power Corporation, HPCL would continue to abide by item 6.2.c of the FAS which refers to Sales Tax applicable as if supplies are made ex Chennai. Accordingly we would like to brief as follows:

1. HPCL is not bringing the goods into local area and hence the Entry Tax liability is not with HPCL.

2. In case, HPCL brings the product into any local area in Tamil Nadu for resale, there is no tax liability. Hence the liability is with GMR only..

3. In case of local sale, the applicable Sales Tax is 3%. However since the billing is done on inter state basis thru C Form, HPCL is billing GMR at 4% and as a commercial arrangement, refunding 1% which is over and above the applicable Sales Tax rate, for Power Plants in Tamil Nadu.

4. Based on the Tax advise obtained by us, in addition to local sales tax applicable at 3% in case we carry out any local sales, there would be an additional liability of 3% towards turnover tax.

5. Not getting into legalities, HPCL as a special case is willing to reimburse to GMR 3% of the sales value which is equivalent to the Entry Tax effective 1.4.2002 as applicable to power plants. It is reiterated that this is not the acceptance of Entry Tax liability, but only a commercial arrangement as a valued large volume consumers.

You are requested to continue to take up the issue of Entry Tax with Tamil Nadu State Government and get the reimbursement of the liability thereof from TNEB as cost of fuel. Our gesture of acceptance of reimbursement of 3% is purely based on business consideration and would be limited to 3% only as that would be an opportunity cost (equivalent to 3% turnover tax) for us in case of local sale. Hope the above clarifies."

We understand that the date of the letter of HPCL is 8-5-2002 and not 8-4-2002 mentioned above.

(6) It is evident from the above letter of HPCL that they extended reimbursement to the Petitioner at the rate of 3% of the sale value, equivalent to the Entry Tax.

(7) It now transpires that the Petitioner secured reimbursement of entry tax from two sources namely HPCL and TNEB. Legally he is entitled to claim reimbursement from the TNEB. As such, he should not have drawn the reimbursement from HPCL. The Commission deprecates this irregularity, which finally led to double recovery both by HPCL and TNEB. We are constrained to observe that recovery of Rs.11.71 crores from the Tariff Invoice of the Petitioner by the TNEB is a clear violation of the PPA, which is matched by the irregularity of the Petitioner in claiming the Entry Tax reimbursement from two sources. It is clear that both the Public Sector Undertakings HPCL and TNEB vied with one another in recovering the reimbursement offered by HPCL resulting in the confusion.

(G) Ruling on Entry Tax

The Respondent is directed to refund Rs.10.04 crores directly to HPCL, since the money legitimately belongs to HPCL and Rs.1.67 crores to the Petitioner being interest recovered from him within a period of 2 months of the Order.

PART - VI

LAND LEASE RENT (LLR)

(A) Facts of the case

(1) As per MoU and subsequent orders of the TNEB, permission was granted to GMR Power Corporation Ltd., to demolish certain existing dilapidated structures and also to make the ground fit for being used as a site for the proposed power project. At the time of handing over the site, there were three old cooling towers, which were previously used for coal based generation. A vast extent of land had been used as a storing place for coal and ash. An Anti Malarial Canal was running across the site besides Otteri Nullah. An overhead 110 KV transmission line was also running across the road.

(2) The Anti Malarial Canal was filled up and the entire portion of land was made fit for use as project site. Apart from three cooling towers, there were old dilapidated buildings, which were all demolished at the cost of GMR Power Corporation Ltd. While permission was granted to demolish the old dilapidated buildings, the value of these structures was estimated by the TNEB at Rs.19 lakhs, which was reimbursed by the Petitioner to TNEB. The accumulated ash had to be removed and major portion of the land was slushy and marshy and all those lands had to be developed as site for the project. The GMR Power Corporation has undertaken all these works and completed the work of making the land fit for site for the project. GMR Power Corporation Ltd., has valued the cost of the improvement work carried out by them at Rs.10 crores. TNEB disputed the figures and put it at approximately Rs.3 crore. The improvement works carried out by GMR Power Corporation Ltd. involved not only demolishing the existing dilapidated structures but also included levelling, filling up water ponds, removal of marsh and slush, removal of wild

growth, etc. The entire Basin Bridge Power House complex is situated in an extent of about 100 acres, out of which, 29.03 acres had been identified and given to GMR Power Corporation Ltd. for the project. The complex has got approach roads running through Central and Choolai, which are in North Chennai. While there were causeways, which were the immediate approach for Basin Bridge Power House and in this, GMR Power Corporation Ltd., had made a pucca concrete bridge.

(3) A total extent of 29.03 acres was leased out to the Petitioner by the TNEB. Possession was delivered on 19-12-1996. The Commissioner of Land Administration on 10-10-1995 recommended fixation of lease rent at the rate of 7% of double the market value of the land. The Petitioner represented to the TNEB on 27-2-1996 and 7-3-1996, to the Chief Minister on 11-12-1996, to the Chief Secretary on 5-2-1997 as well as 9-4-1997 that lease rent at the rate of 7% of double the market value would be exorbitant and would eat away a large chunk of the O & M expenses, which was limited to 2.5% in terms of the PPA. The lease rent, not being a “pass though” as on 19-12-1996, the date on which TNEB handed over the land to the Petitioner, cannot be passed on as a component of Tariff and has to be absorbed within the O & M expenditure.

(4) The Board of the Respondent considered the representations in the 761st meeting held on 11-1-1997 and assured the Petitioner on 28-1-1997 through a letter that land lease rent may be treated as a “pass through” subject to the provision contained in the guidelines of the Government of India in respect of O & M charges.

(5) Probably, based on this assurance, the Petitioner executed the Land Lease Agreement two months later on 26-3-1997. The agreement stipulated lease rent of Rs.30,73,943 per month for a three year period from 19-12-1996 to 18-12-1999. Land Lease Agreement

empowered the TNEB to revise the rent not more than once in 3 years according to applicable Government Notification / Guidelines. 21 days after the execution of the land lease agreement, the Government of India issued a Notification on 17-4-1997 facilitating “pass through” of land lease rent. The Petitioner, armed with this Notification approached the TNEB on 30-4-1998 seeking “pass through” of land lease rent in accordance with Clause 17.1 of the PPA. He followed it up with a draft amendment to the PPA on 10-11-1998. The Board of the TNEB considered the plea of the Petitioner on 26-11-1998 but rejected it.

(6) Having failed in his attempt to secure “pass through” of lease rent, the Petitioner turned to the other option of securing concession in the quantum of lease rent. G.O. Ms. No. 460 dated 4-6-1998 of the Revenue Department prescribed 2% lease rent, 2% local cess and 10% local cess surcharge for lease of poramboke land for commercial purposes. The Petitioner represented to TNEB that the Government Order limited land lease rent to 2%, which was one seventh of the rate of 14% adopted by the TNEB and pressed for reduction of the lease rent based on the above formula. The Secretary, Energy Department on 29-4-2003 clarified, in consultation with the Revenue Secretary, that lease rent should be charged for commercial purposes at 2% of the land cost together with a surcharge at the rate of 23% of the lease rent. The Revenue Secretary clarified on 10-3-2005 that 14% of the land cost should be reckoned for computing lease rent in municipal areas and corporation areas.

(7) The periodic representations of the Petitioner forced the TNEB to constitute an Expert Committee on 3-2-2005 under the chairmanship of Justice (Retd.) Thiru David Christian of the Madras High Court to study the reasonableness of the lease rent of land owned by the TNEB. The Committee submitted its report on 21-3-2005 recommending reduction of lease rent. The Committee observed that the TNEB has no option but to accept

the claim made by GMR Power Corporation Ltd. for treating the rent paid to the Board as “pass through” item (page 9 of the Expert Committee Report). We wish to record here that the note for the Board meeting of TNEB did not correctly reflect the recommendation of the Expert Committee on “pass through”. The recommendations of the Expert Committee were placed before the Board Level Tender Committee of TNEB on 30-12-2005 but the consideration was deferred. The subject was again placed before the Board Meetings of the TNEB on 5-5-2007 and 9-6-2007, but the consideration was deferred. The Board Level Tender Committee finally took up consideration of this item on 28-3-2008 and recommended reduction of lease rent and refund of Rs.38,09,16,465. The matter was taken to the Board Meeting on 29-3-2008, but the subject was deferred. Since then there has been no decision on this subject till date.

(8) While all these developments took place, periodic revision of the land lease rent also happened. The lease rent of Rs.30,73,943 per month was valid from 19-12-1996 to 18-12-1999. This lease rent was enhanced to Rs.41,39,092 per month with effect from 19-12-1999 to 18-12-2002. The lease rent was enhanced, again, from 19-12-2002 to Rs.81,18,452 per month. Under strong protest from the Petitioner and on the basis of the report of the District Collector, the land lease rent was refixed by the Respondent at Rs.49,57,655 per month from 19-12-2002. This rate has been continuing since then, although two revisions have fallen due on 19-12-2005 and 19-12-2008, as per the Lease Agreement.

(B) <u>Contention of the Petitioner</u>

(1) As per notification dated 17-04-97 issued by Government of India under section 43A(2) of Electricity (Supply) Act, where a generating company takes land on lease, the lease charges determined by the Central Government or State Government or any Statutory Body shall be considered as a “Pass Through “ item in the tariff in lieu of interest liability of

the notional cost of the land and the Respondent Board had to treat the land lease rent paid by the petitioner to the respondent as a 'pass-through 'item. The respondent failed to do so without reason.

(2) The respondent had earlier fixed the land lease rental on the basis of the rate communicated by the Government of Tamil Nadu. The respondent did not revise / reduce the land lease rental when the Government itself reduced the land lease rentals to 2 %. The respondent has therefore acted in an arbitrary and discriminatory manner and without justification failed to reduce the land lease rentals.

(3) The O&M charges paid to the petitioner was at 2.5% of the capital cost allowed by the Central Electricity Authority. In view of the land lease rentals, the effective O&M charge recoverable by the petitioner was about 2.08% only. Thus, the high land lease rental made the project unattractive.

(4) Under the Clause 4.1(e) of LLA the respondent had to pay to the concerned authority all applicable rates, taxes and charges on the land leased to the petitioner. The obligation to pay cess and additional surcharge on cess to the Government of Tamil Nadu was on the respondent.

(5) The Expert Committee have examined the issue in its entirety and having considered all aspects of the matter before making detailed and exhaustive recommendations, due weight and deference should have been given to the report and the respondent should have acted on and given effect to the recommendations. In fact, Government of Tamil Nadu (Energy Dept.) by a communication dated 12-04-97 asked the respondent

to take appropriate decision on fixing a fair land lease rent, but the respondent did not comply with the same.

(6) The respondent was bound to follow and comply with the direction of the Government to reduce the rate of rent to 2 % plus surcharge but the respondent failed to do so. Instead the respondent sought a clarification which was irrelevant and an indirect means to avoid compliance with the directions of the Government.

(7) The respondent has singled out the petitioner for hostile discrimination as it granted this benefit to other IPPs.

(8) The Petitioner and the Respondent signed a Land Lease Agreement (LLA) on 26-03-1997 (Vol-I, page 280). The Respondent fixed the Land Lease Rental (LLR) at an exorbitant rate which made the project unattractive; it was also contrary to Clause-3.3 (b) (volume I, page 85) of the PPA which stipulates the terms and conditions of the LLA shall be to the satisfaction of the Petitioner.

(9) The Petitioner, primarily, had two grievances:

i. Fixation of exorbitant and unreasonable LLR
ii. Denial of LLR as a pass through in Tariff.

(10) Fixation of exorbitant and unreasonable LLR:- After signing of the PPA, the Petitioner addressed a communication on 11-12-1996 (Volume 1, page 312, 313) which was followed by several other communications to the GOTN and the Respondent to reduce the high LLR proposed by the Respondent. The Petitioner informed GOTN that it had made rapid progress in the project to achieve financial closure. As the

Petitioner had to adhere to the project milestone dates, there was great urgency to achieve financial closure. The Petitioner therefore requested GOTN to advise the Respondent to fix LLR at a reasonable rate. In order to adhere to this schedule, the Petitioner made all out efforts and achieved financial closure on 13-03-1997. In the absence of financial closure, the Petitioner could not have issued Notice to Proceed for construction of the project and the project implementation would have been delayed. The financing documents had a pre-disbursement condition that the Petitioner should have entered into LLA and that the terms and conditions of the LLA should have been finalized/modified (if necessary) in consultation with Lenders. However, the Respondent did not agree to fix a reasonable/ token rent or to allow LLR as a pass through and the discussions on the terms and conditions of LLA were still in progress. As the LLR proposed by the Respondent was exorbitant, the Petitioner addressed further communications requesting the Respondent to allow LLR as a pass through.

(11) The Respondent took an unreasonable stand and did not fix the LLR at a reasonable rate nor did it treat LLR as a pass through in Tariff. The discussions between the parties consumed substantial time and threatened to delay the commencement of construction of the project. The issue of Notice to Proceed would have entailed release of payments to the EPC contractor and such payment could have been released only by drawing the loans from Banks and financial Institutions. Under these circumstances, the Petitioner was hard pressed to execute the LLA, obtain disbursement of loan and to issue Notice to Proceed.

(12) The Petitioner, therefore, had no option but to proceed ahead with execution of LLA though the proposed LLR was exorbitant and not to the satisfaction of the Petitioner. However, the Petitioner did so, only on the assurance of the Respondent that it will review and revise LLR in conformity with the Government Notification/Guidelines. This understanding

between the parties was incorporated in the LLA. (Clause 3.1 of LLA, Volume-I, page 281).

(13) At this stage, the Respondent insisted that the Petitioner should pay LLR as per GOTN Notification/Guidelines and obtained an undertaking to this effect from the Petitioner. After obtaining this undertaking from the Petitioner on 17-12-1996 (Volume-III, page 57), the Respondent put the Petitioner in possession of the Site on 19-12-1996. Eventually the parties executed LLA on 26-03-1997 and immediately thereafter, on 29-03-1997, the Petitioner issued Notice to Proceed to EPC Contractor and commenced construction works and obtained disbursement of loans on 31-03-1997.

(14) These circumstances clearly demonstrate that the non-execution of the LLA was holding up the disbursement of loans, issue of Notice to Proceed and the commencement of construction of the project and that the Petitioner was under extreme pressure to achieve all these in the interest of implementing the project on schedule. The LLA was executed in these circumstances, even though the Petitioner was not satisfied with the terms and conditions of LLA.

(15) Even after signing the LLA, the Petitioner continued to make representations to the Respondent and to the GOTN requesting them to reduce the LLR and to fix the same at a reasonable rate. The Petitioner pursued this vigorously. Eventually, the GOTN came up with revised guidelines vide GO:460 dated 4-06-1998 (Vol-III, page 62, 63) and reduced the LLR to 2% of the land cost as against 14% fixed earlier. The Respondent, however, continued with its unreasonable position on LLR and did not give effect to the aforesaid Government guidelines also. This was in gross

breach of its obligations in LLA which required the Respondent to revise the LLR in accordance with the Government guidelines.

(16) In the reply filed by the Respondent, it has alleged that the said GO was held in abeyance. The Respondent has relied on a letter dated 10-03-2005 (Vol.III, Page:64&65) in this regard. However, this letter is of no relevance since the GO was notified and gazetted and will remain in force unless there is subsequent GO amending/rescinding or holding the GO in abeyance. Thus, GO No.460, dt. 4-6-98, was binding on the Respondent (under Section-78A of the Electricity Supply Act, 1948). The Respondent accordingly had to fix the LLR at 2%. Its failure to do so, was in violation of the binding direction given by the Govt and LLA. Moreover, the Government Order was in the nature of a Policy decision taken by the Government and the Respondent should have implemented/given effect to it.

(17) The Petitioner was not in a position to bear the burden of exorbitant LLR and continued its efforts to persuade the Respondent and GOTN to review and revise LLR and to fix it at a reasonable rate. At the same time the petitioner proceeded with implementation of the Project in good faith. After persistent efforts and follow ups, GOTN appreciated and eventually addressed a communication dated 29-04-2003 (Volume-I, Page:354) requesting the Respondent to revise the LLR to 2% as mentioned therein. However, the Respondent did not do so and maintained its unreasonable position as to LLR and turned a deaf ear to the Petitioner's representations and even failed to conform to and implement the aforesaid communication from GOTN.

(18) Nonetheless, having signed the PPA and LLA on the basis of the assurances provided by the Respondent to the effect:

(i) that the terms and conditions of LLA would be to its satisfaction, and

(ii) that LLR fixed would be revised based on the Government Guidelines, the Petitioner continued to press its request for reduction of LLR as the exorbitant LLR initially fixed and upward revision thereof from time to time would have serious consequences on the viability of the project.

(19) The Respondent remained rigid and inflexible - it neither reduced LLR nor allowed LLR as a pass through in Tariff, though in the facts and circumstances of the case, the Petitioner was entitled to both. However, the Petitioner's continued efforts resulted in the Respondent appointing a Committee comprising Thiru.Justice (Retd) David Christian of Madras High Court and Thiru.S.Nagarajan, District Revenue Officer (Retd.) in November 2004. The Committee went into the reasonableness of LLR fixed by the Respondent. It is pertinent to mention here that the parties herein had the opportunity to appear before the said Committee and make their submissions on LLR. This was an Expert Committee and after a very detailed exercise, this Committee submitted its report dated 21-03-2005 (Vol-VI, page 131) recommending:

i) "the Lease rent shall be 7% of 80% of market value of land as furnished by District Collector as on the date of handing over of land in 1996. This is applicable for the period from 1996 to 1999.

ii) The rent is increased by 10% once in three years.

iii) GMR is entitled for refund of excess amount of rent paid to TNEB.

iv) Rent is not a pass through in Tariff"

(20) The Report of the said Committee was produced by the Respondent before this Hon'ble Commission (Volume-VI, Page: 131-161). It is very clear from this report that the LLR was exorbitant and the Petitioner's persistent requests and representations made to the Respondent to allow LLR as pass through and /or reduce LLR to 2% in accordance with GOTN guidelines were genuine and reasonable, and that Petitioner was entitled to the same. The Respondent in its usual style did not respect/accept the recommendations of this Committee also. However, various observations made by this Committee clearly bring out the fact that LLR should have been a pass through in Tariff and that the Respondent should have also revised LLR in accordance with GOTN guidelines.

(21) The Petitioner submits that this Hon'ble Commission should give serious consideration to the analysis and observations made by the Committee which throw enormous light on the issues before this Commission. This will assist the Hon'ble Commission in arriving at a proper and effective decision. This report by an independent expert body should be given due weightage and consideration.

(22) It transpires from the Board Note of June 2007, (Volume-VI, Page:173-180) produced by the Respondent that its Board deliberated on the recommendations of the aforesaid Committee. The Respondent did not accept the recommendations and continued to remain indifferent to the plight of the Petitioner, apparently because the recommendations did not suit it.

(23) These facts and circumstances clearly establish that the Respondent was contractually bound to revise LLR to 2% in accordance with GOTN guidelines and also to allow LLR as a pass

through in Tariff. More importantly, the facts and circumstances indicate that the issue of LLR had been raised and pursued by the Petitioner throughout. It was a dynamic situation as developments were taking place from time to time. The issue has remained alive all along and in fact was the subject matter of deliberations by the Respondent's Board even during 2007 and 2008.This is clear from the Board Notes produced by the Respondents before this Hon'ble Commission.

(24) The fact that GOTN and the Committee constituted by the Respondent found merit in the Petitioner's representations and claims, supports the fact that the Petitioner was pursuing the right course of action. Eventually, the Respondent's unreasonable stand and the adamant attitude forced the Petitioner to approach this Hon'ble Commission for necessary relief.

(25) Denial of LLR as a "pass through" The Petitioner addressed communications to the Respondent (Letters dated 18-12-98 (Volume I, Page317, 318), 19-12-98 (Volume I, page 319, 320), 19-01-99 Volume I, Page 321), etc), to treat the LLR as pass through. The Respondent shortly after execution of PPA, addressed the communication to the Petitioner on 28-01-97(Volume I, Page 310), in which, it assured the Petitioner that LLR would be treated as a pass through based on GOI guidelines/notification. Shortly after the LLA was signed, in less than a month thereafter, the GOI issued a notification on 17-04-1997 (Volume II, Page 30) amending its earlier Notification dated 30-03-1992 (Vol-I, page 244).

(26) Under Article 17 of the PPA (Volume-I, Page:130), any amendment to Notification dated 30-3-1992 (Vol-I, page 244) which would result in terms more favorable to the Petitioner, entitles the Petitioner to seek amendment of the PPA to reflect such change/amendment.

The Petitioner addressed communication dated 10-11-98 which was followed by communication dated 19-12-98 (Volume I, Page 319, 320), notifying the Respondent that it is entitled to LLR as pass through. The Petitioner called on the Respondent to execute formal addendum to the PPA.

(27) The Notification dated 17-04-1997, states as follows:

> *"in case a generating company takes land on lease, the leasing charges as determined by the Central Government or the State Government or any other statutory body, as the case may be, considered as pass through item in the tariff in lieu of interest liability of the notional cost of the land"*

(28) By virtue of this Notification, LLR is a pass through in Tariff by operation of Law. Accordingly, the PPA stood amended from the date of notification as this was a direction given by the GOI in exercise of power under Section 43 (A) (2) of Electricity Supply Act, 1948. Despite this, the Respondent failed to give the benefit of pass through to the Petitioner. The Petitioner's claim on this account is Rs.57.62 Crores (Page;18 of the additional statement dated 18-09-2009). Since this benefit accrued to the petitioner from the date of notification, it is entitled to interest on delayed payment which amounts to Rs.32.18 Crores. The Principal along with the interest together comes to Rs.89.80 Crores which is being claimed under this head.

(29) Petitioner's claim is evident from the following chart which gives a bird's eye view of its claim:

Issue	Clause of PPA	Breach	Submission	Document relied	Amount Claimed	Judgment in support
Land Lease Rent	17.1 (b) – [running page 130 of Vol-I]	TNEB failed to give effect to GOI notification allowing LLR as pass through.	TNEB should have been given effect to GOI notification immediately & treated the LLR as pass through.	GOI notification dated 17.4.1997 [running page 30 of Vol-II]	Rs. 89,80,52,446	[1994 (2) SCC 594] [AIR 2006 SC586] [AIR 1966 SC 735] [2007 (8) SCC 1]
	3.3 (b) (i) – [running page 81 of Vol-I]	TNEB failed to grant site lease on the terms and conditions to the satisfaction of the company	GMR made representation to TNEB to give effect to the GOI notification to treat LLR as pass through.	Letter by GMR to TNEB, dated 19.12.1998 [running page 319 of Vol-I]		
			TNEB should have revised the LLR as 2% of the Market value as per GO. 460 [running page 62 of TNEB's counter]	GO. 460 [running page 62 of TNEB's counter]		

(C) Contention of the Respondent

(1) The claim of petitioner regarding LLR is not maintainable and it is not covered by section 86(1)(a) of 2003 Act. The petitioner is bound by LLA dated 26-03-97 and the terms contained in LLA cannot to said to be inconsistent or contrary to the terms of PPA. LLA cannot be modified on the basis of subsequent notification of Government of India dated 17-04-97 (Exhibit R2). The Petitioner was well aware even as early on 27-02-96 (Exhibit R3) that lease rent cannot be pass through. Even MOU dated 13-01-95 (Exhibit R4) specifically contemplates that pass through should be mentioned in PPA. Since PPA does not provide for the lease rent as pass through, petitioner

is not eligible for the same. Government of India notification is only prospective in operation and it is not retrospective. Substantial portion of the claim of petitioner is barred by limitation.

(2) Petitioner knowing fully well that the Power Generating Plant will have to be erected on land belonging to TNEB by paying market rent towards lease of land cannot complain about the rent fixed as per LLA. An undertaking dated 17-12-96 (Exhibit R 7) has been given to the effect that petitioner will pay the rent as intimated by respondent. Petitioner was informed by letter dated 06-03-97 (Exhibit R 8) that the rent payable and thereafter LLA dated 26-03-97 was executed agreeing to pay the rent on the market value fixed by TNEB and further agreeing to pay increased rent once in 3 years to be fixed by respondent. Since the petitioner had not paid the rents within the time stipulated in LLA, the respondent was deducting the Lease Rent from and out of the invoice amounts as authorised by the petitioner. As per Article 3.2 of LLA, the respondent is entitled to adjust from the monthly running bills, the Lease Rent amount and the penalty payable by petitioner. Respondent had collected only Rs.49,57,655 per month though entitled to collect Rs.83,18,452 per month. Petitioner has sub-leased an extent of 5.22 acres out of 29.03 acres in favour of HPCL and collecting rent from HPCL.

(3) In the advertisement given in the newspaper it was clearly stated that for the further particulars about the project, Chief Engineer /Planning may be contacted. Hence, the details of rent should have been ascertained by the Petitioner before signing the contract itself and it is not now open to it to contend otherwise. The respondent specifically denies the averment that the petitioner was not aware that G.O.Ms.No.460, dated 04-06-98 was kept in abeyance. The respondent submits that the petitioner is making such an averment only as an afterthought.

(4) The Special Commissioner and Commissioner of Land Administration had clarified that the lease rent has to be collected on the market value as per R.S.O 24-A and therefore the rents collected by the respondent is just and proper. It is also submitted that as per the market value furnished by the District Collector, the lease rent has been revised and not enhanced.

(5) The issue relating to determination of lease rent payable by the petitioner before this Hon`ble commission is beyond the scope and purview of Electricity Act 2003.

(6) The quantum of rent to be payable by the Petitioner has been agreed by the parties under separate land lease agreement dated 26-3-1997.

(7) The provisions of the LLA will govern the parties. The Land Lease Agreement was executed by the parties only after mutual agreement between the parties which would mean that the petitioner was satisfied in terms of Article 3.1(b) of the PPA.

(8) It is submitted that in the Notification issued by the Respondent Board inviting application for the putting up Independent Private Power Projects and in the Memorandum of Understanding entered between the Petitioner and the Respondent Board there is no mention about the Pass Through for the land lease component. There is no representation from GMR to treat rent as pass through and no assurance given in MOU, PPA to treat lease rent as pass through.

(9) In case of any dispute relating to the land lease rent the Civil Court alone will have jurisdiction under Common Tenancy Civil Laws.

(10) The Petitioner was fully aware of the fact that the land lease rent is not a pass through at the time of executing the PPA and LLA.

(11) The relevant Article of the LLA is 3.1 are extracted hereunder.

> "*In consideration of rents reserved…… The lessor reserves the right to revise the annual rate of rent not more than once in three years, according to applicable Govt. Notification/Guidelines which the Lessee shall pay without demur. The present monthly rent agreed is Rs 30,73,943/ for the demised land*".

(12) The Petitioner has given an undertaking that they will pay the land lease rental as arrived at based on GOTN guidelines and as intimated by TNEB vide page No. 57 of volume No. 3.

(13) By letter dated 10-10-1995, Commissioner of Land fixed 7% of the double the market value to be revised once in three years. i.e 14%

(14) From 19-12-96 to 18-12-1999 Rs. 30,73,943/- per month was paid by the petitioner.

(15) From 19-12-1999 to 18-12-2002 Rs. 41,39,092 per month was paid. From 19-12-2002 to 18-12-2005 Rs. 83,18,452/- was fixed by the District Collector, but the company did not pay

the amount. The company made representation to the District Collector and the rent was fixed at Rs. 49,57,655/- per month which was paid by the petitioner.

(16) The term Revision found in the LLA will mean and include only increase in rent and not decrease of rent.

(17) The petitioner was not agreeable for the revised operating norms stipulated by the CEA in office memorandum dated 30-5-1997 found in page No. 55 of volume No. 3. The Company vide page no 54 of Volume 3 stated that the revised norms would be applicable for those projects who will obtain techno economic clearance on or after 1-10-1997. Techno economic clearance of the GMR project is 10th July 1996 as seen in page 140 of Vol 1.

(18) While the petitioner has not accepted for the revised norms of the CEA in respect of operating norms, the petitioner is not fair enough to claim the revised norms of the CEA for pass through component of land lease rent alone.

(19) The petitioner has been paying Rs. 49,57,655/- per month as rent at the rate revised for the year 2002-05 and there is no revision from 19-12-2005 to till date as the Board is awaiting the report of revenue authorities for the market value i.e. the rent was not revised for the past 4 years pending report from the revenue authorities for the market rate.

(20) The land lease rent paid by the Petitioner is fair and reasonable when compared to the existing market rent, location of the land and vast extent of the land in the heart of the city.

(21) Further, a portion of the land measuring 5.5 acres of land is subleased to HPCL and the Petitioner is collecting rent on that account also from HPCL.

(22) The rent has to be revised once in 3 years as determined by the Board and as assessed by the revenue authorities based on Government of Tamil Nadu Notification/Guidelines and informed by the lessor to lessee.

(23) The land lease rent is not a pass-through as per the notification dated 30-3-1992.

(24) The parties specifically not included the pass through for the lease rent component.

(25) The request of the petitioner to consider land lease rent as pass through was never accepted by the Board in view of the prevailing regulations.

(26) The petitioner also did not pursue the request for pass through after a particular period and was asking only for reduction in land lease rent vide page no 315 of Vol I.

(27) The pass through for land lease rent was not insisted by the Petitioner even in the two amendments made to the LLA vide page no 102 to 107 of Vol VI.

(28) The petitioner was only insisting for reduction of land lease rent based on G.O. Ms. No.460 dated 4-6-1998, which

provided for lease rent of 2% for poromboke land. The said G.O should be read along with GOTN letter no 155 dt 10-03-2005 from Revenue Department/GOTN. As per the said GOTN instructions 14% of the land cost are to be collected.

(29) The petitioner obtained techno-economic clearance on 10-7-1996 from the CEA.

(30) The said G.O. Ms. No.460 will not apply to the lands owned by the public bodies like the Respondent board.

(31) It is submitted that the energy department in letter dated 29-4-2003, furnished calculation of lease rent prior to 4-6-1998 and after 4-6-1998.

(32) The respondent board sought clarification from the revenue department GOTN to ascertain whether the lease rent indicated in the Energy Department letter dated 29-4-2003 are applicable to the lands belonging to Government undertakings such as TNEB.

(33) The Government of India issued notification dated 17-4-1997 which states that “in case, a generating company takes land on lease and the leasing charges as determined by the Central Government or the State government or any Statutory body, as the case may be, then the lease rent may be considered as a pass through item in the tariff in lieu of interest liability of the notional cost of the land”.

(34) The respondent board did not treat land lease rent as pass through in the case of the petitioner as the LLA was executed on 26-03-1997 i.e. 21 days prior to the notification dated 17-4-1997

issued by Government of India. For other IPPs, whose PPA was after the issue of notification dated 17-4-1997, the land lease rent was considered as pass through and there is no discrimination of the petitioner by the respondent Board.

(35) The respondent submits that LLA and PPA are two different agreements.

(36) PPA will not prevail over the LLA with respect to the fixation of rent.

(37) The said GO is applicable only for poromboke lands.

(38) The said GO enunciates a formula as follows:

Lease rent	: 14%
Thalavari	: 14%
Thalamelvari	: 70%
Total	: 98%

(39) The petitioner submits that by letter No. 155 dated 10-3-2005 at page 129 of volume No. 6, issued by the Revenue Secretary, the operation of G.O. Ms. No. 460 was suspended.

(40) The recommendation of the Expert committee consisting of retired High Court Judge Mr. Justice David Christian and District Revenue Officer (retd.) Mr. S. Nagarajan was not accepted by the Board.

(41) The respondent Board has been repeatedly representing to the GOTN for assessment of the rental value to be collected from the petitioner. Kindly refer letter dated 14-5-2004 at page No. 125 of volume No. 6, 24-4-2006 at page No. 166 of volume No. 6.

(42) The respondent Board has not got any reply.

(43) It is submitted that as per the item No. 11, noted in the summary record of discussions of the meeting held on 4-8-1999 at page No. 109 of volume No. 6 for consideration of Firm Financial Package for the petitioner project before Central Electricity Authority, New Delhi, the petitioner has agreed for deletion of land lease rental while working out the completed hard cost of the plant.

(44) It is submitted that while making two amendments in the PPA for other billing and other issues in the year 1999 and 2000, this land lease rent was not included to be treated as pass through by the parties.

(45) As per Art. 7.1 of the PPA at page No. 62 of volume 1, the agreement cannot be amended except by prior written agreement between the parties. Further, if any of the amendments or modifications to the existing notification, that may come into effect after the date of this agreement and if the same is incorporated in to this agreement, resulting in terms more favorable to the company and / or TNEB then, this agreement shall be amended at the option of the company to reflect such change and until such time, the prior terms of the agreement shall continue to bind the parties.

(46) In the instant case, land lease rent was made as pass through in the subsequent amendment to the notification dated 30-3-1992, the same has not been included by way of making amendment to the existing PPA. Therefore, the existing terms of the LLA will be binding on the petitioner. The pass through should never put to an issue after 12 years on the laches and limitations, after the agreement whether it is disputable, and as per clause 17.1(a) of PPA

(D) Jurisdiction of the Commission on LLA

(1) The Respondent contends that the Land Lease Agreement falls outside the scope of Section 86 of the Electricity Act 2003, which defines the functions of the Commission. Land Lease Rent is not a matter related to tariff and therefore it does not come within the purview of Section 86, according to them. The Respondent contends that this Commission is not clothed with jurisdiction to scrutinise Lease Rent.

(2) In this context, we wish to refer to Clause 3.3(b) of the Power Purchase Agreement executed by the Petitioner and the Respondent on 12th September 1996, which enjoins upon the Respondent to provide suitable land for the project. The relevant clause is extracted below:-

"*(b) Site and Infrastructure*

(i) TNEB shall acquire or hold absolute legal title to, and take vacant possession of the land comprising the site free of all liens, charges, encumbrances, occupants and adverse claims and vested with all rights required or appropriate for the implementation of the project at the site; and shall grant to the Company a Site Lease for a term of not less than twenty (20) years commencing from the date of this Agreement on terms and conditions to the satisfaction of the Company including an option to extend the Site Lease until the expiry of any period by which this Agreement is extended pursuant to Article 2 or to the expiry of any period during which the provisions of Section of 13.9 are operative, plus, in each case, two

years. In the event of a sale of the Project by the Company to a third party TNEB shall grant a new Site Lease to such third party on terms substantially similar to the existing Site Lease (including the term). If this Agreement terminates as a result of a Company Event of Default the Site Lease will terminate after the expiry of a two year period from the date of the termination of this Agreement, subject to cure rights provided to Lenders in the Financing Agreements. In the event of a purchase of the Project by TNEB pursuant to a Buy-Out Notice the Site Lease shall terminate on the date of payment of the Buy-Out Price.

(ii) TNEB shall provide such assistance and support as the Company may require in (A) obtaining Government Authorisations for the grant of the Site Lease to the Company and for the construction and operation of the Project and in interacting with Indian Government Instrumentalities as to such Governmental Authorisations; (B) acquiring and obtaining unrestricted access to and possession of the Site; (C) obtaining adequate supplies of water for construction, testing, operation and maintenance of the Project during the term of this Agreement; and (D) obtaining all the infrastructure and utilities support (including, without limitation, road access, cooling water pipeline, water drainage and sewage services, telephone, telecopier and electricity interconnections) necessary for construction and operation of the Project.

(iii) TNEB shall provide such assistance and support as the Company may require to obtain the GOTN Guarantee

(iv) TNEB shall provide the Company with copies of all publicly filed financial statements and reports; and

(v) TNEB shall work with and cooperate in good faith with the Company with respect to all of the Company's obligations and rights hereunder."

(3) In pursuance of the PPA, the Petitioner and the Respondent executed a Land Lease Agreement (LLA) on 26th March 1997. The vital clause 3.1 of the Land Lease Agreement is extracted below:

"3.1. In consideration of rents hereby reserved and of the covenants and conditions on the part of the Lessee hereinafter contained the Lessor doth hereby grant to the Lessee lease of the Demised Land to HOLD the same

unto the Lessee for a term as specified in Article 2, hereto and paying therefore during the said term monthly rent in advance, before the commencement of lease initially and before the commencement of succeeding months, as determined by the Board, and as assessed by the Revenue Authorities based on Government of Tamil Nadu Notification / Guidelines and informed by the Lessor to Lessee. The lease rent is to be paid from the actual date of handing over the land. The monthly lease rent shall however be paid within 10 days of the commencement of each month. Non-compliance of this will attract a penalty of recovering the lease rent with interest at ½ % over and above the cash credit rates. The Lessor reserves the right to revise the annual rate of rent and not more than once in three years, according to applicable Government Notification / Guidelines which the Lessee shall pay without demur. The present monthly rent agreed is Rs.30,73,943 for the demised land"

(E) Ruling on jurisdiction on LLA

Section 86 (1) (f) of the Electricity Act, 2003 empowers the Commission to adjudicate upon the dispute between the licensees and generating companies. The present case is one of adjudication of a dispute between the licensee, namely the TNEB and the generating company, namely the Petitioner arising from the Power Purchase Agreement (PPA) executed between both the parties. The PPA between the two parties provides for subsidiary agreements. These are the Land Lease Agreement [Clause 3.3 (b)], fuel supply agreement [Clause 5(3)], O&M agreement [Clause 5(1)] and security or escrow agreement [Clause 8.4.]. These subsidiary agreements deal with different aspects of the main PPA. The Land Lease Agreement (LLA) deals with the allotment and lease of land by the Respondent to the Petitioner for the purpose of power generation. As the land allotment is related to the activity of power generation, the Commission is well within its powers to scrutinize the Land Lease Agreement (LLA).

(F) Discussion on delay and laches

(1) The sequence of events commences from execution of land lease agreement on 26-3-1997. Lease rent was fixed at Rs.30,73,943 per month in the agreement. The Government of India issued the notification for “pass through” on 17-4-1997. The Petitioner raised this issue with the TNEB on 30-4-1998 and followed it up with a draft addendum to the PPA on 10-11-1998. This was considered by the TNEB on 26-11-1998 but rejected.

(2) The Petitioner then switched over to other option of favourable lease rent. The Petitioner perceived that G.O.Ms.No.460 dated 4-6-1998 provided considerable relief to him and repeatedly represented to the TNEB for giving effect to the G.O. He particularly represented on 24-10-2000 to the TNEB that local cess of 2% and 10% local cess surcharge specified in G.O. should be borne by the TNEB in terms of Article 4.1 (e) of the Land Lease Agreement.

(3) The TNEB enhanced the lease rent on 15-11-2000 from Rs.30,73,943 per month to Rs.41,39,092 per month effective from 19-12-1999. The Petitioner represented to TNEB on 13-3-2002 seeking reduction of lease rent. On 17-4-2003 the TNEB raised the lease rent to Rs.83,18,452 per month effective from 19-12-2002. On 29-4-2003 the Energy Secretary clarified to the Chairman, TNEB that with effect from 4-6-1998, 2% of land cost should be charged as lease rent and 23% of lease rent should be charged as additional surcharge and advised the TNEB to revise the land lease agreement accordingly. The TNEB replied to the Energy Secretary on 9-2-2004 that on receipt of the orders from the Secretary, Revenue Department further action will be taken. On 10-3-2005 the Revenue Secretary issued directions to fix lease rent at 14% of the land cost for poramboke land for commercial purposes in municipal areas and corporation areas.

(4) TNEB constituted an Expert Committee on 3-2-2005 to determine the reasonableness of lease rent of TNEB land. The Expert Committee submitted its report on 21-3-2005. The report of the Committee was considered by the TNEB on 30-12-2005, 5-5-2007, 9-6-2007, 28-3-2008 and 29-3-2008, but no decision has been taken till date. In the meantime, the lease rent was reduced by the TNEB on 9-8-2006 from Rs.83,18,452 per month to Rs.49,57,655 per month effective from 19-12-2002. The Petitioner represented to the TNEB on 17-8-2006 for resolution of the issue of the land lease rent. On 12-4-2007 the Principal Secretary, Energy Department advised the TNEB to take the report of the Expert Committee report to the Board and take appropriate decision. The fact of the matter is that the TNEB has not so far taken a decision on the recommendations of the Expert Committee.

(5) It emerges from a perusal of the case that the issues of “pass through” of lease rent and determination of the quantum of lease rent are inter-linked. Determination of the quantum of lease rent precedes “pass through”. “Pass through” enables the Petitioner to secure reimbursement for whatever lease rent is paid by him, which, otherwise, should have been accommodated within the stipulated O & M expenses. The “pass through” of lease rent de-links the lease rent from O & M expenses and is eligible to be considered as a component of fixed cost distinct from O & M expenses.

(6) The lease rent of the Petitioner was specified in the Land Lease Agreement executed on 26-3-1997. This rent was valid upto 18-12-1999, that is three years from the date of taking over possession of the land on 19-12-1996. The Government of India effected the Notification of “pass through” on 17-4-1997, 21 days after the execution of the Land Lease Agreement. The Petitioner pursued the issue of “pass through” with the Respondent till 26-11-1998, when it was rejected by the Respondent.

(7) Thereafter, the Petitioner concentrated on securing for concessional lease rent, facilitated by the Government Order dated 4-6-1998. This issue shuttled between the TNEB, the Energy department and the Revenue department till March 2005. The Respondent thought it fit to constitute an Expert Committee in February 2005 to suggest reasonable lease rent. Although the Committee submitted the report promptly in March 2005, the TNEB has not been able to take a final decision till date on the recommendation of the Committee. The revision of lease rent which was due on 19-12-2005 and 19-12-2008 are yet to be effected. All these factors establish that the issue is very much alive.

(8) We place great reliance on the judgement of the Hon'ble Delhi High Court in National Research Development Corporation of India vs. Chrome International, MANU/DE/7254/2007.

> "*There was undoubtedly an option with the petitioner to determine the agreement under Clause (5) for nonpayment of royalty. In case of termination, the cause of action would have arisen at that time itself. The petitioner in his wisdom, however, permitted the agreement to continue. In such a case under the Limitation Act, it would not be the residuary clause which would apply but Part I dealing with the position analogous to a suit for accounts. It is only on the agreement coming to an end, that the petitioner would be entitled to claim accounts and such accounts could be claimed for the whole period of agreement. A contrary view would imply that on each default, the petitioner would be required to file a petition for reference of all disputes to arbitration which in my considered view cannot be accepted."*

(9) If a view is taken that the petitioner should have sought appropriate legal remedy, either when "pass through" was denied or whenever the determination of lease rent was detrimental to him, the power project could not have been commissioned on 15-2-1999 ahead of schedule. The parties would have got involved in endless litigation on a variety of issues and the project would not have progressed.

(10) The Power Purchase Agreement between the two parties executed on 12-9-1996 is valid upto 14-2-2014. The petitioner has chosen to file the dispute resolution petition before this Commission on 25-7-2008.

(G) Ruling on delay and laches

On a holistic and pragmatic view, we hold that delay and laches would not be attracted in this case.

(H) Analysis of 'pass-through'

(1) The petitioner represented to the TNEB against the levy of double of 7% of market value of the land and that the lease rent has to be accommodated within the O & M expenses and as per the prevailing guidelines of the Central Electricity Authority, lease rent cannot be passed on to the tariff. The Board considered the representation of the Petitioner but rejected their plea for reduction of lease rent. However, the Board issued Per.BP (FB) No.9 (Technical Branch) dated 24-1-1997, which reads as follows:

> "*The Land lease rent can be treated as a "pass thorough" item to the TNEB, subject to the provisions contained in the GOI guidelines in respect of O & M charges. The Independent Power Promoter may be informed accordingly."*

In pursuance of this BP, Chief Engineer(IPP) of TNEB informed the petitioner in Lr.No.SE/IPP/EMC/AEEC/F.BBDEPP/D.89/97 dated 28-1-1997 as follows:

> *"With reference to your request to reduce land lease rent, vide your letter cited, you are informed that the same is not feasible of compliance. However, the land lease rent may be treated as a "pass through" item subject to the provisions contained in the GOI guidelines in respect of O & M charges."*

(2) We wish to point out that the petitioner was informed on 28-1-1997 that lease rent may be considered as a pass through item subject to the GOI guidelines in respect of O&M charges. Based on this assurance, the Petitioner probably executed the Land Lease Agreement two months later on 26-3-1997. As on the date of the land lease agreement, guidelines of the Government of India on O&M charges are contained in the Notification dated 30th March 1992 of the Ministry of Power, Government of India, which did not provide for lease rent as a pass through. The above Notification was issued by the Government of India in exercise of powers conferred by sub-section (2) of Section 43A of the Electricity (Supply) Act 1948 (54 of 1948). This Notification was amended by another Notification of the Ministry of Power, Government of India on 17-4-1997, that is 21 days after the LLA, as follows. The Notification is reproduced below:-

"New Delhi, the 17th April 1997

S.O. 332 (E).- In exercise of powers conferred by sub-section (2) of section 43A of the Electricity (Supply) Act, 1948 (54 of 1948), the Central Government hereby makes the following further amendments in the notification of the Government of India in then Ministry of Power and Non-conventional Energy Sources No.S.O.251(E), dated 30th March 1992, namely:-

In the said notification in clause 1.5, in paragraph (a), the following note shall be inserted, namely:-

"Note:- In case a generating company takes land on lease, the leasing charges as determined by the Central Government or the State Government or any Statutory body, as the case may be, considered as a pass through item in the tariff in lieu of interest liability of the notional cost of the land"

[F.No.6/1/Tariff/96/Vol-IV]

(3) Clause 17.1 of the Power Purchase Agreement (PPA) executed by the Petitioner and the Respondent on 12-9-1996 six months before the Land Lease Agreement, reads as follows:

"17.1. Amendment

(a) This agreement cannot be amended except by prior written agreement between the parties.

(b) This agreement, including the provisions set forth in Appendix – D, is based upon the Government of India, Department of Power Notification dated March 30, 1992, as amended as of January 17, 1994, August 22, 1994, January 13, 1995 and as of December 14, 1995 (the":Notification"). To the extent there are any amendments or modifications to the Notification which come into effect after the date of this agreement and which, if incorporated into this agreement would result in terms more favourable to the Company and / or TNEB, then this agreement shall be amended at the option of the Company to reflect such change and until such time, the prior terms of this agreement shall continue to bind the parties. The amended terms of this agreement will be deemed to be favourable to TNEB if the Company can demonstrate to the reasonable satisfaction of TNEB that such amended terms result in a lower tariff."

(4) Clause 6.1 of the Land Lease Agreement executed on 26-3-1997, six months after the PPA, reads as follows:

"This agreement cannot be amended except by prior mutual consent of the parties and in the event the provisions in this agreement are in conflict with the PPA, the provisions in the PPA prevail,"

(5) Subsequent to the notification of the Government of India dated 17-4-1997, which enables pass through of lease rent, the Petitioner raised this issue with the Respondent on 30-4-1998 in Letter No. GMR / A2/038 /98-99. The Petitioner referred to the meeting between the Chairman and Board of Directors of the Petitioner and the Chairman and Members of the Respondent held on 29-4-1998, wherein the Respondent reportedly agreed to incorporate the reimbursement of land lease rentals in accordance with the guidelines of the Government of India. This was followed up by Letter No. GMR/675 /98-99 dated 10-11-1998 of the Petitioner to the Respondent enclosing a draft amendment to the PPA providing for land lease rent as a pass through for the computation of tariff.

(6) The Board of the Respondent considered the draft addendum to the PPA proposed by the Petitioner in the 804th meeting held on 26-11-1998. The Board Note is extracted below:

"Sub: Basin Bridge DEPP being developed by M/s. GMR Vasavi Power *Corporation Ltd. – Land Lease Rent as 'pass through' in the tariff – Regarding.*

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1. *This note deals with the request of M/s. GMR Vasavi Power Corporation Ltd., the promoter of 196 MW DEPP at Basin Bridge Power House Complex to treat the land lease rent as a pass through in the tariff.*

2. *The Board has advised M/s. GMR Vasavi Corporation Ltd., to furnish a draft addendum incorporating the various conditions arising out of recent notifications of GOI for mutually signing and incorporating the same as addendum to the PPA. The Company have furnished the draft addendum on 11-11-1998.*

3. *M/s. GMR Vasavi Power Corporation Ltd. have now included a condition to the effect that the land lease rent payable by them will be a 'pass through' in the tariff also in the draft addendum to the PPA. In this connection, the following are stated.*

    (i) The PPA with M/s. GMR Vasavi Power Corporation Ltd. was signed on 12-9-1996 based on the conditions of various notification issued by GOI ruling at that time. At that juncture, though the tariff notification permitted the promoters to include the land cost in the capital cost and claim O&M charges based on percentage of this capital cost, there was no provision to accommodate the lease rentals in the tariff in any of the notification.

    (ii) Though the Company in their letter dated 27-2-1998 indicated they are not in a position to absorb lease rent and wanted the Board either to fix a token lease rent or to adopt a uniform policy for all IPPs. in the State with regard to land lease rent provision in the PPA, during the discussion they were informed that the Board will not treat the land lease rent as pass through, since, the notification do not provide for such a treatment.

(iii) *Subsequently, the Company in their letter dated 4-3-1998 withdrew the above letter for the time being and stated that they will take up the matter separately with GOTN / TNEB.*

(iv) *The draft PPA with the Company was discussed in the Board's 742nd meeting held on 12-2-1996 and 743rd meeting held on 13-2-1996. While approving the draft PPA, the Board has observed that the land lease is not a 'pass through' as per GOI notification and hence cannot be permitted (vide minutes of Board meeting dated 13-2-1996). Accordingly in the PPA of M/s. GMR Vasavi Power Corporation the land lease rent as pass through in the tariff was not included. The draft PPA was sent to GOTN on 4-3-1996. The PPA signed on 12-9-1996 after the completion of elections as advised by GOTN vide letter dated 8-4-1996.*

(v) *Subsequent to the signing of the PPA, the GOI issued a notification dated 17-4-1997 wherein it is stated that "in case a generating company takes land on lease, the leasing charges as determined by the Central Government or the State Government or any Statutory body, as the case may be considered as a pass through item in the tariff in lieu of interest liability of the notional cost of the land."*

(vi) *The Board signed the PPA with M/s. Balaji Power Company for Samayanallur DEPP (to whom the land in the defunct Samayanallur Power house has been leased out) on 21-5-1998. In this PPA, the land lease rent has been permitted as a 'pass through' in the tariff as per the notification dated 17-4-1997. Similarly 'pass through' of lease rent has been allowed in the PPA of M/s. Videocon Power Ltd., for NCTPP Stage-II and M/s. SEPC Ltd., for TTPP Stage IV, since these PPAs were also signed after the issue of the notification dated 17-4-1997.*

(vii) *The Board has leased out land to the extent of 29.03 acres in the Basin Bridge Power House Complex to M/s. GMR Vsavi Power Corporation and the lease rent per month works out to Rs.30,73,943/- Permitting M/s. GMR Vasavi*

Power Corporation to treat this as a pass through will result in the total payment of around Rs.3.7 crores per annum.

(viii) The Board has stipulated that the escrow cover will be provided to IPPs based on first cum first served basis after signing the addendum.

4. Under the circumstances, the following is placed before the Board for consideration.

4.1. To permit M/s. GMR Vasavi Power Corporation to treat the land lease rent as pass through in the tariff and include the same in the addendum to the PPA to be mutually signed."

The Board deliberated on the subject but did not approve the proposal of the TNEB.

(7) Now, let us look at the claim of the petitioner for "pass through" of lease rent. Clause 17.1 of the PPA refers to the Notification dated 30th March 1992 of the Department of Power, Government of India as amended on January 17, 1994, August 22, 1994, January 13, 1995 and December 14, 1995 and states that any amendment or modification to the Notification, which come into force after the date of the PPA and if such amendment is favourable to the petitioner, the agreement shall be amended at the option of the petitioner to reflect such change. The Notification of the Government of India dated 30th March 1992 was amended by another Notification dated 17th April 1997 of the Government of India providing for "pass through" of lease rent. This amendment was, definitely, more favourable to the petitioner. The PPA confers the option of amendment to the petitioner. The PPA is categorical that the agreement shall be amended at the option of the petitioner to reflect any favourable change. The petitioner raised this issue of "pass through" with the Respondent in his letter dated 30-4-1998 and followed it up with a draft amendment to the PPA to provide for land lease rent as a "pass through". We are constrained to note that the petitioner has discharged his part

of the obligation prescribed in Clause 17.1. of the PPA. However, the Board rejected the plea of the petitioner in the 804th meeting held on 26-11-1998. The rejection of the Board is to be viewed in the context of the commitment of 761st meeting of the Board held on 11-1-1997 and spelt out in Per. BP (FB)No.9 (Technical Branch) dated 24-1-1997 as follows:

> "T*he land lease rent can be treated as a "pass through" item to the TNEB, subject to the provisions contained in the Government of India guidelines in respect of O&M charges. The Independent Power Promoters may be informed accordingly."*

This above decision of the Board was communicated by the CE (IPP) in Letter No.SE/IPP/EMC/AEEC/F.BBDEPP/D.89/97 dated 28-1-1997 to the petitioner. The petitioner has brought to our notice that the facility of "pass through" was extended to other Independent Power Producers, whose PPAs were executed after 17-4-1997. The petitioner states that he has been singled out for discrimination. The Respondent has not denied this assertion of the Petitioner but put up the defence that by the time other PPAs were executed, the Government of India had permitted pass through.

(8) It is true that clause 17(1) of PPA states that till the PPA is amended, the prior terms of the agreement would continue. But, this has to be read along with the option available to the Petitioner for amendment and the mandatory nature of the clause. Denial of an amendment proposed by the Petitioner would amount to veto by the Respondent and defeat the purpose of clause 17(1). One might argue that the PPA has been loaded in favour of the Petitioner but the fact is that both parties executed the PPA with eyes wide open. At this distant point of time, this cannot be undone except by mutual consent.

(9) The TNEB has raised a related issue in their counter. The Central Electricity Authority in their Office Memorandum

dated 30-5-1997 prescribed revised operational norms for projects whose DPRs would be received after 1-10-1997. The TNEB argues that although the revised operational norms would not apply to the petitioner strictly in terms of the above Office Memorandum (because the techno economic clearance of the project of the petitioner had been granted 15 months before the deadline of 1-10-1997), the petitioner should subject himself to the revised operational norms, on the analogy of the claim of the petitioner for "pass through". The case of the Respondent is that the "pass through" was effected by a Government of India Notification, 21 days after the execution of the Land Lease Agreement. Just as the petitioner claims the benefit of a subsequent development in the case of "pass through", the petitioner should subject himself to revised operational norms stipulated (in Office Memorandum dated 30-5-1997) by the Central Electricity Authority, subsequent to the execution of the PPA on 12-9-1996.

(10) We wish to bring out the fallacy in this argument. Clause 17.1 of the PPA is extracted below:

> *"To the extent there are any amendments or modifications to the Notification which come into effect after the date of this Agreement and which, if incorporated into this Agreement would result in terms more favourable to the Company and / or TNEB, then this Agreement shall be amended at the option of the Company to reflect such change and until such time, the prior terms of this Agreement shall continue to bind the parties. The amended terms of this Agreement will be deemed to be favourable to TNEB if the Company can demonstrate to the reasonable satisfaction of TNEB that such amended terms result in a lower tariff,"*

It flows from the above clause that the petitioner can choose what is favourable to him, and that the amendment of the agreement shall be at the option of the petitioner. Firstly, the revised norms stipulated by the Central Electricity Authority in their Office Memorandum dated 30-5-1997 strictly do not apply to the petitioner and secondly, the respondent has no right in terms of the PPA to claim that the revised norms should be accepted by the petitioner as a quid pro quo.

(11) In this context, it is necessary to refer to the minutes of the meeting held by the Central Electricity Authority on 4-8-1999 for finalizing the firm financial package for the project. Paras 3, 11, 15 and 23 are extracted below:

*"**3.** Chief Engineer (TA) stated that there is increase in cost of the project which includes increase in cost on account of foreign exchange variation and rate of change in custom duty. These could be allowed subject to verification. However, company's request for the capitalization of land lease rentals to the tune of Rs.6.28 crores is difficult to accept in view of the TEC condition. Chief Engineer (Legal) was of the view that these may not be allowed in capital cost as well as passed through in tariff.*

***11** It was agreed that the completed hard cost of the plant shall be worked out on the following basis:*

(a) Deletion of land lease rentals.

***15** A certificate from Govt. of Tamil Nadu that PPA do not contain any deviation from the GOI Tariff Notification dated 30-3-1992 as amended from time to time be submitted to CEA. If there is any deviation in the PPA the same shall be got approved from the GOI as per provision of the para 3.0 of the above said Notification.*

***23 The** following clarification / details to be furnished by TNEB / Govt. of Tamil Nadu:-*

i) Confirmation by GOTN that equity participation by Indian associates and foreign associates is acceptable to them.

ii) Certificate by GOTN that the PPA does not contain any deviation from GOI Tariff Notification dated 30-3-1992, as amended from time to time.

iii) Clarification / recommendation of TNEB/Govt. of Tamil Nadu on the completed cost as sought by CEA vide letter dated 16-6-1999.

iv) Confirm the installed capacity of the plant corresponding to 50 Hz.

v) TNEB may confirm that only fuel charges have been paid for the infirm power.

vi) TNEB is to confirm that payments have been made by IPP for re-routing of under ground cabling and sewerage pipe line.

vii) GOTN to communicate its approval for the Final Financial Package."

(12) Lease rent was excluded for the computation of capital cost by the CEA on the ground that the Petitioner would derive double benefit, if both capitalization of lease rent and "pass through" of lease rent were allowed. Therefore, the CEA noted that the lease rent may not be allowed in capital cost as well as "pass through" in Tariff.

(13) In the meeting held on 4-8-1999, the CEA wanted a certification from GOTN to the effect that PPA does not contain any deviation from the GOI Tariff Notification dated 30-3-1992 as amended from time to time. The GOI Notification dated 30-3-1992 was amended by another Notification of Government of India dated 17-4-1997 on "pass through". Any deviation from the Notifications of the GOI was to be approved by the GOI. There is nothing on record to show that the GOTN was exempted from the amendment effected by the GOI Notification dated 17-4-1997 on "pass through".

(J) Ruling on "pass-through"

We hold that the summary rejection of the plea of the Petitioner for "pass through" of lease rent on 26-11-1998 by the TNEB is violative of clause 17(1) of the PPA and the GOI Notification dated 17-4-1997 issued under the authority of Section 43 A (2) of Electricity (Supply) Act, 1948. We hold that the Petitioner is entitled to pass through of the lease rent with effect from 17-4-1997, the date on which the notification of the Government of India came into effect.

(K) Analysis of Quantum of Lease Rent

(1) The Commissioner of Land Administration in his letter No.K.dis.E.E6634/951 dated 10-10-1995 addressed to Secretary to Government, Energy Department stated as follows:

"I am to inform that the lease is normally given only for short term and the lease rent should be revised once in three years with reference to the prevailing market value. Since the setting up of power plant by private entrepreneur is for remunerative purposes, the lease rent has to be fixed at 7% of the double the market value of the land based on the sales statistics in the recent past in the vicinity ….. This is the procedure adopted for fixation of lease period and lease rent in respect of Government poramboke lands. There is no Government Orders regarding leasing of land held by Government undertakings."

(2) On the basis of this letter of the Commissioner of Land Administration, the lease rent was fixed at Rs.30,73,943 per month in Clause 3.1 of the Land Lease Agreement for a period of 3 years effective from 19-12-1996, the date on which land was handed over to the Petitioner.

(3) The land lease rent was enhanced from 19-12-1999 to Rs.41, 39,092/- per month as per the previous formula of double of 7% of the market value of the land. Applying the same formula the TNEB enhanced the lease rent to Rs.81,18,452/- per month from 19-12-2002. The petitioner protested at this steep increase. In deference to the representation and on a report from the District Collector, the lease rent was lowered by the Respondent to Rs.49,57,655 per month effective from 19-12-2002, which has been continuing till date, although revision fell due on 19-12-2005 and 19-12-2008 in terms of the Land Lease Agreement.

(4) The Revenue Department issued a G.O.460 on 4-6-1998 prescribing a formula for lease of Government poramboke land. The G.O. prescribed for commercial purposes a rate of 2% for lease rent, 2% for local cess and 10% for local cess surcharge being a total of 14%.

(5) In this context, we need to refer to Clause 4.1(e) of the Land Lease Agreement extracted below:-

> *"The Lessee hereby covenants the Lessor as follows:*
>
> *To pay, from time to time, during the period of lease to the authorities concerned all applicable rates, taxes and charges on building and other structures / equipments erected by the Lessee. However, the Lessor shall continue to pay to concerned authorities all applicable rates, taxes and charges on Demised Land in the name of Lessor."*

The above Clause casts the obligation on the Respondent to bear rates, taxes and charges on the land leased out to the Petitioner. The local cess of 2% and the local cess surcharge of 10% mentioned in the G.O. 460 are liable to be borne by the Respondent in terms of the above Clause 4.1(e) of Land Lease Agreement. The Petitioner is liable to bear only the lease rent of 2%. This was represented by the Petitioner in his letter dated 24-10-2000 to the Respondent and reiterated in his representation dated 6-5-2003 addressed to the Respondent.

(6) The Secretary, Energy Department addressed a letter to the Chairman, Tamil Nadu Electricity Board on 29-4-2003 as follows:-

" I am directed to issue the following clarifications in regard to collection of Land Lease Rent from M/s. GMR Power Corporation Private Limited in consultation with the Revenue Department.

<u>Collection of Land Lease Rent with effect from 4.6.98 on Commercial purpose</u>

(a) Land Lease Rent	*::*	*2% of land cost*
(b) Additional surcharge	*::*	*23% of land lease rent*

<u>Collection of land lease rent prior to 4-6-98 on Commercial purpose</u>

(a) Land Lease Rent	*::*	*14%of land cost*
(b) Additional surcharge	*::*	*23% of land lease rent*

I am therefore to request you to revise the Land Lease Agreement entered into with the GMR Power Corporation Private Limited accordingly"

We need to note here that the clarification of the Secretary, Energy Department was finalised in consultation with Revenue Department. The Respondent submitted during the arguments that a letter cannot supersede a GO and thus the letter dated 29-4-2003 of the Secretary, Energy Department cannot supersede the G.O. Ms.460 dated 4-6-1998 of the Revenue Department. But, the Respondent quietly accepted the letter dated 10-3-2005 of the Revenue Secretary, which extended the operation of the G.O. Ms.460 to Municipal and Corporation areas, because that letter was favourable to the Respondent. This is a case of double standard of the Respondent.

(7) The Revenue Secretary in Letter (Ms.)No.155 dated 10-3-2005 clarified that for grant of lease of Government poramboke land for commercial purposes 14% of land cost is to be collected towards lease rent in Municipal and Corporation areas for Government poramboke lands. The letter is reproduced below:

"Revenue Department
Secretariat
Chennai – 9

Letter (Ms.) No.155, dated 10-3-2005

From
Thiru N.Sundaradevan, IAS
Secretary to Government

To
The Special Commissioner and Commissioner of Land Administration
Chennai-5.

Sir,

Sub:- Land – Lease – Government lands – Grant of lease of Government lands – Fixation of lease rent, local cess and Local Cess Surcharge and Municipal Tax – etc. – Government Order issued – clarification sought for – Instructions – Issued.

Ref:- 1. G.O.Ms. No.460 Revenue Department, dated 4-6-1998.
2. From the District Collector, Chennai D.O. Letter No.38/ 20119/2004, dated 18-11-2004.

******

I am directed to enclose a copy of the D.O.letter second cited and to state that in the Government Order first cited, orders were issued revising the lease rent to be levied in cases of grant of lease as indicated below:-

	Lease Rent per annum	*Local Cess*	*Local Cess Surcharge*	*Total*
Commercial	*2% on land cost*	*2% on land cost*	*10% on land cost*	*14% on land cost*
Non-Commercial	*1% on land cost*	*1% on land cost*	*5% on land cost*	*7% on land cost*

The above rate of lease rent has come into force with effect from 4-6-1998.

2. In this connection, I am to point out that the Local Cess and Local Cess Surcharge are leviable only in Panchayat and Panchayat Union areas. In respect of areas coming under Municipalities and Corporations Local Cess and Local Cess Surcharge not leviable. But additional surcharge at 13% on lease rent in Municipalities and 23% on lease rent in Corporation areas is leviable in addition to the lease rent. In the Government Order first cited it was not specifically mentioned that revised lease rents are applicable only to the land leased out in Village Panchayats. Hence, you have sent proposals to the Government to charge 1% for non-commercial purposes as lease rent besides 23% lease rent as additional surcharge in Chennai Corporation area and 13% of lease rent as additional surcharge in municipal areas. The Accountant General has pointed out that the Government Order first cited is not applicable to Municipalities and Corporation areas.

3. I am, therefore, directed to state that there is some practical difficulty in implementing the Government Order first cited and in order to get over the difficulties, it has been decided to amend the Government Order first cited and it is under examination.

4. In the above circumstances, I am to request you to issue instructions to all District Collectors that pending issue of amendment to G.O. Ms. No.460, Revenue Department, dated 4-6-1998, 7% of the land cost inclusive of additional surcharge and 14% of land cost including additional surcharge may be collected as lease rent for non-commercial purposes and commercial purposes respectively in respect of leases in the Municipal areas and Corporation limits.

5. I am to request you to acknowledge the receipt of this letter at an early date.

Yours faithfully,
Sd.....
for Secretary to Government"

(8) The Revenue Secretary admitted that there was confusion in the implementation of G.O. Ms. No.460 dated 4-6-1998 and clarified that a total of 14% of land cost is to be realised towards lease rent, local cess and local cess surcharge. He clarified that local cess and local cess surcharge are not leviable in areas falling under municipalities and corporations. But, additional surcharge of 13% on lease rent in municipalities and 23% of lease rent in corporation areas are leviable in addition to lease rent. Therefore, the Revenue Secretary directed that pending amendment to G.O. Ms. No.460 dated 4-6-1988, 14% of land cost including additional surcharge may be collected as lease rent for commercial purposes in respect of municipal areas and corporation limits for Government poramboke land. As the letter did not talk of retrospective effect, it is reasonable to assume that 14% land cost should be applied prospectively. The letter of the Revenue Secretary dated 10-3-2005 appears to hold good even today, as the promised amendment to G.O. Ms.No.460 dated 4-6-1998 has not come at all.

(9) The Chairman, TNEB addressed the Revenue Secretary on 14-5-2004 in D.O. Letter No. CE/ GTP&IPP/ Aee2/ F.GMR/D.523/04 to enquire whether the lease rent of 2% indicated by the Secretary, Energy Department in the letter dated 29-4-2003 (which was issued in consultation with the Revenue Secretary) would apply to the lands of TNEB. The Chairman, TNEB stated that the lease rent indicated in G.O. Ms. No.460 dated 4-6-1998 related to poramboke land. It is interesting here to note that while the TNEB accepted the rates applicable for poramboke land contained in the letter of Commissioner of Land Administration dated 10-10-1995, the lease rent indicated for poramboke land in G.O. Ms. No.460 dated 4-6-1998 and in the letter of Secretary, Energy Department dated 29-4-2003 were questioned by the TNEB, probably because the rates were not favourable to them. The TNEB argued that the poramboke land rates were not applicable to lands owned by TNEB. This, again, is a case of double standard.

(10) Another relevant point to be considered here is that clause 3(1) of the LLA stipulates that Lease Rent is to determined based on Government notification / guidelines. While the TNEB gladly accepted the rate recommended by the Commissioner of Land Administration in letter dated 10-10-1995, it refused to accept the rate prescribed in G.O. Ms.460 dated 4-6-1998 and the clarification furnished by the Energy Secretary on 29-4-2003 because the latter advice was adverse to TNEB. We must note that on both occasions the advice/recommendation came from the Government. Clearly, the TNEB adopted double standard.

(11) Piecing together the letter of the Commissioner of Land Administration dated 10-10-1995, the G.O. Ms. No.460 dated 4-6-1998 of the Revenue Department, the letter of the Secretary, Energy Department dated 29-4-2003 and the letter of the Secretary of the Revenue Department dated 10-3-2005, we determine the lease rent as below:-

From 19-12-1996 to 18-12-1999 (as per LLA)	Rs.30,73,943 per month
From 19-12-1999 to 9-3-2005 (in terms of the letter of the Secretary, Energy Department dated 29-4-2003)	Lease rent of 2%of land cost and an additional surcharge of 23% of the lease rent (additional surcharge of 23% has to be borne by the TNEB)
From 10-3-2005 (in terms of the letter of the Revenue Secretary, dated 10-3-2005)	14% of the land cost per month
From 19-12-2005 onwards	14% of land cost per month

(12) Clause 3.1 of the LLA enjoins upon the Petitioner to pay the monthly lease rent within 10 days of the commencement of each month. Non compliance of this Clause entails penal interest of ½ % over and above the cash credit limits. Clause 3.2 of the LLA empowers the TNEB in case of default to recover the lease rent along with penalty from monthly

invoices. The Petitioner did not pay the lease rent in advance but authorized the Respondent to recover the lease rent from monthly invoices.

(13) Yet another issue is the sub-lease of 5.22 acres by the Petitioner to Hindustan Petroleum Corporation Ltd. We have perused the Land Lease Agreement. Clause 4.1d of the above agreement is extracted below:

"Not to sub-let or assign or part with the possession of the Demised Land, the superstructures and the equipment to be erected thereon in whole or in part without the previous consent in writing of the Lessor which shall not be unreasonably delayed. However, Lessor permits the Lessee to (i) sublease a portion of the Demised Land to the Fuel supplier (as defined in the PPA) for construction of fuel storage and handling facilities exclusively for the purpose relating to the power generation from this plant; and (ii) create security including transfer of leasehold rights and by way of mortgage in favour of Lenders (Financial Institutions / Banks) of the Project."

We observe that HPCL is the fuel supplier to the petitioner and therefore the sub-lease of land to HPCL is in accordance with the Land Lease Agreement.

(14) The Sub-Lease Agreement between the petitioner and HPCL was executed on 1st December 1997. Article 3 of the sub-lease agreement is extracted below:-

*"**Consideration and Payment** : In consideration of rents hereby reserved and of the covenants and conditions on the part of the sub-lessee hereinafter contained, the sub-lessor hereby grants to the sub-lessee, lease of 5.22 acres of demised land more fully described in the Schedule-I and demarcated in Red in the map annexed as Schedule-II to hold the same with the sub-lessee for a term specified in article 1.3 for an annual rent of Rs.28,12,500/- p.a. The said rental payment shall be firm and unaltered for a total lease period of 20 years, from 1st August 1997 ending on 25th March 2017 and any escalation and other payments due to TNEB by the sublessor towards rent shall not be applicable to the sublessee.*

However, if during the period of said sublease agreement, any notifications issued by the State Government/TNEB or any authorities to consider payment of the above mentioned rent as a "pass through item" (i.e. to be borne by TNEB.) then the benefits of the same shall be applicable to the sublessee. In such an event, the sublessee shall pay a nominal rent of Rs.100/- p.a. only for

the said occupied premises by sublessee. The lease rent shall be paid from the date of commencement of operations of the facilities at above said premises by the sublessee with retrospective effect from 1st August, 1997. Subsequently the monthly lease rent shall be paid in advance on or before the tenth day of each English calendar month".

(L) Ruling on Lease Rent:-

(1) The quantum of lease rent is determined as below:-

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

(b) From 19-12-1999 to 9-3-2005, lease rent of 2% of land cost and an additional surcharge of 23% of the lease rent (additional surcharge of 23% has to be borne by the TNEB).

(c) From 10-3-2005, 14% of land cost per month.

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

(2) The Respondent is entitled to retain the lease rent recovered from Petitioner from 19-12-1996 to 16-4-1997.

(3) Clause 3 of Appendix D of the PPA shall be amended in accordance with the Notification dated 17-4-1997 of the Ministry of Power, Government of India.

(4) The Petitioner is permitted to claim lease rent with effect from 17-4-1997 as determined in para (1) above as pass through item.

(5) Whatever lease rent has been paid by or recovered from the Petitioner from 17-4-1997 till date will be refunded to him with interest at the rate prescribed in clause 8.7 of the PPA for the period

upto 29-2-2000 and interest at the rate prescribed in clause 8.6 of Addendum-II of the PPA with effect from 1-3-2000.

(6) The Petitioner has been allowed "pass through" of land lease rent with effect from 17-4-1997. This will entail refund of rent realized from HPCL by the Petitioner in terms of Article 3 of the sub-lease agreement. Such refund would be admissible, only if that rent has been absorbed by the HPCL without it being passed on to the TNEB through the Petitioner in some form or the other. The Respondent, Petitioner and the Sub-lessee are directed to sort out this issue. They may come up before this Commission, should there be any dispute on this issue.

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

(8) The Petitioner is directed to submit his claims to the Respondent in accordance with this ruling within two months of the order. The Respondent is directed to make payment within six months of receipt of the claim in six equal monthly instalment.

PART – VII

MINIMUM ALTERNATE TAX

(A) Discussion of the case

(1) The Petitioner has filed a claim for reimbursement of Minimum Alternate Tax (MAT) of Rs.14,95,48,790/- as on 30-6-2008. This was the amount outstanding as on 30-6-2008 for the dues upto the financial year 2006-07. Supplementary invoices for the MAT for the financial year 2007-08 have not been submitted to the Respondent by the Petitioner till 30-6-2008.

(2) The Petitioner submitted during the arguments that the Respondent had offered to make payment towards the principal sum of Minimum Alternate Tax, provided the Petitioner was willing to forego interest. The Respondent mentioned during the arguments that they accept the ruling of the Commission in DRP No.7 of 2008, PPN vs. TNEB on the liability to reimburse Minimum Alternate Tax, but was silent on the question of payment of interest.

(3) We quote para 9(1) of the order of this Commission in DRP No.7 of 2008, PPN vs. TNEB:-

> *"9 (1) It is, therefore, established that the Respondent has delayed the reimbursement of the claim on account of specified taxes and is consequently liable to pay interest on delayed payments in terms of Clause 10.6 of the power purchase agreement at the rate equal to the rate charged from time to time on cash credit extended to the petitioner by the consortium of banks plus one half percent".*

(4) We reiterate the ruling that interest on delayed payment accrues in terms of Clause 8.7 / 8.6 of the PPA between the Petitioner and the Respondent.

(B) Delay and laches

The Petitioner had incurred an expenditure of Rs.15.99 crores towards MAT on power generation income between 2000-01 and 2005-06. He had submitted supplementary invoices to the Respondent claiming reimbursement. He demanded release of at least 75% of the expenditure. The Respondent released a total of Rs.10.85 crores, (Rs.5.60 crores on 28-3-2007 and Rs.5.25 crores on 22-6-2007) as part payment against the supplementary invoices for MAT for the period upto 2005-06. The present claim of the Petitioner for Rs.14,95,48,790 is for the period upto 30-6-2008. The Respondent had made the last part-payment on 22-6-2007. The Petitioner has filed the present claim petition for MAT on 30-6-2008.

(C) Ruling on delay and laches

The Petitioner's claim for Minimum Alternate Tax does not suffer from delay and laches and even if we assume that the Limitation Act, 1963 would apply, the claim has been filed within the period of three years

(D) Ruling on MAT

The Petitioner is directed to submit within two months the list of outstanding claims on account of Minimum Alternate Tax to the Respondent. The Respondent is liable to pay interest in accordance with the PPA from the date when the original supplementary invoice submitted by the Petitioner was due for payment. Interest is payable till the date of actual

payment by the Respondent. The Respondent is directed to make payment within six months of the claim in six equal instalments.

PART – VIII

INTEREST ON DELAYED PAYMENT

(A) Contention of the Petitioner

(1) In terms of Clause 8.7 of PPA (pre-Addendum-2 Volume-I Page:107) and Clause 8.6 of PPA post-Addendum-2 Volume-I Page:274) Late payments shall bear interest accrued from the date became overdue at the rates specified therein. Accordingly, the Petitioner is entitled to claim from the Respondent interest on Late Payment, on all over due payments from the respective dates on which they became over due until payment thereof. The interest so payable by the Respondent as of 30-06-2008 amounts to Rs.45,99,69,583/- as per the particulars furnished at page 63 to 75 of the Additional Statement of Claim filed by the Petitioner filed on 18th September 2009. The Petitioner is entitled to further interest on the said amount from 01st July 2008. The Petitioner had claimed an amount of Rs 66,45,37,980 (Volume I, page 41, para 58) by raising Supplementary Invoices on a yearly basis from the year 2000-2001 till June 2008, arrived by computing Interest on Delayed Payments from the date of Invoice. However, during the course of the hearing,

the Petitioner revised the claim of Interest on Delayed Payments to Rs. 45,99,69,583 taking into consideration the 30 days credit period from the date of submission of Tariff Invoice.

(2) The following chart gives a bird's eye view of the Petitioner's claim:

Clause of PPA	Breach	Submission	Document relied	Amount Claimed
Interest on Late Payments: 8.6 of Addendum-2 to PPA [running page 274 of Vol-I] Billing & Payments : 8.2 (b) of PPA [running page 104 of Vol-I] and 8.3 (d) of addendum-2 to PPA [running page 272 & 273	TNEB made several deductions in Tariff Bills contrary to the terms of PPA.	Late payments shall bear interest equal to PLR charged by working capital bankers. TNEB made several payments beyond due date on which they obligated to make payments & liable to pay interest in terms of 8.6 of addendum-1 to PPA.	TNEB's letter to GMR, dated 10-9-2001 expressing financial constrains to make full payments in time [running page 377 of Vol-I]	Rs. 45,99,69,583

(B) <u>Contention of the Respondent</u>

(1) The petitioner is claiming Interest on Delayed payment under Article 8.6 of Addendum 2 to PPA. The respondent Board was in the practice of making part payments due to its financial position and the same was also accepted by the petitioner.

(2) The petitioner by his conduct and by accepting the part payments cannot now claim interest on such payments stating that the payments made were delayed.

(3) From the letter dated 18-1-2008 given by the petitioner in volume No. 2 at page 119, the petitioner has not made any claim in respect of interest on delayed payment.

(C) Delay and laches

(1) The Petitioner originally submitted a claim of Rs.66.45 crores as the interest on delayed payment for the period from 2000-01 upto 30-6-2008. The details are extracted below:-

Year	Amount (in cores)	Date of submission of Tariff invoice
2000-01	5.56	16th April 2001
2001-02	5.19	9th April 2002
2002-03	7.37	9th April 2003
2003-04	13.48	23rd Dec. 2004
2004-05	6.82	9th Sep. 2005
2005-06	5.55	14th Aug. 2007
2006-07	7.68	14th Aug. 2007
2007-08	11.21	22nd May 2008
2008 (upto June 2003)	3.59	23rd July 2008
Total	66.45	

[Para 58 of the original petition in DRP No.10 of 2008]

(2) We have verified with reference to the records produced by the Petitioner in Vol. IV, which reveal the following corrections.

Year	Amount (Rs. in cores)	Date of submission of Tariff invoice
2007-08	1.21	22nd July 2008
2007-08	2.39	17th June 2008

The claim would come down from Rs.66.45 crores to Rs.55.25 crores.

(3) This claim has been subsequently amended by the Petitioner as Rs.45,99,69,583 after taking into account the grace period of 30 days for each invoice and also after discounting 15 paise per unit consented by the Petitioner.

(4) The significant point to be noted here is that the Petitioner had submitted the claims for interest on delayed payment on 16-4-2001, 9-4-2002, 9-4-2003, 23-12-2004, 9-9-2005, 14-8-2007, 14-8-2007, 17-6-2008 and 22-7-2008 for the respective years. These claims bear the acknowledgement seals of the TNEB. The Respondent in his counter has not disputed the receipt of these claims.

(D) Ruling on delay and laches

The Petitioner had been filing the claims for interest on delayed payments regularly and therefore delay and laches are not attracted.

(E) Discussion of the case

(1) The PPA stipulates interest on delayed payments. The Clause originally stood as Clause 8.7 until 1-3-2000 and thereafter it was substituted as Clause 8.6. The original Clause 8.7 is reproduced below:-

*"8.7 **Late Payments** – If any amount due hereunder from one party (the 'payer') to another party (the 'payee') is not paid when due, there shall be due and payable to the Payee interest at the rate which is one half cent (0.5%) above the cash credit rate, from and including the date on which such payments was due to but excluding the date on which such payment is paid in full with interest. All such interest shall accrue from day today and shall be calculated on the basis of a 365 day year, compounded monthly,*

and paid on demand. If no due date is specified under this agreement with respect to any amount due under this agreement, the due date thereof shall be fifteen (15) days after demand is made therefor by the Payee"

The substituted Clause 8.6 is reproduced below:-

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

The PPA clearly provides for interest for late payments.

(2) The Commission has earlier ruled that the Petitioner having consented for 15 paise per unit deduction between December 1999 and 23-2-2001, he ought not to have included the claim in the invoice on that count. Secondly, lease rent was deducted from the invoice on the instructions of the Petitioner.

(F) <u>Ruling on interest on delayed payment</u>

(1) The Petitioner is directed to exclude the 15 paise per unit from the invoices for the period from December 1999 to 23-2-2001 and exclude lease rent from the first invoice right upto August 2008 and re-submit the invoices to the Respondent within 3 months of the Order.

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

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

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

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

(6) The Respondent is directed to make payment of interest within 6 months of submission of the claim by the Petitioner in 6 equal monthly instalments.

PART – IX

RECONCILIATION OF ACCOUNTS

(A) Contention of the Petitioner

(1) The Respondent is bound to make full payments under the PPA but it was making ad-hoc payments during the period from the year 2000 till 2005 and thereafter started paying against each Tariff Invoice. The Accounts were reconciled and as on 31-12-2003 a sum of Rs 57.12 Crores was overdue and payable by the Respondent. The Respondent has made certain payments towards the said overdue amounts and also made payment of subsequent Tariff Invoices though neither promptly nor in accordance with provisions of PPA.

(2) In spite of several requests made by the Petitioner from time to time, the Respondent has not cooperated and no further reconciliation of accounts has taken place. The fact that the Respondent has made short payments without providing details of the payments withheld and also made ad-hoc and delayed payments have left the Petitioner with no option but to reconcile the accounts at its end on the basis of details of Tariff Invoices submitted and the payments received from the Respondent. Accordingly the Petitioner has reconciled the account at its end and found that as on 30-06-2008 a sum of Rs.8.34 crores remains unpaid as per the particulars furnished at Page: 47-50 of the Additional Statements of Claim filed on 18-09-2009. The Respondent is liable to pay said amount together with interest thereon from 1st July 2008 till payment thereof.

(3) The following chart gives a bird's eye view of the Petitioner's claim:

Clause of PPA	Breach	Submission	Amount claimed
Billing & Payments : 8.2 (b) of PPA [running page 104 of Vol-I] and 8.3 (d) of addendum-2 to PPA [running page 272 & 273	TNEB made only ad hoc payments of Tariff bills on several occasions.	TNEB agreed to pay the dues after reconciliation of accounts but has not paid the same.	Rs. 8,34,48,424.

(B) Contention of the Respondent

(1) As directed by the Hon'ble Commission, Joint reconciliation of accounts were held on 22-11-2009 and 29-11-2009.in the office of the TNEB. The Officials of the TNEB and the authorized representative of the Petitioner. The following are the outcome of the joint reconciliation.

(2) The claim submitted by M/s GMR, admission, disallowance and payment made by TNEB were reconciled for the period from 31st December 2003 to 09-03-2006 tariff bills.

(3) The Balance amount of Rs. 55,35,34,258 (Rupees Fifty Five crores , Thirty Five Lakhs Thirty Four thousand and Two hundred and Fifty Eight only and Rs. 1,76,84,061/- Rs. One crore and Seventy Six Lakhs Eighty Four Thousand and Sixty one only (Totaling to Rs. 57,12,18,319/-) as shown by the Petitioner in their Reconciliation statements Accounts as on 31-12-2003, is subject to audit and the same has not reflected in the books of accounts of TNEB. The outstanding amount shown in the books of accounts of TNEB as on 31-3-2006 is only Rs. 7,423/-

(4) The discrepancy is due to the revised claim submitted by the Petitioner due to revision of capital cost from CEA for the period from December 1998 to January 2001.

(5) The revised claim submitted by the Petitioner due to finalization of Capital Cost is still under the scrutiny by Audit.

(6) On scrutiny of accounts of the revised claim submitted by M/s GMR, only the outstanding balance of Rs. 55.35 crore on 31-12-2003 can be confirmed. Hence, the outstanding amount of Rs. 5.1 crore as on 31-3-2006 has been arrived by the GMR and the TNEB by taking Rs. 55,35,34,258 /- as provisional as the same is subject to audit. .Without prejudice the statement arrived above pursuant to the Joint Reconciliation held on 22-11-2009 and 29-11-2009 are filed before this Hon`ble Commission. Since it is provisional and subject to verification of Accounts and Audit in the context of the detailed scrutiny of revised claim, due to the revision of capital cost, the final outstanding balance as on 31-03-2006 may vary.

(7) The respondent Board requested the petitioner's cooperation to take part in the scrutiny of the accounts from 1998 to arrive at the final outstanding balance as on 31-03-2006.

(8) It is also respectfully submitted that depending upon the final outcome of the case, relating to other issues as may be decided by the Hon'ble commission, the reconciliation of accounts /outstanding balance may vary.

(C) Discussion of the case

The Petitioner claims a sum of Rs.8.34 crores as on 30-6-2008 as per their own reconciliation of accounts, whereas the Respondent admits Rs.5.1 crores as on 31-3-2006.

(D) Ruling on reconciliation of accounts

We direct both the Petitioner and the Respondent to jointly carry out the reconciliation of accounts as on 30-6-2008 within 3 months of the order. The Petitioner will submit his claim within a month of reconciliation and thereafter the Respondent is directed to make payment within a period of six months.

PART – X

Merger of Interim Orders

The interim orders of the Commission in IA.No.6 of 2008 delivered on 5-12-2008, in IA No.2 of 2008 delivered on 13-8-2008 and in IA.No.4 of 2008 delivered on 12-1-2009 are merged with this Order.

PART – XI

General Remarks

We wish to make some general observations about this case. The case is significant in terms of the heavy monetary stakes. The case has dragged on for nearly two years. It was taken up in 19 sittings, of which 11 stretched over the whole day. It is our duty to record our impression that officials of the TNEB, the Respondent in this case, were finding it difficult to appreciate the contractual obligations arising from Power Purchase Agreements and the penalties flowing from violation of contracts. This is, perhaps, the first major case to which they have been exposed. We believe that the TNEB could profit from training the concerned officials on the nuances of the Electricity Act, 2003 and the Indian Contract Act, 1872. We place on record our appreciation of the enormous labour put in by the senior counsels of both sides.

PART – XII

Appeal

An Appeal against this order lies to the Appellate Tribunal for Electricity as per Section 111 of the Electricity Act, 2003 within a period of 45 days.

With the above directions, DRP No.10 of 2008 and Interim Applications No.2 of 2008, 4 of 2008 and 6 of 2008 are finally disposed of. No cost.

Sd/-	Sd/-	Sd/-
(K. Venugopal)	**(R. Rajupandi)**	**(S.Kabilan)**
Member	**Member**	**Chairman**